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
AND OTHERS 1st to 22nd Respondents

APPLICANT'S HEADS OF ARGUMENT
IN THE PART B APPLICATION

A: INTRODUCTION

1. This is the main application for relief primarily aimed at the declaration of unconstitutionality of the impugned Rules in terms of section 172(1)(a) of the Constitution and secondarily the rationality review and setting aside of certain conduct of the Speaker of the National Assembly, as well as any other just and equitable relief in terms of section 172(1)(b) of the Constitution.

2. The impugned Rules, which are the subject matter of the declaratory relief, were adopted on 3 December 2019.

3. The impugned decisions and/or conduct of the Speaker and/or the implementation of the impugned Rules and which are the subject matter of the

review relief were commenced during January and February 2020 and that process of implementation still continues.

4. In March 2020, the applicant instituted the Part A application, the aim of which was to interdict and/or suspend the implementation of the Rules pending the final determination of their constitutionality in this main application.

5. That Part A application was dismissed. An application for leave to appeal was argued on 24 November and the application was dismissed on 30 November 2020. The applicant intends either to urgently petition the Supreme Court of Appeal in terms of section 17(2) of the Superior Courts Act 10 of 2013 and/or to apply for leave to appeal to the Constitutional Court in terms of Rule 19 of the Rules of the Constitutional Court. At least 37 grounds of appeal were identified, including the failure to make findings on material issues and/or where findings are made, the failure to give any reasons therefor. Copies of the relevant Part A judgments will be made available to this Honourable Court.

6. Should the suspension main application be successful, the applicant will also seek the interim halting of the process whilst the National Assembly attends to the corrective redrafting of the Rules, either in terms of section 172(1)(b) of the Constitution, alternatively in terms of a contextual purposive and/or generous interpretation of section 172(2)(b) of the Constitution.

7. It is trite that in respect of the Part A interim relief, the applicant had the lighter burden of establishing the substantive grounds only at a *prima facie* level. In the main application, these grounds must be established in final form. In view of that fact and to the necessary extent, these submissions are a further adaptation and development of the submissions made by us in respect of

Part A. In this part, the requirements for interdict do not feature. We also rely on a few more authorities on the merits and in respect of remedy.

8. It is crucial to point out upfront that there is a dialectical and mutually reinforcing relationship between the review grounds and the declaratory relief, which can be explained as follows:

8.1. the grounds for constitutional invalidity relate specifically to the alleged inconsistences with the Constitution and/or breaches of the Bill of Rights;

8.2. the grounds of review relate to irrationality of the relevant and identified decisions and/or conduct of the Speaker and/or the National Assembly in the implementation of the impugned Rules; and

8.3. all the grounds viewed as a whole constitute grounds for constitutional invalidity on the additional basis of, the cumulative effect of the following sections of the Constitution:

8.3.1. section 1(c);

8.3.2. section 2;

8.3.3. section 8(2);

8.3.4. section 38; and/or

8.3.5. section 172.

9. These provisions are also referred to in the section dealing with the regulatory framework below.

B: THE ISSUES

10. The issues which arise for determination are:

10.1. Whether the impugned rules ought to be declared as unconstitutional based on any one or more or all of the 12 grounds relied upon by the applicant;

10.2. Whether the relevant decisions and/or conduct of the Speaker of the National Assembly should be received and set aside for offending the principle of legality, rationality and the rule of law; and, if so:

10.3. Given the intersections referred to at paragraph 8 above, what appropriate, just and equitable remedies ought to be granted in the circumstances; and/or

10.4. the appropriate order and scale of costs, more specifically whether the Speaker should not be mulcted with a punitive and personal costs order.

11. The 12 grounds forming the backbone of this application and the relief outlined above are listed at paragraph 58 below.

12. While these heads were being prepared, an announcement was made by the Speaker that the 3-member panel, including a judge, had been appointed. The implications of this step may well necessitate the filing of supplementary heads closer to the hearing. We however hope that this will not be necessary. This will possibly depend on the outcome of the application for leave to appeal in respect of Part A.

13. Before outlining the applicable legal and regulatory framework and the grounds relied upon in support of the relief sought, it would be appropriate to outline some of the salient and relevant facts to which the said legal principles ought to be applied.

C: FACTUAL BACKGROUND AND MATRIX

14. The facts set out below are mainly common cause and undisputed and/or indisputable.

15. On 24 January 2020, the Speaker released a public media statement announcing that she had made a decision to accept the DA motion as being "*in order*" in terms of Rule 129S and was therefore inviting political parties to submit nominations for the three-person independent panel envisaged in Rules 129T, 129U and 129V thereof.[1]

16. Upon seeing such media reports, the Public Protector urgently consulted her legal representatives, and the Speaker was resultantly served with a letter of demand dated 28 January 2020,[2] in which some of the grounds for the constitutional invalidity of the rules and/or or process announced by the Speaker were pointed out and a request was made for the suspension of the process to allow for an amicable solution in line with section 41 of the Constitution, failing which a court of law would be approached. The letter also contained a demand for the reasons which accompanied the decision of the Speaker in accepting the DA motion as revealing a *prima facie* case and being otherwise compliant with the rules, the law and the Constitution.

17. On 30 January 2020, the Speaker responded by refusing to suspend the process to allow for an amicable solution, as proposed. She also failed and/or refused to furnish the requested reasons, save to state that she was of the

[1] First Respondent's Answering Affidavit pages 490-491 (Annexure TRM42).
[2] Founding Affidavit pages 154-160 (Annexure PPFA9); First Respondent's Answering Affidavit 495-501 (Annexure TRM45)

view that the motion complied "*with the form requirements of the (impugned) rules*".[3]

The institution of court proceedings

18. On 4 February 2020, the present application was accordingly instituted. The respondents who wished to oppose were given a deadline of 17 February 2020 to respond.

19. By 14 January 2020, the following responses had been received by the applicant:

19.1. A notice to oppose from the 1st respondent and the 10th respondent;

19.2. Notification of support from the 15th and 16th respondents;

19.3. Application for admission as *amici* from the two *amici*;

19.4. A notice to abide and an explanatory affidavit from the President;

19.5. Notices to abide from the ANC and the other Chapter 9 institutions cited;

19.6. There was no response from the remainder of the respondents, who must be taken to either support the application or to be indifferent thereto.

20. By 14 February, two separate requests for extension until 24 February 2020 were received from the 1st and 10th respondents respectively. Both were not granted.

[3] Founding Affidavit pages 161-162 (Annexure PPFA10)and First Respondent's Answering Affidavit 502-503 (Annexure TRM46)

21. Neither on 17 February nor on 24 February 2020 did the two opposing respondents deliver their answering affidavits.

22. It subsequently turned out that on 21 February 2020, the DA, per Ms Mazonne, had withdrawn the first motion and simultaneously replaced it with a new motion for the removal of the Public Protector.

23. Thereafter and on 26 February 2020, the Speaker wrote a letter to the Public Protector[4] informing her of the above and that the Speaker:

23.1. had already made a decision that the second motion was "*in order*";

23.2. had sent out invitations to the Chief Whip of all the political parties to make "fresh" nomination for the independent panel;

23.3. "*after 6 March was planning to:*

23.3.1. *establish and appoint the independent panel;*

23.3.2. *appoint one of the panellists as its chairperson in terms of Assembly Rule 129W and, having done so, immediately:*

23.3.3. *refer the motion and supporting documentation provided by Ms Mazzone MP to the panel in terms of Assembly Rule 129T;*

23.3.4. *advise the panel that it is required by Assembly Rule 129X to conduct and finalise an assessment and report relating to the motion within 30 days of its appointment; and*

23.3.5. *inform (the) National Assembly and the President of the referral to the panel as required by Assembly Rule 129T*".

[4] First Respondent's Answering Affidavit pages 558-560(Annexure TRM65).

24. By this time, the Speaker was aware that the President had indicated that he would recuse himself from this matter due to a potential conflict of interest and that he would delegate "*another member of the Cabinet not tainted by a similar conflict of interest*".[5]

25. In any event, the process in terms of the second motion was underway and had reached the fourth step of the seventeen-step process defined by the Speaker in her answering affidavit.[6] The first three steps had been concluded and publicly announced by the time the Public Protector was informed of the process on 26 February 2020.

26. Following some new exchange of correspondence regarding whether or not it was necessary to supplement and/or amend the Public Protector's papers before the delivery of the already late answering affidavit, the 10th respondent eventually delivered its answering affidavit on 27 February 2020. The 1st respondent delivered her answering affidavit on 3 March 2020, exactly 20 court days and approximately a calendar month after service of the application.

