COURT ADDRESS: DEMOCRACY IN ACTION

A. INTRODUCTION

1. For purposes of this address, we confine ourselves to three points:

    1.1. Subsidiarity: the process followed by the Speaker and the National Assembly for the removal from office of the Public Protector, the Auditor-General and a member of the Commissions established by Chapter 9 of the Constitution is in breach of the principle of subsidiarity;

    1.2. Legislative Constitutional Invalidity: each of the five statutes[1] regulating Chapter 9 Institutions is unconstitutional and invalid for failure to provide for appropriate circumstances under which the Public Protector, the Auditor-General and a member of the Commissions established by Chapter 9 of the Constitution are to be removed from office;

    1.3. New Rules Constitutional Invalidity: the New Rules adopted by the National Assembly for the removal of the Public Protector, the Auditor-General and a member of the Commissions established by Chapter 9 of the Constitution are unconstitutional for contravening the provisions of sections 181(3) and 194 of the Constitution.

2. We do not abandon any of the other points we've addressed in our written submissions. We stand by them. We seek only to avoid covering the same ground already covered, to a significant extent, by Counsel for the Public Protector.

3. The bases for the challenge against the New Rules are:

    3.1. Parliament has no power to develop rules, without first passing legislation to that effect, for the removal from office of the Public Protector, the Auditor-General and members of the Commissions established by Chapter 9 of the Constitution.
    3.2. Parliament has no power to constitute a committee comprising non-MPs to investigate a *prima facie* basis for removal from office of the Public Protector, the Auditor-General and members of the Commissions established by Chapter 9 of the Constitution (Record 579 para 38.5; Record 77 para 126).
    3.3. It is impermissible and undesirable, and therefore an abrogation of the dignity, effectiveness, independence and impartiality of the Public Protector, the Auditor-General and members of the Commissions established by Chapter 9 of the Constitution, to publish complaints against them at the initial stage of the removal process, as the New Rules do (Record 578 para 38.4). (Ms Jiba)
    3.4. The constitutional significance of the Public Protector's decisional independence (like that of Judges) is paramount to the effectiveness of the office, as is that of the other Chapter 9 institutions (Record 52 para 81; 54-61 paras 83-93). (Ms Jiba)

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1 The five statutes in question are: Public Protector Act, 23 of 1994; Public Audit Act, 25 of 2004; South African Human Rights Commission Act, 40 of 2013; Commission for Gender Equality Act, 39 of 1996; Commission for Promotion of the Rights of Cultural, Religious and Linguistic Communities Act, 19 of 2002

4. Counsel for the Public Protector has already addressed you on the issue of intolerable conflicts of interest in the removal process, *audi alteram partem* in the initial stages of the removal process, impermissible retrospective application of the New Rules. We have dealt with those issues in our written submissions and we shall not traverse them again here.

5. We shall deal with other issues – including jurisdiction, authority and standing – in reply should the respondents still persist in them. Frankly, we submit that these are no more than a display of a predilection for technical niceties, just to non-suit a litigant that is proving to be an inconvenience to the grand plan the realization of which may be regarded by those who are complicit in it as a *fait accompli*.

6. But before we advance oral argument on the merits of *Democracy in Action*'s case, the following needs to be said.

B. CAVEAT

7. A French social psychologist, Gustave Le Bon (1841 – 1931) whose seminal work, *La Psychologie des Foules* (1895), the English translation of which was first published in 1896 under the title, *The Crowd: A Study of the Popular Mind*, is generally regarded as a propaganda artist. His works have been consulted by numerous governments and corporations around the world on how to influence group psychology by manipulating the content of the information that the public consumes. This is a phenomenon colloquially known as propaganda.

8. About the power to the human psyche of the repetition of an idea or statement, Le Bon wrote:[2]

   8.1 *"Affirmation, however, has no real influence unless it be constantly repeated, and so far as possible in the same terms . . ."*.

   8.2 *"The thing affirmed comes by repetition to fix itself in the mind in such a way that it is accepted in the end as a demonstrated truth. . ."*

   8.3 *"This power [of repetition] is due to the fact that the repeated statement is embedded in the long run in those profound regions of our unconscious selves in which the motives of our actions are forged. At the end of a certain time we have forgotten who is the author of the repeated assertion, and we finish by believing it. . ."*.

   8.4 *"If we always read in the same papers that A is an arrant scamp and B a most honest man we finish by being convinced that this is the truth, unless, indeed, we are given to reading another paper of the contrary opinion, in which the two qualifications are reversed. . ."*.

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[2] See *The Crowd: A Study of the Popular Mind* (Boomer Books, Waking Lion Press, 2006 ed), ch 7: *"The Leaders of Crowds and Their Means of Persuasion"*, pp 98-99

8.5 *"When an affirmation has been sufficiently repeated and there is unanimity in this repetition . . . what is called a current of opinion is formed and the powerful mechanism of contagion intervenes. . ."*.

9. The dominant and oft-repeated narrative in the public media in recent times is that the Public Protector is incompetent, dishonest, mendacious and must go. It is a narrative that has taken root in popular psyche by constant repetition fueled by the main opposition party, the media and some of the very politicians (including the Speaker and the Executive) that have been and continue to be in the Public Protector's accountability crosshairs.

10. The narrative has also received authoritative status from the bench, including deeply wounding observations of the Constitutional Court about the character (not just the work) of the Public Protector, all based on procedural lapses that would ordinarily attract little more than the setting aside of the decision on review and some mild judicial rebuke aimed not at the character of the person but at the quality of the work.

