IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO.: 1731/ 2020

In the application of:

DEMOCRACY IN ACTION Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS Respondents

14TH RESPONDENT'S NOTE FOR ORAL ARGUMENT

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INTRODUCTION

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1.4 The fundamental requirements that have to be met by the Rules and how the rules meet them; and

1.5 The question of an appropriate remedy (if any).

THE KEY CONSTITUTIONAL PROVISIONS

2 Section 181 of the Constitution deals with the chapter nine institutions, including the Public Protector.

3 The section makes two things clear.

3.1 The first is that the chapter nine office-bearers, including the Public Protector, are "*independent*". This appears in section 181(2) of the Constitution.

3.2 The second is that the chapter nine office-bearers, including the Public Protector, are also "*accountable to the National Assembly*." This appears in section 181(5) of the Constitution.

4 So the Constitution does not adopt an approach of independence at all costs for chapter nine office-bearers. They have independence – but they are also subject to accountability to the National Assembly.

5 The Constitution also <u>expressly</u> permits the removal from office of the chapter nine office-bearers.

5.1 It does so in section 194(1) of the Constitution, where it provides that:

> "The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—
> (a) the ground of misconduct, incapacity or incompetence;
> (b) a finding to that effect by a committee of the National Assembly; and
> (c) the adoption by the Assembly of a resolution calling for that person's removal from office."

5.2 Section 194(2)(a) of the Constitution then provides that in respect of the Public Protector, the majority required for removal is two-thirds of the National Assembly.

6 It is entirely unsurprising that the Constitution makes provision for chapter nine office-bearers to be removed from office. All public office-bearers can be removed from office where necessary.

7 For example:

7.1 The President can be removed from office by the National Assembly via impeachment or a vote of no-confidence, in terms of sections 89 or 102 of the Constitution.

7.2 The Premiers can be removed from office by the Provincial Legislatures via impeachment or a vote of no-confidence, in terms of sections 130 or 141 of the Constitution.

7.3 The Speaker can be removed from office by the National Assembly in terms of section 52(4) of the Constitution.

7.4 A member of the Public Service Commission can be removed from office by the National Assembly in terms of section 196(12) of the Constitution.

8 The fact that an office-bearer – including the Public Protector – may have to face removal proceedings in the National Assembly is therefore constitutionally unremarkable and constitutionally unobjectionable.

9 Indeed, as the Constitutional Court has explained, such removal processes and the ability to pursue them are "*accountability mechanisms that can be used by the National Assembly to hold [office-bearers] accountable*".

EFF v Speaker of the NA 2018 (2) SA 571 (CC) at para 90, summarising _UDM v Speaker of the NA_ 2017 (5) SA 300 (CC) at para 40

10 It must therefore be accepted that removal procedures and processes for chapter 9 institutions, including the Public Protector, are permitted and indeed required by the Constitution. They are essential for the principle of accountability.

11 This is the first important piece of context within which the present application must be assessed.

THE NEED FOR RULES TO OPERATIONALISE SECTION 194

12 It ought to be equally uncontroversial that there is a need for rules to operationalise the removal processes under section 194.

13 As the Constitutional Court explained in ***EFF II*** in respect of the section 89 impeachment proceedings: "*Without rules defining the entire process, it is impossible to implement section 89*".

> ***Economic Freedom Fighters v Speaker of the National Assembly*** **2018 (2) SA 571 (CC) at para 182**

14 It must therefore be accepted that having the National Assembly enact rules to define the entire removal process is permitted and indeed required by the Constitution.

15 This is the second important piece of context within which the present application must be assessed.

16 Yet the DIA contends that this has to be dealt with via <u>legislation</u> rather than <u>rules</u>.

16.1 That argument is utterly inconsistent with the ***EFF II*** judgment.

16.2 There, the Court held that the "*the failure by the National Assembly to make* ***<u>rules</u>*** *regulating the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid*".

***Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at para 222(2)**

16.3 If the Constitutional Court held that the Constitution required that rules be made to give effect to the section 89 removal power, how can the Constitution preclude rules being made to give effect to the section 194 removal power?

