IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 1731/2020

DEMOCRACY IN ACTION	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS	Respondents
DEMOCRATIC ALLIANCE	Applicant for joinder as a respondent

DEMOCRATIC ALLIANCE'S HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

1 On 3 December 2019, the National Assembly ("**NA**"), in the exercise of its constitutionally-ordained oversight function, adopted Rules for the Removal of Heads of Chapter Nine Institutions ("**the New Rules**").[1]

2 The New Rules provide the mechanism and procedure by which the office bearers of Chapter Nine institutions may be removed, in accordance with section 194 of the Constitution. The New Rules are, in other words, a mechanism to achieve a constitutional purpose of critical importance.

3 The New Rules are presently being applied to determine a motion, filed by the Democratic Alliance ("**DA**"), for the removal of Adv Mkhwebane from the office of the Public Protector.

4 Democracy in Action ("**DIA**") – an entity with no demonstrated membership or following – has launched an application which seeks to halt this process.

5 DIA's application seeks wide-ranging relief, including:

5.1 declaring that Parliament has failed to comply with its constitutional obligation to pass legislation giving effect to section 194;

5.2 declaring that five statutes regulating Chapter Nine institutions are unconstitutional and invalid for their failure to provide for appropriate

[1] The New Rules is annexure "DIA2" to the Founding Affidavit ("**FA**"), p88.

circumstances under which Chapter Nine office-bearers are to be removed;

5.3 declaring that the New Rules are unconstitutional for contravening the provisions of sections 181(3) and 194 of the Constitution; and

5.4 directing Parliament to amend the five statutes to regulate the removal of Chapter Nine office-bearers.

6 The application is without any merit. It adopts a scattergun approach, raising one spurious objection after another. Not one of the objections is sound in law.

7 The DA has an obvious interest in the application and asks to be joined as a respondent opposing the application. It also seeks the dismissal of the application with costs.

8 The remainder of these submissions are structured as follows:

8.1 First, we set out a brief summary of the factual background to the adoption of the New Rules.

8.2 Second, we address – only briefly, because it is unopposed – the DA's application to be joined as a respondent.

8.3 Third, we demonstrate that the DIA application ought to be dismissed without even entering the merits, in that:

8.3.1 DIA is not properly constituted and lacks standing to sue; and

8.3.2 DIA in any event lacks standing to sue in the public interest, in which capacity it purports to act.

8.4 Fourth, we demonstrate that the DIA application is fatally flawed on the merits, because:

8.4.1 the Constitution does not require legislation to be passed to define the grounds of removal;

8.4.2 each of the myriad constitutional challenges to the New Rules are entirely without merit.

9 We make three preliminary remarks at the outset.

10 **First**, we note that despite an agreed timetable, in terms of which DIA was to file heads of argument by 8 January 2021, it has not done so.

10.1 DIA sought an indulgence from the respondents on 12 January 2021, to file its heads of argument by 22 January 2021.

10.2 The DA indicated that it agreed to DIA filing its heads of argument by 22 January 2021, but that the DA would nevertheless be filing its heads of argument on 15 January 2021, in accordance with the agreed timetable.

10.3 The upshot is that these heads of argument have been filed without sight of DIA's submissions. We accordingly reserve the DA's right to file supplementary submissions in due course, should the need arise.

11 **Second**, there is of course substantial overlap between this application, and the application instituted by the Public Protector in case number 2107/2020 (the "**Public Protector matter**"). For that reason, the two applications are to be heard together. For the most part, we do not repeat submissions contained in the heads of argument in the Public Protector matter, but instead cross-refer to those submissions where appropriate.

12 **Third**, as explained at paragraphs 9 to 31 of the DA's heads of argument in the Public Protector matter, there are certain fundamental principles that should inform this Court's approach to a challenge to the New Rules. They may be summarised as follows:

12.1 First, as a form of delegated legislation, the New Rules must be interpreted consistently with the Constitution, where it is reasonably possible to do so.[2]

12.2 Second, the constitutional principle of accountability must not be undermined or rendered ineffective.[3]

12.3 Third, the separation of powers doctrine requires the court to assume an appropriate degree of deference in reviewing the NA's Rules. Absent a patent illegality or abuse of its powers, the court will not intervene.[4]

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2 Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC) para 28

3 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) paras 1 and 54.

4 Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at paras 36-37

12.4 Fourth, it must be presumed that the powers conferred under the New Rules will be exercised fairly and will not be abused.[5]

BRIEF FACTUAL SUMMARY

13 The facts in this matter are largely common cause. We set out below only a brief summary of the factual background giving rise to the adoption of the New Rules.

14 On 23 May 2019, Mr Steenhuisen, then the DA's Chief Whip, submitted a request to the Speaker for the removal from office of the incumbent Public Protector, Adv Mkhwebane.[6]

15 The request was made in terms of Rule 337(b) of the NA Rules, read with section 194 of the Constitution. It referred the Speaker, *inter alia*, to:[7]

15.1 the Public Protector's gross over-reach of her powers in the ABSA/Bankorp Report, in which she recommended that the Constitution be amended to alter the mandate of the South African Reserve Bank;

15.2 the Public Protector's gross over-reach of her powers in the ABSA/Bankorp Report in dictating to Parliament how and when legislation should be amended;

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5 Minister of Health v New Clicks SA (Pty) Ltd & Others 2006 (2) SA 311 (CC) para 152, quoting Doody Secretary of State for the Home Department and other appeals [1993] 3 All ER 92 (HL) at 106D-H; Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) para 72; Van Rooyen v The State (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) para 37.

6 Speaker's answering affidavit ("AA") para 21, p278; TRM1, p329.

7 TRM1, pp 329-331.

15.3 the fact that the Public Protector had shown a poor understanding of the law and her own powers;

15.4 the fact that the Public Protector sacrificed her independence and impartiality by consulting with the Presidency and the State Security Agency on remedial action to be recommended in the ABSA/Bankorp Report;

15.5 Court findings that the Public Protector acted, *inter alia*, "*unconstitutionally and irrationally*" by intruding on Parliament's executive authority;

15.6 Court findings in the Vrede Dairy matter, in which the Public Protector's investigation was held to be unconstitutional and invalid and set aside.