11. Faced with all these factors, it is not hard to imagine why a judge hearing a case for the removal of this Public Protector from office may already have been swayed (unconsciously or subconsciously) by the pervasive public narrative. It is a human thing to do.

12. Our task is to seek first to persuade this court to judge this case not on the basis of what may lie in the subconscious mind that may have been the creation of repeated media caricatures of the Public Protector, but on the basis of the merits of legal argument presented in this court.

13. We stress: this case is not about the character of the Public Protector or her competence. The wounding observations of the courts are of no relevance in the determination of the case before this court. The case before this court is about the constitutionality of the process that Parliament has embarked upon in order to remove the Public Protector and other Chapter 9 institution office bearers from office.

C. SUBSIDIARITY

14. Section 181(3) of the Constitution directs all organs of state to *"assist and protect [Chapter 9] institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions"*.

15. Parliament, as an organ of state, has by this removal process done nothing of the kind. What it has done – on the urging of a disgruntled opposition political party that has long been baying for the blood of the Public Protector – is, with undignified haste, to cobble together a process for her removal, disguise it as one of general application, and avoid the rigorous process that our Constitutional Court jurisprudence demands: subsidiarity.

16. I pause here to point out that the removal of a Public Protector or Auditor-General is not analogous to the removal or impeachment of the President under the provisions of section 89(1) of the Constitution which deal with the removal of a President from office by the National Assembly. We have given, in our written submissions, a comparative

table that seeks to demonstrate that the Public Protector is, by her functions and discipline, closer to Judges than a President. We revisit this again later.

17. While the drafters left the details relating to these grounds (of impeachment) to the National Assembly to spell out, it is constitutionally impermissible for the National Assembly, as the institution charged with these responsibilities, to make Rules which do not comply with sections 181 through to 194 of the Constitution as we explain later. It was incumbent upon the National Assembly, in the process of defining and giving meaning to the grounds of removal of office-bearers of Chapter 9 Institutions, not to undermine the constitutionally guaranteed independence, impartiality, effectiveness and dignity of these office-bearers.

18. The principle of constitutional subsidiarity precludes reliance directly on a constitutional provision (in this case section 194 of the Constitution) in order to vindicate a right conferred by that provision when there exists legislation enacted for the purpose of giving effect to that right. In this case, the Speaker and the National Assembly purport to invoke section 194 of the Constitution directly in order to make New Rules of Parliament for the removal from Office of the Public Protector, the Auditor-General and members of the Commissions established by Chapter 9 of the Constitution. This they are precluded by the subsidiarity principle to do.

19. But this they do in circumstances where there exists pieces of legislation that were enacted for that very purpose. But the challenge for the Speaker, the National Assembly and the Democratic Alliance is this: the pieces of legislation that were enacted in order to give effect to Chapter 9 of the Constitution, including section 194, contain no provision giving effect specifically to section 194. So, what do they do? They quickly cobble together a process, through Parliament's internal processes, by adopting rules in the hope that Bob will be their Uncle. Except, Bob is a stubborn old principle of subsidiarity, and does not abide circumvention for political quick fixes.

20. They know that the right thing to do was to pass legislation (or amend each of the 5 pieces of legislation) to cater for the removal of the Public Protector, the Auditor-General and members of Chapter 9 Commissions – perhaps in much the same way as do sections 2A(9) to (12) of the Public Protector Act in relation to removal of the Deputy Public Protector. But, the snag is that such a legislative route would take a better part of some two years as it requires debate in the National Assembly and NCOP, public participation, state law advisors, and input from interested parties, including all those directly affected by it. Plus, there is the risk that the new amendments may either have to be constitutionally vetted in the Constitutional Court or challenged there.

21. It would seem that this was a risk too much to take because by the end of that process, this Public Protector's term of office will have come to an end. They want her out now. This explains the unseemly haste.

22. But *Democracy In Action*, as its Constitution makes plain,[3] exists precisely to ensure that this sort of thing is nipped in the bud. In other words, this sort of political expediency by sacrificing the effectiveness, independence, dignity and impartiality of constitutional institutions at the altar of a quick political fix cannot be tolerated.

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[3] Record, page 80 para 3

23. In **Mazibuko**, the Constitutional Court said:

> "This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."[4]

24. In **My Vote Counts I**, it said:

> "Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role."[5]

25. Thus, the principle applies not only to a constitutional challenge founded on a right in the Constitution. It also applies, as **Mazibuko** makes plain, to giving effect to or, as MVC asserts, to fulfil, a right in the Constitution. In fact, **Mazibuko** caters for both instances.

26. In other words, subsidiarity applies when a party seeks to challenge the constitutionality of conduct on the basis that the conduct offends against a right in the Constitution. An example of this is when a voter is denied access to information, regarding who the private donors of a presidential candidate are, so that the voter can make an informed decision about whether s/he wants to vote for a president who takes money from, say, organized crime syndicates. This conduct engages section 19 of the Constitution. [it also engages section 32(1)(b) as a conduit to the full realization of the right to vote]. But the Constitutional Court has held that the voter cannot challenge the conduct on the basis that it offends against his or her voting rights in section 19. The voter must rather challenge the legislation enacted in order to give effect to the right to that information if that legislation fails to make provision for the disclosure of private donor information to voters. That legislation is PAIA. That is what the majority said the applicant should have done in **My Vote Counts I**.

27. But the subsidiarity principle also applies where a party seeks to exercise or invoke or fulfil a right or power conferred in the Constitution. For example, in **My Vote Counts I**, the applicant's contention was that voters are unable to exercise their section 19 rights effectively if they have no access to information on private donors to political parties. The majority (7 of 11 Justices) said the applicant should have challenged the PAIA for failing to make specific provision for access to private donors to political parties. In **My Vote Counts II** that's what the applicant did, successfully.