16.4 This is especially so when section 181 of the Constitution recognises that organs of state must use *"legislative and other measures*" to ensure the independence and effectiveness of chapter nine institutions.

17 This problem for the DIA is not avoided by its attempts to characterise the issue as being about subsidiarity.

17.1 As Justice Nuku correctly put to the DIA's counsel, the subsidiarity principle is a principle that precludes litigants from relying on the Constitution in challenging governmental conduct.

17.2 The DIA's counsel pointed to ***Mazibuko v Sisulu* 2013 (6) SA 249 (CC)**. But this case does not answer Justice Nuku's proposition at all.

17.2.1 ***Mazibuko*** did not involve Parliament being required to pass legislation.

17.2.2 It involved Parliament being required to pass rules to deal with motions of no confidence.

17.2.3 It is therefore directly against the DIA's proposition that legislation is required.

17.3 There is accordingly no authority at all to support the subsidiarity argument being used as a basis for challenge. The argument is not merely unprecedent, but is unsustainable as matter of law.

18 It must therefore be accepted that having the National Assembly enact rules to define the removal process is permitted and indeed required by the Constitution.

THE REAL DEBATE BETWEEN THE PARTIES AND HOW TO APPROACH IT

19 It must therefore be accepted that:

19.1 Removal procedures and processes for chapter 9 office-bearers, including the Public Protector, are permitted and indeed required by the Constitution. This is essential for accountability; and

19.2 The National Assembly is permitted and indeed required by the Constitution to enact rules to define the removal process.

20 This means that the real debate between the parties is considerably narrower than might be suggested by the reams of paper exchanged.

20.1 It cannot be a debate about whether removal processes are permitted by the Constitution.

20.2 It cannot be a debate about whether it is permissible for the National Assembly to enact rules to define the removal process.

21 Instead, the only real debate is whether it has been shown by those challenging the rules that these particular rules, enacted by the National Assembly, breach the Constitution in some specific way.

22 The DIA ultimately recognises that this is so.

22.1 It spends considerable energy (as did the Public Protector) on the substance of the Rules, and tries to show that they breach the Constitution.

22.2 The DIA, for example, criticises the fact that the Rules provide for an independent panel; criticises the fact that the Rules purportedly allow for removal on the basis of "mere error"; criticises the fact that the Rules do not provide for sufficient confidentiality.

23 The question is how the Court should assess those sorts of criticisms and determine such a challenge.

24 The Constitutional Court has repeatedly laid down how such a challenge is assessed by a court.

24.1 It is <u>not</u> assessed by asking a court to "second-guess" what the National Assembly has done.

24.2 It is <u>not</u> assessed by asking a court to see whether some "better" or "more preferable" set of rules could of have been devised.

24.3 Instead, it is assessed by asking whether the National Assembly's rules fall within the range of many possible measures a rational National Assembly could adopt.

25 The Constitutional Court has made this clear again and again and again in a series of different contexts. Six examples will suffice.

25.1 In ***Van Rooyen*****,** concerning the independence of judicial officers serving in the magistracy, the Court explained:

> "Judicial independence can be achieved in a variety of ways; the "most rigorous and elaborate conditions of judicial independence" need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system."
> ***S v Van Rooyen* 2002 (5) SA 246 (CC) at para 27**

25.2 In ***Albutt***, dealing with the rationality requirement, the Court explained:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved…"
> ***Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) at para 51***

25.3 In ***Merafong***, dealing with the rationality requirement, the Court explained:

> "The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature."
> ***Merafong Demarcation Forum v President of the RSA* 2008 (5) SA 171 (CC) at para 63**

25.4 In ***MyVote Counts 1*****,** in dealing with whether an NGO could require the making of legislation to deal with funding of political parties, the Court was blunt:

> "The applicant wants information on the private funding of political parties to be made available in a manner preferred by it. It prefers that the legislation should require the disclosure of the information as a matter of continuous course, rather than once-off upon request. <u>According to the minority judgment, what South Africa must</u>

have is systematic disclosure. It may well be that this is ideal; who knows? But that is not the issue. It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. Crucially, lack of rationality is not an issue in these proceedings.

