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

Case No.

In the matter between –

Applicant

DEMOCRACY IN ACTION

And

First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

THE NATIONAL ASSEMBLY OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fourth Respondent

THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

THE AUDITOR GENERAL OF SOUTH AFRICA

Sixth Respondent

THE COMMISSION FOR GENDER EQUALITY OF THE

REPUBLIC OF SOUTH AFRICA

Seventh Respondent

THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES OF THE REPUBLIC OF SOUTH AFRICA

Eighth Respondent

THE ELECTORAL COMMISSION O1OF SOUTH AFRICA

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION Ninth Respondent

WRITTEN SUBMISSIONS ON BEHALF OD THE APPLICANT

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A. CAVEAT

These submissions have been prepared under extremely tight time constraints for filing on Friday 28 May 2021 by counsel who came into the brief on the afternoon of Friday 21 May 2021.

In a letter sent to the Judge Presiding, our instructing attorney indicated that we seek indulgence to file supplementary submissions, which we can do only after considering the entire pleadings record that exceeds some 600 pages, as well as the pleadings record in a related application that is scheduled to be heard together with this application on 7 to 11 June 2021. We are indebted to the Court for the indulgence that it may afford us in the circumstances. The application raises complex questions of law that require full and careful analysis. We have endeavoured, for the benefit of the Court, to cover as many of them as meticulously as we could in the time available to us.

B. RELIEF SOUGHT IN A NUTSHELL

1. Democracy In Action (*"DIA"*) seeks the following relief:

1.1. declaring that the process followed by the Speaker of the National Assembly for the removal from office of the Public Protector, the Auditor-General or a member of a Commission established by Chapter Nine of the Constitution is in breach of the principle of subsidiarity;

1.2. declaring that each of the five statutes regulating Chapter Nine Institutions is unconstitutional and invalid for failure to provide for appropriate circumstances under which the office-bearers of Chapter Nine Institutions are to be removed from office;[1]

1.3. declaring that the New Rules for the Removal of Office-Bearers in Institutions Supporting Constitutional Democracy (*"the New Rules"*) are unconstitutional for contravening the provisions of sections 181(3) and 194 of the Constitution, and consequentially setting them aside;

1.4. directing the National Assembly to amend each of the five statutes regulating Chapter Nine institutions so that they make clear provision for the removal from office of the office-bearers of Chapter Nine institutions.

2. The five statutes in question are:

2.1. Public Protector Act, 23 of 1994 (*"the PP Act"*)

2.2. Public Audit Act, 25 of 2004

2.3. South African Human Rights Commission Act, 40 of 2013

2.4. Commission for Gender Equality Act, 39 of 1996

2.5. Commission for Promotion of the Rights of Cultural, Religious and Linguistic Communities Act, 19 of 2002

[1] The declaration to be suspended for two years in order to allow the National Assembly time to remedy the defect

3. Only the Public Protector is presently the subject of removal. But since section 194 of the Constitution relates to all these five statutes, it is convenient and necessary at this stage for this Court, constituted as a Full Bench, to consider their constitutional validity together with the Public Protector Act as they face the same constitutional challenges.

C. SUMMARY OF THE APPLICANT'S CASE

4. This case is about constitutionalism, the role of Parliament in it, and the rule of law.

5. The Applicant challenges the flagrant disregard for constitutional subsidiarity in the development by Members of Parliament of rules and process for the removal of heads of Institutions that are established under Chapter Nine of the Constitution for the protection and strengthening of this democracy against their (MPs) excesses.

6. To that end, the Applicant challenges the constitutional validity of each of five pieces of legislation for failing to give effect to section 194 of the Constitution for the regulation of the removal of heads of Chapter Nine Institutions.

7. If this Court should find that the Constitution does not require the enactment of legislation to give effect to section 194 of the Constitution for the removal of heads of Chapter Nine Institutions from office, the Applicant challenges the constitutional validity of the New Rules developed by Parliament purportedly to give effect to that constitutional provision. It does so on numerous grounds including:

7.1. Parliament's lack of power to develop rules for the removal of heads of Chapter Nine Institutions from office.

7.2. Parliament's lack of power to constitute a committee comprising non-MPs to investigate a *prima facie* basis for removal of heads of Chapter Nine Institutions from office.

7.3. Impermissible and undesirable publication of complaints against heads of Chapter Nine Institutions at initial stage.

7.4. Intolerable conflicts of interest in the process for the removal of heads of Chapter Nine Institutions from office.

7.5. Failure of *audi alteram partem* in the initial stages of the removal process.

7.6. Impermissible retrospective application of the rules developed for the removal of heads of Chapter Nine Institutions.

D. A BRIEF OUTLINE

8. We shall

8.1. first, discuss the subsidiarity principle,

8.2. second, discuss the defects in the present legislation and process in relation to removal from office of Chapter Nine Institution office-bearers,

8.3. third, discuss defects in the New Rules and the conflicts of interest dynamic in relation to such removal,

8.4. fourth, address the jurisdiction, *locus standi* and authority questions, and

8.5. fifth, propose appropriate relief.

E. SUBSIDIARITY

9. It is our respectful submission that the process followed by the Speaker and the National Assembly for the removal of each of the office-bearers of Chapter Nine Institutions is self-evidently at odds with that which the Constitution directs all organs of state to do, namely, to *"assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions"*.

10. Instead, the process seems designed to, and has the effect of, throwing the office-bearer to the wolves by rendering her or him vulnerable to gratuitous attack by politicians[2] aggrieved by an unfavourable finding or, in the case of the Public Protector, remedial action. This is more acute in the case of the Public Protector whose position and functions are *sui generis* in that she must perform what are effectively judicial or adjudicative functions. As explained below, just as in the case of judges whose judicial independence is safeguarded by absolute immunity granted to them by statute in relation to complaints pertaining to the merits of their judgments, the Public Protector is entitled to a statutorily guaranteed or defined immunity which the PP Act[3] and the New Rules fail to grant.

11. While the Applicant is aware of the decision of the majority of the Constitutional Court in **Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)** (*"EFF II"*) the removal of a Public Protector is not analogous to the removal or impeachment of the President under the provisions of

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2 Since only Members of Parliament are afforded the power to institute removal proceedings

3 The PP Act grants immunity only to the extent that the finding or remedial action was made "in good faith", an elastic concept that depends on the disposition of the judicial officer towards the Public Protector

section 89(1) of the Constitution which deal with the removal of a President from office by the National Assembly. While the drafters left the details relating to these grounds (of impeachment) to the National Assembly to spell out, it is constitutionally impermissible for the National Assembly, as the institution charged with these responsibilities, to make Rules which do not comply with sections 181 through to 194 of the Constitution as explained below. It was incumbent upon the National Assembl,y in the process of defining and giving meaning to the grounds of removal for office-bearers of Chapter Nine Institutions, not to undermine the constitutionally guaranteed independence, impartiality, effectiveness and dignity of these office-bearers, including the Public Protector.

12. The issue of compliance with the guaranteed independence of the Public Protector goes much deeper than the institutional responsibility of the National Assembly in the making of Rules for the removal of an office-bearer of a Chapter Nine Institution. Parliament has enacted the PP Act which spells out grounds for the removal of the Deputy Public Protector but is silent about the removal of the Public Protector. It is incumbent upon the National Assembly to amend the PP Act itself to give effect to the grounds for removal of the Public Protector. The National Assembly cannot lawfully circumvent the legislative enactment process by simply promulgating and relying on its own internal rules process which deals with both the details of the grounds for removal and the provision of an entire process for the removal of an incumbent in accordance with the provisions of section 194 of the Constitution. A legislative amendment of the PP Act, along with the required public participation, should have been embarked upon. The National Assembly's failure to hold further public consultations following the change in the grounds and procedures for the removal of the Public Protector, and other

office-bearers of Chapter Nine Institutions, did not comply with the Constitution and the rules of the National Assembly.

13. The principle of constitutional subsidiarity precludes reliance directly on a constitutional provision (in this case section 194 of the Constitution) in order to vindicate a right conferred by that provision when there exists legislation enacted to give effect to that right. In this case, the Speaker and the National Assembly purported to invoke section 194 of the Constitution directly in order to make New Rules of Parliament for the removal of office bearers of Chapter Nine Institutions in circumstances where there exists pieces of legislation enacted for that very purposes but which contain no provision giving effect to section 194. That is disregard for the principle of subsidiarity.

14. In **My Vote Counts**[4], the Constitutional Court noted that the principle of subsidiarity was *"a well-established doctrine within this court's jurisprudence.*"[5] In that case, the Constitutional Court said:

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

15. In this case, Parliament has enacted legislation specifically to give effect to the constitutional guarantees of independent Chapter Nine Institutions, including the Public Protector. In regard to the Public Protector, that legislation is the PP Act. The long title of the PP Act is instructive. It says:

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

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

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

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

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

    17.1. Establishment of the office of the Public Protector.

    17.2. Appointment of the Public Protector and Deputy Public Protector.

    17.3. Powers of the Public Protector and Deputy Public Protector.

    17.4. Removal of the Deputy Public Protector.

18. There can therefore be no doubt that the PP Act has been enacted by Parliament in order to give effect to the provisions of section 181, 182, 183, 193 and 194 of the Constitution. The silence of the PP Act on *"mechanism for the … removal of the Public Protector"* is a constitutional lacuna that needs remedying by making provision for those mechanisms in the PP Act. It does not avail Parliament simply to adopt

internal procedures by way of Rules as a form of giving effect to *"mechanism for the ... removal of the Public Protector"*, especially when the mechanism for the removal of the Deputy Public Protector is provided for in sections 2A(9) to (12) of the PP Act.