27. On 9 March 2020, the 16th respondent filed its supporting affidavit.

28. At the initiative of the applicant and on 10 March 2020, the participating parties reached an agreement as to the further conduct of the matter, which was reduced to a Draft Order sent to the Judge President. The court order

[5] Second Respondent's Explanatory Affidavit page 682 para 38.
[6] First Respondent's Answering Affidavit page 255para 135-159.

representing the agreement of the parties was granted by the Honourable Judge President on 17 March 2020. A copy thereof forms part of the papers.[7]

29. The parties had complied with the provisions of the consented Draft Order, until it became clear that the agreed two-day hearing on 26 and 27 March 2020 had to be postponed for the reasons outlined above.

D: ADDITIONAL SALIENT FACTS

30. In this application, the material facts are generally not seriously disputed and largely common cause. In addition to what has already been outlined above, it will be appropriate to briefly spell out some further salient facts.

31. The current Public Protector was appointed and assumed office on 19 October 2016,[8] following a parliamentary interview and selection process conducted in public.

32. Of the 12 political parties then represented in Parliament, 10 parties supported her appointment, one (COPE) abstained and another one (the DA) opposed it.

33. Within less than a year of her assumption of office and from September 2017 to date, the DA has made at least five separate attempts to have the Public Protector removed from office.[9]

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[7] Consolidated index , page 892
[8] First Respondent's Answering Affidavit page 188 paragraph 6
[9] First Respondent's Answering Affidavit page 193 paragraph 25

34. After yet another such attempt and on or about 21 June 2018, the chair of the Portfolio Committee on Justice and Correctional Services, Dr Motshekga, wrote a letter to the Public Protector[10] indicating that:

> "*The Speaker of the National Assembly received a letter from Mr J Steenhuisen, MP requesting the National Assembly to expedite procedures to remove the Public Protector in terms of section 194 of the Constitution read with section 2(1)(c) of the Public Protector Act 23 of 1994.*"

35. In her detailed response, the Public Protector, *inter alia*, pointed out that such a process for her removal could not be embarked upon without the appropriate (and valid) rules. This was in line with the decision of the 2018 Constitutional Court in *EFF v Speaker, National Assembly*[11] (also known as the impeachment judgment).

36. On 6 March 2018, the Portfolio Committee released to the public a report.[12] To say that the report reads like a transcript of the Spanish Inquisition would be an understatement. The members delved extensively into the merits of the pending court proceedings and the merits of the Public Protector's investigations and reports. In so doing, they also prejudged the outcome of any section 194 enquiry. Some of the comments made included:

36.1. "*it is unacceptable for the Public Protector to state that personal cost orders undermine her independence*";

36.2. She "*had completely failed to investigate criminal allegations*";

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[10] Founding Affidavit page 113 (Annexure PPFA4)
[11] *Economic Freedom Fighters v Speaker, National Assembly* 2018 (2) SA 571 (CC)
[12] Founding Affidavit pages 95-112 (Annexure PPFA3).

36.3. Whether she could reasonably expect people to believe that she was a fit and proper person to occupy her office. She was told to consider *"doing the honourable thing and resign just as the former President did*";

36.4. "*as a whole, the Committee expressed disappointment, frustration and even anger at the responses of the Public Protector and the manner in which she conducted the Vrede investigation*" (emphasis added).

37. So vicious were the threats that it became frequently necessary for one member of the committee to object and plead with members to stop attacking the Public Protector personally and to insult her.

38. The chairperson failed adequately to protect her and kept on telling the objecting member that as a trained advocate, she was "*capable of protecting herself"*.

39. In the period preceding the said meeting, there were a few court cases in which the court had made scathing remarks against the Public Protector. Only one of such cases, the *Reserve Bank* matter,[13] had been concluded in the Constitutional Court as at 6 December 2019. The rest were still in the appeals pipeline. Parliament is prohibited from debating matters which are still *sub judice*.

40. We also pause to mention that since the time of her interviews, the DA had pedalled false information that the Public Protector was a spy. That is the subject of separate pending litigation.

[13] *Public Protector v South African Reserve Bank* 2019 6 (SA) 253 CC

41. When that failed, the accusation was that she was incompetent. That is despite a lot of objective evidence to the contrary, which has not been disputed and which is set out in the founding affidavit.

42. The majority of the DA attempts to remove the Public Protector from office involved the utterances made in court cases which were being appealed. The complaint letters were always accompanied by copies of the relevant court judgments.

43. To cut a long story short, these attempts culminated in the process of drafting the current rules after the Public Protector had pointed out in writing that the absence of rules created a legal lacuna which stood in the way of her lawful removal, where warranted.

44. The DA usurped that process by submitting draft rules, which were clearly targeted at the Public Protector despite the euphemistic references to "*the removal of a Chapter 9 head*". An example of the slip-of-the-tongue but true intentions was articulated by Mr John Steenhuisen in his letter to the Speaker enclosing the draft rules, which were more than 90% adopted as the impugned rules, and when he wrote:[14]

> "*I submit these draft rules to your office in the hope that it (sic) can be of assistance to the Rules and Programming Committee when they (sic) meet to draw up rules to govern <u>the process of considering the removal of the Public Protector</u>*" (emphasis added).

[14] First Respondent's Answering Affidavit page 433 (Annexure TRM29).

45. The rules therefore originated from and were drafted by the would-be complainant and aimed at a specific accused person. The unfairness of this ought to have been clear and manifest.

46. On that sour note, the stage was set for the adoption of the rules which form the core subject matter of this application.

E: THE APPLICABLE REGULATORY FRAMEWORK

47. This is a constitutional matter of great importance raising various novel and complex issues affecting the public interest and the interests of justice, hence its referral to the Full Court as a court of first instance.

48. The legal or regulatory framework relevant to this matter is understandably multifaceted and involves the relevant provisions and the values underlying the Constitution, the Bill of Rights in the Constitution, statutory provisions, the common law, case law and the Rules of the National Assembly.

49. Bearing in mind the interplay between these various instruments, Part B will invariably involve a complex analysis of the relevant legal rules, principles and maxims.

50. The relevant constitutional values at play in this application are:

50.1. Supremacy of the Constitution and the rule of law in terms of section 1(c) of the Constitution;

50.2. Accountability, transparency and openness (section 1(d));

50.3. Equality and fairness;

50.4. Human dignity in terms of section 1 of the Constitution (read with section 181 thereof); and

50.5. Ubuntu.

51. The following fundamental rights contained in the Bill of Rights will feature specifically:

51.1. Equality (section 9);

51.2. Human dignity (section 10);

51.3. The right to fair labour practice (section 23); and

51.4. The right to access to justice and fairness (section 34).

52. Other constitutional provisions and principles which are applicable hereto include:

52.1. the duty on all organs of state to fulfil all constitutional obligations and the injunction that "*all law or conduct inconsistent with it is invalid*" (section 2 of the Constitution);

52.2. the duty on the state (including the legislature) to respect, protect, promote and fulfil the Bill of Rights (section 7(2));

52.3. the decree that the Bill of Rights "*binds the legislature, the executive, the judiciary and all organs of state*"(section 8(2));

52.4. the limitations clause (section 36);

52.5. the interpretation clause (section 39);

52.6. the requirement for co-operative governance (section 41);

52.7. the duty on Cabinet members to avoid any situation which result in the risk of conflicts of interest (section 96(2)(b));

52.8. the establishment and obligations on organs of state in respect of state institutions which strengthen constitutional democracy, including the Public Protector (sections 181 and 182);

52.9. the removal provisions for heads of Chapter 9 institutions (section 194); and

52.10. the doctrine of separation of powers.

53. The following relevant statutory provisions will also be referred to include:

53.1. The Public Protector Act;

53.2. The Basic Conditions of Employment Act; and

53.3. The JSC Act.

54. Further reference will also be made to the Rules of the National Assembly, especially Rules 88 and 89 and of course the impugned Rule 129 as it relates to both the impeachments of the President and Heads of Chapter 9 institutions.