Despite its protestation to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so? None, in the present circumstances. That attempt impermissibly trenches on Parliament's terrain; and that is proscribed by the doctrine of separation of powers."

***My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at paras 155-156**

25.5 In ***EFF 1***, dealing with how far the Court should go in interfering with the National Assembly's processes regarding the removal of the President, the Court warned:

> "It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the "vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government". Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government."
>
> ***Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) at para 93 (emphasis added)**

25.6 In ***EFF 2***, dealing with what the National Assembly rules for removal of the President should say, the Court warned:

> "[A]ny process for removing the President from office must be preceded by a preliminary enquiry, during which the Assembly determines that a listed ground exists. The form which this preliminary enquiry may take

> depends entirely upon the Assembly. It may be an investigation or some other form of an inquiry. It is also up to the Assembly to decide whether the President must be afforded a hearing at the preliminary stage."
> ***Economic Freedom Fighters v Speaker of the National Assembly*** **2018 (2) SA 571 (CC) at para 180**

26 It is therefore not enough for those challenging the Rules to show that there is another way – even a better way – in which they could have been formulated. That is insufficient.

27 Nor may they ask the Court to interfere with or prescribe to the National Assembly how to fulfil its obligations. That is impermissible.

28 If the Court were to set aside the Rules (or any aspect of them) on this basis, it would be acting quite inconsistently with the jurisprudence set out above.

29 Instead, those challenging the rules must go further. They have to show that the Rules do not even fall within the range of many ways in which the National Assembly could rationally fulfil its duties. They have plainly failed to do so. Their challenge must therefore fail.

THE FUNDAMENTAL REQUIREMENTS ARE ALL MET BY THE RULES

30 Having said that, it must be accepted that there are certain fundamental requirements that have to be met for the Rules regarding the removal of chapter nine office-bearers to be valid.

31 It seems to us, particularly having considered the helpful submissions of the amici, that there are three of these.

31.1 The first requirement is that the grounds for removal must be set out.

31.2 The second requirement is that the office-bearer must have a right to be heard before any decision is made to remove him or her.

31.3 The third requirement is that the decision to remove the office-bearer must be made by the National Assembly.

32 However, is demonstrated in what follows, all three of these fundamental requirements are met by the Rules.

The process created by the Rules – a summary

33 The process starts when a motion for removal is brought and the Speaker certifies that it is in order. (Rules 129R and 129S)

34 An independent panel is then appointed. (Rule 129T)

34.1 The purpose of the independent panel is to provide "*a preliminary assessment of the matter*". (Rule 129T(a))

34.2 The independent panel must "*conduct ... a preliminary assessment … to determine whether there is prima facie evidence to show*" that the chapter nine office-bearer committed misconduct, is incapacitated or is incompetent. (Rule 129X(1)(b))

34.3 The independent panel has no binding decision-making power.

34.4 The independent panel may only make "*recommendations*" to the National Assembly. (Rule 129X(1)(c)(v))

34.5 The independent panel must include in its report the "*reasons for such recommendations*". (Rule 129X(1)(c)(v))

35 The entire National Assembly must then meet to give "*consideration*" to the "*recommendations*" of the independent panel. (Rule 129Z(1))

35.1 The National Assembly itself then decides whether "*a section 194 enquiry [should] be proceeded with*" (Rule 129Z(2)). If so, the National Assembly refers the matter to a National Assembly "*committee for formal enquiry"* (Rule 129Z(2)).

35.2 The National Assembly is <u>not</u> bound by the "recommendations" of the independent panel in making this referral decision. All that it must do is give "consideration" to them. (Rule 129Z(1))

35.3 The National Assembly makes its own decision on whether or not to proceed with a formal section 194 enquiry.

35.3.1 If the independent panel recommends that a formal enquiry <u>should</u> take place, the National Assembly is free to proceed with a formal enquiry <u>or</u> stop the motion there and then.

35.3.2 If the independent panel recommends that a formal enquiry should <u>not</u> take place, the National Assembly is still free to proceed with a formal enquiry <u>or</u> stop the motion there and then.

35.3.3 It is thus entirely the decision call of the National Assembly whether to proceed with a formal enquiry <u>or</u> stop the motion there and then.

