IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 2107/2020

In the matter between:

THE PUBLIC PROTECTOR	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Third Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	Fourth Respondent
THE COMMISSION FOR GENDER EQUALITY	Fifth Respondent
THE AUDITOR-GENERAL OF SOUTH AFRICA	Sixth Respondent
THE INDEPENDENT ELECTORAL COMMISSION	Seventh Respondent
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Eighth Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	9th to 22nd Second Respondent

SIXTEENTH RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The African Transformation Movement ("the ATM") joins the applicant in challenging the constitutionality of the New Rules of the National Assembly ("the impugned rules").

2. Initially, the ATM joined in with the applicant in seeking to interdict the First Respondent from taking any further steps in the implementation of the process envisaged in section 194 of the Constitution. That application was dismissed, the appeal processes thereabout are pending.

3. This Part B is the substantive review and challenge of the impugned rules on the basis that they constitute a breach of the Constitution and Parliament's own rules. It is submitted also that the impugned rules are a flagrant disregard of the constitutional functions of the Public Protector.

THE ATM

4. The ATM is a faith-based social democratic peace political party represented in the National Assembly.

5. The impugned rules are designed to govern the removal of heads of Chapter 9 institutions. However, in our respectful submission, they are in reality specifically designed to remove the current Public Protector and are a response to the complaint by the Democratic Alliance against the incumbent Public Protector, Adv Busisiwe Mkhwebane.

THE SCHEME OF THESE SUBMISSIONS

6. The scheme of these submissions is as follows:

6.1. First, we set out the essential background and history preceding the adoption of the impugned rules;

6.2. Second, we set out the relevant legislative framework governing the work of the Public Protector;

6.3. Third, we consider the relevant legal principles on the basis of which the ATM challenges the constitutionality of the impugned rules.

THE RELEVANT BACKGROUND AND THE GENESIS OF THE RULES PROCESS

7. It is important to state that this process was preceded by an onslaught on the integrity and competence of the Public Protector. For months, and for as long as the Public Protector started investigating the President of the Republic of South

Africa, attacks on her person and office were launched from various parties, especially the Democratic Alliance.

8. The ATM was and still is concerned that there is a coalition of forces hell bent on shielding the Executive from scrutiny. The entire complaint by the DA is inspired by the reports of the Public Protector that sought to place under scrutiny the Reserve Bank as well as the President, in respect of which certain powerful communities and interest groups were vehemently opposed.

9. The ATM is also concerned that the DA's complaint is selective in its approach in that it focuses on cases in which the Public Protector has been criticised or had her reports set aside for one legal reason or the other. It is submitted that this approach fails to take into account all the reports of the Public Protector in their proper context.

10. The ATM has been concerned about the comments made by several members of the DA Caucus about matters pertaining to the Public Protector. It is submitted that some of the comments are prejudicial and in breach of Rule 88 of the General Rules of the National Assembly.

11. On 5 February 2020, the ATM addressed a letter to the Speaker of the National Assembly in which it requested the extension of times for the submission of nominations for the independent panel[1].

[1] Annexure VZ 1, Supplementary affidavit

12. On 7 February 2020, the Secretary of the National Assembly addressed a letter to me in which it was stated that **"The Speaker has accordingly extended the period for the submission of nominations to Wednesday, 12 February 2020 no later than 16:00."**[2]

13. The ATM then requested an extension of two months so that we could make a meaningful contribution in the nomination of the independent panel. However, the extension that was granted was for 6 days, which, in ATM's view was simply inadequate given the weighty issues involved in the removal of a Public Protector.

14. The ATM viewed this as the clearest indication that the Speaker wanted the process to be done as swiftly as possible regardless of the negative precedent that will be set.

15. The ATM expressed its concern about the undue haste of the Speaker to carry out the removal process in spite of the pending litigation from which all parties, including the Speaker, will surely benefit, irrespective of the outcome of the said litigation. This has not received any favourable response from the Speaker. The concerns are reflected in the media statement issued on 8 February 2020[3].

