

17 MAY 2023

**INTERIM REPORT
INDEPENDENT INVESTIGATION INTO UCT GOVERNANCE**

**JUDGE LEX MPATI (CHAIRPERSON)
JUDGE AZHAR CACHALIA
DR BERNADETTE JOHNSON
DR PATRICIA HANEKOM**

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Interim Report to Council

Introduction

- [1] The purpose of this interim report is to recommend that Council takes immediate steps to remove the Chairperson of the University Council ("the CoC"), Ms Babalwa Ngonyama.

Background

- [2] On 15 October 2022, Council resolved to establish a Panel of Investigation to make specific conclusions on the issues identified within the Scope of Investigation and to recommend that specific actions be taken against any specific individuals. In this regard the Panel was empowered to:
- (a) Investigate whether the Vice-Chancellor ("the VC") and the CoC misled Faculty Boards, Senate, and Council regarding former DVC Liz Lange's availability for a second term and the reasons she did not pursue it;
 - (b) Investigate all matters related to executive relationships, including the number of and the reasons for resignations within and beyond the executive.
- [3] On 21 February 2023, Council approved a Settlement Agreement terminating the VC's employment on 3 March 2023. We are advised that in terms of the agreement she would stay on at the University in another capacity. However, she has since severed her relationship with the University.
- [4] The termination of the VC's employment required Council to revise the mandate of the Panel. It did so on 11 March 2023 by revising the scope of the inquiry. The revised mandate required the Panel to "investigate issues of governance that have affected and are affecting the University, without specifically investigating the conduct of the (former) Vice Chancellor" ("the FVC").

- [5] Accordingly, the Panel was no longer required to consider whether the FVC committed a disciplinary offence, and she was “*not required to appear before the Panel, or to submit evidence to it.*” She, however, responded to an invitation from the Panel and appeared before it twice, on 11 and 15 May 2023.
- [6] However, in other respects, the scope of the inquiry was broadened. This appears from paragraphs 4a, 4b and 4c thereof. In short, the Panel was and is required to focus on the circumstances surrounding the departure of employees in the senior leadership, governance failures in this regard, legal breaches and possible remedial action arising therefrom. The Panel was also given latitude to consider all evidence relevant to the expanded inquiry.

The Panel’s interpretation of its mandate

- [7] On 15 March 2023 Justice Cachalia prepared a memorandum advising the Panel on the scope of its revised mandate. He concluded that the Panel was not precluded from making findings against specific persons and possible action, including disciplinary action, to be taken against implicated individuals other than the VC. Of relevance to this report is that the Panel is entitled to make findings against the CoC if the evidence warrants it. The Panel adopted this advice. A copy of the opinion is attached marked “Annexure A”.
- [8] On 17 March 2023 the Panel met with the sub-committee of Council, which has the responsibility to liaise with the Panel on behalf of the Council. The Panel’s approach to the revised mandate was explained to the sub-committee, without demur. The advice was reported to Council. It must therefore be taken that Council accepted the Panel’s interpretation of its revised mandate.
- [9] In line with its revised mandate, which also required the Panel to adopt an inquisitorial rather than adversarial approach to its investigation, it adopted rules for this purpose. In terms of the rules, witnesses have no right to legal representation but “*implicated persons*” may apply to the Chairman of the Panel to show “*good cause*” to be legally represented. The rules are attached marked “Annexure B”.

The Inquiry

[10] The Panel began its hearings on 3 April 2023. It has received extensive written and oral evidence from members of the University community, including members of Council and almost all members of the present executive committee. All the evidence given was done so confidentially, in accordance with the rules. A few witnesses insisted on anonymity. None was legally represented at the hearings. This process is almost complete.

The Chair of Council

[11] Since the beginning of the investigation the Panel has tried to secure the attendance of the CoC, without success. It is apparent that she has no intention of providing evidence to the Panel. This despite the decision of Council to establish the Panel, her fiduciary duty to give evidence and her assurances to the public and, until recently, to the Panel that she would. She complains, through her lawyers, that the Panel is not treating her fairly. There is no substance, or evidence to support this complaint:

11.1 On 13 April 2023 the Panel formally invited the CoC to consult with the evidence leaders, prepare a written statement and appear before it on an agreed date.

11.2 On 18 April 2023 her attorneys, Cliff Dekker Hofmeyr ("CDH") responded. Tellingly, her principle concerns were: whether the FVC would be testifying; how the Panel would proceed if the CoC resigned; and whether findings would be made against her.

11.3 In response to a further question as to whether the CoC is an "*implicated person*" as envisaged in the rules, the Evidence Leaders confirmed that she is, in a letter dated 24 April 2023. They itemized the allegations made against her by several witnesses. These were:

"That she misled Faculty Boards, Senate, and Council regarding former DVC Lis Lange's availability for a second term and the reasons why she did not pursue it; and

1. *That she did not perform her functions and duties as Chair of Council effectively, in that she:*
 - 1.1 *failed to ensure that the Council fulfil its undertaking, provided by the previous Council, to oversee the functions and duties of the VC;*
 - 1.2 *failed to act on the allegations contained in the 2019-Ombud report after she was appointed as Chair of Council, and after it would have been clear to her that the Council under the former Chair, took no steps to act on these allegations;*
 - 1.3 *failed to take steps to address the breakdown within the relationship of the executive leadership team;*
 - 1.4 *acted in an unfair and wrongful manner towards former DVC Lis Lange which caused the latter to accept early retirement and to not pursue a second term as DVC;*
 - 1.5 *failed to hold the former Vice Chancellor to account and instead protected the VC from any accountability to Council until the latter part of 2022;*
 - 1.6 *in an attempt to protect and retrieve her own reputation, during the latter part of 2022 offered the VC up as a proverbial 'sacrificial lamb', by suggesting to the VC that she should resign;"*

[12] The Panel notified CDH that their client would be required to provide her statement regarding these matters by 26 April 2023, and would be required to appear before the Panel on 8 May 2023.

[13] She failed to provide her statement on the due date. Instead, in a letter dated 28 April 2023, CDH contended that the Panel's remit is confined "to making recommendations on governance challenges and how to improve them", and further that the Panel has no authority to make findings against anyone. This was a startling contention and contrary to its earlier stance on 18 April 2023 in which

it accepted that the nature of their client's participation in the inquiry "*obliges her to defend herself and answer whether...she has*":

1. *"Mismanaged UCT;*
2. *Not performed her functions effectively;*
3. *Acted in an unfair, discriminatory or wrongful manner towards any person to whom UCT owes a duty...*
4. *Undermined UCT's effective functioning."*

[14] The letter of 28 April 2023 also gave notice that "*before our client is able to deposit a statement...she must be given access to the statements, transcripts and any other evidence furnished to the inquiry implicating our client*", failing which she would not present any statement to the Panel. Put differently, they asserted that she would not present her version of events until the Panel complies with her demand for full disclosure of all evidence against her, notwithstanding the confidentiality decision of the Council. They also indicated that they will seek a ruling from the Panel as to whether the Panel is empowered to make findings against their client. To this end they requested a postponement of the hearing on 8 May 2023.

[15] On 2 May 2023 the Panel responded:

"The invitation to your client to testify, as with other implicated parties, sets out a summary of the relevant allegations against your client in compliance with rule 10 of the Amended Procedural Rules to assist her in the preparation of her statement and her appearance before the Panel.

The Panel declines your client's request for access to "statements, transcripts and other evidence." In this regard we draw your attention to clause 4.1 of the Terms of Reference ("TOR"), which read together with the RTOR, require "all proceedings, deliberations, discussions, materials and records associated with the work of the Panel [to] remain strictly confidential to the Panel, without exception...including submissions, whether oral or written, made to the Panel." Some witnesses have testified on the basis that their evidence is to be treated confidentially. The Panel is therefore bound to uphold their request with due

regard to ensure that implicated persons, including your client, "are treated fairly and equally" in terms of Clause 4.9 of the TOR.

Your request that the former VC must be "involved" in the proceedings before your client would be willing to testify is, with respect, not understood. The Panel has no authority to require the former VC's attendance before the Panel, much less as a condition for your client's participation in this investigation. The former VC has in any event indicated her preparedness to appear before the Panel. And arrangements are being made with her in this regard.

As to whether the Panel is permitted by the TOR read together with the RTOR to make findings against your client, your client is no doubt aware that as Chairperson of Council she owes a fiduciary duty to the University. This includes the duty to cooperate fully with the work of the Panel.

If, having considered all the evidence, the Panel is of the view that findings against any individual, including your client, in respect of any wrongful conduct by him or her, inter alia, for failures of governance, or any other matter envisaged in the RTOR, are warranted, it shall make them.

Finally, your client was required to submit her statement to the Panel on or before 27 April 2023. She failed to do so. She is fully aware that the Panel is conducting its work under time constraints imposed upon it by Council. Your letter of 28 April 2023 contains no proper grounds for a postponement of the hearing scheduled for 8 March 2023. The Panel is, therefore, unable to accede to your request for a postponement of the hearing at which your client is required to present herself. We trust that she will avail herself of the opportunity to give her side of the story. Should she fail to appear on the scheduled date, the Panel shall be entitled to draw its own conclusions by her failure to do so."