16 This request was duly published in the National Assembly's Announcements, Tablings and Committees Reports, and referred to the Portfolio Committee on Justice and Correctional Services.[8]

17 However, the Public Protector challenged the validity of the referral. In a letter to the Speaker dated 5 July 2019,[9] she contended, *inter alia*, that the Speaker had denied her procedural due process or fairness in a manner that was unlawful and unconstitutional. She complained, in particular, that "*[p]arliament does not seem to have Rules in place to deal with these issues*"; that "*[t]he danger here is that Parliament has not designed rules that would safeguard*

8 Speaker's AA para 22, p279.

9 DIA5, p242; TRM3, p339.

against the mischief identified here"; and that "*given the enormity of the constitutional task under Section 194 the lack of specific impeachment rules is unacceptable under any circumstances*."

18 On 27 August 2019, the Portfolio Committee provided the Speaker with a report on Mr Steenhuisen's request to remove the Public Protector. It took the view that the adoption of parliamentary rules to govern the removal of office bearers of Chapter 9 institutions was necessary to ensure the fairness of the process.[10]

19 Then began the process for the adoption of the New Rules.

20 In the first instance, the Speaker referred the matter to the Rules Committee, which met on 10 September 2019 to consider the Portfolio Committee's recommendation to develop rules. The Rules Committee considered a discussion document prepared by the National Assembly Table, and decided to delegate the issue to a Subcommittee on Review of NA Rules (the "**Subcommittee**").[11]

21 The Subcommittee met three times.

21.1 It met on 20 September 2019, where Mr Xaso (the Secretary of the NA) presented the discussion document again, and Mr Steenhuisen presented the DA's proposals. There was input from various other members, including from the Economic Freedom Fighters ("**EFF**"), the African Transformation Movement and the African National Congress

[10] Speaker's AA para 27, p280; TRM6, p353.

[11] Speaker's AA para 29, p281.

("**ANC**"). The Subcommittee resolved that the Secretariat would prepare a draft set of rules for presentation to the Subcommittee at its next meeting.[12]

21.2 The second meeting was on 18 October 2019. Mr Xaso presented the draft rules, and their followed a discussion in which members of, *inter alia*, the DA, EFF and ANC participated.[13] The Subcommittee resolved that the Secretariat would prepare a further draft of the rules based on the input of the members.[14]

21.3 At its third meeting on 9 November 2019, the Subcommittee considered and discussed the revised draft rules, as well as a revised proposal by the DA, a proposal by the EFF, and a submission by a civil society organisation, the Organisation Undoing Tax Abuse. Presentations were given by Parliament's Legal Services and Mr Xaso, and all members of the Subcommittee contributed to the discussion. The Subcommittee thereafter resolved to adopt the draft rules. [15]

22 On 26 November 2019, the NA Rules Committee approved the draft of the New Rules. On 28 November 2019, the New Rules were tabled in the NA. They were unanimously adopted by the NA on 3 December 2019.[16]

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[12] Speaker's AA paras 32-33, p284.

[13] Speaker's AA paras 34-35, pp285-287.

[14] Speaker's AA para 36, p287.

[15] Speaker's AA paras 37-38, p287.

[16] Speaker's AA paras 39-41, pp287-289.

23 On 6 December 2019, the new DA Chief Whip, Ms Mazzone, withdrew Mr Steenhuisen's request of 23 May 2019, and submitted a new request in accordance with the New Rules.[17]

24 It was at this stage that two pieces of litigation commenced – virtually simultaneously – seeking to halt the process.

24.1 On 29 January 2020, DIA launched the present application seeking, *inter alia*, to compel Parliament to enact legislation regulating the removal of Chapter Nine office-bearers, challenging the constitutionality of various statutes regulating Chapter Nine institutions, and impugning the constitutional validity of the New Rules.

24.2 Just a week later, on 6 February 2020, the Public Protector launched a two-part application for urgent interim interdictory relief (Part A), and challenging the constitutional validity of the New Rules (Part B).[18]

25 On 21 February 2020, Ms Mazonne withdrew her request of 6 December 2019, and submitted a new request. On 26 February 2020, the Speaker decided that Ms Mazzone's motion was in order, and called upon the political parties in the NA to submit nominees for the independent panel.[19]

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[17] Speaker's AA para 42.1, p289.

[18] Speaker's AA para 42.3, p289.

[19] Speaker's AA para 42.5, p290.

JOINDER

26 The DA has applied to be joined as a respondent in this matter. The joinder application is unopposed, and we accordingly address it only briefly.

27 There are, in short, four reasons that the DA plainly has a direct and substantial interest in the application and is entitled to be joined as a respondent.[20]

28 First, as explained above, the New Rules are presently being applied to process the DA's removal motion. DIA's challenge to the New Rules therefore has a direct impact on the NA's ability to process the DA's removal motion.[21]

29 Second, this application is to be jointly heard with the application instituted by the Public Protector. The Public Protector has correctly cited the DA as a respondent, and the DA has opposed, thus demonstrating its direct and substantial interest in challenges to the legality of the New Rules and challenges that threaten to impede the National Assembly's determination of the DA's removal motion.[22]

30 Third, DIA makes several serious and prejudicial allegations against the DA and its members in the founding affidavit, including misrepresentations of the DA's removal motion and allegations of unlawful conduct by the DA and its

[20] SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017 (5) SA 1 (CC) para 9.

[21] DA's AA para 7, p524-5.

[22] DA's AA para 8, p525.

members. The DA refuted these allegations comprehensively in its answering affidavit.[23]

31 Fourth, the DA seeks to intervene not only on its own behalf and that of its members, but also to oppose the relief in the public interest. As the leading opposition party in the National Assembly, with the support of 3,6 million voters in the 2019 national elections (20,77% of the national vote), the DA is certainly mandated to act in the public interest.[24]

OBJECTIONS IN LIMINE

Not properly constituted

32 DIA is described in the founding affidavit as *"a civil society organisation"* based in Mpumalanga.[25]

33 In its answering affidavit, the DA challenged the proper constitution of DIA.

33.1 The DA explained that DIA's constitution indicates that it is purportedly established as a non-profit company with members.[26]

33.2 Non-profit companies are regulated by the Companies Act, and must meet the requirements for incorporation of that Act and the further requirements in schedule 1 of the Companies Act.