[2] Annexure VZ 2, Supplementary affidavit

[3] See Annexure VZ 3, Supplementary affidavit

16. Rule 89 prohibits the National Assembly from deliberating on matters that are before a court. It is common cause that the legality of the rules is pending before our courts. Accordingly, in terms of rule 89, the National Assembly may not deliberate on the removal of the Public Protector. It is common cause that the Speaker is determined to continue with the process of removal despite the pending case on the legality of the rules.

17. The rules have been developed as a response to the complaint of the DA, which itself is not influenced by the provisions of section 194 (1) (a) of the Constitution but influenced by the fact that DA has never supported the appointment of the current Public Protector from the beginning. The notice of motion of the DA in paragraph 3 makes it clear that DA had the problem with the appointment of the current Public Protector from the beginning. I attach hereto as Annexure **"VZ 4"** a copy of the notice of motion of the DA.

18. The ATM is also concerned that the Public Protector may well be subjected to a suspension by the President, who himself was a subject of investigation by the Public Protector. It is a fact that the Public protector made adverse findings against the President in respect of funding he received for his internal ANC campaign. Clearly, this renders the President conflicted to be the one to suspend the Public Protector.

19. In our respectful submission, this application should therefore be granted on the following basis:

19.1. First, the deliberations by the National Assembly of the complaint against the Public Protector by the Democratic Alliance would entail that the members are deliberating on a matter that is pending before a court of law, an act that would fly in the face Rule 89 of the National Assembly Rules;

19.2. Second, the Public Protector and other heads of Chapter 9 institutions legitimately expected the Speaker to notify or consult with them when dealing with the ground rules of a process that not only changes their conditions of work but seek to expedite their removal.

20. We submit that the Public Protector, like other heads of Chapter 9 institutions had a **legitimate expectation** that the process of developing the rules for their removal would commence with or at least include consultations with her in order for her to comment on a process that will most certainly have adverse effects on her employment.

21. Clearly, the impugned rules are directed at her as they are referred to as **"Removal from Office of a holder of a public office in Institutions Supporting Constitutional Democracy"**.

22. It is submitted that the National Assembly's failure to afford the Public Protector and other heads of Chapter 9 institutions an opportunity to be heard or to comment on the rules constitutes a breach of their constitutionally enshrined rights to a fair administrative process and human dignity.

23. By reason of the said unjustified infringement, we submit that by appointing heads of Chapter 9 institutions on a set of conditions that existed at the time when they were appointed, a legitimate expectation was created that when new rules regarding their removal are established, they would be notified or consulted as such rules would adversely affect them.

24. A legitimate expectation arises in the following circumstances:

24.1. The representation underlying the expectation must be clear, unambiguous and without qualification.[4] Clearly, the procedural fairness principles dictate that rules and regulations that may adversely affect certain parties must be adopted after consultations with such affected parties;

24.2. The expectation must be reasonable. We submit that it is a reasonable expectation that as and when the National Assembly develop the rules to remove the incumber heads of Chapter 9 institutions, such incumbent heads, like the Public Protector, would be consulted. **In Administrator, Transvaal v Traub** the following was said in this regard;

> **"The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at length in the *Council of Civil Service Unions* case…. The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance:**

[4] See: De Smith, Woolf and Jowell: [Judicial review of Administrative Action 5th Edition at 425 para 8-55

'But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of private law…"[5]

24.3. The representation must have been induced by the decision-maker. In **Attorney -General of Hong Kong, quoting Reg. v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B 299** the following was held:

"the corporation were not at liberty to disregard their undertaking [not to increase the number without holding an inquiry]. They were bound by it so long as it was not in conflict with their statutory duty. It is said that a corporation cannot contract itself out of its statutory duties. In Birkdale District Electric Supply Co. Ltd v Southport Corporation [1926] A.C 355 Lord Birkenhead said, a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties….But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it."[6]

25. It is submitted that each of the above factors is present in respect of this application. Accordingly, the Public `protector had a legitimate expectation that she would be consulted before the New Rules are adopted and implemented.