19. In addition, the Constitutional Court's unanimous judgment in **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)** (*"EFF I"*) changed in a very fundamental way the legal landscape of the Public Protector's work, her decisional independence and her security of tenure. It confirms the Supreme Court of Appeal's finding in **South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others 2016 (2) SA 522 (SCA)** that the Public Protector's recommendations are binding. She performs, in effect, quasi-judicial and adjudicative functions in that she investigates matters, makes findings and remedial orders and recommendations. The Constitutional Court does this on the basis of a purposive interpretation of the South African Constitution. Without the power to make binding recommendations, Mogoeng CJ said, the Public Protector would be ineffectual. Writing for the unanimous Court, Mogoeng CJ said:

> "[55] The Public Protector's investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office-bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated.
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> [56] If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy. The purpose of the office of the

> Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant."

20. The upshot is that the Public Protector's recommendations must be implemented unless they are set aside by a court:

> "[73] When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.
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> [74] This is so, because our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."
>
> (footnotes omitted)

21. In formulating the New Rules regarding the removal of the Public Protector (and other office-bearers of Chapter Nine Institutions) from office, the National Assembly was obligated to have regard to the subsidiarity principle and the Public Protector's quasi-judicial immunity, and to ensure that the incumbent is not subjected to politically-motivated and retaliatory threats of removal by the very people the Constitution and the PP Act task her to hold to account for their conduct. Our submission is that the National Assembly's approach betrays precisely the *"unfriendly response"* to the Public Protector's *"unpleasant findings and a biting remedial action"* against *"powerful public office-bearers"* of which the Constitutional Court warned. Quite sardonically, while the purpose of the office of the Public Protector is *"to help uproot prejudice, impropriety, abuse of power and corruption in State affairs"*, it appears she

has ended up being the target of precisely that for which her office was established to help combat and uproot as we shall show.

F. DEFECTS IN EXISTING REMOVAL LEGISLATION AND PROCESS

22. The PP Act makes quite clear that this is legislation that has been specifically enacted in order to give effect to the provisions of sections 181 to 183 of the Constitution, and to regulate the appointment and removal of the Public Protector as envisaged in sections 193 and 194 of the Constitution. We have already cited the long title and pre-amble to illustrate the point.

23. The PP Act is constitutionally deficient and susceptible to challenge on the ground that it makes express provision for the removal of the Deputy Public Protector but makes no provision whatsoever for the removal of the Public Protector. Section 2A of the PP Act expressly provides, in relevant parts, as follows:

> "(9) The Deputy Public Protector may be removed from office only on-
> (a) the ground of misconduct, incapacity or incompetence;
> (b) a finding to that effect by the committee; and
> (c) the adoption by the National Assembly of a resolution calling for his or her removal from office.
> (10) A resolution of the National Assembly concerning the removal from office of the Deputy Public Protector must be adopted with a supporting vote of a majority of the members of the National Assembly.
> (11) (a) The President may suspend the Deputy Public Protector from office at any time after any complaint relating to the grounds referred to in subsection (9) against him or her has been received by the National Assembly, if the President deems the complaint against the Deputy Public Protector to be of such a serious nature as to make it inappropriate for him or her to perform his or her functions while the complaint is being investigated.
> (b) The President may suspend the Deputy Public Protector in terms of paragraph (a) on such terms and conditions as the President may determine, including the suspension of the payment of his or her remuneration or the suspension of any other term or condition of his or her employment.
> (12) The President shall remove the Deputy Public Protector from office upon adoption by the National Assembly of the resolution calling for his or her removal."

24. Only the Constitution has the following provisions for the removal of the Public Protector from office.

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

25. If this Court were to give full effect to the principle of constitutional subsidiarity, as it is obliged to do as repeatedly pronounced by the Constitutional Court, it would search in vain in the PP Act itself for provisions regulating the removal of a Public Protector. Instead, Parliament has attempted to deal with the obvious defect through the adoption of the New Rules for the removal of office-bearers in Chapter Nine institutions.

26. The central issue is whether office-bearers of Chapter Nine Institutions (including the Public Protector) can validly be removed from office by the National Assembly's resort to its internal processes, thereby avoiding the legislation that has been enacted with a view to regulating that very process, including the PP Act, and imposing a restriction that removal of these office-bearers (including a Public Protector) can only be initiated by members of the National Assembly. We submit "not" on both scores. On the principle of subsidiarity, these office-bearers can only validly be removed in terms of

legislation enacted to regulate that process. In the absence of a legislative provision in the legislation in question, it must be amended to include such provision. To confine the power to initiate the process for the removal of an office-bearer of a Chapter Nine Institution only to Members of Parliament, in circumstances where the power to investigate Members of Parliament for maladministration and other infractions lies with the office-bearer in question, can only invite victimization of the office-bearer by Members of Parliament. This is self-evident and the Public Protector has been targeted by politicians who have been at the receiving end of the Public Protector's unfavourable findings and remedial action, including the Speaker herself, the President, the Minister of Public Enterprises, the Minister of Transport and numerous other Members of Parliament. It does not take much imagination to realise that they would want to throw her off their scent by attacking her and seeking to remove her from office by any means necessary in order to extricate themselves from her holding them accountable for their conduct.

27. While any member of the public may initiate impeachment proceedings against a judicial officer by filing appropriate complaints with the Judicial Services Commission (*"the JSC"*), there is currently no provision of which we are aware that allows a member of the public to initiate a removal process for any office-bearer of Chapter Nine Institutions. (We pause here to point out that the parallels between judges, on the one hand, and the Public Protector, on the other, is discussed later in these submissions. The similarities are both striking and instructive and give guidance on what approach should be followed in the treatment and removal of the Public Protector.)

28. A related question here concerns whether there has been public participation in the legislative process or in the making of the New Rules when the National Assembly embarked on a process to promulgate the New Rules for the removal of the Public Protector and other office-bearers of Chapter Nine Institutions. It appears that the answer is in the negative.

29. Section 59(1)(a) of the Constitution requires that the National Assembly *"facilitate public involvement in the legislative and other processes of the Assembly and its committees."* This is a peremptory requirement, the word used being *"must"*. Section 72(1)(a) requires that the National Council of Provinces must *"facilitate public involvement in the legislative and other processes of the Council and its committees."* It appears that there has been no compliance with both requirements in the making of the New Rules. For that reason alone, these New Rules fall to be set aside without more as the non-compliance of their development with the Constitution runs against one of the foundational constitutional principles in section 2 of the Constitution which says:

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

30. Also, the Constitutional Court's jurisprudence reaffirms the existence of a justiciable duty on the Legislature to involve the public when drafting and enacting legislation. **Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC)** is the seminal authority for the principle that legislation can be declared invalid for lack of public participation in the law-making process. The Court recognized, in paragraph 106, that:

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

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

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

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

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

33. Beyond the remarks made in **Doctors for Life**, the Constitutional Court, in **Democratic Alliance v Masondo N.O**. **2003 (2) SA 413 (CC)** underlined the importance of public participation in the following terms:

> "[42] The requirement of fair representation emphasizes that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. . . . It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.
>
> [43] The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better

> outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making."

34. The Constitutional Court has held that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Further, the obligation to facilitate public participation is a material part of the law-making process, and the failure to comply with this requirement renders the resulting legislation invalid.[6]

35. In the present case, the National Assembly made no attempt to fulfil its section 59(1)(a) obligation to facilitate public participation at all. It held no public hearings and never amended the PP Act or any of the other four Chapter Nine-related pieces of legislation. Instead, it followed the procedure described in and reflected in the minutes of the various Committees. This renders the entire process unlawful for lack of public participation and therefore failure to comply with the fundamental constitutional imperative.

36. The Minutes of the National Assembly Programme Committee of 22 August 2019 (chaired by the Speaker of the National Assembly) reflect that:

> "The Chief Whip of the Opposition indicated that this was an important development when dealing with such matters. He said that he had previously written to the Speaker with regard to an inquiry into the fitness to hold office by the Public Protector and proposed that in future there should be mechanisms in place to process such matters. The Chief Whip of the Opposition suggested that the matter should be referred to the National Assembly Rules Committee (NARC) for it to set up a process to be followed by that inquiry so as to prevent any attempt for an interdict to halt proceedings of a committee on the basis that there were no procedures in place. A similar process to that of the implementation of Section 89 of the Constitution for removal of the President could be followed.

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6 **Doctors for Life**, para 209

> The Speaker replied that such a process had already been started. In the current situation the Portfolio Committee on Justice and Correctional Services could also make recommendations on how the matter could be dealt with or request that the matter be considered by a structure such as the NARC. House Chairperson Mr Frolick confirmed that the committee would follow that process as he was in constant discussion with the chairperson. He also commended the Legal Services unit and National Assembly Table for their vigilance in respect of this matter."

