DEMOCRACY IN ACTION / THE SPEAKER

ORAL ARGUMENT FOR THE SPEAKER

JUNE 2020

1. In its amended notice of motion in this matter the applicant, Democracy in Action ('**DIA**'), seeks the following orders:

   1.1. An order declaring that Parliament has failed to comply with a constitutional obligation to pass legislation giving effect to s 194 of the Constitution in relation to the removal from office of Chapter 9 office-bearers, except in the case of the Electoral Commission (para 1);

   1.2. Orders declaring the Acts of Parliament governing all of the Chapter 9 office-bearers, except the Electoral Commission, inconsistent with s 194 of the Constitution and invalid because they fail to make provision for the removal under appropriate circumstances of the office-bearers to which they apply (paras 2 to 6);

   1.3. Orders suspending the declarations of invalidity of those Acts for a period of two years and directing Parliament to amend them within that two-year period (paras 9 and 10);

   1.4. An order declaring that the National Assembly acted unlawfully and unconstitutionally when, on 3 December 2019, without first inviting representations from the Chapter 9 office-bearers, it adopted new rules defining the grounds of impeachment and regulating the process of impeachment in s 194 of the Constitution ('**New Rules**') (para 8); and

   1.5. An order declaring that the New Rules are unconstitutional because they contravene sections 181(3) and 193 of the Constitution (para 7).

1.6. An order directing any respondent that opposes the application to pay DIA's costs of suit, including the costs of two counsel, jointly and severally, the one paying the other(s) to be absolved (para 11).

2. The application is opposed by the Speaker, the Minister of Justice and the Democratic Alliance ('**DA**').

3. We shall present the oral argument for the Speaker as follows:

3.1. First, we explain why DIA lacks the public interest standing it claims to bring the present proceedings.

3.2. Second, we explain why only the Constitutional Court ('**CC**') has jurisdiction to grant much of the relief DIA is seeking.

3.3. Third, and subject to our two points *in limine*, we deal in turn with the merits of the relief sought in paras 1 to 6, 8 and 7 of DIA's notice motion, in that order.

3.4. Fourth, we respond briefly to certain further allegations by DIA regarding the process for the adoption of the New Rules, the reason for their adoption and their content. These allegations are unrelated to the relief sought in paras 7 and 8 of its notice of motion. We respond to them in the alternative to our submission that they are irrelevant and fall to be disregarded.

3.5. Fifth, we deal with the costs orders to be made should DIA's application succeed or be dismissed.

I. DIA lacks *locus standi*

4. We deal with this issue in our heads paras 12-25 pp 8-12.

5. DIA claims that it brings this application in the public interest, in terms of section 38(d) of the Constitution.

6. While it is for this Court to control who has standing to sue, we submit DIA's claim to public-interest standing under section 38(d) is doubtful for two main reasons.

7. First, section 38(d) confers standing on persons alleging that a right in the Bill of Rights in Chapter 2 of the Constitution has been infringed or threatened. DIA's case is, however, based on provisions of the Constitution outside the Bill of Rights, namely sections 57, 59 and, especially, 181(3) and 194. The relief sought in paras 1 to 6 of DIA's amended notice of motion is expressly based on s 194. The relief sought in para 7 is expressly based on sections 181(3) and 194. And the relief sought in para 8 is based on section 57(1)(b) (see founding affidavit paras 37 and 70 pp 33 and 46) and section 59(1)(a) (see founding affidavit para 39 p 34).

8. Second, and assuming that section 38(d) finds application in a case like the present, DIA has not shown that it is genuinely acting in the public interest. The CC has held that courts must be circumspect in affording litigants standing by way of section 38(d). It is not sufficient for a litigant to claim that they are acting in the public interest. The subjective position of the litigant is not relevant. The issue is whether, objectively speaking, it is in the public interest for the proceedings to be brought. See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) ('***Lawyers for Human Rights***') paras 16-18 (bundle 116-117), approving *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 234 (bundle 85) ('***Ferreira***').

9. The relevant factors include '*the degree of vulnerability of the people affected*' (*Lawyers for Human Rights* para 18 (bundle 116)) and '*whether there is another reasonable and effective manner in which the challenge can be brought*' (*Ferreira* para 234 (bundle 85)).

10. Here, none of the Chapter 9 institutions or the incumbents of the Chapter 9 offices is a vulnerable person. They are all in a position to bring proceedings like the present, if necessary, as indeed the Public Protector has done in the application heard earlier this week. There is consequently another reasonable and effective manner in which DIA's challenges can be brought.

II. Only the CC has jurisdiction in respect of most of the relief sought

11. We deal with this issue in our heads paras 26-41 and pp 13-26.

12. Section 167(4)(e) of the Constitution provides that only the CC may decide whether the President or Parliament has failed to fulfil a constitutional obligation.

13. The leading cases on the scope of the CC's exclusive jurisdiction to decide whether the President or Parliament has failed to fulfil a constitutional obligation are, in the order in which they were decided, the following:

    13.1. *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) ('***Doctors for Life***'), especially paras 24-30 (bundle 183-184);

    13.2. *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) ('***WLC CC***'), especially paras 11-23 (bundle 298-300);

    13.3. *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) ('***My Vote Counts***') paras 131-135 (bundle 333);

    13.4. *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) ('***EFF (Nkandla)***'), especially paras 16-19 and 41-44 (bundle 269-270 and 275-276); and

    13.5. *South African Veterinary Association v Speaker of the National Assembly and Others* 2019 (3) SA 62 (CC) ('***South African Veterinary Association***') paras 15-17 (Public Protector bundle 632-633).

14. We submit these cases yield the following principles relevant to the jurisdictional issue in the present matter:

14.1. The starting point is the pleadings. Jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case. The substantive merits of a claim cannot determine whether a court has jurisdiction to hear it. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. The pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is. See *My Vote Counts* paras 132-134 (bundle 333), applying *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) paras 155 and 169 and *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 75.

14.2. Next, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled (*EFF (Nkandla)* para 16).

14.3. Third, that obligation must be closely examined to determine whether it is of the kind envisaged by s 167(4)(e) (*EFF (Nkandla)* para 16). The relevant factors are the following:

14.3.1. First, s 167(4)(e) must be given a narrow meaning because s 172(2)(a) confers jurisdiction on the Supreme Court of Appeal, the High Court and courts of similar status to pronounce on the constitutional validity of laws or conduct of the President. These courts must not be deprived of their jurisdiction unduly (*WLC CC* paras 11-12; *EFF (Nkandla)* para 17).

