**IN THE HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE DIVISION, CAPE TOWN**

**CASE NO: 2107/ 2020**

In the matter between:

**THE PUBLIC PROTECTOR** Applicant

and

**THE SPEAKER OF THE NATIONAL ASSEMBLY**
**& 21 OTHERS** Respondents

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# HEADS OF ARGUMENT FOR THE TENTH RESPONDENT (THE DEMOCRATIC ALLIANCE)

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## TABLE OF CONTENTS

**INTRODUCTION**

1 The applicant in these proceedings is Ms Mkhwebane. She is the current holder of the office of the Public Protector.

2 Our courts have rightly been scathing of the way Ms Mkhwebane has carried out her functions and powers in a wide range of matters.

2.1 In the *Reserve Bank* matter, the Constitutional Court held that she "*acted in bad faith and in a grossly unreasonable manner*", that she "*was not honest*" and that her conduct "*falls far short of the high standards required of her office.*"[1]

2.2 In the *Vrede Dairy* matter, the High Court held that Ms Mkhwebane's conduct was "*far worse, and more lamentable, than that set out in the Reserve Bank matter*" and that "*her conduct during the entire investigation constitutes gross negligence*".[2] Both the SCA and the Constitutional Court refused leave to appeal against this judgment and the personal and punitive costs award it made.

2.1 In the *CR17* matter, a Full Bench of the High Court held that Ms Mkhwebane acted "*recklessly*" and "*breached her duty to approach every investigation in an open-minded fashion*".[3]

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[1] *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 2; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) at paras 205-207

[2] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) at para 25

[3] *President of the Republic of South Africa and Another v Public Protector and Others* 2020 (5) BCLR 513 (GP); [2020] 2 All SA 865 (GP) at paras 209-211

2.2 In the recent *Gordhan* matter, a Full Court of the High Court held that Ms Mkhwebane conducted herself with "*bias [which was] manifest*"[4] and "*blatant dishonesty*"[5] and acted in an "*egregious*" manner.[6]

3 There is obviously a serious need for the National Assembly to consider whether Ms Mkhwebane can continue to hold office. The DA's motion for her removal allows that to occur.

4 But instead of simply seeking to defend herself and her conduct, Ms Mkhwebane has embarked on a strategy of seeking to delay and obstruct the removal proceedings at every turn.

4.1 This is, perhaps, unsurprising. As our highest courts have explained:

> *"Courts should further be aware that persons facing serious charges … have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."*[7]

4.2 While this was said in a criminal context, this case demonstrates that it applies with equal force to removal or impeachment proceedings.

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[4] *Gordhan v Public Protector,* case no. 48521/19 (Gauteng Division, Pretoria), 7 December 2020 at para 293

[5] At para 290(iv)

[6] At paras 303-304

[7] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) at fn 81, citing *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA) at para 5.

5 In an effort to avoid having to answer the charges against her, or to delay doing so, Ms Mkhwebane first sought (in Part A) an interim interdict against the removal proceedings. That application was roundly and rightly rejected by the Full Court.

6 As part of the same strategy, Ms Mkhwebane now seeks (in Part B) orders:

6.1 Declaring the rules of the National Assembly regarding the removal of Chapter 9 office-bearers ("**the Rules**") invalid, based on a scatter-gun approach of no less than twelve grounds of review; [8]

6.2 Alternatively, declaring that the Rules do not operate with retrospective effect against her;[9]

6.3 Reviewing and setting aside the decision of the National Assembly to adopt the Rules;

6.4 Alternatively reviewing and setting aside the decision of the Speaker to accept the DA's initial motion for the removal of Ms Mkhwebane from office (which has already been withdrawn) and/or its new motion for the removal of Ms Mkhwebane from office. [10]

7 The relief sought and the intentions behind it speak for themselves. We submit that the application is entirely without merit and falls to be dismissed.

8 We structure these submissions as follows:

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[8] In Part A, the applicant pleaded ten grounds. Of these one was abandoned ('the one-size-fits-all' complaint) and three additional grounds were pleaded in Part B. See Supplementary FA v 10, p 939, paras 43-45 and Applicants' heads at paras 58-59.

[9] Amended Notice of Motion prayers 1 and 2, p 977. See also prayer 4, seeking an order suspending the invalidity of the Rules for six months to allow for amendment of the Rules.

[10] Supplementary FA, v 10, pp 929-930, paras 14 and 17.

8.1 We begin by setting out the fundamental principles that should inform this Court's interpretation of the Rules and determination of the review.

8.2 Second, we address the grounds of review. To assist the court, we deal with them in the order addressed in Ms Mkhwebane's heads. We explain that none of the grounds have any merit.

8.3 Third, we address the question of costs, and in doing so deal with the vexatious, irrelevant and prejudicial allegations repeatedly made against the DA in Ms Mkhwebane's affidavits.

## THE APPLICABLE CONSTITUTIONAL PRINCIPLES

9 Ms Mkhwebane's complaints against the Rules are informed by a series of misconceptions and a failure to apply well-established principles of constitutional interpretation.

### *Constitutional interpretation of the Rules*

10 First, Ms Mkhwebane frequently advances the most extreme interpretation of the provisions in the Rules that she seeks to attack. In doing so, she ignores the well-recognised principle of constitutional interpretation that legislative provisions must be interpreted to preserve their constitutional validity where this is reasonably possible.

11 In *Cool Ideas*, the Constitutional Court summarised the correct approach to statutory interpretation as follows:

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)"*[11] (emphasis added).

[11] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

***Accountability***

12 Second, in many of Ms Mkhwebane's submissions, and in her virulent attacks against the Speaker, the National Assembly, the President and the DA's Members of Parliament ("**MPs**"), she loses sight of the fundamental constitutional principle of accountability.

13 As an independent Chapter 9 institution established to support constitutional democracy, the Public Protector is accountable to the National Assembly. This is expressly stipulated in section 181(5) of the Constitution.[12] The Public Protector's accountability to the National Assembly entails –

13.1 reporting regularly to the National Assembly on the performance of her functions, as required under s 181(5) of the Constitution and s 8 of the Public Protector Act 23 of 1994; and

13.2 being subject to the ultimate accountability mechanism of removal from office by the National Assembly, under section 194 of the Constitution.

14 The importance of the principle of public accountability was emphasised by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly.*[13] Writing for a unanimous court, Mogoeng CJ stated:

[12] With reference to all the Chapter Nine institutions, section 181(5) of the Constitution provides:

> "(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

[13] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

> *"One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:*
>
> *"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."*[14]

And, at paragraph 54:

> *"Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real."*

15 As this Court correctly recognised in Part A of these proceedings, *"the process for the impeachment of an office bearer of a Chapter 9 institution is not lightly taken and is a serious mechanism for the accountability of the office bearers of Chapter 9 Institutions under the Constitution. A court should not lightly interfere with such processes…."*[15] This Court also recognised that the public interest required that the court must not unduly intrude into the terrain of the National Assembly that is constitutionally mandated to hold

[14] At para 1, quoting *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80.

[15] *Public Protector v Speaker of the National Assembly and Others* (2107/2020) [2020] ZAWCHC 117 (9 October 2020) para 127.

Ms Mkhwebane accountable. The Court observed that *"such a function by the National Assembly is principally and constitutionally in the public interest*".[16] This statement applies equally to the determination of the relief in Part B.