- [16] Despite the Panel having refused to grant a postponement of the hearing on 8 May 2023, CDH emailed a letter dated 4 May 2023, which the Panel received on 5 May 2023, demanding that:

"Our client wishes to be legally represented. Our client insists on making oral representations virtually to the Panel on 8 May 2023. Please provide us with the video link."

[17] The Panel responded on 6 May 2023 as follows:

"1. The Panel notes the impertinent tone of your correspondence; in particular, the insistence on making representations orally by video link on 8 May 2023.

2. Following your letter dated 28 April 2023 in which your client requested a postponement of the hearing on 8 May 2023, the Panel ruled that the hearing of your client scheduled for 8 May 2023 would not be postponed in the absence of proper grounds supporting the request.

3. Notwithstanding this ruling your client now demands that the Panel instead entertains an application from her legal representatives on this date on the question of whether the Revised Terms of Reference gives the Panel the authority to make findings against her. The Panel has made it clear in our letter of 2 May 2023 that it is entitled to make such findings if the evidence warrants it.

4. Now that it has been established that your client is unwilling to deliver a statement to the Panel or to testify before it on 8 May 2023, the Panel has directed the Evidence Leaders to present the evidence of other witnesses on the day. It shall, therefore, not entertain any application from your client on 8 May 2023.

5. Your client is entitled, within the parameters of the rules, to apply to the Panel to be legally represented and for a ruling on any matter that falls within the ambit of the scope of the investigation. Once the Panel receives the application it will consider whether or not to have an oral hearing."

[18] On 8 May 2023 CDH went ahead and filed what it referred to as an interlocutory application which is attached and marked as "Annexure C" seeking an order from the Panel in the following terms:

- (i) *That the (Panel) does not have the powers to make findings as to the conduct of the Chairperson;*
- (ii) *That the University furnishes the Chair with full particulars i.e., the statements, transcripts and recordings of all allegations against her;*
- (iii) *That the Chairperson is entitled to legal representation;*
- (iv) *That the Chairperson is entitled to all documents furnished to the Panel that pertains to the allegations against her; and*
- (v) *That the Chairperson has the right to cross-examine witnesses who gave evidence against her.*

[19] The Panel did not entertain the application.

[20] We draw Council's attention to the fact that there are no proper grounds to support the proposed orders and it is unconscionable that the CoC would defy a decision of the Council which she chairs and is accountable to. Regarding the Panel's power to make findings against the CoC, as already stated our mandate allows this and this has been have communicated to Council and to the CoC's attorneys. As we have pointed out earlier this was also CDH's interpretation in its letter of 18 April 2023. The order sought for "*full particulars*" is incompetent in the face of the confidentiality provisions of the Terms of Reference, as are the documents provided to the Panel by witnesses confidentially. As regards the entitlement to legal representation and to cross-examine witnesses there is no right to either. The Panel has, however, indicated that it has no objection to the CoC having a legal representative present, if she testifies.

[21] On 9 May 2023 the Panel gave a further opportunity to the CoC to be examined by the evidence leaders and the Panel on 17 May 2023. This time it provided a comprehensive summary of the material facts, which the investigation has established and to which she is required to answer. The letter and the annexure are attached marked "Annexure D".

- [22] CDH responded on 11 May 2023 and reiterated its earlier complaints and confirmed that the CoC will not participate in the inquiry and that she intends launching legal proceedings “*as soon as possible.*”
- [23] From the detailed summary of the facts, we suggest the CoC has no answer to the damning allegations against her. She has, therefore, elected not to respond by seeking refuge behind a thinly disguised legal façade.

The CoC's conduct

- [24] The facts established demonstrate that as early as May 2021 the CoC embarked on a strategy to terminate DVC Lange's contract prematurely, and renew the VC's term for a further five years. To this end she initiated a process on 3 January 2022 to terminate Lange's contract, in violation of the Council approved policy for the re-appointment of an incumbent DVC. It is the responsibility of the VC and not the CoC to establish whether a DVC wishes to be considered for reappointment. The CoC had no authority to approach Lange. It was Lange's expressed wish to remain DVC for a further term.
- [25] Between February and March 2022 she enlisted the assistance of the HR Department to negotiate Lange's termination. At some point during this period the FVC also became aware of the CoC's plans and went along with it as she was also not keen to renew Lange's contract.
- [26] Lange acquiesced and signed the proposed agreement on 17 March 2022. The agreement was tabled at a REMCO meeting on the same day. There were several items on the Agenda. For the two matters that involved the renewal of the FVC's contract and the termination of Lange's, the senior HR representatives present were asked to leave, which in itself begs the question as to what was being concealed. This is unprecedented as there was no conceivable conflict of interest and the representatives are in any event bound by confidentiality requirements. There is therefore no minute of the proceedings which, improperly, were conducted in secret.

- [27] Because the meeting was held five days before the Senate meeting, scheduled to discuss Lange's termination on 22 March 2022, the CoCs clear intent was that the FVC withhold her signature to enable the CoC not to disclose the fact of Lange's impending departure at the Senate meeting. She did not disclose this and when asked by Senate to explain the circumstances regarding Lange's departure the CoC in a written response to Senate on 23 September 2022 stated that Lange's reasons were personal and confidential, and that when she had addressed Senate on the FVC's renewal on 22 March 2022 Lange's matter "was still with DVC Lange and the Vice-Chancellor." This statement was false.
- [28] On 6 October 2022, at a Council meeting, the CoC did not recuse herself from a discussion on the matter even though she had a personal interest. Worse, she remained in the meeting and then voted against a proposal to establish an independent Panel to investigate these matters.
- [29] What is more, she mendaciously reported to Ms Pheladi Gwangwa, the Deputy CoC, and Council that at a meeting between her and Lange on 3 January 2022 held for the purpose of consulting Lange on the renewal of the FVC's contract, Lange became abusive and insisted on being appointed VC. This assertion merely needs to be stated to be rejected as a lie.
- [30] To aggravate this lie, Ms Gwangwa caused this falsehood to be published to the University community, thereby defaming Lange and breaching the settlement agreement with her in terms of which neither party would publish anything regarding the reasons for her departure without the concurrence of the other.

[31] There are other matters concerning the CoC's conduct that emerged in the evidence, amongst others, pertaining to the resignation or termination of other Executives, which we shall deal with more fully in our final report. However, at this stage the facts, established from the uncontested evidence of the witnesses given under oath or affirmation, are sufficient to conclude that her continued presence as CoC poses a serious risk to the University. This, together with her threatened attempt to stymie the work of the Panel through an ill-conceived legal stratagem is further proof that she cannot be trusted to fulfill her fiduciary duty to the University.

Conclusion

[32] In our respectful view and notwithstanding that there are other matters that the Panel will make recommendations on to address organisational culture and governance matters, the decision to remove the CoC cannot wait for the Panel to complete its work and finalise its report, much less wait for the matter to be dragged through the courts. The facts are clear and Council must act.

Memorandum to Panel Members and Evidence Leaders on the Consequences of the Amended Terms of Reference Adopted by Council on 11 March 2023

1. Object

The object of this memorandum is to advise the Panel and Evidence Leaders on how the "Independent investigation into UCT Governance" established on 3 November 2023 shall proceed in light of the revised Terms of Reference (ToR) adopted by Council on 11 March 2023.

2. Scope of Investigation

2.1 The Panel was originally mandated to investigate two matters by a Resolution of Council adopted on 15 October 2022. The first was whether the Vice-Chancellor (the VC) and the Chair of Council (the Chair) misled Faculty Boards, Senate and/or Council regarding former Deputy Vice-Chancellor's, Professor Lange's availability to continue serving for a second term and the reasons she did not pursue it; the second was how the executive relationships contributed to the number of and reasons for resignations within and beyond the executive.¹ The Panel was required to prepare a report drawing "specific conclusions" and recommending "specific actions to be taken generally and against any specific individuals."²

2.2 In regard to the "Lange Investigation" the Panel and Evidence Leaders understood their mandate as covering two areas; whether the VC and Chair misled the University regarding the true reasons Prof. Lange opted to terminate her employment, and if so, what these reasons were. It follows that if there was a positive finding against either the VC or the Chair "specific actions" including disciplinary action against them could be recommended.

2.3 Regarding the broader inquiry, i.e., whether the resignations of other staff was attributable to any improper conduct on the part of any member of the executive, including the VC and the Chair, it followed that if there were positive findings made against anyone, "specific actions" including disciplinary action could be recommended against the offending parties.

¹ Terms of Reference 3 (a) and 3(b).

² Terms of Reference 1.2

3. The Nature of the Investigation

- 3.1 It is apparent from the scope of the inquiry that the investigation would take the form of a fact finding exercise with which our legal system is familiar i.e., where persons against whom adverse allegations are made usually contest these by cross-examining their accusers supported by legal representatives. Proceedings taking this form are sometimes described as *adversarial* in nature with the parties presenting their version of the facts and judges or (in our case) Panel members, adopting more of stance of referee rather than investigator. The investigative function is carried out by evidence leaders and lawyers representing the parties. The Panel thereafter considers the evidence and makes its findings.
- 3.2 However, unlike criminal and civil trials, inquiries such as the one with which we are seized also have features of an inquisitorial process where Panel members may participate more actively in questioning witnesses. Commissions of Inquiry usually adopt this mixed approach. The inquisitorial process is considered further below.
- 3.3 The Panel adopted rules on 2 March 2023 to facilitate an investigation of this nature. This includes the entitlement (not a right) to be legally represented and to cross-examine witnesses on good cause shown.³

4. The Revised Terms of Reference.

- 4.1 On 21 February 2023 Council approved a settlement agreement with the VC. The Panel has not had sight of the agreement but we are advised that her employment as VC was terminated with effect from 3 March 2023. This means that any further investigation regarding her conduct that may have a bearing on the "issues of governance" at the University must *per force* exclude any recommendation, if warranted, regarding specific actions or disciplinary action to be taken against her. This is because the University no longer exercises any authority over her.
- 4.2 Thus, on 11 March 2023, Council revised the ToR to give effect to this development. It now requires the Panel "to consider and investigate issues of governance that have affected and are affecting the University *without specifically investigating the conduct of the former Vice-Chancellor*."⁴

³ Rule 7 of the Rules adopted on 2 March 2023.

