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

CASE NO: 1731/2020

In the matter 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 COMMISION OF THE REPUBLIC OF SOUTH AFRICA	Twelfth Respondent
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Thirteenth Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Applicant for admission as an *Amicus Curiae*
CORRUPTION WATCH	Second Applicant for admission as an *Amicus Curiae*
THE DEMOCRATIC ALLIANCE	Applicant for Intervention

FIRST TO THIRD RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. The Speaker of the National Assembly ('**the Speaker**' and '**the NA**' respectively), the Parliament of the Republic of South Africa ('**Parliament**'), the President of the Republic of South Africa, ('**the President**'), several Ministers in the national Cabinet and all of the institutions supporting constitutional democracy listed in Chapter 9 of the Constitution ('**Chapter 9**'), are cited as respondents in this application instituted by a non-governmental organisation called Democracy in Action ('**DIA**'). By way of an amendment to its notice of motion ('**NoM**'), DIA withdrew the relief sought against the Electoral Commission (which had opposed the application). The respondents currently opposing are the Speaker, the NA and Parliament (who we represent), the Minister of Justice and Correctional Services and the President. Two non-governmental organisations have applied for admission as *amici curiae* and the Official Opposition in the NA, the Democratic Alliance ('**DA**'), has applied for admission as a respondent so as to oppose the application. The parties participating have agreed that the *amici curiae* and the DA be admitted and have requested the Judge President to make an order to that effect.

2. These heads of argument on behalf of the Speaker will be filed before DIA's heads because DIA has requested an extension of time in the context of a joint request by the parties to the Judge President that this matter be enrolled for hearing by a Full Court from 1 to 5 February together with an application by the incumbent Public Protector in which similar relief is sought. If necessary, we will prepare and request the Court's leave to file supplementary heads dealing with any issues raised in DIA's heads which are not covered by our current heads.

3. DIA seeks to have reviewed and set aside new rules, which the NA adopted on 3 December 2019, governing the processing of motions for the removal of officer-bearers of Chapter 9 institutions in terms of section 194 of the Constitution.[1] DIA also seeks orders declaring that Parliament failed to fulfil its constitutional obligations by failing to pass legislation to regulate that process.

4. DIA further seeks orders of constitutional invalidity in respect of various pieces of legislation governing the Chapter 9 institutions (with the exception of the legislation relating to the establishment of the Electoral Commission). Its primary complaint in respect of those statutes is that they fail to deal with the process governing the removal of the heads or office-bearers of the Chapter 9 institutions, despite (so it is alleged) Parliament being constitutionally required to do so.

5. We address the following matters in turn below:

   5.1. First, we give a summary of the relief sought by DIA and the grounds on which it is sought and deal with three preliminary points, namely why, in our submission, (1) DIA does not have the public interest standing in terms of section 38(d) of the Constitution as it claims; (2) most of the relief sought falls within the exclusive jurisdiction of the Constitutional Court **('CC**'); and (3) many of the allegations in the founding affidavit ('**the FA**') are not relevant to the relief sought.

   5.2. Secondly, we give a summary of the process leading up to the adoption by the NA on 3 December 2019 of the new Part 4 of Chapter 7 of the Rules of the NA

[1] The New Rules are Part 4 of Chapter 7 of the NA Rules and comprise six definitions and Rules 129R to 129AF. They were also accompanied by a consequential amendment to NA Rule 88. See annexure DIA2 92-97: D-E. The number before the colon (if any) is/are the page number/s. The number/s after the colon is the paragraph number/s

('**the NA Rules**' or '**the New Rules**') which governs the removal in terms of section 194 of the Constitution of the Public Protector, the Auditor-General and members of the commissions established by Chapter 9 of the Constitution (collectively, '**Chapter 9 office-bearers**'), and in addition we briefly describe certain relevant subsequent events. We do so to illustrate the lawfulness of the process that culminated in the adoption of the New Rules by the NA.

5.3. Thirdly, with reference to the relevant parts of section 194 of the Constitution and the New Rules, we give a description of the process for the removal from office of the Chapter 9 office-bearers. We do so to illustrate the constitutionality and rationality of the process under the New Rules.

5.4. Lastly, we respond to each of the seventeen main grounds of attack in the FA as we (and the Speaker) understand them – with respect, parts of the founding papers are not easy to decipher. We submit that all of these attacks lack merit.

SUMMARY OF THE APPLICANT'S CASE, STANDING, JURISDICTION AND RELEVANCE

Summary of the relief sought

6. In para 1 of the NoM, as amended ('**the amended NoM**'),[2] DIA seeks, in effect, an order declaring that:

6.1. Parliament has a constitutional obligation to pass legislation giving effect to section 194 of the Constitution for the removal from office of Chapter 9 office-bearers; and

[2] Amended NoM 1-9

6.2. Parliament has failed to fulfil that constitutional obligation (except in the case of the Electoral Commission).

7. In paras 2 to 6 of the amended NoM, DIA seeks consequential orders declaring that:

7.1. section 194 of the Constitution obliges Parliament to pass legislation providing for appropriate circumstances under which the Chapter 9 office-bearers may be removed from office for misconduct, incapacity or incompetence; and

7.2. 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 ('**the impugned Acts**') are inconsistent with section 194 of the Constitution and invalid to the extent that they fail to make provision for the removal of relevant Chapter 9 office-bearers.

8. In para 9 of the amended NoM, DIA seeks a further consequential order directing Parliament to amend the impugned Acts, within a period of two years, and to take other measures to provide for appropriate circumstances under which the Chapter 9 office-bearers (except in the case of office-bearers of the Electoral Commission) may be removed from office for misconduct, incapacity or incompetence.

9. The orders sought in paras 2 to 6 and 9 of the amended NoM are 'consequential orders' because, for the most part, they are predicated on the granting of the relief sought in para 1 of the amended NoM. Should the declaration sought in para 1 of the amended NOM be refused, as we submit it should be, the relief sought in paras 2 to 6 and 9 must accordingly fail.

10. 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.

11. In para 8 of the amended NoM, DIA seeks an order declaring that, in adopting the New Rules without inviting representations, comments or submissions from Chapter 9 office-bearers, the NA acted unlawfully and unconstitutionally.

First preliminary point – DIA lacks *locus standi*

12. DIA alleges that it '*brings this application in the public interest as enabled and provided for in section 38(d) of the Constitution and the removal process involving heads of Chapter 9 Institutions ... is a matter of significant public interest*'.[3]

13. Section 38(d) of the Constitution provides:

'*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-*

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.'

[3] FA 17: 2 and FA 17-18: 4

14. As O'Regan J explained in her minority judgment in *Ferreira's* case in relation to the equivalent of section 38(d) in the 'interim' Constitution of the Republic of South Africa Act 200 of 1993:[4]

'This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.'

15. This approach was affirmed in relation to section 38(d) of the 'new' Constitution by the majority of the CC in *Lawyers for Human Rights*,[5] where Yacoob J added the following:

'*The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis.*'[6]

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[4] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 234

[5] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) ('***Lawyers for Human Rights***') paras 16-17

[6] *Lawyers for Human Rights* para 18

16. It is submitted that DIA does not have the public interest standing it claims, and section 38(d) of the Constitution is not engaged for the following reasons.[7]

17. First, as contemplated in *Ferreira*, there is another reasonable and effective manner in which DIA's challenges can be brought, namely in proceedings brought by the Chapter 9 institutions themselves or by the incumbents of Chapter 9 offices. It is noteworthy that a challenge to the New Rules has indeed been brought by one of the heads of a Chapter 9 institution, i.e. the Public Protector.

18. DIA has alleged in its replying affidavit[8] that it is not reasonable or effective for the heads of the Chapter 9 institutions to challenge the New Rules themselves (as the PP has done). However, this is an unsubstantiated claim that relies on sweeping references to such applications being as '*rare as chicken teeth*' and such a move being '*career limiting*'. While they may be rare, this does not mean it is not a reasonable manner of challenge. Further, the allegation that it would be career-limiting is speculative.

19. DIA further suggests that an application to court such as the PP has brought does not '*represent another manner of bringing the challenge but the same manner*'. This allegation misses the point: it is not whether a different kind of application can be brought, but whether the current applicant has *locus standi* to bring the application. Central to such an assessment is whether a person who is directly affected (i.e. who indubitably has *locus standi*) could also reasonably bring the same challenge. The heads of the Chapter 9 institutions can each bring such applications in their own names.

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[7] Speaker AA 277: 18

[8] RA 569: 17.3

20. Secondly, none of the Chapter 9 institutions or the incumbents of the Chapter 9 offices is a vulnerable person. They are all notionally in a position to bring proceedings like the present if necessary and may indeed not want such application to be brought on their behalf.[9] In this regard, it is noteworthy that, in parts, DIA's papers focus on the Public Protector, who as stated has brought her own challenge in separate proceedings.[10]

21. Thirdly, DIA's challenges are, predominantly based on provisions of the Constitution not contained in the Bill of Rights, whereas section 38(d) confers standing on persons alleging that a right in the Bill of Rights has been infringed or threatened. The CC has held that section 38(d) is to be read restrictively so that it rarely applies to cases where the applicant relies on constitutional provisions outside of the Bill of Rights; and, moreover, only those applicants who have made diligent and proper attempts to be heard by the relevant house of Parliament should be entitled to rely on any failure to observe s 59 or 72 of the Constitution.[11]

22. In its replying affidavit, DIA argues that because the aims of DIA in its constitution is to strengthen democracy, protect the Constitution and its institutions and the promotion of human rights, the '*protection of chapter 9 institutions is automatically the protection of the rights in the Bill of Rights*' which the Chapter 9 institutions must promote and

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[9] See *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) paras 74–77 where the CC, while confirming Mr Shuttleworth's standing in respect of challenges to statutory provisions and regulations that directly affected him, did not allow a public interest challenge against other regulations that had no bearing on his own case and would have been purely academic. In para 76 the CC stated: *'Mr Shuttleworth has not shown that, in the cross-appeal, he was genuinely acting in the public interest or that any of the people or groups affected by the exit charge may not be able to take up the challenge themselves. It is needless to add that the group he seeks to represent, being people who are desirous of externalising their wealth, may not be vulnerable or crave for his intervention.*'

[10] See, for example, FA 47-64: 73-98

[11] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) ('***Doctors for Life***') paras 216-221

protect. This broader context, the argument goes, means that the ultimate aim is to protect the rights in the Bill of Rights, hence DIA has *locus standi* in terms of section 38(d).[12]

23. In response we submit, first, that public interest standing in terms of section 38(d) is triggered when there is an allegation that '*a right in the Bill of Rights has been infringed or threatened*'. DIA has not alleged that any rights in the Bill of Rights are being infringed or threatened. Instead, DIA merely alleges (in its reply) that it seeks to protect the institutions that are saddled with the duty to promote and protect such constitutional rights. Section 38(d) is not concerned with situations where protected constitutional rights are not actually infringed or threatened.

24. Secondly, insofar as DIA relies on section 59 of the Constitution to challenge the procedure by which the New Rules were made by the NA – DIA contends that when making the New Rules the NA did not comply with section 59(1)(a) because it failed to facilitate public involvement in the process[13] – it has not put up evidence of its having made any attempts to be heard by the NA.

25. Accordingly, it is submitted that DIA lacks *locus standi* and the application should be dismissed on this basis alone.

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[12] RA 567-569: 14-18

[13] FA 34: 39

Second preliminary point – this Court lacks jurisdiction in respect of most of the relief sought

26. The relief sought in paras 1 to 6 and 9 of the amended NoM is dependent on this Court accepting the following propositions (the merits of which we address later in these heads):

    26.1. Parliament has a constitutional obligation to pass legislation giving effect to section 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; and

    26.2. Parliament has failed to fulfil that constitutional obligation (with the exception of such obligation in respect of the Electoral Commission).

27. DIA alleges that the NA is obliged to pass legislation to give effect to section 194, and that such obligation is rooted in section 181(3) of the Constitution.[14] We address separately below why this allegation is incorrect, but for the purposes of this preliminary point we assume (without conceding) that it is correct.

28. Section 181(3) of the Constitution provides:

    'Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.'

29. Section 194 of the Constitution provides:

[14] See, for example, RA 572: 27 and FA 26: 27 where the applicant states that '*section 181(3) of the Constitution must be read to impose an obligation on Parliament to pass appropriate legislation giving effect to section 194 of the Constitution…*'

'*(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter [i.e. Chapter 9 of the Constitution] 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.'

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

31. For the reasons which follow we submit that this Court, being a Division of the High Court of South Africa, lacks jurisdiction to determine the relief sought by DIA in paras 1 to 6 and 9 of the amended NoM, having regarded to DIA's pleaded case.