55. The provisions of the following common law, since directly or indirectly adapted into the rubric of the rule of law, will be relied upon:

55.1. The *audi alteram partem* rule;

55.2. The rule against bias or *nemo iudex in sua causa*;

55.3. The *nulla poena sine lege* rule; and

55.4. The presumption against retrospectivity.

56. Finally, reliance will be placed, by all parties, on the relevant case law which deals with the abovementioned body of law and the various sources thereof. The cases relied on by the applicant will be mentioned hereunder and listed

in the list of authorities attached hereto. At the top of the list, for reasons which will be explained, is the seminal judgment of the Constitutional Court known as the *EFF Impeachment* case.[15]

57. To avoid prolixity, the above legal instruments are not quoted verbatim herein. The applicant will see to it that an appropriate bundle will be prepared for the court.

F: THE 12 LEGAL GROUNDS

58. The 12 separate grounds relied upon in Part B are:

58.1. The *audi alteram partem* rule, procedural irrationality and reasons;

58.2. Deviations from established procedure (failure to give prior notice);

58.3. Unlawful and premature referral (prior assessment of *prima facie* guilt);

58.4. The right to legal representation;

58.5. Recusal and right to be protected;

58.6. The rule against retrospectivity;

58.7. The right to decisional and institutional independence;

58.8. The interpretation of section 194(1) read with the Rules;

58.9. Separation of powers ground and/or *ultra vires*.

58.10. Double jeopardy;

58.11. *Mala fides*, ulterior and/or improper motives; and

58.12. Unreasonableness.

59. For the sake of word economy in the discussion which follows, we shall group the five separate grounds dealing with the rules of natural justice, namely *audi*

[15] *Economic Freedom Fighters v Speaker, National Assembly (supra)*

alteram partem (mentioned at 58.1 to 58.3 above) and *nemo iudex sua in causa* (mentioned at 58.5 above) both under the general rubric of fairness. We shall then deal with the remaining seven grounds. The fairness grounds are listed above in paragraphs 58.1 to 58.5 and followed by the remaining seven grounds. The seven remaining grounds are made up of the four grounds taken from Part A and the three new grounds introduced for the first time in Part B.

60. The separation is done to facilitate and structure legal arguments. The grounds contain several overlaps.

G: THE FAIRNESS GROUNDS

61. Under this heading, we deal with five of the pleaded grounds or topics which broadly deal with fairness and/or the rules of natural justice, namely *audi alteram partem* and *nemo sua iudex in causa sua*, as well as the procedural irrationality. In short, fairness or natural justice demands a fair hearing by an impartial decision-maker.

62. As Hoexter[16] puts it, and especially in the public law sphere:

> *"Listening fairly to both sides has aptly been described as 'a duty lying upon everyone who decides anything'"* (emphasis added).

63. We also accept and invoke the well accepted departure point that fairness is "*contextual and relative*"[17] and depends on the circumstances of each

[16] Hoexter, Administrative Law in South Africa (Juta) 2nd Edition at page 362
[17] *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 SCA at paragraphs 13-14

particular case.[18] Given the obviously punitive and adverse consequences of a removal process, the general principles which apply to disciplinary proceedings and other comparative quasi-judicial processes apply. This is a simple shorthand for those proceedings in which an adverse decision is to be made against the party which must usually be afforded a fair and impartial hearing.

64. In respect of *audi*, in support of the factual outline, given this ground, this Honourable Court will be more specifically referred, *inter alia*, to:

64.1. the failure and/or refusal to give prior notice and opportunity to influence the Speaker's decision as to whether or not the motion was "*in order*";

64.2. procedural irrationality;

64.3. the numerous requests for adequate reasons in respect of both the first and/or second complaint motion; and

64.4. the denial of full legal representation.

65. In respect of *nemo iudex*, this relates to the recusal or exclusion of all persons tainted with actual and/or reasonably perceived bias, from any participation at any stage of the process.

66. In this respect alone, a protectable *prima facie*, alternatively clear, right has been shown to exist in respect of the violation of the constitutional principle of fairness as found in various relevant sections of the Constitution, including sections 9, 23 and 34 thereof and "borrowing" from section 33 (where it is permissible) in respect of what is otherwise a rationality review and/or a direct

[18] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at paragraphs 113-114

constitutional attack based thereon, ie without necessarily relying on subsidiary legislation.

67. For the avoidance of any doubt, the issue of fairness will be invoked both in the context of the rationality review and the constitutional attack on the objective validity of the Rules *per se*.

G1 Procedural irrationality

68. Closely related to the general complaint regarding *audi* is the pleaded ground of procedural irrationality. In this case, the standard of procedural irrationality is breached thrice over.

69. Firstly, it is breached in the sense that here we are dealing with a classic case of arbitrariness and, as Ngcobo J, as he then was, said in *Masetlha*,[19] a fair hearing provides "*insurance against arbitrariness*". Significantly, this was outside the sphere of general constitutional, PAJA and administrative decisions, underscoring the pervasive universality of the standard of fairness.

70. The defence advanced by the Speaker in explaining why she sent a notification to the Public Protector informing her of and attaching the second complaint motion, even before the appointment of the independent panel, when, in respect of the first motion she refused to do so, is essentially that it is in her sole choice, "prerogative" or election. That is a classical case of the kind of arbitrariness which *ipso facto* amounts to irrationality and a breach of

[19] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) at paragraphs 186-187

the rule of law. The futile attempt to distinguish the first situation from the other is, in the circumstances, unsustainable and must be rejected.

71. Although the above views of Ngcobo J were contained in a minority judgment in *Masetlha*, his view subsequently prevailed after he became Chief Justice and in the unanimous decision in the *Albutt* case.[20]

72. Secondly, the failure and/or refusal to give reasons can in itself be an independent basis for proving procedural irrationality.

73. Thirdly, it has been recently confirmed by the Constitutional Court that in the case of a multi-staged process, such as in the present case, the requirements of a fair hearing must be observed in all the steps, failing which such a composite process will be found to be procedurally irrational.

74. This principle was explained as follows in *NERSA*[21] by Khampepe J:

> *"Rationality is concerned with one question: do the means justify the ends? Democratic Alliance[22] 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 includes everything done (or not done) in the process of making that decision*" (emphasis added).

75. Applied to the present facts, this dictum must apply with equal force to the failure of give notification, to the refusal to give reasons and, more importantly,

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[20] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
[21] *National Energy Regulator of SA v PG Group (Pty) Limited* 2020 (1) SA 450 (CC) at paragraph [64]
[22] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC)

to the admitted failure to go beyond *"the form requirements*" of the impugned rules. These glaring and important omissions fatally taint the entire process.

G2: Failure and/or refusal to furnish any or adequate reasons

76. It is also common cause that in relation to the first motion, the Speaker refused to give reasons and in relation to the second motion, the reasons purportedly given in the answering affidavit are belated and inadequate.

77. We submit that, in light of what has already been said in respect of the broad requirement of fairness, such refusal is self-evidently unconstitutional, and it ought to attract an inference of invalidity. The failure to furnish reasons constitutes a crucial element of the *audi alteram partem* rule.

78. Reliance will also be placed on the principle underling section 5 of PAJA, in terms of which a functionary who refuses to give reasons attracts the presumption that the decision "*was taken without good reason*".

G3: Prior notice and representations

79. As Ngcobo J put it in *Zondi (supra)*:

> *"The right to notice <u>before</u> an adverse decision is made is a fundamental requirement of fairness … A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained."*[23]

80. In the present case, it is common cause that the Public Protector, in respect of both motions, was not afforded any such prior notice of the motion and

[23] at paragraph 112

moreover, she was also not afforded the opportunity to influence the decision of the Speaker on the question whether or not the motion(s) were "*in order*" (the third step). The "*in order*" decision is a very important gateway stage of the entire removal process. Even in the case of the second motion, the Public Protector was only notified of the decision well after it was made. Such conduct cannot pass constitutional muster.

81. It has often been emphasised, as in the above dictum, that in respect of an adverse decision, the opportunity to make representations should ideally and generally be offered before such a decision is taken because it is more difficult to convince a decision-maker that he or she was wrong and, needless to say, it will otherwise be impossible to influence the decision. This self-evident rule, which even pre-dated the Constitution, was well articulated in *Attorney-General, Eastern Cape v Blom and Others*,[24] as follows:

> "*a right to be heard after the event, when the decision has been taken, is no adequate substitute for a right to be heard before the decision is taken. There is, as Van Winsen J pointed out in* Davies and Others,[25] *a 'natural human inclination to adhere to a decision once taken'"* (emphasis added).

