

**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

<b>THE PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA</b>	Eighth Respondent
<b>THE AUDITOR-GENERAL OF SOUTH AFRICA</b>	Ninth Respondent
<b>THE COMMISSION FOR GENDER EQUALITY OF THE REPUBLIC OF SOUTH AFRICA</b>	Tenth Respondent
<b>THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES OF THE REPUBLIC OF SOUTH AFRICA</b>	Eleventh Respondent
<b>THE ELECTORAL COMMISSION OF THE REPUBLIC OF SOUTH AFRICA</b>	Twelve Respondent
<b>THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION</b>	Thirteenth Respondent
<b><u>As Amicus Curiae</u></b>	
<b>COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION</b>	First Amicus
and	
<b>CORRUPTION WATCH (RF) NPC</b>	Second Amicus

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#### **FOURTH 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.

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## INTRODUCTION

1. The applicant, a civil society organisation, has instituted these proceedings against the fourth respondent, the Minister of Justice and Correctional Services (“**the Minister**”) 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

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

under Chapter 9 of the Constitution may be removed from office for 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

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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

of the institutions of the Public Protector, the Auditor-General and 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.
5. The Minister is joined to these proceedings by virtue of his responsibility for the administration of the Public Protector Act and the South African Human Rights Commission Act only.<sup>11</sup>
6. The Office of the Public Protector and the South African Human Rights Commission are both institutions established under Chapter 9 of the Constitution, and their removal from office is regulated by section 194 of the Constitution.
7. Our submissions are thus confined to addressing in the main, the applicant's allegations concerning Parliament's constitutional obligation in relation to Chapter 9, with particular emphasis on the removal provisions contained in section 194 of the Constitution.

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

<sup>11</sup> FA: para 8; p 18 of the record

8. We do not deal in any detail with the applicant's challenge to the constitutional validity of the Rules, as the Minister has aligned himself with the contentions raised by the Speaker of the National Assembly of the Republic of South Africa ("**the Speaker**"). The answering affidavit filed on behalf the first to third respondents explained, in some detail, the approach taken by the National Assembly in adopting the Rules<sup>12</sup>.
  
9. In opposing the application, we advance the following arguments:
  - 9.1. First, the applicant has approached the wrong court for the relief that is set out at prayer 1 of the notice of motion. In seeking a declaration that Parliament has failed to fulfill a constitutional obligation, the applicant ought to have approached the Constitutional Court directly, as it is the only court with exclusive jurisdiction, as contemplated by section 167(4)(e) of the Constitution, to grant such relief.
  
  - 9.2. Second, neither section 194 nor any other provision of the Constitution places a constitutional obligation on Parliament or any other organ of state, to adopt specific legislation or take any other measure to regulate the removal from office of office bearers of Chapter 9 Institutions.

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<sup>12</sup> 4th R's AA: para 8; p 446 - 447 of the record

- 9.3. Third, section 194 of the Constitution expressly regulates the procedure that is to be undertaken by the National Assembly and the President of the Republic of South Africa (the President) when an office bearer of a Chapter 9 Institution is to be removed from office. In amplifying the removal procedure, the National Assembly has adopted the Rules, as it is entitled to do under sections 57(1)(a) and (b) of the Constitution.
10. In what follows, we expand on each of these arguments in the order in which we have identified them.

## THE EXCLUSIVE JURISDICTION OF THE CONSTITUTIONAL COURT

### Section 167(4)(e) of the Constitution

11. The Minister, together with the Speaker, the twelfth respondent (“**the Electoral Commission**”) and the Democratic Alliance (“**the DA**”), submit that this Court does not have jurisdiction to hear the application.
12. In **Doctors for Life International v Speaker of the National Assembly** 2006 (6) SA 416 (CC) the Constitutional Court held:

- 12.1. Section 167(4)(e) of the Constitution must be construed purposively and consistently with the nature of the jurisdiction of the Constitutional Court in our constitutional democracy.<sup>13</sup>
- 12.2. The purpose of giving the Constitutional Court exclusive jurisdiction to decide issues that have important political consequences is 'to preserve the comity between the judicial branch of government' and the other branches of government 'by ensuring that only the highest Court in constitutional matters intrudes into the domain' of the other branches of government.<sup>14</sup>
- 12.3. The principle underlying the exclusive jurisdiction of the Constitutional Court under s 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by the Constitutional Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within s 167(4).<sup>15</sup>
13. The Minister has objected to this Court having jurisdiction because the primary relief sought by the applicant in prayer 1 of the notice of motion is '*declaring that 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 of office*