[23] DA's AA para 11, p526-8 and 27-30, p536-9

[24] DA's AA para 13, p 528

[25] Founding Affidavit ("FA") paras 2 and 4, pp17-18.

[26] DA's AA para 20, p 530

33.3 The DA contended that DIA does not meet these statutory requirements, for the following reasons.

33.3.1 First, in the absence of proof in the form of a registration certificate issued by the Companies and Intellectual Property Commission (**"CIPC"**) in terms of section 14(1) of the Companies Act, the DA denied DIA's legal status as a non-profit company in compliance with the Companies Act.[27]

33.3.2 Second, because DIA's constitution describes the entity as a "*not for profit company with members*", the DA called upon DIA to disclose the register of its members (which it is required to maintain under item 1(9) of Schedule 1 to the Companies Act), both to prove that it is a lawfully constituted and operating non-profit company having members, and to show that it is capable of acting in the public interest as it alleges.[28]

33.3.3 The DA made clear that absent production of DIA's register of its members, it would argue that DIA is not a lawfully constituted entity with standing to litigate.[29]

33.3.4 Third, the DA identified several material irregularities with DIA's constitution which called out for an explanation, including:

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[27] DA's AA para 22.1, p531

[28] DA's AA para 22.2, p531

[29] Id.

(a) DIA's constitution is "*approved*" and signed only by Mr Mtsweni, ostensibly as "*chairperson*", at a special general meeting held on 1 June 2019. Mr Mtsweni's signature is preceded with the recordal: *"This constitution was approved and accepted by me on 01 June 2019".*[30] The DIA constitution therefore does not comply with the incorporation requirements of a non-profit company.[31]

(b) In addition, under Item 4(2)(e) of Schedule 1 of the Companies Act, various particulars are required to be contained in the Memorandum of Incorporation of every non-profit company having members. DIA's constitution does not contain these particulars. In particular, it does not contain: (i) the qualifications for membership; (ii) the process for applying for membership; (iii) any initial or periodic cost of membership in any class; (iv) the rights and obligations, if any, of membership in any class; and (v) the grounds on which membership may, or will, be suspended or lost.[32]

34 In the face of the DA's pertinent denials and objections, the DIA's reply was utterly evasive.

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[30] DA's AA para 22.3, p532

[31] See section 13(1) of the Companies Act provides that "three persons acting in concert" may incorporate a non-profit company by "completing and each signing" the MOI.

[32] DA's AA para 22.3.3, p532-3

35 The DIA's deponent indicated that, while she adopted the Constitution alone on 1 June 2020, "*the two other members of the Non-profit company also subsequently adopted the Constitution*".[33] No details are provided, either in the replying affidavit, or in the attached confirmatory affidavits, as to when "*subsequently*" these other members purportedly adopted the Constitution, and no proof of such adoption is put up.

36 In addition, despite the DA expressly calling for a CIPC registration certificate or a register of members to demonstrate that DIA is a lawfully constituted and operating non-profit company having members, DIA failed to do so. It also failed to address, at all, the specific and targeted allegations of irregularity in its Constitution.

37 In other words, despite being expressly called upon to do so, DIA has failed to establish that it is a lawfully constituted or operational entity with standing to litigate. This casts enormous doubt on whether the present application is brought bona fide by a properly constituted entity or whether, particularly given its timing, it is simply an attempt to rescue Adv Mkhwebane. Whatever the motivation, the failure by the DIA to establish that it is a lawfully constituted or operational entity with standing to litigate means the application must be dismissed.

[33] Replying affidavit ("RA") para 10, pp565-566.

No standing to sue in the public interest

38 DIA claims to bring its application in the public interest.[34] It relies in this regard on section 38(d) of the Constitution, which provides, under the heading "*Enforcement of rights*", as follows:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—*
>
> *…*
>
> *(d) anyone acting in the public interest"*

39 We submit that DIA clearly lacks standing to litigate in the public interest. This is for three primary reasons.

40 First, DIA has not furnished any proof that it represents any constituency of the public, or that it is mandated to do so.

41 As O'Regan J explained in *Ferreira v Levin,*[35] public interest standing is not simply for the taking:

> *"This court will be circumspect in affording applicants standing by way of s 7 (4) (b) (v) [the equivalent in the interim Constitution of s 38(d) of the final Constitution] and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application;*

[34] FA paras 2 and 4, p17.

[35] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC).

and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument in the Court. The factors will need to be considered in the light of the facts and circumstances of each case."[36]

42 Although this was a minority decision, it was later endorsed by the majority in *LHR v Minister of Home Affairs*, where, referring to O'Regan J's approach, the majority (per Yacoob J) held as follows:

> *"[17] I agree in substance with this approach. Although it forms part of a minority judgment it is not inconsistent with anything said in the majority judgment on the issue of standing… The standing provisions in the interim Constitution and s 38 of the Constitution are for all practical purposes the same and the approach advocated by O'Regan J is therefore equally applicable to s 38(d).*
>
> *[18] The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O' Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."*[37]

43 DIA has failed to show that it is genuinely acting in the public interest. As explained above, the nature and extent of DIA's membership base is plainly

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[36] Para 234.

[37] Lawyers for Human Rights and Other v Minister of Home Affairs and other 2004 (4) SA 125 (CC) paras 17-18. See also South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC) paras 75-77 and Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd 2020 JDR 1608 (KZN) paras 44ff.

relevant to its alleged standing to act in the public interest. It has failed to take the Court into its confidence as to the extent of its membership base, beyond the three people that have purportedly approved its Constitution.

44 Again, the issue of DIA's membership and constituency having been raised squarely in the DA's answering affidavit, DIA failed in reply to address it at all.