82. That principle was subsequently reaffirmed in many post-Constitution decisions, including by this Honourable Court by Cleaver J in the *South African Heritage* case,[26] as follows:

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[24] 1988 (4) SA 645 (A) at 668E
[25] *Davies and Others v Administrator, Cape Province and Another* 1973 (3) SA 804 (at 809F
[26] *South African Heritage Resource Agency v Arniston Hotel Property (Pty) Limited* 2007 (2) SA 461 (C) at paragraph [23]

> "*I accordingly conclude that in the particular circumstances of this case, the respondents were entitled to a hearing <u>before</u> the decision <u>provisionally</u> to protect the area was made and in not affording them that right, the decision was not procedurally fair*"[27] (emphasis added).

83. No circumstances have been pleaded in the present case to depart from this general rule. That being so, this court is left with only two options: to declare that the rules are *prima facie* unconstitutional or to construe them in such a way as to save their constitutionality and merely find that their application by the Speaker, in such a way as to deprive the Public Protector of her right to a hearing, is unlawful and/or irrational in the circumstances. The latter approach was adopted in *Zondi (supra)*.[28]

84. For the purposes of the relief sought in Part A, it does not matter which of the two options is adopted by this Honourable Court. Either way, a case of unfairness will have been established leading to the invalidity of the impugned Rules.

85. It can therefore hardly be contestable that, subject to adequate justification, to deny a prior notification and opportunity to influence an adverse decision, such as the one that the DA motion was "*in order*", is *prima facie* unfair and accordingly unconstitutional.

86. We submit that in the present case, no such rebutting justification has been made or even attempted. All that the Speaker has told the court is that subsequent opportunities to make representations to different decision-

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[27] At paragraph [27]
[28] At paragraph [116]

makers make it unnecessary for her to offer any opportunity for representations in respect of a prior and important decision. That is not the law. Nor can it suffice as a justification in the present circumstances. It is trite that any person has the common law and/or constitutional right to be heard in respect of every adverse decision made against him or her.

87. Examples of adequate justifications to depart from the general rule include the situation where there is a need for secrecy or concealment of information if, to disclose it, would defeat the very purpose of the decision. That clearly does not apply here. Proof of that is the fact that in relation to the second motion, the full information and evidence presented by the DA was indeed furnished to the Public Protector, albeit too late. The evidence shows that before 26 February 2020, there was not only a failure to disclose the information but active concealment thereof. This is patently unlawful.

88. The significance and fatality of this omission was, in the present circumstances, underscored by the admission of the Speaker that her decision was taken by the consideration of only *"the form requirements*" of the rules. It is self-evident from even a cursory reading of Rule 129R that it goes to both form and substance. Had the adequate notice of concomitant opportunity to make representations been offered, such an elementary error would clearly have been avoided and the quality of the decision, either way, would have been substantially enhanced. Ergo the purported retrospective application and interpretation of the Rules.

89. In the present case, no opportunity at all exists for representations to be made to the Speaker in respect of the "*in order*" decision, not even after the decision

was made. An opportunity to address a different decision-maker in respect of a separate decision cannot cure this defect. In any event and on the version of the Speaker, the decision made by the independent panel will be different and separate from the one which she makes, albeit both decisions deal with the question of *prima facie* guilt. It is either that is true, in which case each decision should separately attract *audi*, or it is not true, in which case the Speaker's decision cannot be distinguished and it, too, ought to attract *audi*, just like the decision of the panel. There is no escaping the requirement of a fair hearing in respect of two distinct steps in the process.

90. Zeffert[29] defines a rebuttable presumption of law, such as the one we are dealing with here, as "*a rule of law compelling the provisional assumption of a fact*". In the present context, that fact would be the *prima facie* infringement of the right to a prior hearing.

91. We readily concede that in a multi-staged process, it could sometimes be unrealistic to expect the decision-maker(s) to provide a full-blown hearing at each and every stage. However, it is incontestable that some semblance of a hearing, however rudimentary, must necessarily be conducted before every adverse decision is made. It may well, depending on the circumstances, entail only a written statement and/or representations of any kind. But it can never entail total silence and/or, as in the present case, conscious, deliberate and active concealment against a readily accessible person such as the Public Protector.

[29] Zeffert, The South African Law of Evidence, Lexis Nexis (2nd Edition) page 184

92. In confining herself to the form of the motion, the Speaker was unlawfully deviating from the clear wording of her task envisaged in Rule 129R(a), namely to ensure that the motion is limited to "*a clearly formulated and substantiated charge on the grounds specified in section 194, which must prima facie show that the holder of a public protector committed misconduct, is incapacitated, or is incompetent*" (emphasis added). These words clearly refer to the substantive elements of the offences.

93. Given the seriousness of the issues dealt with in such a process, it is not surprising that there are double or multiple filter provisions of *prima facie* guilt, both at the level of the Speaker and also later at the level of the independent panel. The two are not mutually exclusive, nor can they amount to duplication since they involve two different and separate decisions at two different stages and, more importantly, by two different decision-makers. In respect of Part B, an extensive comparative analysis will be done with the impeachment process for judges and even with other local and international examples.

G4: Legal representation

94. The final attack under fairness goes to the constitutional validity of the rules *per se* and not so much on the implementation thereof by the Speaker. That concerns the issue of legal representation.

95. The relevant provision is Rule 129 AD3, which provides that:

> "*The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner and other expert of his or her own choice, provided that the legal*

practitioner or other expert may not participate in the committee" (emphasis added).

96. At the minimum, the underlined words mean that the legal representative has no right of audience under any circumstances whatsoever. No discretion is left in the hands of the decision-maker. This amounts to an invariable exclusion of ordinary, full and proper legal representation.

97. Significantly, this important ground must succeed on the sole basis that the Speaker has simply failed to address it in her answering affidavit. The two lame excuses offered in the answering affidavit simply do not hold any water. Firstly, it is said that to grant an audience to a legal representative would defeat the requirement that the Public Protector is personally accountable to Parliament. Secondly, the court is reminded that Advocate Mkhwebane is *"not a hapless accused*" but a qualified advocate.

98. To defeat the first defence, one needs anecdotally to look no further than the large array of private lawyers who assisted President Donald Trump during his globally televised impeachment trial. In the case of that useful, recent and top-of-mind example, it could not, by any stretch of the imagination or logic, be argued that by allowing him legal representation, he (Trump) was thereby rendered no longer *"personally accountable*" to the US Senate. The accountability justification or excuse must accordingly be rejected.

99. As to the second defence, the Speaker has fallen into the trap of indirectly confirming the Public Protector's strongly held view, supported by objective

evidence,[30] that these rules, while sold on the contrived basis that they constitute a law of general application in respect of all heads of Chapter 9 institutions, were in actual fact specifically designed for and targeted at an individual called Busisiwe Mkhwebane. Otherwise, the Speaker could never invoke the qualifications of Ms Mkhwebane (or even just the Public Protector) to justify a total and inflexible ban on full legal representation if the rules are indeed intended to apply equally and generally to all the other heads of Chapter 9 institutions, who are in fact not and need not be necessarily legally trained persons (with the possible exception of the Human Rights Commission). The Auditor-General, for example, will almost invariably be an accountant and never a lawyer. This justification too is contrived and ought accordingly to be rejected out of hand.

100. The rules are, to this extent, *prima facie* unconstitutional. Perhaps the Speaker would have been well advised to follow the lead of the DA, which simply ignored this unanswerable ground in its original answering affidavit.

101. As was appropriately held in *Hamata*:[31]

> "*… there may be administrative organs which are faced with issues and whose decisions may entail consequences, which range from the relatively trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation, no matter what the circumstances might be, and even if they are such that a refusal might very well; impair the fairness of the administrative proceedings, cannot pass muster in law*" (emphasis added).

[30] See for example the wording in the covering letter containing the draft rules, referred to above (First Respondent's Answering Affidavit page 433 (Annexure TRM29).
[31] *Hamata v Chairperson, Peninsula Technikon IDC* 2002 (5) SA 449 (SCA) at paragraph [12] per Marais HA

102. As the learned judge correctly held, it is exactly the lack of flexibility in the rule which is the source of the unconstitutionality:

> *"that flexibility is, as I have said, now a constitutional imperative"*[32] (emphasis added)

103. This defect is only exacerbated by the provision which also imposes an outright ban on an oral hearing, even during the independent panel stage. In totality, there is a complete ban on full legal representation at all relevant stages of the impeachment process envisaged in the impugned rules.

104. By way of comparison, judges who face impeachment in terms of the Judicial Service Commission Act 9 of 1994 are allowed legal representation at all stages, including the preliminary and subsequent stages. There is no constitutional justification for the limitation or non-extension of the same right to heads of Chapter 9 institutions. The same considerations would apply to the impeachment of a President. The common denominator is that an impeachment is *ipso facto* punitive.[33] There is no rational basis for the differentiation between these different public functionaries in relation to their rights of impeachment.