37. Subsequently, on 20 September 2019 the Subcommittee on the Review of the National Assembly Rules met to consider proposed rules concerning a section 194 enquiry. Section 194 of the Constitution deals with the removal from office of the Public Protector, the Auditor-General or a member of a Commission established by Chapter Nine of the Constitution. The subcommittee confirmed that, among other things, currently there is no clear definition of the grounds for removal and it was imperative that the grounds be clearly defined to close the vacuum that exists.[7]

38. In a media statement posted on Parliament's webpage (attached), it is stated that:

> "While the Constitution and the National Assembly Rules do set out a broad framework for Parliament to exercise its functions in terms of section 194, the subcommittee agreed that to ensure clarity and uniformity, specific rules are required as mandated by the Rules Committee."[8]

39. The proposals presented to the National Assembly Rules Subcommittee were that the rules should provide at least four stages for a section 194 process in Parliament, namely:

    39.1. The initiation;

    39.2. The preliminary assessment of evidence (prima facie);

    39.3. An inquiry by a committee; and

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7 Annexure "TRM10", Record, page 373

8 See also https://www.parliament.gov.za/press-releases/review-national-assembly-rules-removal-chapter-9-institution-office-bearers-kicks-earnest-today (attached)

39.4. A decision by the House.

40. The unofficial minutes of the meeting of the Subcommittee on the Review of the National Assembly Rules reflect that the following was recorded:

> "The Subcommittee on Rules of the National Assembly met to discuss three items referred to it by the Rules Committee.
>
> The Subcommittee found itself in a similar situation to that encountered in the Fifth Parliament. The Constitution provided for the appointment of heads of certain institutions but there were no rules for the removal of those heads of institutions. The Subcommittee would consider the rules for a section 194 inquiry.
>
> Rule 88 indicated that the Speaker had to be the one to determine whether there was prima facie evidence before Parliament could consider a motion to institute an inquiry into whether such a person should be removed. The Subcommittee was presented with suggestions of how the Speaker could be assisted in making that determination by appointing an independent panel of appropriate experts. It was not possible to predetermine a specific Committee to engage in such an inquiry because the appropriate Committee would depend on the particular Chapter Nine institution headed by the individual. Critical to the process would be the fact that the person under inquiry had the right to make representation to the Committee. A legal advisor could not engage with the Committee but could offer advice to the person who was the subject of the inquiry..."[9]

41. To the extent that these unofficial minutes may be challenged, we nonetheless advance the argument contained in them, especially in relation to Rule 88.

42. Between 10 September 2019 and 29 November 2019, the Rules Committee and its Subcommittee met on several occasions in which it discussed and debated a Rule to regulate the removal of office-bearers of Chapter Nine Institutions. A discussion document by the Secretary of the National Assembly was presented in the early stages of the proceedings and as a result of lengthy discussions that followed, the Rules Committee delegated the development of New Rules to a Subcommittee. The discussion document outlined four stages for the removal of an office-bearer of a

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9 See also https://pmg.org.za/committee-meeting/28937/

Chapter Nine Institution in terms of Section 194. These are set out above. Inasmuch as Rule 88 of the National Assembly concerned substantive motions it required of the Speaker to assess whether there were sufficient grounds for a process of such a nature to be initiated. The Rule confers no power on the Speaker to delegate that power to a committee comprising non-MPs. We submit that the New Rules flounder on that ground too.

43. On 6 December 2019, the National Assembly unanimously adopted the set of New Rules in terms of which a removal in terms of section 194 is to be undertaken. This, in our respectful submission, is not what the Constitution envisages in section 181(3) read together with the long title, the pre-amble and section 194. Section 193 (appointment of the Public Protector) is given effect to by section 1A of the PP Act. *Pari passu*, the PP Act must also give effect to section 194 (removal). That process cannot validly be left to the internal machinations of the National Assembly by way of its rules regime, kicked off by a panel that is nowhere envisaged in the Constitution, legislation or Rules of Parliament.

44. The suggestion by the respondents that 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 is as surprising as it is extraordinary. Legislation exists such as the PP Act. Incidentally that legislation deals with the appointment of the Public Protector and also makes provisions for the removal of the Deputy Public Protector. The omission of the removal of the Public Protector from the legislation cannot be treated as a mere oversight of no consequence. Security of tenure for the incumbent Public Protector is enshrined in the Constitution. Where the National Assembly

purports to legislate on the tenure and conditions of service of the Public Protector, it stands to reason that the grounds for her removal must be clearly stated in the legislation. Only in this way can Parliament give effect to section 181(3) of the Constitution which 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"*.

45. The respondents argue that section 181(3) envisages *"legislative and other measures"* and that even if the National Assembly was constitutionally obliged to take steps to provide for the removal of the office-bearers of such institutions, enacting Rules plainly constitutes *"other measures"* within the meaning of the provision. The respondents claim that section 181(3) does not prescribe only legislative measures but that it expressly allows legislative *"and other measures"*. This is a mistaken approach. What must be scrutinized is the content of the extant legislation, that is the PP Act, in order to determine if the process followed by Parliament facilitates a process to, through legislative and other measures, *"assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."*

46. It is undisputed that there is no provision for the removal of the Public Protector in the PP Act, while the removal of the Deputy Public Protector is catered for in the same Act. To the extent that the respondents argue that the New Rules are *"other measures"* sufficient to comply with section 181(3) the question must be whether the New Rules fulfill the purpose of assisting and protecting these institutions to ensure their independence, impartiality, dignity and effectiveness. Viewed from this prism, the New Rules woefully fail to comply with the Constitution's provisions.

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

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

49. The *"mere legal error"* doctrine is recognized in other Western jurisdictions.[10] In a recent Uganda Supreme Court judgment, **Attorney General v Kisekka 11/7/2018** the court cited the United States persuasive authority of **Oberholzer v Commission on Judicial Performance**, where the Tennessee Supreme Court stated that a judge's legal error is not ordinarily misconduct warranting disciplinary action. Furthermore, in the same case, the court held that: *"Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."* As the legal scholars Jeffrey M. Shaman et al state in their book, Judicial Conduct and Ethics, (1995):

> "The preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings, other than in extreme or compelling circumstances. An independent judge is one who is able to rule as he or she determines appropriate, without fear of jeopardy or sanction. So long as the rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or overreaching lies in the adversary system and appellate review. As the courts have often said, the disciplinary process should not be used as a substitute for appeal. Due to the possible threat to judicial independence, it has been suggested that legal error should be dealt with only in the appellate process and never should be considered judicial misconduct."

50. To maintain the requisite independence of the Public Protector, errors of law should not be the subject of a removal inquiry. The judges' decisional independence is guaranteed by shielding them from punitive or disciplinary actions for *"mere legal errors"*, while

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[10] The doctrine of *"mere legal error"* precludes judicial conduct organizations from employing generally worded canons to undermine judicial independence. Legal error is correctable by appellate review, not by judicial-conduct inquisitions. "*Mere legal error, without more, ... is insufficient to support a finding that a judge has violated the Code of Judicial Ethics."* **Oberholzer v. Comm'n on Judicial Performance**, 84 *Cal.* Rptr. 2d 466, 975 P.2d 663, 680 (1999); see also **People ex rel. Harrod v. Illinois Courts Comm'n**, 372 N.E.2d 53, 65 (1977) (stating that "*to maintain an independent judiciary mere errors of law ... should not be the subject of discipline*"). *"Mere legal error"* is exempt from attack by judicial conduct organizations in order to protect the value of judicial independence. "*That value is threatened when a judge ... must ask not 'which is the best choice under the law as I understand it,' but 'which is the choice least likely to result in judicial discipline*?'" **In re Curda**, 49 P.3d 255, 261 (Alaska 2002). See also Cynthia Gray, *The Line between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 Hofstra L. Rev. 1245, 1247 (2004) (stating that *"if every error of law or abuse of discretion subjected a judge to discipline as well as reversal, the independence of the judiciary would be threatened"*).

the Public Protector runs the risk of removal each time she makes a decision or remedial actions which result in judicial review applications or her remedial actions being set aside. The New Rules in their current form serve as an open invitation for politically motivated attacks on the Public Protector who makes a quasi-judicial decision in almost all the cases she investigates. Instead of safeguarding her independence the New Rules serve as an *in terrorem* weapon available to politicians who may be corrupt or those guilty of maladministration. They can now routinely threaten a removal inquiry and threaten impeachment of the Public Protector each time she is criticized by the judiciary and each time she makes a decision with which they disagree.

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

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

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

53. It is noteworthy that the majority of the complaints involving politicians investigated by the Public Protector are initiated by political parties or their members. When the same parties or their representatives in the National Assembly who are in litigation with the Public Protector (or have cases pending before her) are allowed to initiate removal proceedings, a specter of a serious conflict of interest looms large. Most important, the constitutionally guaranteed independence (decisional and institutional) of the Public Protector is gravely undermined. As highlighted by the tactics used by the main opposition Democratic Alliance (*"the DA"*) in its recent complaints to Parliament, the party used cases in which a member or the party was a litigant against the Public Protector as a basis for its "incompetence" claim. Under the guise of scrutinizing alleged "incompetence" by the Public Protector, the DA brazenly alleged that adverse comments by the judiciary solely related to the merits of the Public Protector's decision and remedial orders evince incompetence on her part. The Courts should, with respect,

never endorse such a proposition in relation to the Public Protector while the judges are shielded by section 15(2)(c) of the JSC Act as explained. The extant New Rules simply sidestep this pivotal constitutional issue.