32. In *Doctors for Life*,[15] a case dealing with the duty of the National Council of Provinces ('*NCOP*') to facilitate public involvement in the legislative and other processes of the NCOP and its committees, the CC described the significance of the separation of powers in the rationale for depriving other superior courts of jurisdiction, where a matter falls under section 167(4)(e), as follows:

'*[24] The principle underlying the exclusive jurisdiction of this 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 this 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).*

[25] It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation.

[15] *Doctors for Life* paras 24-27

[26] By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, 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. This is precisely what the obligation comprehended in s 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement, but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under s 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the State. Under our Constitution, this intrusion is reserved for this Court only.

[27] A construction of s 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principal legislative organ of the State. Such an order will inevitably have important political consequences. Only this Court has this power.'

33. In *EFF (Nkandla)*,[16] a case dealing with, amongst others, the duty of the NA to hold the executive accountable and to maintain oversight over it imposed by section 55(2) of the Constitution, the CC elaborated on these principles as follows:

'*[16] Whether this 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).*[17]

[17] Additional and allied considerations are that s 167(4)(e) must be given a narrow meaning. This is so because whenever a constitutional provision is construed, that must be done with due regard to other constitutional provisions that are materially relevant to the one being interpreted. In this instance 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. This is the responsibility they share with this court – a terrain that must undoubtedly be adequately insulated against the inadvertent and inappropriate monopoly of this court. An interpretation of s 167(4)(e) that is cognisant of the imperative not to unduly deprive these other courts of their constitutional jurisdiction, would be loath to assume that this

[16] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) ('***EFF (Nkandla)***')

[17] See further *South African Veterinary Association v Speaker of the National Assembly and Others* 2019 (3) SA 62 (CC) ('***South African Veterinary Association***') paras 15-17, including the authorities cited in footnote 15

court has exclusive jurisdiction even if pleadings state strongly or clearly that the President or Parliament has failed to fulfil constitutional obligations.

[18] An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation shared with other organs of state will always fail the s 167(4)(e) test. …

[19] To determine whether a dispute falls within the exclusive jurisdiction of this court, s 167(4)(e) must be given a contextual and purposive interpretation, with due regard to the special role this apex court was established to fulfil. As the highest court in constitutional matters and "the ultimate guardian of the Constitution and its values", it has "to adjudicate finally in respect of issues which would inevitably have important political consequences". Also to be factored into this process is the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications. This is necessary to preserve the comity between the judicial branch and the executive and legislative branches of government.'

'*[42] Skinned to the bone, the contention here is that the National Assembly failed to fulfil its constitutional obligation to hold the President accountable. Just to recap, what triggered the duty to hold the President accountable? The Public Protector furnished the National Assembly with her report which contained unfavourable findings and the remedial action taken against the President. The National Assembly resolved to absolve the President of compliance with the remedial action instead of facilitating its enforcement as was expected by the Public Protector. It is on this basis argued that it failed to fulfil its constitutional obligations to hold him accountable. Whether this is correct needs not be established to conclude that this court has exclusive jurisdiction.*

[43] It is still necessary though to determine whether the obligation allegedly breached is of the kind contemplated in s 167(4)(e). Holding members of the executive accountable is indeed a constitutional obligation specifically imposed on the National Assembly. This, however, is not all it takes to meet the requirements of s 167(4)(e). We still need to drill deeper into this jurisdictional question. Is holding the executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches on sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly's constitutional power or discretion. This is a powerful indication that this court is entitled to exercise its exclusive jurisdiction in this matter. But that is not all.

[44] As in the case of the President, the National Assembly also has an actor-specific constitutional obligation imposed on it by s 182(1)(b) and (c) read with s 8(2)(b)(iii) of the Public Protector Act. Crucially, the Public Protector's obligation "to report on that conduct" means to report primarily to the National Assembly, in terms of s 182(1)(b) of the Constitution read with s 8 of the Public Protector Act. She reported to the National Assembly for it to do something about that report. Together, these sections bring home into the chamber of the National Assembly the constitutional obligation to take appropriate remedial action. Although remedial action was not taken against the National Assembly, the report in terms of s 182(1)(b) read with s 8(2)(b)(iii) of the Act was indubitably presented to it for its "urgent attention . . . or . . . intervention". That

constitutionally sourced obligation is not shared, not even with the National Council of Provinces. It is exclusive to the National Assembly. When that report was received by the National Assembly, it effectively operationalised the house's obligations in terms of ss 42(3) and 55(2) of the Constitution. The presentation of that report delivered a constitutionally derived obligation to the National Assembly for action. And it is alleged that it failed to fulfil these obligations in relation to the remedial action.'

34. DIA's reply to the Speaker's assertion that only the CC has jurisdiction is as follows:[18]

34.1. DIA quotes[19] *Women's Legal Centre Trust*,[20] where the CC concluded that section 167(4)(e) must be read restrictively. The CC further concluded that the obligation relied upon by the applicant in that case fell upon '*the State*' as opposed to exclusively on the President or Parliament and that section 167(4)(e) '*envisage[d] only constitutional obligations imposed specifically and exclusively on the President or Parliament, and on them alone*'.

34.2. The obligation in section 181(3) is not on the NA alone, but on all organs of state. Section 181(3) applies to the NA by virtue of its being an organ of state, and not because the Constitution has imposed an exclusive duty on the NA.

34.3. The responsibility to pass legislation lies with both the NA and others, being the national executive.

34.4. Because section 181(3) places the duty on all organs of state, section 167(4)(e) is not applicable in this case.

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[18] RA 572: 27

[19] RA 572-574: 28-29

[20] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) ('***WLC CC***') paras 20-21

35. We submit that *WLC CC* is distinguishable on the facts, and the circumstances of this case satisfy the test for exclusive jurisdiction expounded in *WLC CC, Doctors for Life* and *EFF (Nkandla)*:

35.1. The relief sought in *WLC CC* was a declarator that the '*President and Parliament [had] failed to fulfil obligations the Constitution impose[d] on them*' and a directive that the President and Parliament fulfil such obligations by '*preparing, initiating, enacting and implementing an Act of Parliament providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition*'.[21]

35.2. The relevant obligation, the Women's Legal Centre Trust argued in *WLC CC,* was rooted in section 7(2) of the Bill of Rights which provides that '*the State must respect, protect, promote and fulfil the rights in the Bill of Rights.*'

35.3. The CC emphasised that the Constitution imposes the obligation on '*the State*' and such obligation is elucidated upon in section 8(1) of the Constitution which provides that the Bill of Rights '*binds the legislature, the executive, the judiciary and all organs of State*'.[22] However, '*the State'* includes '*all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels*….'[23] Section 7(2), therefore, did not found an exclusive obligation on Parliament and/or the President.

[21] *WLC CC* para 1

[22] *WLC CC* para 17

[23] *WLC CC* para 19

35.4. By contrast, no organ of state, other than Parliament, more specifically the NA, can take the legislative measures of the kind DIA would want Parliament (the NA) to take to give effect to section 194 of the Constitution. That is because section 194 creates scope for the exercise of legislative (or rule-making) powers on Parliament (the NA) alone[24] – the President's role being limited by section 194(3) to removing a Chapter 9 office bearer if Parliament (the NA) 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 NA for their removal from office. None of the provincial legislatures or municipal councils has the constitutional competence to do so.

35.5. Moreover, as the Constitution imposes the primary obligation on Parliament to determine what is required of it to give effect to section 194, 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. Under s 167(4)(e) of our Constitution, this intrusion is reserved for the CC only because it has crucial and sensitive political implications.

36. We submit that this conclusion is supported by the decision of the majority of the CC in *My Vote Counts*[25] where the applicant alleged that Parliament had 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 for the disclosure of political parties' private funding information. The majority of the CC[26] held that those allegations were

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[24] Compare *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) ('***EFF (impeachment)***') paras 176-178, 180-182 and 189-190

[25] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) paras 131-135

[26] Quoting from *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) para 169 and *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 75

sufficient to engage the CC's exclusive jurisdiction. This reasoning applies with equal force to the relief sought in para 1-6 and 9 of DIA's amended NoM.

37. It is accordingly submitted section 167(4)(e) of the Constitution has the result that this Court lacks jurisdiction to adjudicate the relief sought in paras 1 to 6 and 9 of the amended NoM.

38. 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. In support of this relief, DIA makes the following allegations in the FA (the merits of which we address later in these heads):

38.1. section 181(3) of the Constitution requires that measures taken by Parliament giving effect to section 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 NA like the New Rules;[27]

38.2. section 181(3) obliges the NA to adopt rules that will assist and protect the Chapter 9 office-bearers to ensure their independence, impartiality, dignity and effectiveness, whereas the New Rules expose them to an arbitrary removal process that completely undermines these constitutional attributes and requirements;[28]

[27] 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

[28] FA 28: 28.6; and FA 41-42: 59

38.3. the New Rules are inconsistent with section 181(3) (and sections 181(2) and (4) of the Constitution) (FA para 22) because 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;[29]

38.4. in contravention of section 181(3) (and NA Rule 89), the New Rules do not prohibit members of the NA from filing removal charges against the Public Protector which are based on cases that are still pending in courts;[30]

38.5. 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 NA are engaged in litigation against that person or s/he has made adverse findings against them or they are being investigated by her/him;[31]

38.6. in contravention of section 181(3), the New Rules permit the Speaker to consult the member who has initiated the proceedings for a section 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

[29] FA 28-29: 28.7 and FA 54-58: 83-89

[30] FA 60-61: 93

[31] FA 58-59: 90, FA 61-64: 94-98 and FA 66: 101

issue or before referring the matter to an independent panel and informing the President and the NA of the referral;[32]

38.7. in contravention of section 181(3), the New Rules do not require that motions initiating proceedings for a section 194(1) enquiry be handled confidentially in the early stages of the process (i.e. before the motions have been screened and a section 194 removal enquiry has been triggered);[33]

38.8. in contravention of section 181(3), the New Rules require that motions initiating proceedings for a section 194(1) enquiry be screened by a panel chosen by the Speaker or members of the NA, which means the panel will not be independent in the true sense of the word;[34]

38.9. in contravention of section 194, the New Rules require a body not comprised of members of the NA – 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;[35] and

38.10. in contravention of section 181(3), the New Rules permit members of the NA 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.[36]

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[32] FA 66-67: 102-104 and FA 69-71: 110-113

[33] FA 67-68: 105-107

[34] FA 69: 109

[35] FA 77: 126

[36] FA 49-51: 76-77

39. It is submitted that the determination of the correctness of DIA's challenge to the New Rules summarised in para 38.1 above turns on the correctness of the fundamental contentions in para 26 above (i.e. that Parliament has failed to fulfil a constitutional obligation), and consequently for the reasons given in paras 27 to 37 above this challenge, too, is a matter falling within the exclusive jurisdiction of the CC in terms of section 167(4)(e) of the Constitution.

40. As mentioned above, in para 8 of the amended NoM, DIA seeks an order declaring that, in adopting the New Rules without inviting representations, comments or submissions from Chapter 9 office-bearers, the NA acted unlawfully and unconstitutionally. In this regard, DIA makes the following allegations in the FA:

40.1. the procedure followed by the NA 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;[37] and

40.2. the procedure followed by the NA 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.[38]

41. According to *Doctors for Life*, if the NA or the National Council of Provinces indeed fails to satisfy their obligations to facilitate public involvement in the process of making

[37] FA 33: 37 and 46: 70

[38] FA 34: 39

law, as required by sections 59(1) and 72(1) of the Constitution respectively, Parliament as a whole fails in its constitutional obligation to do so.[39]

42. It follows that the determination of DIA's allegation that the NA failed to comply with section 59(1)(a) of the Constitution, and it is submitted also that the determination of DIA's allegation that the NA failed to comply with section 57(1)(b) of the Constitution, falls within the exclusive jurisdiction of the CC, in terms of section 167(4)(e) of the Constitution.

Third preliminary point – DIA makes irrelevant allegations

43. DIA makes several allegations which are not related to the relief sought in the amended NoM, and are consequently irrelevant and fall to be disregarded.[40] The allegations in question are the following:

43.1. 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;[41]

43.2. the NA adopted the New Rules in retaliation for the adverse findings made by the Public Protector against members of the National Executive;[42]

43.3. 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

[39] *Doctors for Life* para 29. See also *South African Veterinary Association* para 17.

