ELECTORAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NUMBER: EC 05/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

In the matter between:

UNITED DEMOCRATIC MOVEMENT	First Applicant
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Second Applicant
AGANG SA	Third Applicant
CONGRESS OF THE PEOPLE	Fourth Applicant
ECONOMIC FREEDOM FIGHTERS	Fifth Applicant

and

TLAKULA, FAITH DIKELEDI PANSY	First Respondent
ELECTORAL COMMISSION	Second Respondent

Coram: WEPENER J, (M. MTHEMBU AND S. PATHER, members, concurring)

Heard: 29 April, 1 May, 4, 5 and 6 June 2014

Delivered: 18 June 2014

JUDGMENT AND RECOMMENDATION

WEPENER J:

[1] The applicants in this matter are all registered political parties. They are the United Democratic Movement, The African Christian Democratic Party, Agang SA, Congress of the People and Economic Freedom Fighters. Each of the applicants was duly registered to participate in the 2014 national and provincial elections to be held on 7 May 2014 (the 2014 elections). I refer to them as the applicants.

[2] The first respondent is Faith Dikeledi Pansy Tlakula, a commissioner and current chairperson of the Electoral Commission (the Commission).

[3] The Commission, cited as the second respondent, is a constitutional institution established under chapter 9 of the Constitution and governed by the Electoral Commission Act[1] (the Electoral Commission Act). Its objects are set out in s 4 of the Electoral Commission Act and incudes to

'strengthen constitutional democracy and promote democratic electoral processes.'

[4] The Commission filed a notice stating that it would abide by the decision of this court and took no part in the proceedings. Any reference to the respondent is therefore a reference to the first respondent only.

[5] The applicants launched an application in this court seeking an order in the following terms:

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[1] Act 51 of 1996.

'2. Recommending that the National Assembly convene an urgent hearing in terms of section 194(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 7(3)(a)(ii) of the Electoral Act 51 of 1996 to determine whether the first respondent should be removed from office as chairperson of the second respondent on the grounds of misconduct.'

[6] The respondent resisted the application. During the course of the hearing, counsel for the applicants applied to amend the relief and requested the court to simply declare that the respondent had misconducted herself within the meaning of s 7 of the Electoral Commission Act and to recommend that a committee of the National Assembly has regard to this finding. The applicants further amended their contentions during the investigation but nothing turns on it.

[7] The applicants instituted the application with a view to securing the eventual removal of the respondent from her office as a commissioner on the grounds of her misconduct. The grounds set out in support of these contentions are dealt with later in this judgment. The applicants also contended that in the light of the nature of the misconduct of the respondent, her continued participation in the planning and execution of the 2014 elections would seriously harm the credibility of the commission and, by extension, the applicants' and the public's confidence in the outcome of the elections.

[8] The applicants brought an application to this court under Rule 8 of the Rules[2] (the Rules), for relief.[3]

[9] The first step in a process for the removal of a commissioner from office would be for this court to determine whether, in its view, such a commissioner is guilty of misconduct and any of the contemplated action by a committee of the National Assembly is dependent upon a recommendation of this court in respect of any misconduct of that commissioner. Counsel agreed that such a determination is indeed a

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[2] Rules Regulating the Conduct of the Proceedings of the Electoral Court.
[3] See paras 5 and 6 supra.

requirement.[4] This is so by virtue of the provisions of s 7(3)(a) of the Electoral Commission Act, which is congruent with s 194 of the Constitution[5] and provides that

'A commissioner may only be removed from the office by the President –

i) on the grounds of misconduct, incapacity or incompetence;

ii) after a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court;'(emphasis added)

[10] The determination by this court constitutes an opinion upon which it bases its recommendation.[6] It is the prerogative of the committee of the National Assembly to make findings of misconduct. However, this court is required to weigh up all the relevant factors and decide the question of misconduct in order to make a recommendation. In *Ex Parte Porritt,*[7] Squires J said as follows:

'Applied to the context of that subsection, it seems to me to mean that the Master must, in the first instance, himself weigh up all that can be said for and against an application for rehabilitation and decide whether, in his estimation, the applicant is worthy of rehabilitation; and whether removal of the diminished status of insolvency in the particular case is desirable. For a variety of reasons related to his supervision of events in a sequestration and to his closer contact with the insolvent, creditors and trustees, he is normally in a better position than anyone else to identify and assess the merits of such an insolvency, shorn of any wider legal considerations. As was said by Slomowitz AJ in Kruger v The Master and Another NO, Ex parte Kruger1982 (1) SA 754 (W) at 757G, albeit in discussing a larger issue, "... what was intended (by s 124(2)) was an independent exercise by the Master of a discretion".'

In *Walele v City of Cape Town and Others,*[8] O'Regan ADCJ said as follows:

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[4] Although the applicants took a somewhat different view in replying argument.

[5] '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) on the grounds of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly;

(c) the adoption by the Assembly of a resolution calling for that person's removal from office.'

[6] *Schierhout v Union Government* 1919 AD 30 at p 47.

[7] 1991 (3) SA 866 (N) at 870J to 871B.

[8] 2008 (6) SA 129 (CC) at para 90.

'In making recommendations to a municipality on an application for the approval of building plans, a Building Control Officer must consider two primary issues. He or she must have regard to all the requirements in the Building Standards Act and other applicable legislation which might have a bearing on whether or not the plans should be approved. Section 7(1)(a) makes plain that if the plans do not comply with the Act or other applicable legislation, the municipality may not approve them. Similarly, the Building Control Officer must pay regard to the requirements set out in s 7(1)(b) of the Act and consider whether the proposed building will probably or in fact: disfigure the area; be unsightly or objectionable; derogate from the value of adjoining or neighbouring properties; or be dangerous to life or property. All of these matters must be considered by the Building Control Officer. The Building Control Officer may not recommend the approval of the plans if he or she is not satisfied that the proposed building does comply with the Act and all applicable legislation, or if he or she thinks that the proposed building will have or probably have any of the harmful effects mentioned in s 7(1)(b).' (footnote omitted)

[11] Section 20(7) of the Electoral Commission Act grants this court jurisdiction to investigate any allegation of misconduct of a member of the Commission. It became common cause that the issue to be investigated is whether the respondent is guilty of misconduct. In order to then make a recommendation, the court is of the view that such can only be made based on the facts found by us to have been proven after weighing up and considering all relevant factors.

[12] Following on the argument on behalf of the applicants, counsel for the respondent concentrated on the urgency of the matter. It was submitted that the respondent had had little time to prepare her affidavit; that she was extremely busy due to the upcoming elections and did not have time to properly attend to placing her version or explanation before this court; that the removal of the respondent from the Commission would result in only four commissioners being in office, which in turn could result in a stalemate during meetings where a majority vote amongst the five commissioners secures a decision of the Commission; that she was not brought to this court to contend with an investigation as envisaged in s 20(7) of the Electoral Commission Act; and that, due to the fact that in the past she was not called upon to

answer allegations of misconduct, her explanation, already given to the National Assembly, needed supplementation.

[13] Counsel for the respondent was invited to deal with the merits of the matter and to indicate the nature of the additional evidence which the respondent wished to tender. It was not contended that the respondent wished to give explanations different than those already on record, but only that she wished to furnish additional information. It is difficult to think of any reason why her responses to the allegations would be any different simply because it would be elaborated upon and were given for a different purpose.[9]

[14] In dealing with the merits of the matter it was accepted that the respondent had already set out her responses to the complaints against her in a document which had been submitted to the National Assembly. Her counsel said that the respondent might wish to place further explanations before the court. Although it became apparent that the additional matter which the respondent wished to place before the court was limited to three or four issues, it seemed prudent to allow her a further opportunity to formulate additional explanations.

[15] The second ground, namely that the respondent was extremely busy at the time, was understandable but not a reason to postpone the matter for fifteen to twenty days as suggested by her counsel. The matter before this court is of importance. The court was therefore of the view that the respondent should give priority to it. There was no indication that the Commission would not be able to function properly and smoothly

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[9] See *The President of the Court of Appeal v The Prime Minister and Other*s [2014] LSCA 1 (3April 2014) at para 25 where Brand JA said:

'It is true, as the appellant argued, that he was not formally invited by the Prime Minister to make representations as to why the request for the appointment of the Tribunal should not be made. Consequently, so he contended, his answer to the allegations in his replying affidavit was not a response to an invitation of that kind. I accept that the appellant was not invited to make representations regarding the appointment of the Tribunal and that what he said in his replying affidavit cannot be construed as having been such a response. It is also true that two of the allegations relied upon by the Prime Minister in his letter of 22 August 2013 had not been referred to in the answering affidavit in the first application. In consequence, the appellant had no opportunity to respond to these allegations either before the Prime Minister's impugned request was made to the King. But it is difficult to think of any reason why his response to the allegations would have been any different simply because it was given for a different purpose.'

should the respondent apply her mind to the few issues indicated by her counsel that needed elaboration.

[16] The submission that the Commission may have found itself in a stalemate position if only four commissioners remained in office is speculative and can therefore not outweigh the importance of the matter before this court. It was also contradicted by credible, uncontroverted evidence: at a meeting where the applicants sought to discuss the possible stepping down of the respondent from her office, the remaining commissioners gave the assurance that they and the Commission would not be hampered in the performance of its functions, should the respondent not be present or available during the forthcoming elections. This issue was, accordingly, not a bar to the continuation of these proceedings.

[17] The argument, on behalf of the respondent, that she was not brought to court to contend with the investigation envisaged in s 20(7) of the Electoral Commission Act, but only to object to the relief sought in the notice of motion, needs to be placed in its proper context. Regrettably, the manner in which the relief was originally framed in the notice of motion, together with the applicants' insistence that an investigation by this court could be dispensed with, unduly obscured the appreciation of the core question, ie the investigation that this court is enjoined to conduct into the allegations of misconduct of the respondent. This is so despite the affidavit filed by the applicants detailing the relevant sections of the applicable legislation and concluding as follows:

'To this end, s 20(7) of the Act accords this honourable court jurisdiction to:

". . . investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in s 7(3)(a)(ii)".'

[18] The respondent's counsel argued that the court's directive, issued in terms of Rule 8(3), that the parties may file affidavits and submissions by 16h00 on Friday 25 April 2014, was not a clear indication that an investigation would be held. By having regard to the relevant legislation and Rules as well as the contents of the applicants' affidavit, our view was, and remains, that an investigation was indeed indicated.

Nevertheless, in the interests of fairness, a further directive was issued which allowed the respondent more time to address the issues which she wished to elaborate upon.

[19] Once that directive clarified any uncertainty that may have existed as to the status of the matter before this court, the position changed. Despite the wording of the notice of motion, the matter is what it should have been from the outset, namely, an investigation as envisaged in the Electoral Commission Act. A notice of motion, as a procedural step in litigation, accordingly has no relevance. The requirements for the commencement of such an investigation are set out in Rule 8(1):

‘Investigation of misconduct, incapacity or incompetence of a member of the Commission.

1. An allegation of misconduct, incapacity or incompetence on the part of a member of the Commission must be –

a) in writing and, if possible, accompanied by supporting evidence; and
b) lodged with the Secretary.’

[20] There was no dispute that this point had indeed been reached. Counsel for the respondent agreed that the lodging of the founding affidavit by the applicants was sufficient to constitute compliance with Rule 8(1).

[21] I disagree that an investigation by this court can be dispensed with and, despite the heads of argument to the contrary, counsel for the applicant conceded that this is so. In the circumstances, the following directive was issued:

‘This court directs that an enquiry as envisaged in s 20(7) of the Electoral Commission Act will be held on Friday 2 May 2014 at 10h00. The first respondent is given the opportunity to file a further affidavit in order to clarify any of her responses to the Public Protectors’ report styled “Inappropriate Moves”[10] and to the allegations contained in paragraph 30 of the applicants’ affidavit.’

[22] This directive was issued by virtue of the very limited issues which counsel for the respondent submitted needed further clarification. Indeed, a period of two days to deal

[10] Public Protector, Report on an investigation into allegations of maladministration and corruption in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission, Report No 13 of 2013/2014, August 2013 ("Public Protector's report").

with the three or four matters raised by counsel was, in our view, quite generous. In affording the respondent the opportunity to further respond in writing to the allegations it was anticipated that, due to the limited disputes, the investigation would be dealt with on the papers. This is so by virtue of the fact that the nature of the investigation is determined by the nature of the issues to be dealt with. Counsel for the applicants submitted that

> 'An investigation…connotes the conferral of powers on the court to carry out its constitutional purpose, such that a court is not simply to resolve a dispute between litigating parties. If the court has sufficient evidence before it to make a recommendation, it has no need to invoke investigative competences. That the court has a discretion to determine whether a full scale investigation is required is evident from the language of s 20(7) of the Act which states that the court "may investigate any allegations. . . . ".'

Save for the issue of dispensing with the investigation, I agree with counsel's submission. The scope of the requirements of any investigation by this court is defined by, and will depend on, the facts of each case.

[23] A further issue raised by the respondent at the initial hearing was that the failure to join the National Assembly in the application rendered it defective. It was argued that, since the respondent's removal from office could not take place before the upcoming 2014 elections, the matter should be dismissed. The answers thereto are threefold. Firstly, this court is obliged to perform its functions regardless of what the National Assembly may do thereafter. Secondly, with the proceedings taking the form of an investigation, no joinder of any party is essential or required. It is an investigation by this court into the conduct of the respondent. It does not matter whether the information is contained in affidavits, either founding or replying, or in reports. The information is before this court in its investigative capacity and should be considered along with all relevant facts. Strictly speaking, there is no longer an applicant or a respondent. However, for the sake of convenience, I continue to refer to the parties as indicated at the outset of the judgment. Thirdly, there is no room for a dismissal of the relief sought where the proceedings are by their very nature an investigation, save in circumstances

where the allegations may be frivolous or for another reason untenable or unsubstantiated and no investigation is called for.[11]

[24] It was also submitted that the respondent is currently engaged in legal proceedings with a view to have the Public Protector's findings reviewed and set aside. However, such a review can have no bearing on the question which this court has to investigate. In addition, the respondent's responses to the relevant allegations have been placed before the court.