45 Second, the fact that the Public Protector has also instituted an application to review the legality of the New Rules, which is pending in this Court, demonstrates that there is another reasonable and effective manner for the challenge to be brought and heard.[38] This is one of the primary factors for determining whether a party acts genuinely in the public interest.[39]

46 Third, in any event, section 38 only applies where it is alleged that "*a right in the Bill of Rights has been infringed and threatened*". Put differently, "'*[p]ublic interest' standing is merely recognised in constitutional challenges involving allegations that "a right in the Bill of Rights has been infringed or threatened" (s 38 (d) of the Constitution)*".[40]

47 Indeed, this is precisely what the Constitutional Court held in *Kruger*, where it explained that, while section 38 calls for a generous approach to own-interest standing, "*Section 38, however, is not of direct application in this case as it does not concern a challenge based on a right in chapter 2 of the Constitution*."[41]

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[38] DA's AA para 24.3, p534

[39] Ferreira v Levin para 234.

[40] Peermont para 52.

[41] Kruger v President of the Republic of South Africa and Others 2009 (1) SA 417 (CC) para 23.

48 DIA failed in its founding affidavit even to allege that the public on whose behalf it purports to act have had rights in the Bill of Rights infringed or threatened by the conduct of the National Assembly.

49 For the first time in its replying affidavit, DIA sought to address the issue of an infringement of the Bill of Rights. But it did so hopelessly inadequately. It did not refer to a single specific right, alleging instead that "*[t]here is therefore no doubt that the protection of the chapter 9 institutions is automatically the protection of the rights in the Bill of Rights in their respective area of responsibility*".[42]

50 This contrived attempt to shoehorn the application within the parameters of section 38 does not pass muster and again raises real questions about whether this application is brought bona fides. For this reason too, the application should be dismissed.

THE APPLICATION IS FATALLY FLAWED IN SUBSTANCE

Legislation is not required to define the grounds of removal

51 DIA seeks declaratory relief to the effect that:

51.1 Parliament has failed to comply with its constitutional obligation to pass legislation giving effect to section 194;

[42] RA para 16, p568.

51.2 five statutes regulating Chapter Nine institutions[43] are unconstitutional and invalid for their failure to provide for appropriate circumstances under which Chapter Nine office-bearers are to be removed; and

51.3 the New Rules are unconstitutional for contravening the provisions of sections 181(3) and 194 of the Constitution.

52 This relief is premised on DIA's interpretation of section 181(3) and section 181(5) of the Constitution, read with section 194 of the Constitution. In essence, DIA contends that these provisions require that legislation must be passed setting out the "*specific factors*"[44] the National Assembly must consider for removal, and defining "*why and how*"[45] Chapter Nine officer-bearers are to be removed.[46]

53 This interpretation is fundamentally mistaken.

54 **First**, there is nothing in the language or purpose of section 181 or 194 of the Constitution that requires the National Assembly to pass legislation of this kind.

54.1 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*".

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[43] The Public Protector Act 23 of 1994, the Public Audit Act 25 of 2004, the South African Human Rights Commission Act 40 of 2013, the Commission on Gender Equality Act 39 of 1996, and the Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

[44] FA para 26, p26.

[45] FA para 33, p31.

[46] FA paras 20-21, 26-27, 33, 35, 41, 55-57, pp24-40.

54.1.1 All that section 181(3) requires of organs of state is that they assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. On no conceivable reading does that require the passing of legislation to regulate the removal of the office-bearers of such institutions.

54.1.2 Indeed, section 181(3) envisages "*legislative and <u>other</u> measures*". Even if the National Assembly were 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.

54.1.3 DIA ignores this language. It says that the rules of Parliament "*is not a legislative measure envisaged* in section 181(3) of the Constitution and therefore unlawful."[47] But section 181(3) does not prescribe only legislative measures. It expressly allows legislative "or other" measures.

54.2 Section 194 merely sets out the grounds upon which the Public Protector, the Auditor-General or a member of a Chapter Nine Commission may be removed, and prescribes the majority required in Parliament to effect such removal. There is nothing in the provision even suggestive of a duty to legislate.

[47] FA para 21, p24.

55 **Second,** section 55(2) takes the matter no further.[48] It merely provides that

> "the National Assembly must provide for mechanisms –
>
> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of–
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

55.1 Section 55(2) thus requires the National Assembly to exercise oversight, predominantly over the Executive.

55.2 Section 55(2) does not oblige the National Assembly to employ legislative measures to maintain oversight of organs of state; and chapter nine institutions are, in any event, not "*executive organs of state*".

56 **Third**, in the absence of an express constitutional requirement to do so, it would be contrary to the constitutional principle of separation of powers for a Court to compel parliament to pass specific legislation.

56.1 Sections 43 and 44 of the Constitution stipulate that the legislative authority in the national sphere of government is vested exclusively in Parliament.

56.2 The importance of affording due respect and recognition to the constitutionally ordained role of Parliament was emphasised by the Constitutional Court in *Doctors for Life* as follows:

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[48] FA para 34, p31.

"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised". Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[49]

56.3 In *Women's Legal Centre*, the SCA, relying on the above dictum, recently rejected the argument that courts can – in the absence of an express constitutional injunction – compel parliament to enact legislation.[50]

56.3.1 In that case, the applicants argued that Parliament had failed to recognise and regulate marriages solemnised in accordance with Sharia law, and was thus in breach of various constitutional provisions. It argued that section 7(2) of the Constitution obliged the state to prepare, initiate, introduce and bring into operation legislation recognising Muslim marriages.

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[49] Doctors for Life and Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others 2016 (5) 635 (CC) para 37.

[50] President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177 (18 December 2020).

56.3.2 On appeal, the SCA rejected this argument, and instead granted the alternative relief declaring certain provisions of the Marriage Act and Divorce Act unconstitutional.