⁴ Preamble to Revised ToR

- 4.3 In line with the fact that no disciplinary action may be taken against the previous VC, Clause 4 of the amended mandate provides pertinently that “the (revised) scope of the inquiry (considered further below) shall exclude any consideration of whether the former Vice-Chancellor committed any disciplinary offence.” Clause 5 precludes any “specific findings touching on the personal responsibility of the former Vice-Chancellor” arising from matters that fall within the (revised) scope of inquiry. And Clause 6 says that the former VC “shall not be required to appear before the Panel, or to submit evidence to it.” This also follows from the fact that neither the University, nor the Panel, may exercise any authority over the former VC following the termination of her employment. The question is whether the Panel is precluded from requesting the former VC to appear before it or to submit evidence to it.
5. Is the former VC precluded from submitting evidence to the Panel?
- 5.1 The short answer is no.
- 5.2 This is apparent from the revised ToR. Clause 7 requires the Panel, quite properly, to have regard to all evidence by “*any person touching on the conduct of the former Vice-Chancellor which is imputable to the University.*” It goes on to say that “*the Panel shall not make any specific findings concerning the personal responsibility of the former Vice-Chancellor for any wrong possibly constituting misconduct.*” Importantly, the clause adds, “*[t]he Panel may however make conclusions or findings pertaining to her acts and omissions taken and made in the ordinary course of employment and therefore attributable to the University.*”⁵ The import of this clause is therefore clear: the former VC’s acts and omissions in the course and scope of her employment must be investigated and findings and conclusions arrived at.
- 5.3 The Panel must therefore invite her to present evidence regarding any adverse allegation that has been made against her, not for the purpose of investigating any personal responsibility on her part, but to establish the true facts underlying the “governance issues” that are the subject of the investigation. Her evidence is not only relevant but vital for this purpose. Fairness to all parties, including the former VC, demands this.⁶
- 5.4 It must however be emphasised that she would have to testify voluntarily and cannot be compelled to do so.

⁵ The Vice-Chancellor is responsible for the management and administration of the University. She is the Chief Executive Officer. Viewed either from the perspective of the vicarious liability of employers for the acts and omissions of its employees or from the perspective of direct liability of an employer for the acts of its Chief Executive Officer, who is its “controlling or directing mind.” (Cf. *First National Bank of SA Ltd v Rosenblum and Another* 199 (4) SA 189 at para 18) the University is liable for wrongs committed by its employees and Chief Executive Officer.

⁶ Clause 9 provides that “the Panel shall retain the authority to decide what fairness demands under the specific circumstances presented to it.”

6. The Revised Scope of Inquiry.

- 6.1 Clause 4 of the Revised ToR now requires the Panel to “focus” on the following:
- 6.1.1 The circumstances surrounding the resignation or retirement of members of the executive including DVC’s deans, directors and other employees linked to the senior leadership, with specific purpose of finding out whether executive relations and the failures of governance within the Council, its offices and structures contributed to this;
- 6.1.2 In relation to 6.1.1, the Panel is empowered to advise whether any unfairness, breaches of labour law or UCT Statues, regulations and policies took place, whether any remedy is possible and practicable, and whether there are policy gaps that need rectifying; and
- 6.1.3 The role of Council in handling the Ombud report and subsequent reports, and whether there were any failures of governance in this regard that still need to be addressed.
- 6.2 The revised focus broadens and clarifies the scope of the investigation (see para 2 above), particularly in relation to clause 3(b) of the original scope of investigation.
- 6.3 With regard to clause 3(a) the Panel is no longer required to *specifically* investigate “whether the VC and the Chair of Council misled Faculty Boards, Senate and/or Council regarding for DVC Liz Lange’s availability for a second term and the reasons she did not pursue it.” But, it is apparent from 6.1.1 above that the investigation regarding the circumstances of her departure from the University, including whether “executive relations and the failures of governance within the Council...contributed to this” remains part of the focus of our investigation, as does the investigation into the circumstances of the departure of other executives linked to the senior leadership.
- 6.4 I do not understand the Revised ToR to preclude findings against specific persons and possible action, including disciplinary action to be taken against implicated individuals other than the VC.

7. The Adoption of an “Inquisitorial Approach”

- 7.1 Clause 2 of the “Revised ToR” now requires the Panel not to conduct its inquiry in an adversarial fashion, but to adopt an inquisitorial approach with the assistance of an evidence leader. This suggests that the Panel together with the evidence leader must adopt a more active role in identifying and probing witnesses to establish the facts than possibly would have been the case with an adversarial approach.
- 7.2 The question now is whether the Rules adopted on 2 March 2023 by the Panel require further revision to provide for the “Inquisitorial Approach.”
- 7.3 In this regard the two issues already provided for in the rules i.e., legal representation and cross-examination are pertinent.

- 7.4 The existing rules⁷ make clear that there is no right to either but that a witness against whom an adverse allegation may show good cause why they should be allowed legal representation and to cross-examine persons who have made adverse allegations against them.
- 7.5 In my view the adoption of the "inquisitorial approach" does not require a major revision of the rules. Rather, with the Evidence Leaders and Panel now taking a more active role as described in 7.1 above, the Chair of the Panel will take this revised mandate into account in deciding whether or not to permit legal representation and "further examination" by a legal representative.⁸
- 7.6 If either is allowed, the latitude for further examination is likely to be curtailed and confined to those areas the Evidence Leaders and Panel may not have adequately covered.
- 7.7 The obvious advantage of the revised mandate is that the Panel arguably now has a wider discretion to curtail proceedings where it considers this to be expedient.
- 7.8 The rules must now be amended to reflect that what we are now dealing with is the possibility of "further examination" in the context of inquisitorial proceedings rather than "cross-examination", which is a feature of adversarial proceedings

Azhar Cachalia

15 March 2023

⁷ Rules 7 and 10 of the Rules adopted on 2 March 2023.

⁸ See the note prepared by Pieter Botha SC regarding the "erroneous" use of the idea of cross-examination in the context of inquisitorial proceedings.

UCT GOVERNANCE INDEPENDENT INVESTIGATION

Amended Operating Procedures

Pursuant to the provisions of clause 4 of the Terms of Reference adopted by the University of Cape Town's Council, read with the Revised Terms of Reference, the Panel of Investigation has established the following amended operating procedural rules in respect of its investigation:

1. Definitions:

In these procedural rules, unless the context indicates otherwise –

"Chairperson" means the Chairperson of the Panel, Justice Lex Mpati;

"Council" means the Council of the University of Cape Town;

"Deliver" means forwarding a copy of the relevant document by email to communication@heroldgie.co.za;

"Implicated person" means any person against whom an adverse allegation relevant to the Scope of the Inquiry has been made in oral or written evidence intended for delivery or presentation to the Panel;

"Evidence Leaders" means the evidence leaders appointed by the Council, at the Request of the Panel, instructed by the Secretariat.

"Panel" means the Panel of Investigation established in terms of the Terms of Reference;

"Panel members" means the following 4 members of the Panel:

- a) Retired Supreme Court of Appeal President, Justice Lex Mpati;
- b) Retired Supreme Court of Appeal Judge, Justice Azhar Cachalia;
- c) Dr Bernadette Johnson, director: Transformation and Employment Equity at WITS; and
- d) Dr Patricia Hanekom, public sector governance expert.

"Scope of the Inquiry" means the scope of inquiry as set out in the Revised Terms of Reference;

"Secretariat" means Herold Gie Attorneys;

"Terms of Reference" means the terms of reference established by the Council for an independent investigation into the University of Cape Town's governance;

"Revised Terms of Reference" means the revised terms of reference adopted by the Council at a meeting on 11 March 2023;

2. Commencement date:

These Amended Procedural Rules shall commence on the date upon which they are adopted by the Panel.

3. Proceedings to which the Procedural Rules apply:

3.1 These Amended Procedural Rules shall apply to all meetings and hearings held by the Panel in the execution of its mandate as determined by the Scope of the Inquiry.

3.2 A copy of these Amended Procedural Rules may be made available to any interested person by the Secretariat on written application to it.

4. Relationship between the Amended Procedural Rules, the Terms of Reference and the Revised Terms of Reference:

4.1 The Amended Procedural Rules, the Terms of Reference and the Revised Terms of Reference must be read together.

4.2 However, in the event of an inconsistency or discrepancy, the Revised Terms of Reference shall prevail.

5. Secretariat:

- 5.1 Herold Gie attorneys will perform the secretarial, administrative, legal, and other supporting functions to the Panel and the Evidence Leaders.
- 5.2 All correspondence directed to the Panel or the Evidence Leaders, and all documents intended for delivery to the Panel, shall be delivered by email to the Secretariat at communication@heroldgie.co.za marked for the attention of Mr Ashley Meyer.