[40] Speaker AA 276: 17

[41] FA 34: 38

[42] FA 43: 62

misconduct by or the incompetence of every '*holder of a public office*', the New Rules are irrational;[43]

43.4. the New Rules reduce the Speaker to a mere conduit for the referral of a section 194 complaint, compel her to deal with the complaining member of the NA 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;[44]

43.5. 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;[45] and

43.6. 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.[46]

44. The submissions which follow are made in the alternative to the preliminary points objections above.

[43] FA 42: 61 FA 51: 78 and FA 53: 82

[44] FA 73: 118

[45] FA 75-76: 120

[46] FA 75-76: 121-122

THE ADOPTION OF THE NEW RULES AND SUBSEQUENT EVENTS

45. This section is dealt with by the Speaker in her answering affidavit under the section with same heading as above.[47]

46. On 23 May 2019, the day after the establishment of the Sixth Parliament and the election of the Speaker on 22 May 2019, Mr John Steenhuisen MP, the then Chief Whip of the Official Opposition in the NA, the DA, submitted a request for the removal from office of the incumbent Public Protector Adv Busisiwe Mkhwebane, alleging that '*she is not fit to hold the office she presently occupies*' and '*is not able to properly execute her mandate*'.[48] The letter was a formal request in terms of Rule 337(b), read with section 194

47. Rule 337 provides in its relevant part:

'*The Speaker must table the following instruments without delay, or if the Assembly is in recess, on its first day when the Assembly resumes its sittings:*

. . .

(b) all requests, applications and other written submissions made to the Assembly in terms of legislation to activate a parliamentary process prescribed by such legislation'

48. On 3 July 2019 Mr Steenhuisen's request was published under item 1(b) in the NA's Announcements, Tablings and Committee Reports ('**ATC**') No. 18 of 2019. The relevant extracts from the ATC, attached to the Speakers affidavit, show that she had

[47] Speaker AA 278-291: 21 - 42.10

[48] Annexure TRM1 329-331

referred this request to the Portfolio Committee on Justice and Correctional Services ('**Portfolio Committee**') for consideration and report.[49]

49. At all times material to this matter:

49.1. the Portfolio Committee has been responsible for overseeing the Department of Justice and Constitutional Development and other institutions, including the Public Protector, that receive their budgetary allocation under the Justice and Constitutional Development Vote;

49.2. the relevant powers of the Portfolio Committee have included requiring any person or institution to report to it in terms of section 56(b) of the Constitution, and monitoring, investigating, enquiring into and making recommendations concerning the institutions within its portfolio in terms of NA Rule 227(1);

49.3. the members of the Portfolio Committee are appointed to it by the political parties represented in the NA in terms of NA Rule 155, and they have freedom of speech in the Committee (as indeed they also do in the NA itself), subject to the rules and orders of the NA; and

49.4. the Portfolio Committee reports to the NA.[50]

50. On 5 July 2019 the Public Protector wrote to the Speaker contesting the validity of her referral of Mr Steenhuisen's request to the Portfolio Committee.[51]

[49] Annexure TRM2 332-339

[50] Speaker AA 279: 23

[51] Annexure TRM3 339 – 350; and DIA5 242-253

51. On 10 July 2019 the Speaker replied to the Public Protector's letter[52] in which she directed the Public Protector to the relevant provisions of the Constitution and the NA Rules, as they then stood and disputed her contention that the process followed was unlawful and unconstitutional.

52. On 10 July 2019 the Speaker also wrote to the Chairperson of the Portfolio Committee, Mr Gratitude Magwanishe, advising him that: (1) the NA Rules empower the Committee to determine its own working arrangements; and (2) the Committee was to consider, and report to the NA on, whether grounds exist for the NA to conduct an inquiry envisaged in section 194.[53]

53. On 27 August 2019 the Portfolio Committee provided the Speaker with its report on Mr Steenhuisen's request to remove the Public Protector.[54] The Portfolio Committee noted that no rules were in place to regulate the removal of office bearers of Chapter 9 institutions. It was of the view that rules were necessary to ensure the fairness of the process. It said it appreciated the importance of the matter and the urgency with which it should be addressed. It therefore requested that the Speaker urgently refer the matter to the Rules Committee, which she duly did.[55]

54. On 2 September 2019 Mr Steenhuisen submitted to the Speaker a set of draft rules for the removal of the head of a Chapter 9 institution.[56]

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[52] Annexure TRM4 351

[53] Annexure TRM5 352

[54] Annexure TRM6 353 - 354

[55] Speaker AA 280: 27

[56] Annexures TRM7.1 355 and TRM7.2 356 - 361

55. On 10 September 2019 the Rules Committee, with the Speaker chairing, met to consider the Portfolio Committee's recommendation that it develop rules governing the process of removing office-bearers of Chapter 9 institutions.[57]

56. The Rules Committee decided to delegate the issue to a Subcommittee on Review of the NA Rules ('**Subcommittee**'). The following extract (which is paragraph 6) of the draft minutes of the Rules Committee is pertinent:

'*Mr Xaso [the Secretary of the NA] presented the discussion document prepared by the National Assembly Table, related to the removal of office bearers of institutions supporting constitutional democracy. He gave an overview of the discussion document, in which he outlined the grounds for the removal of an office-bearer in terms of section 194. The document also outlined four stages to be considered for the removal process. The stages were: (1) the initiation of a process; (2) the preliminary assessment of evidence (prima facie); (3) an inquiry by a committee; and (4) a decision by the House. Mr Xaso highlighted that in terms of Rule 88 in respect of substantive motions, the responsibility to assess whether there were sufficient grounds for a process of this nature to be initiated rested with the Speaker. However, in terms of the rules developed in relation to section 89 of the Constitution, that responsibility was vested with an independent panel. He said that the Rules Committee should make a determination on how the assessment of evidence should be dealt with. He added that clarity should also be given on the role of the Speaker, the role of the committee and whether there was a need for an independent panel. He also highlighted that there was a need to consider whether a special committee, an ad hoc committee or the relevant portfolio committee*

[57] Annexure TRM8 362- 368

should conduct the inquiry if it was found that such an inquiry was warranted. He also made reference to the submission made by the Democratic Alliance on the same matter. Mr Steenhuisen indicated that most of what had been highlighted was also captured in the proposal submitted by the Democratic Alliance. He said that the process under consideration was not one that should be entered into lightly, as the institutions were in place to guard against abuse of state power, and as such they may from time to time make uncomfortable findings against the state. The process to remove such an office bearer should therefore be a rigorous one. He also stated that the Constitution had envisaged that the National Assembly should be able to remove an office-bearer of these institutions in terms of section 194, and therefore the House should have a procedure developed to determine whether the grounds for removal warranted such a decision. He added that the process should guard against arbitrariness. He drew a parallel to the Section 89 process and indicated that the criticism received by Parliament for not having rules in place was unfounded, as the rules, like the Constitution, had evolved over time. He proposed that the Democratic Alliance submission be used as a basis for discussion. He cautioned that the process of formulating rules should not be unduly delayed, as there was an issue with the current incumbent in the office of the Public Protector that required a resolution. The rules should provide for a fair, open and transparent process that was beneficial to democracy.

The Deputy Chief Whip of the Majority Party agreed that the rules in their current form did not provide a process for the removal of an office-bearer of a chapter 9 institution and that such rules were indeed required. She proposed that the review of evidence be done by an independent panel, which could be led by a retired judge or persons with a

legal background. She added however, that the Subcommittee on Review of Assembly Rules would consider the matter in greater detail.

Mr Dyantyi cautioned that the 'removal' of the office-bearer was not a forgone conclusion, and that the matter could end up being litigious if this clarity was not pronounced from the outset of the process to be developed.

The Chief Whip of the Majority Party said that it was not the intention of the meeting to discuss the finer details of the process, but she also agreed with Mr Dyantyi, in that the process should be fair and not pre-empt the outcomes. She drew the Rules Committee's attention to the fact that the Speaker had submitted a request from the Democratic Alliance to initiate procedures to remove the Public Protector to the Portfolio Committee on Justice and Correctional Services for consideration, but that the Committee had reverted back to the Speaker, to request a formal formulation of a process in terms of the rules, as there were no clear mechanisms in place. She cautioned that the Rules Committee should focus on the process it was requested to develop and not on any extraneous matters that may have brought this matter to the Rules Committee.

Mr Ngwezi engaged with the submission of the Democratic Alliance and sought clarity on whether the House would be bound to agree with the findings of the panel proposed therein.

The Speaker said that the process to be clarified should enable the House to fulfil its constitutional obligations. She added that the test of 'fitness to hold office' should also be conducted when the House considered candidates to fill the position, instead of when there were complaints and calls for their removal. This would assist the shortlisting processes committees conducted before candidates were even called for interviews.

The Deputy Chief Whip of the Majority Party recommended that an independent panel be enlisted so as to ensure objectivity and fairness of the process. Dr Koornhof added that there were institutions contained in other chapters of the Constitution, and requested that this process also take those institutions into consideration for the procedures to be developed. He also said that section 194(1) of the Constitution made a distinction between the Auditor-General, Public Protector and commissioners of other bodies. This distinction should be factored in when considering procedures to remove an office bearer. He further added that the Constitution provided for the involvement of civil society when a person was being nominated for one of these bodies, and requested that civil society should therefore also be involved in the removal procedures, even if it was just an opportunity to make a representation.

Mr Xaso indicated that the motion that would initiate the process would need to comply with section 194, in that the grounds listed would need to form part of the motion. The Deputy Speaker cautioned that it was important for the process to provide certainty to the office-bearers and the general public, and emphasised that the process should be prioritised and completed as expeditiously as possible.'

57. Mr Xaso also presented a discussion document at this meeting.[58]

58. On 20 September 2019 the Subcommittee held its first meeting. As is apparent from the draft minutes of this meeting,[59] which was chaired by Ms D Dlakude MP of the Majority Party in the NA, the African National Congress ('**ANC**'), after Mr Xaso had presented the discussion document again and Mr Steenhuisen had presented the DA's

[58] Annexure TRM9 369-370

[59] Annexure TRM10 371-374

proposals (as they both had done at the meeting of the Rules Committee on 10 September 2019), a discussion ensued during which, amongst other things:

58.1. Mr Matiase MP (Economic Freedom Fighters ('**EFF**')) stressed that the procedures for removal of the President could not be identical to those for the removal of the head of a Chapter 9 institution;

58.2. Ms Marawu MP (African Transformation Movement) requested that political parties be given additional time to make detailed proposals, and she supported the involvement of legal experts. She also agreed that it was necessary to define the grounds for removal of an office-bearer;

58.3. Mr Dyantyi MP (ANC) highlighted that the rules were meant to cover office bearers of all Chapter 9 institutions and not just the Public Protector. He agreed that it was imperative to define the grounds for removal. In principle, he supported the proposal for an independent panel for conducting a preliminary assessment of evidence, as well as a special committee for an inquiry. He, however, suggested that membership of the committee should be proportional;

58.4. The Subcommittee Chairperson requested that the Secretariat draft the rules for presentation to the Subcommittee, having regard to the deliberations; and

58.5. It was resolved that the parliamentary administration would prepare a draft set of rules and present them at the next meeting of the Subcommittee.

59. On 18 October 2019 the Subcommittee held its second meeting.[60] By then, draft rules had been prepared by the National Assembly Table ('**NA Table**').[61] The NA Table, which is headed by the Secretary to the NA (the most senior parliamentary official serving the NA), provides procedural and technical advice and guidance to the NA.

60. As appears from the minutes, at the meeting several issues concerning the draft rules were raised. Following a presentation on the draft rules by Mr Xaso and members of Parliament's Legal Services, members of the Subcommittee made various proposals and comments, including the following:

60.1. Mr Steenhuisen MP (DA) proposed several amendments, including that a member may submit additional evidence to the independent panel before the panel reported. He suggested that the panel be empowered to reach conclusions of fact and law, that the panel should elect a chairperson and should table its report. He further suggested that in the event that the NA adopts the panel's report, the matter should proceed to a committee for an enquiry; but if the NA did not accept the panel's report, the committee would not convene. He proposed alternative definitions, recommended that the Speaker appoint the panel and that the committee should be proportionally represented.

60.2. Ms NV Mente MP (EFF) suggested that the panel should make findings and not merely recommendations to the NA, that it should include a judge, and that the definitions should be clarified.

[60] Annexure TRM11 375-379

[61] Annexure TRM12 380- 385

60.3. Mr QR Dyantyi MP (ANC) also thought that the definitions could be more precise. He proposed that the appointment of a judge as a panellist should be the prerogative of the NA and not the Speaker. The Speaker should appoint the chairperson and a quorum of two would suffice. He suggested that the panel should table its report to the NA, after which it should be referred to a proportionally constituted committee. He concluded that head of the Chapter 9 institution in question, and not his or her legal representative, should answer to the committee.

61. The Subcommittee resolved that the Secretariat would prepare a further draft of the rules based on the inputs of the members.