[25] The respondent's counsel argued that this matter is one of self-created urgency and that the applicants should be denied a hearing on that basis. Although Rule 8 does not prescribe strict time limits such as those contained in Rules 5 and 6, Rule 2 refers to the 'need for the expeditious disposal of matters' by this court. This court is aware of that duty. The question of urgency is consequently not a tool which can be used to bar the court from investigating the matter on an urgent or expeditious basis.

[26] In addition, one of the recommendations of the Public Protector[12] was that the Commission, in consultation with the National Treasury, consider commissioning a forensic investigation into the lease agreement and related expenditure which form the basis of the complaint of misconduct in this matter, in order to determine a fair market value and to recover any extravagant expenditure incurred. A forensic report[13] (the PwC report) was completed on 14 December 2013, and it was only published on 18 March 2014. It cannot be disputed that such a forensic report would have either confirmed the Public Protector's findings or vindicated the respondent. As it turned out, it confirmed the Public Protector's findings and made other serious findings against the respondent.

[27] Taking this into account, as well as the steps which the applicants took in order to engage the respondent in an attempt to resolve the applicants' disquiet, I am of the view that those steps, together with this court's general approach to dispose of matters

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[11] *Lötter v Electoral Commission and Others* (006/2014) ZAEC 3 (19 May 2014) at para 12.
[12] Public Protector's report para 11.2.3.
[13] PwC, National Treasury Forensic Investigation: Electoral Commission - Riverside Office Park, 14 December 2013.

expeditiously,[14] render the matter sufficiently urgent to justify the conducting of an investigation forthwith. The approach of this court is that it is, by its very nature and design, enabled to deal with matters on an urgent basis. It adjudicates disputes regarding electoral matters as they arise. Consequently, through its directives issued to the parties, the court determined to resolve this matter as expeditiously as possible, given the reality and urgency of the situation with the elections only a few days away. The expeditious finalisation of the matter would be in the interest of the respondent, as the completion of an investigation would lead to a position where certainty could prevail.

[28] The respondent filed an affidavit in compliance with the directive given by this court which gave rise to disputes that required further investigation. Having due regard thereto, this court formed an initial view that the investigation was unlikely to be completed prior to 7 May 2014 and that a decision regarding any possible recommendation, if justified, could not be reached by the time that the elections were held. This was due to the fact that there were only two working days left before the elections were to be held. Even if we had made ourselves available on the Saturday and Sunday in order to have four days available to conduct the investigation, there were logistical and time constraints that would have prevented deliberation and the reaching of a conclusion. A hasty decision, based on some disputed facts, would not have been in any party's interests.

[29] On the resumption of the hearing on 2 May 2014, the respondent's counsel complained that she had had insufficient time to place her version before the court. At the commencement of the investigation we enquired from her counsel whether there would be an application for further time to be granted for the filing of an affidavit. The enquiry was answered in the negative. However, counsel indicated that he might require more time to present his argument. Although the volume of the matter contained in the affidavit filed by the respondent was in contrast to what counsel indicated might be the position during the initial hearing, the court was still alert to the fact that counsel indicated an unease because of a possible lack of time to argue his client's case

[14] See *Lötter supra* at para 7. See also *Liberal Party v The Electoral Commission and Others* 2004 (8) BCLR 810 (CC) at para 11.

properly. As this court is enjoined to act fairly, we considered the following position. Jafta AJP (as he then was) said in *Bongoza v Minister of Correctional Services and Others*:[15]

'Those decisions dealt with the requirement for a tribunal to adopt and follow a fair procedure. Their focus was upon the need to act fairly where the rights of other people could be affected by an administrative decision. The procedural fairness referred to in those authorities is by no means confined to the standard of fairness usually found in a court of law. It is a requirement to act fairly whether it be by an administrative tribunal or a court of law. Thus in *Du Preez*[16], Corbett CJ said at 233C - F:

"I am of the view that likewise in the present case the Commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings. As I have indicated the subject-matter of injuries conducted by the Committee is ''gross violations of human rights''. Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, *inter alia*, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the Commission may accuse or condemn persons in the position of appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly.

But what does fairness demand in the circumstances of the present case? That is the critical question. Section 30(2) requires that persons detrimentally implicated should be afforded the opportunity subsequently to submit representations to or give evidence before the Commission. But does that exhaust the requirements of fairness? The appellants say ''No; we require, in the first place, reasonable and timeous notice of the time and place when evidence affecting us detrimentally or prejudicially will be presented to the Committee.'' King J was of the view that fairness required such notice to be given. I agree".'

[30] I align myself with the views expressed above. Accordingly, the respondent was afforded sufficient opportunity to fully present her case before the court. Although the order that was made had defeated the immediate objective of the applicants, it was nevertheless, in my view, the appropriate order having regard to all the facts and circumstances.

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[15] 2002 (6) SA 330 (TkH) at para 12.

[16] *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).

[31] The investigation was accordingly postponed to the week of 2 June 2014 on the following terms:

'a) The respondent is afforded the opportunity of placing any further evidential material before the Court, as she may be advised to do, by 19 May 2014.

b) Should the applicant wish to supply further evidential material it may be done by 23 May 2014

c) Both parties are requested to submit heads of argument by 28 May 2014.'

[32] During the week preceding the proposed continuation of the investigation, the parties met with the presiding judge where it was further agreed that the investigation would proceed on 4 June 2014 and not on 2 June 2014. All the parties accepted that the investigation was to be conducted with reference to the documents before the court and that no additional evidence was required, save that the respondent was requested to furnish particulars regarding the past disclosure of her relationship with Mr Mufamadi, as referred to by her in her affidavit.

[33] I have shown that the triggering event for this court to exercise its powers of investigation occurred when the applicants lodged allegations of misconduct on the part of the respondent with the Secretary of this court.[17] The respondent was given the opportunity to respond to the allegations by 17h00 on 1 May 2014 in order to elaborate upon the responses already on record. As a result the investigation as envisaged in s 20(7) of the Electoral Commission Act was to commence on Friday 2 May 2014 at 10h00.

[34] The applicants' counsel initially submitted that the facts relied upon by the applicants were sufficient for this judicial investigation to find and conclude that the respondent is guilty of serious misconduct. However, the seriousness, or otherwise, of any misconduct is not an element referred to in s 7 of the Electoral Commission Act. The question which arises in this investigation is whether the respondent's actions of

[17] Rule 8(1).

which the applicant complained, constitute misconduct.[18] In addition, counsel for the applicants submitted that by virtue of the provisions of s 9(2)(c) of the Electoral Commission Act[19]the respondent harmed the credibility, impartiality, independence and integrity of the Commission. I am of the view that the court is mandated to investigate whether the relevant conduct falls within the meaning of misconduct as envisaged in s 7(3)(a)(i) of the Electoral Commission Act. It was submitted by the applicants that a contravention of s 9(2)(c) of the Electoral Commission Act by a commissioner does constitute such misconduct. The respondent submitted that only in the event of a contravention of s 9, can misconduct be found on the part of a commissioner. I disagree. The provisions of s 9 form the basis of a code of conduct for commissioners, but they are not an all-inclusive set of rules determining misconduct. Section 7 does not limit misconduct to that which is contained in s 9.

[35] Principally, the applicants rely on the findings of the Public Protector, which is also a state institution supporting constitutional democracy as provided for in Chapter 9 of the Constitution. The respondent's counsel submitted that the Public Protector had not conducted a judicial investigation, had not enquired into and did not make findings on whether the respondent was guilty of misconduct warranting her removal as a commissioner. Firstly, the fact that the Public Protector's report does not conclude that the respondent is guilty of misconduct is of no consequence. For present purposes it is the Electoral Court that is empowered to investigate the facts and then to make a value judgment as to whether the facts do indeed constitute misconduct, in order to make any recommendation. Any opinion expressed or finding made by the Public Protector in this regard is not binding on this court. Secondly, I am of the view that the contents of the Public Protector's Report are sufficiently and materially relevant in order for this court to have regard to it. The Constitutional Court, in *Kaunda and Others v President of the Republic of South Africa and Others,*[20] sanctioned the use of reports by Amnesty

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[18] S 7(3)(a)(i) of the Electoral Commission Act.

[19] '9(2) No member of the Commission-

(c) may, by his or her membership, association, statement, conduct or in any other manner place in jeopardy his or her perceived independence, or in any other manner harm the credibility, impartiality, independence or integrity of the Commission;. . . .'

[20] 2005 (4) SA 235 (CC).

International and The International Bar Association as a materially relevant consideration in deciding a claim for diplomatic protection pressed by the applicants who faced rights violations abroad. Chaskalson CJ expressed the proper position as follows:

'Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.'[21]

[36] The view was subsequently adopted by Murphy J in *Tantoush v Refugee Appeal Board and Others*,[22] where the Court held that:

'. . . it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights.'

[37] I agree with the applicants' submission that the above approach extends to a report of the Public Protector, whose office is a Chapter 9 institution tasked with the constitutional duty to investigate conduct in state affairs or in the public administration in any sphere of government that is alleged to be improper, or which may result in impropriety or prejudice.[23]

[38] This is even more so since the respondent has attached her response, provided to the National Assembly, regarding the relevant allegations contained in the Public Protector's report, to the affidavit that she filed in this court. In this response, as in the additional affidavit filed on 2 May 2014, she has dealt with the allegations against her. The result is that the question which is to be answered will, largely, be premised on the respondent's own version.

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[21] Kaunda at para 123. O'Regan J confirmed this position at para 265.
[22] 2008 (1) SA 232 (T) at para 19.
[23] S 182 of the Constitution.

[39] It was further submitted that the conduct, which this court is called upon to investigate, is not the conduct of the respondent in her capacity as a commissioner, and that an investigation can only be held to establish whether the respondent, qua commissioner, is guilty of misconduct. The argument was as follows: 'The conduct of a person, at any time before her or his appointment as a commissioner, is not the conduct of a commissioner.' The argument is premised on the provisions of s 9 of the Electoral Commission Act. I am of the view that s 9 is but one source of possible misconduct. Therefore, the limitation of the investigation to whether the respondent contravened the provisions of s 9 only has no justification. Although the investigation into any misconduct is in terms of the provisions of s 7 of the Electoral Commission Act, it is necessary to read that section in conjunction with s 9 of the Act, which section prohibits any commissioner from placing

> 'in jeopardy his or her perceived independence or in any other manner harm the credibility, impartiality, independence or integrity of the Commission.' (emphasis added)

[40] The conduct of the respondent, which may prove to be misconduct on her part, whether during the time after her appointment as a commissioner or before, would constitute conduct which may harm the Commission. The underlined words, in my view, are wide in their reach and would include conduct prior to the respondent's appointment as a commissioner. What is important is the possible effect of the respondent's conduct on the independence, credibility and integrity of the Commission. It would, in our view, be artificial to say that misconduct which came to light after the appointment of a commissioner, which may have impacted on her very appointment - had it been known, and which could have disqualified her from office, cannot be investigated by this court. However, in my view, if the conduct had an impact upon the credibility, independence or integrity of the Commission, this court is obliged to investigate it. The provisions of s 9 of the Electoral Commission Act require commissioners to act according to the prescripts of the Act. A failure to do so, would, in my view, constitute misconduct, irrespective of the time when such misconduct was committed.

[41] If I am wrong in this conclusion, reference only needs to be made to s 7(3)(a)(i) of the Electoral Commission Act, which provides that a

'commissioner may . . . be removed from office by the President . . . on the grounds of misconduct . . . . '

Counsel for the applicants submitted that the conduct referred to is not time bound. I am of the view that counsel's argument is sound. The wording of the section is clear and the limitation contended for by the respondent cannot be read into s 7. As Meyer AJA said in *Harmony Gold Mining Co Ltd v Regional Director, Free State Department of Water Affairs, and Others:*[24]

'The limitation contended for by Harmony is not expressly provided for in ss (3) and will thus have to be read into it by implication. Corbett JA in *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A), said that "(w)ords cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands".'[25]

[42] Wallis JA explained the test for statutory interpretation as follows:[26]

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The

[24] 2014 (3) SA 149 (SCA) at para 22.

[25] Also see *Bernstein and Others v Bester and Others NNO*1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2) para 105; *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) (2003 (1) SACR 561; 2003 (5) BCLR 476) para 48; and *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC) (2003 (1) SACR 404; 2004 (9) BCLR 895; [2002] ZACC 29) para 20.

[26] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (footnotes omitted)

[43] The wording of the legislation is clear. It has not been shown that the context of s 7 requires it to be read in any manner other than excluding a time period. If regard is had to the provisions of s 9, there are subsections where the legislation wished to refer to a period 'during the term of office' and others where it specifically excluded those words. In our view, the purpose of the section is to promote high standards of commissioners and to avoid those who are unfit for office to hold office. The result is that the person who occupies the office of commissioner must be free from conduct which can taint that high office, irrespective of when the misconduct occurred.