6. Venue of Hearings:

- 6.1 Hearings shall be held at such venue, or venues, as determined by the Secretariat, after consultation with the Council.
- 6.2 All scheduled hearings shall be held *in camera*.

7. Right to legal representation and questioning or examination of witnesses:

- 7.1 Subject to Rule 10 below, no person appearing before the Panel shall have a right to legal representation nor shall any such person have the right to question or examine any other person appearing before the Panel or to make submissions to the Panel.
- 7.2 Any person who wishes to be legally represented when appearing before the Panel must show good cause why this should be allowed.
- 7.3 Likewise, any person who wishes to question or examine any other person appearing before the Panel, must show good cause why such questioning or examination should be allowed.
- 7.4 Any person who wishes to be legally represented, to question or examine any other person appearing before the Panel or to make submissions to the Panel, shall make written application to

the Chairperson of the Panel, in which the grounds for such a request are fully set out.

7.5 Any decision by the Chairperson shall be final.

8. Statements and other Documents:

8.1 Any statement intended for delivery or presentation to the Panel by, or on behalf of, a person appearing before the Panel must:

8.1.1 have a heading which clearly identifies the statement;

8.1.2 be clearly written, typed or reproduced;

8.1.3 be formatted in numbered paragraphs; and

8.1.4 include an index and subject matter heading if the statement is more than 5 (five) pages in length.

8.2 All documents in a language other than English, delivered or handed to the Panel must be accompanied by:

8.2.1 an English translation;

8.2.2 a declaration by the translator that the translation is accurate.

8.3 At least 7 (seven) clear and legible copies of all documents and statements shall be delivered or handed to the Panel.

8.4 All documents delivered or handed to the Panel shall remain strictly confidential.

9. Evidence:

9.1 The Panel shall conduct its work and fulfil its mandate in an inquisitorial manner.

9.2 The Panel may receive any evidence relevant to its Scope of Inquiry, including evidence that might otherwise be inadmissible in a court of law, and the Chairperson shall determine the admissibility of such evidence should questions of admissibility arise.

- 9.3 Anyone who has knowledge of the matters that fall within the Scope of Inquiry may deliver a statement or affidavit to the Secretariat to be placed before the Evidence Leaders for consideration.
 - 9.4 Subject to good cause being shown, any person referred to in Rule 9.3 above, may apply to the Chairperson of the Panel, duly assisted by the Evidence Leaders if necessary, for leave to provide his or her statement or affidavit anonymously.
 - 9.5 For purposes of Rule 9.4, 'good cause' shall include a reasonable fear or apprehension of intimidation or harassment by any other person, or of adverse repercussions for providing evidence to the Panel.
 - 9.6 Subject to Rule 9.8 below, all evidence placed before the Panel shall be in writing.
 - 9.7 Written statements, with or without any additional, relevant, documents, shall be placed before the Panel with the assistance of the Evidence Leaders.
 - 9.8 The Chairperson may in his sole discretion determine whether the Panel requires oral evidence of any person, regardless of whether such a person has already provided or delivered a written statement or document(s) to the Panel or not.
 - 9.9 The Evidence Leaders will assist the Panel in placing the oral evidence of any witness before the Panel, and will have the right to examine, and cross-examine, any such witness, and to make submissions to the Panel, if the Chairperson deems such examination, cross-examination or submissions necessary for the Panel to fulfil its mandate, irrespective of whether an implicated person has also been granted leave to question or examine such a witness, or to make submissions to the Panel, or not.
-

- 9.10 The sequence in which witnesses are called shall be subject to the discretion of the Panel, in consultation with the Evidence Leaders.
- 9.11 Any person against whom an adverse allegation relevant to the Scope of the Inquiry has been made in oral or written evidence presented to the Panel, shall be informed of his or her right to be heard by the Panel, orally or in writing.
- 9.12 Oral evidence presented to the Panel shall be recorded and transcribed as often as required by the Panel Members.

10. Implicated persons:

- 10.1 Implicated persons shall be informed in writing by the Secretariat:
 - 10.1.1 that the Evidence Leaders have been provided with a statement by a witness who has made an adverse allegation against him or her, which the Evidence Leaders intend to present to the Panel;
 - 10.1.2 what the general nature of the allegation is and, subject to Rule 9.4 above, shall be provided with a copy of the witness' statement, or relevant portions or a summary of the statement containing the allegation, together with any relevant document attached to the statement, if any;
 - 10.1.3 subject to Rule 9.4 above, the time and date when, and venue where, the witness will testify;
 - 10.1.4 that, subject to Rule 7 above regarding the right to legal representation, Rule 9.4 above regarding anonymous witnesses and the Rule of non-disclosure regarding the identity of witnesses and the contents of statements and documents in Rule 10.3 below, he or she may attend the hearing where the witness will testify and be assisted by a legal representative at the hearing;

- 10.1.5 that he or she is entitled to testify himself or herself and to call any witness to testify on his or her behalf;
 - 10.1.6 that he or she is entitled to apply to the Chairperson for leave to question or examine the witness, and to make written submissions on the findings or conclusions by the Panel on the evidence placed before it that relates to him or her. The application must be accompanied by a statement from the implicated person responding to the witness's statement insofar as it implicates him or her. The statement must clearly state which parts of the witness's statement are disputed or denied and the grounds upon which those parts are disputed or denied; and
 - 10.1.7 that the Chairperson shall in his sole discretion decide the application.
- 10.2 The application referred to Rule 10.1.7 shall be made no less than three days before the date of the hearing of the evidence of the relevant witness.
- 10.3 Subject to any direction by the Chairperson, and to protect the confidentiality of the work of the Panel, no one may disclose the identity of any witness, or the contents of any statement or document provided to the Panel, to anyone other than a legal representative for the purpose of obtaining legal advice.
- 10.4 The Chairperson may exclude any person whose presence is not reasonably required from the proceedings.

11. General:

- 11.1 The Chairperson may amend these Amended Procedural Rules and issue Practice Directions from time to time.
-

IN THE INDEPENDENT INQUIRY INTO THE GOVERNANCE OF THE
UNIVERSITY OF CAPE TOWN

In the matter between:

BABALWA NGONYAMA

Applicant

FILING SHEET

TAKE NOTICE THAT the Applicant, hereby, present service and filing of her interlocutory application.

DATED at SANDTON on this the 08th of day MAY 2023.



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SERVICE BY EMAIL

**IN THE INDEPENDENT INQUIRY INTO THE GOVERNANCE OF THE
UNIVERSITY OF CAPE TOWN**

In the matter between:

BABALWA NGONYAMA

Applicant

INTERLOCUTORY APPLICATION

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INTRODUCTION

1. This is an interlocutory application to the Panel ("**the Panel**") of the Independent Inquiry into the governance of the University of Cape Town ("**UCT**") for certain rulings, which are addressed fully below.
2. The Chairperson of the University Council ("**the Chair**" or "**Ms Ngonyama**") submits that the Panel, as an organ of the University Council, must act rationally, reasonably and must observe procedural fairness. The Panel is bound by section 1(c) of the Constitution, section 33 of the Constitution, the Promotion of Administrative Justice Act 3 of 2000, the provisions of the Higher Education Act 101 of 1997, the Institutional Statute of UCT and its own Terms of Reference.
3. The Panel must, in the first instance, interpret and apply its own terms of reference. It is submitted that there is a material dispute as to the correct interpretation of the terms of reference. It is irrational, unreasonable, and procedurally unfair for the Panel to refuse to entertain submissions on the correct interpretation of the terms of reference. This is a necessary step before the Panel can entertain submissions on the merits.

NO POWER TO MAKE CONDUCT RELATED FINDINGS

4. The first submission is that the Panel has no authority to make "findings" of improper conduct or misconduct against the Chair. The Panel's mandate is limited to the following questions -
-

- 4.1. The alleged *"the failures of governance"*¹.
 - 4.2. *"Whether executive relations and the failures of governance within Council, its officers and structures contributed to" the resignation or retirement of members of the executive*².
 - 4.3. *"Whether any unfairness, breaches of labour law or UCT Statutes, regulations and policies took place"*³.
 - 4.4. *"The role of Council in handling the Ombud report and subsequent reports, and whether there were any failures of governance in this regard that still need to be addressed"*⁴.
5. Despite this, the Panel through its attorneys has stated that the Chair is *"an implicated person"* and set out specific acts of alleged misconduct at paragraph 8 of the letter dated 24 April 2023. The Panel apparently intends to make findings relating to the *"conduct"* of the Chair. The Panel is an organ of the University Council. It has no power beyond that which is conferred to the Council.
6. The Council has no power to conduct an enquiry into allegations of misconduct against the Chair. Only the Minister of Education has such powers. The Panel has not provided the Chair with the source of its powers in this regard. Although the Panel insists that it is empowered to make findings relating to the conduct (or alleged misconduct) of the Chair, such powers are not conferred expressly or by necessary implication by the terms of reference. They are also not permissible in terms of the applicable statutes. As an organ of Council any enquiry regarding the conduct or misconduct of the Chair is *ultra vires* the terms of reference and the statutory powers of the Panel.