62. On 9 November 2019 the Subcommittee held its third meeting, at which it considered amended draft rules prepared by the Secretariat along with a revised proposal by the DA, a proposal by the EFF and a submission by the Organization Undoing Tax Abuse.[62]

63. As appears from the minutes, at the meeting:

63.1. members of Parliament's Legal Services gave a briefing about the amended definitions of '*incapacity*', '*incompetence*' and '*misconduct*' in the draft rules;

63.2. Mr Xaso gave a briefing about the rest of the draft rules, highlighting the amendments;

63.3. all members of the Subcommittee present contributed to the ensuing discussions, during which certain further amendments were suggested and agreed to; and

[62] Annexure TRM13 386-390

63.4. the Subcommittee resolved to agree to the draft rules, taking into account the views expressed.

64. On 26 November 2019 at a meeting of the NA Rules Committee, the Committee approved the draft of the New Rules prepared by the Secretariat pursuant to the resolution of the Subcommittee on 9 November 2019; and, later the same day, Parliament issued a media statement indicating that the NA Rules Committee had agreed to draft rules for the removal of heads of Chapter 9 institution to give effect to section 194. It also briefly explained the contents of the draft rules.[63]

65. On 28 November 2019 the New Rules were tabled in the NA as part of the Third Report of the NA Rules Committee for 2019. The relevant extracts from ATC No. 111 of 2019 are annexure "DIA2" to the founding affidavit.[64] The New Rules and a consequential amendment to NA Rule 88 appear in sections D and E of "DIA2".

66. On 3 December 2019 the Third Report of the NA Rules Committee of 2019, which included the New Rules, served before a meeting of the NA at which a majority of the members were present and it was adopted without any debate (i.e. unanimously). The pertinent part of the Minutes of Proceedings of the NA from that day (i.e. Item 5) provides:

'*SECOND ORDER [15:38]*

Consideration of Third Report of National Assembly Rules Committee (Announcements, Tablings and Committee Reports, 28 November 2019, p 4).

The Deputy Chief Whip of the Majority Party, as a member of the Committee, introduced the Report.

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[63] Annexure TRM14 391-393

[64] Annexure DIA2 92-97

There was no debate.

The Chief Whip of the Majority Party moved: That the Report be adopted.

A majority of members being present in terms of Rule 4(4), the question was put: That the motion by the Chief Whip (sic) of the Majority Party be agreed to.

Motion agreed to.

Report accordingly adopted.'[65]

67. The New Rules are Part 4 of Chapter 7 of the NA Rules. They comprise six definitions and Rules 129R to 129AF and were accompanied by a consequential amendment to NA Rule 88. We emphasize two features of the New Rules:

67.1. First, in line with the judgment of the majority of the CC in *EFF (impeachment)* paras 176-178, the New Rules define the grounds of misconduct, incapacity and incompetence set out in section 194(1).

67.2. Second, in line with *EFF (impeachment)* paras 180-182 and 189-190, and as explained more fully in the next section of these heads, the New Rules regulate the entire process in the NA, including the following:

67.2.1. the manner in which the impeachment process must be initiated, namely by a notice of a substantive motion containing a clearly formulated and substantiated charge(s) and attaching all evidence relied upon (Rule 129R);

67.2.2. two sifting mechanisms to determine whether the Chapter 9 office-bearer has a case to answer, namely an initial assessment by the Speaker

[65] Annexure TRM15 395

of whether the motion is compliant with the criteria in Rule 129R (Rule 129S) and a subsequent assessment by a three-person independent panel of whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion (Rule 129X(1));

67.2.3. after receipt of the panel's recommendations, the taking of an initial decision by the NA as to whether an enquiry in terms of section 194 should be proceeded with (Rule 129Z(2));

67.2.4. the conduct of the enquiry by a specially-appointed committee of the NA ('**the section 194 committee**') with a view to its making a finding (referred to in section 194(1)(b)) as to whether the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion (Rules 129AD, 129AE and 129AF); and

67.2.5. after receiving the section 194 committee's report and recommendations, and if the committee recommends that the incumbent be removed from the Chapter 9 office, the voting on that question by the NA in accordance with section 194(2) (Rule 129AF(2)).

68. For completeness' sake, we mention the following events subsequent to the adoption of the New Rules on 3 December 2019:[66]

68.1. on 6 December 2019 the new Chief Whip of the Official Opposition, Ms NWA Mazzone MP, withdrew Mr Steenhuisen's request of 23 May 2019 and

[66] Speaker AA 289-291: 42-42.10

submitted a new request to institute the process for the removal of the Public Protector, this time in the form of a notice of substantive motion in terms of Rule 129R of the New Rules;

68.2. on 24 January 2020 Ms Mazzone MP was advised that the Speaker had accepted her motion and she requested the political parties represented in the NA to submit nominees to serve on the independent panel to conduct the preliminary assessment of the evidence presented;

68.3. on 30 January 2020 DIA issued the present application;

68.4. on 6 February 2020 the Public Protector served on the Speaker's office an application issued out of this Honourable Court under case number 2107/2020 ('**the Public Protector's application**') in which she sought relief in two tranches, namely:

68.4.1. urgent relief set out in Part A of her notice of motion, including an interim interdict *pendente lite* which though enrolled for hearing by agreement on 26 and 27 March 2020 was subsequently postponed *sine die*, was heard on 12, 13 and 24 August 2020 by a Full Court and was dismissed by that Court on 9 October 2020 – following the Full Court's refusal of an application by the Public Protector for leave to appeal to the Supreme Court of Appeal, she has now applied to the CC for leave to appeal directly to it; and

68.4.2. non-urgent relief set out in Part B of the Public Protector's notice of motion, which mainly relates to the constitutionality and lawfulness of the New Rules and in respect of which, as mentioned earlier, the parties

have now requested the Judge President enrol the matter for hearing by a Full Court, together with DIA's application, from 1 to 5 February 2021;

68.5. on 21 February 2020 Ms Mazzone MP withdrew her notice of substantive motion of 6 December 2019 and submitted a replacement substantive motion for the removal of the Public Protector in terms of Rule 129R;

68.6. on 26 February 2020 the Speaker decided that Ms Mazzone MP's substantive motion of 21 February 2020 was in order and again called upon the political parties represented in the NA to submit nominees to serve on the independent panel;

68.7. on 17 March 2020, at a special meeting of the Presiding Officers of Parliament, the chief whips and party representatives to discuss the parliamentary programme and to receive a briefing on institutional arrangements in the light of the President's announcement of a national state of disaster due to the Covid-19 virus, it was decided that at the conclusion of the sitting on 18 March 2020, the business of the NA, including sittings of the House, committees and public hearings, would be suspended until further notice, and further that the last sitting of the National Council of Provinces would be on 19 March 2020, after which its business would also be suspended until further notice;

68.8. on 8 June 2020 the Speaker decided to resume the processing of the motion for the impeachment of the Public Protector and informed her, Ms Mazzone and the other parties to the Public Protector's matter accordingly;

68.9. on 25 November 2020 the Speaker appointed the three members of the independent panel; and

68.10. on 5 December 2020 the Speaker acceded to a request by the members of the independent panel that the period of 30 days from the date of its appointment for the conduct of its enquiry be extended to 90 days.

THE SECTION 194 PROCESS UNDER THE NEW RULES[67]

69. The procedure for the removal from office of a Chapter 9 office-bearer is governed by section 194 and the New Rules. (In what follows, unless otherwise stated, all references to rules are to the NA Rules as amended by the New Rules.)

70. As a brief preface, it is noteworthy that section 55(2)(b)(ii) of the Constitution requires that the NA provide for mechanisms to maintain oversight of any organ of state and section 181(5) adds that the Chapter 9 institutions are accountable to the NA. The power conferred on the NA by section 194 to require that the President remove a Chapter 9 incumbent from office is the ultimate accountability-ensuring mechanism for all office-bearers of Chapter 9 institutions.[68]

71. If the process runs its full course, it comprises seventeen steps.

72. The <u>first step</u> is the submission by a member of the NA of a notice of a substantive motion in terms of Rule 129(6) requesting the NA to initiate proceedings for an enquiry by it to remove the incumbent from a Chapter 9 office in terms of section 194 ('**the**

[67] This section is based on the Speaker's description of the process; Speaker AA 292-298: 43-69

[68] Compare *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) ('***UDM***') para 10, referring to, amongst others, section 89(1) of the Constitution, which is the presidential equivalent of section 194

motion') (see Rule 129R(1), read with the definition of '*section 194 enquiry*' in the New Rules).

73. The motion must be limited to a clearly formulated and substantiated charge relating to an action performed by or conduct of the incumbent which, if established by the evidence, shows the incumbent committed misconduct (i.e. the intentional or grossly negligent failure to meet the standard of behaviour or conduct expected of a person appointed in terms of Chapter 9 of the Constitution), is incapacitated (i.e. as including a permanent or temporary condition that impairs the incumbent's ability to perform her work, and any legal impediment to employment) or is incompetent (i.e. as including a demonstrated and sustained lack of knowledge to carry out, and of ability to skill to perform, her duties effectively and efficiently) (see paras (a) and (b) of the proviso to Rule 129R(1), read with the definitions of '*misconduct*', '*holder of a public office*', '*incapacity*' and '*incompetence*' in the New Rules and with Rule 129R(2)).

74. The motion must be consistent with the Constitution, the law and the Rules, in particular the New Rules (see para (d) of the proviso to Rule 129R(1)).

75. All evidence relied upon in support of the motion must be attached to it (see para (c) of the proviso to Rule 129R(1)).

76. The second step is an assessment by the Speaker of whether the motion is in order, i.e. compliant with the criteria set out in Rule 129R. The Speaker may consult with the member to ensure the motion is compliant (see Rule 129S, read with the opening words of Rule 129T ('*When the motion is in order*')).

77. The third step is the giving by the Speaker to political parties represented in the NA ('**the political parties**') of a reasonable opportunity to put forward nominees for

consideration for appointment to the independent panel to conduct the preliminary assessment into the motion described in Rule 129X ('**the panel**' and '**the preliminary assessment**') (see Rule 129V(2)).

78. The fourth step is the establishment by the Speaker of the panel, the appointment by the Speaker of the members of the panel and the appointment by the Speaker of one of the panellists as its chairperson. The panel must be independent. It must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct the preliminary assessment. If the Speaker appoints a judge to the panel, that must be done in consultation with the Chief Justice. When appointing the members of the panel, the Speaker must give due consideration to all persons nominated by the political parties (see Rules 129U, 129V, 129W and 129X(1)(a)).

79. The fifth step is the referral by the Speaker to the panel of the motion and any supporting documentation provided by the member. Without delay after the referral to the panel, the Speaker must inform the NA and the President of the referral (see Rule 129T).

80. The sixth step is the conduct of the preliminary assessment by the panel. The task of the panel to is to assess whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion. When performing its task the panel must apply the Constitution, the law and the Rules impartially and without fear, favour or prejudice (see Rule 129X(1)(a) and (b)).

81. The panel may determine its own working arrangements, subject to the following: (a) a *quorum* comprises the chairperson and one of the panellists; (b) in its sole discretion the panel may afford any member of the NA an opportunity to place written

or recorded information before it within a specified timeframe; (c) the panel must, without delay, provide the incumbent with copies of all information available to the panel relating to the assessment; (d) the panel must provide the incumbent with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her; (e) the panel must not hold oral hearings, i.e. it must limit its assessment to the written and recorded information placed before it; and (f) within 30 days of its appointment the panel must complete the assessment and its report thereon, which must include any recommendations and its reasons for such recommendations and any minority view of any panellist (see Rules 129X(1)(c) and (2) and 129Y).

82. The panel's recommendations may include whether the NA should refer the matter to a committee of the NA to consider motions initiated in terms of section 194 (i.e. the section 194 committee) and if that is done whether the incumbent should be suspended by the President from the Chapter 9 office (see Rules 129X(1)(c)(v), 129Z(2) and (3) and 129AA, read with section 194(1)(b) and (3)(a)).

83. The seventh step is the scheduling by the Speaker of a meeting of the NA to consider the report and recommendations by the panel. This must be done with due urgency, given the programme of the NA (see Rule 129Z(1)).

84. The eighth step is the taking of a decision by the NA of a decision as to whether an enquiry by it to remove the incumbent from the Chapter 9 office in terms of section 194 should be proceeded with. If the NA resolves that such an enquiry should be proceeded with, it must refer the matter for a formal enquiry to the section 194 committee (see Rule 129Z(2)).

85. The NA may also resolve to recommend to the President that the incumbent be suspended by the President from the Chapter 9 office pending the outcome of the formal

enquiry (see Rule 129Z(3) s.v. '*any action or decision emanating from the recommendations*', read with section 194(3)(a)).