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

G. THE CONFLICT OF INTEREST DYNAMIC AND OTHER DEFECTS IN THE NEW RULES

55. Any of the Ministers or MPs who are currently under investigation by the Public Protector, or have had adverse findings made against them, should not be allowed to participate in a committee set up by Parliament to decide the Public Protector's impeachment as they have a conflict of interest. In this regard, President Ramaphosa against whom the Public Protector has made adverse findings and who is currently involved in ongoing litigation against the Public Protector is a text-book case of a conflicted official who is likely to play a role in the removal process envisaged for the

Public Protector. Importantly, the President concedes that he is indeed conflicted.[11] However, his contention that adverse findings and remedial action made against him by the Public Protector do not found a conflict of interest on his part (when the validity of such findings and remedial action are yet to be finally determined by the courts) beggars belief.

56. In any event, the Full Bench of the North Gauteng High Court has already determined this type of conflict issue. In **Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; CASAC v President of the Republic of South Africa and Others [2018] 1 All SA 471 (GP)** the Full Bench, dealt with the potential conflict of interest that arises where a sitting President who is still to face criminal charges appoints the National Director of Public Prosecutions. It found that there is a clear conflict. The court said:

> "[110] The President argued that he is not conflicted because he is not actually facing the charges yet; the NDPP must first decide again to arraign him, since the charges were actually withdrawn … Adv Abrahams, the NDPP who has to decide whether or not again to charge the President, makes common cause with the President, explicitly *"endorsing"* the submissions made on his behalf. He submits that even if the President were conflicted, the Constitution does not assist, because s.90 was intended to address a different situation.
>
> [111] But he went further. He submitted that even if the President were conflicted, that matters not because when he appoints the NDPP, he acts as head of the national executive, and thus in cabinet. Since the members of the cabinet are not similarly conflicted, his being conflicted will be so diluted as to disappear.
>
> [112] We cannot agree with either the President's submissions or those of Adv Abrahams. In a rights-based order it is fundamental that a conflicted person cannot act; to act despite a conflict is self-evidently to pervert the rights being exercised as well as the rights of those affected. And s.96(2)(b) makes that clear beyond the pale. If conflicted, the individual simply cannot act, is *"unable"* to act, whether s.90 was there or not.
>
> [113] In this light, all s.90 does is to identify the person who must act whenever the

[11] President's AA, Record p 480, para 11.6

> President, by virtue of a conflict, is unable. And it is the Deputy President, who does not get sworn in; s/he simply performs the act which the President himself is unable to perform.
>
> [114] In our view President Zuma would be clearly conflicted in having to appoint a NDPP, given the background to which we have referred, particularly the ever-present spectre of the many criminal charges against him that have not gone away. There is no longer any obstacle in the way of the criminal charges proceeding."

57. Similarly on the facts of the President's continuing litigation tussle with the Public Protector over his CR17 campaign donations and other cases involving the Minister of Public Enterprises, he remains conflicted. He is also conflicted because of the ever-present spectre of the many allegations of maladministration (and worse) that have been levelled against him at the State Capture Commission. If a sitting President who may potentially face criminal charges is conflicted and so disqualified from appointing a National Director of Public Prosecutions, then it stands to reason that a sitting President who may potentially face investigation by the very Public Protector he wants to remove is disqualified from performing that function. This is not mere conjecture. The President is an implicated person at the State Capture Commission and may be the subject of this Public Protector's investigation. To permit him to have a say in her removal is tantamount to giving him the power to avoid accountability, thereby sacrificing a constitutional being who was appointed for the strengthening and protection of our democracy at the altar of the President's political convenience. This, we urge this court not to do.

58. Similar considerations apply in relation to the Speaker and other Members of Parliament like the Minister of Transport, the Minister of Public Enterprises and others. As the Full Bench has said, the fact not all Members of Parliament are conflicted does nothing to diminish or dilute the conflict of conflicted President, Speaker, Ministers and

Members of Parliament, and the perversion of the rights of the Public Protector that this will cause.

59. Political parties are the main complainants to the Public Protector as only politicians of the status identified in section 4 of that Act can lodge complaints under the Executive Members Ethics Act, 82 of 1998. Some politicians have been vociferous in condemning the Public Protector for issuing reports and taking remedial action which did not suit their political agendas. Some parties, like the DA, are currently involved in litigation against the Public Protector. Should they be allowed to initiate the section 194 removal enquiry to deal with matters in which they were the losing litigants or matters still pending judicial decision? The New Rules are deafeningly silent in this regard.

60. The Speaker does not deny this conflict of interest. Instead, she seeks to justify it by pointing out that section 194(2) envisages that the vote for the removal of the Public Protector or Auditor-General must be supported by at least two-thirds of members of the National Assembly.[12] But this conflates conclusion of the process with initiation of it. Nowhere in section 194 of the Constitution is there a power conferred on a member of the National Assembly (even those with pending cases before the Public Protector or those litigating against her for her findings against them) to initiate the removal process. That is a creation of the New Rules which neither the Constitution nor the PP Act envisages. It is simply iniquitous.

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[12] Speaker's AA, Record, p 308 para 90

61. In our law, the conflicts of interest dynamic is usually captured in the maxim *nemo iudex in sua causa debet*. In this respect, courts in other countries have had occasion to make pronouncements on the concept of conflicts of interest and the key concerns arising from such conflicts. As stated by the Ontario High Court of Justice in **Moll v Fisher (1979), 23 OR (2d) 609 at para 6, 96 DLR (3d) 506 (H Ct J (Div Ct))**.:

> "All conflict-of-interest rules are based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired where their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose."

62. The core concerns over conflicts of interest were concisely summarized by Commissioner Madam Justice Denise Bellamy in her 2005 report on the **Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry[13]:**

> "The driving consideration behind conflict-of-interest rules is the public good. In this context, a conflict of interest is essentially a conflict between public and private interests. ... The core concern in a conflict is the presumption that bias and a lack of impartial judgment will lead a decision-maker in public service to prefer his or her own personal interests over the public good.
> ...
> Conflict of interest should be considered in its broadest possible sense. It is about much more than money. Obviously, a conflict of interest exists when a decision-maker in public service has a personal financial interest in a decision. But conflicts of interest extend to any interest, loyalty, concern, emotion or other feature of a situation tending to make the individual's judgment less reliable than it would normally be.
> ...
> Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence."

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[13] Madam Justice Denise Bellamy, *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry*, vol 2 (Good Government) (City of Toronto, 2005) at 38-40, online: www1.toronto.ca/inquiry/inquiry_site/report/pdf/TCLI_TECI_Report_Good_Government.pdf

63. In **Democracy Watch v Campbell, 2009 FCA 79 at paras 40-51, [2010] 2 FCR 139**, the Canadian Federal Court of Appeal further addressed the concept of conflicts of interest and the key concerns associated with such conflicts and observed:

> "The common element in the various definitions of conflict of interest is ... the presence of competing loyalties ... the idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations ... Any conflict of interest impairs public confidence in government decision-making. Beyond that, the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest."

64. Here it is remarkable that the DA boasts every time that the party *"opposed her [Public Protector] appointment from the start"*; that the DA has been a complainant in the complaints the Public Protector investigated; and that the DA is currently involved in litigation as a party in the many appeals pending before the courts. It is simply the height of conflict of interest (and unconstitutional) for members of a political party involved in litigation against the Public Protector to use the Parliamentary removal process as a way of securing strategic and tactical advantages over the Public Protector. That is a classical case of a conflict of interest.

65. The primary concern with conflicts of interest is that public officials, who are tasked with exercising their duties and responsibilities in furtherance of the public interest, should not be placed in a position where their private interests might interfere with the fair and impartial judgment rightly expected of them. In order to uphold public confidence in the government, the public must reasonably be satisfied that public decision makers are exercising their powers and fulfilling their duties with undivided loyalty to the public interest. It is this concept – undivided loyalty to the public – that makes conflicts of interest problematic and demands that policy makers construct a robust regime aimed at preventing and managing such conflicts. The New Rules

promote political mischief and can become a potent weapon of harassment, interference and destabilization of the Public Protector's office.

66. The Constitutional Court in **EFF I** cautioned that in the Public Protector's *"execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action."*[14] Further, the Court observed that the Public Protector's investigative powers are not supposed to *"bow down to anybody, not even at the door of the highest chambers of raw State power"*. It cautioned of the real possibility of the Public Protector's *"unpleasant findings and a biting remedial action … especially [against] powerful public office-bearers"* attracting *"a very unfriendly response"* and being *"strongly resisted in an attempt to repair or soften the inescapable reputational damage"*.[15]

67. The Constitutional Court further observed that the Constitution '*requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness, shows just how potentially intrusive her investigative powers are and how deep the remedial powers are expected to cut"*.[16]

68. The extant New Rules do not even prohibit MPs from filing a removal charge against the Public Protector on the basis of cases still pending before the courts and some of which relate to them. The climate conducive to independence, impartiality, dignity and effectiveness of the Public Protector is effectively destroyed when the Public Protector

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14 at para 54
15 at para 55
16 at para 66

can be subjected to personal and political attacks on the basis of quasi-judicial decisions on matters still *sub judice*. The National Assembly, as an organ of state, cannot flout its obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness by ignoring the National Assembly's own Rule 89 which prohibits members from *"reflecting"* on matters *sub judice*. Under the extant New Rules the Speaker can ignore the fact that the Public Protector has lodged an appeal or is currently litigating matters which are the subject matter of the removal complaint. Obviously, the Public Protector would have no dignity and be ineffective if her rights to litigate matters could be ignored willy-nilly and her legal arguments pre-empted by a politically motivated impeachment process.