16 Many of Ms Mkhwebane's submissions and the relief she seeks – such as the alternative relief in prayer 2 on retrospectivity and the new claim of double jeopardy – appear calculated to avoid accountability before the National Assembly. This is unacceptable from any public officer-bearer. But it is especially egregious when it is the Public Protector that adopts this stance, as the Public Protector is supposed to be a guardian and enforcer of the principle of public accountability.[17]

17 A number of court findings have been made against Ms Mkhwebane that cast serious doubt over her competence and fitness to remain in office as the Public Protector. We have set some of these out in paragraph 2 above. These include the most serious findings of dishonesty and bad faith made by the Constitutional Court.

18 In light of these findings, it is <u>incumbent</u> on the National Assembly and its members to examine whether Ms Mkhwebane is competent to hold the office of the Public Protector or has committed misconduct requiring her removal under section 194 of the Constitution. Indeed, the National Assembly and its

[16] Id at para 119.

[17] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at paras 51-56.

members would be neglectful of their constitutional duties and oversight of the office of the Public Protector were they not to do so.

19 The effect of the constitutional principle of accountability is that:

19.1 In considering the challenge to the Rules, the Court must take care not to undermine their effectiveness as the National Assembly's ultimate mechanism for enforcing accountability under section 194 of the Constitution; and

19.2 In considering the conduct and motives of the Speaker and the DA and its MPs, the Court must bear in mind that these legislators are performing their constitutionally-mandated responsibility of ensuring that Ms Mkhwebane is accountable in the office of the Public Protector and, further, that the dignity and effectiveness of the Office of the Public Protector is protected. This too is a constitutional duty imposed on the National Assembly, as an organ of state, under section 181(3) of the Constitution.[18]

***Separation of powers***

20 Third, in attacking the Rules of the National Assembly and the conduct of the National Assembly, the Speaker and the DA's MPs, Ms Mkhwebane fails to have regard to the separation of powers. In considering both the Rules and the conduct of members of the Legislature, due deference is required to ensure that the Court does not unduly trespass on the terrain of the

[18] Section 181(3) provides, with reference to all Chapter Nine institutions: "(3) 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."

Legislature and inhibit it in the performance of its constitutional function under section 194.

21 The potential for separation of powers harm is acute and palpable in the relief Ms Mkhwebane seeks, given the nature and importance of the constitutional function at issue. As the Speaker explained in answer:

> *"The provisions of section 194 of the Constitution and the New Rules are part of a constitutional scheme that gives effect to <u>one of the NA's primary constitutional responsibilities</u>, namely the responsibility to maintain oversight of all organs of state (section 55(2)(b)(ii) of the Constitution) and to ensure the PP (an organ of state) is and remains accountable to the NA (compare section 181(5) of the Constitution … [P]roceedings for the impeachment of the PP are <u>the ultimate mechanism</u> for ensuring accountability of the PP to the NA."*[19]

22 It must be recalled that the National Assembly is elected "to represent the people and to ensure government by the people under the Constitution", the interests served and advanced by the exercise of its powers must be the collective interests of the people it represents. The powers of the Assembly are, and must primarily be, exercised to promote only the people's interests and the institutional objectives of the Assembly.[20]

23 The separation of powers concern is heightened by the fact that the challenge is directed at the National Assembly's internal Rules, which it is constitutionally empowered to develop, to control its own internal arrangements, processes and procedures.

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[19] Speaker's AA v 3 pp 287-288 para 227, emphasis added.

[20] Section 42(3) of the Constitution provides:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

See also *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC), majority judgment per Jafta J at para 141.

24 Section 57(1)(a) and (b) and (2)(a) and (b) of the Constitution provides in relevant part:

> *"(1) The National Assembly may —*
>
> *(a) determine and control its internal arrangements, proceedings and procedures; and*
>
> *(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.*
>
> *(2) The rules and orders of the National Assembly must provide for—*
>
> *(a) the establishment, composition, powers, functions, procedures and duration of its committees;*
>
> *(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy; . . . "*

25 The importance of respect for Parliament's autonomy to regulate its own affairs was recognised in *Doctors for Life*, albeit in a different context.[21] Writing for the majority, Ngcobo J held:

> *"Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference. To this extent, it has the power to "determine and control its internal arrangements, proceedings and procedures". The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers."*[22]

26 The effect of the separation of powers principle was described by Ngcobo J as follows:

> *"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The*

[21] *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at paras 36-37.

[22] Id at para 36.

> *structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."*[23]

27 The result of the separation of powers doctrine is that the court must respect the National Assembly's democratic mandate and responsibilities and its authority to determine its own rules and processes. Absent a patent illegality or abuse of its powers, the court will not intervene.

***Presumption that powers will not be abused***

28 Fourth, Ms Mkhwebane repeatedly makes the error of presuming that the powers vested under the Rules – in the Speaker, the independent panel, the section 194 committee members, the MPs – will be abused. But this is an impermissible basis to challenge the Rules.

29 Courts will not assume that discretionary statutory or delegated powers will be abused.[24] Courts will also assume that powers are exercised fairly. In *New Clicks*, the Constitutional Court held:[25]

> *"…(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) …"*

[23] Id at para 37.

[24] See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 222.

[25] *Minister of Health v New Clicks SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC) para 152, quoting *Doody v Secretary of State for the Home Department and other appeals* [1993] 3 All ER 92 (HL) at 106D-H:

30 Where officials are shown to have abused their powers, the law provides remedies. That possibility has no bearing however on the interpretation of the power, or the determination of its legal validity. The Constitutional Court has repeatedly made this point.

30.1 In *Hoërskool Ermelo*, it stated:

> *"The possibility that a statutory power may be abused – which is an ever-attendant risk – cannot determine the construction of the ambit of the power, especially since the law affords adequate remedies for official abuse of power. Moreover, in this instance, the statute requires the exercise of the power to be reasonable. The remedy is thus to correct the abuse, and not to attenuate the power through strained construction."*[26]

30.2 In *Van Rooyen*, it held:

> *"Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute."*[27]

31 In assessing the constitutional validity of the Rules, the court must, therefore, apply the presumption that the Speaker, the independent panel, the section 194 committee and MPs in the National Assembly will exercise their discretion and powers fairly, at different stages of the section 194 removal process, and will not abuse their powers.

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[26] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 72.

[27] *Van Rooyen v The State (General Council of the Bar of South Africa Intervening*) 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) para 37.

***PAJA does not apply***

32 Fifth, Ms Mkhwebane relies on both the Promotion of Administrative Action Act 3 of 2000 (**"PAJA"**) and the principle of legality in this review. However Ms Mkhwebane's reliance on PAJA is misplaced.

32.1 Both the decision of the National Assembly to adopt the Rules and the Speaker's conduct in terms of those rules constitute the exercise of the legislative functions of Parliament under sections 57(1) and 194 of the Constitution. The performance of such functions are expressly excluded in the definition of 'administrative action' in section 1 of PAJA, with the result that PAJA does not apply.

32.2 Neither the adoption of the Rules nor the Speaker's preliminary decision to accept the DA's motion constitute acts that have a direct, external legal effect as required for reviewable administrative action.

33 The result is that the grounds of review pleaded under the rubric of procedural fairness and unreasonableness do not apply.

***Summary***

34 In considering Ms Mkhwebane's constitutional challenge to the Rules, the court must have regard to the following principles:

34.1 First, as a form of delegated legislation, the Rules must be interpreted consistently with the Constitution, where it is reasonably possible to do so.

34.2 Second, the constitutional principle of accountability must not be undermined or rendered ineffective.

34.3 Third, the separation of powers doctrine requires the court to assume an appropriate degree of deference in reviewing both the National Assembly's Rules and the Speaker's and MPs' conduct. Absent a patent illegality or abuse of its powers, the court will not intervene.