105. This constitutes a strong and stand-alone ground of a clear violation of the Constitution – sufficient for granting of the primary declaratory relief sought in Part B, as well as the secondary review relief depending on the stage reached in the process at the time of adjudication.

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[32] *Hamata (supra)* at paragraph [13]
[33] *Economic Freedom Fighters v Speaker, National Assembly* (*supra*) at paragraph [138]

G5: The rule against bias : Failure and/or refusal to recuse and breach of the relevant NA Rules

106. In this section, we deal with various persons who are either identified by name, designation or category and who ought to be disqualified from any supposedly impartial participation in the process of the removal of this particular Public Protector. Secondly and more pertinently for Part B, the applicant attacks the rules themselves for failure to make sufficient provisions and/or safeguards against an unfair removal tainted by bias. In other words, her case is that the rules are constitutionally deficient and that the proof thereof is the type of bias to which she is at present actually exposed. So, while the two complaints are interrelated, they must be conceptually separated to be properly understood.

107. It is also important to distinguish between the complaints of personal bias directed at the President, the Speaker and the Deputy Speaker, related to the ongoing *BOSASA* case, on the one hand, and the bias as to subject matter which is directed at the chairperson and various members of the Portfolio Committee on Justice and Correctional Services and to a certain extent the DA, on the other. In the first category of personal bias, we may include other persons who may be under investigation by or involved in adversarial litigation against the Public Protector.

108. With the above in mind, it will be convenient to begin with the admitted conflict of interest which taints the intended participation of the President in the process. The President has correctly and commendably conceded that the ongoing and well-known *BOSASA* case litigation, which involves allegations and binding findings of financial benefits to him and his son, as well as alleged

breaches of the Executive Members Ethics Act by wilfully misleading Parliament, creates a potential conflict of interest on his part or a sufficient risk thereof in terms of section 96(2)(b) of the Constitution. As a result, he will have to recuse himself from any participation in any of the seventeen steps outlined in the Speaker's answering affidavit, more particularly steps 5, 6, 8, 8, 13, 16 and 17.

109. The applicant's case on this leg is simply that both the Speaker and Deputy Speaker, having rightly or wrongly openly sided with the President in that very same litigation, for which he has admitted a conflict, should follow suit, on the sole basis that the Public Protector harbours a reasonable suspicion of their own bias. The sole question that arises therefore is whether that suspicion or perception is, in the circumstances, reasonable. We submit that on the above facts, it clearly is.

110. Regarding the members who have made statements which clearly indicate that they have prejudged the issue, we simply point out that their participation in the process is incompatible with the promise of fairness. In the words of this court in *Hamata (supra)*, which were not questioned or overturned on appeal:

> "*it is not bias per se to hold …* *No-one can fairly decide a case before him if he has already prejudged it*" (emphasis added).

111. 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. It is either they do or they do not. If they do, then the complaint of bias

and/or unfairness is *prima facie* valid. If they do not, then the court will duly sanction their further participation in both the ad hoc committee and/or the subsequent vote to determine the two-thirds majority. Whether such people are included or excluded from the voting pool will have a material result on the outcome. This fact can and will be demonstrated mathematically.

112. Such members have also *ipso facto* breached their duties arising from Rule 88 of the National Assembly Rules, which provides that:

> "*No member may reflect upon the competence or integrity of … the holder of a public office in a state institution supporting constitutional democracy referred to in section 194 of the Constitution … whose removal from such office is dependent upon a decision of the House, except upon a separate substantive motion in the House presenting clearly formulated and properly substantiated changes.*"

113. The purpose of this rule is quite obviously to prevent situations of a reasonable perception of bias on the part of members and to protect them against recusal applications when they subsequently have to perform their parliamentary duties. This rule was breached and consequences must follow. Any member who breaches this rule cannot also participate in the removal process.

114. Quite significantly, the rule is also significant for a different reason in that it demonstrates that the opinion of the Speaker regarding the *prima facie* guilt of an officeholder is not an unimportant mechanical or box-ticking exercise. It has serious legal implications.

115. Also relevant hereto are the provisions of Rule 89, which provides that:

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

116. The Speaker is also a member of the House and she is, as such, equally bound by the above rule, as are all the other 399 members.

117. In the premises, the attitude of the Speaker and the DA in forging ahead with the removal process, in spite of the present application, Part A and Part B thereof, which impugns the validity of the very rules they seek to implement, is a logical and legal impossibility. It is in clear violation of Rule 89. It "criminalises" the conduct of all members of the House who may wish to participate in the removal process. This probably informs the correct attitude of those political parties who have elected to abide the decision of the court and/or to refrain from participating even in the process of appointing the so-called independent panel. What is certainly clear and will be forcefully argued is that Rule 89 precludes the National Assembly, including the Speaker, from conducting themselves as if the rules are valid, when that very question is *sub judice*.

118. In the totality of the circumstances, we submit both the rules in themselves and the conduct of the Speaker in implementing them in this particular case, are accordingly unconstitutional.

119. Accordingly, and on this broad ground of fairness alone, also viewed in the context of the applicable rules, the relief set out in Part B ought to be granted whether based on the common-law rules of natural justice, the relevant constitutional provisions which guarantee fairness and/or procedural irrationality.

H: RETROSPECTIVITY

120. We submit that the rules adopted on 3 December 2019 are in blatant violation of the presumption against retrospectivity. It is common cause that both the motion of 6 December 2019 which has since been withdrawn and the fresh motion of 21 February 2020 relate to events that occurred before 3 December 2019, the date of the adoption and enactment of the impugned Rules.

121. It is unnecessary to enter the academic debate as to whether there is a "rule" or a "presumption" against retrospectivity. In a way, both are true. The presumption against retrospectivity is a manifestation of the rule of law. The rules adopted by the National Assembly over and above their regulation of matters of procedure also regulate matters of substance.

122. The First Respondent in her papers states that the presumption against retrospectivity can be rebutted but fails to deal with or to present the instances or facts which allow the rebuttal of the aforesaid presumption in this particular case.

123. The First Respondent further argues that it will be absurd to interpret the new rules as applying only to events after their adoption. The First Respondent also fails to substantiate this contention. Accordingly, it does not disclose a valid rebuttal and the presumption stands unrebutted. The Applicant is not arguing against the validity and applicability of the relevant principles but is simply arguing that the rules were clearly not <u>intended</u> to apply retrospectively. Had that been the case, the drafters of the rule would have clearly expressed the intended retrospective operation of the rules. This is purely a matter of

construction or interpretation. An intention of retrospectivity is not lightly made, hence it must ordinarily be expressly articulated or properly inferred.

124. There is a natural resistance to creating legal consequences for conduct only after the conduct has occurred. In the US judgment in *Kaiser Aluminium and Chemical Corporation et al v Bonjorno et al* 494 US 827 at 855. As stated by Justice Scalia concurring with the majority stated the following:

> *"The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks … by the Romans … by English common law … and by the code Napoleon. It has long been a solid foundation of American law …"*

125. The principle is also equally recognised by the law of this country in respect of which there is a strong presumption against the retrospective operation of a statute. Generally, statutes will be construed as operating prospectively only unless the legislature has clearly expressed a contrary intention. See *Genrec MEI (Pty) Limited v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry & Others.*[34]

126. The First Respondent further states that the new rules mainly regulate the procedure to be followed for the impeachment processes in terms of section 194 of the Constitution, a provision which has been in operation since the commencement of the Constitution on 4 February 1997, a date long before Advocate Mkhwebane's appointment to the office of the PP.

[34] 1995 (1) SA 563 (A) at 572E-F

127. No argument has been advanced either by the First Respondent and the Tenth Respondent in support of a retrospective construction of the rules. We submit that as a matter of principle, clear expression of legislative intent is required before a court will give retrospective effect to a statute, failing which, the statute must be construed as operating only prospectively. The onus clearly lies with the party asserting an exception to the general rule.

128. In the result, any motion that relates to events before 3 December 2019 is not a valid foundation for an impeachment process in relation to the Applicant.