[44] Section 7(3) does not reference s 9 as a basis for any misconduct. There is also, in our view, no justification to read into the subsections of s 9 the words 'during his or her term of office' where it does not appear. The Legislature used such words in those subsections where it deemed it appropriate to limit the reach of the subsections. Section 9 (2)(c) is not couched in terms that limit the reach of subsections as is the position with s 9(2)(a) and 9(2)(f). The omission of the limitation in s 9(2)(c) and the wording therein 'or in any other manner . . .' render the provisions of s 9(2)(c) much wider to include conduct of the commissioner prior to or after serving as a commissioner.

[45] The question that arose was whether the facts relied upon by the applicants, that underlie the investigation and which are based on the respondent's admission that she violated procurement procedures, as also confirmed by the reports of the Public Protector and Treasury, constitute misconduct by the respondent. Her conduct, while

she was the Chief Electoral Officer (CEO) and accounting officer of the Commission, came under scrutiny. The facts relied upon are set out below. Both parties submitted that the '. . . crisp issue in this matter is whether that conduct, as a matter of law, amounted to misconduct warranting . . . the respondent's . . . removal from office.' This, in my view, is the obligation imposed upon this court.[27]

[46] On 26 August 2013, the Public Protector released a final report on her investigation into allegations of maladministration and corruption in the procurement of Riverside Office Park premises for the head office of the Commission. The Public Protector found, inter alia, that the respondent, as CEO of the Commission and prior to her appointment as a commissioner, had presided over a grossly irregular process for procurement of the Commission's premises in 2009, which process was also characterised by violations of procurement legislation and prescripts. The respondent did so, it was found, despite her having had an undisclosed and unmanaged conflict of interest as she had a close business relationship with Mr Thaba Mufamadi, a significant stakeholder and the successful bidder in the procurement process. The Public Protector's report further found that the respondent's improper conduct and maladministration risked impairing public confidence in the integrity and impartiality of the Commission.[28]

[47] The first ground of complaint (the maladministration complaint), is premised on several factual findings of the Public Protector. These are:

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[27] See *Porritt* and *Walele* supra.

[28] The complete findings are as follows at para10.7.7 of the Public Protector's report:

'10.7.17 Adv. Tlakula's improper conduct and maladministration in this regard, in particular the non-compliance with relevant procurement prescripts as well as her undisclosed and unmanaged conflict of interest had the impact of:

10.7.17.1 Risking of loss of public confidence in the Electoral Commission as an organ of state in open and transparent procurement of goods and services;

10.7.17.2 Risking impairment of the reputation of the Electoral Commission as an impartial constitutional body with optimal levels of integrity;

10.7.17.3 Fostering a perception from potential service providers that they cannot expect fair and equal treatment from Electoral Commission; and

10.7.17.4 Risking the possibility of an asset procurement process that is not cost effective, through failure to ensure that the procurement of assets is tested in the open market, a systemic problem that afflicts most organs of state.'

[47.1] the respondent contravened the Commission's original tender award and, before it was rescinded, invited potential bidders to submit proposals in a new procurement process, without authorisation by the Commission to do so, which was improper and constituted maladministration;

[47.2] the process followed by the respondent in the procurement of the Riverside Office Park building was grossly irregular as it was characterised by violations of procurement legislation and prescripts.

[48] This complaint is, additionally, based on the PwC report, which found the following pertinent matters:

- the procurement process followed by the respondent was not fair, equitable, transparent, competitive or cost-effective as required by section 217(1) of the Constitution, and some of the expenditure could have been avoided had reasonable care been taken;[29]
- the process involved numerous errors, which resulted in Abland being favoured at the expense of other bidders, as well as at the expense of the Commission;[30]
- as a result of the irregularities, the Commission is being overcharged by Abland in an amount between R 20,8 million and R 110 million over the ten year term of the lease;[31] and
- the respondent, as CEO and accounting officer, should be held responsible for the role she played in the irregular process.[32]

[49] The second ground of complaint (the conflict of interest complaint) is premised on the following findings of the Public Protector:

- the respondent had an undisclosed and unmanaged conflict of interest which compromised her duty to act in the best interests of the Commission, as she had a close business relationship with Mr Mufamadi, who was:[33]

[29] PwC report para 14.064.
[30] PwC report para 14.061.
[31] PwC report para 14.066.
[32] PwC report para 14.071.
[33] Public Protector's report para 10.7.1.

- the chairperson of Manaka Property Investments (Pty) Ltd, which held a 20% stake in Abland (Pty) Ltd (Abland), the company which was eventually awarded the tender, and was a co-director with the respondent and also executive chairperson of Lehotsa Investment (Pty) Ltd (Lehotsa);[34] and
- on at least one occasion, introduced by the respondent to colleagues at the Commission as her business partner.[35]

[50] Despite this conflict of interest, the respondent was closely involved in the initiation of the procurement process, as well as the evaluation and adjudication of the bids for the procurement of the building in her capacity as the CEO and chairperson of the executive committee of the Commission (EXCO).

[51] It was said that the respondent's improper conduct and maladministration, in particular the non-compliance with relevant procurement prescripts, as well as her undisclosed and unmanaged conflict of interest, had the impact of risking loss of public confidence in the Commission as an organ of state in open and transparent procurement of goods and services, risking impairment of the integrity and reputation of the Commission as an impartial constitutional body with optimal levels of integrity and fostering a perception among potential service providers that they cannot expect fair and equal treatment from the Commission.[36]

[52] Although the court has to distinguish between facts found and conclusions reached by the Public Protector and the PwC report, the respondent has been afforded a full opportunity to furnish answers to the allegations, whether matters of fact or findings and conclusions by the Public Protector and those contained in the PwC report. Both the reports are comprehensive. The court will only deal with the matters contained in the reports upon which the complaints are based.[37]

[53] A number of issues canvassed in the Public Protector's report are confirmed in the PwC report. Three instances are set out. Firstly, the Public Protector's report found

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[34] Public Protector's report para 10.7.2.
[35] Public Protector's report para 7.2.2.3.
[36] Public Protector's report para 10.7.17.
[37] See para 61 infra.

that the needs-analysis conducted was not comprehensive enough to include fixtures and other items subsequently procured as part of a turnkey solution. This resulted in poor demand management and left a blank cheque to be filled in during negotiations with Abland as a sole supplier. This report also found that the turnkey solution had not been approved by the Commission when Abland was appointed and that the items were not procured through an open market process. The PwC report confirms that Abland was used as an agent to procure furnishing from third parties for just under R60 million. This was not part of the original request for proposals. Thus the amount of almost R60 million had not been properly budgeted for as the funds were initially procured from a roll-over of funds of the previous year. As a result the budget steadily increased as the Commission simply purchased what it wanted.

[54] Secondly, the Public Protector's report states that no formal bid specification committee was used to draft a needs-analysis that would have catered for all the needs of the Commission. The PwC report finds that the space requirements of the Commission were not properly calculated and that the space norms of the Department of Public Works were not properly applied. Had these norms been applied, the space to be rented would have been 6500 square metres rather than the 9000 square metres which the Commission had advertised was required. A company called Spacejam was tasked by the Commission in July 2009 to do a needs-analysis. They assessed the Commission's needs at 8550 square metres. When this company was brought in to do the analysis it was too late because the tender had already been awarded. The final space procured from Abland was 9489 square metres, which is even more excessive. According to the PwC report, the cost of the excess space on the assumption that the correct size was 6500 square metres will be a sum of R110 million over a ten year period. Furthermore, on the assumption that the space needs were correct, the effect of rentalising various fixtures over the ten-year lease period at high operating costs was that the Commission incurred additional expenditure in the sum of R20.8 million above expected market norms over a ten-year period.

[55] Thirdly, the Public Protector's report found that the change in occupation date of the property from April 2010 to August 2010 was irregular because bidders who

proposed a later date were not considered. The PwC report indicates that the EXCO, chaired by the respondent, did not perform its function as a bid evaluation committee properly. It relied almost exclusively on the summary spreadsheet prepared by Mr Langtry, the respondent's then office manager. The spreadsheet indicated that certain bidders should be excluded because they failed to meet the Commission's requirements as advertised. The spreadsheet contained a number of material errors. One of the bidders that were disqualified, Khwela City (Khwela), was excluded on the basis that it had offered an occupation date of June 2010 whereas the Commission had requested a date of 1 April 2010. It has been established that EXCO subsequently permitted Abland to change the proposed occupation date to 1 August 2010. This was irregular in the light of the fact that other bidders had been excluded by virtue of the initial occupation date as specified by the Commission. According to the PwC report, had Khwela not been excluded, it would have scored higher than Abland on the PPPFA[38] criteria. It should therefore have been awarded the contract.

[56] Save for the aforesaid matters, this court directed that the respondent should furnish answers to the allegations which are contained in para 30 of the applicants' affidavit. Those allegations include the matters referred to previously in this judgment and, in addition, conclude that

'the procurement process followed by Adv. Tlakula was not fair, equitable, transparent, competitive or cost-effective as required by section 217(1) of the Constitution, and some of the expenditure could have been avoided had reasonable care been taken'

and:

'Adv. Tlakula, as CEO and accounting officer, should be held responsible for the role she played in this irregular process.'

[57] By virtue of the fact that there was no longer any urgent reason to finalise the matter, the limitation[39] placed on the issues which the respondent was called upon to deal with, fell away. Accordingly, prior to the continuation of the proceedings envisaged for 2 June 2014, this court issued the following directive:

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[38] Preferential Procurement Policy Framework Act no. 5 of 2000.
[39] Para 21 supra.

‘The Electoral Court’s directive issued on 29 April 2014 requiring the respondent to contain her responses, as far as the PWC report is concerned, to the allegations contained in paragraph 30 of the applicants’ affidavit, is no longer applicable. The respondent is required to deal with all matters contained in the PWC report, relevant to her conduct.‘

In this manner, the respondent was afforded an opportunity to deal with any adverse findings contained in the PwC report.

[58] Despite the court having indicated to counsel for the respondent that directives regarding time for the filing of documents are interlocutory by their very nature and that if time was needed on a well-grounded basis in order to submit responses, it would be granted to the parties, the respondent’s reaction was not to deal with the further allegations contained in the PwC report. The respondent rather elected to respond to the aforesaid directive through her attorney, who, in an affidavit, responded as follows:

‘5. We submit that this Court has misdirected itself in issuing the new directive. The complaint upon which the applicants rely is fully set out in the founding affidavit deposed to by Mr Holomisa. The complaint was further amplified through the submissions made by the applicants’ counsel when the matter was heard on 2 May 2014. Furthermore, in its directive of 29 May 2014, this Court, in clarifying the applicants’ complaint, directed the first respondent, in relation to the PWC report, to confine herself to the allegations contained in paragraph 30 of the founding affidavit.

6. Accordingly, without hearing any further submissions, this Court has decided *mero motu* to expand the scope of the complaint beyond that which is contended for by the applicants. We submit that this Court is not empowered to do so.

7. In addition, the new directive afforded the first respondent only one court day to traverse and respond to the PWC report. In terms of the order of this Court on 2 May 2014, the first respondent is required to file the additional evidence she wishes to place before the Court by 19 May 2014. This affidavit will be filed with the additional evidence tendered in accordance with the directive of 29 April 2014 and the order of 2 May 2014. The PWC report runs in excess of 200 pages, excluding annexures. Thus in the limited time available, it was virtually impossible for the first respondent and her legal representatives to respond to the PWC report in its entirety. Moreover, the matter is not urgent. In addition to being not competent, we submit that the new directive is in any event grossly unreasonable.’

[59] The statements are clearly misconceived in, at least, two respects. If the respondent needed time to react to allegations, she could have requested further time and her request would have been considered by the court, as it did in all other previous instances.

[60] The second, but more serious, flaw as echoed in the argument presented on behalf of the respondent, is the statement that the court had expanded the scope of the complaint beyond that which is contended for by the applicants. The deponent appears to ignore the fact that there are a number of documents before this court containing allegations regarding the conduct of the respondent. These include founding and replying affidavits of the applicants, the report of the Public Protector as well as the PwC report. A cursory glance at section 20(7) of the Electoral Commission Act enlightens the reader that the court, once it has embarked on an investigation, may look at any allegation of misconduct. The allegations that are contained in the three sources referred to above are now before the court and the respondent was requested to deal with them, irrespective of their source. To confine the court's investigation to that, which has been articulated in the founding affidavit of the applicants, would place a wholly unwarranted limit on the duties of the court. Far from being a misdirected or irregular or unreasonable as contended by the respondent's attorney, the court afforded the respondent the opportunity to deal fully with that which is before this court specifically, to be reasonable and fair. As a responsible official, the respondent should deal with what is before the court so that the investigation may be adequately conducted. The belief that the scope of the investigation is to be limited to the contents of the applicants' affidavit, is without substance and clearly wrong. It is also contradicted by the respondent's attorney in his own affidavit. He was alert to the fact that the complaint was '. . . fully set out in the founding affidavit deposed to by Mr Holomisa and was further amplified through the submissions made by the applicant's counsel . . . . ' The affidavit attested to by Mr Holomisa incorporated both the Public Protector's report and the PwC report.

[61] Despite this, and having had the opportunity to fully consider the contents of the PwC report, this court formed the view that the directive of 2 June 2014 sufficiently

required the respondent to deal with the allegations contained in the PwC report that may have needed a response from the respondent for purposes of this investigation. The respondent's responses after the directive of 2 June 2014 can be considered and evaluated by this court without reference to the matters, which the respondent's attorney believes and the respondent's counsel argued, to be an 'expanded scope of the complaint.'

[62] During final argument, the applicants referred to certain paragraphs in the 2010 Annual Report of the Commission, issued under the signature of the respondent. This court ruled that references in the document, which is a public document and readily available on the Commission's website, could form part of the material before us. The respondent was accordingly allowed time time to deal with the issues specifically referred to by the applicants.