¹ Clause 3 of the terms of reference.

² Clause 4(a) of the terms of reference.

³ Clause 4(b) of the terms of reference.

⁴ Clause 4(c) of the terms of reference.

7. The attorneys acting on behalf of the Panel have stated the following in paragraph 3 of the letter of 24 April 2023 -

"The RToR do not contain a paragraph 1.2. We assume that the references to "paragraph 1.2" in paragraphs 4, 14, and 18 of your letter under reply, are probably references to paragraph 1.2 of the Terms of Reference (which were adopted by the Council on 15 October 2022 ("the ToR")) which reads as follows:

"The Panel shall prepare a report and submit it to Council by 31 December 2022. The report shall make specific conclusions on the issues identified in para 3 below and recommend the specific actions to be taken generally and against any specific individuals. The Panel shall also prepare a redacted report that will be made available to Senate." (My emphasis)"

8. A copy of the letter dated 24 April 2023 is attached marked annexure **A**.
9. Notably, the paragraph referenced above is excluded in the final terms of reference. This makes it abundantly clear that it was not within the contemplation of the Council that findings and recommendations against any individual would be made. For the avoidance of doubt a copy of the final terms of reference and procedure is attached marked annexure **B**.
10. It is submitted that the Panel should interpret its terms of reference to exclude findings of misconduct against the Chair for the reasons stated above.

VAGUENESS OF TERMS OF REFERENCE

11. The terms of reference set out the scope of the inquiry as follows -

"The circumstances surrounding the resignation or retirement of members of the executive including DVCs, deans, directors and other employees linked to the senior leadership, with the specific purpose of finding out whether executive relations and the failures of governance within Council, its officers and structures contributed to this;

In relation to 4(a) above, the Panel is empowered to advise whether any unfairness, breaches of labour law or UCT Statutes, regulations and policies took place, whether any remedy is possible and practicable, and whether there are policy gaps that need rectifying; and

The role of Council in handling the Ombud report and subsequent reports, and whether there were any failures of governance in this regard that still need to be addressed."

12. The terms of reference do not refer to the conduct of the Chair.
13. The Chair is also unable to prepare for the inquiry in the absence of the following information -
 - 13.1. The precise nature of the circumstances surrounding the resignation or retirement of members of the executive.
 - 13.2. The identities of the executives referred to.
 - 13.3. What is referred to by "*executive relations*".
 - 13.4. What is referred to by "*failures of governance*".
 - 13.5. What is referred in relation to the Council's role in handling the Ombud report and the subsequent reports.
14. In addition to the above, the attorneys of the Panel have considerably extended the scope of the Panel mandate. As stated above, the mandate of the Panel is limited to clause 4 of the terms of reference.
15. The letter from the attorneys of the Panel dated 24 April 2023 contains a list of allegations of misconduct against the Chair. It also identifies the Chair as an "*implicated person*". The term "*implicated person*" does not appear from the terms of reference. This confirms that the Council did not envisage that this enquiry would be about the conduct of the Chair but would be about governance.

16. It is submitted that the Panel should rule that the letter of 24 April 2023 was an improper extension of the terms of reference. It appears from the attorneys appointed by the University that they have sought fit to extend the mandate of the committee under the guise that they are so instructed by the committee. This cannot be.
17. In any event the allegations of misconduct are framed in vague and imprecise terms, making it impossible for the Chair to understand the case she is expected to meet.
18. Paragraph 8.1 states as follows –

"That she withheld information from and misled Faculty Boards, Senate, and Council regarding former DVC Lis Lange's availability for a second term and the reasons why she did not pursue it."
19. In this regard, there is vagueness regarding the following aspects -
 - 19.1. what did the Chair tell the Faculty Boards, Senate and Council;
 - 19.2. when were the meetings of the alleged structures held;
 - 19.3. in what manner did the Chair make a misleading statement (or statements);
and
 - 19.4. what is alleged to have been the correct facts, which the Chair did not correctly reflect.
20. In paragraph 8.2 it is alleged that *"she undermined the effective functioning of UCT."* It is simply not possible to prepare to answer this allegation without any facts alleged to support the allegation.
21. In paragraph 8.3.1 it is alleged that she *"failed to ensure that the Council fulfilled its undertaking, provided by the previous Council, to oversee the functions and duties of the VC."* In this regard, it is not possible to prepare for the enquiry without information as to the nature of the alleged undertaking made; the manner in which it is alleged that there was a failure to oversee the

functions and duties of the VC; the reasons why it is alleged that such functions should have been performed by the Chair; and the precise duties and functions that were not overseen by the Chair.

22. In paragraph 8.3.2 it is alleged that she *“failed to act on the allegations contained in the 2019-Ombud report after she was appointed as Chair of Council, and after it would have been clear to her that the Council under the former Chair, took no steps to act on these allegations.”* These allegations are vague and imprecise in the following respects -
- 22.1. On what basis is it alleged that the former Council and the former Chair did not act on the *“allegations”* contained in the 2019-Ombud report;
 - 22.2. Why was the former Chair not held responsible for failing to act on these allegations and why should the current Chair be held responsible for omissions of the previous Chair;
 - 22.3. Why is the Panel not taking action against the former Chair for the alleged failure to act on the report;
 - 22.4. What are the allegations referred to;
 - 22.5. In what manner did the Chair not act on them?
 - 22.6. Why is it alleged that it became clear to her – as opposed to the Council as a whole – that the report had not been acted upon.
23. It is alleged that she *“failed to take reasonable steps to address the breakdown within the relationship of the executive leadership team.”* Precisely what is referred to in this paragraph? What is alleged to have been the obligation of the Chair? Why is it alleged that there was a breakdown in executive team relations? On what basis is it alleged that she failed to act?
24. In paragraph 8.3.4 it is alleged that she *“acted in an unfair and wrongful manner towards former DVC Lis Lange which caused the latter to accept early retirement and to not pursue a second term as DVC.”* On what basis is it

alleged that her conduct (which is also unspecified) caused former DVC Lis Lange to accept early retirement and to not pursue a second term as DVC?

25. In paragraph 8.3.5 it is alleged that she *"failed to recuse herself from the deliberations and vote regarding Council's decision on 6 October 2022 not to appoint an independent panel when she had a duty to do so."* This allegation can be responded to. It is submitted, however, that it falls outside the terms of reference which do not contemplate a finding of misconduct against a specific individual.
26. In paragraph 8.3.6 it is alleged that she *"failed to hold the former Vice Chancellor to account and instead protected the VC from any accountability to Council until the latter part of 2022."* This allegation is vague and imprecise. In what manner is it alleged that the Chair did not hold the former Vice Chancellor accountable? On what factual basis is it alleged that she *"protected"* the former Vice Chancellor from accountability? What is alleged to have been the role of Council as opposed to that of the Chair in this regard.
27. In paragraph 8.3.7 it is alleged that *"in an attempt to protect and retrieve her own reputation, during the latter part of 2022 offered the VC up as a proverbial 'sacrificial lamb', by suggesting to the VC that she should resign."* This allegation is vague. Why is it alleged that the Chair tried to "retrieve her own reputation"? What is the meaning of the phrase "retrieve her own reputation" in this context? Why is it alleged that the Chair "offered the VC up as a proverbial sacrificial lamb"? What is the meaning of this phrase? Why is it alleged that it was the Chair who prevailed on the former Vice Chancellor to resign, as opposed to the former VC's own voluntary decision?
28. In addition to the vagueness and lack of clarity highlighted above, the Chair has been denied access to the witness statements, transcripts and recordings which support the allegations against her.
29. It is irrational, unreasonable, and procedurally unfair that she is denied access to information which implicates her, yet she is expected to answer to vague charges of misconduct. The fact that the Panel shall conduct its affairs in an

inquisitorial fashion does not excuse it from the duty to comply with the fundamental precepts of procedural fairness, namely that a person who is accused of impropriety – the Chair clearly is – must know the case against them.

30. It is submitted that the Panel should order the production of full particulars, and the statements, transcripts and recordings of the allegations made against the Chair.

THE HIGHER EDUCATION ACT, 1997

31. The Applicant submits that her participation before the Panel was requested to improve governance at UCT. She acknowledges that the office of the Vice-Chancellor ("VC") and Deputy Vice-Chancellors ("DVCs"), (referred to as Members of the Executive), form part of UCT's institutional governance structure.
32. These employees form part of the University's executive staff and are appointed by Council in terms of section 34(2) of the Higher Education Act 101 of 1997 ("HEA"), in consultation with the Senate. Paragraph 8 of the Institutional Statute in turn, empowers Council to appoint the VC.
33. In terms of paragraph 11 Council is empowered to appoint up to four DVCs. Both paragraphs 8 and 11 of the Institutional Statute seek to create a broader consultative process than the HEA, obliging Council to consult with Senate and Institutional Forum in the decision to appoint the VC and DVCs.
34. With respect, it is however not immediately clear why the Panel seeks submissions on the "chair's role and conduct in relation to Senate". At the level of institutional governance, the answer is contained in the HEA and Institutional Statute. In terms of section 26(1) of the HEA, Senate accounts to Council "for the academic and research functions of the public higher education institution and must perform such other functions as may be delegated or assigned to it by the council". The senate is comprised of, among others, the VC, DVCs, and members of Council.