14.3.2. Second, an alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation the President or Parliament share with other organs of state falls outside s 167(4)(e) (*WLC CC* paras 16-23; *EFF (Nkandla)* paras 17-18).

14.3.3. Third, even if the obligation is specific to the President or Parliament, for it to fall within the exclusive jurisdiction of the CC the obligation must be one which is not readily ascertainable (an example of an obligation which is readily ascertainable is a prescribed majority for the passage of legislation of a particular kind); and the obligation must be one which requires the court to deal with a sensitive aspect of the separation of powers (*Doctors for Life* paras 25-27; *EFF (Nkandla)* paras 18-19 and 43).

14.3.4. An obligation which engages a sensitive aspect of the separation of powers in relation to Parliament, is one where the Constitution imposes an obligation on Parliament but does not outline how Parliament is to discharge the duty. Parliament itself must determine what is necessary to discharge the duty. A review by a court of whether Parliament has fulfilled such an obligation trenches on the autonomy of the principal legislative organ of state to regulate its own affairs and, thus, the principle of separation of powers. It of the utmost importance that the CC alone deals with disputes of that kind. This is necessary to preserve the comity between the judicial branch and the executive and legislative branches of government (*Doctors for Life* paras 26-27; *EFF (Nkandla)* paras 18-19 and 43).

14.4. An example of a constitutional obligation imposed upon Parliament which engages a sensitive aspect of the separation of powers and hence falls within s 167(4)(e), is the obligation imposed on Parliament by s 33(2) to enact legislation that gives effect to the right contained in s 32(1) (*My Vote Counts* para 135).

14.5. An example of a constitutional obligation imposed upon NA which engages a sensitive aspect of the separation of powers and hence falls within s 167(4)(e), is the obligation imposed on the Assembly by s 55(2)(a) to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. The Constitution gives no details as to how the Assembly is to discharge this obligation; the mechanisms for doing so are not outlined; and no hint is given as to their nature and operation. To determine whether the Assembly has fulfilled or breached this obligation, therefore, will entail the resolution of crucial political issues (*EFF (Nkandla)* paras 41-43).

14.6. A third example of a constitutional obligation imposed upon Parliament which engages a sensitive aspect of the separation of powers and hence falls within s 167(4)(e), is the obligation imposed upon the Assembly by s 59(1)(a) and on the National Council of Provinces ('**NCOP**') by 72(1)(a) to facilitate public involvement in their legislative and other processes and of their committees. If either the Assembly or the NCOP fails to satisfy their obligation to facilitate public involvement in the process of making law, as required by ss 59(1)(a) and 72(1)(a), Parliament as a whole fails in its constitutional obligation to do so. These provisions do not tell the Assembly and the NCOP how to facilitate public involvement, and leave it to them to determine what is required of it in this regard. An order declaring that Parliament has failed to comply with this obligation will inevitably have important political consequences (*Doctors for Life* paras 27-29; *South African Veterinary Association* paras 15-17).

15. For the reasons which follow, we submit most of the relief sought by DIA falls within the exclusive jurisdiction of the CC, conferred upon it by section 167(4)(e) of the Constitution, to decide that Parliament has failed to fulfil a constitutional obligation.

16. The relief in question is the following.

17. The first order sought by DIA which falls within the exclusive jurisdiction of the CC, is the order in para 1 of DIA's amended notice of motion declaring that Parliament has failed to comply with its constitutional obligation to pass legislation giving effect to s 194 of the Constitution in relation to the removal from office of the Public Protector, Auditor-General and the members of the commissions established by Chapter 9 of the Constitution.

18. As pointed out in our heads para 26 p 13, this declarator comprises two components:

    18.1. The first component is a positive declaration, namely that Parliament has a constitutional obligation to pass legislation giving effect to s 194 of the Constitution for the removal of Chapter 9 office-bearers from office by providing for appropriate circumstances under which they may be removed for misconduct, incapacity or incompetence.

    18.2. The second component is a negative declaration, namely that Parliament has failed to fulfil that constitutional obligation, except in the case of the members of the Electoral Commission.

19. We submit that no organ of state, other than Parliament, can take the legislative measures of the kind DIA would want Parliament to take to give effect to s 194. That is because s 194 creates scope for the exercise of legislative powers by Parliament (more specifically, the Assembly) alone. The President's role is limited by s 194(3) to removing a Chapter 9 office-bearer if the Assembly duly so decides and to suspending such a person from office at any time after the start of the proceedings of a committee of the Assembly for their removal from office.

20. We further submit that the Constitution obliges the Assembly to decide for itself on the details of its mechanisms to give effect to s 194. Compare *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) ('***EFF (impeachment)***') paras 176-182 (Public Protector bundle 213-214).

21. It follows in our submission that a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers.

22. Under s 167(4)(e) of our Constitution, this intrusion is reserved for the CC only because it has crucial and sensitive political implications.

23. The second set of orders sought by DIA which falls within the exclusive jurisdiction of the CC, are the consequential orders sought in paras 2 to 6 and 9-10 of DIA's amended notice of motion.

24. Paras 2 to 6 are declarators directed at five Acts of Parliament, namely the Public Protector Act 23 of 1994, the Public Audit Act 25 of 2004, the South African Human Rights Commission Act 40 of 2013, the Commission on Gender Equality Act 39 of 1996 and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 ('**impugned Acts**').

25. In paras 2 to 6 DIA seeks orders that the impugned Acts are inconsistent with s 194 of the Constitution and invalid to the extent that they fail to provide for appropriate circumstances under which the Chapter 9 office-bearers to which they apply may be removed from office for misconduct, incapacity or incompetence as envisaged in s 194 of the Constitution.

26. In paras 9 and 10 DIA seeks orders directing Parliament to remedy the defects within two years and suspending the declarations of invalidity during that period.

27. We submit the orders in paras 2 to 6, 9 and 10 are consequential orders because they are predicated upon the granting of the declaratory order sought in para 1 of DIA's amended notice of motion.