28. The position is the same in this case. The Speaker and the National Assembly cannot invoke section 194 directly by adopting rules. They must amend the PP Act (and the other Chapter 9 legislation) to give effect to, or fulfil, the National Assembly's section 194 power or right to hold Chapter 9 institution heads to account.

29. It is tempting to argue that where the Constitution does not expressly say that national legislation must be enacted in order to give effect to the right in question – as, for

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4 **Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)** at para 73.

5 **My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC)** at para 161

example, sections 23(5) (in relation to collective bargaining legislation), 32(2) (in relation to access to information), 33(3) (in relation to just administrative action legislation), 217(3) (in relation to public procurement) of the Constitution do – then the constitutional provision (such as section 194) cannot be read as requiring the enacting of national legislation in order to give effect to it. This would be a rote, as opposed to purposive, reading of the Constitution. Why do we say this?

30. Section 181(3) enjoins organs of state, *"through legislative and other measures"*, to assist and protect Chapter 9 institutions in order to ensure their independence, impartiality, dignity and effectiveness. The Public Protector Act, as its long title and pre-amble make plain, was then enacted in order to give effect to this section 181(3) constitutional injunction.

31. You were referred in argument to s 178(4) of the Constitution for the proposition that the provision does not require the passing of legislation in order to give effect to the powers of the JSC. But this makes our point because Parliament has enacted the JSC Act to give effect to powers of the JSC. The Speaker is reading the Constitution by rote, with respect.

32. Let us demonstrate this. The long title of the PP Act is instructive. It says:

> "To provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith."

33. The pre-amble to the PP Act is equally instructive in its clarity that the PP Act is intended to give effect to sections 181 to 183 and 193 and 194 of the Constitution. It says:

> "WHEREAS sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provide for the establishment of the office of Public Protector and that the Public Protector has the power, as regulated by national legislation, to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic;
> AND WHEREAS sections 193 and 194 of the Constitution provide for a mechanism for the appointment and removal of the Public Protector;
> AND WHEREAS the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the office of Public Protector;
> BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows …"

34. The PP Act then deals with, among other things

    34.1. Establishment of the office of the Public Protector.
    34.2. Appointment of the Public Protector and Deputy Public Protector.
    34.3. Powers of the Public Protector and Deputy Public Protector.
    34.4. Removal of the Deputy Public Protector.

35. There can therefore be no doubt that the PP Act has been enacted by Parliament in order to give effect to the provisions of section 181, 182, 183, 193 and 194 of the

Constitution. The silence of the PP Act on *"mechanism for the ... removal of the Public Protector"* is a legislative and constitutional lacuna that needs remedying by making provision for that mechanism in the PP Act. It does not avail Parliament simply to adopt internal procedures by way of Rules as a form of giving effect to *"mechanism for the ... removal of the Public Protector"*, especially when the mechanism for the removal of the Deputy Public Protector is provided for in sections 2A(9) to (12) of the PP Act.

36. This case mimics **My Vote Counts I** in that there, too, the applicant sought to invoke section 19 of the Constitution directly without going through the legislation that was enacted in order to give effect to the right (to access information) that it sought for purposes of the effective exercise of section 19 rights.

37. The majority in **My Vote Counts I** summarized the applicant's legal contentions in paras 26 to 28 thus:

> "[26] The applicant accepts that Parliament did enact national legislation to give effect to the right of access to information in the form of PAIA. It contends, however, that the principle of subsidiarity does not apply because PAIA does not cover nor purport to "cover the entire field of legislation [giving] full effect to section 32(2)", and that "Parliament's obligation under section 32(2) of the Constitution did not begin and end with the enactment of PAIA". It argues that PAIA gives effect "only" to one aspect of the right of access to information, namely the right to gain access to specific records held by specific bodies at specific times. The applicant submits that this is not an ordinary case of enforcing the right of access to information, but rather a case of enforcing the *duty* to enact national legislation required to give effect to the right under section 32(1) of the Constitution.
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> [27] In addition, the applicant argues that even though political parties are not "organs of state", they are a special species of "private actors" with constitutional responsibilities to the voting public. It contends that political parties are part of the state for the purposes of section 32(1)(a). Consequently, everyone is entitled to information regarding the private funding of political parties as information "held by the state". In the alternative, the applicant contends that citizens are entitled to information on the private funding of political parties as information that is required for the exercise or protection of their right contained in section 19(3) of the Constitution. This entitlement stems from section 32(1)(b).
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> [28] Notably, the applicant steadfastly asserts that it is not challenging the constitutional validity of PAIA, even if it was legislation enacted pursuant to section 32(2). Even so, according to it, the legislation required is fundamentally different from PAIA in its nature and purpose as it would require the disclosure of private funding information as a matter of "continuous course, rather than once-off upon request". The ability to access information pertaining to the private funding of political parties on an ongoing basis, the applicant contends, is necessary if the right to vote is to have meaningful content."

38. Parliament's contentions are summarised thus, in para 29:

> "In essence, Parliament contends: the principle of subsidiarity applies; Parliament met its constitutional obligation by enacting PAIA; in accordance with the principle of subsidiarity, the applicant ought to have challenged the constitutional validity of PAIA in the High Court; and – because it has not done so – the matter ought to be dismissed. In amplification, Parliament maintains that the principle of subsidiarity precludes the

> applicant from having direct recourse to the section 32(1) right itself. The question is whether PAIA "purports to be the legislation required by section 32(2)". And if it does, then the applicant is obliged to challenge it directly for failing to give effect to the right in the manner that the applicant contends is constitutionally compliant. What the applicant is not permitted to do, continues the contention, is to demand the enactment of a different piece of legislation that would deal with a matter for which PAIA was enacted."