56.3.3 The SCA held, in particular that although parliament may be obliged to legislate in accordance with *international law*, or in pursuance of an *express constitutional obligation to pass legislation* – such as that in section 32(2) of the Constitution – section 7(2) does not oblige the state to enact legislation on a specific subject.[51]

56.3.4 The SCA concluded on this aspect as follows:

> *"We know of no authority, and we were not referred to any, where the court directed the enactment of legislation outside of the parameters that we have mentioned, namely, international law and specific constitutional obligations, and solely under s 7(2) of the Constitution. In our view, for a court to order the State to enact legislation, on the basis of s 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of ss 43, 44, and 85 of the Constitution. As we have said, these sections vest the power to initiate legislation in the President and Cabinet, and to adopt legislation in Parliament. This is not to say that this Court is insulating itself from constitutional responsibility. It is for Parliament to make legislative choices provided that they are rational and constitutionally compliant. And if they are not, the court must act in terms of s 172 of the Constitution."*[52]

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[51] Paras 25-39

[52] Para 43.

56.4 The same must be true here. Section 181(3) does not oblige the state to enact legislation on a specific subject. And for a court to order the State to enact legislation, on the basis of section 181(3) and 194 alone, would be contrary to the doctrine of separation of powers, in light of the express provisions of sections 43 and 44 of the Constitution

57 **Fourth,** regulating the removal of office-bearers of Chapter Nine institutions is a matter quintessentially suited to rules.

57.1 The grounds of removal in section 194 are clear and objective.

57.2 All that is required to give effect to section 194 is a procedure by which the National Assembly is to apply those grounds; table, debate and adopt removal resolutions; and vote.

57.3 As our courts have explained (in the context of rules of court), rules exist primarily to ensure fair play and good order. [53]

57.4 That is precisely the purpose of the New Rules. They ensure fairness and good order, and they prescribe a procedure in terms of which section 194 can be given proper effect. That is not a purpose which requires the passage of legislation.

[53] Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another 2014 (2) SA 119 (WCC) para 9.

The New Rules do not breach the Constitution

58 In challenging the constitutionality of the New Rules, DIA has adopted a scatter-gun approach. Its numerous challenges are not always clearly delineated or fully developed.

59 Each of them is, in any event, entirely without merit.

60 Because DIA has not yet filed its heads of argument, we address each of these objections only briefly, reserving the DA's right to address them in greater detail in due course should the need arise.

61 In addition, where there is an overlap between different objections, we have sought to address them together to avoid unnecessary prolixity.

<u>The process by which the New Rules were adopted was lawful and constitutional</u>

62 DIA suggests that, in adopting the New Rules, the National Assembly followed an unconstitutional process and, in particular, infringed sections 53(1)(c), 56, 57(1) and 59(1)(a) of the Constitution.[54]

63 These contentions are meritless.

64 Section 53(1)(c) requires that "*all questions before the Assembly are decided by a majority of the votes cast*".[55]

64.1 This provision was plainly complied with.

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[54] FA paras 34-39, pp31-34.

[55] FA para 38, p34.

64.2 Indeed, not only were the New Rules adopted by a majority; the Speaker has confirmed that they were adopted unanimously at a sitting of the National Assembly at which the majority of members were present.[56]

65 Section 56 of the Constitution also does not assist.[57]

65.1 Section 56, which is headed "*Evidence of information before the national assembly*", provides that:

> *"The National Assembly or any of its committees may—*
>
> (a) *summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;*
>
> (b) *require any person or institution to report to it;*
>
> (c) *compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and*
>
> (d) *receive petitions, representations or submissions from any interested persons or institutions."*

65.2 Section 56 is thus an *empowering* provision, which enables the National Assembly to *obtain information* in various possible ways – such as by summoning persons to appear, requiring persons or institutions to report, or the like.

65.3 Section 56 does not impose an obligation on the National Assembly to exercise its information-gathering powers in any particular case.

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[56] Speaker's AA para 128, p320.

[57] FA paras 35-36, pp32-33.

Nor does DIA say precisely how, in its view, these powers ought to have been and were not exercised in the present case.

66 DIA also contends that section 57(1) obliged the National Assembly to receive representations from Chapter Nine institutions before adopting the New Rules.[58]

66.1 Section 57(1) provides that:

> *"The National Assembly may—*
>
> *(a) determine and control its internal arrangements, proceedings and procedures; and*
>
> *(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."*

66.2 Section 57(1)(b) requires the National Assembly to have "due regard" to democratic principles when it makes rules and orders concerning its business.

66.3 However, this provision does not prescribe the process that the National Assembly must follow in making particular rules.

66.4 Quite the opposite, in fact. The emphasis of section 57 – which, like section 56, is an *empowering* provision – is that the power "*to determine its internal arrangements, proceedings and procedures; and make rules and orders concerning its business*" is one that resides squarely with parliament.

[58] FA para 37, pp33-34.

66.5 In any event, DIA has not laid any factual basis for the suggestion that there was a failure, in adopting the New Rules, to pay due regard to values of "*representative and participatory democracy, accountability, transparency and public involvement*".

67 DIA's reliance on section 59(1)(a) is also mistaken.[59]

67.1 Section 59(1)(a) provides that "*The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees*".

67.2 It does not oblige the National Assembly to receive the representations of any particular person or institution in the formulation of its own internal Rules.

67.3 In any event, the Speaker has demonstrated that the rule-making process was open to the public, that the National Assembly gave public notice of its review of the draft Rules, and that it received representations from interested members of the public.[60]

The New Rules contain a mechanism for sifting out meritless motions

68 DIA complains about the removal from National Assembly Rule 88 of the requirement that the Speaker must, on receipt of a removal motion, assess whether there is a *prima facie* basis for removal.[61]

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[59] FA para 39.

[60] Speaker's AA paras 125 to 126 and TRM17 to TRM19.

[61] FA para 71, pp46-47.

69 Its complaint appears to be that because of the absence of this requirement, meritless motions can, as a result, be moved in the National Assembly, to the prejudice of Chapter Nine institutions.[62]

70 This is clearly wrong. The requirement of a *prima facie* basis remains in the New Rules.

71 Rule 129X(1)(b) provides that an independent panel (of three appropriately qualified persons appointed by the Speaker) must assess whether there is *prima facie* evidence to support the motion *before* it is referred to a parliamentary committee for a section 194 enquiry.[63]

72 The New Rules therefore do contain a mechanism for sifting-out meritless motions before the removal enquiry is launched. Indeed, it is a mechanism that is even more protective of Chapter Nine office-bearers than Rule 88 was, as the assessment of a *prima facie* basis for the motion is made by an independent panel.