36 If the National Assembly decides that a section 194 enquiry should be proceeded with, it refers the matter to a National Assembly "*committee for formal enquiry".* (Rule 129Z(2))

36.1 The function of that National Assembly Committee is to "*conduct an enquiry and establish the veracity of the charges and report to the Assembly thereon*". (Rule 129AD(1))

36.2 In doing so, the National Assembly Committee "*must ensure that the enquiry is conducted in a reasonable and procedurally fair manner*". (Rule 129(2)).

36.3 The National Assembly Committee "*must afford the holder of a public office the right to be heard in his or her defence*". (Rule 129(3)).

37 The National Assembly Committee must then file a report with the National Assembly containing its findings, recommendations and the reasons for its findings and recommendations. (Rule 129AF)

37.1 If the National Assembly committee recommends <u>against</u> removal, then no removal can occur.

37.2 If the National Assembly committee recommends <u>in favour of</u> removal, the matter must be voted on by the entire National Assembly. (Rule 129AF(2)).

37.3 At least <u>two-thirds</u> of the National Assembly would have to vote in favour of the removal of the Public Protector for removal to occur. (Section 194(2)(a) of the Constitution).

The involvement of the independent panel is permissible

38 The DIA contends that it is impermissible to have the independent panel involved at all. It argued that this involves an unlawful "delegation" of power.

39 But this is not correct.

40 The role of the independent panel has been set out above.

40.1 It is only to "*conduct ... a preliminary assessment … to determine whether there is prima facie evidence to show*" that the chapter nine office-bearer committed misconduct, is incapacitated or is incompetent. (Rule 129X(1)(b))

40.2 The independent panel has no binding power and may make only "*recommendations*" to the National Assembly, which must be accompanied by reasons. (Rule 129X(1)(c)(v))

41 The entire National Assembly must then meet to give "*consideration*" to the "*recommendations*" of the independent panel. (Rule 129Z(1)).

41.1 The National Assembly is <u>not</u> bound by those recommendations of the independent panel.

41.2 Instead, the National Assembly makes its own decision on whether "*a section 194 enquiry [should] be proceeded with*" (Rule 129Z(2)).

42 The function of the independent panel stands in sharp contrast to that of the National Assembly Committee that conducts the formal enquiry.

42.1 The independent panel merely makes a non-binding "*preliminary assessment*" on "*whether there is prima facie evidence*" to show that the chapter nine office-bearer committed misconduct, is incapacitated or is incompetent. (Rule 129X(1)(b))

42.2 By contrast, the National Assembly Committee conducts a "*formal enquiry*" to *"establish the veracity of the charges"*. (Rule 129AD(1))

43 Seen in this context, the DIA's contentions about the independent panel are without merit. There is no "*delegation*".

43.1 Delegation occurs where "*one public authority authorizes another to act in its stead*".

Baxter, Administrative Law at 432 (emphasis in original)

43.2 So, where a statute confers a power on a Minister to make a decision about something, the Minister may sometimes permissibly "*delegate*" that power to his or her Director-General. That means the Director-General is empowered to take the decision in the Minister's stead.

43.3 For example, in the case where a piece of legislation confers a power on the Minister to issue a mining permit to an applicant, if there is a valid delegation to the Director-General then the Director-General can make that decision instead of the Minister.

44 But in the present case, there is no delegation of the National Assembly's decision-making power.

45 Section 194(2) of the Constitution explains that for a chapter nine office-bearer to be removed, two decisions are necessary.

45.1 First, "*a finding*" by "***a committee of the National Assembly"*** that the chapter nine office-bearer is guilty of misconduct, suffers incapacity or incompetence. That appears from section 194(1)(b) of the Constitution.

45.2 Second, the "*adoption of the National Assembly of a resolution calling for the [chapter nine office-bearer's] removal from office.*" That appears from section 194(1)(c) of the Constitution.

46 The Rules do <u>not</u> empower the independent panel to take either of these two decisions. On the contrary, the Rules expressly preserve the powers of the National Assembly Committee and the National Assembly itself to take these two decisions.