39. Similarly, here Parliament has enacted legislation specifically to give effect to the constitutional guarantees of independent Chapter 9 Institutions, including the Public Protector. The Speaker and Parliament cannot by-pass that legislation by adopting rules giving effect directly to the constitutional right or power that the Constitution confers on Parliament in section 194. Parliament can only give effect to the constitutional guarantees of independent Chapter 9 institutions by amending the existing legislation to provide for the process of removal of heads of these institutions, as section 181(3) of the Constitution read together with the long title and pre-amble of the PP Act make clear and require.

40. Quite plainly, all we ask is that this Court pulls the Speaker and the National Assembly by their own bootstraps. In **My Vote Counts I**, they argued that where there exists legislation that purports to give effect to a constitutional right or power, it does not avail a litigant to demand the enactment of a different piece of legislation to give effect to the same right. (I know this first-hand because I represented Parliament on that occasion, together with 2 colleagues.) By the same token, because the PP Act (and the other 4 pieces of legislation) were enacted in order to give effect to Chapter 9 of the Constitution, it does not avail the National Assembly to enact rules that seek to deal with a matter for which the PP Act was enacted.

41. The long title and pre-amble to the PP Act make plain that the PP Act is the only avenue by which Parliament has elected to give effect to section 194 of the Constitution. The attempt to do so through rules of Parliament is a political quick fix that neither the Constitution nor the PP Act nor Constitutional Court authority countenance.

42. In his address to you in answer to the case for the Public Protector a few days ago, Counsel for the Speaker and National Assembly sought to persuade you that the mechanism for the removal of the Public Protector is similar to that for the removal of the President. That is not correct. Section 89 of the Constitution bears no resemblance to section 194 at all. And, we know of no piece of legislation that, in its long title and pre-amble, specifically notes that it has been enacted in order to give effect to section 89 of the Constitution. The pre-amble of the PP Act specifically says the PP Act has been enacted in order to give effect to, among others, section 194 of the Constitution.

D. CONSTITUTIONAL CHALLENGE TO LEGISLATION

43. On this question of the constitutional invalidity of the PP Act (and the other Chapter 9-related pieces of legislation) for their failure to give effect to section 194 of the Constitution, we commend to this Court the judgment of the Constitutional Court in **My Vote Counts I**, specifically – though not exclusively – para 122. The suggestion that a piece of legislation has certain shortcomings is, in fact, an attack on its validity.

44. Our submission is that the failure of the PP Act (and the other pieces of legislation mentioned) to deal with the removal of the Public Protector (especially when its pre-amble expressly says this is one of the issues for which it has been enacted) renders it constitutionally deficient. As section 2 of the Constitution tells us, all law and conduct that is inconsistent with the Constitution is invalid. But it must first be so declared by this Court and confirmed by the Constitutional Court.

E. CONSTITUTIONAL CHALLENGE TO THE NEW RULES

45. Counsel for the Public Protector has already addressed you on many of the issues that arise under this rubric. We touch only on a few others, namely

    45.1. The New Rules fail to comply with the Constitution for lack of public participation in their making and non-conformity with constitutional principles in their content.
    45.2. The New Rules are a threat to decisional independence of Chapter 9 institutions, especially those who make decisions of a quasi-judicial nature.
    45.3. Parliament has no power to constitute a committee comprising non-MPs to investigate a *prima facie* basis for removal from office of the Public Protector, the Auditor-General and members of the Commissions established by Chapter 9 of the Constitution.
    45.4. In permitting publication of the removal process at the initial stage, the New Rules create fertile ground for the erosion of the dignity, effectiveness, independence and impartiality of the Public Protector, the Auditor-General and members of the Commissions established by Chapter 9 of the Constitution.

46. On the issue of conflict of interest that Counsel for the Public Protector has already addressed, we add only reference to the Full Bench decision of the North Gauteng High Court in **Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; CASAC v President of the Republic of South Africa and Others [2018] 1 All SA 471 (GP)** where the Full Bench dealt with the potential conflict of interest that arises where a sitting President who is yet to face criminal charges appoints the National Director of Public Prosecutions. It found that there is a clear conflict.

47. In that judgment we would commend to this Court paras 110 to 114.

48. To the Public Protector's Counsel's address on retrospectivity, we would only add reference to the following authorities:

48.1. **Pharmaceutical Manufacturers Association of South Africa and Others; In Re: Ex Parte Application of the President of the RSA and Others 2000 (2) SA 674 (CC)** at para 39 which says the rule or presumption against the retrospective application of law embraces *"all public law"* and is not a rule of criminal law only.

48.2. **Veldman v Director of Public Prosecutions 2007 (3) SA 210 (CC)** at para 26 which says law is not to be interpreted as extinguishing existing rights and obligations unless the instrument expressly says so or the meaning is clear from the language used. To the extent that the DA's Counsel disputes that this is the legal position, this case is the answer.