[63] The respondent responded to the findings of the Public Protector in submissions supplied to a committee of the National Assembly (the first response). She also filed an affidavit in this court on 1 May 2014 (the second response) and furnished further evidence in affidavits filed on 19 May 2014 in accordance with this court's directive (the third response). An affidavit dealing with the 2010 Annual report was filed on 10 June 2014.

[64] While not contending that the procurement process over which she presided was lawful, the respondent submitted that none of those instances of non-compliance with aspects of the relevant procurement legislation constitute misconduct by a commissioner within the meaning of sections 7, 9 and 20 of the Electoral Commission Act. The respondent further contended that she was under no obligation to make further disclosure 'in the circumstances prevailing at the time.' She also alleged that the conduct under investigation does not and has not as a matter of fact undermined the credibility of the Commission in the public eye. Lastly, the respondent does not seriously deny that she failed to disclose and manage her relationship with Mr Mufamadi in the context of the lease procurement process. She disputes that she had a duty to disclose it, contending that she had no such duty because she had no financial stake in the company concerned.

[65] The presence of misconduct is in our view, an objective question.[40] The conduct is to be viewed against the accepted norms and standards as set out in legislation and the common law.

[66] The approach in an investigation such as the one with which this court is seized, has been dealt with by the Appellate Division (Supreme Court of Appeal) on a number of occasions.

[67] In *Olivier v die Kaapse Balieraad*[41] it was held that the proceedings are sui generis and civil in nature where the test is on a preponderance of probabilities. The Appellate Division said in *Nyembezi:*[42]

'When a law society applies for an attorney to be struck off the roll, it places before the Court facts which, in its submission, show the respondent is no longer a fit and proper person to continue in practice as an attorney. The respondent replies with explanations and other facts to show the contrary. The Court, after considering the facts and hearing argument, decides on a balance of probability whether the respondent's alleged offending conduct or acts have been established and, if so, whether they show that, by reason of his character or otherwise, the respondent is not a fit and proper person to practise as an attorney. Although that may sometimes necessitate making a value judgement to some extent, the Court's function is, in essence one of making an objective finding of facts, and not the exercise of a discretion.'

[68] In *Freedom Under Law v Acting Chairperson: JSC*[43] Streicher JA said:

'. . . an investigation of a complaint of gross misconduct is not a criminal enquiry, but more in the nature of a disciplinary enquiry, where proof on a balance of probabilities is required at its conclusion.'

[69] In *Hepple v Law Society of the Northern Provinces*[44] Mthiyane DP said:

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[40] See *Nyembezi v Law Society , Natal* 1981 (2) SA 752 (A) at 756H –757A.
[41] 1972 (3) SA 485 (A) at 496.
[42] *Nyembezi* at 756H – 757A: See also *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at 615B-F.
[43] 2011 (3) SA 549 (SCA)at para 46.
[44] (507/2013) [2014] ZASCA 75 (29 May 2014,) at para 9.

‘In considering whether a case has been made out against an attorney sought to be struck from the roll it is necessary to bear in mind that the evidence presented by the law society is not to be treated as though one was dealing with “a criminal case” or “an ordinary civil case”. The proceedings in applications to strike the name of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are sui generis. It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them. In this regard the remarks of Harms ADP in Malan v The Law Society of the Northern Provinces are apposite:

“If one turns to the bookkeeping charges, the position is simply that there is no allegation of a realisation of the seriousness of the offences. They are brushed off on the basis that the society failed to prove a trust shortage that the bookkeeper had erred, that they did not know the rules, that their auditors had erred, or simply by not dealing with the pertinent allegations. Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over the files ─ in short, their approach on the papers was obstructionist. . . . These factors are “aggravating” and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight”. ’ (footnotes omitted)

[70] The applicability of the relevant legal prescripts is not in dispute. The prescripts are contained in a number of Acts of Parliament, Treasury documents and Regulations (including regulations issued by the Commission).

[71] Section 38 of the Public Finance Management Act (PFMA)[45] sets out the general responsibilities of accounting officers, a position which it is common cause that the respondent held. Section 38 states:

‘(1) The accounting officer for a department, trading entity or constitutional institution-

[45] Act 1 of 1999.

(a) must ensure that that department, trading entity or constitutional institution has and maintains-

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) must take effective and appropriate steps to-

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(d) is responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who-

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(i) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(k) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(l) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(m) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(n) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.'(emphasis added)

[72] The legislative provisions place a responsibility upon the accounting officer to ensure proper compliance with the law. The responsibility is that of the accounting officer personally.

[73] In terms of the provisions of s 39 of the PFMA:

'(1) The accounting officer for a department is responsible for ensuring that-
(a) expenditure of that department is in accordance with the vote of the department and the main divisions within the vote; and
(b) effective and appropriate steps are taken to prevent unauthorised expenditure.

(2) An accounting officer, for the purposes of subsection (1), must-
(a) take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote;
(*b)* report to the executive authority and the relevant treasury any impending-
(i) under collection of revenue due;
(ii) shortfalls in budgeted revenue; and
(iii) overspending of the department's vote or a main division within the vote; and

(c) comply with any remedial measures imposed by the relevant treasury in terms of this Act to prevent overspending of the vote or a main division within the vote.'

[74] In terms of s 81 of the PFMA, officials in departments and constitutional institution are guilty of financial misconduct in the following instances:

'(1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer wilfully or negligently-
(a) fails to comply with a requirement of section 38, 39, 40, 41 or 42; or
(b) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.'

[75] The fiduciary role of the accounting officer is highlighted by the provision for criminal offences and penalties in s 86(1) of the PFMA which includes:

'an accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with the provision of section 38, 39 or 40'.

[76] In addition, the Regulations on the Conditions of Service, Remuneration, Allowances and other Benefits of the Chief Electoral Officer and other Administration Staff[46] stipulate in s 19 that:

'where a possible conflict of interest arises or where an employee has an interest, whether financially <u>or otherwise</u>, or obtains an interest in a company or firm with which the employer enters into business transactions, or where the interest is of such a nature that it may influence the outcome of any decision or benefit any person or company or firm, such interest must be disclosed in writing to the employer as soon as it arises and the employee must refrain from participation in any way in related business dealings.'(emphasis added)

[77] The National Treasury Practice Note number 4 of 2003 is applicable to all officials and other role players involved in supply chain management. The PwC report[47] summarises these principles, correctly in our view, as follows:

'1) The Government of South Africa commits itself to a policy of fair dealing and integrity in the conducting of its business. The position of a SCM practitioner is, therefore, a position of trust, implying a duty to act in the public interest. Practitioners should not perform their duties to unlawfully gain any form of compensation, payment or gratuities from any person, or supplier/ contractor for themselves, their family or their friends.

2) Practitioners should ensure that they perform their duties efficiently, effectively and with integrity, in accordance with the relevant legislation and regulations including the Public Service Regulations issued by the Department of Public Service and Administration, National Treasury Regulations and Practice Notes and directives issued by accounting officers/ authorities. They should ensure that public resources are administered responsibly.

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[46] General notice No. R. 514 of 18 May 2000, Regulation Gazette No. 6816.
[47] At pp 36-38.

3) Practitioners should be fair and impartial in the performance of their functions. They should at no time afford any undue of preferential treatment to any group or individual or unfairly discriminate against any group or individual. They should not abuse the power and authority invested in them.

4) SCM practitioners “should declare any business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest.”

5) “They should not place themselves under any financial or other obligation to outside individuals or organizations that might seek to influence them in the performance of their official duties.”

6) “Practitioners are accountable for their decisions and actions to the public.”

7) “Practitioners should use public property scrupulously.”

8) “Only accounting officers/authorities or their delegates have the authority to commit the government to any transaction for the procurement of goods and/or services.”

9) “All transactions conducted by a practitioner should be recorded and accounted for in an appropriate accounting system. Practitioners should not make any false or misleading entries into such a system for any reason whatsoever.”

10) The following provisions of Paragraph 6 of the Code of Conduct regarding Bid Evaluation/Adjudication teams should be noted:

“6.1 Bid evaluation/adjudication teams should regulate supply chain management on behalf of the institution in an honest, fair, impartial, transparent, cost-effective and accountable manner in accordance with the accounting officer’s/authority’s directives/delegated powers.”

“6.3 Bid evaluation/adjudication teams should be familiar with and adhere to the prescribed legislation, directives and procedures in respect of supply chain management in order to perform effectively and efficiently.”

“6.5 No person should –

6.5.1 interfere with the supply chain management system on an institution; or

6.5.2 amend or tamper with any bid after its submission.”’

[78] In 2002, the Commission approved its Procurement Policy. Chapter 4[48] of the policy sets out the duties of the CEO, the Procurement Committee, the Evaluation Committee and the Procurement Department as follows:

'4.2 The Chief Electoral Officer

(a) The Chief Electoral Officer (CEO) procures goods and services for the Electoral Commission and arranges for the hiring of goods and services or the acquisition or granting of any right for or on behalf of the Electoral Commission, and disposes of moveable assets subject to compliance with the requirements of section 12(2)(c) of the Electoral Commission Act, section 38 (a)(iii) of the Public Finance Management Act, the Treasury Regulations and the Act. In respect of goods and services in excess of R2 million, the CEO does so after consultation with the Commission.

(b) The power to enter into, amend or cancel contracts rests with the CEO.

(c) The CEO may delegate certain functions.

4.3 The Procurement Committee

4.3.1 Composition

(a) The CEO establishes the Procurement Committee by appointing five members who will serve on the committee on a permanent basis.

(b) The CEO appoints a Chairperson.

(c) A quorum shall be made up of 50% of members plus one.

(d) In the absence of a Chairperson at a meeting, the Procurement Committee shall elect an Acting Chairperson from among the members present at the meeting.

(e) The Chairperson of the Committee may co-opt a member of staff for a particular meeting.

4.3.2 Meeting Procedure

…

4.3.3 Introduction

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[48] PwC report at para 6.080.

(a) The Procurement Committee makes recommendations to the CEO on the procurement of goods and services for or on behalf of the Electoral Commission.

(b) The Procurement Committee makes recommendations on the hiring of goods and services for, or on behalf of the Electoral Commission.

(c) The Procurement Committee makes recommendations to the CEO on the disposal of movable Electoral Commission property.

4.4 Evaluation Committee

An Evaluation Committee shall be constituted upon the closure of each and every tender or for any quote or bid exceeding R100,000. In respect of quotations and bids less than R100,000 the Procurement Department evaluates a quote and makes recommendations to the User Department to deal with within their delegated authority.

4.4.1 Composition

(a) The Evaluation Committee shall consist of:

(i) A member of the Procurement Department;

(ii) A member of the Legal Services Department;

(iii) A maximum of two members of the User Department;

(iv) In the event of a tender exceeding ten million (R10,000,000) or on recommendation of the Procurement Committee, an external expert.

(b) The member from the Procurement Department shall serve as a Convenor of the Evaluation Committee.

(c) In the event of an external expert, the User Department together with the Procurement Department shall submit a recommendation to the Procurement Committee with regard to the appointment of such an expert.

(d) A quorum shall be made up of at least one member from the departments mentioned above.

(e) A member of the Procurement Committee may sit as a member of the Evaluation Committee.

(f) The Composition of the Evaluation Committee shall be approved by the Chairperson of the Procurement Committee.

4.4.2 Meeting Procedure

…

4.4.3 Functions of the Evaluation Committee

(a) Determination of Acceptable quotes/tenders/goods for Goods and Services:

(i) At the stipulated closing time for the responses, the Procurement Department at Head Office, opens the tenders and compiles a register of quotes/tenders/bids received.

(ii) The Evaluation Committee evaluates the quotes/tenders/bids according to the specifications and submits a report to the Procurement Committee.

(iii) The Internal Audit department performs audit tests prior to final adjudication.

(iv) The Procurement Committee makes recommendations to the CEO in respect of the awarding of quotes/tenders/bids taking into account the Act and the Electoral Commissions Procurement Policy. (Refer to annexure B for the Provisions of the Act).

4.4 The Procurement Department

4.4.1 The Procurement Department is responsible for the administration of all the Electoral Commission procurement processes.

4.4.2 The Procurement Department shall maintain and update a database of suppliers of the Electoral Commission.

4.4.3 The Procurement Department provides support functions to the Procurement Committee.

4.4.4 The Procurement Department must provide all the information which the Procurement Committee and/or the CEO require in connection with the execution of their powers and functions.

4.4.5 On receipt of the report from the Evaluation Committee, the Procurement Department shall apply the Act with regard to the allocation of points.

4.4.6 The Procurement Department shall perform the due diligence enquiries together with the internal Audit Unit prior to the awarding of a contract.'

[79] The legal prescripts are to be seen through the prism of the Constitution, which provides[49] that

'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.'

[80] The applicants submitted that the respondent was responsible and, as the accounting officer, accountable for her actions. There can be no doubt that this is so. In order to evaluate the conduct of the respondent, the concept of accountability needs some clarification.

[81] Okpaluba and Osode[50] remark that

'Furthermore, one of the nine fundamental but basic values and principles of good public administration set to govern the new South African democracy in s 195(1)(f) of the Constitution is that "public administration must be accountable".'

[82] In *Ex Parte Attorney-General in re the Constitutional Relationship*[51], it was said that

'"Responsibility" is defined in the *Shorter Oxford Dictionary* as:

"1. The state or fact of being responsible. A charge, trust or duty for which one is responsible. A person or thing for which one is responsible".

And the relevant meaning of "responsible" given is "answerable, accountable".'