46.1 Rule 129AD(1) expressly provides that the National Assembly Committee must "*conduct and enquiry and establish the veracity of the charges*" against the chapter nine office-bearer. This replicates section 194(1)(b) of the Constitution and vests the decision in the National Assembly.

46.2 Rule 129AF(2) then expressly provides that the entire National Assembly itself must decide whether to adopt a resolution for the removal of the chapter nine office-bearer. This replicates section 194(1)(c) of the Constitution and vests the decision in the National Assembly.

47 By contrast, the independent panel does not take either of these two decisions. It takes no binding decision <u>at all</u>. All that it does is make a non-binding "*preliminary assessment*" on "*whether there is prima facie evidence*" to show that

the chapter nine office-bearer committed misconduct, is incapacitated or is incompetent. (Rule 129X(1)(b))

48 This is certainly permissible. Our law is quite clear on this point.

48.1 Professor Baxter made the position clear:

> "This principle [of passing the buck] does not preclude consultation with other officials and advisory bodies. On the contrary, as long as the final decision is taken by the properly empowered authority, much good is likely to come of hearing the advice of other officials and, indeed, members of the public."
> **Baxter, Administrative Law p 443 (emphasis added)**

48.2 Professor Hoexter endorses this and explains the position neatly:

> "There are at least two other ways in which an administrator may abdicate its power or usurp the power of another body: by unlawful dictation or unlawful referral. Like unlawful delegation, these practices flout the basic principle that the responsibility for the exercise of discretionary power rests with the authorised body and no one else. However, because they are more covert and less 'official' forms of delegation, these illegalities tend to be less obvious and are more difficult to prove. But neither of these two grounds prevents, or can possibly be intended to prevent, an administrator from consulting with other officials or bodies or the public before taking a decision. As Baxter remarks, taking advice from other officials or the public is likely to prove beneficial. The point is rather that the final decision must be taken by the properly empowered administrator. The agency responsible must not be reduced to rubber-stamping a decision which it ought to have taken itself."
> **Hoexter, Administrative Law in South Africa (2nd ed) pp 273-4 (emphasis added)**

48.3 The SCA endorsed this same approach in ***Scenematic***:

> "A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate. …
>
> > 'It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of Baxter Administrative Law (at 443), ''pass the buck'' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity.'
>
> As to the reliance on the advice of another, the functionary would at the least have to be aware of the grounds on which that advice was given. …. But it does not follow that a functionary such as the DDG in the present case would have to read every word of every application and

> may not rely on the assistance of others. Indeed, given the circumstances, Parliament could hardly have intended otherwise. What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion …
> Whether, therefore, there has been an abdication of the discretionary power vested in the functionary is ultimately a question that must be decided on the facts of each case…."
> ***Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at para 20**

48.4 The Constitutional Court endorsed this same approach in ***SARFU III***:

> "[I]t is clear that, were the President to purport to delegate his or her powers in terms of s 84(2) of the Constitution or s 1 of the Commissions Act to another, that delegation would be invalid. However, it will not constitute an abdication of power, where it is clear that the President, although acting upon advice from advisers or members of the Cabinet, exercised the presidential powers himself or herself. The President is entitled to seek and rely on advice, but must make the final decision."
> ***President of the RSA v SARFU* 2000 (1) SA 1 (CC) at para 43 (emphasis added)**

48.5 The Constitutional Court reiterated this approach in ***Chonco***:

> "[T]he President bears powers that go beyond the principal decision-making power, and includes what may be described as 'auxiliary powers'….
> … [T]he scope of these auxiliary powers is narrow - only those powers reasonably necessary to properly fulfil the functions in s 84(2) are endowed. These would include the power to request advice as well as the power to initiate the processes needed to generate that advice, such as receiving and examining applications for pardon.
> The preliminary process at issue here is within the ambit of the President's auxiliary powers, implicit in s 84."
> ***Minister for Justice & Constitutional Development v Chonco* 2010 (4) SA 82 (CC) at paras 31-33 (emphasis added)**

49 Against these strong and consistent authorities, the DIA offers only authorities saying that the National Assembly only has the powers conferred by the Constitution.