<u>The New Rules do not offend against the 'sub judice rule' or fail to protect the dignity and effectiveness of the office of the Public Protector</u>

73 DIA contends that by allowing members of the National Assembly to consider court judgments issued against the Public Protector and that are pending on appeal, the New Rules –

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62 FA paras 73 and 81, pp47-48 and 52-53.

63 DIA2, p 95.

73.1 override the protection of the 'sub judice rule' in National Assembly Rule 89;[64] and

73.2 fail to protect the dignity and effectiveness of the office of the Public Protector.[65]

74 This argument is flawed on both legs.

75 First, the New Rules do not breach or override the *sub judice* rule.

75.1 The purpose of the sub judice rule is not to preclude Parliament from having any regard to court judgments that are pending on appeal. It does not operate as a total bar against any discussion of a pending court case.

75.2 Instead, as the SCA explained in *Midi Television*, the sub judice rule is concerned with statements or conduct that present a "*real risk of demonstrable and substantial prejudice" to the administration of justice*."[66]

75.3 Public scrutiny of court judgments is a vital democratic check and necessary for public confidence in the judiciary. Far from *undermining* the administration of justice, it promotes it.

75.4 The consideration by Members of Parliament ("MPs") of a court judgment in the context of a section 194 enquiry clearly does not

[64] Rule 89 provides: "No member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending."

[65] FA paras 72-73 and 93, pp47 and 60-61.

[66] Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape) [2007] 3 All SA 318 (SCA) para 19.

prejudice or interfere with the court's functions. The appeal court is required to determine the correctness of the order that is appealed against, on the basis of the record that is before it and argument presented to it. Any reliance on, or discussion of a court judgment, by MPs during the removal process would not prejudice the court's ability to determine an appeal before it.

75.5 In any event, under Rule 4 of the National Assembly Rules, the Speaker is vested with the power to suspend or supplement rules for a particular purpose or period. Although we submit that it would not be necessary, it would remain open to the Speaker to suspend Rule 89, should the Speaker consider this necessary for the full and proper consideration a particular removal motion and the NA's performance of its oversight under section 194 of the Constitution.

76 Second, MPs' consideration of judgments that are critical of the incumbent Public Protector does not tarnish the dignity or effectiveness of the office.

76.1 On the contrary, while Adv Mkhwebane may in her personal capacity feel affronted by the consideration of such judgments, it is an entirely reasonable exercise of oversight over her *office*.

76.2 Indeed, members of the National Assembly are arguably <u>obliged</u> to have regard to court judgments that have found the incumbent Public Protector wanting in the performance of her functions, and to scrutinise those judgments to assess whether the incumbent is undermining the dignity and effectiveness of the office.

76.3 Were MPs to ignore court judgments on such crucial matters, they would be remiss in their constitutional duties, and South Africa's constitutional democracy would be undermined by the lack of essential dialogue between the courts and Parliament.

The New Rules adequately define "misconduct" and "incompetence"

77 DIA contends that the New Rules' definition of "*misconduct*" and "*incompetence*" are "*woefully inadequate*" because *(i)* "*they fail to take into account the full extent and nature of the Public Protector's constitutional functions*", and *(ii)* they "*permit a subjective criterion*".[67]

78 DIA's actual complaints about these definitions are difficult to discern.

79 It says that the problem with the definition of "incompetence" is that "*there is no requirement on the National Assembly to determine incompetence within the context of the requirements set out in section 181(3) of the Constitution*".[68]

80 But the very word "*incompetence*" is used in section 194 of the Constitution. The purpose of the New Rules is, *inter alia*, to operationalise this and the other grounds of removal. Quite what DIA means by determining incompetence "*within the context of the requirements set out in section 181(3)*" is not clear.

81 DIA also complains that the definitions do not distinguish between the different constitutional functions of each Chapter Nine institution.[69] But that is simply a

[67] FA para 76, pp49-50.

[68] FA para 77, p50.

[69] FA para 78, p51.

reflection of the constitutional scheme: insofar as the grounds of removal are concerned, section 194 does not distinguish between the different institutions and their functions.

82 In any event, misconduct, incompetence and incapacity are general and objective standards. While the *application* of these standards will depend on the context (including the particular institution concerned), it would be quite inappropriate for these concepts to be differently *defined* depending on the particular office-bearer.

83 Ultimately, DIA's complaints about the definitions are bald assertions, made without any substantiation or proper explanation. Certainly, DIA has not identified the "*subjective criterion*" of which it complains.

<u>There is no requirement to assist and protect the office prior to a finding of incompetence</u>

84 DIA contends that it is only "*after there is evidence of demonstrated and focused interventions to assist and protect the independence, impartiality, dignity and effectiveness of the Public Protector*" that the National Assembly can make a finding of incompetence.[70]

85 This effectively means that even if an independent panel concludes that there is prima facie evidence that the Public Protector is incompetent, and even if a large majority of the National Assembly agrees with that assessment, it is constitutionally impermissible for the Rules to permit the National Assembly to

[70] FA para 77, pp50-51.

remove the Public Protector until it has taken steps to "*assist and protect*" her office.

86 There is no such requirement under the Constitution or the Public Protector Act.

87 Whether or not the alleged misconduct and incompetence of Ms Mkhwebane as the incumbent Public Protector can be justified and explained by inadequate assistance by other organs of state is a matter for determination in the removal enquiry. It is certainly not a basis to invalidate the Rules.

The removal motion is not concerned with mere errors of law and does not undermine decisional independence

88 DIA suggests that the New Rules permit the removal of the Public Protector for mere errors of law, and thus undermine her decisional independence.[71]

89 This is manifestly incorrect.

89.1 It is not "the merits" of her reports that are grounds for removal under the New Rules.

89.2 The New Rules only permit her removal where her conduct rises to the level of incompetence, misconduct or incapacity that she may be removed. That her conduct may or may not have informed or affected the merits of her reports is neither here nor there.

