

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

Case No: 1731/2020

In the application between:

**DEMOCRACY IN ACTION**

Applicant

and

**SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

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

Second Respondent

**PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA**

Third Respondent

**MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

Fourth Respondent

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

Fifth Respondent

**MINISTER OF WOMEN, YOUTH AND PERSONS  
WITH DISABILITIES**

Sixth Respondent

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

Seventh Respondent

**THE PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA**

Eighth Respondent

**THE AUDITOR-GENERAL OF SOUTH AFRICA** Ninth Respondent

**THE COMMISSION FOR GENDER EQUALITY OF  
THE REPUBLIC OF SOUTH AFRICA** Tenth Respondent

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

**THE ELECTORAL COMMISSION OF THE  
REPUBLIC OF SOUTH AFRICA** Twelve Respondent

**THE SOUTH AFRICAN HUMAN RIGHTS  
COMMISSION** Thirteenth Respondent

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## **SEVENTH RESPONDENT'S HEADS OF ARGUMENT<sup>1</sup>**

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<sup>1</sup> These Heads of Argument are filed prior to receipt of the applicant's Heads of Argument. We reserve the right to supplement these Heads of Argument on receipt of the applicant's Heads of Argument.

## INTRODUCTION

1. The applicant, a civil society organisation, has instituted these proceedings against the seventh respondent, the President of the Republic of South Africa (“**the President**”) and twelve other respondents, seeking an order in the following terms:

1.1. Declaring that Parliament of the Republic of South Africa (“**Parliament**”) has failed to carry out its constitutional obligation to pass legislation giving effect to section 194 of the Constitution in relation to the removal from office of the Public Protector, the Auditor-General and Members of the Commissions established under Chapter 9 of the Constitution.<sup>2</sup>

1.2. Declaring 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; the Commission for the Promotion of Rights of Cultural, Religious and Linguistic Communities Act, 19 of 2002 and the Electoral Commission Act, 51 of 1996 as invalid to the extent of its inconsistency with the Constitution for *‘failing to provide for the appropriate circumstances under which’* the Public Protector, the Auditor-General and the Members of Commissions established under Chapter 9 of the Constitution may be removed from office for

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<sup>2</sup> NoM: prayer 1; p 3 of the record

misconduct, incapacity or incompetence, as envisaged in section 194 of the Constitution.<sup>3</sup>

- 1.3. Declaring the Rules for the Removal of the Heads of Chapter 9 Institutions (“**the Rules**”), adopted by the National Assembly of the Parliament of the Republic of South Africa (“**the National Assembly**”) as unconstitutional, *‘in that they contravene sections 181(3) and 194 of the Constitution’*.<sup>4</sup>
- 1.4. Declaring that the National Assembly had acted unlawfully and unconstitutionally by not inviting any representations, comments or submissions from the Public Protector, Auditor-General or Members of the Commissions established under Chapter 9 of the Constitution, before adopting the Rules.<sup>5</sup>
- 1.5. Directing that Parliament amend the Public Protector Act, the South African Human Rights Act, the Gender Equality Act, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, the Public Audit Act and the Electoral Commission Act, and take any other measure to provide for appropriate circumstances under which office bearers of the institutions of the Public Protector, the Auditor-General and

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<sup>3</sup> NoM: prayers 2 - 7; p 3 - 4 of the record

<sup>4</sup> NoM: prayer 8; p 4 of the record

<sup>5</sup> NoM: prayer 9; p 5 of the record

the Commissions established under Chapter 9 of the Constitution, may be removed from office on the grounds of misconduct, incapacity or incompetence, within a period of two years from the date of an order.<sup>6</sup>

1.6. The orders of declaration of invalidity be suspended for a period of two years from the date of an order.<sup>7</sup>

2. The purpose of the application ostensibly, and in general terms, is to *'challenge the failure of the Parliament to take appropriate legislative measure (sic) to assist and protect the Chapter 9 institutions in so far as it has passed constitutionally deficient laws that do not address the specific circumstances under which office bearers of Chapter 9 institutions may be removed from office on account of misconduct, incompetence and incapacity'*.<sup>8</sup>
3. The consequence of this, according to the applicant, is that there are seemingly no legislative measures, as envisaged by section 181(3) of the Constitution, to assist and protect the institutions established under Chapter 9 of the Constitution ("**the Chapter 9 Institutions**") in order to ensure their independence, impartiality, dignity and effectiveness.<sup>9</sup>

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<sup>6</sup> NoM: prayer 10; p 5 of the record

<sup>7</sup> NoM: prayer 11, p 5 of the record

<sup>8</sup> FA: para 20; p 24 of the record

<sup>9</sup> FA: para 20; p 24 of the record

4. In addition, it is argued that the removal of office bearers of Chapter 9 Institutions through rules is not a legislative measure for purposes of section 181(3) of the Constitution, alternatively, that it is not permissible for Parliament to give effect to section 194 by way of rules, and that the Rules themselves, are<sup>10</sup>:
  - 4.1. inconsistent with sections 181(2) to (4) of the Constitution;
  - 4.2. violate the independence, impartiality, dignity and effectiveness of the Chapter 9 Institutions; and
  - 4.3. fall to be declared unconstitutional and set aside.