129. In *Phaahla v Minister of Justice & Correctional Services & Others*[35], Dlodlo AJ dealing with application of criminal laws states that one of the functions of section 35(n) of the Constitution is to give effect to equality before the law and the principle of non-retrospectivity. The court states that:

> "*It is important to appreciate the self-standing pedigree of section 35 (3) because of the various meanings in applications that it holds as the constitutional embodiment of the maxim nulla poena sine lege (no punishment without law). As an expression of legality, section 35(3) prohibits punishment that has not been clearly set out in statute or common law, thus demonstrating how nulla poena sine lege is inextricably intertwined with nulla crimen sine lege (no crime without law). As an interpretive presumption, section 35(3)(n) has been applied to resolve ambiguities in sentencing legislation in favour of prospectively rather than retrospectivity*" (emphasis added)

130. Viewed from the prism of the rule of law and legality, no principled distinction can be made between the abovementioned criminal law application of the

[35] 2019 (7) BCLR 795 (CC) at paragraph [64]

presumption and the present situation, in which a punitive outcome is similarly envisaged. The canons of interpretation apply with equal force.

131. The presumption against retrospectivity or retroactivity is based on the trite principle that a retrospective interference with vested rights or the creation of new obligations or any imposition of new duties by the legislature is not lightly assumed. See *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman National Transport Commission.*[36] In *Peterson v Cuthbert & Company Limited* 1945 AD 420, Watermeyer CJ expressed the rule as follows:

> *"Now there is a well-known rule of construction that no statute is to be construed so as to have a retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have that effect."*

132. We therefore submit that a proper observation of the rule or presumption against retrospectivity ought properly to have prevented the Speaker from making the decision that any motion in violation thereof was "*in order*" and "consistent" with the Constitution and the law.

I: RIGHT TO DECISIONAL AND INSTITUTIONAL INDEPENDENCE

133. According to Hoexter,[37] the Constitution "*insists on the independence and impartiality of the Public Protector*". She goes on to say that:

> "*To help ensure independence and impartiality <u>the Constitution forbids any organ of state, state official or private person from interfering in the</u>*

[36] 1999 (4) SA 1 (SCA) at paragraph 12
[37] Hoexter, op cit, pages 88-89

> *performance of the functions of the Public Protector. The Public Protector Act 23 of 1994 also contains a number of practical measures similar to those employed to ensure the independence of judges. The remuneration and terms and conditions of employment of the Public Protector may not be adversely altered during his or her term of office, the incumbent is prohibited from performing remunerative work outside his or her official duties, and the incumbent and his or her staff are protected from legal liability in respect of any finding or recommendation made in good faith and submitted to Parliament or otherwise made public. However, a potentially serious detraction from independence is that the Public Protector remains completely reliant on the executive for financing*" (emphasis added).

134. The Applicant in her founding affidavit contends that the Constitution confers upon the Public Protector a status almost similar to members of the judiciary insofar as the crucial issue of decisional independence is concerned and we submit that there is much constitutional logic in that approach. 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. The First Respondent on the other hand argues that the fallacy in the Applicant's argument is demonstrated by the fact that the findings of the courts include findings in relation to things done by the Applicant in the course of her investigations and things said by her in the report, particularly the *CIEX* report.

135. The First Respondent's argument is undermined by the fact that remarks of a judge are the opinions of that judge, therefore the judge's remarks on the Applicant's findings cannot validly be used to determine the competence and/or misconduct of the Applicant. The Tenth Respondent's motion is also premised on the judge's remarks on the Applicant's findings. The Tenth

Respondent clearly poses the incorrect view that the Applicant's removal from office can be hinged upon the remarks made by judges exercising a judicial function. We submit that in actual fact what the Tenth Respondent attempts to do is to meddle in individual cases or pending court cases under the guise of holding the Public Protector to account. For both judges and the Public Protector, independence from external influence is critical to the judicial and Public Protector function and to remove them solely on the basis of the merits of their decisions would be constitutionally impermissible in that it undermines their independence to rule *"without fear, favour or prejudice*" and in the public interest. The protection is not for an individual judge or Public Protector. It is for the public itself.

136. The office of the Public Protector is established in terms of section 181 of the Constitution. That section further guarantees its constitutional independence. To be more precise, section 181(2) of the Constitution states that chapter 9 institutions are independent and subject only to the Constitution and the law and further provides that Public Protector is independent, impartial and that the function of the Public Protector must be exercised without fear, favour or prejudice. Section 165 of the Constitution similarly and congruently provides that:

136.1. the judicial authority of the Republic is vested in the courts;

136.2. the courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.

137. This provision puts chapter 9 institutions at par with the courts when it comes to the question of decisional and institutional independence. Furthermore, in *The Economic Freedom Fighters and Others v The Speaker of the National Assembly*[38] *(*also known as the *Nkandla* matter), the court found that the remedial action of the Public Protector is binding until set aside by the court of law. This is one notch less than the judgments of the court of law which are binding until appealed and/or set aside by the courts. The crucial distinction is of course that court judgments are not reviewable while remedial action is. But that is a separate matter from the crucial need to protect the independence of both institutions equally, which is what is currently under discussion. It has been correctly stated that in making her decisions, the Public Protector almost has a free hand.

138. In *South African Broadcasting Corporation & Others v Democratic Alliance & Others*[39] the Supreme Court of Appeal when dealing with the constitutional and legislative scheme regulating the power of Public Protector found that any person or institution aggrieved by a finding or decision taken by the Public Protector might in appropriate circumstances challenge it by way of a review application but in the absence of a review application such person is not entitled to simply ignore the findings. Surely, any person aggrieved by the findings of the Public Protector must take her findings on review. However, the Tenth Respondent, a party which is clearly aggrieved by the findings of the Public Protector, instead of following the legal authority established by the courts it now seeks to substitute the court processes with the parliamentary

[38] 2018 (2) ZACC571 (CC)
[39] 2015 (4) All SA 719 (SCA)

process, something unprecedented and clearly bordering on infringing the doctrine of separation of powers. The process which is exclusively prescribed by the Constitution to fall on the National Assembly cannot be used by the aggrieved political party as a backdoor enquiry based on the merits of the findings of an independent institution like the Public Protector. Neither can it appropriately be used as a further "appeal" or "confirmation" of the judicially made decisions of the courts.

139. We submit that the motion premised on the findings of the Public Protector and tabled through the National Assembly which is a legislative body to challenge or "affirm" the court process is not only unlawful but contrary to the established Supreme and Constitutional Court's jurisprudence.

140. In the *Minister of Police v Vowana & Another,*[40] the court held that the comparable independence of judicial officers is one of the foundational prescripts of our law and one of the very important aspects or pillars of the rule of law. The independence of the courts and judicial officers is not only enshrined in our Constitution, but it is a universal principle respected by all civilized judicial systems. Accordingly, a threat to the institutional independence of either the judiciary or institutions like the Public Protector poses a direct threat to the rule of law.

141. Section 181(3) of the Constitution provides that other organs of state through legislative and other measures must assist and protect these institutions to

[40] 2019 (2) All SA 172 (ECM)

ensure the independence, impartiality, dignity and effectiveness of these institutions.

142. Section 181(4) of the Constitution states that no person or organ of state may interfere with the function of these institutions. We submit that the DA's meddling with the Public Protector's investigations and findings is tantamount to interfering with the office of the Public Protector and as such, unlawful and unconstitutional, moreso given that the DA has been hellbent on removing the Public Protector since the first day of her taking office.

143. In *Minister of Home Affairs v The Public Protector,*[41] the SCA concluded that the office of the Public Protector is not a department of state or administration, neither can it be said to be part of the national, provincial or other spheres of government. It is an independent body that it is answerable only to the National Assembly. It is however an institution that exercises both constitutional powers and public powers in terms of legislation. We further submit that the office of the Public Protector does not fit into the institutions of public administration but stands apart from them and that it is a purpose built watchdog that is independent and answerable not to the executive branch of government but the National Assembly. Similarly, the role of the judiciary is simply to review the decisions of the Public Protector, but the judiciary must not play any direct role in her appointment or removal, which is the exclusive preserve of the legislature. The Public Protector's accountability to the courts, which is conceded, must not be conflated or equated with her accountability to Parliament. These are legally two distinct concepts.

[41] 2018 (3) SA 380 (SCA)

144. In *Economic Freedom Fighters v Speaker National Assembly & Others* 2016 (3) SA 580 (CC), the Court stated that "*the Public Protector's investigative and remedial powers target even those in the throne room of executive raw power, she is empowered to take binding and effective remedial action and she has extensive investigative powers under the Public Protector Act 23 of 1994 initiated either through a complaint or on her own initiative. These investigative powers are not supposed to bow down to anyone*". This is specifically intended to protect her against the abuse of power. Like the courts, the Public Protector is often called upon to hold, *inter alia*, both the executive and the legislature to account. No shortcuts can be allowed in the process of holding her accountable. The judiciary cannot be made a proxy for the legislature.