28. The correctness of this submission can be tested in two ways.

29. First, if this Court were to enter the merits and refuse to grant the declarator sought in para 1 that Parliament has failed to carry out its constitutional obligation to pass legislation to give effect to s 194 of the Constitution in relation to the removal from office of the Public Protector, then it would be obliged also to refuse to grant the declarator sought in para 2 that the Public Protector Act is unconstitutional and invalid to the extent that it fails to provide for appropriate circumstances under which the Public Protector may be removed from office.

30. Second, to grant the declarations of unconstitutionality of the impugned Acts which DIA is seeking in paras 2 to 6, this Court would have to find that Parliament has failed to carry out its constitutional obligation to pass legislation giving effect to section 194 in relation to the removal from office of the Chapter 9 office-bearers regulated by the impugned Acts. In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 52, the CC emphasized that s 172(1)(a) of the Constitution '*enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution*'. This '*Gijima principle*' (*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) paras 63-68) means this Court cannot grant the relief sought in paras 2 to 6, without granting the declaration in para 1.

31. However, for the reasons given earlier, this Court has no jurisdiction to grant the relief sought in para 1.

32. The third order sought by DIA which falls within the exclusive jurisdiction of the CC, is the order sought in para 7 of DIA's amended notice of motion, on the ground set out in the parts of its founding affidavit cited in para 38.1 footnote 27 of our heads (FA 24: 20-21; FA 26-27: 26-27; FA 27: 28.1; FA 31: 33; FA 32-33: 36; FA 35: 41; FA 36: 44; FA 37- 40: 46-55; and FA 77: 125). The order in question is one declaring that the New Rules contravene section 181(3) of the Constitution because it requires that measures taken by Parliament giving effect to s 194, and in particular legislative measures setting out the specific factors that make out a case for misconduct, incapacity or incompetence, must take the form of legislation passed by Parliament in accordance with the national legislative process in the Constitution, and may not take the form of rules of the Assembly like the New Rules.

33. This ground, too, is consequential – i.e. predicated – upon the granting of the declaratory order sought in para 1 of DIA's amended notice of motion.

34. The fourth order sought by DIA which falls within the exclusive jurisdiction of the CC, is the order in para 8 of DIA's amended notice of motion. The grounds on which this order is sought are set out in the parts of its founding affidavit cited in paras 40.1 and 40.2 footnotes 37 and 38 of our heads (FA 28-29: 28.7, 54-58: 83-89 and 60-61: 93). When read together, what DIA is seeking is an order declaring that, in adopting the New Rules without inviting any representations, comments or submissions from the Chapter 9 office-bearers, the Assembly acted inconsistently with sections 57(1)(b) and 59(1)(a) of the Constitution.

35. Section 57(1)(b) provides the Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

36. As mentioned earlier, s 59(1)(a) provides the Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.

37. As also mentioned earlier, in *Doctors for Life* paras 27-29 and *South African Veterinary Association* paras 15-17 the CC held that the determination of a dispute regarding whether the Assembly has failed to comply with the obligation imposed on it by s 59(1)(a), falls within the exclusive jurisdiction of the CC conferred by s 167(4)(d).

38. We submit the same applies to the determination of a dispute regarding whether the Assembly has failed to comply with the obligation imposed on it by s 57(1)(b) to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

39. That is because, like s 59(1)(a), s 57(1)(b) does not tell Parliament how it should have regard to those matters, and instead leaves it to Parliament to determine what is required of it in this regard; and an order declaring that Parliament has failed to comply with this obligation will inevitably have important political consequences.

40. For these reasons, we submit this Court lacks jurisdiction to determine the relief sought in paragraphs 1, 2 to 6, 8, 9 and 10 of DIA's amended notice of motion, as well as the relief sought in para 7 insofar as the relief in that prayer is based on the contention that the legislative measures by Parliament setting out the specific factors that make out a case for misconduct, incapacity or incompetence as envisaged in s 194, must take the form of legislation passed by Parliament and not rules of the Assembly.

41. Our submissions which follow regarding the merits of DIA's case, are thus made in the alternative to our objections, *in limine,* to its *locus standi* and to this Court's jurisdiction to determine the relief sought in the paragraphs of its amended notice of motion just mentioned.

III. The relief sought in para 1 of DIA's amended notice of motion and the consequential relief sought in paras 2 to 6 thereof – DIA's contention that Acts of Parliament, and not rules of the Assembly, are required to regulate impeachment under section 194

42. We deal with this issue in our heads paras 98-108 pp 51-55.

43. It is significant that there is no equivalent in s 194 to the many provisions of the Constitution which require the enactment of national legislation to give effect to them. Compare e.g. ss 32(2) (national legislation must be enacted to give effect to the right of access to information in s 32(1)) and s 192 (national legislation must establish an independent authority to regulate broadcasting).

44. There is even no equivalent in s 194 to the many other provisions in the Constitution which expressly allow national legislation to elaborate on them. Compare e.g. s 178(4) (the Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation).

45. We submit the DIA are wrong to contend that Acts of Parliament, and not rules of the Assembly, are required to regulate impeachment under s 194.

46. Like s 89(1) of the Constitution, which governs the circumstances and process pursuant to which the President may be removed from office by the Assembly, s 194 leaves it to the Assembly to spell out the circumstances and process pursuant to which the incumbent of a Chapter 9 office may be removed from office. The absence of those details is evident on the face of ss 89(1) and 194.

47. Section 194 requires that the Assembly spell out these matters by way of NA Rules which define the terms '*misconduct, incapacity or incompetence*' in s 194(1)(a) and which are specially tailored for the impeachment process contemplated in s 194 as a whole.

48. The reason why the Assembly must use its rules for this purpose is because, we submit, the reasoning of the majority of the CC in relation to s 89(1) of the Constitution in *EFF (impeachment)* is indistinguishable and must be followed.

49. As the Court knows, in *EFF (impeachment)* the majority held that the Assembly was obliged to adopt rules defining the grounds on which the President may be removed from office in terms of s 89(1) and regulating the process in the Assembly for the President's impeachment in terms of that section.