34.4 Fourth, it must be presumed that the powers conferred under the Rules will be exercised fairly and will not be abused.

34.5 Fifth, PAJA is not applicable. The PAJA-based review grounds of procedural unfairness and unreasonableness do not apply.

35 Once these principles are applied, it is clear that there is little left of Ms Mkhwebane's grounds of complaint. We now turn to deal with those grounds.

## THE GROUNDS OF REVIEW

## PROCEDURAL FAIRNESS OR IRRATIONALITY

### *No prior notice and hearing before acceptance of DA's motion*

36 Ms Mkhwebane contends that the Rules are invalid because they do not provide for her to be formally notified by the Speaker of the complaint when the motion to commence section 194 proceedings is made and before the preliminary assessment of the complaint is done by the independent panel. She contends that the Speaker acted unfairly or irrationally by failing to give her prior notice of the DA's complaint and an opportunity to 'give her side of the story' before deciding whether the DA's motion was "in order" under rule 129T. [28]

37 There is no merit in this complaint, as Ms Mkhwebane's rights are not materially affected on the mere initiation of the section 194 enquiry and referral to an independent panel (under rules 129R and 129T). The scheme of rule 129 indicates that the Speaker's acceptance of the motion is only a preliminary step to facilitate the investigation of the alleged grounds of removal. The process of enquiry to be conducted upon the Speaker's acceptance and referral of the motion under rule 129 implies that no finding or decision has yet been made that could adversely affect Ms Mkhwebane's rights.

[28] FA v 1 pp 52-56, paras 97-106; Supp FA v 10 pp 951-952, paras 83 -88; and Applicant's heads of argument at paras 79-93.

38 Ms Mkhwebane will have every opportunity to present her case fully before the independent panel and, if it is referred to a committee, that committee being the appropriate body mandated by the Constitution to investigate motions of removal from office.

39 Ms Mkhwebane's right to a fair hearing is amply protected under the Rules before any decision is taken on removal.

39.1 Under rule 129X, the independent panel responsible for conducting a preliminary enquiry into the charges must give her notice and an opportunity to respond to the charges. It provides that the panel –

> *"(ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;*
>
> *(iii) must provide the holder of the public office with a reasonable opportunity to respond in writing to all relevant allegations against him or her."*

39.2 Under rule 129AD, if the National Assembly approves a recommendation by the independent panel to proceed with a section 194 enquiry, the committee appointed to conduct the enquiry "*must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe*", and

> *"must afford the holder of the public office 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."*

40 There is an overwhelming weight of authority that there is no right to a 'hearing before a hearing', or a hearing before a complaint is lodged and referred for investigation.

40.1 In *Langa v Hlophe*,[29] the Supreme Court of Appeal dismissed the claim by a judge accused of serious misconduct that he was entitled to be heard before the complaint was referred to the Judicial Services Commission for investigation. The Court considered the authorities on point, and found that:

> *"While a judge is obviously entitled to be heard in the course of the investigation of a complaint (as appears from the various cases and protocols referred to by the high court and referred to in the heads of argument) that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the 'trigger'), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware – whether in decided cases or in judicial protocols anywhere in the world – that obliges a complainant to invite a judge to be heard before laying the complaint."*

40.2 In *Viking Pony,*[30] the Constitutional Court held that the administrative justice requirement of procedural fairness does not arise from the mere institution of an investigation. As the Court noted, "*It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect."*

40.3 In *Competition Commission v Yara,*[31] the Supreme Court of Appeal of South Africa rejected the contention that the subject of an investigation by the Competition Commission is entitled to be heard by the Commission upon the initiation of a complaint and prior to the referral of the matter for hearing at the Competition Tribunal. It

[29] *Langa and others v Hlophe* 2009 (4) SA 382 (SCA) at para 40.

[30] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) at paras 37 to 39.

[31] *Competition Commission v Yara (SA) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA).

held that the right to a hearing is satisfied at the hearing of the Competition Tribunal, and explained:

> *"[T]he purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.*

40.4 An older case which makes the point clearly is that of *Meyer v Law Society, Transvaal*.[32] There the Court held that there is no obligation on the Law Society to afford an attorney a hearing before it applies to court for the attorney's removal from the Roll. It reasoned as follows:

> *"Where, however, it decides to apply to court for the removal from the roll of the name of a practitioner, it does not itself make any findings; it does not seek to impose any punishment; it does not decide anything more than that there is a prima facie case which it is proper should be considered by the Court. Such a decision does not affect the rights of the practitioner and consequently the rules of natural justice have no application."*

40.5 In *Meyer v Prokureursorde van Transvaal*[33] the full bench endorsed the High Court's approach in *Meyer v Law Society, Transvaal* and held that where a functionary merely determines that there is a *prima facie* case for a matter to be referred to another tribunal or body, there is no right to be heard.

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[32] *Meyer v Law Society, Transvaal* 1978 (2) SA 209 (T) at 214F-H.

[33] *Meyer v Prokureursorde van Transvaal* 1979 (1) SA 842 (T) at 855G-856E.

40.6 The English courts have likewise dismissed claims for '*a hearing before a hearing*'. In an oft-quoted dictum, the House of Lords stated in *Wiseman v Borneman*[34] that:

> *"Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no-one supposes that . . . he should first seek the comments of the accused or the defendant on the material before him. . . . Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him."*

40.7 In *Moran v Lloyd's*[35] which concerned disciplinary proceedings by the Committee of Lloyd's against one of its members (and which was cited with approval in *Langa v Hlophe*), Lord Denning dismissed various challenges by Moran based on the rules of natural justice against the preliminary enquiry into his dealings. Lord Denning cautioned courts against permitting the abuse of the principle of natural of justice:

> *"Today we have to deal with a modern phenomenon. We often find that a man (who fears the worst) turns around and accuses those – who hold the preliminary inquiry – of misconduct or unfairness or bias or want of natural justices. He seeks to stop the impending charges against him. It is easy enough for him to make such an accusation. Once made, it has to be answered. . . . So he gets that which he most wants – time – time to make his dispositions – time to put his money in a safe place – time to head off the day when he has to meet the charge, and who knows? If he can stop the preliminary inquiry in its tracks, it may never start up again.*
>
> *To my mind the law should not permit any such tactics. They should be stopped at the outset. It is no good for the tactician to appeal to 'rules of natural justice'. They have no application to a preliminary inquiry of this kind. The inquiry is made with a view to seeing whether there is a charge to be made. It does not decide anything in the least. It does not do anything which adversely affects the man concerned or*

[34] *Wiseman and another v Borneman and others* [1971] AC 297 (HL).

[35] *Moran v Lloyd's (A Statutory Body)* [1981] 1 Lloyd's Reports 423 (CA) at 427.

*prejudices him in any way. If there is, there will be a hearing, in which an impartial body will look into the rights and wrongs of the case. In all such cases, all that is necessary is that those who are holding the preliminary inquiry should be honest men – acting in good faith – doing their best to come to the rights decision."*

41 Under rule 129, however, Ms Mkhwebane is indeed afforded an opportunity to make representations *"at the preliminary stage"*, in the form of written representations to the independent panel responsible for assessing whether there is *prima facie* evidence to support the motion. Under rule 129X, the independent panel–

> *"(ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;*
>
> *(iii) must provide the holder of the public office with a reasonable opportunity to respond in writing to all relevant allegations against him or her."*

42 Rule 129 thus goes beyond what the rules of natural justice require.

***Failure to furnish reasons***

43 Ms Mkhwebane's complaint that there is inadequate provision for reasons in the Rules, and that the Speaker acted unlawfully in not furnishing her with reasons for accepting the DA's motion, is unfounded.[36]

43.1 It is doubtful that there is any duty to give reasons arises before a final decision has been taken that has a direct, external legal effect.