49.1 The DIA for example relies on paragraph 25 of ***De Lille***, which states:

> "… The National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. 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. 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."
> ***De Lille v Speaker of the NA* 1998 (3) SA 430 (C) at para 25, citing *Executive Council, Western Cape v President of the RSA* 1995 (4) SA 877 (CC) at para 62**

49.2 But that trite proposition cannot sustain the DIA's challenge to the independent panel.

49.3 It is indeed clear, as ***De Lille*** confirms, that the National Assembly has "*only those powers vested in it by the Constitution expressly or by necessary implication*".

49.4 But in ***EFF 2**,* the Constitutional Court already held that there was an implied power (and indeed a duty) to make rules regarding a "sifting mechanism" for removal processes. The independent panel is just such a mechanism.

50 The Court has therefore not been furnished with any authority to support the proposition that the role of the Independent Panel is impermissible. It is plainly permissible.

The first requirement is met – the grounds of removal are set out

51 The grounds of removal are set out in section 194 of the Constitution. They are "*misconduct, incapacity or incompetence*".

52 Those grounds are repeated and defined in the Rules. This is done in the "definitions" section of the Rules. This is precisely what the decision in ***EFF2*** envisages.

53 The first requirement – that the grounds for removal must be set out – is therefore plainly satisfied.

The second requirement is met – the office-bearer must be given a hearing

54 There can be no question that a chapter nine office-bearer has to be given a hearing before a removal decision is made.

55 As already indicated, the National Assembly Committee is the key process here. Its job is to conduct a "formal enquiry" to "*establish the veracity of the charges and report to the Assembly thereon*". (Rule 129AD(1)). If it does not recommend removal from office, no removal can occur.

56 The Rules are emphatic on the duty of procedural fairness in this regard.

56.1 Rule 129(2) requires that the National Assembly Committee "*must ensure that the enquiry is conducted in a reasonable and procedurally fair manner*".

56.2 Rule 129(3) requires that the National Assembly Committee "*must afford the holder of a public office the right to be heard in his or her defence*".

57 The second requirement – that the chapter nine office bearer be given a hearing before any removal decision is made – is therefore plainly satisfied.

58 This is without even considering the additional hearing, which is provided by the independent panel.

The third requirement is met – the removal decision is made by the National Assembly

59 Section 194(1)(c) of the Constitution is clear. A chapter nine office-bearer can only be removed upon "*adoption of the National Assembly of a resolution calling for that person's removal from office.*"

60 It is therefore plain that the ultimate decision has to be that of the National Assembly itself.

61 The rules achieve this in express terms.

61.1 It is the entire National Assembly itself that decides whether to proceed with "*a formal section 194 enquiry*". (Rule 129Z(2)).

61.2 It is a committee of the National Assembly that conducts the "*formal enquiry*" to *"establish the veracity of the charges"*. (Rule 129AD(1)).

61.3 It is the entire National Assembly that decides whether to adopt a motion calling for the removal of the chapter nine office bearer (Rule 129AF).

62 The third requirement – that the removal decision must be made by the National Assembly – is therefore plainly satisfied.

Conclusion on the Rules

63 The Rules are therefore lawful in all respects. The DIA's challenge must therefore be dismissed.

THE QUESTION OF AN APPROPRIATE REMEDY (IF ANY)

64 We submit that the entire challenge of the DIA falls to be dismissed. That means no question of remedy arises.

65 If, however, we are wrong and the Court were to uphold the challenge in any respect, then the question of an appropriate remedy would arise.

Remedy for substantive concerns (if any)

66 If the DIA's challenge were upheld on any substantive grounds, then the Court would be under a duty to seek to use the remedy of severance if at all possible.