69. The removal grounds in section 194 of the Constitution must be respected but the New removal Rules adopted by the National Assembly are unlawful and irreconcilable with the need for an independent, impartial and dignified Public Protector. She stands no chance of effectively strengthening our constitutional democracy if her decisional independence can be undermined and thwarted by politicians with an axe to grind.

70. The New Rules provide for a process whereby only a Member of Parliament may trigger a section 194 removal enquiry. They state:

> "(1) Any member of the Assembly may, by way of a notice of a substantive motion in terms of Rule 124(6), initiate proceedings for a section 194(1) enquiry, provided that –
>
> (a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must *prima facie* show that the holder of a public office:
>
> (i) committed misconduct;
>
> (ii) is incapacitated; or
>
> (iii) is incompetent;

(b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;
(c) all evidence relied upon in support of the motion must be attached to the motion; and
(d) the motion is consistent with the Constitution, the law and these rules.

(2) For purposes of proceedings in terms of section 194(1), the term "charge" must be understood as the grounds for averring the removal of the holder of a public office from office."

71. Once a member has given notice of a motion to initiate proceedings in a section 194 enquiry, the Speaker may consult the member to ensure that the motion is compliant with the criteria set out in the New Rules.

72. This requirement of *"clearly formulated and substantiated charge on the grounds specified in section 194"* can only make sense if there is strict compliance with procedural and substantive due process requirements. The Speaker is required to determine whether the MP's motion *prima facie* shows that the holder of a public office committed misconduct, is incapacitated, or is incompetent. As drafted, the New Rules do not impose the requirement that the Speaker must in a meaningful manner engage on a *prima facie* level with the merits of the motion to initiate a section 194 enquiry. There is no requirement that the target of the motion (holder of the Public Office), who is not an MP, must be served with notice or copy of the motion, or that she should be alerted in any way about the allegations undergirding the removal enquiry motion.

73. Even worse, the New Rules provide that the "*Speaker may consult the member to ensure the motion is compliant with the criteria set out in this rule"*, but there is no provision whatsoever for the Speaker to consult with the accused Public Office holder "*to ensure the motion is compliant with the criteria set out in this rule."* This is not mere denial of procedural due process or violation of the *audi alteram partem* rule; it is

a serious violation of section 181(3) of the Constitution which requires that other organs of state, through legislative and other measures, *"must assist and protect these institutions [Public Protector] to ensure the independence, impartiality, dignity and effectiveness of these institutions."* The Speaker is constitutionally obligated to *"assist and protect"* the Public Protector in order to ensure that she is not subjected to constant harassment through removal motions that may turn out to be frivolous or vexatious. At a minimum, she can only decide whether a constitutionally compliant motion exists after giving the accused public holder a chance to respond. We are by no means suggesting that she must hold a mini-trial but the evidence required for a serious removal motion must be of higher quality. This is based on the principle that the more serious the allegation or its consequences, the stronger the evidence must be before a court will find the allegation established.[17] That would preclude frivolous and vexatious complaints or unwarranted threats of removal and vituperative attacks on the Public Protector based solely on the merits of her rulings or matters still pending before the courts.

74. Another serious constitutional infirmity lies in the fact that there is no provision for confidentiality akin to that applicable to judicial misconduct complaints. Article 17 of the **UN Basic Principles on the Independence of the Judiciary[18]** provides as follows:

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

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17 See **Gates v Gates** 1939 AD 150 at155; **R(N) v Mental Health Review Tribunal (Northern Region)** [2006] QB 468 para 62

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

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

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

76.1. article 11(1)(a) of the Code of Judicial Conduct prohibits public comment by a judge on the merits of any case pending before, or determined by, that judge or any other court. Yet, under the New Rule regime there is no such restraint by a complainant MP against the Public Protector;

76.2. article 11(1)(b) prohibits a judge entering into a public debate about a case irrespective of criticism levelled against that judge, his or her judgment, or any other aspect of the case. Yet, under the New Rule regime nothing prohibits a complainant MP or members of their political party in Parliament publicly discussing a case in which s/he is a party against the Public Protector, as has indeed happened;

76.3. article 11(1)(c) directs a judge to refrain from any action which may be construed as designed to stifle legitimate criticism of him or her or of any other

judge. Yet, the entire basis for the New Rule regime seems designed to stifle legitimate findings and remedial action by the Public Protector against MP complainants without there being any conflicts of interest filter; and

76.4. article 11(1)(f) requires that judges refrain from public criticism of another judge or branch of the judiciary (unless such criticism is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law). Yet, one will search in vain for any provision in the New Rule regime that proscribes such public criticism of the Public Protector by complainant MPs or other members their party in Parliament.

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

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

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

impartiality, effectiveness and independence of the Public Protector as required by section 181(3) of the Constitution.

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

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

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

> "At the early stages of the process, there has to be a large measure of confidentiality. An allegation of impropriety against a judge can have serious consequences in terms of the credibility of the judge. Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing. One cannot prevent a complainant from going public. There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage. The new American Bar Association procedures maintain confidentiality at the investigation stage. The same seems to be true in Canada for complaints against lawyers. And in the criminal process generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken."[19]
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> (emphasis supplied)

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

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

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

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

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

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

84. During an investigation, in all states in the USA, judicial commission proceedings are confidential, and the commission cannot disclose or confirm that a complaint has been lodged against a judge or that the commission is investigating a judge unless an exception applies. This is done to safeguard judicial independence. The United States Supreme Court has stated that confidential investigations *"encourage the filing of complaints and the willing participation of relevant witnesses by providing protection*

against possible retaliation or recrimination"[20]. Moreover, because "*frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants*," confidentiality protects judges from the publication of unexamined and unwarranted complaints and maintains confidence in the judiciary as an institution "*by avoiding premature announcement of groundless claims of judicial misconduct or disability*"[21].

85. In the case of the Public Protector, the Constitutional Court has already taken judicial notice of the fact that she is vulnerable to retaliation by politicians she investigates and against whom she makes adverse findings. The Public Protector has pointed out that her detractors are out to remove her under the guise of her alleged incompetence in retaliation for her release of unfavourable reports against certain politicians. Allowing the publication of the complaints that may or may not trigger a section 194 removal enquiry is inimical to the independence, dignity, effectiveness and impartiality of the Public Protector. Because frivolous complaints will be made against the Public Protector who, like judicial officers, can hardly satisfy all contending litigants, confidentiality is required to protect her from the publication of unexamined and unwarranted complaints and to maintain confidence in the Office of the Public Protector as an institution. This can only be achieved by avoiding premature announcement of claims of misconduct or incompetence against her which may turn out to be groundless but damage having already been done to her person and the Office by then. The New Rules do not protect her; they leave her vulnerable to political attacks and politically-inspired frivolous motions for section 194 enquiry.

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20 **Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) at 835**

21 ibidem

86. The comparison or parallel we draw between the judiciary, on the one hand, and the Public Protector, on the other, for purposes of demonstrating the egregious and unconstitutional treatment meted out on the Public Protector, is not far-fetched. For example, it is clear from the description by the Supreme Court of Appeal of the constitutional function of the Public Protector that hers is closer to a judicial than an administrative function. The Supreme Court highlighted the following factors about the Public Protector's function:[22]

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

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

86.3. Third, although the State Liability Act, 20 of 1957, applies to the Office of the Public Protector to enable it to sue and be sued,[23] it is not a department of state and is functionally separate from the state administration. It is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature.