43.2 The Rules do, appropriately, provide for reasons in respect of the section 194 committee's ultimate findings and recommendations to the National Assembly. This is expressly required under rules

[36] FA v 1 p 74, para 158; Supp FA v 10 pp 951-952, para 87; Applicant's heads of argument at paras 76-78.

129AE and 129AF. Rule 129E further specifies that "*when the committee reports, all views, including minority views, expressed in the committee must be included in its report".*

43.3 Ms Mkhwebane's reliance on *NERSA*[37] in her heads of argument is misleading and does not take the matter any further. That case did not find (as Ms Mkhwebane suggests) that "a fair hearing must be observed in all the steps [in a multi-stage process], failing which such a composite process will be found to be procedurally irrational".[38] In the passage relied on by Ms Mkhwebane (at paragraph 64 of the judgment), the Constitutional Court merely confirmed the uncontroversial principle that, in assessing whether a procedure is rational, the process followed must be considered as a whole.[39]

44 Even assuming (for the sake of argument) that there was a duty in law to provide reasons in relation to the initial decision, then it existed without the need for the Rules to say so. In that event, Ms Mkhwebane's remedy was to compel the Speaker to provide the reasons. Having failed to do so, she cannot now contend that the Rules are invalid or that the decision was invalid.[40]

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[37] *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) at para 64.

[38] Applicant's heads at para 73.

[39] The Court said:

> "[64] Rationality is concerned with one question: do the means justify the ends? Democratic Alliance developed the test for rationality by explaining that an absence of a sufficient link can arise for procedural reasons. This is not a new or different type of irrationality, but rather a way of evincing a broken or missing link between the means and the ends. The means chosen by an administrator include everything done (or not done) in the process of making that decision."

[40] Cf: *Road Accident Fund v Duma* 2013 (6) SA 9 (SCA) at paras 21-26

45 In any event, as the Speaker has repeatedly pointed out, Ms Mkhwebane was advised of the reasons for the Speaker's decisions to accept the DA's initial motion of 6 December 2019 (since withdrawn) and the subsequent motion of 21 February 2020 in correspondence and in the Speaker's answering affidavit filed in Part A of these proceedings.[41]

46 The complaint about the absence of reasons is therefore plainly a contrived and makeweight point.

***Denial of full legal representation***

47 Ms Mkhwebane's contention that there is inadequate provision for legal representation is likewise unfounded.[42]

48 Procedural fairness does not require "full legal representation" at every stage of the removal process, as contended by Ms Mkhwebane.[43]

49 As Nkabinde J recognised in *Legal Aid South Africa v Magidiwana*,[44] and as the Supreme Court of Appeal has repeatedly held, "*our courts have consistently denied any entitlement to legal representation as of right in fora other than courts of law*".[45]

[41] See Speaker's AA v 3, pp 233-234 para 103 read with TRM46, pp 502-503; and Speaker's AA v 3 pp 242-246, paras 125-127.

[42] FA v 1 pp 57-58, paras 110-113; Supp FA v 10 pp 952-953, paras 89-91; Applicant's heads of argument at paras 94-105.

[43] Applicant's heads of argument para 103.

[44] *Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC)

[45] At para 75, citing *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* [2014] ZASCA 151; 2015 (1) SA 106 (SCA) para 26; *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* [2013] ZASCA 118; 2014 (2) SA 321(SCA) para 19; and *Hamata* at para 5.

50 Should the complaint be referred to a section 194 committee, then Ms Mkhwebane will be afforded a full opportunity to be heard by the committee, with the assistance of a legal representative. Rule 129AD provides that if the National Assembly approves a recommendation by the panel to proceed with a section 194 enquiry, the committee appointed to conduct the enquiry "*must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe*", and–

> *"must afford the holder of the public office 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."*

51 The Speaker has stated in answer that her understanding of the effect of Rule 129AD is that the legal representative will not be entitled to "*speak for*" Ms Mkhwebane, as this would undermine the principle of accountability to the National Assembly.

52 It might be that, properly interpreted, rule 129AD affords Ms Mkhwebane the right to be entitled to be assisted by a legal representative during the committee proceedings, including by examining or cross-examining witnesses on behalf of Ms Mkhwebane.

52.1 On that interpretation, the only effect of the Rule is that the legal representative may not "speak for" Ms Mkhwebane in responding to the committee's questions put to her.[46]

52.2 This interpretation would accord with the language and purpose of the rule, and give effect to all the relevant constitutional

[46] Speaker's AA v 3 p 269, para 179. See also Speaker's Supp AA v 12 pp 1143, para 66.

imperatives. But it would do so in a manner that gives effect to sections 181(5) and 194 of the Constitution that require Ms Mkhwebane to be accountable to the National Assembly. As the Speaker asserts, the accountability of public office-bearers necessarily implies that they are personally accountable to the National Assembly, and must therefore personally answer charges against them before the section 194 committee.

53 But whether that is the correct interpretation of the Rule or not, what is clear is that the challenge to the Rule cannot succeed.

53.1 Ms Mkhwebane's reliance on *Hamata* to support her complaint of impermissible "inflexibility" in the rule, on provision for legal representation, is incorrect.[47] *Hamata* concerned a disciplinary committee's holding that legal representation was not permitted at all under its rules, and is by no means analogous. In this case, the rule expressly provides for the assistance of a legal representative, subject only to the requirement that the legal practitioner may not speak for the public office-holder in the committee's proceedings. Notably, *Hamata* confirmed that there is no absolute right to full legal representation, even in administrative disciplinary proceedings (which the section 194 enquiry is not).

53.2 The analogy sought to be drawn between Ms Mkhwebane and a judicial officer is neither apt nor relevant to the determination of the validity of Rule 129. The mere fact that Rule 129 does not contain

[47] Applicant's heads of argument at paras 101-103.

identical provisions to those governing the removal of judicial officers in proceedings before the Judicial Service Commission does not render Rule 129 invalid. And there are fundamental structural differences between the Public Protector and judicial officers. To name just two: the Public Protector is accountable to the National Assembly, while judicial officers are not; and the performance of the functions and exercise of power by the Public Protector is subject to judicial review, which is not the case for judicial officers.

54 Finally, and in any event, Ms Mkhwebane's recognition in her supplementary founding affidavit that "excision" of the proviso in Rule 129 that "*the legal practitioner or other expert may not participate in the committee*" is feasible,[48] means that this ground of review can never be fatal to the Rules as a whole nor impede the National Assembly in the performance of its functions under section 194.

***Recusal and protection from bias and conflicts of interest***

55 Ms Mkhwebane contends that "various people who are either identified by name, designation or category" ought to be disqualified from the section 194 process, and that Rule 129 is unconstitutional for lack of "safeguards against an unfair removal tainted by bias".[49]

[48] Supp FA v 10 p 946 para 67.

[49] Applicant's heads of argument para 106.