89.3 This is indeed apparent from the grounds for removal set out in the DA's charges: they include an intentional or grossly negligent failure

[71] FA paras 83ff, p54.

to perform the duties of office; dishonesty; and a sustained and demonstrated inability to perform the functions of the office of the Public Protector effectively and efficiently (i.e. incompetence).[72]

89.4 Thus, the DIA's comparison with judges, who are shielded from punitive or disciplinary actions for "mere legal errors", is inapposite.[73] Apart from the fact that judges, unlike Chapter Nine institutions, are not accountable to the National Assembly,[74] the issue of "mere legal errors" does not arise.

The New Rules adequately protect against conflicts of interest and bias

90 DIA further contends that the New Rules are unconstitutional for failing to prevent conflicts of interest and bias on the part of MPs in the section 194 removal process. It also suggests that that the mere fact that a political party or MP has been the subject of an adverse finding by the Public Protector, or is under investigation by the Public Protector, renders them conflicted.[75]

91 This challenge is mistaken for four separate reasons.

92 First, it ignores the legal presumption that officials exercising discretionary powers must be presumed to exercise their powers lawfully. Courts will not assume that discretionary statutory powers will be abused or exercised

[72] DA's AA para 42.1, p548.

[73] FA para 87, pp56-57.

[74] Section 181(5) of the Constitution.

[75] FA paras 94-98 and 101, pp61-66 and 66.

unfairly.[76] Where officials are shown to have abused their powers, the law provides remedies. However, that possibility has no bearing on the validity of the rule.

93 Second, the removal process in the New Rules is multi-staged, with numerous checks against conflicts of interest or bias jeopardising the process. In particular:

93.1 The assessment of whether there is *prima facie* evidence that supports the charges is vested, in the first instance, with an independent panel. The independence of the panel is itself an important check, as it ensures that non-political actors assess the merits of the motion.

93.2 If the independent panel recommends, and National Assembly approves, referral to a section 194 enquiry, then a committee of the National Assembly must be convened to assess the charges.

93.3 Ultimately, it is for the National Assembly to decide whether to accept the recommendations of the committee. The removal power is "*institutional*" and vests within the exclusive jurisdiction of the National Assembly as a whole.[77] A supporting vote of two-thirds of the National Assembly is required for the removal of the Public Protector.

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[76] Minister of Health v New Clicks SA (Pty) Ltd & Others 2006 (2) SA 311 (CC) para 152, quoting Doody v Secretary of State for the Home Department and other appeals [1993] 3 All ER 92 (HL) at 106D-H; Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) para 72; Van Rooyen v The State (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) para 37.

[77] This is the language the Constitutional Court used to describe the removal power under section 89 of the Constitution (for removal of the President) in Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) at para 178-181.

93.4 The multi-stage removal process, coupled with the vesting of the ultimate decision in the entire National Assembly and the high threshold for removal, ensures overall fairness in the removal process.

94 Third, it is false that the mere fact that a political party or MP has been the subject of an adverse finding by the Public Protector renders them conflicted. To hold otherwise would be to immunise the Public Protector from accountability to the National Assembly by virtue of the performance of her functions.

95 Fourth, the 'conflict of interests complaint' is, in any event, entirely speculative. Should a conflict of interest in fact arise, recourse can be had to the Speaker, or if necessary and appropriate, the court, to resolve the matter.

The New Rules entitle the Public Protector to make representations

96 DIA objects to the New Rules on the basis that they do not require the Speaker to invite representations from the Public Protector *"at the preliminary stage"*.[78]

97 Again, this complaint is entirely mistaken.

98 First, as a matter of law, there is an overwhelming weight of authority that there is no right to a '*hearing before a hearing'*, or a hearing before a complaint is lodged and referred for investigation. We have referred to these authorities at

[78] FA paras 103-104 and 110-111, pp66-67 and 69-70.

paragraph 40 of the heads of argument filed in the Public Protector matter, and do not repeat them here.[79]

99 Second, in any event, the Public Protector is in fact afforded an opportunity to make representations *"at the preliminary stage"*, in the form of written representations to the independent panel responsible for assessing whether there is *prima facie* evidence to support the motion. The New Rules thus go beyond what the rules of natural justice require.

99.1 Under rule 129X, the independent panel–

> *"(ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;*
>
> *(iii) must provide the holder of the public office with a reasonable opportunity to respond in writing to all relevant allegations against him or her."*

99.2 The Public Protector's representations will accordingly inform the panel's recommendation and the Assembly's determination of whether to refer the motion to a parliamentary committee for a formal enquiry.

99.3 Should the matter be referred to a section 194 committee, then the Public Protector will be afforded a further and full opportunity to be heard by the committee itself.

99.4 Rule 129AD provides that, if the National Assembly approves a recommendation by the panel to proceed with a section 194 enquiry,

[79] See also Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd para 22; Park-Ross v Director for Serious Economic Offences 1998 (1) SA 108 (C).

the committee appointed to conduct the enquiry "*must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe*", and–

> "must afford the holder of the public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee."

<u>There is no requirement that complaints must be handled confidentially</u>

100 DIA complains that the New Rules' failure to provide for the <u>confidential</u> handling of complaints "*exposes the process to prejudicial political attacks" and "frivolous complaints*"; "*strips the Chapter Nine institution of its inherent dignity*"; and undermines public confidence in these institutions and their office-bearers.[80]

101 This is an astonishing submission, particularly for an entity that claims to be committed to democracy, transparency and accountability. It is entirely at odds with foundational constitutional principles, and with the openness and transparency required of the National Assembly in particular.

102 The confidentiality of parliamentary proceedings is anathema to our Constitution. While much has of course been said about the fundamental importance of public involvement in the law-making process,[81] our courts have gone further.

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[80] FA paras 105-107, pp55-56.