[83] Professor John Mubangizi[52] writes as follows in an article:[53]

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[49] Section 195(1)(a) of the Constitution.
[50] *Government Liability: South Africa and the Commonwealth 1st Ed (2010)* para 9.5.1 at pp 223-224.
[51] 1995 (8) BCLR 1070 (NmS) at page 1078F
[52] Professor of Law; Deputy Vice-Chancellor and Head: College of Law and Management Studies, University of Kwazulu-Natal.

'5.1 Accountability in the human rights context

Accountability has various meanings. *Black's law dictionary* defines accountability as the "state of being responsible or answerable". Cook cautions that accountability is a wider concept than responsibility, which simply denotes liability for a breach of the law. She argues that accountability "requires a state to explain an apparent violation and to offer an exculpatory explanation if it can".' (footnotes omitted)

I am of the view that accountability in the context of the Constitution and the nature of the respondent's profile within the Commission, are factors placing her within the framework of this definition of accountability.

[84] Davis J said[54]

'In my view, the determination of the legal convictions of the community on which the test for wrongfulness is based must take account of the spirit, purport and object of the Constitution. As Prof Mureinik wrote, the new Constitution "must lead to a culture of justification - a culture in which every exercise of power is expected to be justified"((1994) 10 SAJHR 31 at 32). This principle of justification includes the concept of accountability, namely that a public authority is accountable to the public it serves when it <u>acts negligently and without due care</u>. Accountability includes the recognition of <u>legal responsibility for the consequences</u> of such action.' (emphasis added)

[85] Schedler[55] defines accountability as follows:

'In governance, accountability has expanded beyond the basic definition of "being called to account for one's actions". It is frequently described as an account-giving relationship between individuals, e.g. "A is accountable to B when A is obliged to inform B about A's (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct".'

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[53] *The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?* 2010 AHRLJ 105 at 128.

[54] *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) at 65E-F.

[55] Schedler, Andreas (1999). "Conceptualising Accountability". In Andreas Schedler, Larry Diamond, Marc F. Plattner. *The Self-Restraining State: Power and Accountability in New Democracies*. London: Lynne Rienner Publishers pp 13-28.

[86] In the circumstances, I am of the view that the respondent, as a public official, or as her counsel suggested, 'one of South Africa's leading public servants', is not only the responsible official as indicated herein before, she is to be held accountable in the sense referred to by Schedler, in that she is obligated to inform the public about her past and future actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct. Such accountability and its consequences have nothing to do with dishonesty or wilful acts by the persons so being held accountable. Arguments on behalf of the respondent that she was not dishonest would, consequently, not avail her if she is found to have misconducted herself.

[87] The view that the respondent is accountable for the procurement process is underscored by the provisions of s 44(2)(d) of the PFMA.[56]

[88] The conduct of the respondent, as a public official, is to be evaluated against the background of the prescribed legislation and as set out by the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others:*[57]

'. . . deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'[58]

And

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[56] 'A delegation or instruction to an official in terms of subsection (1)-
(d) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.'

[57] 2014 (1) SA 604 (CC).

[58] *AllPay* at para 27.

'If the process leading to a bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.'[59]

[89] One of the basic obligations of an individual who operates in a fiduciary capacity is to avoid conflicts of interest. This principle was discussed in *Robinson v Randfontein Estates Gold Mining Co Ltd*[60] where the following was said:

'Where one man stands to another in a position of confidence involving a duty to protect the interests of the other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in *Aberdeen Railway Company v Blaikie Bros.* (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1 34.7), and must of necessity form part of every civilised system of jurisprudence.'[61]

And at 178:

'A director is, of course, an agent; generally he acts in conjunction with his co-directors; but he may be duly authorised to act alone, and, like any other agent, he may without antecedent authority, place himself in such a position that a Court will not allow him to say that he did not so act. See *Benson v Heathorn* (1) Y. & C., at p 340).'[62]

And further:

'The test is expressed, for the most part, in terms peculiar to English law; but the principle which underlies it is not foreign to our own. For it rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests (e.g., by making a profit) at that other's expense.'[63]

Also:

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[59] *AllPay* at para 24.

[60] 1921 AD 168.

[61] *Robinson* at 177-178.

[62] *Robinson* at 178.

[63] *Robinson* at 179.

'Its acquisition for himself would, under the circumstances, be a breach of faith which the courts will not allow him to set up. That seems to me a principle deducible from such cases as those above quoted. The doctrine of the English decisions was adopted by the Transvaal courts in *African Land Company v Langerman* (1905, TS. p. 499) as being in accordance with the principles of our law; and I think we should also adopt it. Whether a fiduciary relationship is established will depend on the circumstances of each case. Where the director was at the date of the acquisition the agent of the company for such a transaction, the fiduciary relationship would of course be created. That element has generally been present in the decided cases where profits have been awarded. But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases. There may surely be circumstances, apart from mandate, where a duty to acquire for the company may be inferred.'[64]

[90] In *Volvo (Southern Africa) (Pty) Ltd v Yssel*[65] the Supreme Court of Appeal held that the assessment of whether a fiduciary obligation arises is dependent on the facts of each case:

'While certain relationships have come to be clearly recognised as encompassing fiduciary duties there is no a closed list of such relationships. As pointed out in *Randfontein Estates*, and in numerous other cases in this country and abroad, whether a particular relationship should be regarded in law as being one of trust will depend on the facts of the particular case. . .

outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. . .

the discretion that one party may have in relation to the affairs of another, the influence that he or she is capable of asserting, the vulnerability of one person to another, the trust and reliance that is placed in the other – receive frequent mention in judgments on the subject of whether a relationship was one of trust.'[66]

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[64] *Robins*on at 180.

[65] 2009 (6) SA 531 (SCA).

[66] At paras 16-17.

[91] The obligation of an individual who operates in a fiduciary capacity to avoid conflicts of interest was stated by the Supreme Court of Appeal as follows in *Phillips v Fieldstone Africa (Pty) Ltd and Another*:[67]

'The following short summary attempts to encapsulate the present level of development. The rule is a strict one which allows little room for exceptions . . . . It extends not only to the actual conflicts of interest but also to those which are a real <u>sensible possibility</u>. The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice.'[68] (emphasis added)

[92] The law encompasses a conflict that arises when a person has with another a relationship of a kind that would generate a conflict. By applying the principles referred to above, the court takes into account that during her tenure as CEO of the Commission, the respondent was to head up its administration[69]. In this capacity the respondent was the accounting officer of the Commission for purposes of the PFMA. She thus was responsible for its financial affairs.[70] The object of the PFMA is to

'secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions" to which it applies.'[71]

[93] In an answer to Parliament the respondent explained her conduct regarding the procurement process. She said that she had the discretion to deviate from the prescribed procedures. However, while that departure from the prescribed procedures is permissible, such a departure must be justified and only to the extent necessary in relation to the urgency that may prevail at the time of the deviation. The respondent said:

'The accounting officer approved that the process to be used in the procurement of the Riverside Office Park be different to the norm, given the fact that the matter was sufficiently significant and urgent. In 2009 The Electoral Commission was in the middle of conducting the

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[67] 2004 (3) SA 45 (SCA) at 465.

[68] *Phillips* at para 31.

[69] S 12(2)(a) of the Electoral Commission Act.

[70] S 12(2)(b) of the Electoral Commission Act states that the CEO of the Commission is its accounting officer for purposes of the Exchequer Act 66 of 1975, which latter Act was repealed and replaced by the PFMA.

[71] *AllPay at* para 36.

2009 general elections and a move had to be completed as soon as possible thereafter and seamlessly not to impede on the preparations for the municipal elections soon thereafter in 2011. This required precise management at a senior level.'

[94] In this regard the Public Protector said in her report:[72]

'8.5.19.1 The PFMA and Treasury Regulations require that the default position in regard to procurement is that a competitive bid procedure be embarked upon.

8.5.19.2 The legislation, however, recognises that in certain cases it is impractical to invite competitive bids and as such it is permissible to procure goods or services by other means, provided that reasons for the deviation are recorded and approved by the accounting officer (Regulation 16A6.4).

8.5.19.3 The National Treasury issued Practice Note 8 of 2007/08 wherein, inter alia, urgent, emergency or sole supplier cases were further regulated. Paragraph 3.4.3 thereof provides as follows:

"Should it be impractical to invite competitive bids for specific procurement ,e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process."

8.5.19.4 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.

8.5.19.5 The SCM Guide defines an "emergency case" as –

[72] At pp 157-158.

“a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.”

8.5.19.6 An “urgent case” is defined as “a case where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical.” This definition is, however, subject to the qualification that “A lack of proper planning should not be constituted as an urgent case.”

8.5.19.7 The following principles can be gleaned from this definition of urgency:

a) The early delivery is the key requirement which would decide the success or failure of the project.

b) The time period available for the acquisition makes it impractical or impossible to pursue a competitive bid process.

c) The urgency was not foreseeable or the result of dilatory conduct.

8.5.19.8 For a situation to be classified as urgent all three the above requirements must be met.’

[95] The respondent’s view that she exercised a power conferred on her in terms of s 38 of the PFMA, is wholly unsubstantiated and without merit. The explanation does not remotely place her conduct within the boundaries of urgency required. Indeed, her answer is an alleged justification without substance. The answer, therefore, does not detract from the fact that she wilfully flaunted legal prescripts on a wholly insufficient basis. She flaunted the legal prescripts and failed to explain how a period of two years which were to elapse before any further elections were to be held, could possibly have rendered the circumstances or her decision of such an urgent nature to depart from the prescripts.

[96] In the second response, the respondent does not persist with the version that she acted lawfully. The theme is that she accepts that she acted unlawfully and her counsel said in argument that

‘Adv Tlakula, as accounting officer, accepted full responsibility for the failure of the Commission to follow the regular procurement process.’

[97] The next example of the respondent's conduct emerges from remarks by the Public Protector:[73]

'By her own admission, Adv. Tlakula issued a directive on 11 February 2009 for the procurement process to be handled by EXCO to the exclusion of the procurement committee in violation of her own Commission's Procurement Policy and Procedures. In so doing, she countermanded the decision of the Commission, which had on 12 January 2009 made a decision to award the office space tender to a different company in respect of Menlyn Corporate Park premises.'

The respondent took an executive decision to bring a process to an end and decided that the EXCO over which she presides would henceforth control the bid process to the exclusion of the extant procedures. This, in our view, is irregular conduct, detrimental to the Commission and a violation of the applicable prescripts. The court is of the view that it is unlawful and constitutes misconduct on the part of the respondent.

[98] In her second response the respondent states that, being aware of the fact that the process regarding the Menlyn Corporate Park office was flawed, and, being uncomfortable with the existing practice that avoided a procurement process, she deliberately brought the process to an end and commenced the new process. However, she had done so in exactly the same unlawful fashion. The very reason given by the respondent for ending the one process was then used in the new process. In this regard, she admits that she did not 'insist on the process being a full tender process in terms of the Commission's policy'. She does not explain why she did not so insist on adhering to the policy. I will deal with her subsequent affidavit regarding an error, later. Indeed her actions support the perception that she ended the one process in order to commence a new one for the benefit of her business partner. She offers the re-housing of the Commission two years later as a reason for her conduct. However, since this has been shown to be fanciful and has not been pursued by her before this court, her conduct can only be seen to have breached the prescripts and to have been unlawful.

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[73] Public Protector's report para 10.2.2.

[99] I summarise. Having deliberately embarked upon an attenuated tender process, the respondent chose not to abide by the requirements of the law. The respondent's reference to an error having been made (in hindsight) is refuted by her own evidence that she deliberately took the decision not to insist on the lawful procurement process to be followed. She chose not to abide by the law. Her actions in this regard are unlawful and as such, in our view, constitute misconduct. Save for the urgency issue, which is untenable, the respondent provides no justification for her deliberate decision to break the law.

[100] Once the respondent had taken this unjustifiable decision, a plethora of unlawful actions followed.[74] They include the failure to advertise the requirements of the Commission according to the law and a failure to implement the three tiers of bid specification, evaluation and determination.

[101] Acting in this manner, the respondent's actions prompted the Public Protector to report:

'There was no separation of roles and responsibilities between the various committees within the Commission that are tasked with administration of the procurement process i.e. the bid specification, bid evaluation and bid adjudication committees. Though these structures may have existed under different names, they were not used in the matter under investigation.'[75]

[102] The structures are in place to separate the determination of the criteria, evaluation of bids and the making of a final selection to ensure fairness in the bidding process. In her second response the respondent accepts that she did not follow the prescribed process. She then concludes that her failure to follow due process was due to an honest mistake. This version contradicts her first version that she had the

[74] The respondent's counsel accepted this in argument:
'Having made the decision that she did, it was inevitable that instances of non-compliance with the relevant procurement legislation would occur. So it happened that the advertisement calling for bids did not contain all that was required for a formal Request for Bids; the same advertisement was published in five national newspapers but not the Government Tender Bulletin; the time stated in the advertisement for submission of bids was 10 days and not the required 21 days; and the bid specification, evaluation and adjudication roles were performed by Mr du Plessis (signed off by Adv Tlakula), EXCO and the Commission respectively, instead of the roles being spread between the Evaluation Committee, the Procurement Committee, EXCO and the Commission.'

