IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO.: 1731/ 2020

In the application of:

DEMOCRACY IN ACTION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS	Respondents
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First *Amicus Curiae*
CORRUPTION WATCH	Second *Amicus Curiae*

NOTE FOR ORAL ARGUMENT ON BEHALF OF *AMICI CURIAE*

---

1. In this short note we address four points:

    1.1. Comparing and contrasting the Public Protector to a judge;

    1.2. Examining the accountability of judges and whether judgments overturned on appeal may warrant removal on the grounds of misconduct, incompetence or incompetence;

1.3. Addressing why the complaints about the Public Protector must be dealt with by Parliament in a public manner and not confidentially; and

1.4. Identifying the eight features of removal processes internationally based on comparative research.

IS THE PUBLIC PROTECTOR AKIN TO A JUDGE?

2. Both the Public Protector and DIA have claimed that the position of the Public Protector is akin to that of a judge. While there are elements of the Public Protector's powers and functions that are similar to a judge, they are unique in many respects. As a result, in *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at para 45, the SCA considered comparing the Public Protector to a judge to be *"an inaccurate comparator*". The point is not to merely compare the Public Protector to a judge, but to identify the principles that support accountability while ensuring the independence and effectiveness of this important institution.

3. Professors Govender and Swanepoel agree with the finding of the SCA and in their article "*The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of SABC v DA and EFF v Speaker of the National Assembly 2016 3 SA 580 (CC)"* in PER 2020 (Vol 23), at page 15, they state:

"*As the [Public Protector] plays an investigative and adjudicative role, it performs functions that are materially and constitutionally different from those performed in a court of law. In terms of the separation of powers doctrine, officers performing investigative functions cannot simultaneously be classified as court officials. … some Chapter 9 institutions that are empowered to take decisions straddle the continuum between the bureaucracy and the judiciary. The [Public Protector], like the SAHRC, is a structure of government. Neither body, however, are members of the bureaucracy, nor can they be described as courts."*

4. In our heads of argument at paragraph 52 we point out in addition that:

"The most compelling reason why the Public Protector is not akin to a judge of the High Court is however because the Constitution and the Public Protector Act expressly provides that the Public Protector is directly accountable to the NA and must report to it. How that is to occur is at the heart of this case".

DOES THE "DECISIONAL INDEPENDENCE" OF THE PUBLIC PROTECTOR IMMUNISE HER FROM ACCOUNTABILITY OR TO ANSWER FOR ALLEGATIONS OF MISCONDUCT, INCOMPETENCE OR INCAPACITY?

5. The Public Protector and the DIA have proffered the argument that the independence of the Public Protector contained in section 181 of the Constitution guarantees her 'decisional independence' and as such she may not be removed on the grounds of misconduct, incompetence or incapacity on the basis of an error of law as found by a court in a judicial review of one of her reports. In support of this contention, they argue that:

5.1. if the incumbent can be removed on the basis of an erroneous finding in a report, this would undermine her independence; and that

5.2. judges may not be removed on the basis of their judgments being overturned on appeal.

6. While we wholeheartedly agree that the Constitution protects the independence both judges and the Public Protector, these two contentions are incorrect.

7. Firstly, if the contentions of both applicants were true, it would render removal on the basis of misconduct, incapacity and incompetence nugatory or perfunctory, and accountability would be reserved for her administrative

duties only. This would allow the Public Protector a free hand to commit misconduct or act in a dishonest or biased manner during an investigation or when making a finding -- notwithstanding the prejudice to both her office and the public at large. Successful judicial review only addresses one dimension of accountability. The Constitution however identifies three grounds on which to hold the Public Protector accountable and all three grounds must be available within a Parliamentary process to ensure that accountability.

8. Similarly, when the grounds of incapacity or incompetence are considered, the specialised functions of the Public Protector and the enormous power which the office-bearer wields, demand that the incumbent possess a high degree of both skill and competence. Section 1A(3) of the *Public Protector Act* thus requires that this person must be a South African citizen who is a fit and proper person to hold such office, and who:

> "*(a) is a Judge of a High Court; or*
> *(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or*
> *(c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or*
> *(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or (e) has, for a cumulative period of at least 10 years, been a member of Parliament; or*
> *(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.*"

9. It is important to distinguish between the <u>performance</u> of the Public Protector as reflected in the reports produced that are scrutinised in judicial

review proceedings and her conduct when in office. The former is what is evaluated in judicial review proceedings, and that may be analogous to an appeal of a lower court's decision. However, the latter is what has given rise to the most concerning findings by the courts.