35. The Chair of council, in that designation, plays no role in relation to the senate, other than to serve as the chair of council to whom senate accounts and to, as chair of council, communicate to senate any functions council has assigned to it.
36. It is of course trite that where any of the grounds listed in section 42 or 45 of the HEA are alleged, the Minister of Higher Education is empowered to issue a directive to the University to comply with the HEA, or its Institutional Statute.
37. Where such directive is issued, and the institution has failed to comply therewith the Minister may appoint an independent assessor. The Minister is also empowered to appoint an assessor where the council requests such an appointment in writing.
38. While the ToR establish the Panel of Inquiry pursuant to a resolution of council at its meeting of 15 October 2022, and while council is indeed empowered to regulate its governance processes most efficiently, it must do so within the framework of the HEA and Institutional Statute. There are no empowering provisions in the HEA or Institutional Statute permitting council to assign its functions to a Panel as constituted in the amended ToR.
39. Council is empowered by paragraph 12(4) of the Institutional Statute to only delegate and assign its powers and functions to a closed list of structures, namely -
 - 39.1. A committee of the council;
 - 39.2. A member of the council;
 - 39.3. Any officer of the University; or
 - 39.4. Other structures of the University.
40. Although created by council resolution, the Panel is none of these structures, which may affect its ability inquire into governance constraints, notwithstanding the October 2022 resolution.

41. If this process is an institutional investigation, it can only be done by council or delegated by council to the structures identified in paragraph 16 above. Alternatively, the inquiry must then proceed in terms of the relevant provisions of the HEA, and council must request in writing under section 45(a) of the HEA that the Minister appoint an assessor, or that the Panel so constituted is appointed by the Minister in terms of section 45(a).
42. Consequently, the committee does not have the power to adjudicate the issues as set out in the terms of reference.

LEGAL REPRESENTATION

43. Rule 7.2 of the operating procedures provides that where any person appearing before the Panel wishes to be legally represented, they must show good cause why legal representation should be permitted. Rule 10.1.4 makes provision for a person to be assisted by a legal representative at the hearing if they are summoned to appear as an "implicated person." The test formulated by the Panel for legal representation is thus whether good cause has been illustrated to justify leave to be legally represented being granted.
44. The Supreme Court of Appeal in **Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others**⁵ held that there is a discretion whether or not legal representation should be permitted for bodies such as the present. The following factors guide the discretion -
 - 44.1. the factual or legal complexity raised by the charges;
 - 44.2. the potential seriousness of a possible finding against the accused employee; and

⁵ 2002 (5) SA 449 (SCA) at paras 9; 11-13.

- 44.3. the prejudice the accused employee might suffer as result of not being permitted legal representation.
45. The Chair applies for legal representation in light of the following -
 - 45.1. she is an implicated person;
 - 45.2. the allegations against her are serious;
 - 45.3. if her conduct is impugned, that carries grave consequences for her;
 - 45.4. she has no legal training or background;
 - 45.5. She is required to cross examine those persons who have implicated her so that the veracity of their versions could be tested; and
 - 45.6. the case is factually and legally complex.

VC ORDER

46. Finally, it is common cause that the former VC was central to the inquiry and has left the employ of the University. The University and former VC have since reached a settlement and the ToR was subsequently amended to require the panel *"to consider and investigate issues of governance that have affected and are affecting the University without specifically investigating the conduct of the former Vice-Chancellor"*.
47. The role of the Chairperson and VC are intertwined. Considering the amendments to the ToR, we seek clarity as to the role of the former VC in the inquiry.

CONCLUSION

48. We seek an order regarding the following:
 - 48.1. That the committee does not have the powers to make any finding as to the conduct of the Chairperson;
 - 48.2. That the University furnishes the Chair with the particulars sought herein;

- 48.3. That the Chairperson is entitled to legal representation;
- 48.4. That the Chairperson is entitled to all documents furnished to the panel that pertains to allegations against her; and
- 48.5. That the Chairperson has the right to cross-examine witnesses who gave evidence against her.

DATED AT SANDTON ON THIS THE 08th DAY OF MAY 2023




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Date 24 April 2023

PER EMAIL: aadil.patel@cdhlegal.comCc: Tamsanga.Mila@cdhlegal.com

Dear Aadil

INDEPENDENT INVESTIGATION INTO UNIVERSITY OF CAPE TOWN GOVERNANCE

1. Your letter dated 18 April 2023 refers.
2. The scope of the Panel's investigation is set out in the Revised Terms of Reference which were adopted by the Council of UCT ("the Council") on 11 March 2023 ("the RToR").
3. The RToR do not contain a paragraph 1.2. We assume that the references to "paragraph 1.2" in paragraphs 4, 14, and 18 of your letter under reply, are probably references to paragraph 1.2 of the Terms of Reference (which were adopted by the Council on 15 October 2022 ("the ToR")) which reads as follows:

"The Panel shall prepare a report and submit it to Council by 31 December 2022. The report shall make specific conclusions on the issues identified in para 3 below and recommend the specific actions to be taken generally and against any specific individuals. The Panel shall also prepare a redacted report that will be made available to Senate." (My emphasis)

4. Unlike what is stated in your letter under reply, the Panel was indeed tasked in paragraph 1.2 of the ToR, amongst others, to make recommendations regarding findings in respect of the specific actions to be taken against an individual.

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5. The scope of the Investigation of the Panel has now been amended and is set out in paragraphs 4(a) to 4(c) of the RToR (the wording of which is correctly quoted in paragraphs 4.1.1 to 4.1.3 of your letter under reply, but incorrectly referenced therein as "set out" in paragraph 3 of the ToR).

6. In paragraph 9 of your letter under reply, you state the following:

"With respect, it is however not immediately clear why the Panel seeks submissions on the chair's role and conduct in relation to Senate".

7. We are uncertain on what this statement is premised. In paragraph 4 to 4.5 of our previous letter of 13 April 2023, we have set out what the issues are which the Panel wishes your client to address them on. Submissions "on the chair's role and conduct in relation to Senate" were not expressly called for.

8. Your client is indeed an implicated person, in that the following adverse comments have been made against her by more than one witness:

8.1 That she withheld information from and misled Faculty Boards, Senate, and Council regarding former DVC Lis Lange's availability for a second term and the reasons why she did not pursue it.

8.2 That she undermined the effective functioning of UCT.

8.3 That she did not perform her functions and duties as Chair of Council effectively, in that she inter alia:

8.3.1 failed to ensure that the Council fulfilled its undertaking, provided by the previous Council, to oversee the functions and duties of the VC.

- 8.3.2 failed to act on the allegations contained in the 2019-Ombud report after she was appointed as Chair of Council, and after it would have been clear to her that the Council under the former Chair, took no steps to act on these allegations.
 - 8.3.3 failed to take reasonable steps to address the breakdown within the relationship of the executive leadership team.
 - 8.3.4 acted in an unfair and wrongful manner towards former DVC Lis Lange which caused the latter to accept early retirement and to not pursue a second term as DVC.
 - 8.3.5 failed to recuse herself from the deliberations and vote regarding Council's decision on 6 October 2022 not to appoint an independent panel when she had a duty to do so.
 - 8.3.6 failed to hold the former Vice Chancellor to account and instead protected the VC from any accountability to Council until the latter part of 2022.
 - 8.3.7 in an attempt to protect and retrieve her own reputation, during the latter part of 2022 offered the VC up as a proverbial 'sacrificial lamb', by suggesting to the VC that she should resign.
9. Your client's rights and obligations as an implicated person are set out in the Amended Operating Procedures. It would be improper for the Panel to provide her with legal advice about the way she should respond to the allegations against her.
10. However, we reiterate that your client is a vital witness to the scope of investigation of the Panel, who would be able to contribute materially to the work thereof. Without her input, the Panel will only have the version of, amongst others, the witnesses who have implicated her.

11. It therefore seems obvious that it would be in the best interest of both your client and UCT for your client to make herself available as a witness. As Chair of the Council which took the decision to appoint the Panel, we assume that your client will be cooperating with the work thereof.

12. As a result, the Panel has instructed the Secretariat to inform you, as we hereby do, that arrangements have been made for your client to testify before the Panel on **8 May 2023**. Your client will be required to attend in person at the venue in Cape Town.

13. Further, your client is required to submit her statement to the Secretariat by no later than Thursday, 27 April 2023 (via email at communication@heroldgie.co.za and ameyer@heroldgie.co.za), so that the Evidence leaders may prepare and, if necessary, consult with her prior to her testimony.

Yours faithfully

HEROLD GIE

A handwritten signature in black ink, appearing to be 'A MEYER', enclosed within a large, hand-drawn oval shape.