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<sup>13</sup> At para 22

<sup>14</sup> At para 23

<sup>15</sup> At para 24, see too para 25

*of the Public Protector, the Auditor-General and Members of Commissions established by Chapter 9 of the Constitution of the Republic of South Africa, 1996* falls squarely within the realm of section 167(4)(e) of the Constitution.

14. Section 167(4)(e) of the Constitution provides:

‘167(4) Only the Constitutional Court may -

.....

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation.’

15. It is only the Constitutional Court that may decide whether Parliament or the President has failed to fulfill a constitutional obligation, as is borne out by the case-law that we refer to hereunder.
16. In **My Vote Counts NPC v Speaker of the National Assembly and Others** 2015 (12) BCLR 1407 (CC) (*My Votes Count*), where the applicant invoked the Constitutional Court’s exclusive jurisdiction under section 167(4)(e) of the Constitution, seeking an order compelling Parliament to pass legislation that would oblige political parties to disclose the sources of their private funding, the Court held<sup>16</sup>:

“We conclude thus: the applicant alleges that Parliament has failed to fulfil the obligation imposed by s 32(2) of the Constitution to enact legislation that gives effect to the right contained in s 32(1) of the Constitution. In

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<sup>16</sup> At para 135

terms of s 167(4)(e) of the Constitution, only this court has jurisdiction to answer that question.”

### **The applicant’s argument must fail**

17. Notwithstanding the jurisprudence of the Constitutional Court, the applicant argues, in reply, that Parliament is to be held accountable as an organ of state, as provided for in section 181(3), for failing to assist and protect Chapter 9 Institutions, by not enacting legislation that deals with the removal provisions of section 194 of the Constitution.
18. The applicant’s argument is beset with difficulties, for the following reasons:
  - 18.1. First, the wording used by the applicant in prayer 1 of the notice of motion mirrors exactly that of section 167(4)(e) which specifically refers to a failure to ‘fulfill a constitutional obligation’, whereas section 181(3) speaks of assisting and protecting Chapter 9 Institutions through legislative and other measures.
  - 18.2. When dealing with matters of this nature, the Constitutional Court has emphasised that the starting point in ascertaining whether its exclusive jurisdiction is engaged under section 167(4)(e), is the pleadings.
  - 18.3. In **My Vote Counts** at paras 132 and 133, the Court held:

*'A court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.*

*..... Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. . . . 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. While 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, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.'*

18.4. In **EFF v Speaker of the National Assembly** 2016 (3) SA 580 (CC)

the Court held whether the Constitutional Court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. The starting point is the pleadings. But much more is required. First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely

examined to determine whether it is of the kind envisaged by s 167(4)(e).<sup>17</sup>

18.5. Second, the applicant's reliance on **Women's Legal Centre Trust v President of the Republic of South Africa and Others** 2009 (6) SA 94 (CC) ([2009] ZACC 20) ("**WLC**") is entirely distinguishable from the present matter<sup>18</sup>:

18.5.1. In that matter, the applicant (the WLC) sourced the obligation to enact and implement legislation in various provisions of the Bill of Rights including the right to equality and to dignity and section 7(2) which provides that '(t)he State must respect, protect, promote and fulfil the rights in the Bill of Rights'.

18.5.2. As held by the Constitutional Court, the obligation in section 7(2) of the Constitution pertains to the State, which includes all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels, State institutions supporting constitutional democracy created by Chapter 9 of the Constitution, 'State

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<sup>17</sup> At para 16

<sup>18</sup> At para 15 to 20

departments and administrations' as well as bodies created by statute.<sup>19</sup>

18.5.3. By contrast with this broad assemblage of duty-bearing organs and institutions, the Constitutional Court emphasised that section 167(4)(e) is precise in delineating the actors on whom it imposes obligations; they are the President and Parliament as distinct from 'the State'.