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

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

23 Public Protector Act, s 5(2).

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

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

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

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

89. Also, a comparison of factors (including requirements for appointment, removal, protection) relating to judges, on the one hand, and those relating to the Public Protector, on the other, demonstrates that the legislature intended to confer on the Public Protector powers akin to (and we put it no higher) those of a judge than an administrator. We show that in the comparative table below:

COMPARISON BETWEEN JUDGES AND PUBLIC PROTECTOR

Judges	**Reference**	**Public Protector**	**Reference**
Judicial independence: - Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice	s165(2) Constitution	**PP independence:** - Chapter nine institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice	s181(2) Constitution
No person or organ of state may interfere with the functioning of the courts	s165(3) Constitution	No person or organ of state may interfere with the functioning of these institutions	s181(4) Constitution
Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts	s165(4) Constitution	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	s181(3) Constitution
Appointment: - Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. - The President as head of the national executive, after	s174 Constitution	**Appointment:** - The Public Protector must be women or men who are South African citizens, who are fit and proper persons to hold the particular office and comply with	s193 Constitution s1A Public Protector Act 23 of 1994

consulting the Judicial Service Commission and the leader of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal. - The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly - The President must appoint the judges of all other courts on the advice of the Judicial Service Commission - Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.		any other requirements prescribed by national legislation - The President, on the recommendation of the National Assembly, must appoint the Public Protector	
Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.	s174(8) Constitution	The Public Protector strengthens constitutional democracy The Public Protector is subject only to the Constitution and the law	s 181(1) and 181(2) Constitution
Removal: A judge may be removed from office only if - the Judicial Service	s177 Constitution ss 14-33 & 38 of JSC Act	**Removal:** The Public Protector may be removed from office only on	s194 Constitution Impugned New Rules – see Record pp 93 to 97,

Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and - the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.		- the ground of misconduct, incapacity or incompetence; - a finding to that effect by a committee of the National Assembly; and - the adoption by the Assembly of a resolution calling for that person's removal from office - A resolution of the National Assembly concerning the removal from office of the Public Protector must be adopted with a supporting vote of at least two thirds of the members of the Assembly	annexure "DIA2"
Judicial immunity (common law): As a general rule judicial officers are immune against actions for damages arising out of the discharge of their judicial functions. The only exception is if the conduct of the judicial officer was malicious or in bad faith. Mere possibility of bias apparent to a layman, on the part of a judicial officer, is insufficient in the absence of an extrajudicial expression of opinion in relation to the case, or in	*Claassen v Minister of Justice and Constitutional Development 2010 (6) SA 399 (WCC) at 407B–410B.* In this case it has also been held that the doctrine of judicial immunity is consonant with the provisions of the Constitution, notably s 165 thereof.	**Liability of Public Protector:** - The office of the Public Protector shall be a juristic person. - The State Liability Act, 1957 (Act 20 of 1957), shall apply with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to 'the Minister of the	s 5 PP Act

the absence of one of the other recognized grounds. The applicant must found the required *exceptio recusationis* (or *exceptio suspecti judicis*) on a reasonable cause (*justa causa recusationis*) which must be proved **Immunity (statutory):** Complaint based on merits of order or judgment are dismissed summarily	JSC Act, s 15(2)(c)	department concerned' shall be construed as a reference to the Public Protector in his or her official capacity - Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution	
Contempt of Court - Any person who, during the sitting of any Superior Court— a) wilfully insults any member of the court or any officer of the court present at the sitting, or who wilfully hinders or obstructs any member of any Superior Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties; b) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held; or	s 41 Superior Courts Act 10 of 2013	**Contempt of Public Protector** - No person shall insult the Public Protector or the Deputy Public Protector - No person shall in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court	s 9 PP Act

c) does anything calculated improperly to influence any court in respect of any matter being or to be considered by the court, may, by order of the court, be removed and detained in custody until the court adjourns - Removal and detention does not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court - At common law contempt of court is an injury committed against a person or body occupying a judicial office, by which injury the dignity and respect to which are due to such office or its authority in the administration of justice is intentionally violated. It may be committed either *in facie curiae* or *ex facie curiae*			

90. Based on all these factors, we submit that the dignity, protection, fairness, independence, respect and effectiveness afforded to judges must equally be afforded the Public Protector. Anything less, as demonstrated by the treatment she has received at the hands of the very politicians she is constitutionally mandated to hold to account, detracts from her independence, dignity, effectiveness and impartiality as the Sword of Damocles hangs over her head every time she makes findings and remedial action that certain politicians and Members of Parliament may not like.

91. There are more problems with the New Rules. New Rule 129T says:

> "When the motion is in order, the Speaker must –

(a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and
(b) inform the Assembly and the President of such referral without delay"

92. This provision violates the *audi alteram partem* rule in that it permits the Speaker to refer the motion for the removal of an office holder of a Chapter Nine Institution, and any supporting documentation provided by a Member of Parliament, without inviting the accused public office holder to make any representation or to be heard. Inexplicably, the Speaker is also required under the Rule to inform the National Assembly and the President of such referral without delay, but not the office holder of a Chapter Nine Institution against whom the motion is raised. This goes against the confidentiality requirement that governs disciplinary processes against judges who perform an analogous function as that performed by the Public Protector, and has the effect (as pointed out above in respect of judges) of denuding the person of the Public Protector – and, with her, inevitably the Institution of the Public Protector – of her dignity, independence, effectiveness, public trust and respect.

93. Allowing the Speaker to publicize the referral widely within the National Assembly and to inform the President of it without first obtaining preliminary comments from the implicated or charged office holder of a Chapter Nine Institution, who is the subject of the complaint, is prejudicial, unreasonable, irrational, unfair and goes against the *audi alteram partem* rule. The danger is real that a member of the National Assembly (or even the President) who may or may not have an axe to grind with the Public Protector may leak news of such referral to the media. Once that happens, news of such referral is likely to trigger an avalanche of adverse publicity and may be treated by members of the public as indicating that the implicated or charged office holder of a Chapter Nine

Institution is already guilty of the allegations. To paraphrase and tailor a judgment of the Supreme Court of Belize for South African context: idle gossip or the salacious must be restrained, particularly in a society such as we have in South Africa, which is a veritable fish bowl for almost every public office holder. Otherwise, the right of the public to know becomes corrupted with the zeal to feed frenzy on unsubstantiated rumours and stories. This will be a positive disservice to all South Africans, for when facts and fiction collide, faction is the result to the detriment not only of the persons targeted but also of the administration of justice.

94. The New Rules also violate section 181(2) of the Constitution which provides that Chapter Nine Institutions are independent and subject only to the Constitution and the law, and that they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. Furthermore, they violate 181(3) which requires that 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, and 181(4) of the Constitution which provides that no person or organ of state may interfere with the functioning of these institutions.

95. The office holder of a Chapter Nine Institution who is referred to the Panel without her or his input, and whose referral is widely publicized without even minimal due process, cannot be said to be independent and subject only to the Constitution and the law, or remain impartial or exercise her or his powers and perform functions without fear, favour or prejudice. Instead, he or she will forever function under the heavy yoke of MPs potentially peeved by adverse findings and recommendations of the Public Protector or Auditor-General or Commissioner of the Human Rights Commission. This

hardly conduces to independent, impartial and effective discharge of constitutional duties and functions by a constitutional being.

96. The Speaker does not deny lack of confidentiality in the initial stages of the removal process. Indeed, it is impossible to deny it. On the contrary, she confirms it and says,

> "initiating proceedings for a section 194(1) enquiry … is a matter to be dealt with openly not confidentially."[24]

97. She says confidentiality even in the initial stages of a section 194 process is *"inapt"*.[25] This is an extraordinary submission that does not even engage with the potentially dire consequences of that approach on the independence, dignity, effectiveness and impartiality of the Public Protector or any of the other office bearers targeted by it. We have identified many of these dire consequences already.

98. Further, instead of assisting and protecting these institutions to ensure their independence, impartiality, dignity and effectiveness, the New Rules undermine the independence, impartiality, dignity and effectiveness of the Chapter Nine Institutions. The premature announcement of a referral by the Speaker, accompanied by reports to the National Assembly and the President, all without giving notice to the affected Chapter Nine office bearer, will have a direct adverse impact on and constitute interference with the functioning of the office of the relevant Chapter Nine Institution. This is in flagrant violation of section 11(1) of the PP Act which says:

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[24] Speaker's AA, Record pp 313-314, para 106

[25] Speaker's AA, Record p 314, para 108

> "Any person who … interferes with the functioning of the office of the Public Protector as contemplated in section 181(4) of the Constitution, shall be guilty of an offence."

99. Section 181(4) of the Constitution, for its part, says:

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

100. On any reasonable construction of the removal process now established by Parliament through the New Rules, Parliament and each Member of Parliament who participates in the removal process in its current form interferes with the functioning of each of the Chapter Nine Institutions because of the inevitable effect that the process, viewed in its entirety, will have on the office bearer at whom it is targeted. We ask this Court to remedy that travesty.

101. Moreover, both the initiation of the motion and the referral Rules undermine the role that the Speaker is supposed to play as an impartial arbiter. This is particularly acute in the circumstances involving the Public Protector's removal process that is currently underway because the Speaker is presently involved in litigation against the Public Protector following findings and remedial action against her by the Public Protector. By that factor alone, the Speaker's impartiality in the process is compromised. Her conflict of interest is palpable.

102. In our constitutional democracy all public power is subject to constitutional control. The exercise of public power is only legitimate where it is lawful and this principle of legality is generally understood to be a fundamental principle of constitutional law. Parliament's power and privilege to determine its own proceedings and procedures is

derived from section 57 of the Constitution. Section 57(1)(a) and (b) of the Constitution provides that the National Assembly may determine and control its own internal arrangements, proceedings and procedures and may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

103. In **De Lille and Another v Speaker of the National Assembly 1998 (3) SA 430 (C),** this Court held that all acts and decisions of Parliament are subject to the Constitution and therefore subject to review by the courts. The Court (per King DJP et Hlophe J as they then were) noted that while section 57(1) permits Parliament to determine and control its internal arrangements, *"it has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution"*. The Court went further to say, citing the judgment of the Constitutional Court in **Executive Council, Western Cape Legislature, and Others v President of the RSA and Others 1995 (4) SA 877 (CC) at para [62]**, *"It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."*[26]

104. Viewed within this prism, Parliament's current section 194 removal Rules are in direct violation of section 181 of the Constitution as shown above. Furthermore, the Speaker occupies a pivotal position in achieving and sustaining a vigorous and healthy system of a vibrant parliamentary constitutional democracy. The Speaker's powers, functions and duties are traditional and ceremonial, statutory, procedural and administrative.