[75] Public Protector's report para 10.2.3.

discretion which she deliberately exercised due to an alleged urgency and it is inconsistent with her second response that she deliberately decided to attenuate the bid process because she wanted to ensure an expeditious process. She was not mistaken as to what the law required but decided not to implement the law when she exercised her discretion. The striking incredulity of the respondent's version of the making of a mistake appears to be an ex post facto attempt to justify that which cannot be rationally explained.[76] The respondent cannot exercise a discretion deliberately not follow the prescripts and then claim that not to have done so was simply a mistake. One of the versions cannot be true. In her parliamentary response the respondent repeatedly contended that her actions were justified due to her right to exercise the discretion to deviate from the procurement prescripts. The mistake version remains an ex post facto conflicting explanation why she acted in the unlawful manner. The explanation in itself does not detract from the illegality of her actions. Her flaunting of the prescripts has no justification and would, in our view, constitute misconduct on her part. I will return to this issue.

[103] Having decided to be in control of the new bid process, the respondent caused certain steps to be taken. The Public Protector says in her report:

'10.2.13 The advertisement of a "request for proposal" for the office accommodation as opposed to a comprehensive competitive tender bidding process violated the provisions of Chapter 4 of the Commission's procurement policy and was accordingly irregular and constituted maladministration.

10.2.14 The request for proposal did not comply with provisions of the Treasury Regulations, the PFMA, the PPPFA and the Commission's own procurement policy and procedures, where applicable in respect of:

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[76] In the 2010 annual report of the Commission, the respondent asserted the following: 'Policy review workshops were held and policy review had been attended to. All applicable Supply Chain Management directives from National Treasury were given immediate attention/effect'. She also said: 'Staff trained on procurement policy and procedural matters' and 'Policy documents and information circulated to all staff'. The report also states that 'During the year of under review the Commission fully accepted its obligations in respect of Supply Chain management in terms of section 16A of the Treasury Regulations' and 'Continues review of asset policies, procedures and processes to ensure compliance with the requirements of the Public Finance Management Act, 199 (Act 1 of 1999) (GRAP) and International Financial Reporting Standards (IFRS).'

10.2.14.1 The thresholds for a tender process, which the Commission policy puts at R100 000 unless otherwise approved;

10.2.14.2 The number of days that it needed to be advertised;

10.2.14.3 The evaluation process i.e. the evaluation and procurement committee were not involved in the evaluation process; and

10.2.14.4 The evaluation criterion was not clearly defined at the point of advertising.'[77]

After bringing the procurement process under her control, the respondent failed to specify the criteria, the most fundamental part of an objective procurement process, in an advertisement to obtain new office accommodation. This failure, which contravenes the prescripts, is explained as follows in the respondent's first response:

'Failure to include the evaluation and adjudication criteria in the advertisement also violated Section (2)(1)(e) of the PPPFA.'[78]

No justifiable explanation for this deviation has been forthcoming. Again, the response that there was urgency in the matter falls to be rejected.

[104] The advertisement that the respondent caused to be published was defective in a number of other respects as well. It did not specify the requirements of the Commission correctly, it was not published in the manner prescribed and it provided a shortened period for bidders to respond. The prescribed advertisement period is 21 days. Elections two years after that time could not have justified the shortened period. Proper explanations as to why those unlawful actions occurred are absent. As a result I am constrained to infer that the respondent intended to favour her business partner by her actions. Even if she acted unintentionally, the perception that she favoured her business partner intentionally, is unavoidable.

[105] Following her discomfort with some of the procedures that were followed in a process to procure new offices at Menlyn Corporate Park, the respondent allowed an underling (Mr Langtry) to consider the proposals alone by failing to put the necessary

[77] Public Protector's report paras 10.2.13 -10.2.14.

[78] Preferential Procurement Policy Framework Act 5 of 2000.

tear structures for consideration of the bids in place, the respondent, again, allowed the process to be flawed. The EXCO, chaired by the respondent, met and shortlisted four bidders. One of the bidders was Abland, despite the fact that their date of occupation was in conflict with the initial criteria. At that stage, Abland should have been disqualified as their bid was not within the specified criteria. As accounting officer,[79] the respondent should have guarded against such a course of conduct, but she did not.

[106] The EXCO thus effectively changed the evaluation criteria without offering the benefit of the changed criteria to other bidders who had been disqualified earlier.

[107] The PwC report finds that the EXCO, presided over by the respondent, distorted the bid process to the benefit of Abland; other bidders were excluded from the opportunity of meeting the later, changed date and thus were excluded from the initial process. This resulted in a perception of manipulation of the criteria to the advantage of Abland. This conduct is, in my view, misconduct on the part of the respondent. This is borne out by the results of the bid process. The moment the criteria changed it was the respondent's duty to ascertain whether any of the previously excluded bidders would have qualified by virtue of the new criteria, which she failed to do.

[108] The respondent chaired the EXCO meeting where the criteria was changed, Abland was recommended to the Commission as the successful bidder and Menlyn, whose bid met the criteria before the change, was excluded. Thus a candidate that did meet the stipulated criteria was disqualified. This is a remarkable outcome for which the respondent is directly responsible. The PwC report highlights this skewed outcome of the process. The amendment of the date to 1 August 2010, makes a mockery of the respondent's version that a date was one of the key criteria of the assessment as 'given the pending municipal election in 2011 a later date' than 1 April 2010 'would be problematic.'[80] The respondent gave no other acceptable explanation for her actions and the perception that she caused the skewed process to be to the advantage of Abland, is unavoidable. This unfair and inconsistent conduct to the benefit of Abland and detriment of other bidders constitutes, in our view, misconduct on her part.

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[79] Section 38 of the PFMA.

[80] PwC report para 14.022.

[109] Yet the respondent claims that, with the facts before it, the Commission had both the Abland and Menlyn bids before it on 'an equal footing' and that 'on objective criteria, Abland had the better bid.' This, of course, ignores the fact that other bids were excluded, based on the date of 1 August 2010, whilst those bids should have been revisited. This attempted justification of the result by the respondent falls far short of what she was required to do. The Constitutional Court stressed in *AllPay* that the process must be properly followed because the adequacy of the process determines the adequacy of the result. The unlawful and inconsistent process initiated and furthered by the respondent did not result in the better bid being accepted. The better bid (Khwela) had lost out due to the respondent's unlawful actions.

[110] As a final resort, the respondent argued that, because others before her had acted unlawfully when procuring leased office space, she had made an honest mistake by relying on precedent and advice. However, having regard to her previous version given to Parliament I have shown that the honest mistake version cannot be accepted..

[111] Another ground of complaint is the acquisition of the movables for the Commission by the respondent or on her instructions, referred to as the turnkey project. The PwC report finds:[81]

'The items that make up the R59,918,380 of immovable (sic) were reviewed to see whether they are what one would normally expect for furnishing the premises of an Organ of State. In this regard a number of items have been identified, some of which are listed below, where it appears that little or no regard was given as to whether these items were really required:

- Brushed steel plant pots R957,000

  (399 @ R2,400 each)

- Gym equipment R482,942
- Gym audio equipment R 69,073
- CEO's office furnishing R898,794

(Office, boardroom, waiting area and PA's office).'

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[81] At para 14.057.

The respondent, who authorised an amount in excess of R58 million to be spent on furnishing the new offices of the Commission without the supply of such furnishing going out to tender, failed to explain this conduct when requested by Treasury to do so.

[112] In her first response the respondent said that:

'It is correct that the movable portion of the turnkey solution was not part of the capital public advertisement . . . .'

She added that the items were discussed in weekly site meetings with senior officials of the Commission.

[113] The result is that only the two final bidders were afforded the opportunity to furnish the offices on a turnkey basis. No competitive bidding was secured. The PwC report describes the conduct of the respondent as incurring luxurious expenditure. That finding, having regard to the failure of the respondent to follow procurement procedures, is fully justified and I agree with it. I also agree with the Public Protector who said:

'It is important to note that even in those instances where a situation does not warrant the use of tender procedures, it does not mean that an organ of state may do away with a competitive procurement process altogether. Organs of state are still required in order to ensure compliance with the principles of competitiveness and cost effectiveness in section 217(1) of the Constitution, to procure goods or services on the best possible terms.'[82]

The respondent's response to this by no means constitutes a justification for her failures to comply with the prescripts. The respondent's conduct by flaunting the prescripts is manifest. Her response is that she had very little to do with the turnkey transaction and it was left to Mr Du Plessis to deal with it. But the turnkey project was contained in an addendum to the lease agreement and was signed by the respondent[83] on behalf of the Commission.

[114] The respondent's involvement in signing the agreement for the turnkey project can hardly be described as a 'very little direct role in the turnkey transaction'. On the contrary, the CEO who signs a contract intending to bind the Commission should, in my

[82] Public Protector's report para 9.11.15.
[83] Public Protector's report para 6.3.24.

view, have knowledge of that contract. The respondent was committing the Commission to substantial expenditure without any procurement process at all. Significantly, save for stating that she had little direct input in the turnkey project, the respondent does not explain why the unlawful process was embarked upon. As accounting officer, she cannot shift the blame to her underlings in circumstances where she personally entered into the agreement on behalf of the Commission. It is significant that the 2011 annual report of the Commission, again issued under the hand of the respondent, recorded that

'This amount (being the amount expended in the current financial year) which includes the once off turnkey costs is disclosed as irregular due to the fact that technical issues in respect of compliance arose. These include failure to indicate the manner for evaluating the proposals in the advertisement.'

This statement, put out to the world by the respondent, wholly underplays her unlawful actions. To describe the failures as 'technical issues' is, in my view, a suppression of the truth.

[115] The respondent attempts to refute the finding of the PwC report that the Commission was overcharged and that expenditure incurred could have been avoided as follows:

'I understand the complaint against me further to be that my decisions were to the detriment of the Commission because it was overcharged and expenditure was incurred that could have been avoided had a regular procurement process been followed. I deny this. None of the expenditure incurred in the furnishing of the Commission's offices has been declared wasteful or fruitless expenditure. The Commission needed new offices and it needed new furniture for those offices. It obtained both.'[84]

The answer is really that, because the Commission required office space and furnishing, and it was sourced, there was nothing wrong with her conduct. It misses the unlawfulness of the process by ignoring the space norms of the Department of Public Works, which resulted in the overcharges. Nevertheless, the respondent's counsel conceded in argument that the respondent acknowledged the flaws in this part of the

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[84] See para 88 of the respondent's affidavit in terms of Rule 8(2).

process when the payment of R59 million was declared to be an irregular payment. It was further argued that, because there is no wasted space at the Commission's new offices, this court should find that there was no money wasted. But that is putting that cart before the horse. The procurement process requires a determination of the required space according to prescripts, not an ex post fact justification that all the space was indeed used. The argument attempts to justify the unlawful conduct, but it is an attempted justification without a basis in fact or law.

[116] The respondent also denies the finding in the PwC report that the lease which was entered into was at an unnecessary cost of between R20,8 million and R110 million due to the calculation of interest at too high a rate. The denial is based on the fact that '. . . Mr Du Plessis has informed me that the interest rate charged was indeed market related . . . .' However, the reliance on the say-so of an unqualified person as to market related rentals cannot assist the respondent since it could never have formed the basis of a decision to incur expenses on behalf of the Commission. This is borne out by the subsequent finding in the PwC report (an expert forensic report) that the transaction was subject to too high an interest rate. There is nothing to controvert the detailed and reasoned evidence contained in the PwC report, nor was its expertise in dispute. Clearly, the respondent failed in her duties as the accounting officer[85] by failing to ensure that expenditure was not improperly incurred. In addition, she refuses to take responsibility for duties for which she is clearly accountable.

[117] Treasury said:[86]

'It is evident that Adv. Tlakula gave an instruction that the procurement process to be followed for the procurement of new head office premises was not in terms of the Electoral Commission policy or procedure. Adv. Tlakula did not give guidance or formally inform the various persons, including EXCO, what was expected of them in the evaluation process. The process that was then followed was also not in terms of the requirements of the PFMA and Treasury Regulations. There were numerous errors made in the process that has resulted in Abland being favoured at the expense of other bidders and in Abland being favoured at the expense of the Electoral Commission.

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[85] See paras 70-79 supra.

[86] At paras 14.061 and 14.062 of the PwC report.

The expenditure on immovable items appears to have been made with little or no regard to what the actual cost was and at no stage is there evidence that Mr Du Plessis or Adv. Tlakula, who approved this expenditure, ensured that items were procured at market related prices. It also appears that they had little concern for what things cost and merely bought what they wanted.'

[118] The PwC report then continues to find: [87]

'The procurement process followed was flawed in that, amongst others, the following occurred:

i. The advertisement setting out the building and lease requirements was inadequate

ii. There was no tender briefing and no detailed tender specification document issued

iii. The normal bid evaluation process was not followed and the bid evaluation was done by EXCO

iv. The summary of the 10 bids prepared by and presented to EXCO by the Manager in the Office of the CEO for evaluation contained numerous errors

v. EXCO members relied on the summary, referred to above, to perform the evaluation and prepare a shortlist of bidders on 15 May 2009, and did not refer to the actual bid documents

vi. During an EXCO meeting on 19 June 2009, when the shortlisted bidders made presentations, the bid evaluation criteria were changed, to the benefit of Abland, without the non- shortlisted bidders being afforded the same opportunity

vii. The lease agreement was signed on 21 August 2009, by the CEO, even although the tax clearance certificates for two of the five members of the Abland consortium are dated after this.

viii. The acquisition of moveable items, for R59 918 380, via Abland as part of a turnkey solution, were not tendered to the open market even though this is what Abland originally proposed.

ix. The budget for moveable items continually increased as the Electoral Commission management changed their requirements for fitting and furnishing the building.'

[119] In addition, the PwC report finds: [88]

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[87] At para 14.065.

[88] At para 14.066.