A MEYER

Amendments to Council Resolution Establishing an Investigative Panel

Recalling that, on 21 February 2023, Council adopted a resolution accepting and approving the Memorandum of Agreement between the University and the former Vice-Chancellor, Professor Mamokgethi Phakeng, and agreed to review the current constitution and mandate of the Investigative Panel in order to determine an appropriate form for the Panel that would enable it to consider and investigate issues of governance that have affected and are affecting the University without specifically investigating the conduct of the former Vice-Chancellor; and

Considering the legal advice Council has received;

Council hereby reviews the constitution and mandate of the Investigating Panel as set out in Council Resolution dated 15 October 2022 as follows:

1. The Panel retains the current four members (including the current Chair), with three members constituting the quorum as stated in the original terms of reference (dated 24 October 2022).
2. The Panel shall not conduct its inquiry in an adversarial fashion. Rather, it shall adopt an inquisitorial approach with the assistance of an evidence leader.
3. The purpose of the inquiry shall be primarily forward looking although, based on its findings, the Panel is authorised to recommend redress where warranted. The Panel is thus authorised to make recommendations that could help Council and the University to prevent and better address any of the failures of governance the Panel finds.
4. The scope of the inquiry shall exclude any consideration of whether the former Vice-Chancellor committed any disciplinary offence. Rather, it shall focus on the following:
 - a. The circumstances surrounding the resignation or retirement of members of the executive including DVCs, deans, directors and other employees linked to the

senior leadership, with the specific purpose of finding out whether executive relations and the failures of governance within Council, its officers and structures contributed to this;

- b. In relation to 4(a) above, the Panel is empowered to advise whether any unfairness, breaches of labour law or UCT Statutes, regulations and policies took place, whether any remedy is possible and practicable, and whether there are policy gaps that need rectifying; and
 - c. The role of Council in handling the Ombud report and subsequent reports, and whether there were any failures of governance in this regard that still need to be addressed.
- 5. The Panel shall not make any specific findings touching on the personal responsibility of the former Vice-Chancellor with regard to 4 above.
 - 6. Due to Council Resolution dated 21 February 2023 referred to in the preamble and clauses 4 and 5 above, the former Vice-Chancellor shall not be required to appear before the Panel, or to submit evidence to it.
 - 7. However, the Panel shall not disregard any relevant evidence submitted by any person touching on the conduct of the former Vice-Chancellor which is imputable to the University provided that the Panel shall treat such evidence with appropriate caution to avoid undue prejudice to the University. In order to avoid breaching the Memorandum of Agreement referred to in the preamble, the Panel shall not make specific findings concerning the personal responsibility of the former Vice-Chancellor for any wrong possibly constituting misconduct. The Panel may however make conclusions or findings pertaining to her acts and omissions taken and made in the ordinary course of employment and therefore attributable to the University.
 - 8. In admitting and considering evidence touching on the conduct of the Vice-Chancellor as referred to in 6 and 7 above, the Panel shall be directed by the need to ensure that the University accounts and takes full responsibility for all actions and omissions attributable

to it that may have had an adverse impact on the rights and interests of its employees and other members of the university community.

9. With regard to clauses 6, 7 and 8 above, the Panel shall retain the authority to decide what fairness demands under the specific circumstances presented before it.
10. The Panel shall only consider evidence and reports that are relevant to matters defined in 4 above. It shall not consider submissions of a general nature from any group or individuals unless those submissions constitute admissible evidence.
11. This Resolution takes precedence over all prior Council Resolutions pertaining to the Investigative Panel and its Terms of Reference. Prior Resolutions and Terms of Reference shall apply to the extent that they do not conflict with any term of this Resolution.

Approved by Council 11 March 2023

HEROLD GIE | ATTORNEYS

established 1894

Cliffe Dekker Hofmeyr

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Date 9 May 2023

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Dear Aadil

INDEPENDENT INVESTIGATION INTO UNIVERSITY OF CAPE TOWN GOVERNANCE

The Chairperson of the Panel has requested us to respond to your client's interlocutory application as follows:

1. Whether Council has the authority to appoint the Panel is not something the Panel can decide.
2. As to the interpretation of the Revised Terms of Reference, the Panel has done this and has determined that making findings against the Chair of Council ("CoC") is within its mandate.
3. A summary of the material facts regarding the allegations that the CoC misled Senate on the circumstances and facts surrounding the departure of Professor Lange, the other material allegations against her regarding the 2019-Ombud report, the 6 October 2022-Council meeting and the conversation between her legal representative and Prof. Hall on 23 October 2022, is included herewith. In this regard, your client is reminded of her duty to keep the information contained in the Summary confidential.
4. The CoC must submit a written statement to the Secretariat on or before close of business on FRIDAY, 12 May 2023, in which she responds fully to the allegations contained in the summary, together with any supporting documentation.

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5. The CoC will be required to present herself in person for examination by the Evidence Leaders and the Panel, on WEDNESDAY, 17 MAY 2023, at 09h30 and at a venue in Cape Town, the details of which will be provided to you.

6. Subject to her compliance with the Panel's Rules of Procedure, the CoC may have a legal representative present with her when she testifies.

Yours faithfully

HEROLD GIE

A handwritten signature in black ink, appearing to be 'A MEYER', enclosed within a large, hand-drawn oval shape.

A MEYER

SUMMARY OF FACTS

The following are a summary of the material facts regarding the allegations against the Chair of Council:

1. Ms. Ngonyama is appointed as the Chair of Council ("CoC") 1 July 2020, taking over from the former Chair, Mr Siphon Pityana, who was the CoC when the 2019-Ombud report was tabled.
2. Despite her knowledge that neither the previous CoC, nor Council itself, took any steps to act on the allegations contained in the 2019-Ombud report against Prof. Phakeng ("the VC"), she also fails to take any steps to investigate these allegations against the VC, nor does she hold the VC to account.
3. On 20 May 2021, the CoC indicates to Professor Hall ("Prof. Hall") at a meeting of Executive at Spier organized by Board of Practice that she wants to terminate Associate Professor Lange's ("A/Prof. Lange") position as DVC. Prof. Hall advises the CoC on the procedures regarding the renewal of A/Prof. Lange's contract at the end of her first term in January 2023. The strategy involving the renewal of the VC's contract and not renewing A/Prof. Lange's, was articulated here for the first time.
4. On 17 December 2021, the CoC contacts a member of the HR department at UCT to set up a meeting on 3 January 2022, which arrangement was confirmed on 2 January 2022.

5. On 3 January 2022, the CoC and the HR representative meet. At this meeting, they discuss relationship problems between the VC and A/Prof. Lange, arising from, amongst others, the 4 December 2021 Council meeting. The CoC explains that she believes A/Prof. Lange must leave as soon as possible. The CoC makes it clear that the VC is aware of her plans, stating that that the VC is "in the loop," but that she (the CoC) will be dealing with HR on the issue.

6. Later that same day, the CoC meets A/Prof. Lange and intimates that she should consider leaving. According to A/Prof. Lange, she made it clear to the CoC that she wishes to stand for a second term. The CoC indicates to her that she will not have the support of Council and that it will be difficult for her to continue in her role as DVC. The CoC tells her that it will be pointless to apply for the renewal, because she will not get appointed – *"no one will get a renewal if the Vice-Chancellor doesn't get along with them"*. A/Prof. Lange is distressed by this and contacts her lawyer who advises her to record her recollection of the conversation, which she does on 4 January 2022.

7. On 4 January 2022, Prof. Hall meets the CoC at her home. She reports to him that A/Prof. Lange "hijacked the meeting," was "aggressive" and "combative" and said she would not be able to work with the VC for another term. In response the CoC, said that, if this is her (A/Prof. Lange's) attitude, it would be difficult to continue her role as DVC. The CoC also tells Prof. Hall that she will now step back and let HR manage the issue.

8. A/Prof. Lange meets with HR on 27 January 2022. At this meeting A/Prof. Lange relates what happened at her meeting with the CoC on 3 January 2022.
9. On 31 January 2022, HR meets with A/Prof. Lange on behalf of the CoC. A/Prof. Lange is still angry and wants to renew her contract but begins to resign herself to the reality that they want her to go. HR proposes that A/Prof. Lange leaves as DVC at the end of February. A/Prof. Lange refuses and proposes that she be allowed to stay until the end of March 2022.
10. During the first three weeks in February 2022, negotiations regarding the termination agreement between HR and A/Prof. Lange continues.
11. On 22 February 2022, the CoC receives an email from HR regarding the draft termination agreement, a copy of which is sent to the CoC via email on 23 February 2022.
12. On 4 March 2022, the CoC calls A/Prof. Lange on WhatsApp to consult her about the VC's reappointment. It is a brief conversation. A/Prof. Lange mentions what she believed to be the VC's strong points but also says that the renewal must be predicated upon a better relationship with the Executive. She also says to the CoC that she is still considering lodging a grievance against the VC.
13. On 13 March 2022, Prof. Hall sends an email to HR, in which he states, amongst others, the following:

"... Not sure if Babalwa has briefed you, but she has asked me to help with the confidential settlement issue that you're working on with her, given her role as RemCom (Chair). At Babalwa's request I have a call set up with Gavin Stansfield* this Tuesday. Can we talk before then? All the best, Martin."

* The reference to Gavin Stansfield is to the lawyer who is advising the university on the terms of the contract.

14. On 14 March 2022, the CoC responds to the draft agreement in an email to HR:

"That's fine. I just want you to look at the legal parts of the agreement. I'm still happy with the terms."

15. On 15 March 2022, the CoC is briefed by HR via email on the agreement informing her that they have agreed on the projects that A/Prof. Lange will complete, and stating the following:

"... sent a final draft to Martin who was going to brief the VC at 17h30 today as VC will present the item at RemCom... she will, as per normal process send the papers to yourself and Kgethi for signoff with 2 recommendations 1) that we take the item 17 March remcom meeting as a matter of urgency and 2) that we do not circulate papers ahead of the meeting."