86. The ninth step is the Speaker must inform the President of the action or decision by the NA emanating from the recommendations by the panel (see Rule 129Z(3)).

87. The tenth step is the determination by the Speaker of the number of members of the section 194 committee (if that has not already been done) and the allocation of seats on the committee to the political parties in accordance with Rule 154, i.e. each party is entitled to at least one representative on the committee and the political parties are entitled to be represented on the committee in substantially the same proportion as the proportion in which they are represented in the NA except where the number of members of the committee does not allow for all political parties to be represented (see Rule 129AB(1)).

88. The eleventh step is the appointment by the political parties of their members of the section 194 committee (see Rule 129AB(2), read with Rule 155).

89. The twelfth step is the appointment by the committee of one of its members as chairperson (see Rule 129AC).

90. The thirteenth step is the conduct by the section 194 committee of an enquiry aimed at establishing the veracity of the charges against the incumbent in the motion. For the purpose of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and the Rule, subject to the following: (a) the committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe; (b) the committee must afford the incumbent the right to be heard in his or her own

defence and to be assisted by a legal practitioner or other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee; (c) a question before the committee is decided when a majority of the members is present and there is agreement among the majority of members present; (d) the committee must make a finding as to whether the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion; and (e) the committee must set out in a report its findings and recommendations, the reasons therefor and all views expressed in the committee including minority views (see Rules 129AD, 129AE and 129AF (introductory portion), read with Rule 162(2) and section 194(1)(b)).

91. At any stage after the start of the proceedings of the section 194 committee, the President may suspend the incumbent from the Chapter 9 office (see section 194(3)(a)).

92. The fourteenth step is the scheduling by the Speaker of a meeting of the NA to consider and debate the report and recommendations by the section 194 committee. This must be done with due urgency, given the programme of the NA (see Rule 129AF(1)).

93. The fifteenth step is the consideration and debate by the NA of the report and recommendations by the section 194 committee. If the report recommends that the incumbent be removed from the Chapter 9 office, the question must be put to the NA directly for a vote in terms of the Rules. In the case of the Public Protector and the Audit-General, if at least two thirds of the members of the NA vote in favour, the resolution is adopted; otherwise, it fails (see Rule 129AF(2), read with section 194(1)(c) and (2)(a)). In the case of a member of a commission established by Chapter 9, if a majority of the members of the NA vote in favour, the resolution is adopted; otherwise, it fails (see Rule 129AF(2), read with section 194(1)(c) and (2)(b)).

94. The sixteenth step, which must be taken only if the NA adopts the resolution, is the NA (presumably through the Speaker) must convey its decision to the President (see Rule 129AF(2)).

95. The seventeen and final step is the removal by the President of the incumbent from the Chapter 9 office, something which may be done only if the NA has adopted the resolution and which must be done in that eventuality (section 194(3)(b), read with Rule 129AF(2)).

THE SPEAKER'S ANSWER TO THE APPLICANT'S MAIN GROUNDS OF ATTACK

96. We address more fully below why DIA's assumption that section 181(3) of the Constitution applies to the removal of a Chapter 9 office-bearer is incorrect and that the meaning of section 194 of the Constitution does not depend on the meaning of section 181(3) as they each serve distinct purposes.

97. Our responses to DIA's grounds of attack are made on the basis that the assumption is correct (without conceding that it is so), whereafter we set out our reasons for disputing its correctness. Our responses to each of the grounds of attack, therefore, would still be valid, we submit, even if DIA's assumption is found to be correct. For the sake of brevity, we refrain from repeating this qualification when addressing each ground below.

The first ground: sections 181(3) and 194 of the Constitution require legislation passed by Parliament, not rules made by the NA like the New Rules[69]

98. In the alternative to contesting this Court's jurisdiction to determine this point for the reasons given in paras 26 to 37 above, and assuming without conceding that section 181(3) applies to the regulation of the circumstances and process pursuant to which the incumbent of a Chapter 9 office may be removed from office by the NA and the President in terms of section 194, it is submitted, first, that section 181(3) contemplates and consequently authorises legislative measures and other measures.

99. One of DIA's contentions in this regard is that the NA '*has a duty to pass appropriate legislation and adopt measure [sic] to give effect to section 194 of the Constitution.*'[70] DIA thus contends that the NA must pass both legislation and take other measures to fulfil its constitutional obligation imposed by section 181(3). However, it is submitted that this literal, conjunctive meaning attached to section 181(3) is unsustainable.[71]

99.1. Only a few organs of state (i.e. municipal councils, provincial legislatures and the national legislature) have the power to legislate. Organs of state other than legislative bodies lack that competence and would be limited to '*other measures*'.

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[69] This is explained in the Speaker's AA, 271-272: 9.1

FA, 24: 20-21; 26-27: 26-27; 27: 28.1; 31: 33; 32-33: 36; 35: 41; 36: 44; 37- 40: 46-55; and 77: 125

[70] FA 26: 26

[71] *Storm and Co v Durban Municipality* 1925 AD 49 at 55: '*The principle of construction laid down in Venter's case is therefore that, where it appears from the scope and intention of the enactment that to give to particular words their ordinary and unqualified meaning would be contrary to such scope and intention, or lead to an absurdity, the Court will modify and restrict the words used so as to bring them into harmony with the mind and purpose of the Legislature.*'

99.2. For those organs of state that do have legislative powers, a conjunctive construction would mean that they must adopt legislative measures together with other measures. However, section 181(3) does not prescribe which measures those legislative bodies should use for discharging the constitutional obligations that it contemplates. We submit that this is not a sensible interpretation of the provision.

99.3. It is accordingly submitted that the conjunctive '*and*' must mean '*and/or*' since it would be for the relevant legislative body to decide on whether it will take legislative or the other measures. The conjunction 'and' is used simply to denote that that the measures are to be taken by all organs of state, not limited to those with legislative powers.

100. It follows that if section 181(3) so applies to the removal of Chapter 9 office-bearers, it does not preclude the use of measures other than legislation passed by Parliament in accordance with the national legislative process in the Constitution.

101. It is further submitted that the NA Rules are – in any event – an appropriate measure to use because it is a committee of the NA which must make the finding of misconduct, incapacity or incompetence, it is the NA alone which must adopt the resolution calling for the incumbent's removal from office. It follows that DIA is wrong to assert that section 181(3) requires Parliament (which includes the NCOP) to make legislation to operationalise section 194.

102. Secondly, and in any event, like section 89(1) of the Constitution, which governs the circumstances and process pursuant to which the President may be removed from office by the NA, section 194 leaves it to the NA to spell out the circumstances and process pursuant to which the incumbent of a Chapter 9 office may be removed from office;

and section 194 requires that the NA do so by way of NA Rules which define the terms '*misconduct, incapacity or incompetence*' in section 194(1)(a) and are specially tailored for the impeachment process contemplated in section 194 as a whole.

103. In this regard, it is submitted, the reasoning of the majority of the CC in relation to section 89(1) of the Constitution in *EFF (impeachment)* is indistinguishable and must be followed. In that matter the majority held that the NA was obliged to adopt rules defining the grounds on which the President may be removed from office in terms of section 89(1) and regulating the process in the NA for the President's impeachment in terms of that section. We refer in particular to the following paragraphs of the judgment of Jafta J for the majority: paras 130-131, 133-136, 138-139, 164, **170-182 (the first set of key paragraphs) and 187-196 (the second set of key paragraphs)**.

104. We submit these passages of Jafta J's judgment in *EFF (impeachment)* have the effects that the NA is obliged to adopt rules:

104.1. which give meaning to the grounds of misconduct, incapacity and incompetence set out in section 194(1) (*EFF (impeachment)* paras 176-178, referring to section 89(1) of the Constitution), i.e. to clarify those terms; and

104.2. which regulate the entire process in the NA, including but not limited to (1) describing the manner in which the impeachment process must be initiated, (2) creating a sifting mechanism to determine whether the Chapter 9 office-bearer has a case to answer and (3) regulating the proceedings of the NA committee which must consider and decide whether a Chapter 9 office-bearer is incapable or incompetent or has misconducted himself or herself (*EFF (impeachment)* paras 180-182 and 189-190).

105. The New Rules do contain definitions of '*misconduct*', '*incapacity*' and '*incompetence*'[72] and they do set out the specially-tailored, seventeen-step process for proceedings in terms of section 194 described above.[73]

106. Finally in this regard we note 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 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*'.[74]

107. Electoral Commission Act indeed provides 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 NA, i.e. to the section 194 Committee. 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 NA and both of them conduct a preliminary investigation and make recommendations to the NA. There is, therefore, no merit in DIA's attempt to draw a distinction between the New Rules and the removal under the Electoral Act, which DIA concedes is adequate. The concession harms its own thesis for claiming the relief it does.

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[72] Speaker AA 292-293: 73 and FA (Annexure DIA2) 93

[73] Speaker AA 292- 298: 46-69

[74] RA 575: 33

108. For all of these reasons we submit the relief sought in paras 1 to 6 and 9 of the amended NoM must be refused.

The second ground: the New Rules expose the Chapter 9 institutions to an arbitrary removal process

109. As the Speaker explained in her answering affidavit,[75] DIA alleges that section 181(3) obliges the NA to adopt rules that will assist and protect the Chapter 9 institutions to ensure their independence, impartiality, dignity and effectiveness, whereas the New Rules expose them to an arbitrary removal process that completely undermines these constitutional attributes and requirements.[76]

110. Although DIA does not substantiate nor specify how the New Rules fail to ensure independence, impartiality, dignity and effectiveness its contention appears to be that the mere fact that the New Rules exist is contrary to the principles in section 181(3) as they permit the removal of a head of a Chapter 9 institution. However, such an interpretation would negate section 194 – which is the ultimate accountability mechanism provided by Chapter 9. Chapter 9 office-bearers are, after all, accountable to the NA in terms of section 181(5).

111. That section 194 – and mechanisms devised in the implementation of section 194 – is harmonious with section 181(3) has been considered and endorsed by the CC. In the *First Certification Judgment*[77] the CC discussed whether the new text of the final

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[75] Speaker AA 272-273: 12.2

[76] FA 28: 28.6; and FA 41-42: 59. At FA 28: 28.6 DIA alleges: *'The adopted Rules do not assist and protect these Institutions to ensure their independence, impartiality, dignity and effectiveness, but expose them to a removal process that completely undermines these constitutional attributes and requirements*.'

[77] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) ('***First Certification Judgment***')

constitution sufficiently protected the independence and impartiality of the Public Protector. In refusing to certify the then version of section 194, the CC said:[78]

'*The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing the removal of the Public Protector from office do not meet the standard demanded by CP XXIX. NT 194 does require that a majority of the NA resolve to remove him or her, but a simple majority will suffice. We accept that the NA would not take such a resolution lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken. These considerations themselves suggest that NT 194 does provide some protection to ensure the independence of the office of the Public Protector. Nevertheless we do not think it is sufficient in the light of the emphatic wording of CP XXIX, which requires both provision for and safeguarding of independence and impartiality. We cannot certify that the terms of CP XXIX have been met in respect of the Public Protector*.'

112. The Constitutional Assembly consequently amended what is now section 194 to require a two-thirds majority for a resolution removing the Public Protector and Auditor-General from office; and in the *Second Certification Judgment*[79] the CC certified the amended section 194. The New Rules operate within the paradigm forged by section 194 as endorsed by the *Second Certification Judgment*.

[78] *First Certification Judgment* para 163

[79] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997 (2) SA 97 (CC) para 134

113. It is further submitted that, in any event, section 181(3) is not relevant to interpreting the meaning and reach of section 194. These provisions serve two distinct, albeit complementary, purposes:

114. 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 section 181(3). This Parliament has done by passing legislation which support each of the Chapter 9 institutions. For instance, as regards the Public Protector, we refer to the following provisions of the Public Protector Act 23 of 1994 ('**the PP Act**'):

114.1. Sections 2 and 2A, which deal with the remuneration of the Public Protector and the Deputy Public Protector;

114.2. Section 3, which deals with the staffing of the office of the Public Protector.

114.3. Section 4, which empowers the Chief Administrative Officer of the Public Protector's office to perform such duties as the Public Protector may confer or assign to such person.

114.4. Sections 6, 7 and 7A, which provide the Public Protector with the necessary additional investigative powers in order to fulfil her mandate.

114.5. Section 9, read with section 11, which makes it an offence to insult the Public Protector if such insult would have amounted to contempt of court had the investigation been court proceedings.

115. It is submitted that these legislative measures put in place by Parliament in respect of the Public Protector and the similar measures in the legislation governing the other Chapter 9 institutions comply with its obligations as contemplated in section 181(3).