56 Ms Mkhwebane's challenge against rule 129 for alleged inadequate safeguards against bias or conflict of interest is framed as follows in the founding affidavit (paragraph 129):

> *"Any rules for removal directed at Chapter 9 institutions which fail to make provision for filtering malicious and/or dishonest 'complaints' by conflicted [and] compromised individuals or any other abuse-of-process manoeuvres are not worth the paper they are written on and ought to be set aside as irrational on that ground alone. It is a fatal omission which must be cured by the courts in the spirit of our constitutional system of checks and balances."*

57 This attack is unsustainable for at least three reasons.

58 First, the challenge ignores the legal presumption that officials exercising discretionary powers must be presumed to exercise their powers lawfully.

58.1 A corollary of the presumption is that courts will not assume that discretionary statutory powers will be abused or exercised unfairly.[50] Yet that is what Ms Mkhwebane asks the court to do in this attack on rule 129.

58.2 Where officials are shown to have abused their powers, the law provides remedies. That possibility has no bearing however on the interpretation and validity of the rule. The Constitutional Court has repeatedly made this point, in the cases cited above.

59 Second, Ms Mkhwebane fails to appreciate that there are built-in checks against conflicts and abuses of discretion in rule 129. Specifically:

[50] See the authorities in Part II of these submissions in support of these propositions.

59.1 The assessment of whether there is prima facie evidence that supports the charges is vested, in the first instance, with an independent panel. The independence of the panel is itself an important check, as it ensures that non-political actors assess the merits of the motion.

59.2 If the independent panel recommends, and National Assembly approves, referral to a section 194 enquiry, then a committee of the National Assembly must be convened to assess the charges.

59.3 Ultimately, it is for the National Assembly to decide whether to accept the recommendations of the committee. The removal power is "institutional" and vests within the exclusive jurisdiction of the National Assembly as a whole.[51] A supporting vote of two-thirds of the National Assembly is required for the removal of the Public Protector.

59.4 The multi-stage removal process, coupled with the vesting of the ultimate decision in the entire National Assembly and the high threshold for removal, suffices to ensure overall fairness in the removal process.

60 Third, should a conflict of interest or reasonable apprehension of bias in fact arise in respect of any members of the independent panel or the section 194 committee, nothing in rule 129 would prevent Ms Mkhwebane from

[51] This is the language the Constitutional Court used to describe the removal power under section 89 of the Constitution (for removal of the President) in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) at para 178-181.

addressing her concerns to the Speaker at the appropriate time, or, if necessary having recourse to the court to resolve the matter.

61 Ms Mkhwebane is wrong to submit, at paragraph 111 of her heads of argument, that –

> *"The task of this Honourable Court on this leg is therefore to analyse those utterances which are admitted and adjudge whether or not they amount to prejudging the central issue of the Public Protector's removal or fitness for office… If they do, then the complaint of bias and/or unfairness is prima facie valid".*

62 Such an analysis is not required for the Court to decide the relief in the amended notice of motion, and nor is it appropriate.

62.1 Ms Mkhwebane's case is directed at reviewing the Rules and the Speaker's decision to accept the motion. It does not call for, nor require, the Court to decide whether particular Members of Parliament are biased or conflicted such that they must "be recused" from the removal process.

62.2 Ms Mkhwebane cannot seek such findings of bias or conflict of interest against any particular MP, since the allegations are pleaded in the vaguest terms, and at the highest level of generality. No particular persons are cited, and no proper factual basis for any alleged bias or conflict on the part of any particular members is pleaded.

62.3 The test for bias or partiality is objective and the onus of establishing it rests on the alleging party. The question is whether "*a reasonable, objective and informed person would <u>on the correct</u>*

*facts reasonably apprehend*" bias or partiality.[52] The applicant has failed to put up any facts – only vague and hypothetical assertions – of (actual or perceived) bias or partiality on the part of MPs.

62.4 The result is that the Court is invited to find bias or a conflict of interest in vacuo, and without any persons alleged to have conflicts of interest having been joined and afforded the opportunity to answer the allegation. This is patently impermissible.

62.5 In these circumstances, it would not only be unfair on the (unspecified) conflicted parties, but also premature and unnecessary for the Court to determine this issue.

63 The only basis that is pleaded for the "recusal" of the whole of the DA from the removal proceedings is the claim that, because Ms Mkhwebane has sued the DA and two of its members for defamation, the DA is automatically disqualified from participating in the removal process.[53] The expedience and intention of this argument is obvious, and it cannot be accepted.

63.1 The defamation proceedings that Ms Mkhwebane has instituted against the DA has nothing to do with the grounds for her removal and are therefore irrelevant to the removal proceedings.

63.2 Ms Mkhwebane cannot be entitled to effectively preclude members of the National Assembly from doing their jobs, and to determine who may or may not be involved in the removal process, by the

[52] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) par 48.

[53] Supp FA v 10 pp 958-959, paras 102-106.

institution of litigation against them. That would have absurd consequences: it would enable Ms Mkhwebane (or any other office holder facing removal proceedings) to exploit the institution of legal proceedings to avoid accountability.

63.3 The removal process is designed to involve the entire National Assembly, including the persons and parties that institute motions, and they – like all members of the National Assembly – are constitutionally entitled and obliged to perform their democratic mandate and functions in holding Chapter 9 office-bearers to account. The multi-stage removal process, coupled with the involvement of the entire National Assembly and the high threshold for removal, suffices to ensure overall fairness in the removal process.

64 Ms Mkhwebane also invokes Rule 88 and Rule 89 to contend that the DA's members and other members of parliament have "*ipso facto breached their duties*" under these rules by reflecting on the import of the court judgments against Ms Mkhwebane.[54]

65 How this advances Ms Mkhwebane's challenge to the Rules and the Speaker's acceptance of the DA's motion (as opposed to the vague allegations of bias and conflict of interest that are not properly before the court) is entirely unclear.

[54] Applicant's heads of argument at paras 112-117.

66 In any event, we make the following submissions on the application of these rules:

66.1 Rule 88 has been amended precisely to allow for MPs to reflect on the competence or integrity of a holder of a Chapter Nine institution. This is clear from the amendment to rule 88 that follows rule 129.[55]

66.2 Rule 89 must be read in light of the proper ambit of the *sub judice* rule, as it is plainly intended to give effect to that rule.[56] (We address the *sub judice* rule at paragraph 77.3 below.)

66.3 Under rule 4 of the Rules of the National Assembly, the Speaker is vested with the power to suspend or supplement rules for a particular purpose or period. Although the DA contends this is not required, it would remain open to the Speaker to suspend rule 89, should the Speaker consider this necessary for the full and proper consideration of the DA's removal motion and the National Assembly's performance of its functions under section 194 of the Constitution. Given the unprecedented nature of the section 194 removal process, the Speaker might also exercise her powers under rule 6 of the National Assembly Rules, to give a ruling or frame a rule in respect of any eventuality for which the rules or orders of the House do not provide.[57]

[55] See Annexure TRM37, v 5, p 480.

[56] The Rule is headed '*Matters sub judice'* and reads: "*No member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending*".

[57] The Rules of the National Assembly (9 ed.), are available on the National Assembly's website: https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf

**ALLEGED RETROSPECTIVITY**

67 Ms Mkhwebane's contention that subjecting her to the Rules would offend the principle against retrospectivity is fundamentally misconstrued,[58] because rule 129 does not introduce any new legal standards or consequences. The question of retrospectivity does not even arise.

68 Rule 129 simply operationalises and gives effect to section 194 of the Constitution. This is readily apparent from its terms: rule 129 contains the same grounds of removal specified in section 194(1) of the Constitution – of misconduct, incompetence, and incapacity.[59] We refer to our submissions under the heading 'Section 194 and the grounds of removal under rule 129', below at paragraph 79*ff*.