(a) Failure of public participation and constitutional principles

49. Section 59(1)(a) of the Constitution requires that the National Assembly *"must facilitate public involvement in the legislative and other processes of the Assembly and its committees."* This is a peremptory requirement. Section 72(1)(a) similarly requires that the National Council of Provinces *"must facilitate public involvement in the legislative and other processes of the Council and its committees."*

50. There has been no compliance with either of these constitutional requirements in the making of the New Rules. For that reason alone, these New Rules fall to be declared unconstitutional as the non-compliance of their development with the Constitution runs against one of the foundational constitutional principles in section 2 of the Constitution which says:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

51. In **Doctors for Life**[6] the Constitutional Court affirmed the principle that legislation can be declared invalid for lack of public participation in the law-making process. The Court recognized, in paragraph 106, that:

> "In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression, but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process."

52. In the majority judgment, participation was underscored as a core constitutional value. Ngcobo J (as he then was) said (at paragraph 116):

> "[O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy."

53. Sachs J, in a concurring judgment, stated (at paragraph 235):

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6 **Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC)**

> "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."

54. Section 181(1) of the Constitution tells us that these Chapter 9 Institutions have been established in order to *"strengthen constitutional democracy in the Republic"*. By that measure, they exist in order to serve the South African public, not to serve Parliament and politicians. We, the South African public, are the consumers of the constitutional democracy that these institutions are there to strengthen. That being so, the South African public has a right to participate fully in any new law-making process intended to affect these Chapter 9 Institutions in a material way, as these New Rules undoubtedly do. The failure of public participation in the making of these New Rules renders them unconstitutional.

55. The Constitutional Court has held that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Further, the obligation to facilitate public participation is a material part of the law-making process, and the failure to comply with this requirement renders the resulting law invalid.[7]

56. In the present case, the National Assembly made no attempt to fulfil its section 59(1)(a) obligation to facilitate public participation at all. It held no public hearings and never amended the PP Act or any of the other four Chapter 9-related pieces of legislation. Instead, it followed the quick fix process of political expediency. This renders the New Rules unlawful for lack of public participation and therefore failure to comply with the fundamental constitutional imperative.

57. The respondents argue that section 181(3) envisages *"legislative and other measures"* and that even if the National Assembly was constitutionally obliged to take steps to provide for the removal of the office-bearers of such institutions, enacting Rules plainly constitutes *"other measures"* within the meaning of the provision. The respondents claim that section 181(3) does not prescribe only legislative measures but that it expressly allows legislative *"and other measures"*.

58. This is a mistaken approach. But even if it were correct, there is no doubting that these New Rules create new law to the extent (at the very least) that they introduce a new basis in the form of *"temporary incapacity"*[8] (as Counsel for the Public Protector pointed out) which is nowhere contained in section 194 as a basis for removing the Public Protector and the other Chapter 9 office-bearers from office. So, if the Public Protector were to test positive for covid-19 and require hospitalization for a month, a Member of the National Assembly would be entitled under these New Rules to initiate the removal process, and the National Assembly would then be entitled to remove her from office. This is, self-evidently, insane. And they can do all this without the public,

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7 **Doctors for Life**, para 209

8 The definition of *"incapacity"* in the New Rules includes *"temporary condition that impairs a holder of a public office's ability to perform his or her work"*. See record, page 93

at whose behest the Public Protector has been appointed to *"strengthen constitutional democracy in the Republic"*, having participated in the making of these New Rules.

59. For that reason, because the New Rules are in truth new law, public participation was constitutionally required for their making. It's not an optional extra. So, Parliament's failure to engage in public participation in the making of these New Rules renders them unconstitutional.

60. But the argument that these New Rules are the *"other measures"* envisaged in section 181(3) for purposes of giving effect to the provisions of that section is flawed for another reason. What must be scrutinized is the content of the legislation, that is the PP Act, in order to determine if the process followed by Parliament facilitates a process to *"assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."* These New Rules do nothing of the kind, as ably demonstrated by Counsel for the Public Protector in his address to you on Monday with specific reference to an analysis of section 194, the fairness or procedural irrationality of these New Rules, the retrospectivity of the rules, and the breach of the separation of powers and *ultra vires* doctrines.

61. In any event, even accepting that these New Rules are perfectly permissible as a means of giving effect to section 194 as *"other measures"*, section 159(1)(a) still requires public participation in their making as it says the National Assembly *"must facilitate public involvement [not only] in the legislative [processes] [but also in] other processes of the Assembly"*. So, even if the New Rules constitute "other measures" as envisaged in section 194 of the Constitution, they are still *"other processes of the Assembly"* requiring public participation that the National Assembly has woefully failed to facilitate in its undignified haste to get rid of a Public Protector that has touched one untouchable too many.

62. Viewed from this prism, the New Rules woefully fail to comply with the Constitution's provisions.

(b) Ultra Vires: Parliament has no power to do what it has done

63. Counsel for the Public Protector has dealt with this issue but only in relation to delegation by the Speaker of her constitutional obligation to a Judge. We agree. Nowhere does the Constitution confer on the Speaker the power to delegate her constitutional function, which she exercises as a leader of the legislature, to a Judge, a member of the judiciary. The breach of the separation of powers doctrine is palpable. But we deal with the Speaker's *ultra vires* conduct at a broader level.

64. It is the central conception of our constitutional order that those who exercise public power (such as Parliament and the Speaker) are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. This principle is so trite as not to require reference to authority. But on the off-chance that authority may be required, we commend the following cases to the Court:

64.1. **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at para [58]**

64.2. **Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC) at para [34]**
64.3. **Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at para [49]**
64.4. **Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) at para [80]**

65. In **De Lille and Another v Speaker of the National Assembly 1998 (3) SA 430 (C),** this Court held that all acts and decisions of Parliament are subject to the Constitution and therefore subject to review by the courts. The Court (per King DJP et Hlophe J as they then were) noted that while section 57(1) permits Parliament to determine and control its internal arrangements, *"it has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution"*. The Court went further to say, citing the judgment of the Constitutional Court in **Executive Council, Western Cape Legislature, and Others v President of the RSA and Others 1995 (4) SA 877 (CC) at para [62]**, *"It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."*[9]

66. There is also no provision in any of the pieces of legislation enacted pursuant to Chapter 9 of the Constitution that empowers the National Assembly or the Speaker to outsource even the initial stages of a removal process intended to give effect to section 194 of the Constitution. Only the National Assembly or any of its committees has the power to make a finding (*prima facie* or otherwise) in relation to the issue of misconduct or incompetence or incapacity of an office holder of a Chapter 9 Institution.