116. Section 194 fulfils a different purpose. Since all Chapter 9 institution office-bearers are accountable to the NA, section 194 imposes upon the NA the duty to administer the process which may ultimately result in the removal of office of such a head. And it is for this very reason of holding the incumbent to account that section 194 is congruent to section 181(3) in that a warranted impeachment of an errant head of a chapter 9 institution is indeed a protection of that very institution.

117. Alternatively, and assuming without conceding that section 181(3) applies to the regulation of the circumstances and process pursuant to which a Chapter 9 office-bearer may be removed from office, it is submitted 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.

118. Without limiting the generality of this submission, we point out that the New Rules contain the following safeguards:

118.1. they contain definitions of '*misconduct*', '*incapacity*' and '*incompetence*';

118.2. they require that a member of the NA seeking the removal of the incumbent from a Chapter 9 office in terms of section 194 must do so by way of a substantive motion in terms of Rule 129(6) containing a clearly formulated and substantiated charge relating to an action or conduct of the incumbent which, if established by the evidence, shows the incumbent committed misconduct, is incapacitated or is incompetent (as so defined) (Rule 129R(1)(a), (b) and (2));

118.3. they require that all evidence relied upon in support of the motion must be attached to it (Rule 129R(1)(c));

118.4. they require that the Speaker assess (Rules 129S and 129T) whether the motion is in order, i.e. meets the requirements (in Rule 129R) summarised in paras 118.2 and 118.3 above – an initial mechanism to sift out motions which, on their face, are groundless or unsubstantiated (i.e. do not comprise a clearly formulated charge of misconduct, incapacity or incompetence (as defined) relating to actions or conduct of the incumbent, accompanied by the evidence relied upon);

118.5. they require the establishment by the Speaker of an independent panel (Rule 129U) and the appointment by the Speaker of three panellists who collectively must possess the necessary legal and other competencies and experience to conduct a 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)) – a second, more stringent mechanism to enable the NA, when it first considers the matter (in terms of Rule 129Z) to sift out motions which are not supported by evidence that calls for an answer from the incumbent;

118.6. they require that before making that preliminary assessment the independent panel must provide the incumbent with copies of all information available to the panel relating to the assessment and afford the incumbent a reasonable opportunity to respond, in writing, to all relevant allegations against him or her (Rule 129X(1)(c)(ii) and (iii));

118.7. they require that 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);

118.8. they provide that the NA may decide to proceed with a formal enquiry to remove the incumbent from office only after considering the report and recommendations by an independent panel (Rule 129Z(1)) – the requirement that the NA itself must decide to proceed is a third sifting mechanism;

118.9. they provide that the formal enquiry be conducted by a specially-established committee of the NA (Rule 129AA);

118.10. they require that the section 194 committee conduct the enquiry aimed at establishing the veracity of the charges against the incumbent in the motion, in a reasonable and procedurally fair manner including by affording the incumbent the right to be heard in her own defence and to be assisted by a legal practitioner or other expert of her choice (Rule 129AD(1) to (3));

118.11. they provide that at the end of the enquiry the section 194 committee must set out in a report its findings and recommendations, the reasons therefor and all views expressed in the committee including minority views (Rule 129AE); and

118.12. they provide that the NA may decide that the incumbent be removed from office only after considering and debating the report and recommendations of the section 194 committee (Rule 129AF(1)).

119. It is submitted that these safeguards will eliminate spurious or vexatious complaints. The process is strengthened by the multiple steps that must be completed before a head of a Chapter 9 institution may be removed. A removal from office is not there for the taking pursuant to unsustainable charges. The process permits the NA to make an

informed decision on the important matter of the continued incumbency of a Chapter 9 office.

120. Accordingly, this challenge is misconceived and should be rejected.

The third ground: the New Rules expose the Chapter 9 institutions to interference with their functioning

121. DIA alleges that the New Rules are inconsistent with section 181(3) (and sections 181(2) and (4) of the Constitution),[80] because they expose the Chapter 9 institutions to interference with their functioning by permitting the filing of misconduct or incompetence charges based solely on the merits of their decisions or mere errors of law.[81]

122. It is submitted that, together:

122.1. the stringent definitions of '*misconduct*', '*incapacity*' and '*incompetence*' in the New Rules;[82]

122.2. the requirement in the New Rules that a member of the NA seeking the removal of the incumbent from a Chapter 9 office in terms of section 194 must do so by way of a substantive motion in terms of NA Rule 129(6) containing a clearly formulated and substantiated charge relating to an action or conduct of the incumbent which, if established by the evidence, shows the incumbent committed misconduct, is incapacitated or is incompetent (as so defined); and

[80] FA 24-25: 22

[81] FA 28-29: 28.7 and FA 54-58: 83-89

[82] In particular see FA 292-293: 47 which makes the point that complaints must comply with the proviso in Rule 129R(1)(a) read with the definitions of '*misconduct*', '*incapacity*' and '*incompetence*' (*vide* Annexure DIA2, 93-94)

122.3. the requirement in the New Rules that before the NA may resolve to conduct a formal impeachment enquiry an independent panel must assess and report to the NA on whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated (as so defined), for the reasons alleged in the motion,

will prevent undue interference with the functioning of the Chapter 9 institutions.

123. It would be absurd and incompatible with the purpose or function of section 194 as the ultimate accountability mechanism, if a decision or action of a Chapter 9 office-bearer taken in the course of the exercise of his or her powers is an impermissible basis for a decision by the NA that the incumbent be removed from office. On the contrary, if, following a reasonable and procedurally fair enquiry in terms of the New Rules, a section 194 committee finds such a decision or action to be misconduct by the incumbent or to reveal incapacity or incompetence (as these three words are defined in the New Rules) on the part of the incumbent, that is a constitutionally sound basis for a decision by the NA that the incumbent be removed from office, provided of course that the number of members of the NA required by section 194(2) supports the resolution.

124. DIA argues that the heads of Chapter 9 institutions should be treated on a similar footing to judges. It further argues – citing international authority – that where judges commit mere errors in their judgments, these are rectified on appeal and that there is an '*ironclad*' rule that judges cannot be removed from office for such errors.

125. However, the Constitution does not regard errant judges as sacrosanct in their positions when their performance reveals gross incompetence. Section 177(1)(a) of the

Constitution specifically contemplates such removal in the case of a judge being '*grossly incompetent*'

126. Similarly, section 194 also contemplates the removal of a head of a Chapter 9 institution where such head is incompetent. The New Rules have, if anything, raised the bar for the removal for incompetence in its definition. Thus '*incompetence*' is defined in the New Rules as including the demonstrated and sustained lack of knowledge to carry out and ability and skill to perform his or her duties effectively and efficiently.[83]

127. It is thus submitted that the Constitution does not contemplate an '*ironclad rule*' against the removal of judges and the heads of Chapter 9 institutions where their performance reveals they are incompetent as contemplated in the Constitution and/or NA Rules.

128. Furthermore, the Constitution does indeed treat the Public Protector and the Auditor-General on a similar footing to that of judges when it comes to the NA vote on their removal. In the case of all three offices a two-thirds majority vote in favour of the removal is needed. This extraordinary threshold serves as safeguard against Chapter 9 office-bearers being the targets of spurious, unmeritorious and vexatious complaints.

129. In paragraph 89 of its FA, DIA argues that errors in the reports of the Public Protector should not form the basis for a valid complaint. DIA further argues that the legislature has, through the Judicial Services Act, 1994 ('**JSC Act**') protected judges against complaints that are '*solely related to the merits of a judgment or order*' in that section 14 of the JSC Act requires that such complaints be dismissed. Similarly, the argument proceeds, judicial criticisms in respect of the findings of the Public Protector's reports should not form the basis of complaints.

[83] The definition appears at p93 of the record in Annexure DIA2

130. This argument misses the point. Section 194(1)(a) of the Constitution provides that a Chapter 9 office-bearer may be removed from office on the grounds of misconduct or incompetence. If, for example, the 'merits' of a report by the Public Protector are conclusive evidence of misconduct or incompetence on her part (as those terms are now defined in the New Rules, i.e. '*the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of public office*' or '*a demonstrated and sustained lack of (a) knowledge to carry out; and (b) ability or skill to perform, his or her duties efficiently*'), and if a finding to that effect is made by a committee of the NA in terms of section 194(1)(b), then the Public Protector may validly be removed by a resolution supported by the requisite two-thirds majority of the NA in terms of section 194(1)(c). There would be nothing constitutionally objectionable about that because the criteria and process prescribed by section 194(1) of the Constitution will then have been complied with. In such circumstances, the Public Protector will have been dismissed for incompetence and/or misconduct, and not solely because of the merits of the report in question.

The fourth ground: the New Rules do not prohibit removal charges based on cases that are pending in courts

131. DIA alleges that in contravention of section 181(3) of the Constitution and Rule 89 of the NA Rules, the New Rules fail to prohibit members of the NA from filing removal charges against the Public Protector which are based on cases that are still pending in courts.[84]

[84] FA 60-61: 93

132. It is submitted that neither section 181(3) nor Rule 89 preclude members of the NA 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.

133. Section 194 confers on the NA and the President alone the power to remove the incumbent from a Chapter 9 office on the ground of misconduct, incapacity or incompetence. The NA and the President are not disabled from exercising that power because legal proceedings arising from or related to the same action or conduct of the incumbent of a Chapter 9 office have been instituted in a court and have not been finally concluded. The question for decision in any such legal proceedings could never validly be whether there are sufficient grounds for the incumbent to be removed from office; and the relief sought could never be an order removing the incumbent from office.[85]

134. It follows that section 194 proceedings in the NA 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 will not create a real risk of demonstrable and substantial prejudice to the administration of justice in those legal proceedings.[86]

135. Finally in this regard it would be absurd and incompatible with the purpose or function of section 194 as the ultimate accountability mechanism provided by Chapter 9, if the NA 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

[85] *Institute for Accountability in Southern Africa v Public Protector and Others* 2020 (5) SA 179 (GP) paras 43-53

[86] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 19

incumbent constituting or evidencing the misconduct, incapacity or incompetence in question is also the subject of un-concluded legal proceedings in the courts.

136. Accordingly, there is no basis to contend, as DIA does, that pending legal proceedings in which the '*subject matter of the removal complaint*' is considered should preclude the process as envisaged in section 194 from proceeding. DIA's contention, if accepted, would create scope for abuses of the court process aimed at delaying the impeachment process.

The fifth ground: the New Rules do not preclude persons with conflicts of interest or who are biased from initiating or participating in impeachment processes

137. DIA alleges that in contravention of section 181(3), the New Rules do not preclude the initiation of complaints against the Public Protector, the Auditor-General and members of the commissions established by Chapter 9 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 NA are engaged in litigation against that person or s/he has made adverse findings against them or they are being investigated by her/him.[87]

138. First, it does not automatically follow that members of the NA will invariably be biased against the incumbent of a Chapter 9 office because they or their political parties are engaged in litigation against the incumbent, or the incumbent has made adverse findings against them or to their knowledge the incumbent is investigating them. Whether or not the members in question will be biased is a question to be answered in each particular instance in the light of all the relevant facts. This is a fact-based exercise

[87] FA 58-59: 90, FA 61-64: 94-98 and FA 66: 101

and the potential for bias of a member or members in a particular complaint does not serve as a valid basis for a generalised challenge to the New Rules.