67 We have made extensive submissions on this during the Public Protector matter and do not repeat those here. We merely remind the Court of the emphatic

approach of the unanimous Constitutional Court in the closely analogous ***Van Rooyen*** case:

> "[T]he legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made."
> **S and Others v Van Rooyen and Others 2002 (5) SA 246 (CC) at para 88 (emphasis added). See also paras 180, 202 and 211**
> "If regulation 26(17) is declared to be invalid, and the presiding officer at any enquiry is a magistrate, the remainder of the regulation will serve the legitimate and important purpose of providing a framework for conducting enquiries into serious allegations that might warrant the removal of a magistrate from office. …. The appropriate order, therefore, is not to declare the whole regulation to be inconsistent with the Constitution, but to sever the offending portions from the regulation.
> The order of the High Court declaring the whole of regulation 26 invalid is set aside and is replaced by an order deleting the words "or person" where they appear for the first time in regulation 26(6) immediately before the words "hereinafter called the presiding officer" and deleting the whole of regulation 26(17)."
> ***S and Others v Van Rooyen and Others*** **2002 (5) SA 246 (CC) at paras 214-5 (emphasis added)**

Remedy for public participation concerns (if any)

68 The DIA also raises a public participation challenge.

69 The Speaker has advanced two main arguments in this regard.

69.1 First, that this issue is beyond the jurisdiction of this Court and can only be decided by the Constitutional Court.

69.2 Second, that even if the issue was within this Court's jurisdiction, the challenge is without merit.

70 We agree fully with both of those submissions and endorse them. We therefore do not repeat them here.

71 We add only that there has never been a decision of a High Court or the SCA upholding a public participation challenge to legislation. This is – no doubt – because just as the Speaker argued, the High Court and SCA lack the jurisdiction to do so.

72 But if the Court were somehow to overlook the jurisdiction problem and conclude that the claim on the merits of the public participation challenge were well-founded, the question of an appropriate remedy would arise.

73 In that event, we submit that this Court should not strike down the Rules and leave the void and lacunae that the DIA is seemingly intent on creating.

74 Instead, the Court should couple any striking down order with an order suspending the declaration of invalidity.

75 As the Constitutional Court explained in ***Doctors for Life*** dealing with the public participation challenge:

> "[T]hese two statutes have come into operation. Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive and leave a vacuum. In terms of s 172(1)(b)(ii), this Court has discretion to make an order that is just and equitable, including an order suspending the declaration of invalidity. Parliament must be given the opportunity to remedy the defect. In these circumstances, I consider it just and equitable that the order of invalidity be suspended for 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution."
> ***Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 214**

76 The Court therefore granted the following order:

> "(b) The Choice on Termination of Pregnancy Amendment Act, 2004, and the Traditional Health Practitioners Act, 2004, were, as a consequence, adopted in a manner that is inconsistent with the Constitution and are therefore declared invalid.
> (c) The order declaring invalid the Choice on Termination of Pregnancy Amendment Act, 2004, and the Traditional Health Practitioners Act, 2004, is suspended for a period of 18 months to enable Parliament to

re-enact these statutes in a manner that is consistent with the Constitution."

***Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 225**

See also: *Matatiele Municipality v President of the RSA* (No 2) 2007 (6) SA 477 (CC) at para 114

CONCLUSION

77 We conclude where we began.

78 Two things must be accepted as plain:

78.1 Removal procedures and processes for chapter 9 office-bearers including the Public Protector, are permitted and indeed required by the Constitution. They are essential for the "accountability" that section 181(5) of the Constitution entrenches.

78.2 Having the National Assembly enact rules to define the entire removal process is permitted and indeed required by the Constitution.

79 The only debate is whether it has been shown by those challenging the rules that these particular rules, enacted by the National Assembly, breach the Constitution in some specific way.

80 In approaching this question, the cases make clear again and again that:

80.1 It is not enough for those challenging the Rules to show that there is another way – even a better way – in which they could have been formulated. Nor may they ask the Court to interfere with or prescribe to the National Assembly how to fulfil its obligations.

80.2 They must go further and show that the Rules do not even fall within the range of many ways in which the National Assembly could reasonably fulfil its duties.

81 In the present case, the Rules include all three essential pre-requisites for a valid removal process.

81.1 The grounds for removal are set out.

81.2 The office-bearer must have a right to be heard before any decision is made to remove him or her – in fact on two separate occasions.

81.3 The decision to remove the office-bearer is made by the National Assembly. It is not made by the independent panel or anyone else.

82 There is accordingly no basis for the challenge to the Rules to succeed. The entire application should be dismissed, with costs.

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11 June 2021