[81] Doctors for Life International v Speaker of the National Assembly & others 2006 (6) SA 416 (CC) para 138

103 The SCA has, for example, held that the Constitution creates a "*default position*" that all parliamentary proceedings are open to the public.[82] At its simplest, '*[t]he Constitution thus affords all South Africans the right to see and hear what happens in Parliament*."[83] This extends to knowing "*what the Speaker or the Chairperson says during moments of disorderly behaviour, but also to see how MPs are treated by security staff who forcibly evicts them from the Chamber*".[84]

104 The question of secrecy and confidentiality also arose in *UDM v Speaker,*[85] in which the Speaker's decision that she was legally precluded from holding a presidential no-confidence vote by secret ballot was set aside.

104.1 The Constitutional Court confirmed that "*the Assembly's internal arrangements, proceedings and procedures must have due regard to the need to uphold the value of transparency in carrying out the business of the Assembly*."[86]

104.2 Thus, while the Court recognised that circumstances might make secret ballots occasionally rational and permissible, this was in order to protect those *casting* ballots against undue influence, intimidation or fear of disapproval by others; it was not to protect the person subject to a no-confidence vote.

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82 Primedia Broadcasting (a division of Primedia (Pty) Ltd) and Others v Speaker of the National Assembly and Others 2017 (1) SA 572 (SCA) paras 21 and 23

83 Para 1.

84 Para 38.

85 United Democratic Movement v Speaker of the National Assembly and Others 2017 (5) SA 300 (CC)

86 Para 80

104.3 Even then, it was ultimately for the Speaker to decide how the vote should be conducted, and the appropriate level of secrecy. For the Court to *direct* the speaker to hold a secret ballot would be a "*radical and separation of powers-intensive move*" and "*most inappropriate*".[87]

104.4 Moreover, the Court emphasised that secrecy was not the norm, and that "*[c]onsiderations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party's instructions."*[88]

105 Lastly, if anything, the public exposure of removal motions will serve to prevent frivolous attacks, and will inspire public confidence in Chapter Nine institutions. The National Assembly will be seen to be performing its oversight functions, and any unwarranted attacks can be publicly answered by the incumbent.

<u>The independent panel is lawful and constitutional</u>

106 DIA complains that the referral by the Speaker to an independent panel of three nominated and suitably-qualified individuals *"is not envisaged in"* sections 181(3) or 194 of the Constitution.[89]

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87 Paras 73 to 75.

88 Para 80.

89 FA para 109, p69.

107 However, neither section 181(3) nor section 194 purport to define the removal process exhaustively. It is perfectly permissible for the NA to make use of such a mechanism.

108 DIA also suggests that the involvement of the panel undermines the independence of the removal process or somehow contravenes section 181(3) of the Constitution.[90] This too is mistaken.

108.1 The role of the panel is to assist and make recommendations to the NA. It has no decision-making authority.

108.2 The panel does not usurp the role of the section 194 committee in conducting the enquiry, nor that of the NA, which must (i) consider the recommendation of the independent panel in deciding whether to proceed with a section 194 enquiry; and (ii) take the ultimate decision on removal following a section 194 enquiry.

108.3 The independent panel serves only to check that there is indeed a *prima facie* case to answer at a section 194 enquiry, and to advise the NA accordingly by making recommendations to it.

108.4 The role of the independent panel is carefully circumscribed and limited. It does not perform any partisan function and is required to be independent.

108.5 If anything, the fact that there is a screening of the charges by a non-partisan and non-political panel <u>enhances</u> the independence of the

[90] FA para 126, p77.

process, and provides a check against unwarranted 'political attacks' (which DIA repeatedly contends must be avoided).

The New Rules do not offend the "rule against retrospectivity"

109 Finally, DIA complains that the application of the New Rules to the DA's removal motion would offend the "rule against retrospectivity".[91]

110 This is premised on a fundamental misunderstanding of the nature of the New Rules, and of retrospectivity in our law.

111 First, Rule 129 does not introduce any new legal standards or consequences. This is apparent from its terms: rule 129 contains precisely the same grounds of removal specified in section 194(1) of the Constitution – of misconduct, incompetence, and incapacity.

112 Second, this objection misunderstands the application of retrospectivity to matters of procedure, where vested substantive rights are not affected.

112.1 Procedural rules, which do not affect vested rights,[92] generally apply retrospectively, because "*no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.*"[93]

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91 FA paras 121-122, pp75-76.

92 Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A) at 753 B-D.

93 See Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 at 836 cited with approval in Veldman v Director of Public Prosecutions, Witwatersrand Local Division 2007 (3) SA 210 (CC) Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd 2017 (4) SA 17 (SCA).

112.2 As Kentridge AJ explained in *S v Mhlungu and Others*[94], where a law effects changes in procedure "[*i*]*t is presumed that such a law will apply to every case subsequently tried "no matter when such case began or when the cause of action arose.*""[95]

112.3 Therefore, if a statute does not impair substantive rights and obligations, then it is presumed that the new procedure applies – and it is plainly permissible for it to do so. Thus, in *Nkabinde & Jafta v Judicial Service Commission*,[96] where a new statutory procedure for the investigation of complaints of alleged judicial misconduct had no fatal effect on existing rights, the presumption against retrospectivity did not apply, and the new rules applied.

113 Upholding the complaint on the basis of retrospectivity would have the absurd effect of rendering the Public Protector immune from accountability to the NA for misconduct or other 'transgressions' committed before the Rules were promulgated. That would be a serious affront to the rule of law. It is deeply troubling that DIA – if it is truly committed to democracy, transparency and accountability – would see fit to advance this argument.

CONCLUSION AND PRAYER

114 For these reasons, we submit that:

114.1 The DA should be joined as a respondent in this matter;

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94 1995 (3) SA 867 (CC) at paras 65 to 67.

95 Citing Curtis v Johannesburg Municipality 1906 TS 308 at 312.

96 2016 (4) SA 1 (SCA).

114.2 the application should be dismissed with costs, including the costs of two counsel.

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15 January 2021

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26. Van Rooyen v The State (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)

27. Veldman v Director of Public Prosecutions, Witwatersrand Local Division 2007 (3) SA 210 (CC)

28. Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd 2017 (4) SA 17 (SCA)