18.5.4. According to the Constitutional Court, constitutional duties the State and its organs must perform collaboratively or jointly do not fall within the purview of section 167(4)(e). The latter provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament, and on them alone.

18.5.5. By contrast, the present matter is brought on the basis that the specific obligation is sourced directly and exclusively in the powers of Parliament as distinct from a generalised provision relating to the State.

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<sup>19</sup> At para 19

19. Consequently, this Court can neither hear the application, nor grant any relief, in relation to prayer 1 of the notice of motion.
20. In circumstances where the Court is unable to pronounce on the primary relief sought by the applicant, that is, whether Parliament has failed to fulfill a constitutional obligation (as contemplated by prayer 1 of the notice of motion) it ought similarly not to hear the application in relation to, nor grant the consequential relief sought at prayers 2 to 7 of the notice of motion.
21. This we say because the declarations of invalidity of the impugned legislation (sought at prayers 2 to 7 of the Notice of Motion) are dependent on a finding that Parliament has failed to fulfill a constitutional obligation by not passing legislation that gives effect to section 194 of the Constitution.
22. The application must fail, with costs (including the costs of two counsel), on this basis alone.

#### **PARLIAMENT'S CONSTITUTIONAL OBLIGATION IN RELATION TO CHAPTER 9 OF THE CONSTITUTION**

23. Chapter 9 of the Constitution establishes the offices of the Public Protector, the Auditor-General as well as the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality and the

Electoral Commission, as the State Institutions that strengthen and support constitutional democracy.<sup>20</sup>

24. Chapter 9 Institutions are independent, subject only to the Constitution and the law, must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.<sup>21</sup>
25. No person or organ of state may interfere with their functioning and they are accountable to the National Assembly to whom they must report, at least once a year, on their activities and the performance of their functions.<sup>22</sup>
26. Other organs of state are mandated to assist and protect Chapter 9 Institutions to ensure their independence, impartiality, dignity and effectiveness, through legislative and other measures.<sup>23</sup>

### **The removal provisions of section 194 of the Constitution**

27. It is alleged that Parliament failed to fulfill its constitutional obligation by not passing legislation that gives effect to the removal provisions of section 194 of the Constitution.
28. Section 194 provides:

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<sup>20</sup> Section 181(1) of the Constitution

<sup>21</sup> Section 181 (2) of the Constitution

<sup>22</sup> Sections 181(4) and (5) of the Constitution

<sup>23</sup> Section 181(3) of the Constitution

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; or*
  - (b) *a member of a Commission must be adopted with a supporting vote of a majority 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."*

(the removal provisions)

29. Section 194 does not, expressly or otherwise, impose an obligation on Parliament to pass national legislation that deals specifically with the removal from office of office bearers of Chapter 9 Institutions, nor does it contain an

express obligation on Parliament to give effect to the grounds of removal as referred to in section 194(1)(a).

### **The constitutional obligation to enact national legislation**

30. Where the Constitution makes the enactment of national legislation peremptory for a particular purpose, it says so expressly. Examples of this can be found in the provisions of Chapter 9, where national legislation is required to either regulate or prescribe:

30.1. the powers, additional powers and functions of the Public Protector and the exceptional circumstances under which a report issued by the Public Protector must be kept confidential;<sup>24</sup>

30.2. the powers, additional powers and functions of the South African Human Rights Commission;<sup>25</sup>

30.3. the powers, additional powers and functions of the Commission or the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the Commission), as well the number of members of the Commission and their terms of office;<sup>26</sup>

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<sup>24</sup> Sections 182 (1), (2) and (5) of the Constitution

<sup>25</sup> Sections 184(2) and (4) of the Constitution

<sup>26</sup> Section 185(2) and section 186(1) of the Constitution

- 30.4. the powers, additional powers and functions of the Commission for Gender Equality;<sup>27</sup>
- 30.5. the powers, additional powers and functions of the Auditor-General as well as the other authorities to whom the Auditor-General must submit audit reports;<sup>28</sup>
- 30.6. the period within which the Electoral Commission must declare election results, the additional powers and functions of the Electoral Commission as well as the number and terms of the offices of members of the Electoral Commission;<sup>29</sup> and
- 30.7. the establishment of an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.<sup>30</sup>
31. By contrast, there is no equivalent provision in section 194 or elsewhere in the Constitution, that obliges Parliament (or the National Assembly) to enact national legislation to give effect to the removal provisions of section 194 of the Constitution.