[5] Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731

[6] Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 (PC) at 637-638

26. The facts of this case and the ongoing attacks on the Public Protector demonstrate quite amply that the desire and intent to remove her is there. The ATM submits that it cannot be disputed that this imminent removal is related to some of her investigations.

THE RELEVANT CONSTITUTIONAL FRAMEWORK

27. The Office of the Public Protector is established in terms of Section 181 of the Constitution. In relevant parts, the Constitution guarantees the independence of the Public Protector and other Chapter 9 institutions.

28. Section 181 (2) provides that:

> **"These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."**

29. Section 181 (3) provides that:

> **"Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."**

30. Section 181 (4) provides that:

> **"No person or organ of state may interfere with the functioning of these institutions."**

31. The most important provision for present purposes though is section 194 of the Constitution, which provides for the removal of the Public Protector from Office by the National Assembly. In the relevant part, the section states the grounds upon which the National Assembly may take a resolution to remove the Public Protector or Auditor General. Section 194 provides as follows:

> **"194 Removal from Office**
>
> **(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on-**
>
> **(a) The ground of misconduct, incapacity or incompetence;**
>
> **(b) A finding to that effect by a committee of the National Assembly; and**
>
> **(c) The adoption by the Assembly of a resolution calling for that person's removal from office.**
>
> **(2) A resolution of the National Assembly concerning the removal from office of-**
>
> **(a) The Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or**
>
> **(b) …..**
>
> **(3) The President-**
>
> **(a) May suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and**
>
> **(b) Must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal."**

32. Clearly, the National Assembly is constitutionally empowered, and duty bound to make the rules and design the process by which it will effect this constitutional function. It is inherent in the process itself that it must be fair, transparent and just. This is so because the process is, by definition, punitive.

33. Indeed, our courts have reiterated the importance of the Office of the Public Protector in our nascent democracy. It follows that as political parties, we have a duty to protect the Office of the Public Protector from the whims of the Executive and the incumbent repositories of public power who may, from time to time be unhappy with being investigated by the Public Protector.

34. In the case **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 CC**, the Court, in relevant parts, held as follows:

> **"[49] Like other Chapter Nine institutions, the office of the Public Protector was created to "strengthen constitutional democracy in the Republic" … To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice…I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decision it takes is at the mercy of those against whom they are made. It is also doubtful the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, finding and remedial actions taken, would ever make any sense if the Public Protector's powers or decisions were meant to be inconsequential. The constitutional**

safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so."

"[52]The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance."

"[53] Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental "embarrassment" and censure. This is a necessary service because State resources belong to the public, as does State power. The repositories of these resources and power are to use them, on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this Court said in the Certification case:

"[M]embers of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action."

"[54] In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real. Within the context of breathing life into the remedial powers of the Public Protector, she must have the

resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy."

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

"[58] The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take appropriate remedial action. Section 182(1) and (2) recognises the pre-existing national legislation which does regulate these powers and confer additional powers and functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution. In any event section 182(1) alludes to national legislation that "regulates" the Public Protector's three-dimensional powers."

35. The General Rules of the National Assembly also provide for the conduct of members of the National Assembly and the decorum they should uphold in their deliberations.

36. Rule 88, which deals with **"Reflections upon judges and certain other holders of public office"**, expressly provides that:

"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."

37. Rule 89 is more relevant for the contentions of the ATM in supporting the contentions of the Public Protector for an interdict. It provides expressly that;

> **"No member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending."**

38. We submit that the current rules, properly interpreted, could never have anticipated that the Public Protector was not entitled to prior notification about the content of the complaint and the decision to approve it. The fact that she learnt about these issues for the first time in the media is clearly unlawful. The refusal by the Speaker to furnish the Public Protector with reasons for the Speaker's approval decision is just further proof of an unlawful process thus far.