50. We refer in particular paragraphs 170-182 of 187-196 of *EFF (impeachment)* (Public Protector bundle 212-216). As the Court will recall, Jafta J concluded this part of his judgment as follows:

'*In the result I conclude that s 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section.*'

51. In the alternative to our submission that *EFF (impeachment)* is indistinguishable and consequently obliges the Assembly to use its rules for this purpose, we submit that the Assembly Rules are – in any event – an appropriate measure to use because (1) it is a committee of the Assembly which must make the finding of misconduct, incapacity or incompetence on the part of a Chapter 9 office-bearer and (2) it is the Assembly alone which must adopt the resolution calling for the office-bearer's removal from office.

52. Finally in this regard we point out that in its reply DIA signalled its withdrawal of its application insofar as it relates to the Electoral Commission, saying it was an oversight to have challenged the Electoral Commission Act 51 of 1996 as it provides for '*appropriate circumstances under which a member of the Electoral Commission may be removed from office on the grounds of misconduct, incapacity or incompetence as envisaged in section 194*' (RA 575: 33).

53. The Electoral Commission Act does indeed provide for the Electoral Court (whose members are appointed by the Judicial Service Commission) to investigate charges of misconduct, incapacity and incompetence of members of the Electoral Commission. Section 20(7) requires the Electoral Court to investigate such allegations and then to make recommendations to a committee of the Assembly, i.e. to the s 194 Committee.

54. In this regard we point out that both the independent panel to be appointed in terms of the New Rules and the Electoral Court are independent from the Assembly and both of them conduct a preliminary investigation and make recommendations to the Assembly. It is interesting to note that section 19(1) of the Electoral Commission Act provides the Electoral Court comprises a chairperson, who is a judge of the SCA, two High Court judges and two other members who are South African citizens. The investigation and recommendation are thus made by a body the majority of whose members are members of the senior judiciary.

55. There is, therefore, no merit in DIA's attempt to draw a distinction between the New Rules and the Electoral Act, which DIA concedes is adequate. The concession undermines the basis for claiming the relief it does in paragraphs 1 to 6 of its amended notice of motion, which falls to be refused.

IV. The relief sought in para 8 of DIA's amended notice of motion – the process by which the New Rules were adopted violated ss 57(1)(b) and 59(1)(a) of the Constitution

56. As explained earlier when making our submissions regarding the CC's exclusive jurisdiction in relation to this and other aspects of this case, in para 8 of its notice of motion DIA seeks an order that, in adopting the New Rules without inviting representations, comments or submissions from the Chapter 9 office-bearers, the Assembly acted unlawfully and unconstitutionally.

57. In support of this order, DIA makes the following allegations in its founding affidavit:

    57.1. the procedure followed by the Assembly when making the New Rules did not comply with section 57(1)(b) of the Constitution because it did not accord with representative and participatory democracy, accountability, transparency and public involvement (FA 33: 37 and 46: 70); and

    57.2. the procedure followed by the Assembly when making the New Rules did not comply with section 59(1)(a) of the Constitution because it failed to facilitate public involvement in the process, including obtaining representations, submissions or comments from the Chapter 9 institutions (FA 34: 39).

58. We deal with this challenge in our heads of argument paras 180-186 pp 80-83.

59. Our answer is as follows.

60. First, section 57(1)(b) of the Constitution means that when deciding on the content of the rules and orders governing its business, the Assembly must have due regard to representative and participatory democracy, accountability, transparency and public involvement, i.e. it must consider whether the content of rules and orders duly reflects those values and concepts. It does not govern the process within the Assembly leading up to the making of the rules and orders of the Assembly governing its business. That is the Assembly's internal business.

61. Second, section 59(1)(a) of the Constitution similarly does not govern the process within the Assembly leading up to the making of rules governing its legislative and other processes and those of its committees, which as stated is its internal business. What section 59(1)(a) requires is that when the Assembly or any of its committees undertakes legislative and other processes in terms of the rules, it must facilitate public involvement.

62. Third, there is nothing in the Assembly Rules and the Joint Rules which precludes the Assembly or its committees from facilitating public involvement if and to the extent it is appropriate to do so. On the contrary, they require that the Assembly and its committees facilitate public involvement in their legislative and other processes.

63. For example, as the Speaker explains in her answering affidavit, Rule 167(b), (c) and (d) provide that for the purposes of performing its functions a committee may: (1) receive petitions, representations or submissions from interested persons or institutions; (2) permit oral evidence on petitions, representations, submissions and any other matter before the committee; and (3) conduct public hearings. In addition, Rule 170 provides generally that committees must ensure public involvement in accordance with the provisions of the Constitution and the Assembly Rules (Speaker AA 319: 124).

64. Fourth, as regards the facts of the present matter, as the Speaker explains in her affidavit paras 125-126 pp 319-320, all of the meetings of the Rules Committee and the Subcommittee during which the New Rules were developed were open to the public; and at the time it was widely publicised that new rules to give effect to s 194 were being formulated. The Organisation Undoing Tax Abuse submitted representations about the draft New Rules to the Subcommittee, which were tabled in the Subcommittee at its meeting on 9 November 2019. See annexures TRM 17, TRM 18 and TRM 19 pp 430-436.

65. Although none of the Chapter 9 institutions submitted representations, the presently relevant points are that the rule-drafting process was widely-publicised and the Assembly Rules permitted them to submit representations or request the opportunity to make oral submissions.

66. It follows that this ground of attack is without merit and the relief sought in para 8 of DIA's notice of motion should be refused.

V. The relief sought in para 7 of DIA's amended notice of motion – DIA's challenges to the content of the New Rules

67. As mentioned earlier, in para 7 of the amended NoM DIA seeks an order declaring that the New Rules are unconstitutional because they contravene the provisions of sections 181(3) and 194 of the Constitution.

68. In support of this relief, DIA makes ten allegations in its founding papers, the merits of each of which we shall now address, as briefly as possible, in turn.

69. Before doing so, we make the preliminary point that, for the reasons given in our heads paras 113-116 pp 57-58, s 181(3) is not relevant to interpreting the meaning and reach of s 194. These provisions serve two distinct, albeit complementary, purposes.

    69.1. Section 181(3) is aimed at ensuring Chapter 9 institutions are properly supported and assisted by other organs of state in order to promote the principles in s 181(3). This Parliament has done so by passing legislation which supports each of the Chapter 9 institutions (i.e. the impugned Acts). See, for example, ss 6, 7 and 7A of the Public Protector Act 23 of 1994, which provide the Public Protector with the additional investigative powers necessary to fulfil her mandate.