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<sup>27</sup> Sections 187(1) and (3) of the Constitution

<sup>28</sup> Sections 188(3) and (4) of the Constitution

<sup>29</sup> Sections 190(1)(c), 190(2) and 191 of the Constitution

<sup>30</sup> Section 192 of the Constitution

## Parliament's discretionary legislative power

32. Parliament consists of the National Assembly and the National Council of Provinces which participate in the legislative process in the manner set out in the Constitution.<sup>31</sup>
33. The legislative authority of the national sphere of government vests in Parliament, and in turn, Parliament confers upon the National Assembly the power to *inter alia*, pass legislation with regard to any matter.<sup>32</sup>
34. In exercising its legislative power, the National Assembly may consider, pass, amend or reject any legislation before the Assembly and may initiate and prepare legislation, except money bills.<sup>33</sup>
35. When Parliament exercises its legislative authority, it is bound only by the Constitution, and must act in accordance with, and within the limits of the Constitution.<sup>34</sup>
36. Parliament has the sole discretion to regulate its legislative process and determine the laws that it is to consider, pass, amend or reject. This power is granted to it by section 55(1)(a) of the Constitution.

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<sup>31</sup> Sections 42(1) and (2) of the Constitution

<sup>32</sup> Including a matter within the functional area listed in schedule 4, but excluding, subject to subsection 2, a matter within the functional area listed in schedule 5 - Section 43(1)(a)(ii) of the Constitution

<sup>33</sup> Sections 55(1)(a) and (b) of the Constitution

<sup>34</sup> Sections 43(a) and 44(5) of the Constitution

37. In the present application, the applicant seeks to intrude on Parliament's discretionary power and prescribe to it the manner in which it is to legislate.
38. Save for the instances where the enactment of national legislation is prescribed by the Constitution, there is no other duty, constitutional nor otherwise, that requires Parliament to legislate in a particular manner. All that is required, is that Parliament legislate in a manner that gives effect to its constitutional obligations.<sup>35</sup>
39. Furthermore, by virtue of sections 57 and 70 of the Constitution, Parliament may determine and control its internal arrangements, proceedings and procedures.
40. As explained by the majority Court in **My Vote Counts**<sup>36</sup>:

*“It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. ...*

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

41. More recently, in **President of the RSA and Another v Womens Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v**

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<sup>35</sup> *My Vote Counts* (minority judgment), para 119

**Esau and Others** (612/19) [2020] ZASCA 177 (18 December 2020) ('**WLC SCA**') the SCA held:

41.1. The legislative authority provided for in sections 43 and 44 of the Constitution confer on the National Assembly and the National Council of Provinces the power to pass legislation. It is the responsibility of Parliament to make laws. The President and Cabinet are given a discretion as to the nature and content of the legislation that it prepares and initiates.<sup>37</sup>

41.2. That it knew of authority and nor was it referred to any, where the court directed the enactment of legislation outside of the parameters of international law and specific constitutional obligations, as opposed to solely under section 7(2) of the Constitution.

41.3. For a court to order the State to enact legislation, on the basis of s 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of ss 43, 44, and 85 of the Constitution.<sup>38</sup>

42. For those reasons, the SCA set aside the Order of the High Court, which had directed the State to adopt specific legislation.

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<sup>37</sup> At para 42

<sup>38</sup> At para 43

### **The Executive is not obligated to initiate and prepare specific legislation**

43. The executive authority is vested in the President, who exercises such authority with the other members of Cabinet (the Executive), by *inter alia*, implementing national legislation<sup>39</sup> or initiating and preparing legislation<sup>40</sup>.
44. There is no provision in the Constitution from which a constitutional obligation on the Executive to initiate and prepare specific legislation can be sourced, nor is there any provision in the Constitution that requires the Executive to either initiate or prepare legislation or take any other legislative or any other measures to advance the removal provisions under section 194 specifically. This is borne out by the recent judgment of the SCA in the **WLC** matter referred to above.