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[26] At para 25

There are clear indications in the Constitution and court judgments that the Speaker is required to be independent, impartial and fair.

105. The Supreme Court of Appeal in **Gauteng Provincial Legislature v Kilian and Others 2001 (2) SA 68 (SCA)** explained that the Speaker *"should not submit to [political pressure]. He is required by the duties of his office to exercise, and display, the impartiality of a judge"*.

106. In **Lekota and Another v Speaker, National Assembly and Another 2015 (4) SA 133 (WCC)** this Court said *"the Speaker, although affiliated to a political party, is required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament"*. The New Rules reduce the Speaker in her constitutional status not only to a mere conduit for the referral of a section 194 complaint but also to an intimately interested party in the outcome of the process for the removal of the Public Protector by vice of the legal tussle she has pending in the courts against the Public Protector. There are no guidelines as regards what complaints must be dismissed at the earliest stage and whether complaints about mere legal errors or about matters subject to litigation (*sub judice*) must be summarily dismissed. She is not even required or allowed under the impugned rules to inform the Chapter Nine office holder concerned about the complaint lodged against her. In fact, the only time when the holder of an office of a Chapter Nine Institution has the first chance to know the contents of the complaint is when she or he is informed by the independent panel to which the Speaker would have referred the matter, which is after the Speaker had already reported to both the National Assembly and the President. The New Rules do not insulate the Speaker from political pressure and actually force her to deal with and

hear only from the complaining MP without giving the accused person any opportunity to respond. She is *"required by the duties of [her] office to exercise, and display, the impartiality of a judge*" but the New Rules undermine that position.

107. New Rule 129X deals with the powers and functions of the Panel. It provides that in considering the matter, the Panel may, in its sole discretion;

107.1. afford *"any member"* an opportunity to place relevant written or recorded information before it within a specific timeframe;

107.2. must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;

107.3. must provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;

107.4. must not hold oral hearings and must limit its assessment to the relevant written and recorded information placed before it by members, or by the holder of a public office; and

107.5. must include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panelist.

108. First, it is clear from the New Rule that *"any member"* allowed the opportunity to place relevant written or recorded information before the Panel is not just the member who

filed the complaint but extends to any other Member of Parliament. Second, the New Rule does not allow for oral hearing and cross-examination before the Panel. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity for the accused to confront and cross-examine her or his accuser. Where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy, it is unconstitutional to deny the holder of public office the right to show that it is untrue or to expose such bias. The Panel is precluded or prohibited from holding any oral hearings.

109. The New Rules are also unconstitutional for their retrospectivity. According to section 194(1)(a) of the Constitution, the Public Protector, Auditor-General or a member of a Commission established by Chapter Nine of the Constitution may be removed from office only on the ground of misconduct, incapacity or incompetence. Currently, the meaning of *"misconduct"*, *"incapacity"* or *"incompetence"* is nowhere defined in any of the five pieces of legislation enacted pursuant to the Chapter Nine Institutions in issue. In other words, the standard of performance that is required of the Public Protector, Auditor-General or a member of a Chapter Nine Commission is nowhere defined in the applicable legislation so as not to fall foul of the removal process. The New Rules attempt to define these concepts for the very first time. Thus, while the New Rules purport to be procedural in form, they are actually substantive in nature and effect to the extent that they define these concepts. It is for the first time that the affected Chapter Nine institutions know what these concepts mean. This means that their rights are being defined for the first time.

110. Against the above background, it is clear that the New Rules are intended to apply retrospectively. They are designed and adopted to deal with complaints or conduct that occurred prior to their adoption, while they substantively define for the first time what misconduct, incapacity or incompetence as contemplated in section 194(1)(a) of the Constitution means. For that reason the New Rules are unlawful, grossly unfair and unconstitutional. The presumption against retrospective application of the law stands against applying these New Rules to facts and process that arose prior to their adoption.

111. If the New Rules are applied to conduct which took place before their adoption, they would infringe on the rights of the office bearers of the Chapter Nine Institutions because their capacities, competencies and standards of performance would be measured against standards which were introduced after they had performed. This is particularly the case in respect of the Public Protector whose removal process has already commenced.

112. The Speaker says, *"[I]t would be absurd to interpret the New Rules as applying only to events after their adoption"*[27]. By that submission, she admits that the New Rules apply retrospectively. She also says, save in criminal trials, *"[T]here is no rule against retrospectivity in our law. There is a presumption but it can be rebutted"*[28]. These submissions by the Speaker are, with respect, as extraordinary as they are surprising, coming as they do out of the mouth of the Speaker of the Legislature.

113. The Speaker, better than most, should be fully conversant with legislative presumptions and their effect on the existing and vested rights of people that such legislation is

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27 Speaker's AA, Record p 326, para 144
28 Speaker's AA, Record p 326, para 143

intended to regulate. The legal position, as we understand it, is that law or legislation is presumed to apply prospectively (to future conduct) unless the piece of legislation or law in question expressly says otherwise or the language of the statute or law clearly demonstrates retrospective application.[29]

114. Nowhere does the PP Act (or any of the other Chapter Nine centric pieces of legislation enacted to give effect to section 194 expressly say the removal process established by Parliament in terms of its New Rules applies retrospectively. In fact, these statutes are all silent on the removal process. Not even the New Rules expressly say the removal process applies retrospectively (assuming they are an appropriate mechanism for giving effect to section 194 of the Constitution) or even demonstrate a clear intention of retrospective application.

115. In **Pharmaceutical Manufacturers Association of South Africa and Others; In Re: Ex Parte Application of the President of the RSA and Others 2000 (2) SA 674 (CC)** the Constitutional Court said:

> "[T]he rule of law embraces some internal qualities of all public law: that it should be certain, that it is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation."[30]

116. Thus, the presumption against retrospective application of law is also not confined to criminal cases. It covers *"all public law"*.

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29 See, for example, **Veldman v Director of Public Prosecutions (Witwatersrand Local Division) 2007 (3) SA 210 (CC) at para 26**

30 at para 39. See also **Veldman v Director of Public Prosecutions (Witwatersrand Local Division) 2007 (3) SA 210 (CC) at para 26**

117. In **Veldman v Director of Public Prosecutions 2007 (3) SA 210 (CC)**, the Constitutional Court said:

> "[26] Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to *'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed'*."

118. In **Curtis v Johannesburg Municipality 1906 TS 308 at 311**, Innes CJ said:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation."[31]

119. It would thus seem that the Speaker's submission that *"there is no rule against retrospectivity in our law"* is not the correct legal position. Based on the clear legal position as expressed in numerous South African cases since 1906 and endorsed by the Constitutional Court, the Speaker's admission that the the New Rules apply retrospectively is fatal to their constitutional validity. For this reason, the New Rules are unconstitutional and must, with respect, fall. The Public Protector cannot fairly, reasonably and constitutionally be judged according to a standard (wrought by a new definition of *"incompetence"*, *"misconduct"* and *"incapacity"*) that did not exist at the time when she allegedly made herself guilty of the conduct that now falls within any one of these new definitions. It matters not that the new definitions are more onerous. The fact is they are new and the Public Protector had no fore knowledge of them as being the standard by which her fitness to hold office would be measured. The same

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[31] See also **Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A) at 884A-B**

holds true for all the other office bearers of the other Chapter Nine Institutions who may fall victim to the same Rules.

120. The New Rules are therefore unconstitutional in that they violate section 181(3), (4) and (5) of the Constitution, and are impermissibly retrospective in their application.

121. There is also no provision in any of the pieces of legislation enacted pursuant to Chapter Nine of the Constitution that empowers Parliament to outsource even the initial stages of a removal process intended to give effect to section 194 of the Constitution. Only Parliament or any of its committees has the power to make a finding (*prima facie* or otherwise) in relation to the issue of misconduct or incompetence or incapacity of an office holder of a Chapter Nine Institution. There is no constitutional or legislative power on the National Assembly to establish an independent body to make any *prima facie* findings against office holders of Chapter Nine Institutions. The Constitution does not provide for any role of any private body in the removal process of the head or member of a Chapter Nine Institution. Neither does any of the pieces of legislation in question. For that reason, the New Rules confer a power on Parliament that it does not have, namely, to refer an alleged incompetence or incapacity or misconduct of an office holder of a Chapter Nine Institution to an outside Panel that the Panel itself has no statutory or constitutional power to investigate or assess, whether *prima facie* or otherwise.