#### **THE PRESIDENT'S APPROACH TO THIS APPLICATION**

5. The President is cited and joined in these proceedings by virtue of his role as the head of state and head of the national executive, as contemplated by section 83(1) of the Constitution.<sup>11</sup>
6. No relief is sought against the President. The President abides the decision of this Court as it relates to the relief sought by the applicant.<sup>12</sup> The Constitutional Court has cautioned against the President being cited as a party to litigation when the primary function at issue rests with a Minister to whom it has been assigned in accordance with the Constitution. According to the Constitutional Court, once Cabinet ministers are assigned powers and functions by the

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<sup>10</sup> FA: paras 20 - 21; p 24 - 25 of the record

<sup>11</sup> FA: para 11, p 19 of the record

<sup>12</sup> 7th R's AA: para 8, p 477 of the record

President they are not “*mere vassals*” of the President; they bear the duty and the responsibility to fulfil the duties and functions so assigned.<sup>13</sup>

7. However, the President is named expressly as one of the persons against whom the Office of the Public Protector (“**the Public Protector**”) has made adverse findings and who is at present, involved in ongoing litigation against the Public Protector.
8. It is alleged, on this basis, that the President is “conflicted to play any role in the removal process envisaged for the Public Protector”.<sup>14</sup>
9. Our submissions are thus confined to addressing in the main, the applicant’s allegations concerning a conflict of interest, specifically as it relates to the interaction between the President’s constitutional powers under section 194(3) of the Constitution and the constitutional powers conferred upon the Public Protector by section 182 of the Constitution, as amplified by the relevant provisions of the Public Protector Act.
10. In terms of section 194(3) of the Constitution, it is only the President who: (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 National Assembly of the resolution calling for that person’s removal.

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<sup>13</sup> Van Abo v President of the Republic of South Africa 2009 (5) SA 345 (CC); 2009 ((10) BCLR 1052; [2009] ZACC (15), at paragraphs 40 to 44; see too para 49 and 50

<sup>14</sup> FA: para 94, p 61 of the record

## CONFLICTS OF INTEREST

### The law

11. Section 96(2)(b) of the Constitution enjoins the President, as a member of Cabinet, to desist from acting in any way that is inconsistent with his office or exposes himself to a situation involving the risk of conflict between his official responsibilities and his private interests.<sup>15</sup>
  
12. A conflict of interest in a range of circumstances is catered for in various statutes. It is commonly referred to as a person having a material interest in any matter which could conflict with the proper performance of his or her statutory duties.<sup>16</sup>
  
13. In **Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others** (62470/2015) [2017] ZAGPPHC 743; [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP) (8 December 2017) the Court dealt with a conflict of interest in respect of the former President Zuma which was alleged to preclude him “from appointing a National Director of Public Prosecutions (**NDPP**), given the raft of criminal charges he is facing”.<sup>17</sup>
  
14. The Court identified the conflict in the following terms:

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<sup>15</sup> The President accepts, at paragraph 11.1 of his answering affidavit (p 478 of the record) that it would not be appropriate for him to exercise any constitutional power conferred on him in circumstances where there is a conflict between the exercise of such power and his private interests.

<sup>16</sup> Section 45 of the Protection of Personal Information Act 4 of 2013, section 21 of the Land and Agricultural Development Bank Act No 15 of 2002

<sup>17</sup> At para 107

*“[109] The interests that are said to be conflicted are the President's private interests resulting from the host of criminal charges against him, specifically given his concession and the finding by the SCA that the decision to withdraw them was irrational; and as against that, his official responsibility to appoint the NDPP in terms of s. 10 of that Act.”*

15. In rejecting the arguments of former President Zuma, the Court emphasised that a person who is conflicted cannot act.<sup>18</sup>

### **The facts**

16. Three specific instances, where persons may risk a conflict, are identified in the founding affidavit. These are:

16.1. persons against whom adverse findings have been made by the Public Protector;

16.2. persons under investigation by the Public Protector; and

16.3. persons who are involved in ongoing litigation against the Public Protector.<sup>19</sup>

17. We submit that bar the matter of ongoing litigation, none of these instances give rise to a conflict of interest, for the reasons that follow.