    69.2. Section 194 fulfils a different purpose. Since all Chapter 9 institution office-bearers are accountable to the Assembly, s 194 imposes upon the Assembly the duty to administer the process which may ultimately result in the removal of an office-bearer on the grounds and following the procedure mentioned there.

70. We submit that if this Court finds that s 181(3) is not relevant to s 194 and impeachment processes under s 194, the legal foundation for most of DIA's ten challenges to the content of the New Rules will fall away. The grounds in question are those which allege infringements of s 181(3), of one sort or another.

71. DIA's first challenge to the content of the New Rules is that s 181(3) of the Constitution requires that measures taken by Parliament giving effect to s 194, and in particular legislative measures setting out the specific factors that make out a case for misconduct, incapacity or incompetence, must take the form of legislation passed by Parliament in accordance with the national legislative process in the Constitution, and may not take the form of rules of the Assembly like the New Rules (FA 24: 20-21; FA 26-27: 26-27; FA 27: 28.1; FA 31: 33; FA 32-33: 36; FA 35: 41; FA 36: 44; FA 37- 40: 46-55; and FA 77: 125). As explained earlier, this challenge is consequential upon DIA's argument in support of the relief it seeks in para 1 of its amended notice of motion. We have dealt with this argument.

72. DIA's second challenge to the content of the New Rules is that in contravention of s 194, the New Rules require a body not comprised of members of the Assembly – the independent panel – to make findings of misconduct or incompetence against the Public Protector, the Auditor-General or a member of a commission established by Chapter 9 of the Constitution (FA 77: 126). In other words, DIA contends, the panel should comprise members of the Assembly.

73. We deal with this challenge in our heads paras 167-172 pp 77-78.

74. We submit this challenge is unfounded for four reasons.

75. First, as the Court knows, the task of the panel is to conduct a preliminary enquiry in which it conducts and finalises a preliminary assessment to determine whether there is *prima facie* evidence to show that the incumbent committed misconduct or is incapacitated or incompetent as alleged in the motion. See Rules 129T(a) ('*preliminary assessment*'), 129U ('*preliminary enquiry*') and, especially, Rule 129X(1)(b) ('*conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is prima facie evidence to show that the holder of public office – (a) committed misconduct; is incapacitated; or is incompetent*').

76. Second, the panel does not make a decision which is binding on anyone. Instead, it must submit a report to the Assembly containing '*recommendations*'. See Rule 129X(1)(c)(v). Although the Assembly is obliged to consider the recommendations, it alone decides whether a section 194 enquiry must be proceeded with. See Rule 129Z(1) and (2).

77. Third, our law permits public decision-makers to receive and consider advice, so long as they take the decision themselves. As Baxter says the principle against what he calls 'passing the buck' – a form of unlawful abdication or sub-delegation of public power – does not preclude taking advice from or consultation with other officials and advisory bodies. As long as the final decision is taken by the properly empowered authority, much good is likely to come of hearing the advice (Baxter Administrative Law (1984) 444).

78. This was confirmed by the SCA in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) paras 19-20, a PAJA case; and is also in line with the approach of the CC in *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) paras 35 to 41 the President's enlisting the assistance of the Minister and Department of Justice to conduct a preliminary process to evaluate and make recommendations regarding applications for a pardon in terms of section 84(2)(j) of the Constitution, something which only the President, acting alone, can give.

79. Fourth, the touchstone for the validity of the New Rules is rationality, and it is rational to appoint an independent panel whose three members collectively possess the necessary legal and other experience to conduct a preliminary assessment as to whether there is *prima facie* evidence to show that the incumbent committed misconduct or is incapacitated or incompetent; and to make recommendations to the Assembly.

80. In this regard, as we mentioned earlier, the DIA has, quite rightly, endorsed the appointment of the Electoral Court (which does not consist of NA members) in term of the Electoral Commission Act as the entity that conducts the initial investigation of charges against members of the Commission and makes recommendations to the s 194 committee.

81. DIA's third challenge to the content of the New Rules is that, in contravention of section 181(3), the New Rules require that motions initiating proceedings for a s 194(1) enquiry be screened by a panel chosen by the Speaker or members of the Assembly, which means the panel will not be independent in the true sense of the word (FA 69: 109).

82. We deal with this challenge in our heads paras 162-166 pp 75-77.

83. We submit this challenge is unfounded for three reasons.

84. First, Rule 129U requires that the panel be independent. This is an objective criterion which, if not complied with in a particular case, will sustain legal proceedings for a declaration of invalidity of the panel's appointment.

85. Second, the conferral upon the Speaker of the power to appoint the independent panel is rational because the Speaker is obliged by the Constitution and Rule 26(4) to maintain the neutrality of the office by acting fairly and impartially.

86. Third, as mentioned during our argument on the Public Protector's application, although the power to appoint the independent panel, like all powers conferred upon organs of state, is capable of being abused, that possibility has no bearing on the constitutionality of the New Rules. Should a power be abused, the solution lies not in invalidating the provision of the New Rules conferring it or the New Rules as a whole, but in the remedies afforded by our law for abuses of public power. See *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 37.

87. DIA's fourth challenge to the content of the New Rules is that section 181(3) obliges the Assembly to adopt rules that will assist and protect the Chapter 9 office-bearers to ensure their independence, impartiality, dignity and effectiveness, whereas (so it is contended) the New Rules expose them to an arbitrary removal process that completely undermines these constitutional attributes and requirements (FA 28: 28.6; and FA 41-42: 59).

88. We deal with this challenge in our heads paras 117-120 pp 58-61.

89. We submit that the New Rules do not expose incumbents Chapter 9 office-bearers to an arbitrary removal process that undermines the independence, impartiality, dignity and effectiveness of the Chapter 9 institutions.

90. On the contrary, the New Rules contain a range of safeguards, including the following:

90.1. First, they contain definitions of '*misconduct*', '*incapacity*' and '*incompetence*', which preclude removal in circumstances not covered by them.