67. There is no constitutional or legislative power conferred on the National Assembly to establish an independent body to make any *prima facie* findings against office holders of Chapter 9 Institutions. The Constitution does not provide for any role of any private body in the removal process of the head or member of a Chapter 9 Institution. Neither does any of the pieces of legislation in question. For that reason, the New Rules confer (in New Rule 129T to 129Z) a power on the National Assembly that it does not have, namely, the power to refer an alleged incompetence or incapacity or misconduct of an office holder of a Chapter 9 Institution to an outside Panel that the Panel itself has no statutory or constitutional power to investigate or assess, whether *prima facie* or otherwise.

68. Worse still, New Rule 129X even purports to confer investigative and adjudicative powers on the panel. Neither the Speaker nor the National Assembly has powers to delegate these powers to unelected persons to perform. As these Rules have no anchor in the Constitution or in any legislation, they are simply unconstitutional.

69. It is one thing for the Speaker or the National Assembly to seek legal opinion on whether or not there is a *prima facie* case against a Chapter 9 institution office bearer. This it is entitled to do. Quite another to abdicate its constitutional function to a Judge and legal practitioners. This is has no power to do.

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9 At para 25

(c) <u>*Decisional Independence*</u> (Ms Jiba)

70. The New Rules are a real and present threat to decision-making independence. It must be emphasized that the Constitution places the Public Protector (who performs investigative, quasi-judicial and adjudicative functions) on the same plane as judges insofar as decisional independence is concerned. In our written submissions (**page 44, at para 89**) we provided a comparative table between a Judge and the Public Protector. The purpose was to show that the Public Protector's functions, powers, obligations, eligibility for appointment and accountability mechanism are more akin to those of judges than the President. This was intended to dispose of the notion that the process for the removal of the Public Protector is akin to that for the removal of the President. I ask this Court to have to regard to that table as it shows, in fairly panoramic fashion, why in the final analysis the process adopted by the National Assembly for the removal of the Public Protector is simply inappropriate and constitutionally indefensible.

71. My Learned Friend Mr Ngalwana has already shown that there exists no legislation that seeks to give effect to the section 89 power or right of the National Assembly to remove the President. The PP Act in its pre-amble and long title makes plain that the PP Act is the legislation that Parliament has enacted in order to give effect to Chapter 9, including section 194 which is mentioned expressly.

72. In the case of the judiciary, through appellate review, courts can ensure that lower court judges have neither misstated the law, nor misapplied it. Judges review lower court decisions to determine whether those judges abused their discretion in resolving cases or controversies. But there is a necessary understanding, for the sake of judicial independence, that a judge whose decision has been overturned on appeal, or who was subject to scathing criticism by the higher court, cannot suffer retaliation or threat of removal based simply on the judgment later proven to be erroneous, or even incompetent. By design, the New Rules give politicians the right to initiate removal proceedings against the Public Protector and no such right exists for members of the public.

73. To secure the decisional independence our judges are insulated against personal costs orders or even impeachment based solely on the merits of judgments they make. It matters not how egregious these rulings may be. Section 15(2)(c) of the JSC Act provides that no judicial misconduct complaint against any judge may be entertained if it *"is solely related to the merits of a judgment or order."* (**page 303 of bundle of authorities)** No judicial misconduct complaint is entertained if it relates solely to the merits of a judges' decision or mere legal errors. But the adopted New Rules for removal of office-bearers of Chapter 9 Institutions allow the lodging of complaints that may result in removal by MPs that are related solely to the merits of the Public Protector's decisions.

74. I invite my lady and my lord to look at **page 329 & 330** of the record, the letter of complaint filed by the chief whip of the Democratic Alliance. I will not read the whole letter. Misconduct complained above reads, "*that she grossly over-reached her powers when she sought in the ABSA /Bankorp report to dictate to Parliament to whom she is accountable in terms of section 181(5) of the Constitution, how and when legislation should be amended. Her actions in this regard compromised the independence of*

Parliament and the effectiveness of Parliamentary procedure." Not only is the complaint based on the merits of the case, but also it is misconduct because her remedial action dictates to Parliament to whom she is accountable too. This shows the point that we make that these New Rules infringe on the decisional independence of a chapter nine institution.

75. The *"mere legal error"* doctrine is recognized in other Western jurisdictions.[10] In a recent Uganda Supreme Court judgment, **Attorney General v Kisekka 11/7/2018** the court cited the United States persuasive authority of **Oberholzer v Commission on Judicial Performance**, where the Tennessee Supreme Court stated that a judge's legal error is not ordinarily misconduct warranting disciplinary action. Furthermore, in the same case, the court held that: *"Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."* **Para 30, page 201 of the bundle of cases**.