### **The constitutional obligation to take legislative and other measures**

45. The applicant argues that Parliament has failed to give effect to section 181(3) that requires organs of state to take legislative and any other measures to assist and protect Chapter 9 Institutions, by not passing legislation that deals with the removal of office-bearers of Chapter 9 Institutions.
46. We submit that there is no obligation on Parliament to take legislative or other measures to advance the removal provisions of section 194 of the Constitution.

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<sup>39</sup> Except where the Constitution or an Act of Parliament provides otherwise - Section 85(2)(a) of the Constitution

<sup>40</sup> Section 85(2)(d) of the Constitution

47. Even outside of the realm of Chapter 9 Institutions, where the Constitution prescribes the adoption of legislation, it says so in terms. For example,
- 47.1. Section 9(4) of the Constitution provides: “*National legislation must be enacted to prevent or prohibit unfair discrimination*”.
  - 47.2. Section 32(2) of the Constitution, in the context of access to information, provides: “*National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*”.
  - 47.3. Section 33 of the Constitution, in the context of just administrative action, provides that national legislation must be enacted to give effect to this right.
48. The applicant's attempts to infer an obligation to pass legislation from section 181(3) is plainly unsustainable. The constitutional obligation placed on organs of state in terms of section 181(3) does not impose a duty on the National Assembly, and by extension, Parliament, to adopt specific legislation, particularly in circumstances where:
- 48.1. Section 194 expressly regulates the removal of office bearers of Chapter 9 Institutions; and
  - 48.2. the duty to assist and protect Chapter 9 Institutions does not extend to adopting legislation, particularly where the independence, impartiality,

dignity and effectiveness of these institutions is already protected and secured through the removal provisions of section 194.

49. What is required is for the National Assembly to regulate its own processes, in relation to the removal procedure of section 194, which it has in any event done with the adoption of the Rules.

## THE RULES ADOPTED BY THE NATIONAL ASSEMBLY

### The removal procedure set out in section 194 of the Constitution

50. There is no doubt as to the grounds on which office bearers of Chapter 9 Institutions may be removed from office. This much is clear from s 194(1)(a), which states expressly that office bearers may only be removed from office on the grounds of misconduct, incompetence and incapacity.
51. A ground of removal must be accompanied by a finding to that effect by a committee of the National Assembly and the adoption of a resolution by the National Assembly calling for the office bearer's removal from office.<sup>41</sup>
52. In the case of the Public Protector and the Auditor-General, a resolution must be adopted by a vote of at least two thirds of the members of the National Assembly, whereas a vote of the majority of the members of the National Assembly will

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<sup>41</sup> S 194(1)(a) of the Constitution

suffice where the office bearer is a member of a Commission of a Chapter 9 Institution.<sup>42</sup>

53. Where the National Assembly has adopted a resolution calling for the removal of an office bearer of a Chapter 9 Institution, the President must remove that person from office.<sup>43</sup>

### **The Rules adopted by the National Assembly**

54. In addition to the process as set out above, and in recognising that the Constitution provides a broad framework for Parliament to exercise its functions in terms of s 194 of the Constitution, the National Assembly has adopted the Rules, specifically with the aim of ensuring clarity and uniformity in removing an office bearer of a Chapter 9 Institution.
55. The Rules include definitions for ‘incapacity’, ‘incompetence’ and ‘misconduct’ and details the manner in which a s 194 enquiry is to be initiated; the establishment, composition and appointment of an independent panel to conduct a preliminary assessment into the s 194 enquiry; the establishment of a committee to consider motions initiated in terms of s 194, the decisions of the committee and reporting of the committee to the National Assembly.

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<sup>42</sup> S 194(2)(a) and (b) of the Constitution

<sup>43</sup> S 194(3)(b) of the Constitution

## CONCLUSION

56. For the reasons advanced in these heads of argument, we submit -

56.1. this Court does not have jurisdiction to hear the application in relation to, nor grant the relief sought at prayer 1 of the notice of motion;

56.2. the Court ought similarly not to hear the application in relation to, nor grant the consequential relief sought at prayers 2 to 7 of the notice of motion;

56.3. there is no constitutional obligation on Parliament to pass legislation that regulates the removal provisions of section 194 of the Constitution;  
and

56.4. the application must fail, with costs, including the costs of two counsel.

**Karrisha Pillay SC**

**Zaytoen Cornelissen**

Chambers

Cape Town & Johannesburg

25 January 2021