90.2. Second, they require that the Speaker assess (Rules 129S and 129T) whether the motion is in order, i.e. meets the requirements just mentioned – this initial mechanism is designed to sift out motions which do not comprise a clearly formulated charge of misconduct, incapacity or incompetence (as defined), do not relate to the actions or conduct of the incumbent, or are not accompanied by the evidence relied upon;

90.3. Third, the New Rules require that if the Speaker finds the motion is in order, she must establish and appoint three members to an independent panel and immediately refer the motion and supporting documents to the panel for a preliminary assessment of the matter (Rules 129T(a) and 129U). The three panellists must, collectively, possess the necessary legal and other competencies and experience to conduct the preliminary assessment (Rule 129V), i.e. to assess whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incapacitated or incompetent, for the reasons alleged in the motion (Rule 129X(1)(b)). The independent panel must embody its preliminary assessment in a written report, which must include any recommendations and its reasons for such recommendations and any minority view of any panellist (Rule 129X(1)(c)(v) – this second, more stringent sifting mechanism enables the Assembly, when it first considers the matter (in terms of Rule 129Z) to make an informed decision as to whether the matter must be referred to a committee for a formal enquiry;

90.4. Fourth, the New Rules provide that the formal enquiry aimed at establishing the veracity of the charges against the incumbent in the motion must be conducted by a specially-established committee of the Assembly (Rule 129AA). The committee must conduct the enquiry in a reasonable and procedurally fair manner (Rule 129AD(1) to (3)). At the end of the enquiry the committee must set out in a report its findings and recommendations, the reasons therefor and all views expressed in the committee (Rule 129AE).

90.5. Fifth, the New Rules provide that the Assembly may decide that the incumbent be removed from office only after considering and debating the report and recommendations of the s 194 committee (Rule 129AF(1)).

91. We submit that, together, these safeguards are designed to eliminate spurious or vexatious complaints and ensure that the process is rational, and not arbitrary.

92. DIA's fifth challenge to the content of the New Rules is that the New Rules are inconsistent with section 181(3) (and sections 181(2) and (4) of the Constitution) (FA para 22) because (so it is contended) they expose the Chapter 9 institutions to interference with their functioning by permitting charges of misconduct or incompetence to be made based solely on the merits of their decisions or mere errors of law (FA 28-29: 28.7 and FA 54-58: 83-89). In their argument, DIA refers to this as interfering with decisional independence.

93. We deal with this challenge in our heads paras 121-130 pp 61-64.

94. We submit the stringent definitions of '*misconduct*' and '*incompetence*' in the New Rules render it impossible for a Chapter 9 office-bearer to be removed from office on account of mere errors made in the discharge of their functions. Something more – a lot more – is required. In the case of misconduct, it is the intentional or a grossly negligent failure to meet the standard of behaviour or conduct expected of a holder of public office. In the case of incompetence, what will be required in most instances is a demonstrated and sustained lack of the knowledge, ability or skill to carry out their duties effectively.

95. DIA's sixth challenge to the content of the New Rules is that, in contravention of section 181(3) (and NA Rule 89), the New Rules do not prohibit members of the Assembly from filing removal charges against the Public Protector which are based on cases that are still pending in courts (FA 60-61: 93).

96. Rule 89, which is headed '*Matters sub judice*' provides:

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

97. We deal with this challenge in our heads paras 131-136 pp 64-66.

98. For four reasons, some of which we advanced in the Public Protector application in response to a related point, we submit that neither section 181(3) nor Rule 89 preclude members of the Assembly initiating removal processes based on an action or conduct of the incumbent of a Chapter 9 office which is also the subject of un-concluded legal proceedings in the courts.

98.1. First, s 194 confers on the Assembly and the President alone the power to remove the incumbent from a Chapter 9 office on the ground of misconduct, incapacity or incompetence.

98.2. Second, the purpose of the *sub judice* rule is to avoid public statements about pending legal proceedings which create a real risk of demonstrable and substantial prejudice to the administration of justice in those proceedings (*Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 19 (bundle 436).

98.3. Third, because the question for decision in any legal proceedings in the court could never validly be whether there are sufficient grounds for the incumbent to be removed from office, s 194 proceedings in the Assembly based on an action or conduct of the incumbent of a Chapter 9 office which is also the subject of un-concluded legal proceedings, will not create a real risk of demonstrable and substantial prejudice to the administration of justice in those legal proceedings.

98.4. Fourth, it would be incompatible with s 194 if the Assembly and the President were legally prevented from removing the incumbent from a Chapter 9 office because of the happenstance that the action or the conduct of the incumbent constituting or evidencing the misconduct, incapacity or incompetence in question is also the subject of un-concluded legal proceedings in the courts.

99. DIA's seventh challenge to the content of the New Rules is that, in contravention of section 181(3), the New Rules do not preclude the initiation of complaints against Chapter 9 office-bearers or the participation in the resulting impeachment process by political parties or their members who have a conflict of interest or are biased against the person against whom the complaint is directed because they or their representatives in the Assembly are engaged in litigation against that person or s/he has made adverse findings against them or they are being investigated by her/him (FA 58-59: 90, FA 61-64: 94-98 and FA 66: 101).

100. We deal with this challenge in our heads paras 137-144 pp 66-70.

101. As we have made submissions on the identical point in the application brought by the Public Protector, we stand by the content of our heads and our earlier oral submissions on this issue.

102. DIA's eighth challenge to the content of the New Rules is that, in contravention of section 181(3), the New Rules permit the Speaker to consult the member who has initiated the proceedings for a s 194(1) enquiry to ensure his or her motion is compliant with criteria set out in rule 129R, but do not require the Speaker to consult the accused Chapter 9 office-bearer about that issue or before referring the matter to an independent panel and informing the President and the Assembly of the referral (FA 66-67: 102-104 and FA 69-71: 110-113).

103. We deal with this challenge in our heads paras 146-153 pp 70-73.

104. As we have also dealt with a similar point in the application brought by the Public Protector, we shall be brief and confine our submissions to four points.

104.1. First, the touchstone for the validity of the rules is substantive and procedural rationality.

104.2. Second, the provision in the New Rules (i.e. Rule 129S) empowering the Speaker to consult with the member who has initiated the proceedings for a s 194(1) enquiry to ensure his or her motion is compliant with criteria set out in Rule 129R, is rationally related to the requirement (in Rule 129T) that only motions which are in order may be taken forward in the impeachment process.