69 Ms Mkhwebane's submission would also have the absurd effect of rendering her immune from accountability to the National Assembly for any misconduct committed before the Rules were promulgated. That would be a serious affront to the rule of law and could never be correct. As Ms Mazzone observed in answer, it is concerning that Ms Mkhwebane has seen fit to advance this argument.[60]

[58] FA v 1 p 60 para 120; Supp FA v 10 pp 953-955 paras 92-95; Applicants heads of argument paras 120-132.

[59] The rule is Annexure TRM37, v 5, pp 475-480. See esp. rules 129R and 129X at pp 477-478.

[60] DA's AA v 8 p 716 para 48.

**THE 'DECISIONAL AND INSTITUTIONAL INDEPENDENCE' OF THE PUBLIC PROTECTOR**

70 Ms Mkhwebane's complaint on this ground is not directed at the provisions of the Rules, but is premised, rather, on the substance of the DA's motion – in particular, its reference to findings of Court made against Ms Mkhwebane.

71 The court will look in vain for any explanation – in the founding papers or Applicant's heads of argument – for how the Rules offend the decisional and institutional independence of the Public Protector.[61] This ground does not, therefore, found an attack on the Rules.

72 Ms Mkhwebane's contention that the DA's motion infringes the 'decisional and institutional independence' of the Public Protector is an unacceptable attempt to avoid accountability.

73 The Constitutional Court made clear in *Glenister*, that independence does not, and cannot, mean "*insulation from political accountability"*.[62] Yet that is exactly what Ms Mkhwebane argues under this heading. For instance, the following is submitted at paragraph 134 of Ms Mkhwebane's heads:

> *"We submit that the Applicant ought not to be liable to be impeached solely on account of things done in the course of investigations or the merits and contents of her reports".*

74 Ms Mkhwebane (like any other Chapter Nine office-bearer) cannot be rendered immune from accountability to the National Assembly by virtue of the performance of her functions. This is patently absurd, as they are

[61] See FA paras 131-135, p 63-65; and Applicant's heads of argument, paras 133-152.

[62] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (Glenister II) paras 215-216

accountable to the National Assembly for the very performance of their functions.

75 Ms Mkhwebane submits further that "remarks of a judge are the opinions of that judge", and that "therefore the judge's remarks on the Applicant's findings cannot validly be used to determine the competence and/or misconduct of the Applicant".[63] This contention is incorrect for at least two reasons.

75.1 First, the judge's remarks relied upon by the DA in its motion for removal are not mere "opinions" of judges, but are findings of the court that constitute the *ratio decidendi*. They constituted the basis for setting aside the findings and remedial action of Ms Mkhwebane and the punitive and personal costs orders made against her. They are not mere *"obiter dicta"* as Ms Mkhwebane suggests.

75.2 Second and in any event, the section 194 committee has been placed in possession of not just the judgments but also the evidence which served before the judges concerned. The committee is thus able, should it be necessary (which is not conceded) to engage in its own fact-finding process, as the provisions of rule 129 make clear.

76 The removal enquiry serves a distinct purpose from judicial review of the Public Protector's Report. The removal process is concerned with interrogating Ms Mkhwebane's fitness to hold the office of the Public Protector, and determining whether she must be removed on grounds of

[63] Applicant's heads of argument para 135. See also FA v 1 p 70 para 146.

misconduct or incompetence. The fact that this entails examining Ms Mkhwebane's reports and having regard to court findings in respect of those reports does not alter the distinct nature and purpose of the enquiry. There is, therefore, no merit in Ms Mkhwebane's contention that the DA seeks to *"substitute the court processes with the parliamentary process"*.[64]

77 There is also no merit in Ms Mkhwebane's further contention that what the DA attempts to do, in submitting its motion for removal, is "*to meddle in individual cases or pending court cases under the guise of holding the Public Protector to account*".[65]

77.1 This contention is categorically denied by the DA in answer. The DA has stated repeatedly that it has acted out of concern to restore the effectiveness and integrity of the office of the Public Protector and to ensure that Ms Mkhwebane accounts for her apparent failures to perform her duties and functions appropriately.[66]

77.2 The determination by MPs of the DA's motion will not prejudice or interfere with the court's functions in determining reviews of the Public Protector's reports or in subsequent appeals. The task of MPs under section 194 is different from that the courts and can have no bearing on the decisions that the courts make on the records before them. The court is required to determine the review (or the case of an appeal, the correctness of the order appealed against) on the basis of the record that is before it and the argument

[64] Applicant's heads of argument, para 138.

[65] Applicant's heads of argument, para 135.

[66] DA's AA v 8 p 695 para 17; DA's Supp AA v 12, p 1178 para 8.1 and p 1186 para 25.2.

presented to it. Any reliance on, or discussion of, a court judgment by MPs during the removal process would not prejudice the court's ability to exercise this function.

77.3 For the same reason, the DA's motion does not contravene the *sub judice* rule. The *sub judice* rule does not operate as a total bar against any discussion of a pending court case, as Ms Mkhwebane seems to believe.[67] The *sub judice* rule prohibits public statements or conduct that present a "real risk of demonstrable and substantial prejudice" to the administration of justice (as a form of contempt of court). The proper ambit and effect of the *sub judice* rule was addressed by the Supreme Court of Appeal decision in *Midi Television.* [68]

77.4 The DA's motion does not present any "real risk of demonstrable and substantial prejudice" to the administration of justice.

78 The DA's motion also does not interfere with the functions of the office of the Public Protector or purport to influence any investigation currently underway by the Public Protector as alleged.[69]

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[67] See FA v 1 pp 26 and 29, paras 35 and 42.

[68] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at paras 16 and 19.

For a comparative discussion of the sub judice rule and its purpose, see: Lorne Sossin & Valerie Crystal, A Comment on No Comment: The Sub Judice Rule and the Accountability of Public Officials in the 21st Century, 36 Dalhousie L.J. 535 (2013). See p 564, where the authors observe –

> "The review of the jurisprudence provided above reveals a concern not with publicity about a case or the underlying dispute but with prejudicial publicity – that is, publicity which could reasonably undermine the impartiality or integrity of the judicial process. Avoiding prejudice to a judicial process lies at the heart of the sub judice rule. Therefore, to the extent that the sub judice rule does not in fact protect the integrity of the administration of justice, the justification for the existence of the rule may be undermined."

[69] Applicant's heads of argument at para 142.

78.1 The DA's motion is premised on the past conduct of Ms Mkhwebane in investigations and reports that have been finalised and her conduct in previous litigation.

78.2 The consideration by MPs of judgments that are critical of the conduct of Ms Mkhwebane does not tarnish the dignity or effectiveness of the office of Public Protector. It is a reasonable, and indeed necessary, exercise of the National Assembly's oversight function. It is directed at *protecting or restoring* the dignity and effectiveness of the Public Protector's office, in accordance with section 181(3) of the Constitution.

78.3 Were MPs simply to ignore court judgments that make serious findings of impropriety or incompetence on the part of a Chapter 9 office-holder, they would be remiss in their constitutional duties. South Africa's constitutional democracy would be severely weakened if such an essential dialogue between the courts and Parliament were not permitted.

**SECTION 194 AND THE GROUNDS OF REMOVAL UNDER RULE 129**

79 Related to the retrospectivity argument is Ms Mkhwebane's contention that rule 129 conflicts with section 194, because it contains definitions of the grounds of misconduct that do not appear in section 194.[70] But this is incorrect.