76. To maintain the requisite independence of the Public Protector, errors of law should not be the subject of a removal inquiry. The judges' decisional independence is guaranteed by shielding them from punitive or disciplinary actions for *"mere legal errors"*, while the Public Protector runs the risk of removal each time she makes a decision or remedial actions which result in judicial review applications or her remedial actions being set aside. The New Rules in their current form serve as an open invitation for politically motivated attacks on the Public Protector who makes a quasi-judicial decision in almost all the cases she investigates. Instead of safeguarding her independence the New Rules serve as an *in terrorem* weapon available to politicians who may be corrupt or those guilty of maladministration. They can now routinely threaten a removal inquiry and threaten impeachment of the Public Protector each time she is criticized by the judiciary and each time she makes a decision with which they disagree.

77. In the same vein, for the Public Protector as well, impartial adjudication is critical. Members of the National Assembly or politicians should not be able to meddle in individual cases under the guise of holding the Public Protector to account. In short, for both judges and the Public Protector, freedom from external influence is critical to the judicial and Public Protector function, and seeking to discipline or remove them solely on the basis of the merits of their decisions is constitutionally impermissible and unpalatable.

78. In regard to the judiciary, Parliament has designed a rule to weed out frivolous and vexatious complaints and to protect our judiciary from public political controversy. Pursuant to section 15(2)(c) of the Judicial Service Commission Act, judicial misconduct complaints which are *"solely related to the merits of a judgment or order"* are subject to summary dismissal. But in the case of the Public Protector, Parliament has failed in its New Rules to ensure that a complaint against the Public Protector based solely on the merits of her findings or remedial action is likewise subject to summary

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[10] The doctrine of *"mere legal error"* precludes judicial conduct organizations from employing generally worded canons to undermine judicial independence. Legal error is correctable by appellate review, not by judicial-conduct inquisitions. "*Mere legal error, without more, ... is insufficient to support a finding that a judge has violated the Code of Judicial Ethics."* **Oberholzer v. Comm'n on Judicial Performance**, 84 *Cal.* Rptr. 2d 466, 975 P.2d 663, 680 (1999)

dismissal. The reviewing and setting aside of a Public Protector's remedial measures, even if accompanied by scathing criticism by a High Court judge, cannot reasonably be a basis for hauling her before the National Assembly for a hearing over alleged "incompetence" or "misconduct" or "incapacity". The rule of law requires that the normal review process be exhausted. Legal issues ventilated before the Courts, including judgment criticizing the Public Protector, cannot be opportunistically relied upon as a basis for a removal inquiry. There is nothing in the New Rules which safeguards this vital aspect of the Public Protector's decisional independence and impartiality. There is nothing which prevents pending cases in which the Public Protector is a litigant from being used as a basis for harassment and removal. The Speaker admits this: **para 84; page 305 of the record.**

79. It is noteworthy that the majority of the complaints involving politicians investigated by the Public Protector are initiated by political parties or their members. When the same parties or their representatives in the National Assembly who are in litigation with the Public Protector (or have cases pending before her) are allowed to initiate removal proceedings, a specter of a serious conflict of interest looms large. Most important, the constitutionally guaranteed independence (decisional and institutional) of the Public Protector is gravely undermined. As highlighted by the tactics used by the main opposition Democratic Alliance (*"the DA"*) in its recent complaints to Parliament, the party used cases in which a member or the party was a litigant against the Public Protector as a basis for its "incompetence" claim. Under the guise of scrutinizing alleged "incompetence" by the Public Protector, the DA brazenly alleged that adverse comments by the judiciary solely related to the merits of the Public Protector's decision and remedial orders evince incompetence on her part. The letter of complaint which I have already referred to above, which is at **pages 329 & 330** of the record bears this out. The Courts should, with respect, never endorse such a proposition in relation to the Public Protector while the judges are shielded by section 15(2)(c) of the JSC Act as explained. The extant New Rules simply sidestep this pivotal constitutional issue.

80. Decision making independence is critical to assure litigants and complainants before the Public Protector that judicial results or Public Protector's decisions are as free from external influence as possible. Public Protectors and judges cannot function effectively if their decisions are viewed as the product of threats of removal by the National Assembly or lobbying by some with ulterior motives. Moreover, the appearance of propriety may, in fact, matter as much as the reality. Litigants or the members of the public served by the Public Protector must have faith in the unbiased nature of the litigation or the Public Protector's remedial orders. The New Rules must not be allowed to trump any possibility of complete Public Protector decisional independence.

(d) *Confidentiality* (Ms Jiba)

81. Another serious constitutional infirmity lies in the fact that there is no provision for confidentiality akin to that applicable to judicial misconduct complaints. Article 17 of the **UN Basic Principles on the Independence of the Judiciary**[11] provides as follows:

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[11] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

> "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. *The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.*" (**page 333 of the bundle of authorities**)

82. Lack of confidentiality in the section 194 removal process as purportedly given effect to by the New Rule is highly likely to undermine public confidence in the targeted institutions or public office holders and erode the integrity of the public office holders concerned. As such, the lack of confidentiality in the process is inimical to the independence, integrity, impartiality and effectiveness that section 181(3) of the Constitution demands.