'The rental being charged by Abland is not a fair market rental for the following reasons:

i. Too much space is being leased, 9 489m2, when the total space required should be in the region of 6 500m2. The nominal cost of the rentals, for this excess space for 10 years is approximately R110 million.

ii. Assuming the Electoral Commission space allocations of 9 489m2 were correct, the effect of rentalising tenant items at too high a rate and the high operating costs has meant that the Electoral Commission will pay at least R20.8m above expected market norms over the 10 year term of the lease.'

These findings have, on a balance of probabilities, been shown to be correct.

[120] The PwC report further finds:[89]

'It is not possible to determine if value for money was received when purchasing moveable items for R59 918 380 as most of these items were purchased without going out on tender or obtaining quotations. Abland have stated that there was no requirement to go out to the market to get competitive quotations as long as the purchases were within budget and were approved by the Electoral Commission. To date we have not been provided with copies of the original supplier invoices by the Electoral Commission as they do not have them and despite these being requested from Abland and one of the interior designers who sourced some of the suppliers they have also not provided these. We have therefore been unable to go back to the original suppliers to verify if the prices were market related or whether these suppliers were tax compliant.'

It is common cause that there was not even a pretence to follow a process to acquire furnishing. This was unlawful. The respondent fails to give any credible justification for breaking the law.

[121] The respondent alleges that once she took the decision to embark on this truncated procedure, the EXCO was fully involved with the process. However, the respondent being the ultimate responsible official as accounting officer under the PFMA cannot invoke a collective responsibility to reduce her own responsibility by apportioning

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[89] At para 14.070.

blame to those who served with her on the EXCO. It does not exonerate the respondent from her unlawful conduct.

[122] The respondent stated that the bids that were received, based on the improper advertisement, were dealt with by Mr Langtry (her office manager) who collated them in a spreadsheet. The spreadsheet was incorrect in certain material respects and because the respondent never checked the spreadsheet to ensure its accuracy in respect of the bids received, the spreadsheet that served before the EXCO was materially inaccurate and formed the basis for certain decisions made by the EXCO. No one was made aware of the fact that the respondent did not verify the information contained in the spreadsheet. The inaccurate information before the EXCO was therefore a direct result of the respondent's failure to follow a proper bid process, ie the failure to have an evaluation committee in place.

[123] The failure, which arose as a consequence of the respondent's decision to follow the attenuated process, was so serious that it resulted in the exclusion of a bidder (Khwela) who, according to the PwC report, was very likely to have prevailed in the bid. Several other fundamental 'mistakes' were made in the evaluation of the Khwela proposal, all of which would have been avoided had the respondent followed the correct bidding procedure. It was the respondent's decision to follow the unlawful truncated procedure that resulted in the many failures which occurred thereafter.

[124] Mr Langtry does not supply a justification for the respondent's conduct. Neither does he or the respondent wish to take responsibility for the manner in which the bids were handled. But it was the decision of the respondent to employ the unlawful bid procedures that caused a materially erroneous shortlist of bidders to be placed before the EXCO. The fact that the respondent may not have been present at each and every meeting held by the EXCO is of no consequence, as she created the process which was then flawed throughout. The respondent failed to ascertain the correctness of the facts presented by Mr Langtry and to appreciate that Khwela had incorrectly and unfairly

excluded, while Abland received a relaxation in its bid. Throughout the process, however, she remained responsible for the performance of the duties.[90]

[125] Each of the findings contained in the PwC report[91] is consequently factually correct. It is also correct when it states

'The procurement process followed was not fair, equitable, transparent, competitive, or cost efficient and some of the expenditure could have been avoided had reasonable care been taken.'[92]

[126] In stark contrast, the respondent avers in her second response that:

'I deny that these errors resulted in Abland being favoured at the expense of other bidders, as well as at the expense of the Commission.'

Objectively, this statement, made under oath by the respondent, is untrue.

[127] What is clear is that the respondent failed to oversee the evaluation of the bidders, having decided to clothe the EXCO with that duty. This court is of the view that once the respondent commenced on the extraordinary, attenuated road she should have taken control of and taken responsibility for the process. Since she failed to do so, the process contained gross irregularities.

[128] Counsel for the respondent argued:

'60. Adv Tlakula accepted full responsibility for failing to comply with the relevant procurement legislation by disclosing the non-compliance in the financial statements of the Commission for the year 2010/2011. As a result, the Auditor-General declared all the expenditure for the current year on the lease agreement as irregular. The Auditor-General also declared the expenditure on the movable assets (the "turnkey" transaction) as irregular after Adv Tlakula disclosed in the 2010/2011 financial statements that the turnkey transaction had been negotiated with the successful bidder. A total of R71 819 569 (being the lease payments plus the turnkey transaction) was declared as irregular. The audited financial statements were part of the

[90] Section 44(2)(d) of the PFMA.
[91] At para 14.065.
[92] PwC report at para 14.064.

Commission's Annual Report to the National Assembly, dated 31 July 2011 and signed by Dr Bam (the Chairperson) and Adv Tlakula, and presented to the Portfolio Committee on Home Affairs.

61. In June 2011, the Commission reported the irregular expenditure to National Treasury and sought condonation therefor. National Treasury replied that the accounting authority of the Commission was the body that was empowered to condone such irregular expenditure. The matter was therefore left in the hands of the Commission.

62. As the CEO of the Commission, Adv Tlakula was an employee of the Commission and thus subject to its discipline. The Commission did not see fit to subject Adv Tlakula to sanctions in terms of the PFMA or to other disciplinary measures for her failure to observe the relevant procurement statutes and regulations. We submit that it is clear that the Commission has decided not to take any further action against Adv Tlakula for the irregular expenditure recorded in the Public Protector's Report and the PwC Report.

63. The Auditor-General did not declare the expenditure on the lease or the turnkey transaction as fruitless and wasteful, or unauthorised, and accepted that there was no financial misconduct. Furthermore, Adv Tlakula has never been accused of financial misconduct while CEO and neither the Public Protector's nor the PwC Report finds so.'

In my view, acceptance of the fact that the respondent caused irregular expenditure is acceptance of the respondent's misconduct.[93] The fact that the respondent disclosed her irregular conduct in the past, or the fact that she sought condonation for the conduct does not justify that conduct.[94] The fact that the Commission did not see fit to subject the respondent to sanctions or disciplinary measures,[95] too, does not detract from the nature of her conduct. The argument advanced can, at most, be utilised as mitigating factors, if they so qualify, but not as justification for her conduct.

[93] See s 81 of the PFMA which provides that the permitting of an irregular expense is "financial misconduct".
[94] Treasury refused to grant condonation.
[95] Despite having been directed by Treasury to deal with the irregular expenditure.

[129] It was further submitted on behalf of the respondent that the 'flaws' in the process referred to thus far are not indicative of dishonesty, impropriety or corruption. But the test is whether her conduct constitutes misconduct in that she contravened legal prescripts and failed to act within the requirements of the law set out herein before. The respondent's continued refusal to be accountable for her actions shows her failure to appreciate her wrongful conduct. If the conduct amounts to misconduct to the extent that it is at odds with the requirement of the office, it would warrant her removal from office.

[130] The respondent, as a main theme before this court, advanced the argument that her breaches, referred to below, were committed as an honest mistake on her part. However, she was appointed to a high office. It required her to obtain and have knowledge of the duties and the prescripts applicable to her. Tshabalala JP said in *Narot v 135 Smith Street Trust*[96]

'This Court is acutely aware of the fact that many of those who come before it find the processes of the law difficult to understand. However, ignorance is no excuse for a complete lack of diligence or concern. Every litigant should ensure that his/her matter is being properly dealt with.'

[131] In *Fischat v Nelson Mandela Bay Municipality*[97] Revelas J said[98]:

'Ignorance of the law, in my view, should not be open as an excuse to a lawyer, who was gainfully engaged by a municipality (or other organ of state) to do legal work on assumption of his legal expertise. Particularly not ignorance of the legal and procedures involved when he wishes to sue that organ of state for remuneration owing to him. It is fair to say that it can reasonably be expected from the applicant that he ought to have known of the statutory notice period.'

[132] The following has been the reasoning of the Supreme Court of Appeal[99] and has been the law for some decades:

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[96] 2008 JDR 0915 (D) at para 30.

[97] 2013 JDR 0313 (ECP).

[98] *Fischat* at para 21.

'At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of *mens rea* in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved.'

[133] In my view, the extent of the transgression, together with the serious consequences for the Commission, cannot be excused as an honest mistake. Her version is contradicted by both her statement to Parliament (that she took a deliberate decision to follow the truncated procedure) and the version published in the 2010 Annual Report[100] (that compliance with the PFMA and other prescripts was being ensured). The respondent acknowledges that

'As the Accounting Officer, I was responsible for the effective, efficient, economical and transparent use of the resources of the Commission.'

Section 38(1)(a)(iii) of the PFMA, just above the duty of the accounting officer, requires:

'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.'

It is significant that the respondent never says that she did not know of her obligations under the PFMA. She also did not insist on the process being a full tender process in terms of the Commission's policy. This again shows a deliberate decision not to comply with the policy known to her, which includes the hiring of goods and services for the Commission.

[134] The respondent's representations to Parliament are consistent with the facts stated in her affidavit. The representations are clear:

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[99] *State v De Blom* 1977 (3) SA 513 (A) at 514 E –F. Also see *Coetzee v Steenkamp* [2010] JOL 25798 (NCK) at para 10.

[100] See footnote 76 supra.

’30. In terms of section 38 of the PFMA an Accounting Officer must ensure that a constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent and cost-effective. This section places the legal responsibility for determining the procurement and provisioning system with the Accounting Officer.
31. Given that responsibility for determining the procurement and provisioning system vests with the Accounting officer, the authority to amend that process also vests with the Accounting Officer.
32. The Accounting Officer approved that the process to be used in the procurement of Riverside Office Park be different to the norm, given the fact that the matter was sufficiently significant and urgent. In 2009 the Electoral Commission was in the middle of conducting the 2009 general elections and a move had to be completed as soon as possible thereafter and seamlessly not to impede on the preparations for the municipal elections soon thereafter in 2011. This required precise management at a senior level.’

Her about-turn in her later affidavits that she believed that the Commission’s tender procedure did not apply to the procurement of lease agreements is consequently an argument of convenience and difficult to sustain. The two versions put up by the respondent are mutually destructive. One of the versions cannot be true. The respondent attached the Commission’s letter to Treasury in which condonation was sought for irregular expenditure. It reads as follows:

‘Although the CEO was <u>aware of the deviation</u> her approval was not evidenced in writing . . . .’ (emphasis added)

It puts paid to the later version alleging that she had made a mistake.

[135] The respondent further contended that to err is human and even judges who err are not guilty of misconduct or removed from office. The comparison is neither available to the respondent, nor valid. Firstly, I am of the view that the respondent acted deliberately and that the honest mistake version is a version of convenience. Secondly, judges who err when exercising their judicial functions do not act unlawfully. The legality of conduct is determined by the prescripts of every particular case. Section 177(1)(a) of the Constitution provides for the removal of a judge from office in the event of a judge being ‘guilty of gross misconduct.’ The difference in the standard to be applied to judges

and commissioners is plain. It stands to reason that a reference to cases where judges might have erred is unhelpful.

[136] A further issue before this court was the appropriateness of the respondent's participation in the bid process having regard to her relationship with Mr Mufamadi. The respondent and Mr Mufamadi were co-directors and co-shareholders in a company, Lahotsa Investments (Lahotsa).[101] The respondent's version is that the company floundered in 2007; that the lease for the office terminated in 2008 and that since then the company has not been in active business. Secondly, the respondent states that she was not required to disclose her involvement with Mr Mufamadi in business, because Lahotsa was not itself going to participate in the contract that was the subject of consideration by the EXCO. This argument was advanced despite the fact that Lahotsa was the Black Economic Empowerment component of Abland, the successful bidder.

[137] The question remains whether there was indeed a conflict of interest and a duty to make disclosure. Measured against the provisions of s 10 of the Electoral Commission Act,[102] which is in congruence with the common law and applicable to all relevant situations, the respondent should not have participated in the proceedings where the successful bidder was evaluated. She plainly had an 'other' interest with

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[101] As described in para 49 supra.

[102] Section 10 of the Electoral Commission Act provides:

'(1) Subject to subsection (2), a member may not at any meeting of the Commission during the discussion of any matter before such meeting in respect of which he or she has any financial or other interest which might preclude him or her from performing his or her functions in a fair, impartial and proper manner-

(a) be present;

(b) cast a vote; or

(c) in any other manner participate in the proceedings thereof.

(2) If at any stage during the course of any proceedings before the Commission it appears that any member has or may have an interest which may cause such a conflict of interests to arise on his or her part-

(a) such member shall forthwith and fully disclose the nature of his or her interest and leave the meeting so as to enable the remaining members to discuss the matter and determine whether such member is precluded from participating in such meeting by reason of a conflict of interests; and

(b) such disclosure and the decision taken by the remaining members regarding such determination, shall be recorded in the minutes of the meeting.

(3) If any member fails to disclose any interest as required by subsection (2) or, subject to that subsection, is present at a meeting of the Commission or in any manner whatsoever participates in the proceedings of the Commission in relation to such matter, such proceedings may be reviewed and varied or set aside by the Commission.'

somebody who stood to benefit directly from the contract which she was considering. She had a subsisting business association with Mr Mufamadi in a company in which they were co-directors and co-shareholders and in which they had conducted business in the past. Therefore, the fact that Lehotsa was not in active business since 2008 is superseded by its connection to the successful bidder. The respondent could not be perceived to have been impartial in such circumstances. The relationship could certainly have influenced her judgement in respect of the bidding process.