[70] FA v 1 pp 66-67, paras 137-141; Supp FA v 10 pp 960-961, paras 107-110; Applicant's heads of argument, paras 153-161.

80 The Rules operate like any subsidiary legislation to provide the detail required to operationalise the standards set in the governing or empowering legislation (in this instance, section 194 of the Constitution), they do not offend those standards.

81 The introduction of the qualifiers of "intention" and "gross negligence" in defining misconduct does not offend section 194, as they do not lower the standard set for removal in section 194. The Rules can, and must, be applied consistently with section 194 of the Constitution.

82 Ms Mkhwebane also contends that the provision in the rule of "temporary incapacity" constitutes a new ground of removal.[71]

82.1 No such allegation is made in the founding affidavit or supplementary founding affidavit, and Ms Mkhwebane cannot be permitted to raise it for the first time in argument.

82.2 In addition, there is no allegation in the DA's motion for removal that Ms Mkhwebane suffers from "temporary incapacity". There is therefore simply no need for the Court to deal with or pronounce on the issue.[72]

82.3 Lastly, and in any event, the contention is premised on a misrepresentation of the definition of "incapacity" in the rule. The definition reads:

*"Incapacity includes –*

[71] Applicant's heads of argument at para 159.

[72] See: *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at paras 84-87

*(a) a permanent or temporary condition that impairs a holder of a public office's ability to perform his or her work; and*

*(b) any legal impediment to employment.*

82.4 The definition does not distinguish between permanent and temporary incapacity, but provides that where a public office-holder becomes unable to perform his or her work – regardless of whether the cause for the incapacity is temporary or permanent – the office-bearer may be removed. This is entirely consistent with the provision in section 194 of the Constitution of removal for incapacity.

83 There is, accordingly, no merit in this complaint.[73]

84 We fail to see the relevance of Ms Mkhwebane's final submission under this ground of review – pertaining to the alleged statistical evidence of her performance in office.[74] It is for the National Assembly, not the Court, to assess Ms Mkhwebane's performance and competence. However, Ms Mkhwebane's contention that the statistics of the Public Protector's office *"stand uncontested"*, and that "*there is therefore no independent basis to show a prima facie case of 'incompetence'"*, is wrong. We refer the Court to paragraph 22 of the DA's answering affidavit, at pages 699 to 703.

[73] The applicant's further contention in argument under this heading, that the merits of the Public Protector's reports cannot be relied upon to find that she has committed a misconduct and/or that she is incompetent is addressed above under the heading 'The decisional and institutional independence of the Public Protector'.

[74] Applicant's heads at paras 166 to 167.

**SEPARATION OF POWERS / *ULTRA VIRES* (PROVISION FOR A JUDGE ON THE INDEPENDENT PANEL)**

85 Ms Mkhwebane argues that the provision in rule 129V for the involvement of a judge on the independent panel violates the separation of powers.[75] This argument is clearly wrong.

86 There is no breach of separation of powers if the legislature elects to appoint a judge to assist it in the performance of its functions. This is no different from a judge being appointed by the President to assist in the conduct of a commission of enquiry. Ms Mkhwebane never explains why the position ought to be different for the Legislature.[76]

87 Ms Mkhwebane's reliance on *Heath*[77] does not assist.[78] No absolute prohibition on the performance by judges of non-judicial functions of the sort contended for by Ms Mkhwebane, was endorsed in *Heath.* To the contrary, in *Heath*, the Constitutional Court accepted that a non-exhaustive list of factors was relevant to determining the permissibility of the assignment of non-judicial functions to a judge; and the Court expressly declined to lay down any rigid test.[79]

[75] FA v 1 pp 70-71, paras 148-151; Supp FA v 10 pp 962-963 paras 112-120; Applicant's heads at paras 169-189.

[76] Cf Applicant's heads at para 183.

[77] *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77.

[78] Applicant's heads at para 188.

[79] *Heath* at para 31.

88 As the Constitutional Court emphasised in *NSPCA,*[80] its judgment in *Heath* must be read as a whole. The Court drew attention to its statements in *Heath* that –

88.1 the list of factors set out therein "*should be given a weight appropriate to the nature of the function that the Judge is required to perform and the need for that function to be performed by a person of undoubted independence and integrity*" (the Court's emphasis); and

88.2 *"Ultimately the question is one calling for a judgment to be made as to whether or not the functions that the Judge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a Judge will not be harmful to the institution of the Judiciary, or materially breach the line that has to be kept between the Judiciary and the other branches of government in order to maintain the independence of the Judiciary."*

89 The role of the independent panel does not offend any of the open list of factors identified in *Heath* as indicative of an inappropriate assumption of a non-judicial function.[81]

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[80] *NSPCA v Minister of Agriculture, Forestry and Fisheries and Others* 2013 (5) SA 571 (CC) at para 34.

[81] These were listed in *Heath* at para 29. They are whether the performance of the function –

(a) is more usual or appropriate to another branch of government;

(b) is subject to executive control or direction;

(c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;

89.1 The role of the independent panel is carefully circumscribed and limited, and it must complete its work within 30 days of its appointment.

89.2 The independent panel does not perform any partisan function. It is required to be independent.

89.3 The independent panel does not usurp the role of the section 194 committee in conducting the enquiry, nor that of the National Assembly, which must *(i)* consider the recommendation of the independent panel in deciding whether to proceed with a section 194 enquiry; and *(ii)* take the ultimate decision on removal following a section 194 enquiry. The independent panel serves only to check that there is indeed a prima facie case to answer at a section 194 enquiry, and to advise the National Assembly accordingly by making recommendations to it.[82]

89.4 Moreover, a judge is particularly well suited to perform the functions required of the members of the independent panel, given the analytical skills required in the review the documentary submissions. This was recognised in *Heath* as a particularly important factor. As the Court held, in considering the appropriateness of a judge presiding over commission of enquiry, "*the performance of such functions ordinarily calls for the qualities*

(d) creates the risk of judicial entanglement in matters of political controversy

(e) involves the judge in the process of law enforcement

(f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.

[82] See rule 129X in v 5, pp 478-479.

*and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information."*[83]

90 Moreover, the complaint about the potential for undue influence on sitting judges does not arise on the facts since a retired judge has been appointed to the independent panel.[84] There is therefore no need for this Court, in this case, to determine whether the appointment of a non-retired judge would cause any constitutional difficulty.[85]

**DOUBLE JEOPARDY**

91 The complaint of double jeopardy is totally misdirected.[86] The nature and purpose of the section 194 enquiry is manifestly different from the enquiry that is entailed when a court of law determines costs awards.

91.1 The section 194 enquiry is concerned with determining whether the holder of a public office is fit to remain in office.

91.2 The court's punitive costs awards mark the court's displeasure at the manner in which a litigant has conducted his or herself in the proceedings before it.

[83] *Heath* at para 34.

[84] Cf Applicant's heads at para 185.

[85] See: *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at paras 84-87

[86] Applicant's heads at paras190-198.

92 Further, the section 194 enquiry is not a "punitive" process, but a process of accountability and an assessment of fitness for office. The principles pertaining to double jeopardy find no application for this reason too.

**UNREASONABLENESS**

93 This ground of review is incompetent, as PAJA does not apply.

94 The allegations pleaded under its heading also take the matter no further, but are a repetition of the other grounds of review.[87]

95 We note Ms Mkhwebane seeks to rely on the right to fair labour practices under section 23 of the Constitution under this ground of review.[88] But Ms Mkhwebane cannot rely on section 23 under this ground or any other.[89] Ms Mkhwebane is not an "employee", and she is not in an "employment relationship" with the National Assembly.