10. It is concerning that our courts have not simply set aside the decisions of the Public Protector in a routine exercise of judicial review, but have made scathing findings against her conduct of investigations and reasoning in her reports which, those courts found, evidence bias, dishonesty/misrepresentation of the facts or law, and/or incompetence. It is significant to note the escalating intensity of the findings and criticisms made against the Public Protector by our courts.

11. The judgments we cite in our heads of argument at paragraphs 65 to 68 demonstrate the obvious harm to the credibility, public confidence in and consequent effectiveness of the Office of the Public Protector of this pattern of findings. Unanswered, the public's faith in the Public Protector will dwindle and erode. The NA must act to provide the Public Protector with a fair and meaningful opportunity to address these troubling findings to dispel these doubts so that she can continue to serve the public with their trust.

12. Furthermore, even if the Public Protector is held to be akin to a judge, even judges may be removed on the basis of misconduct, incompetence or

incapacity, as provided for in section 14(4) of the Judicial Service Commission Act 9 of 1994:

> *"(a) Incapacity giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177(1)(a) of the Constitution;*
>
> *(b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to in section 12, including any failure to comply with any regulation referred to in section 13(5);*
>
> *(c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowances in contravention of section 11;*
>
> *(d) Any wilful or grossly negligent failure to comply with any remedial step, contemplated in section 17(8), imposed in terms of this Act; and*
>
> *(e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts."*

13. In this regard, the DOHA Declaration on Promoting a Culture of Lawfulness notes that judicial misconduct breaks down the very fibre of what is necessary for a functional judiciary: citizens who believe their judges are fair and impartial. The judiciary cannot exist without the trust and confidence of the people. Judges must, therefore, be accountable to legal and ethical standards. In holding them accountable for their behaviour, judicial conduct review must be performed without invading the independence of judicial decision-making.

14. With regard to the Doha Declaration, it has been noted that:

> "*More than any other branch of government, the judiciary is built on a foundation of public faith - judges do not command armies or police forces, they do not have the power of the purse to fund initiatives and they do not pass legislation. Instead, they make rulings on the law. Rulings that the people must believe came from competent, lawful and independent judicial officers.*
>
> *Judicial misconduct comes in many forms and ethical standards address problematic actions, omissions and relationships that deplete public confidence. Common complaints of ethical misconduct include improper demeanour; failure to properly disqualify when the judge has a conflict of interest; engaging in* ex parte *communication and failure to execute their judicial duties in a timely fashion. Behaviour outside of the courtroom can also be at issue. Judicial conduct oversight should not attempt to regulate purely personal aspects of a judge's life. However, a judge can commit misconduct by engaging in personal behaviour that calls their judicial integrity into question. This is true even if the same behaviour would merely be considered unwise for the average citizen. As the saying goes, the robe magnifies the conduct."*[1]

15. Similarly, the Bangalore Principles of Judicial Conduct support the idea that a judge may be removed for misconduct, incompetence or incapacity. In this regard:

    15.1. Item 14 provides that "*A judge must consider it his or her duty not only to observe high standards of conduct, but also to participate in collectively establishing, maintaining and upholding those standards. Even one instance of judicial misconduct may irreparably damage the moral authority of the court*."'

    15.2. Item 19 provides that "*While the principles of judicial conduct are designed to bind judges, they do not intend for every alleged transgression to result in disciplinary action. Not every failure of a judge to conform to the principles will amount to misconduct (or misbehaviour). <u>Whether disciplinary action is appropriate or not may depend on other factors, such as the seriousness of the</u>*

[1] https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html

transgression, whether or not there is a pattern of improper activity, and the effect of the improper activity on others and on the judicial system as a whole."

16. For the aforementioned reasons, the cloud that hangs over the Office of the Public Protector must be dealt with expeditiously by Parliament. This process may well vindicate the incumbent or it may find her wanting – in either case, it would restore the status and dignity of this important office.

UBUNTU, CONFIDENTIALITY AND WHY THE COMPLAINTS ABOUT THE PUBLIC PROTECTOR MUST BE DEALT WITH BY PARLIAMENT IN A PUBLIC, TRANSPARENT MANNER

17. Both the Public Protector and DIA have called for the initial complaint to the National Assembly in the removal process to be dealt with confidentiality, and in the spirit of *Ubuntu* and out of concerns for her dignity to afford the Public Protector a hearing before it is made public.

18. Section 59(1) of the Constitution, however, requires that "*The National Assembly must… –*

    (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

    (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public."

19. Section 42 then provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

20. Section 58(1) further provides that members of the National Assembly, have freedom of speech in the Assembly and in its committees, subject to its rules and orders.