139. Secondly, both procedural fairness (the standard made applicable by Rule 129AD(2) to the conduct of the enquiry by the section 194 committee) and procedural rationality (a standard for the validity of all exercises of public power)[88] require that the members of the section 194 committee should not have or be reasonably perceived to have a personal interest in the outcome of the proceedings of the committee. In this regard, it is important to bear in mind that the function of the committee is to make a finding as to whether the incumbent has committed misconduct, or is incapacitated or is incompetent (as defined) on the grounds set out in the charges. In instances where the facts are in dispute, this will entail both fact-finding and determining whether the facts, as found, show misconduct, incapacity or incompetence. In instances where the facts are common cause, the function of the committee will solely be to determine whether the facts show misconduct, incapacity or incompetence. When appointing members to section 194 committees the political parties represented in the NA must therefore take care to ensure that the members in question do not have a personal interest in the outcome of the proceedings of the committee or are not persons who may reasonably be perceived to have such an interest.[89]

140. Thirdly, it is submitted that if the section 194 committee makes a finding that the incumbent has committed misconduct, or is incapacitated or is incompetent (as defined) on the grounds set out in the charges, the NA as a whole must decide whether to remove

[88] Speaker AA 310: 97. *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* 2018 (1) SA 200 (SCA) para 82

[89] Speaker AA 306-307: 89

him or her from office.[90] A supporting vote of at least two thirds of the members of the NA is required for the Public Protector or the Auditor-General to be removed; and a supporting vote of a majority of the members of the NA is required for the removal of a member of a Commission established by Chapter 9. It would be inimical to the proper functioning of the impeachment mechanism and to our system of party-political representative democracy, if members of the NA were to be precluded from participating or voting in the proceedings of the NA because they or their political parties are engaged in litigation against the incumbent or they know or have reason to suspect the incumbent has made findings against them or is investigating complaints against them. It is necessarily implicit in section 194(2), the provision which requires that, to be adopted, a resolution calling for the incumbent's removal from office must be supported by at least two thirds of all the members of the NA (if the Public Protector or Auditor-General) or by a majority of all the members of the NA (if a member of a Commission established by Chapter 9), that all the members of the NA are entitled to vote.[91]

141. Fourthly, voting on such a motion entails an exercise of political judgment, more specifically whether the misconduct, incapacity or incompetence as found by the section 194 committee are so serious that removal from office – the ultimate accountability mechanism provided by Chapter 9 – is warranted. Consequently, when voting on such a motion, all members of the NA must put the public interest ahead of their personal interests.[92] See *EFF (impeachment)* where the CC stated:

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[90] Speaker AA 307: 90

[91] *Id*

[92] Speaker AA 307-308: 91

'*The fact that members of the Assembly assume through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives.*'[93]

142. This is underscored by Rule 30 and the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ('**the Ethics Code**') (which is referred to in Rule 30 and is a schedule to the Joint Rules of the NA and the National Council of Provinces ('**the Joint Rules**')).[94] It provides that if a member has a personal interest or a private financial or business interest in any matter before a forum of the NA of which he or she is a member, he or she must at the commencement of engagement on the matter by the forum immediately declare that interest in accordance with the code of conduct contained in the schedule to the Joint Rules and comply with the other provisions of the code. The code in question is the Ethics Code.[95]

143. In line with the oath or solemn affirmation to be taken by all members of Parliament before they may perform their functions as such (see item 4 of Schedule 2 to the Constitution), the Ethics Code outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct. It specifically provides that all members of the NA must '*take decisions solely in terms of public interest and without regard to personal financial or other material benefits for themselves, their immediate family,*

[93] *EFF (impeachment)* para 144

[94] Speaker AA, Annexure TRM16 397 ff

[95] Speaker AA 308: 92

their business partners, or their friends' (clause 2.4.1), must '*declare private interests relating to public duties and resolve any conflict arising in a way that protects public interest*' (clause 2.4.5) and must '*discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests*' (clause 4.1.4). A member of the NA breaches the Ethics Code when he or she, amongst other things, '*contravenes or fails to comply with the requirements of the provisions for disclosing interests*' (clause 10.1.1.1) or contravenes clause 4.1 (clause 10.1.1.1.3).

144. The Joint Committee on Ethics and Members' Interests as established by the Joint Rules may consider complaints of alleged breaches of these provisions of the Ethics Code (clause 10.2.2.1) or acting on its own may consider any breach or alleged breach of the Code (clause 10.2.2.3). If the Committee finds on the balance of probabilities that a member has breached a provision of the Ethics Code (clause 10.7.6.1), then, depending on the provision breached, the Committee may impose certain sanctions including a reprimand in the NA or a fine of up to 30 days' salary (clause 10.7.7.1) or recommend to the NA any greater sanction it deems appropriate, in which event the NA shall decide on the appropriate sanction to be imposed (clause 10.7.7.2).

145. Accordingly, it is submitted that this ground is to be dismissed.

The sixth ground: the New Rules permit the Speaker to consult the complainant but do not require the Speaker to consult the accused Chapter 9 office bearer

146. DIA alleges that in contravention of section 181(3), the New Rules permit the Speaker to consult the member who has initiated the proceedings for a section 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 NA of the referral.[96]

147. First, it is submitted that section 181(3) does not require that the Speaker consult the accused Chapter 9 office bearer about whether the motion is compliant with criteria set out in Rule 129R or before referring the matter to an independent panel and informing the President and the NA of the referral.

148. Secondly, the touchstone for the validity of the New Rules is the constitutional principle of legality,[97] which includes substantive rationality[98] and procedural rationality. [99] In its substantive sense, rationality requires a rational relationship between the scheme which is adopted and the achievement of a legitimate purpose. In its procedural sense, rationality requires that during the decision-making process all material relevant to achieving that purpose be considered unless ignoring is rationally related to achieving that purpose or does not colour the entire process with irrationality. Procedural rationality therefore entails looking at the process as a whole and determining whether the steps in the process are rationally related to the end sought to be achieved; and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.

149. Thirdly, it is submitted that the relevant part of the New Rules is rational in both senses.

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[96] FA 66-67: 102-104 and FA 69-71: 110-113

[97] See, e.g., *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC) para 38

[98] See, e.g., *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) para 55

[99] See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 49-51, *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) paras 39 and 67 and *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) para 61

150. 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 section 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.

151. The New Rules do afford the incumbent the opportunity to comment on whether the motion is compliant with criteria set out in Rule 129R before the matter is considered by the NA for the first time (i.e. before the NA decides whether a section 194 enquiry should be proceeded with in the NA committee envisaged by section 194(1)(b)). As explained by the Speaker:[100]

151.1. Rules 129U, 129V and 129X require that an independent panel be established to assess and advise the NA on whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated for the reasons alleged in the motion;

151.2. Rule 129X(1)(c)(ii) requires that when considering the matter the independent panel must provide the incumbent with copies of all information available to the panel relating to the assessment – this will include the motion initiating the proceedings and all evidence relied upon in support of the motion;

151.3. Rule 129X(1)(c)(iii) requires that in considering the matter the independent panel must afford the incumbent a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;

[100] Speaker AA 294 ff: 54 ff

151.4. Rule 129X(c)(v) requires that the independent panel embody its assessment and recommendations in a report to the NA;

151.5. Rule 129Z requires that the NA consider the independent panel's recommendations before deciding whether to proceed a formal section 194 enquiry in the committee of the NA envisaged by section 194(1)(b).

152. Before the matter is first tabled in the NA, therefore, the incumbent may 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 with the evidence supporting it (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).

153. Accordingly, it is submitted that this ground of challenge is without merit and should be rejected.

The seventh ground: the New Rules do not require that complaints be handled confidentially in the early stages of the process

154. DIA alleges that in contravention of section 181(3), the New Rules do not require that motions initiating proceedings for a section 194(1) enquiry be handled confidentially in the early stages of the process (i.e. before the motions have been screened and a section 194 removal enquiry has been triggered).[101]

155. First, it is submitted that nothing in section 181(3) requires that motions initiating proceedings for a section 194(1) enquiry be handled confidentially.

[101] FA 67-68: 105-107

156. Secondly, it is submitted that section 57(1)(b) of the Constitution requires that the NA Rules regulating the process pursuant to which the incumbent of a Chapter 9 office may be removed from office by the NA and the President in terms of section 194 be informed by representative and participatory democracy, accountability, transparency and public involvement; and, further, that those considerations require that openness be the norm and confidentiality be the exception to the norm.[102]

157. Thirdly, rule 26(1)(a) provides that one of the functions of the Speaker is to ensure that the NA 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. This is because under our Constitution, especially sections 1(d), 57, 59, 70 and 72, the default position is that the public has access to proceedings in Parliament unless there is strong justification for departing from it.[103]

158. Fourthly, it is submitted the giving by a member of the NA of a notice of a substantive motion initiating proceedings for a section 194(1) enquiry, aimed as it is at the removal from office of the incumbent of an office established by the Constitution, is a matter to be dealt with openly not confidentially.

159. Consequently, Rule 129R, read with Rule 124(6), provides that when giving notice of such a motion the member must read it aloud and immediately thereafter deliver a signed copy to the Table or deliver a signed copy to the Secretary for placing on the Order Paper; and Rules 129T, 129U and 129V provide, in effect, that if or as soon as

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[102] Speaker AA 312: 105

[103] *Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA) paras 21-26; *UDM* para 80

the motion is in order (i.e. compliant with the criteria in Rule 129R), the Speaker must establish an independent panel, refer the motion and supporting documentation to the panel and inform the NA and the President of the referral without delay.

160. 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 impair the dignity of the Public Protector. The New Rules are designed to sift out and eliminate groundless complaints and, it is submitted, it is in the interests of factors listed in section 57(1)(b) of the Constitution – such as transparency – that the public is aware that any incumbent of a Chapter 9 institution has been the target of a groundless complaint. The making of a complaint which, following the application of the sifting mechanisms in the New Rules is found to be groundless, will if anything reflect adversely on the member of the NA who lodged the complaint.

161. Confidentiality is thus inapt in the circumstances portended by DIA and this ground of challenge should be rejected.

The eighth ground: the independent panel will not be truly independent because its members are chosen by the Speaker or members of the NA

162. DIA alleges that in contravention of section 181(3), the New Rules require that motions initiating proceedings for a section 194(1) enquiry be screened by a panel chosen by the Speaker or members of the NA, which means the panel will not be independent in the true sense of the word.[104]

[104] FA 69: 109

163. First, it is submitted that section 181(3) does not preclude the Speaker from choosing the members of the independent panel. It furthermore does not preclude members of the NA from nominating potential members of the panel as envisaged in Rule 129V, for consideration by the Speaker when she makes the appointment. (No members of the NA, other than the Speaker, have the power to choose the members of the independent panel.)

164. Secondly, it is submitted that the applicable legal criterion is rationality (as to which see para 148 above) and the requirement in Rule 129V that the three members of the independent panel be appointed by the Speaker (after permitting members of the NA to nominate potential panellists) is rational. Section 52(1) of the Constitution provides the Speaker is elected by the NA from among its members. When exercising the various powers conferred on the Speaker by the NA Rules, including the New Rules, the Speaker is obliged by the Constitution and Rule 26(4) to maintain the neutrality of the office by acting fairly and impartially. In addition to this, when members of the NA nominate potential panellists, they do so subject to the ethical duty to '*take decisions solely in terms of the public interest*' (clause 2.4.1 of the Ethics Code).[105] This precludes nominations being made for illegitimate purposes that undermine, *inter alia*, the independence of the panel.

165. In any event, when making the appointments to an independent panel, the Speaker is obliged by Rule 129V(1) to appoint only fit and proper South Africans who collectively possess the necessary legal and other competencies and experience to conduct the assessment required by Rule 129X(1)(b).

[105] *EFF impeachment*, para 144

166. Accordingly, this ground of attack is without merit and should be rejected.

The ninth ground: the independent panel should comprise members of the NA

167. DIA alleges that in contravention of section 194 the New Rules require a body not comprised of members of the NA – 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.[106]

168. First, it is submitted that neither section 181(3) nor section 194 requires that the members of the independent panel be members of the NA.

169. Secondly, it is submitted that (contrary to what DIA alleges) the independent panel does not make any findings of misconduct, incapacity or incompetence. It determines whether there is *prima facie* evidence to show that the incumbent committed misconduct or is incapacitated or incompetent and submits an advisory and hence non-binding report to the NA.

170. Thirdly, it is submitted that the applicable legal criterion is rationality (as to which see para 148 above); 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 and to advise the NA as to whether there is *prima facie* evidence to show that the incumbent committed misconduct or is incapacitated or incompetent.

171. Fourthly, DIA has adopted a fatally conflicting stance in its replying affidavit. In paragraph 34.2 DIA endorses the appointment of the Electoral Court (which does not consist of NA members) in term of the Electoral Commission Act as the entity that

[106] FA 77: 126.

conducts the initial investigation of charges of misconduct, incapacity and incompetence.[107] In paragraph 36, DIA then gives its unqualified backing of the Electoral Commission Act referring to it as a '*model of legislation which Parliament ought to have passed*'.[108] DIA cannot have it both ways. Either the NA can appoint external entities or persons to perform the initial investigation or it cannot. It is unclear what the principled position of DIA is in light of these mutually destructive stances.

172. Accordingly, this ground of attack is without merit and should be rejected.

The tenth ground: the New Rules permit members of the NA to vote along partisan political lines

173. DIA alleges that in contravention of section 181(3), the New Rules permit members of the NA 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.[109]

174. First, it is submitted that section 181(3) does not preclude members of the NA from voting along party-political lines and there is nothing inherently untoward about that. However, members of the NA must act with faithfulness to the Republic and obedience to the Constitution and our laws (as required by the oath or solemn affirmation they must make before beginning to perform their functions in the NA). Accordingly, it is inconsequential whether or not they vote along party lines – provided that when they vote, their oath or affirmation is upheld.