NO *AUDI* GRANTED BEFORE RULES WERE APPROVED

39. The New Rules titled "**Removal from Office of a holder of a public office in Institutions Supporting Constitutional Democracy**" by the National Assembly are unlawful and were adopted without granting the Public Protector an opportunity to make representations as a party to be adversely affected by the New Rules.

40. The *audi* doctrine is a trite principle of administrative law and the Speaker's failure to grant the Public Protector an opportunity to be heard constitutes procedural unfairness. It is indeed common cause that no such opportunity was given to the Public Protector or any other head of a chapter nine institution.

41. Both PAJA[7] and the common law provide for the granting of the opportunity to be heard. Procedural fairness is an important component of administrative justice and one of the mechanisms of ensuring fairness is afforded to those affected by administrative action an opportunity to be heard.[8]

REFUSAL TO FURNISH REASONS

42. The Public Protector sought reasons from Speaker on her decision to approve the impugned Rules. The Speaker refused to furnish her with reasons and this on its own is procedurally flawed, irrational and unlawful. Accordingly, the Speaker's conduct is inconsistent with the Constitution and therefore subject to be reviewed and side.

RETROSPECTIVITY OF NEW RULES

43. It could never have been in the contemplation of the political parties, including the ATM, that the rules would operate retrospectively. It was certainly never the intention of the ATM that the rules would apply retrospectively. The retrospective

[7] Section 3 of PAJA
[8] Janse Van Rensburg NO v Minister of Trade and Industry No 2001 (1) SA 29 (CC); De Lange v Smuts NO 1998 (3) SA 785 (CC) para 131

implementation of the rules by the Speaker constitutes conduct inconsistent with the Constitution and is accordingly invalid.

44. The rule against the retrospective application of law is well-established in our law and is widely relied on in statutory and constitutional interpretation.[9] It has been held that retrospective interference with vested rights or the creation of new obligations or the imposition of new duties by the legislature is not likely assumed.[10]

45. The basis of the presumption is considerations of fairness, which dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.[11]

46. In the case of Minister of Safety and Security v Molutsi & Another 1996 (4) SA 72 (A) at par 88, Marais JA held that the 1993 Constitution appears **"to enjoin an approach to interpretation of statutes which would be mindful of society's distate for retrospective legislation and which would be characterised by a reluctance to accept that accrued and vested rights are intended to be retroactively set at nought unless the legislation in question makes that plain."**

[9] DVB Behuising (Pty) Ltd v North West Provincial Government 2000 (4) BCLR 347 (CC) at par 65; see also S v Mhlungu 1995 (7) BCLR 793 (CC) at par 37 and 38 (majority judgment) and par 66.
[10] Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission; Transnet Ltd (Autonet Division) v Chairman Transport Commission 1999 (4) SA 1 (SCA) par 12
[11] National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 (SCA) par 36; Gardener v Whitaker 1995 (2) SA 672 (E) 672 where Froneman J states that '[t]he underlying rationale for the presumption against retrospectivity is that it seeks to prevent injustice being done to an individual'

47. In the case of S v Mhlungu, Mohamed J held that the presumption against retrospectivity seeks to protect individuals from an invasion of rights which might have occurred in litigation; it is not intended to exclude the benefits of rights sanctioned by new legislation.

48. It follows on the basis of this principle of law against the retrospective application of legislation that unless it is justified by reference to the available exceptions, the attempts to impeach the Public Protector on the basis of the new rules is both wrong, unlawful and unfair.

CONCLUSION

49. In the light of the above, we submit that a case has been made for the setting aside of the impugned rules.

M SIKHAKHANE SC

ADV N MOTSEPE

PABASA SANDTON

06 December 2020