[138] The provisions of Regulation 19,[103] which were directly applicable to the respondent at the time that she was head of the EXCO and chief electoral and accounting officer, also require of an official to disclose his or her relationship and to refrain from participation in the business dealings of the Commission that could be affected thereby. The requirement was applicable to the respondent whose business partner stood to benefit from her decisions. The result is that there was both a duty to disclose and a duty to refrain from participating in the process.

[139] In the second response the respondent refers to an extract of the Employees Policy Manual of the Electoral Commission. The manual provides:

'All employees have a duty to promote the reputation and business of the IEC and not to make any personal gain at the expense of or as a result of their employment by the IEC. Decisions and functions carried out in the course and scope of employment must be directed at what is in the best interests of the IEC. Personal interests must not conflict with those of the IEC.

'Where a possible conflict of interest arises or where an employee has or obtains a financial <u>or other interest</u> in a company or firm with which the IEC enters into a business transaction, or where the interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Commission as soon as it arises and the employee must refrain from participation in any way in related business dealings. Written disclosure is effected by the employee making an appropriate entry in a register kept for this purpose in the office of the CEO.' (emphasis added)

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[103] See Footnote 46 supra.

[140] Although the respondent only disavowed the making of any gain, ie receiving a direct financial benefit, the manual clearly and unmistakably accords with the legal position set out previously, namely that personal interests should not conflict with those of the Commission. The respondent continued with this private procurement process despite her acknowledgement as follows:

'Despite the narrow wording of the policy, I fully accept that there could be circumstances in which it would be prudent for a Commission employee to disclose a personal or business relationship with persons doing business with the Commission and to recuse oneself from any involvement in any decisions involving these persons. However, in my judgement, this was not such a case.'

[141] Once the respondent appreciated the duty to recuse, her subjective belief that, in this matter, she would be absolved from a recusal, is without foundation. Her personal involvement seems to have clouded her judgment and her ability to act objectively. But the absence of an explanation as to why she judged it as a matter as one where her recusal was not called for, is woefully inadequate. The court finds that the respondent is offering excuses rather than justification for her unlawful conduct. Mr Mufamadi, her business associate, was interested in the tender before the Commission and the respondent had an interest of the kind that could influence the outcome of the tender procedure. She was a key decision maker when the process commenced she and proceeded therewith while her business partner was appearing as one of the interested parties in the bid. She therefore acted in violation of the Manual.

[142] Taking into account the fact that conflict provisions are not confined to financial interests but extend to other interests which are of such a kind as to influence the outcome of the process, the respondent acted contrary to the law. The respondent attempts to escape this conclusion by stating in her second response that this aspect entails a subjective determination by her of whether she had an interest that may have influenced the outcome of her decision or benefit any person. However, as has been indicated, a conflict of interest is an objective question. Counsel for the applicants, submitted, in my view, aptly, that:

'A conflict of interest is an objective question. You are either conflicted or you are not. You are not given a discretion to subjectively determine whether you are conflicted. If that was the case nobody would ever become conflicted. So it is, with respect, simply not a submission that can be sensibly maintained.'

The submission of counsel for the applicants is, in my view, sound.[104]

[143] This court is of the view that when a person has a direct financial interest in a process, it is a manifest conflict of interest to participate in such a process; but so too in circumstances where another person, who is a business partner of the first, has an interest in the bid. The question is whether that person's association with the other person is likely to give rise to a perception that he or she may be influenced by the existing relationship.[105]

[144] The respondent did not, in this case, refrain from participating, but instead steered the matter through the EXCO, which she chaired. When the competing bidders made representations to the EXCO, the respondent knew that one of the bidders was a company in which her business partner, Mr Mufamadi, was involved. She said that 'I made nothing of this fact', which is a rather astonishing remark for a responsible employee who was becoming familiar with the bids. The document which served before the EXCO, chaired by the respondent, clearly set out Mr Mufamadi's curriculum vitae, including the fact that he was the chairman of Manaka, executive chairman of Lehotsa and that he was one of the

'…shareholders of Manaka Property Investments, a black owned company having about 50 000 m² under management with more being negotiated.'[106]

[145] The respondent avers that she had looked at the bids prior to the EXCO meeting. The bidder had advertised the fact that Mr Mufamadi was executive chairman of Lehotsa as an additional attribute to it. The respondent should immediately have

[104] *Nyembezi,* footnote 40 supra.
[105] See *Phillips*, footnote 67 supra.
[106] Public Protector's report para 6.3.20.12.

realised that her business partner was seeking to advance his company. She justifies her failure to remove herself from the bidding process on the basis of her disclosure of interests in an annual disclosure of interests. Nowhere is it alleged that the disclosure was made to the Commission or to the members of the EXCO who were involved with the bid process. On the contrary, reliance on the annual and general declaration of interests forms in compliance with an Annual Disclosure Framework, which is a standard disclosure of interest form, is opportunistic. The Public Protector said:[107]

‘Adv. Tlakula only declared her interest in Lehotsa Investments in the Commission’s annual and general declaration of interests’ forms in compliance with the annual Financial Disclosure Framework which is a standard disclosure of interest form and which did not relate to a specific procurement transaction. This declaration said nothing about her business relationship with Hon Mufamadi.

The declaration only covered Lehotsa as a company in which she has shares and not the names of her co-directors or shareholders. All the members of EXCO, including Adv. Tlakula, failed to disclose their business interests prior to participating in evaluation committee meetings that considered the procurement in violation of Chapter 4 of the Electoral Commission’s Procurement Policy and Procedures. The conduct of Adv. Tlakula and her EXCO colleagues in this regard was improper and constituted maladministration.’

Having regard to these facts, her reliance on the declaration of interests, which does not disclose her business relationship with Mr Mufamadi, is an inadequate attempt to justify her failure to disclose that which the law requires of her to disclose. The respondent’s counsel, wisely in my view, did not pursue this attempted justification.

[146] In addition, that very disclosure underscores her knowledge of her duty to disclose her business relationship with Mr Mufamadi and is the reason why she should have recused herself from the meetings where the bids were being discussed.

[147] The respondent was consequently presiding at a meeting when she had an ongoing business relationship with one of the bidders. This is aggravated by the fact

[107] Public Protector’s report paras 10.7.5 and 10.7.6

that the bidder was relying on its association with Lehotsa, the respondent's business vehicle, at the meeting at which she had to take decisions. The respondent was in a position to influence the outcome of the process. In order for that process to be perceived as fair her disclosure of her business relationship was vital. She had a conflict which she was required to disclose and which necessitated that she absent herself from the meeting.

[148] Unsurprisingly, the Public Protector found as follows:

'The situation was exacerbated by the fact that Adv. Tlakula not only managed the bid selection and evaluation process, but also prompted the retraction of the original award of the contract to Menlyn Corporate Park though the final decision was taken by the Commission following her presentation when she recommended the two bidders resulting in the Commission awarding the contract to Abland.'[108]

[149] These facts, in my view, place the respondent's perceived independence in jeopardy and so harmed the credibility, impartiality, independence and integrity of the Commission.

[150] Based on the reasoning of the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union,*[109] the respondent submitted that the perception relied upon by the applicants regarding her duty to recuse herself from the meeting where the bid was discussed, was based on incorrect facts as there was no conflict of interest between her and Mr Mufamadi. The submission cannot be sustained. Objectively, the respondent indeed had a subsisting business relationship with Mr Mufamadi. That fact placed the respondent in conflict and she should have disclosed the connection and recused herself once she was aware of the facts. The cases relied upon by the respondent to show the nature of the relationship between parties where a recusal was necessary, are distinguishable, since none of those cases considered the relationship of business partners. The respondent's counsel submitted that the 'errors' committed by the respondent do not impact on her ability to be in office. It is

[108] Public Protector's report para 10.7.11.
[109] 1999 (4) SA 147 (CC) at para 48.

unfortunately so that extremely able persons have been found guilty of misconduct, but the ability of the individual cannot, and does not, diminish the unlawfulness of the conduct.

[151] By applying the principles set out herein to the facts, the court concludes that the respondent was required to comply with the procurement law and its prescripts. In addition, the court concludes that the respondent stood in a fiduciary duty towards the Commission and owed it a duty to disclose a potential conflict of interest. Significant procedural failures allowed by the respondent resulted in a wholly skewed procurement process. The skewed procurement process suffered from multiple infringements, which, in turn, favoured her business associate to the detriment of other bidders and at a cost substantially to the detriment of the Commission by causing it to incur unjustified expenditure. In addition, the respondent failed to abide by the conflict rules that were applicable to her office. The conduct of the respondent was inconsistent with her office and obligations as CEO and accounting officer; she had breached the norms that govern her office. It was also unlawful in circumstances where she was imbued with the particular responsibility to ensure proper legal process. The respondent failed in her constitutional obligations. Her wrongdoing shows that she misconducted herself seriously in dealing with the business of the Commission.

[152] Save in the respects where the respondent admits a violation of the law, the respondent refuses to be held accountable for her actions. She attempts to shift the blame to a collective responsibility of the EXCO or the Commission, she blames Mr Langtry and Mr Du Plessis for what they have done, but she fails to take that responsibility as the responsible accounting officer, which she is required to do by law.[110] However, the respondent should be held responsible for the irregular and unlawful process which was initiated by her. Her failure to accept responsibility is deserving of censure as it constitutes a violation of the provisions of the PFMA. The

[110] See s 38 of the PFM**A**.

conduct of the respondent is described by s 31 of the PFMA as 'financial misconduct.'[111] The responded initiated and drove the deviation from the prescribed process, contrary to her duties and responsibilities,[112] constitutes malfeasance as referred to in *AllPay.*[113] On a conspectus of the evidence, the respondent's decision to deviate from compliance with the prescripts was wilful.

[153] In my view, the conduct of the respondent, which is of the nature described herein, risks the impairing of public confidence in the integrity and impartiality of the Commission. The applicants' disquiet that the independence of the Commission has been tainted, is justified. It is conduct of such a nature, that had it been known at the time of the respondent's appointment as commissioner, would in all probability have played a role in the decision whether or not to appoint her. The disquiet of the applicants was shared by the National Education Health and Allied Workers' Union (NEHAWU), members of which include employees of the Commission. I refer to this fact only to demonstrate that the perception was not only held by the applicants, but also by members of NEHAWU.

[154] The respondent compromised the integrity and independence of the Commission in violation of a requirement that such integrity and impartiality must be above suspicion and beyond question. This view finds its basis in *New National Party of South Africa v Government of the Republic of South Africa and Others:*[114]

'. . . independent institutions are an important structural component of our constitutional democracy. The Constitution obliges such institutions to be impartial and to perform their functions without fear, favour or prejudice. Other organs of state are obliged to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness. It is clear that both constitutional obligations should be scrupulously observed.'

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[111] See para 67 supra.
[112] See, *inter alia,* para 64 supra.
[113] See para 88 supra.
[114] 1999 (3) SA 199 (CC) at para 162.

[155] In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[115] the Constitutional Court pronounced this principle as follows:[116]

'They perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution.'

[156] The constitutional independence of the judiciary is subject to the same doctrine, and indeed it was with the purpose of securing public confidence in the courts that this doctrine was developed. The doctrine was explained in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*[117] and I am of the view that the principles enunciated apply with equal force to an institution like the Commission. The Constitutional Court concluded as follows:[118]

'That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen* where Le Dain J held that:

"Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.

. . . I agree that an objective test properly contextualised is an appropriate test for the determination of the issues raised in the present case. The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. . . . Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of

[115] 1997 (2) SA 97 (CC).
[116] At para 142.
[117] 2002 (5) SA 246 (CC).
[118] At paras 32 and 34.

constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.'(footnotes omitted)

[157] These considerations apply particularly strongly where the head of an institution is concerned. In *Justice Alliance of South Africa v President of Republic of South Africa and Others*, *Freedom Under Law v President of Republic of South Africa and Others*, *Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others,*[119] the Constitutional Court held, in striking down the statutory power of the President to extend the tenure of the Chief Justice,[120] that such power 'violates the principle of judicial independence', because it 'may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.'

[158] The reasonable public perception of independence is of no less importance in respect of public institutions other than the Public Protector, the Auditor-General and the judiciary. Thus, in *Glenister v President of the Republic of South Africa and Others,*[121] concerning the independence of the Directorate of Priority Crime Investigation and particularly its head, the Constitutional Court held as follows:[122]

'This Court has indicated that "the appearance or perception of independence plays an important role" in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy – protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for

[119] 2011 (5) SA 388 (CC).
[120] *Justice Alliance* at para 68.
[121] 2011 (3) SA 347 (CC) at para 207.
[122] *Glenister* at para 207.

independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.'

[159] In my view, the respondent compromised the independence and integrity of the Commission to such an extent that her actions complained of constitute misconduct within the meaning of the Electoral Commission Act. It is conduct which renders her unsuitable for the office of a commissioner and destrucitve of the very values of the Commission.

[160] There was some debate as to the nature of the recommendations which this court may, or is required, to make. Section 7(3)(ii) requires this court to make a recommendation to a committee of the National Assembly. Such a recommendation can be any recommendation[123] regarding the alleged misconduct. Any eventual finding of misconduct, which may lead to further steps, is that of the Committee of the National Assembly. Nevertheless, this court is required to make a recommendation based on the facts of the matter.[124]

Recommendation:

[161] The court is of the view that the misconduct of the respondent has been established on a balance of probabilities and having regard to the provisions of sections 7(3)(ii) as read with 20(7) of the Electoral Commission Act, the following recommendation is made:

This court recommends that a committee of the National Assembly adopts the facts, views and conclusions of the court and that it finds that the respondent has committed misconduct warranting her removal from office.

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Wepener J

[123] S 20(7) of the Electoral Commission Act.

[124] See paras 9 – 11 supra.

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