16. On the same day, Prof. Hall emails HR, stating amongst others, the following:

".... Will you be able to give the final version to me by about 5, so that I can prep for my briefing of Kgethi at 05:30?"

17. HR responds to the aforesaid email as follows:

"made good progress. finalised from an HR perspective and sent to Gavin earlier. We have been engaging and sent him contract documents. I'm now awaiting his version..."

And

"she will then, as per normal remcom process send to the Chair and the VC for signoff and make 2 proposal to them for approval 1) to take this as a matter of urgency at the remcom meeting on Thursday and 2) not to circulate papers beforehand."

18. Prof. Hall states further in an email as follows:

"... We've been through the contract and Kgethi understands the time line,* leave blocks, etc. She is though hesitant about two things, the timing (should we wait until after her renewal is complete?) and the principle of a payment of R1.6m given the poor performance issues...I've asked her to talk this through directly with Babalwa ahead of RemCom, which she will do (this evening, if she can get through)."

*The "timeline" issue refers to sequencing of the renewal of the VC contact and the termination of Prof.Lange's employments as DVC. The "principle of payment" refers to the concern of justifying a gratuity in the face of an allegation by the VC that the DVC had not performed.

19. HR acknowledges the email and expresses some "caution":

"Thanks for the update. The timing question is noted. On the performance issue, I'm not sure which cycle is being referred to. It will need to follow an evidenced-based approach."

and:

"... wait on feedback and approval from the Chair and the VC in alignment with the decisions on the issues that she's now raised."

20. On 16 March 2022, Prof. Hall emails HR on the VC's and the CoC's response to "the timing issue":

"Kgethi and Babalwa have agreed not to take it to RemCom and that this be initiated after the VC renewal process is complete (so early April)."

21. Regarding the VC's problem with an *ex gratia* payment to A/Prof. Lange, Prof. Hall says:

"I will let it cool for a few days and then ask KG at a briefing."

22. HR confirms this on the same day:

"So, nothing to go to RemCom now?"

23. HR further tries to explain that dealing with the *ex gratia* issue separately may create a potential risk to the University and for the conclusion of the agreement, and also cautioned the CoC about "delaying and dragging things out unnecessarily."

24. On 17 March 2022, A/Prof. Lange signs the agreement. On the same day REMCOM meets on an online platform. The CoC, the Deputy Chair of Council and the VC are among the attendees. There are two confidential issues on the Agenda, which means that no HR representative is present to record what happens when these issues are discussed. The two issues

are the renewal of the VC's contract and the termination of the DVC's contract.

25. On 18 March 2022 Prof. Hall emails HR regarding the signed agreement: "Babalwa tells me that Lis signed the agreement last night and that she wants it to go to RemCom after Senate. So, the signature must have been dependent on RemCom approval."

26. He continues suggesting that the VC has not been briefed on the latest development i.e., presumably that A/Prof. Lange signed the agreement (1062-63):

"I haven't talked to Kgethi about this yet. Did Babalwa brief you?"

27. HR responds:

"Babalwa spoke to me in preparation for RemCom. I made some changes to the agreement per discussion and secured the signature for her ahead of RemCom. am awaiting the outcome."

28. The Senate is due to consider the proposal for the VC's renewal on 22 March 2022. A clause referring to the agreement being subject to approval by REMCOM was included in the final version signed by A/Prof. Lange, as well as an exit date of 30 April 2022.

29. Prof. Hall then asks:

"So, the exit agreement did go to RemCom yesterday evening after all? Kgethi must have changed her mind."

30. On 22 March 2022, the CoC presents the motivation for the VC's renewal at the Senate meeting where she informs the Senate that "*while the challenges within the Executive team were known, ongoing work was being done to address the issue in this area and each member of the Executive had indicated that they remained committed to working with the Vice-Chancellor if she is appointed for a second term*".

31. She assures Council that where there are "*identified issues with the Vice – Chancellor's interpersonal relationships...[she]... would continue to hold [her] accountable for her part in these issues.*" After some debate, Senate votes to renew the VC's term for a further five years. The vote is as follows:

Support 142

Oppose 31

Abstain 9

32. On 28 March 2022, the VC and A/Prof. Lange meet at one of their "regular meetings" where she acknowledges the process and agreement leading to her departure. The VC indicates surprise at the document but then says that she had changed A/Prof. Lange's stepdown date to 30 April 2022, which provides further corroboration that she was aware of the agreement and amended it before it was signed by A/Prof. Lange.

33. On 14 April 2022, A/Prof. Lange meets the CoC in Sandton for a “close-off meeting” where she indicates her continued commitment to working at UCT.
34. On 19 April 2022, the VC announces A/Prof. Lange’s stepping down at an Extended Executive meeting.
35. On 20 April 2022, the VC signs the agreement.
36. On 3 May 2022, UCT makes the official announcement regarding A/Prof. Lange’s departure.
37. On 4 May 2022, at a Commerce Faculty Board meeting, the VC says, in response to a question from one its members regarding the reasons for A/Prof. Lange’s departure, that her termination was voluntary and for personal reasons, and that she had no role in this decision. In fact, she signed it a month after Lange had signed it.
38. On 10 June 2022, Prof. Moultrie, acting on his concerns, tables a motion at Senate asking questions to be answered at the following plenary meeting as to whether *“the Chair of Council was aware of A/Prof Lange’s impending departure when she addressed the Special Senate Meeting on 22 March 2022 and if so whether she had consulted with DVC Lange and the VC to establish the reasons for DVC Lange’s departure.”* And further *“whether the Chair is able to provide clarity on the reasons for the early resignation of*

A/Prof Lange from the position of DVC... and does the Chair of Council know of any further instability in the senior leadership structures of the University."

39. In her written response to these questions on 23 September 2022, the CoC states, amongst others, that A/Prof. Lange indicated to her that she did not want to be considered for a second term; that her reasons were both personal and confidential; and that, at the time when she addressed the Senate on 22 March 2022, *"the matter was still with DVC Lange and the Vice-Chancellor"*.
40. On 29 September 2022, A/Prof. Lange sends a letter addressed to the Chairperson of Senate, the Chairperson of Council, the proposer of the 10 June Senate motion, and the UCT Senate asserting that the CoC's response is a misrepresentation.
41. On 30 September 2022, the Senate debates the issue and resolves to establish a group of 10 members to investigate the facts and to report back to a Special Senate meeting. The outcome of the meeting was widely reported in the media.
42. On 3 October 2022, the CoC addresses a letter to the Senate, questioning its authority to launch an investigative process.
43. On 6 October 2022, a Special Council meeting convened to discuss the outcome of the Senate meeting. The CoC recuses herself as Chair but remains for the discussion and the subsequent vote despite her being

conflicted on the issue. The Deputy Chair of Council takes over the Chair, despite being alleged to also be conflicted because she is Chair of the University Human Resources Committee. The meeting is required to decide on whether to establish a sub-committee or an independent panel to investigate the facts. 28 members cast their ballots and each positions garners 14 votes. The Deputy Chair of Council casts a deciding vote in favour of the formation of a sub-committee.

44. Later that evening, at about 23h00, a statement is issued to the University Community in the name of the Deputy Chair of Council in which she states that the CoC met with A/Prof. Lange on 3 January 2022 *"as a continuation of her informal and confidential engagement with stakeholders of the university on the re-appointment of the Vice-Chancellor. During this meeting, when she (the CoC) informed Associate Professor Lange about the possibility that the Vice-Chancellor's term of office would be renewed, Associate Professor Lis Lange became abrasive, aggressive and abusive, making clear her own ambition to succeed Professor Phakeng as the Vice-Chancellor."* The statement also adds an untruth that there was consensus in the meeting regarding the appointment of a sub-committee.
45. Contrary to established practice where Council's statements to the University are only issued once the Registrar ensures that it is aligned with the minute of the meeting, this statement was issued in haste without the Registrar having confirmed its accuracy.

46. On 7 October 2022, 14 Council members sign and issue a statement distancing themselves from the communiqué issued the day before.
47. On 15 October 2022, a Special Council meeting rescinds its decision of 6 October to appoint a sub-committee and votes to establish an independent investigation into recent developments.
48. On 23 October 2022, Mr. Aadil Patel of Cliffe Dekker Hofmeyr, calls Prof. Hall at the instance of his client, the CoC, ostensibly to discuss the timeline regarding the processes leading to A/Prof. Lange's departure. However, Mr. Patel says to Prof Hall that he is not interested in the timeline, but that the strategic issue at play is that someone must be sacrificed to safeguard the CoC's reputation. Prof. Hall believes this to be a reference to the VC. Prof. Hall makes a contemporaneous note of the discussion.
49. On 26 October 2022, a Special Senate meeting considers a report from its sub-committee of 10 members and approves the appointment of an independent investigation.
50. On 7 December 2022, the CoC announces that VC will be put on medical leave immediately and that an acting VC will be appointed. At the time, the VC is undergoing "routine tests" in hospital. According to Prof. Hall, the VC is not consulted about this decision and the relationship between her and the CoC begins to sour.
51. During December 2022 to January 2023, the CoC continues to push the VC to take a settlement and leave, threatening to suspend her for disciplinary

reasons. According to Prof. Hall, this was part of the strategy mapped out by Mr. Patel on 23 October 2022.