104.3. Third, Rule 129X(1)(c)(ii) and (iii) afford the office-bearer the opportunity to comment on whether the motion is compliant with criteria set out in Rule 129R, before the matter is considered by the Assembly for the first time (i.e. before the Assembly decides whether a s 194 enquiry should be proceeded with in the Assembly committee envisaged by s 194(1)(b)).

104.4. In other words, before the matter is first tabled in the Assembly, the incumbent may:

104.4.1. take issue with the motion, notably by responding that even if the charge is proven it will not mean he or she committed misconduct or is incapacitated or incompetent (as defined); and/or

104.4.2. take issue with the evidence supporting the motion, notably by responding that the evidence relied upon does not support the motion or is so weak that it does not call for an answer.

104.5. Fourth, the overwhelming weight of authority in our law, including the judgments of the SCA and the CC cited by counsel for the DA, says there is no right to hearing before a decision is taken to refer a complaint for an investigation during which the respondent will be heard.

105. DIA's ninth challenge to the content of the New Rules is that, in contravention of section 181(3), the New Rules do not require that motions initiating proceedings for a s 194(1) enquiry be handled confidentially in the early stages of the process (i.e. before the motions have been screened and a s 194 removal enquiry has been triggered) (FA 67-68: 105-107).

106. We deal with this challenge in our heads paras 154-161 pp 73-75.

107. For three reasons we submit this challenge is in unfounded.

108. First, as explained earlier, section 57(1)(b) of the Constitution requires that the Assembly Rules be informed by representative and participatory democracy, accountability, transparency and public involvement. Those considerations require that openness be the norm and confidentiality be the exception to the norm. In line with this, as the Speaker explains in her answering affidavit para 105 p 312, NA Rule 26(1)(a) provides that one of the functions of the Speaker is to ensure that the Assembly provides a national forum for public consideration of issues; and the remainder of the sub-rules make provision for the confidentiality of documents and closed meetings only in limited and carefully circumscribed circumstances.

109. Second, a notice of a substantive motion initiating proceedings for a s 194(1) enquiry aimed at the removal from office of the incumbent of a public office established by the Constitution, is a matter of public concern. Consequently, if the Speaker finds a motion is in order (i.e. complies with the requirements of Rule 129R), it should be dealt with openly. In line with this, Rule 129T(b) requires that when the motion is in order the Speaker must inform the President and the Assembly. It would be contrary to the provisions of the Constitution requiring openness and transparency if the commencement of the process aimed at the establishment of the independent panel, should happen in secret.

110. Third, it does not follow (as contended by DIA) that if a motion is groundless and is not treated as confidential in the early stages, this will irreparably impair the dignity of the Public Protector. The New Rules are designed to sift out and eliminate groundless complaints. The making of a complaint which is found to be groundless, will, if anything, reflect adversely on the member of the Assembly who lodged the complaint.

111. DIA's tenth and last challenge to the content of the New Rules is that, in contravention of section 181(3), the New Rules permit members of the Assembly to vote along partisan political lines when determining whether any of the grounds for removal exist; and the definitions of '*incompetence*' and '*misconduct*' in the New Rules contain subjective criteria and therefore are open to political considerations and factors (FA 49-51: 76-77).

112. We deal with this challenge in our heads paras 173-179 pp 78-80.

113. We submit this challenge is bad for two reasons.

114. First, s 194 has entrusted the function of deciding whether a Chapter 9 office-bearer should be removed to the Assembly, a body comprising 400 people nominated by the political parties which participated in a national general election in proportion to their showings in the election. Accordingly, there is nothing inherently untoward about members voting along party-political lines on resolutions put to the Assembly for decision.

115. Second, the definitions of '*incompetence*' and '*misconduct*' in the New Rules are sufficiently specific to avoid the individual members of the Assembly or their political parties having to determine what constitutes incompetence or misconduct with reference to political considerations and factors.

116. The definition of '*misconduct*' is exhaustive.

117. Although the definition of '*incompetence*' is not exhaustive – it '*includes*' a demonstrated and sustained lack of knowledge by the incumbent to carry out his or her duties effectively and efficiently and lack of ability and skill to do so – the defined criteria are specific and, for most practical purposes, cover the field. To constitute '*incompetence*', anything else will have to reflect adversely on the incumbent's competence in a comparably serious manner. The same applies to the definition of '*incapacity*'.

VI. Irrelevant allegations

118. As mentioned earlier, DIA's papers contain allegations regarding the New Rules which are unrelated to the relief sought in paras 7 and 8 of its notice of motion. It will be recalled that the relief in para 7 is for a declarator that the New Rules are unconstitutional in that they contravene ss 181(3) and 194; and the relief in para 8 is for a declarator that in adopting the New Rules without inviting any representations from the Chapter 9 office-bearers, the Assembly acted unlawfully and unconstitutionally.

119. In parts of its papers, however, DIA challenges another aspect of the process for the adoption of the New Rules, as well as the reason for their adoption and four aspects of their content which are unrelated to sections 181(3) and 194.

120. Our principal submission in response to those allegations is they are irrelevant and fall to be disregarded. See our heads para 43 pp 27-28.

121. To cater for the contingency of this Court finding that some or all of these six allegations are indeed relevant, in what follows we shall make brief submissions on the merits of each of them.

122. DIA's first irrelevant allegation is that there is no evidence that the New Rules were adopted by a majority of the votes cast, as required by section 53(1)(c) of the Constitution (FA 34: 38).

123. We deal with this allegation in our heads paras 187-188 p 83.

124. DIA is mistaken about the evidence on this issue. As appears from the Speaker's answering affidavit para 41 pp 288-19, the New Rules were adopted unanimously during a sitting of the Assembly at which a majority of the members were present.

125. DIA's second irrelevant allegation is that the Assembly adopted the New Rules in retaliation for the adverse findings made by the Public Protector against members of the National Executive (FA 43: 62).

126. We deal with this allegation in our heads paras 190-192 pp 83-84.

127. Not only is this allegation speculative (i.e. not supported by any evidence), but it is incompatible with the sequence of events leading up to the adoption of the New Rules which is described in detail by the Speaker in her answering affidavit paras 27-41 pp 280-289.