145. In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (Certification case) paragraphs 162 and 163, the Constitutional Court emphasised the importance of the independence of the office of the Public Protector with due regard to its important role within our constitutional scheme.

146. In *Independent Electoral Commission v Langeberg Municipality,*[42] the Constitutional Court pointed out that the Constitution in effect provides for Chapter 9 institutions as state institutions that strengthen constitutional democracy. Chapter 9 institutions are independent and subject only to the Constitution and the law. The effectiveness of their watchdog duties is directly linked to the extent to which their independence is actually protected.

[42] 2001 (3) SA 925 (CC)

147. In the *Certification* case, the Constitutional Court further emphasised the importance of the Public Protector's independence with reference to her security of tenure. This aspect is particularly relevant to provisions of the repealed section 2(2) of the Public Protector Act, which protected the Public Protector against the alteration of her conditions of employment during her tenure. This was not merely a protection against unlawful interference with labour rights, but a crucial provision related more to ensuring the decisional and institutional independence of the Public Protector. Although the relevant provision is now differently worded, there is no indication that this was done to take away the protection against a midstream imposition of more onerous working conditions.

148. To the extent that the impugned rules offend against the spirit of the said past and present provisions, they must be held to be *prima facie* unconstitutional and in breach of the rule of law.

149. The sentiment asserted herein was expressed as follows by O'Regan J in the case of *Premier, Mpumalanga*:[43]

> "*Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.*"

[43] *Premier, Mpumalanga v Association of State-Aided Schools* 1999 (2) SA 91 (CC) at paragraph [41]

150. Stu Woolman[44] notes the following on the necessary independence of the Public Protector. The Public Protector occupies a middle space in the political, bureaucratic, social, constitutional landscape. It serves the public and assists the courts and the legislature. It assists the courts by addressing those complaints about the administration of justice the falls beyond the court's purview. It assists the legislature by monitoring performance of the executive and answering those complaints that elected representatives are unable to address. The Public Protector will perform these functions free from substantial political pressure.[45] During the certification process, the Constitutional Court considered whether a provision permitting removal of the Public Protector by simple majority vote of the National Assembly was sufficient to ensure its independence:

> "*The independence and impartiality of the Public Protector shall be provided for and self-guided by the Constitution in the interest of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service."*[46]

151. The court found that the Public Protector will not be able to investigate politically sensitive matters that could embarrass public officials if its removal could be effected by simple majority. These are further safeguards for independence which have not been given any recognition in the impugned Rules.

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[44] Stu Woolman*: "The Politics of Accountability: How South Africa's Judicial Recognition of the Binding Effect of the Public Protector's Recommendations Had a Catalytic Effect That Brought Down a President"* (2016) 8 CCR 155 at 164 – 165.
[45] See *Certification of the Constitution of the Republic of South Africa (First Certification Judgment)* at paragraphs 162-163.
[46] See *Certification of the Constitution of the Republic of South Africa (First Certification Judgment)* at paragraph 160

152. The relationship between the Public Protector and Parliament requires careful judicial monitoring and extra scrutiny because while the Public Protector frequently has to hold Parliament itself and its individual members accountable, they are also constitutionally enjoined to hold her accountable. It is a unique constitutional relationship.

J: INTERPRETATION OF SECTION 194 OF THE CONSTITUTION

153. This is an important aspect of the application.

154. It is important to emphasise that, when all is said and done, this application does not call upon this Honourable Court to do anything which implicates any judicial encroachment whatsoever into the terrain of the legislature. On the contrary, the exercise of declaring both the conduct of the Speaker (and other players), as well as the provisions of the rules, to be inconsistent with the Constitution is the exclusive preserve of the judiciary. In a nutshell, this court will be called upon, especially in Part B, to undertake what Froneman J called a *"substantive interpretive exercise undertaken … in order to assist the National Assembly to what (section 194 of) the Constitution demands of it."*[47]

155. Section 194(1) provides that:

> ***"(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on:***
>
> ***(a) the ground of misconduct, incapacity or incompetence.***

[47] *EFF v The Speaker (2) (supra)* at paragraph [286]

(b) a finding to that effected 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.***"

156. The limited grounds for removal of the Public Protector from office are clearly set out in the aforesaid section of the Constitution. The grounds are misconduct, incapacity or incompetence. Nothing more, nothing less. The employment by the drafters of the word "only" must be given effect to and be purposively interpretated.

157. The impugned rules define:

157.1. "*misconduct"* to mean "*the intentional or gross (sic) negligent failure to meet the standard of behaviour or conduct expected of a holder of public office" and*

157.2. *"incompetence"* to mean *"in relation to a holder of a public office, includes a demonstrated and sustained lack of:*

(a) knowledge to carry out; and

(b) ability or skill to perform

his or her duties effectively and efficiently."

158. The National Assembly's interpretation of Section 194(1) offends against the Constitution in that the impugned rules not only tempers with the threshold for impeachment in section 194 (1) of the Constitution but also confers a wide discretion upon the National Assembly's interpretation of the above terms by

adding the phrases " *intentional*" and *"gross"* in the definition of *"misconduct"*[48]*.* The National Assembly obviously cannot define a higher or additional offence than that prescribed by the Constitution, which would be clearly *ultra vires.*

159. More ominously, the impugned Rules also introduce "temporary incapacity" as a new ground of impeachment which is not listed under section 194 of the Constitution. This is a far-reaching innovation which not only impermissibly introduces a new offence not envisaged by the drafters of the Constitution, but also puts paid to the purported defence of the respondents that the impugned rules do not deal with substance but only with the "procedural operationalisation" of the provisions of section 194. The definition of a new offence is clearly a matter of substance, not procedure. It amounts to an impermissible amendment of the Constitution and accordingly invalidates the Rules.

160. Equally questionable is the introduction of gross negligence in the definition of misconduct. It is similarly an impermissible amendment of the Constitution which negates the clear restrictive wording of the relevant constitutional provision.

161. The National Assembly is permitted to draft the rules to govern the procedure for the removal of holders of office, not to interfere with the substance of the provisions of Section 194(1) of the Constitution. As indicated, such substantive and unlawful amendment of the Constitution cannot be done

[48] First Respondent's Answering Affidavit Page 284, Paragraph 218

inadvertently and via rulemaking. There is a prescribed process for amending the Constitution.

162. Furthermore, the merits of the Public Protector's report cannot be relied upon to find that she has committed a misconduct and/or that she is incompetent.

163. Three of the charges proffered by the DA in its complaint motion refer exclusively to the merits of her reports and to the findings and comments of judges. The DA states in its answering affidavit that the motion is premised, inter alia, on the very serious findings of the majority of the Constitutional Court in *Public Protector v South African Reserve Bank* (CCT107/18) ZACC 29.[49] The charges are not consistent with grounds as set out in section 194.

164. The Speaker approved to DA's Complaint motion when the motion was not "in order", in that the contents thereof do not comply with or exceed the grounds laid in Section 194 (1) of the Constitution, as explained above.

165. Therefore, we submit that the approval of the motion by the Speaker is also unlawful for these reasons and must also be declared to be inconsistent with the Constitution and/or reviewed and set aside in Part B.

166. The Public Protector interface with Parliament involves her fiscal budget allocation (administrative) and the effective discharge of her duties. We submit that each year, the Public Protector's office obtained an unqualified audit under the current incumbent. Furthermore, the statistics of her office which stand uncontested by either the First Respondent or Tenth Respondent

[49] Tenth Respondent Answering Affidavit page 695 paragraph 18

evinces competency by the incumbent Public Protector. Outside the pronouncements of the judiciary, there is therefore no independent basis to show a *prima facie* case of "incompetence".

167. The question to be posed at the Part B stage is whether the sole reliance on the *Reserve Bank* case can sufficiently outweigh the admitted statistics, which seems to demonstrate sufficient levels of competence on the part of the Public Protector. In other words, even if there was a *prima facie* case of constitutional incompetence based on the judicial pronouncements, which is disputed, that case is rebutted by the undenied objective evidence to the contrary.

168. The Rules are invalid for undermining the constitutionally entrenched institutional independence of the Public Protector.

K: SEPARATION OF POWERS AND *ULTRA VIRES*

169. The DA's complaint motion is seemingly and largely based on opinions of courts in their criticisms of the Public Protector's reports.[50] The complaint motion infringes upon the Public Protector's decisional independence and it is incompetent on that ground alone, as discussed in the preceding section.