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[107] RA 576: 34.2

[108] RA 576: 36

[109] FA 49-51: 76-77

175. Secondly, it is submitted that the definitions of '*incompetence*' and '*misconduct*' in the New Rules are sufficiently specific to avoid the individual members of the NA having to determine what constitutes incompetence or misconduct with reference to political considerations and factors.

176. 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. Further and contrary to what DIA contends in its founding affidavit,[110] section 181(3) does not require that – before a finding of incompetence may be reached – intervention measures must be instituted by the NA aimed at improving the relevant incumbent's competence, and that such measures must have been exhausted without success.

177. The definition of '*misconduct*' – the intentional or grossly negligent failure to meet the standard of behaviour expected of the holder of a public office – read in the context of Chapter 9 and the national legislation regulating each Chapter 9 institution, is specific. It requires intention (i.e. in this context, bad faith) or gross negligence by the incumbent in discharging his or her obligations.

[110] FA 50-51: 77

178. Both intention (bad faith)[111] and gross negligence[112] are well-known, circumscribed legal concepts. Both are applied by the courts in the related context of ordering personal costs against public officials who are guilty of bad faith or gross negligence in discharging their constitutional obligations.[113] As to what those constitutional obligations are (i.e. what the standard of behaviour expected of the holder of a Chapter 9 office is), section 181(2) and (3) of the Constitution make it clear that the incumbents of the Chapter 9 offices must be independent, impartial and dignified, and that they must exercise the powers and perform the functions conferred on them by the operative provisions of Chapter 9 (e.g. in the case of the Public Protector, section 182) and by national legislation (e.g. in the case of the Public Protector, section 6 of the Public Protector Act 23 of 1994) effectively and without fear, favour or prejudice.

179. Accordingly, this ground of attack is without merit and should be rejected.

The eleventh ground: the process by which the New Rules were adopted violated sections 57(1)(b) and 59(1)(a) of the Constitution

180. DIA alleges that, in adopting the New Rules without inviting representations, comments or submissions from the Public Protector, the Auditor-General and members of the commissions established by Chapter 9 of the Constitution, the NA acted unlawfully and unconstitutionally. In support of this order, DIA makes the following allegations in the FA:

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[111] *Commission for Conciliation, Mediation and Arbitration v Inzuzu IT Consulting (Pty) Ltd* [2012] 11 BLLR 1081 (LAC) para 20 and *Birch v Lombard and Others* 1949 (3) SA 1093 (SR) at 1097 – cited in footnote 62 of *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC)

[112] See *MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA) para 7

[113] See for example *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) paras 147-148

180.1. the procedure followed by the NA 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;[114] and

180.2. the procedure followed by the NA 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.[115]

181. Firstly, section 57(1)(b) of the Constitution means that when deciding on the content of the rules and orders governing its business, the NA 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 NA leading up to the making of the rules and orders of the NA governing its business. That is the NA's internal business.[116]

182. Secondly, it is submitted that section 59(1)(a) of the Constitution similarly does not govern the process within the NA 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 NA or any of its committees undertakes legislative and other processes in terms of the rules, it must facilitate public involvement.

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[114] FA 33: 37 and 46: 70

[115] FA 34: 39

[116] Speaker AA 318: 123

183. There is nothing in the NA Rules and the Joint Rules which precludes the NA 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 NA and its committees facilitate public involvement in their legislative and other processes. For example, Rule 167(b), (c) and (d) provide that for the purposes of performing its functions a committee may: receive petitions, representations or submissions from interested persons or institutions; permit oral evidence on petitions, representations, submissions and any other matter before the committee; and conduct public hearings. Moreover, Rule 170 provides generally that committees must ensure public involvement in accordance with the provisions of the Constitution and the NA Rules.[117]

184. All of the meetings of the Rules Committee and the Subcommittee in which the New Rules were considered were open to the public and at the time it was widely publicised that new rules to give effect to section 194 were being formulated. That the New Rules were being formulated was a matter of public knowledge reported on widely at the time.[118]

185. Thereafter, 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. None of the Chapter 9 institutions submitted representations, but the presently relevant points are that the rule-drafting process was widely publicised and the NA Rules permitted them to submit representations or request the opportunity to make oral submissions.[119]

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[117] Speaker AA 319: 124

[118] Speaker AA 319: 125; TRM17 429; TRM18 431; TRM19 434

[119] Speaker AA 320: 126

186. Accordingly, this ground of attack is without merit and should be rejected.

The twelfth ground: the motion adopting the New Rules did not comply with section 53(1)(c) of the Constitution

187. DIA alleges 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.[120]

188. Subject to the relevance objection raised by the Speaker,[121] it is submitted that, as appears from the Speaker's answering affidavit,[122] the New Rules were adopted unanimously by the NA during a sitting at which a majority of the members were present.

189. Accordingly, there is no merit in this challenge and should be rejected.

The thirteenth ground: the NA adopted the New Rules in retaliation for the adverse findings made by the Public Protector

190. DIA alleges that the NA adopted the New Rules in retaliation for the adverse findings made by the Public Protector against members of the National Executive.[123]

191. Subject to the relevance objection raised by the Speaker,[124] it is pointed out that this allegation is speculative (i.e. not supported by any evidence) and amounts to an

[120] FA 34: 38

[121] Speaker AA 276: 17

[122] Speaker AA 288-289: 41

[123] FA 42: 62

[124] Speaker AA 276: 17

inference incorrectly drawn and incompatible with the sequence of events leading up to the adoption of the New Rules by the NA described in detail by the Speaker.[125]

192. Accordingly, there is no merit in this challenge and should be rejected.

The fourteenth ground: 'one size fits all'

193. DIA alleges that by applying generally to all 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.[126]

194. Subject to the relevance objection raised by the Speaker,[127] it is submitted, first, that 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. The court is referred to the submissions of the definitions of '*incompetence*' and '*misconduct*' in paras 173 to 177 above.

195. Secondly, it is submitted that although the definitions (and indeed the New Rules as a whole) apply to all the incumbents of Chapter 9 office, these are not irrational. As explained earlier, 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

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[125] Speaker AA 278-291: 45-66. See further Schwikkard & Van der Merwe, *Principles of Evidence* 2010 (third ed), 538 where the learned authors discuss the well-established principle that '*[i]n civil proceedings the inference sought to be drawn must also be consistent with all the proved facts…:* '

[126] FA 42: 61, 51: 78 and 53-54: 82

[127] Speaker AA 276: 17

specific constitutional and statutory duties of the Chapter 9 institution in question. 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)).

196. Leaving aside the different voting requirements for the removal of the incumbents of the two types of offices created by Chapter 9, something dealt with in section 194 itself, the New Rules regulate the rest of the process, from start to finish, of proceedings aimed at Chapter 9 office-bearers' removal from office in terms of section 194. In the parts of section 194 relevant to the rest of the process no distinction is drawn between the Public Protector and the Auditor-General, on the one hand, and the members of the Chapter 9 commissions, on the other hand. The New Rules, which similarly draw no such distinction, are thus rationally related to section 194.

197. Accordingly, there is no merit in this challenge and should be rejected.

The fifteenth ground: the New Rules impermissibly constrain the Speaker

198. DIA alleges that the New Rules reduce the Speaker to a mere conduit for the referral of a section 194 complaint, compel her to deal with the complaining member of the NA 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. DIA also complains that the New Rules do not permit her to dismiss motions at the earliest possible stage.[128]

[128] FA 73: 118

199. Subject to the objection of the Speaker,[129] first, it is submitted that there is nothing in section 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.

200. Secondly, and in any event, as appears from the description by the Speaker of the process created by the New Rules,[130] it is wrong to describe the Speaker as a mere conduit for the referral of a section 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 the following:

200.1. consulting the member who gave the impeachment motion to ensure it is compliant with the criteria set out in Rule 129R (Rule 129S);

200.2. appointing the independent panel after giving due consideration to the nominees put forward by the political parties represented in the NA (Rule 129V(3));

200.3. referring the motion to the panel and informing the NA and the President of the referral (Rule 129T);

200.4. scheduling a sitting of the NA sitting to consider the report and recommendations of the panel (Rule 129Z(1));

200.5. informing the President of any action or decision by the NA emanating from the recommendations of the panel (Rule 129Z(3));

[129] Speaker AA 276: 17

[130] Speaker AA 292-298: 72 - 95

200.6. if the NA resolves that a section 194 enquiry be proceeded with, determining, subject to Rule 154, the number of members of the section 194 committee (Rule 129AB(1));

200.7. scheduling a meeting of the NA to consider and debate the report and recommendations by the section 194 committee (Rule 129AF(1)); and

200.8. if the NA resolves that the incumbent be removed from the office of Public Protector, conveying that decision to the President (Rule 129AF(2)).

201. Thirdly, as regards the complaint that the New Rules do not permit the Speaker to give the accused Chapter 9 office-bearer an opportunity to respond before referring the complaint to an independent panel, it is submitted that (for the reasons given in paras 147 to 153 above) the New Rules are both substantively and procedurally rational.

202. Lastly, DIA's complaint that the Speaker is not able to dismiss (presumably 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 NA to consider the panel's report before deciding whether a formal impeachment enquiry should be proceeded with.

203. Accordingly, there is no merit in this challenge and should be rejected.

The sixteenth ground: the New Rules impermissibly prohibit oral hearings by the independent panel

204. DIA alleges 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.[131]

205. Subject to the relevance objection raised by the Speaker,[132] the court is further referred to the submissions previously made on rationality in para 148 above, and it is further submitted that 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 performs screening and advisory functions. Written evidence and submissions are sufficient for the proper performance of those functions.

206. Also, the panel must act expeditiously. Hearing oral evidence will make it hard or perhaps even impossible to complete its task expeditiously. If, after considering the panel's report, the NA decides that a section 194 enquiry be proceeded with, the section 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.

207. Accordingly, there is no merit in this challenge and should be rejected.

The seventeenth ground: the New Rules impermissibly apply retrospectively

208. DIA alleges 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 the conduct of Chapter 9 office-bearers prior to the adoption of the New

[131] FA 74-75: 120

[132] Speaker AA 276: 17

Rules they are unlawful, infringe the office-bearers' rights and offend the presumption against the retrospective application of the law.[133]

209. Subject to the relevance objection raised by the Speaker,[134] it is submitted, first, that with the exception of criminal trials (as to which, see section 35(3)(l) of the Constitution), there is no rule against retrospectivity in our law. There is a presumption, but it can be rebutted either expressly or by necessary implication by the provisions or indications to the contrary in the enactment itself.[135] In this regard it has been held:

'*the presumption against retrospectivity does not apply when it must be inferred from the provisions of the Act that the Legislature intended the Act to be retrospective. Such an inference can be drawn when the consequences of holding an Act to be non-retrospective would lead to an absurdity or practical injustice.*'[136]

210. Secondly, it would be absurd to interpret the New Rules as applying only to events after their adoption. Not only would that leave a *lacuna* (i.e. the NA could not validly impeach a Chapter 9 officer or commission member for anything done or not done before 3 December 2019, no matter how serious), but the New Rules mainly regulate the procedure to be followed for impeachment processes in terms of section 194, a provision which has been in operation since the commencement of the Constitution on 4 February 1997.

211. Thirdly, insofar as the New Rules regulate matters of substance (i.e. define '*incapacity*', '*incompetence*' and '*misconduct*') they impose higher thresholds for impeachment than

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[133] FA 75-76: 121-122

[134] Speaker AA 276: 17

[135] *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) 424G

[136] *Lek v Estate Agents Board* 1978 (3) SA 160 (C) 169F-G

the ordinary meaning of those words would otherwise impose, alternatively they do not impose lower thresholds. Consequently, in this respect, the retrospective operation of the New Rules inures to the benefit or at least not to the detriment of an incumbent. In this regard, it has been held:

'*First of all, a Statute which deals with a topic or subject which has been a matter of some doubt and which is intended to clarify and settle that doubt does operate retrospectively…Second, a statute which is intended to operate for the benefit of a subject is also so interpreted.*'[137]

212. The reasons underlying the presumption against retrospectivity are thus not engaged. Accordingly, there is no merit in this challenge and should be rejected.

CONCLUSION

213. Should this Court uphold the Speaker's contention that DIA does not have the *locus standi* it claims to bring these proceedings in the public interest in terms of section 38(d) of the Constitution, this Court may and should depart from the general rule in constitutional litigation that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs because instituting and persisting with proceedings of this nature and scope without *locus standi* is conduct that deserves censure by this Court.[138]

214. The Speaker prays for an order that the relief sought in the notice of motion be refused with costs, including the costs of two counsel.

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[137] *Ex Parte Christodolides* 1959 (3) SA 838 (T) 841A-B

[138] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) paras 21 and 24

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18 January 2021

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31. *Ex Parte Christodolides* 1959 (3) SA 838 (T)

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