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<sup>18</sup> At para 112

<sup>19</sup> FA: para 94, p 61 of the record

18. It is unclear at this stage as to whether the applicant is persisting with the broad challenge in respect of conflict interest. We nevertheless address each of the categories as identified in the founding affidavit.
19. As to the first category of conflict relied on by the applicant: the applicant has not identified any basis at all as to why the President is conflicted in the manner contemplated by section 96(2)(b) of the Constitution (i.e. there is a conflict between his official responsibilities and his private interests) in circumstances where the Public Protector has made an adverse finding against him. The applicant has not addressed in any meaningful way the following allegations made by the President:

19.1. Since the office of the Public Protector exists as a check on the conduct of other organs of state, it is accepted that there may be instances where the Public Protector has made adverse findings against the President, and conversely, that the President may be called upon to exercise his constitutional powers in such a way that directly affects the office of the Public Protector.<sup>20</sup>

19.2. In circumstances where the President has accepted any adverse findings of the Public Protector, there would no reasonable basis

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<sup>20</sup> 7th R's AA : para 11.3, p 479 of the record

upon which he could be called upon to refrain from exercising his constitutional powers under section 194(3) of the Constitution.<sup>21</sup>

19.3. Where the President has successfully challenged any adverse findings of the Public Protector, there is equally no reasonable basis upon which he is to be precluded from exercising his constitutional powers under section 194(3) of the Constitution.<sup>22</sup>

19.4. Should there be a concern that the President may have exercised his powers under section 194(3) improperly, such exercise invariably remains open to challenge on review.<sup>23</sup>

19.5. Any adverse findings against the President cannot, on their own, neutralise the President's ability to exercise any constitutional powers that implicates the office of the Public Protector, especially those set out in section 194(3) of the Constitution.<sup>24</sup>

20. As to the second category of conflict relied on by the applicant: the applicant has not identified any basis at all as to why the President is conflicted in the manner contemplated by section 96(2)(b) of the Constitution (i.e. there is a conflict between his official responsibilities and his private interests) in circumstances where the Public Protector has an investigation underway against him. The

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<sup>21</sup> 7th R's AA: para 11.7, p 480 of the record

<sup>22</sup> 7th R's AA: para 11.8, p 480 of the record

<sup>23</sup> 7th R's AA: para 11.8, p 480 of the record

<sup>24</sup> 7th R's AA: para 11.3, p 479 of the record

applicant has not addressed in any meaningful way the following allegations made by the President:

- 20.1. Any previous investigation by the Public Protector into the President or any other organ of state, cannot be sufficient to create a conflict of interest.<sup>25</sup>
  - 20.2. If that is so, the possibility must exist that the Public Protector could immunise herself against the removal process of section 194 of the Constitution, by initiating an investigation, no matter how spurious, against those organs or individuals who she considers to be a threat to her.<sup>26</sup>
  - 20.3. An ongoing investigation could similarly be used by the Public Protector to contrive a conflict of interest. In order to thwart the provisions of section 194 of the Constitution, the Public Protector could commence frivolous investigations and delay their outcome indefinitely.<sup>27</sup>
21. In both these instances, the Public Protector is performing her constitutionally prescribed role. Should the President exercise his constitutional powers in relation to removal in either or both of those instances, it does not give rise to a conflict between official responsibility and private interests.

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<sup>25</sup> 7th R's AA : para 11.4, p 479 of the record

<sup>26</sup> 7th R's AA: para 11.4, p 479 of the record

<sup>27</sup> 7th R's AA: para 11.5, p 480 of the record

22. As to the third category of conflict relied on by the applicant:

22.1. The President has accepted that the only instance that may give rise to a potential risk of conflict could be where there is pending litigation between the Public Protector and the President, at the time at which he is exercising his powers under section 194 of the Constitution.<sup>28</sup>

22.2. The President has accepted that it would not be appropriate for him to exercise any constitutional power conferred on him in circumstances where there is a conflict between the exercise of such power and his private interest.<sup>29</sup>

## CONCLUSION

23. As stated above, no relief is sought against the President.

24. The only rationale for joining the President to these proceedings, appears to be because of the allegations of conflicts of interest that have been leveled against him. As addressed, many of these complaints of an alleged conflict are entirely without merit.

25. In conclusion -

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<sup>28</sup> 7th R's AA : para 11.6, p 480 of the record

<sup>29</sup> 7th R's AA : para 11.1, p 478 of the record

- 25.1. the President abides the decision of this Court on the relief sought by the applicant;
- 25.2. save for instances where there is pending litigation between the President and the Public Protector, there are no other instances where a conflict of interest exists between the President's ability to exercise his constitutional powers under section 194(3) of the Constitution and the Public Protector's exercise of her constitutional powers under section 182 of the Constitution, as amplified by the relevant provisions of the Public Protector Act;
- 25.3. the President does not seek costs against the applicant, nor would a costs order against the President and his office be appropriate, given the position he has taken in these proceedings;<sup>30</sup>
- 25.4. the applicant and the President, as the seventh respondent, should therefore be ordered to pay their own costs.<sup>31</sup>

**Karrisha Pillay SC**  
**Ndumiso Luthuli**

Counsel for the President  
Chambers, Cape Town and Sandton

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<sup>30</sup> 7th R's AA : para 13, p 481 of the record

<sup>31</sup> 7th R's AA : para 13, p 481 of the record