83. By way of comparison, the Code of Judicial Conduct promulgated in terms of the JSC Act demands restraint from other judicial officers in relation to criticism of another judge in public. It does not take much imagination to appreciate why this is so. For example, **(page 325 of the bundle of cases.)**

    83.1. article 11(1)(a) of the Code of Judicial Conduct prohibits public comment by a judge on the merits of any case pending before, or determined by, that judge or any other court. Yet, under the New Rule regime there is no such restraint by a complainant MP against the Public Protector;
    83.2. article 11(1)(b) prohibits a judge entering into a public debate about a case irrespective of criticism levelled against that judge, his or her judgment, or any other aspect of the case. Yet, under the New Rule regime nothing prohibits a complainant MP or members of their political party in Parliament publicly discussing a case in which s/he is a party against the Public Protector, as has indeed happened;
    83.3. article 11(1)(c) directs a judge to refrain from any action which may be construed as designed to stifle legitimate criticism of him or her or of any other judge. Yet, the entire basis for the New Rule regime seems designed to stifle legitimate findings and remedial action by the Public Protector against MP complainants without there being any conflicts of interest filter; and
    83.4. article 11(1)(f) requires that judges refrain from public criticism of another judge or branch of the judiciary (unless such criticism is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law). Yet, one will search in vain for any provision in the New Rule regime that proscribes such public criticism of the Public Protector by complainant MPs or other members their party in Parliament.

84. The **UN Basic Principles on the Independence of the Judiciary** have been subsumed into South African law by section 39(1) of the Constitution which enjoins the courts to consider international law in the interpretation of the Bill of Rights.

85. Article 17 of the UN Basic Principles specifically states that the examination of a complaint *"at its initial stage shall be kept confidential, unless otherwise requested by the judge"*.

86. There are sound considerations of public policy that necessitate that disciplinary proceedings against a judge be kept confidential at least at the initial stages. There is no reason in principle – and for the same considerations as inform that approach in relation to judges – why the same considerations should not apply in relation to the Public Protector and other office-holders in Chapter Nine Institutions facing removal process. The idea is not to *"sweep things under the carpet"* but rather to preserve the integrity, impartiality, effectiveness and independence of the Public Protector as required by section 181(3) of the Constitution.

87. These considerations were articulated thus by the Supreme Court of Belize in **George Meerabux v The Attorney General of Belize and the Bar Association of Belize, A.D. 2001**:

> "But the public weal itself will be damaged if the news [of a probe concerning a judge] is not handled with care and circumspection; for it may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole. The public right to know and be informed is one which the courts ought always to protect, but this must be balanced with the way that knowledge or information is purveyed. Anything tending to convey unsubstantiated rumours, idle gossip or the salacious must be restrained, particularly in a society such as we have in Belize, which is a veritable fish bowl for almost every public office holder. Otherwise, the right to know becomes corrupted with the zeal to feed frenzy on unsubstantiated rumours and stories. This will be a positive disservice to all Belizeans, for when facts and fiction collide, faction is the result."

88. Professor Martin Lawrence Friedland, an accomplished Canadian Barrister turned academic, captured the importance of confidentiality in the process of judicial discipline as follows:

> "At the early stages of the process, there has to be a large measure of confidentiality. An allegation of impropriety against a judge can have serious consequences in terms of the credibility of the judge. Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing. (One cannot prevent a complainant from going public.) There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage. The new American Bar Association procedures maintain confidentiality at the investigation stage. The same seems to be true in Canada for complaints against lawyers. And in the criminal process generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken."[12]
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> (emphasis supplied)

89. Because of the quasi-judicial function that the Public Protector performs in terms of the Constitution, these considerations apply to her in equal measure.

90. While *"one cannot prevent a complainant from going public"* with allegations of misconduct against the Public Protector, this can surely not apply to MPs who allege misconduct or incompetence against the Public Protector in the performance of her constitutional functions. This is because

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[12] **Professor Martin L Frieland A Place Apart (1995), p 134-135**

90.1. more is expected of MPs because of the position they occupy, in much the same way as is expected of judges by article 11 of the Code of Judicial Conduct,

90.2. that would be a breach of article 17 of the UN Basic Principles,

90.3. that would feed frenzy on unsubstantiated rumours and *"result in the corrosion of public confidence in the [Public Protector] itself, with deleterious effects on the administration of justice as a whole"*.

91. The comparison or parallel we draw between the judiciary, on the one hand, and the Public Protector, on the other, for purposes of demonstrating the egregious and unconstitutional treatment meted out on the Public Protector, is not far-fetched. For example, it is clear from the description by the Supreme Court of Appeal of the constitutional function of the Public Protector that hers is closer to a judicial than an administrative function. The Supreme Court highlighted the following factors about the Public Protector's function:[13] see, **Minister of Home Affairs and Another v Public Protector 2018 (3) SA 380 SCA para 36 & 37, page 157 of the bundle of authorities**.

91.1. First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them.

91.2. Second, the Office of the Public Protector is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly.

91.3. Third, although the State Liability Act, 20 of 1957, applies to the Office of the Public Protector to enable it to sue and be sued,[14] it is not a department of state and is functionally separate from the state administration. It is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature.

91.4. Fourth, the function of the Office of the Public Protector is not to administer but to investigate, report on and remedy maladministration.

91.5. Fifth, the Public Protector is given broad discretionary powers as regards what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order. This is as close as one can get to a free hand to fulfilling the mandate of the Constitution.

92. What is more, the Constitutional Court in **EFF I** made clear that the powers of the Public Protector are more akin to those of a judge than a mere administrator. Citing the Supreme Court of Appeal with approval, the Constitutional Court said (at para 68):

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13 **Minister of Home Affairs and Another v Public Protector 2018 (3) SA 380 (SCA) at paras [36] & [37]**

14 Public Protector Act, s 5(2).

> "It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation."

93. We submit that this power is not substantially different from the power of the courts to grant just and equitable remedy under section 172(1)(b) of the Constitution.

F. APPROPRIATE RELIEF AND COSTS

94. In all the circumstances, we submit that appropriate relief is as sought in the Applicant's Notice of Motion.

95. As regards costs, we refer to our written submissions in paras 129 to 134.

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10 June 2021