128. DIA's third irrelevant allegation is that, by applying generally to Chapter 9 office-bearers with no regard to their significant specific constitutional qualities and features or their different constitutional functions, and specifically by setting low generic thresholds for misconduct by or the incompetence of every '*holder of a public office*', the New Rules are irrational (FA 42: 61 FA 51: 78 and FA 53: 82).

129. We deal with this allegation in our heads paras 193-197 pp 84-85.

130. We submit there is no merit in this allegation, for three reasons.

131. First, the New Rules do not set low thresholds for misconduct or incompetence by the holders of public office to which they apply, i.e. to the incumbents of Chapter 9 offices. If anything, as we submitted in the Public Protector's application, they set higher thresholds than the ordinary meaning of those words do.

132. Second, although the definitions – and, indeed, the New Rules as a whole – apply to all the incumbents of Chapter 9 office, they are not irrational. Whether a particular incumbent is indeed incompetent or is indeed guilty of misconduct, will depend on an assessment of the facts concerning the actions or conduct of the incumbent on which the charge is based relative to the general and specific constitutional and statutory duties of the Chapter 9 institution in question.

133. The definitions and the process of assessment can accommodate the differences between the Chapter 9 institutions and between the incumbents of the two types of offices created by Chapter 9 (notably, single-person offices (i.e. the Public Protector and the Auditor-General) and membership of multi-member bodies (i.e. the Commissions listed in section 181(b), (c), (d) and (f)).

134. Third, aside from the different voting requirements in s 194(2) for the removal of the incumbents of the two types of offices created by Chapter 9, s 194 does not draw any distinctions between the different Chapter 9 office-bearers. The New Rules similarly do not draw any distinctions. Given the structure and content of s 194, that was a rational choice for the Assembly to make.

135. DIA's fourth irrelevant allegation is that the New Rules reduce the Speaker to a mere conduit for the referral of a s 194 complaint, compel her to deal with the complaining member of the Assembly and do not permit her to give the accused Chapter 9 office-bearer an opportunity to respond before referring the complaint to an independent panel (FA 73: 118).

136. We deal with this allegation in our heads paras 198-203 pp 85-87.

137. There are four difficulties with this allegation.

138. First, there is nothing in s 194 or elsewhere in the Constitution which requires that the rules governing the impeachment process ascribe a particular role or important functions to the Speaker.

139. Second, in any event, it is wrong to describe the Speaker as a mere conduit for the referral of a s 194 complaint. The main functions of the Speaker in this process under the New Rules extend far beyond referring the complaint to the independent panel. They are outlined in our heads para 200 pp 86-87.

140. Third, we have already dealt with the allegation that the Rules do not provide for the Speaker to give the accused Chapter 9 office-bearer an opportunity to respond before referring the complaint to an independent panel.

141. Fourth, insofar as DIA's complaint may be that the Speaker is not able to dismiss unmeritorious motions at the earliest possible stage, the New Rules have adopted the rational process of assigning to the independent panel the function of making an assessment of whether there is *prima facie* evidence substantiating the complaint and then requiring the Assembly to consider the panel's report and recommendations before deciding whether a formal impeachment enquiry should be proceeded with.

142. DIA's fifth irrelevant allegation is that the New Rules prohibit oral hearings by the independent panel including the cross-examination of witnesses, and in so doing unconstitutionally deny the accused Chapter 9 office-bearer an opportunity to show that the complaint is unfounded (FA 75-76: 120).

143. We deal with this allegation in our heads paras 204-207 pp 87-88.

144. The short answer to this allegation is the requirement in the New Rules that the independent panel must not hold oral hearings and must limit its assessment to the relevant written and recorded information placed before it, is both substantively and procedurally rational. The panel must act expeditiously. Hearing oral evidence will make it hard or perhaps even impossible to complete its task expeditiously. The panel performs screening and advisory functions. Written evidence and submissions are sufficient for the proper performance of those functions.

145. If, after considering the panel's report and recommendations, the Assembly decides that a s 194 enquiry be proceeded with, the s 194 committee will conduct an oral hearing which may include oral evidence if that is what procedural fairness requires. Rule 129AD(2) requires that the committee conduct the enquiry in a procedurally fair manner.

146. DIA's sixth and last irrelevant allegation is that by defining the concepts of '*incapacity*', '*incompetence*' and '*misconduct*' the New Rules are substantive not solely procedural in nature, and if they are applied to conduct of Chapter 9 office-bearers that occurred prior to the adoption of the New Rules they are unlawful, infringe the office-bearers' rights and offend the presumption against the retrospective application of the law (FA 75-76: 121-122).

147. As we have dealt with essentially the same non-retrospectivity allegation when responding to the Public Protector's application, we refer the Court to those submissions and to the answer in our heads paras 208-212 pp 88-90.

VII. Costs and conclusion

148. It will be recalled that in DIA's amended notice of motion it seeks an order directing any respondent that opposes the application to pay DIA's costs of suit, including the costs of two counsel, jointly and severally, the one paying the other(s) to be absolved (para 11).

149. In DIA's counsel's heads of argument paras 131-132 pp 64-65, however, DIA seeks attorney-and-client costs against the Speaker personally, citing her alleged conflict of interest and her alleged '*frivolous, vexatious or manifestly inappropriate conduct*'.

150. The making of this claim for personal and punitive costs against the Speaker, without any foundation in the papers, is impermissible. See *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) paras 18-19 and *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC) para 4.

151. In any event, for the reasons given in our submissions in answer to the similar costs claim made by the Public Protector, there is no merit in the DIA's claim for personal and punitive costs.

152. Turning to the issue of costs should DIA's application fail, the applicable legal principles are laid down in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) paras 21-25, especially paras 21 and 24 (bundle 522-524).

153. We submit that should this Court find that DIA does not have the *locus standi* it claims to bring these proceedings in the public interest in terms of s 38(d) of the Constitution, this Court would be justified in departing from the general rule in constitutional litigation that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs. It is manifestly inappropriate to persist with proceedings of this nature and scope without *locus standi*.

154. The Speaker prays for an order that the relief sought in DIA's amended notice of motion be refused with costs, including the costs of two counsel.

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Cape Town

9 June 2021