21. Given that the Public Protector is accountable to the National Assembly, any member of the NA, including from a single party, can lodge a complaint about her.

22. This is subject to the NA's Rules which balance interests and protect incumbents such as the Public Protector from frivolous or vexatious complaints. In this regard rule 88 of the NA Rules provides as follows:

> "*No member may reflect upon the competence or integrity of a judge of a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in Section 194 of the Constitution, or any other holder of an office (other than a member of the government) whose removal from such office is dependent upon a decision of the House, except upon a separate substantive motion in the House presenting clearly formulated and properly substantiated charges which, if true, would in the opinion of the Speaker prima facie warrant such a decision*."

23. Where an allegation against an incumbent in not made via a separate substantive motion, this will have to be withdraw. In *Lekota and another v Speaker of the National Assembly and another* 2015 (4) SA 133 (WCC), this Court held that the following ruling cited at paragraph 10 by the Speaker was valid:

> "*Hon. members, as regards the duty of members towards their fellow members, members should appreciate that their freedom of speech must, of necessity, be subject to the principle that they may not impute improper or unworthy motives or conduct on the part of other members, or cast personal reflections on their integrity, or verbally abuse them in any other way . . . This is not to say that if a member has good reason to believe that another member may have acted improperly, such matter should not be brought to the attention of the House. However, there are proper ways of doing that. In such circumstances, it is sound practice to require that a member does this by way of a separate, clearly formulated and properly motivated substantive motion, which requires a distinct decision of the House . . . Hon. members as we all know, when the President takes office,*

he takes the oath of office, in which he commits, amongst other things, to obey, observe, uphold and maintain the Constitution. As members will be aware, one of the grounds for removal of the President, in terms of section 89 of the Constitution, is a serious violation of the Constitution or the law. Therefore, to accuse the President of the violation of the oath of office is a serious charge, indeed which, if proven correct, could have serious consequences. The remarks that the President has violated the oath of office are, in no doubt, a reflection on the integrity and competence of the President. Except upon a properly motivated, substantive motion, as indicated above, such allegation cannot be allowed in this House. Hon. Lekota, your remarks that the President has violated his oath of office are out of order, and I now ask you to please withdraw them."

24. The NA Rules therefore contain a protection mechanism against baseless complaints against the leaders of Chapter 9 institutions.

25. Section 9(1) of the Public Protector Act in any event protects the dignity of the Public Protector by providing that "*No person shall* -

    (a) insult the Public Protector or Deputy Public Protector;

    (b) in connection with an investigation or do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court."

26. *In Gordhan v the Public Protector and Others* 2020 JDR 2741 (GP) the full court held that section 9(1) protected the Public Protector from defamation and from contempt undermining of the dignity of the office.

THE EIGHT COMMON FEATURES OF REMOVAL PROCESSES INTERNATIONALLY

27. For the assistance of the court, we set out below the eight common features of removal processes that we could identify through comparative research.

28. First, the appointing body must remove the office bearer –

    28.1. This ensures credibility and accountability in that the body that empowered the office, exercises oversight over it and ensures the public's protection when needed from an incumbent who is failing to fulfil their mandate on one of the available grounds for removal.

29. Second, that there are limited and identified grounds for removal –

    29.1. These routinely include the three grounds in South Africa, incapacity, incompetence and misconduct, but also include personal bankruptcy or conviction on a crime of moral turpitude. These additional two grounds appear to arise due to the risk of influence or corruption in the case of personal bankruptcy and character or dishonesty concerns in the case of crimes such as fraud.

30. Third, in jurisdictions where no grounds are specified, removal occurs following a motion of no confidence, which can even be on simple majority.

31. Fourth, in these jurisdictions, there are limitations on the frequency with which a motion of no confidence can be introduced for debate and consideration – this to protect the independence of the ombuds office.

32. Fifth, an opportunity to respond to the allegations –

    32.1. Though this may even be a single opportunity, and even only in written submissions.

33. Sixth, our research was silent on the question of legal representation –

    33.1. It appears to neither be prohibited or permitted, though none of the jurisdictions researched provided for mimicry of an adversarial trial-like proceeding.

34. It appears that the objective is to provide an opportunity for the individual to respond, thereby enabling the public's representatives to satisfy themselves that they retain confidence in that person's ability to continue to perform the onerous tasks of the ombud office.

35. Seventh, many jurisdictions required enhanced majority before removal –

35.1. This affords some protection from divisive party-political circumstances of removal.

36. Finally, open debate in a plenary session was a common feature of these other jurisdictions' procedures.

M M LE ROUX SC

M R VASSEN

Counsel for the *Amici Curiae*

Chambers, Sandton and Cape Town

11 June 2021