H. JURISDICTION, *LOCUS STANDI* AND AUTHORITY

122. There is simply no basis for these technical defences.

123. The Applicant's case is self-evidently a constitutional attack on the five pieces of legislation regulating five Chapter Nine Institutions.[32] It is also an attack on the constitutionality of the New Rule.[33] The Constitution confers the power on the high court to decide constitutional attacks on legislation[34] and other prescripts and documents, and many such cases appear in the law reports.[35]

124. In any event, the constitutional attack based on Parliament's failure to fulfil its constitutional obligation does not fall under the exclusive jurisdiction of the Constitutional Court. In this regard we refer to the judgment of the Constitutional Court in **Women's Legal Centre Trust v President of the Republic of South Africa and Others 2009 (6) SA 94 (CC)** which dismissed an exclusive jurisdiction access directly to that Court, by-passing lower courts, in similar circumstances. The Constitutional Court held that section 167(4)(e) of the Constitution *"does not embrace the President when he or she acts as part of the national executive, nor Parliament when it is required to act not alone but as part of other constituent elements of the State. Were it to be otherwise, it would undermine the jurisdiction of the High Court and the Supreme*

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32 NoM, paras 2-6

33 NoM, para 7

34 See section 172(2)(a) of the Constitution

35 This is so trite that it is not necessary to cite case law. But, to the extent that the court may require authority, see **Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC)** on a constitutional challenge on section 1(1)(b) of the Intimidation Act 72 of 1982**; Mlungwana and Others v S and Another 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC)** on a constitutional challenge on section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993**; Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC)** on a constitutional challenge to the Regulations promulgated in terms of section 51 of the Cross-Boarder Road Transport Act, 4 of 1998; **Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others 2020 (1) SA 90 (GP)** on constitutional challenge on a myriad provisions of the RICA, 70 of 2002.

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Court of Appeal envisaged in s 172(2)(a)". Significantly, Counsel for the Speaker in these proceedings conceded the point on that occasion.

125. The Constitutional Court said:

> "[20] … Constitutional duties the State and its organs must perform collaboratively or jointly do not fall within [the] purview [of section 167(4)(e)]. The provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament, and on them alone. It does not embrace the President when he or she acts as part of the national executive, nor Parliament when it is required to act not alone but as part of other constituent elements of the State. Were it to be otherwise, it would undermine the jurisdiction of the High Court and the Supreme Court of Appeal envisaged in s 172(2)(a).
> [21] This analysis has radical implications for the applicant's case in the form in which it has been brought. For the obligation to enact legislation to fulfil the rights in the Bill of Rights falls upon the national executive, organs of State, Ch 9 institutions, Parliament and the President. The obligation does not fall on the President and Parliament alone.
> [22] Counsel for the Women's Legal Centre rightly conceded this. But this concession is fatal to the proceedings in the form they have been brought. This is because the obligation the applicant invokes - the duty to prepare, enact and implement legislation in fulfilment of the Bill of Rights - cannot be distinguished from other obligations arising from the Bill of Rights, including securing the right to vote and the right to the progressive realisation of socioeconomic entitlements. Over these obligations other courts patently have jurisdiction. By contrast, the obligation that was at issue in Doctors for Life, namely the obligation to facilitate public involvement in its legislative processes, fell pointedly and solely upon Parliament.
> [23] The fact that the obligation on which the Women's Legal Centre relies may encompass the President and Parliament amongst other State actors (a matter we do not decide now) is not sufficient to bring it within the exclusive jurisdiction of this court. It must fall on the President and Parliament alone. Resisting the applicant's attempt to engage the court through s 167(4)(e), the respondents pointed out correctly that in terms of s 85 of the Constitution, the President exercises executive authority in collaboration with other members of the national executive. The responsibility for preparing and initiating legislation falls on the national executive as a whole, and not exclusively on the President acting as Head of State.
> [24] In trying to save the proceedings in their present form, the Women's Legal Centre and those organisations who supported its stance took recourse to statements this court made in Doctors for Life. The Women's Legal Centre submitted that, on the respondents' own account, the adjudication of the present dispute involved questions that relate to sensitive areas of separation of powers and would require a decision on a crucial political question. It would therefore fall within s 167(4)(e) and this court's exclusive jurisdiction. But, as indicated earlier, all exercise of judicial power in some way affects the separation of powers and may involve the judicial determination of questions with political overtones. That is not enough for this court's exclusive competency to be engaged. The obligations invoked must, in addition, entail an agent-specific focus on the President and Parliament alone. That is not the case here.
> [25] It follows that since the application was directed solely to this court and sought to engage its exclusive jurisdiction, bypassing other courts with constitutional jurisdiction, it was incorrectly conceived."

126. The obligation to enact legislation giving effect to section 194 of the Constitution is an obligation to fulfil the rights in the Bill of Rights of the targeted office holders in the Chapter Nine Institutions in question.[36] That obligation falls not exclusively upon the National Assembly or Parliament but collaboratively also upon the national executive, organs of state, Chapter Nine Institutions, and the President. The obligation does not fall on Parliament alone. On application of the *stare decisis* principle, this construction of the ambit of section 167(4)(e) of the Constitution by the Constitutional Court is binding on this Court even if it disagrees with it.

127. In any event, prayer 1 of the Applicant's Notice of Motion is the invocation of the subsidiarity principle. It is simply impermissible for the National Assembly or Parliament to invoke section 194 of the Constitution directly when there is legislation enacted specifically to give effect to the removal provision, as Parliament has done in making the New Rule without first making provision for removal in that legislation. Parliament failure to make provision for that removal in the legislation violates the subsidiarity principle.

128. The *locus standi* and authority points are, with respect, entirely without merit. The Applicant's Constitution – as does that of other non-governmental organisations like CASAC, Helen Suzman Foundation, Freedom Under Law and others – entitles it as a *"person"* to approach this court in the public interest alleging that the rights of the Public Protector (and other office holders in Chapter Nine Institutions) in the Bill of Rights have been or are being infringed or threatened. Its stated objectives include

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[36] These rights include human dignity (s 10), freedom and security (s 12(1)(c) & (e)), fair labour practices (s 23(1)), property (s 25(1)), just administrative action (s 33(1)).

strengthening South Africa's Democracy, protecting South Africa's Constitution and its institutions, and promoting human rights and the rule of law. To the extent that it is necessary still to deal with these meritless, frivolous and vexatious challenges, we shall do so in oral argument.

I. APPROPRIATE RELIEF AND COSTS

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

130. As regards costs, we ask for costs against all respondents opposing this application on attorney and client scale only against the Speaker. The Constitutional Court has laid the standard for costs on that scale. The Applicant must show frivolous, vexatious or manifestly inappropriate conduct.[37] Because she is personally invested in the removal of the Public Protector and has pending litigation against her in the courts, the opposition by the Speaker of this application is, with respect, frivolous, vexatious or manifestly inappropriate conduct. Her conflict of interest in this case and in marshalling the entire removal process as Speaker of the National Assembly, is palpable and completely out of sync with the impartial role that she should be playing as the Speaker of the National Assembly. In fact, the Speaker ought to be ordered to pay costs in her personal capacity. The Constitutional Court has laid the standard too in this regard when it said:

> "Personal costs orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is

[37] **Biowatch Trust 2009 (6) SA 232 (CC), para 18; Helen Suzman Foundation 2015 (2) SA 1 (CC), para 36**;

> required of them. There can be no fear or danger of a personal costs award where a public official acts in accordance with the standard of conduct required of them by the law and the Constitution."[38]

131. The Speaker is a public official. Her conduct in the setting up of the removal process and the central role she has played and continues to play while having a clear conflict of interest as regards the removal of the Public Protector places her beyond the pale of conduct that is expected of the Speaker of Parliament by the law and the Constitution. Impartial towards the Public Protector she clearly is not. She should have removed herself from the process entirely, at the very least. The litany of glaring shortcomings that we have chronicled above demonstrates that the Speaker is blinded by her personal determination to get rid of an office holder of a Chapter Nine Institution whose victim she considers herself to be. She seems to conceive of her removal process as proverbial pay-back time. That is manifestly inappropriate conduct that calls for strict censure by this Court against the Speaker if the Applicant should succeed.

132. If the Applicant should be unsuccessful, we commend the approach followed by the Constitutional Court in **Biowatch**[39] and **Affordable Medicines**[40]. In **Biowatch**, the Constitutional Court articulated the general rule in **Affordable Medicines** as being:

> "[O]rdinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs".[41]

133. Three bases have been advanced for the rule:[42]

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38 **Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para 159**
39 **Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)**
40 **Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)**
41 **Biowatch at para [22]**
42 **Biowatch at para [23]**

133.1. it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights;

133.2. constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations; and

133.3. it is the State that bears primary responsibility for ensuring that both the law and the State conduct are consistent with the Constitution.

134. This is, however, not an inflexible rule and may be departed from in instances, for example, of frivolity of the litigation or other conduct on the private litigant's part that deserves censure.[43] This, we respectfully submit, is not such a case. The Applicant raises complex questions of constitutional law that concern public administration and the proper functioning of Parliament. The issues involved affect parties beyond just the parties in this case. The proper interpretation of the Constitution, and a proper appreciation of the powers it confers on Parliament and protections afforded to office holders of Chapter Nine Institutions, are at issue. The application is far from frivolous.

135. Both **Biowatch** and **Affordable Medicines** came before the Constitutional Court at the instance of private litigants asserting constitutional rights against the State. So, too, in this application. We thus urge that no costs be awarded against the Applicant in the event of it not being successful.

VUYANI NGALWANA SC
NOMGCOBO JIBA

Counsel for Democracy in Action
Chambers, Sandton
28 May 2021

43 **Affordable Medicines at para [138]; Biowatch at para [24]**

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