95.1 The Public Protector is appointed under sections 181 and 183 of the Constitution as the holder of an independent constitutional office, which is not governed by the Labour Relations Act or the Public Service Act.

95.2 The independence of the office of the Public Protector requires that she does not stand in the position of employee to the National Assembly (or any other organ of state).

[87] Applicant's heads at paras 200-216.

[88] Applicant's heads at paras 202-216. See also Supp FA v 10 pp 942-943, paras 49-55.

[89] The applicant's reliance on section 23 is never enumerated as a separate and self-standing ground of review.

95.3 The Public Protector is nevertheless accountable to the National Assembly, which accountability is ultimately exercised through section 194 of the Constitution.

95.4 This misguided complaint is further addressed in the Speaker's supplementary answer at paragraphs 52 and 53, and we align with what is stated therein.[90]

**BAD FAITH AND IMPROPER MOTIVE ON THE PART OF THE SPEAKER**

96 Ms Mkhwebane persists in claiming *mala fides* and improper motives on the part of the Speaker. Ms Mkhwebane makes certain allegations against the Speaker and President. It is not for us to deal with this issue, save to say that there is no proper showing at all of them being compromised or biased. We refer to the Speaker's affidavits in response to these charges:

96.1 the Speaker's answering affidavit at paragraphs 202 to 209, at pp 277 to 280; and

96.2 the Speaker's supplementary answering affidavit at paragraphs 69 to 74 and 84 to 87, at pp 1145-1156.

97 We note that no argument is advanced to support any self-standing ground of review for alleged bias or improper motive on the part of the DA. Nevertheless, these factual allegations have been categorically denied by

[90] At pp 1133-1137.

the DA.[91] We address the implication of these allegations in dealing with the issue of costs.

**CONCLUSION AND COSTS**

98 No case has been made out in Part B, and the application must therefore be dismissed with costs, including the costs of two counsel.

99 The DA seeks a punitive costs order against Ms Mkhwebane for the scandalous and vexatious allegations that are repeatedly and recklessly made against it by Ms Mkhwebane, without factual foundation.

100 The language and tone used by Ms Mkhwebane in her affidavits is intemperate, accusatory and sarcastic. This is inappropriate for a public official in the office of the Public Protector, who is expected to stay impartial and above the fray – including in her dealings with political parties and their representatives. She must also maintain the dignity of her office, which is undermined by the use of such language and tone.

101 Ms Mkhwebane's founding affidavit is replete with unwarranted attacks against the DA and its representatives, and unfounded suppositions about our motives. In the founding affidavit, these include the allegation that DA representatives have made "malicious" statements against Ms Mkhwebane, knowing them to be false (paragraphs 23-24); that the DA uses "double standards" in measuring her performance (paragraph 28); that the DA has a "permanent" and "unrelenting vendetta" against Ms Mkhwebane, and "has

[91] DA's AA v 8 pp 691-692 paras 7 to 11; DA's Supp AA v 12 pp 1178-1180, 1187-1188 at paras 8.1-8.2; 9.1 and 9.2, 10.1, 11.2, 25.1 and 25.2, 29.2.

targeted her personally" (paragraphs 57 and 63); that "from the beginning the DA wanted to reduce the chapter 9 institution [of the office of the Public Protector] to advance their narrow political narrative" (paragraph 59); that the DA's concern about her fitness to hold office is "a smokescreen designed to deceive" (paragraph 65); that the DA "has consistently sought to undermine the Constitution" (paragraph 67); and that the DA is acting in "bad faith" and with "corrupt motives" in seeking Ms Mkhwebane's removal from office, in particular with the aim of "destabilising the office of the Public Protector" (paragraphs 138-140, 147, 165). These statements are vexatious and irrelevant and false, and were all categorically denied by the DA.[92]

102 Ms Mkhwebane also made sarcastic remarks and unfounded suppositions about the Speaker's conduct and motives, as well as that of members of the Portfolio Committee on Justice and Correctional Services ("the Committee"). She described comments made by Committee members as "pejorative and bigoted" (paragraph 32), and goes so far as to describe members of the Committee as "delinquent members" (paragraph 49).[93] While the Speaker and committee members must speak for themselves, these statements too are vexatious and irrelevant.

103 Further, the insinuation by Ms Mkhwebane that the DA is somehow 'in cahoots' with the Speaker was categorically denied.[94] The DA's member, Ms Mazzone was obliged to submit her motion to the Speaker. There was

[92] DA's AA v 8 pp 691-692 para 8.

[93] I refer also to paragraphs 68 to 70 of the founding affidavit, where an inappropriately sarcastic tone is used against the Speaker.

[94] DA's AA v 8 p 692 para 11.

no duty on Ms Mazzone to give notice to any other person, including Ms Mkhwebane in doing so.

104 The DA having drawn attention in its answer to the unfounded and prejudicial nature of the allegations in the founding affidavit, and requesting Ms Mkhwebane to be more restrained and responsible in the further affidavits she filed in these proceedings. The DA reserved its right to seek punitive costs.[95]

105 Despite this, the allegations were repeated in all Ms Mkhwebane's affidavits. They were repeated in –

105.1 the reply in the Part A;[96]

105.2 the supplementary founding affidavit in Part B;[97] and

105.3 the supplementary reply in Part B.[98]

106 The SCA has recently remarked on this issue:

> *"It should not be necessary to remind legal professionals who draft affidavits for their clients that they bear a responsibility for the contents of those documents and may not use them for the purpose of abusing their client's opponents. Such allegations*

[95] DA's AA v 8, pp 692, para 10.

[96] See the Public Protector's replying affidavit, v 9, pp 829-833 at paragraphs 79, 86, 87, 94 – alleging "*the DA's proven and undenied bias in this matter";* that *"the impugned Rules were a result of a hasty job by the DA and forced down the National Assembly's throat to have my removal from office expedited, probably without even disclosing their origins and authorship by the DA";* that the rules are part of *"a targeted vendetta"*; and that the DA *"only seeks to undermine the independence of my office and of the Constitution".*

[97] See the Public Protector's supplementary founding affidavit, v 10, pp 932-938, 949, 959 & 966 at paragraphs 27, 29..2, 293; 39.2; 75; 104; 133, where the Public Protector alleges "bad faith", ulterior or improper or "sinister" motives on the part of the DA, and that the DA has a "personal vendetta" against her; has made "false and malicious allegations" about her; and "has a desire to mete out punishment to her".

[98] See the Public Protector's supplementary replying affidavit, v 14, pp 1317-1318 at paras 94-95, where it is stated that the DA is *'issuing its vilification and personal attacks against me as a soft target"* and that the DA "*seeks to enlist the assistance of state organs in the pursuance of it political agenda … to do its dirty work*".

*should only be made after due consideration of their relevance and whether there is a tenable factual basis for them…."*[99]

107 It is therefore clear that the statements made would be unacceptable for any litigant.

108 But they are especially unacceptable from the holder of a constitutional office such as the Public Protector, who falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.[100]

109 Given that the DA specifically raised this issue and called for Ms Mkhwebane to show some restraint and given that she manifestly failed to do so, her repeated, prejudicial attacks on the DA in this matter warrant a punitive costs order.

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11 December 2020

[99] *Knoop and Another NNO v Gupta (Tayob Intervening)* [2020] ZASCA 163 (9 December 2020) at para 145

[100] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019) at para 155

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