170. Furthermore, Rule 129V of the impugned Rules makes provision for the appointment by the Speaker of a Judge as a member of the three-person panel.[51]

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[50] Founding Affidavit page 70 paragraph 146
[51] Founding affidavit page 71, paragraph 149

171. In our respectful submission, the above grounds require this Honourable Court to declare both the motion and the Rules themselves as being in violation of the principle of separation of powers.

172. In *De Lange v* Smuts,[52] Ackermann J said:

> "*I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest*".

173. In *South African Association of Personal Injury Lawyers v Heath and Others*[53] the court held that:

> "*The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the 18 47 De Lange v Smuts, above in 42, at paras 60-61. Chaskalson P courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power.[48] Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be*

[52] *De Lange v Smuts* 1998 (3) SA 785
[53] 2001 (1) SA 883 (CC)

> *and be seen to be independent. The fact that it may be permissible for judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not appropriate to the central mission of the judiciary. [69] They are functions central to the mission of the legislature and executive and must be performed by members of those branches of government*" (emphasis added).

174. In response to the attack based on this ground, the Speaker submits that

174.1. our model of the separation of powers is not one that requires a complete or total separation in that it permits the performance of some non-judicial functions by the judiciary;[54]

174.2. the performance of the panel's function is compatible with the office of a judge and will not be harmful to the institution or central mission of the judiciary;

174.3. it is in order to appoint a member of the judiciary to such a panel since the skill required of members of the panel is that which judges possess.

175. The first problem is that the Speaker is the one vested with the authority to establish the independent panel and appoint members to the panel. Although the impugned rules provide that the appointment of a judge to the panel should

[54] First Respondent's Answering Affidavit page 287, paragraph 225

be done in consultation with the Chief Justice, this does not cure the fact that members of the judiciary cannot intrude into the sphere of other arms of Government. The Rule promotes the violation of the principle of the separation of powers between the judiciary and the legislature in a manner that allows judiciary interference in the legislative process.

176. Secondly, the idea that the Speaker can have powers to appoint a judge, albeit in consultation with the Chief Justice, is in itself offensive to the doctrine of separation of powers. With respect, even the Chief Justice has no authority to appoint judges to perform particular tasks. The only authorities with the power to appoint judges are the Judicial Services Committee and, in limited circumstances, the President.

177. Very recently, the Gauteng Division of the High Court was confronted with a similar situation, in which Sutherland J remarked about "*the impropriety of a judge serving in any capacity at the pleasure of a minister of state*" and stated, with respect correctly, that *"the … appointment process of the designated judge is on the wrong side of history*".[55]

178. We respectfully submit that the issues of principle are the same, whether one is dealing with a ministerial appointment of a judge or one by the head of the legislature, namely the Speaker. Sutherland J went on to say:

> "*The device of a non-reviewable term of office is already well-known as a measure to bolster independence, for example, in the case of the Public Protector. It is argued that it is appropriate that a similar approach be applied in the case of a designated judge. <u>The appointment must not</u>*

[55] *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Others* 2020 (1) SA 9 (GP) at paragraph [64]

> *be capable of being perceived as a sinecure that might induce, if only subliminally, an appetite to appease*"[56] (emphasis added).

179. That is exactly the reason why judges are neither appointed by the executive nor the legislative arms of the state but by an independent body such as the Judicial "Service Commission, in which those arms are represented but remain in the minority. In the pre-constitutional apartheid state, the situation was different.

180. Thirdly and just as no judge can be involved in the process of the appointment of the Public Protector, similarly, no judge can be involved in the process of her removal. The reasons for that are fairly obvious. The clear intent of the Constitution is that the appointment of the Public Protector and the removal thereof, are the sole preserve of the legislative arm of the state. Further, the Public Protector need to be protected by the remedy of judicial review against any unlawfulness in her removal process, but the conduct of judges is not judicially reviewable. Involving a judge in any stage of the 17-stage removal process in these circumstances clearly offends against the doctrine of separation of powers.

181. As to the symbiotic relationship between the appointment process and the removal process, we refer to the dictum of Moseneke DCJ in *Masetlha*,[57] when he said:

> "*… the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into the (appointing provision).*

[56] *Amabhungane Centre (supra)* at paragraph [66]
[57] *Masetlha (supra)* at paragraph [68]

There is no doubt that the power to appoint … implies a power to dismiss."

182. The leading case of *Heath*[58] made it clear that the problematic area of the deployment of judges for the performance of non-judicial roles must be determined according to the circumstances of each case. We respectfully submit that on the facts of the present case, it would be eminently inappropriate to allow Rule 129V to survive the necessary scrutiny and possibly striking down after Part B.

183. In South Africa, while there are examples of judges performing administrative tasks on behalf of the executives, such as Commissions of Inquiry, there is no precedent of a member of the judiciary performing the task of the legislature. This is an unprecedented proposal which is clearly unlawful and unconstitutional.

184. Subsequent to the *Heath* case, the Constitutional Court, per Zondo J, developed an appropriate test in respect of judicial officers performing administrative tasks which are unrelated to their judicial functions.[59] We will seek to demonstrate that the impugned Rules do not pass the test.

185. What makes this rule more absurd is that political parties are mandated to nominate members to be appointed to this panel, including the nomination of a judge. Members of the judiciary are supposed to be impartial at all times and cannot be subjected to any conduct where political parties will have to nominate them as it might send a message that a particular judge subscribes

[58] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC)
[59] *NSPCA v Minister of Agriculture, Forestry and Fisheries* 2013 (5) SA 571 (CC) at paragraph [37]

to the views of a certain political party that nominated him or her or that there is an expectation for him or her to be so aligned or to be indebted to the nominating party. The entire scheme is destined to undermine the independence of the judiciary, wittingly or unwittingly. No doubt, the intentions of its sponsors might have been noble, but the unintended consequences will leave a devastating impact on judicial independence. One needs only imagine the situation where each of the 14 parties represented in Parliament would nominate one or more of "their" own judges.

186. The Constitutional Court described the *Gool* annotation in *OUTA* as follows:

> *"courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself"* (emphasis added).

187. In this regard the participation of the judiciary in this legislative process is not mandated by the Constitution. No submission in that regard has been advanced. Nor can it be properly advanced on the objective evidence.

188. In the *Heath* case quoted hereinabove, the court held that under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive or legislative posts, or to perform other executive or legislative functions, which are not appropriate to the "*central mission of the judiciary*". Were this to happen the public may well come to see the judiciary

as being functionally associated with the executive and/or the legislature and consequently unable to control the excesses of power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, both crucial for the proper discharge of functions assigned to the judiciary by our Constitution.

189. We therefore submit that the impugned rules undermine the Constitution and should ultimately be declared to be unconstitutional and unlawful on this important ground alone.

L: SUBMISSIONS IN RESPECT OF NEW GROUNDS

Double Jeopardy

190. The Democratic Alliance's notice of complaint motion is based on the grounds of misconduct and/or incompetence as alluded to in *South African Reserve Bank*, *Vrede Dairy* and other matters.

191. In these matters, the applicant was ordered to pay the costs personally because she was found to have acted in a grossly unreasonable manner amongst others. The personal costs orders are punitive in nature.

192. The double jeopardy principle comes into play when someone is charged or punished twice for the same incident. This is equivalent to civil law principle of *"once and for all".*

193. To be more precise, double jeopardy occurs where an employee is punished twice for the same incident of misconduct or poor performance.

194. Such discipline would be found to be unfair and unlawful.

195. The applicant has already been punished by our courts for her *"misconduct"*.

196. There is no justification for National Assembly to hold a disciplinary process, especially because the decisions of the court stand. It is not the Speaker and DA's case that there is evidence to show that the penalty by the court was grossly irrational and/or unfair.

197. The fact that the applicant is guilty of misconduct *"incompetence"* had already been established by the courts. As such, there is no new evidence justifying the enquiry into applicant's *"misconduct"* (see *Rakgolela v Trade Centre*[60]*).*

198. It is submitted that double jeopardy is just a principle of law where exception may need to be made. The Speaker has not shown exceptions why the National Assembly process is justified. We submit that in the circumstances the National Assembly process offends the principle of double jeopardy as such, unfair and unlawful.

***Mala fides*, ulterior and/or improper motives**

199. In the applicant's supplementary founding affidavit, sufficient evidence is advanced that establishes *mala fides* on the part of the Speaker. Examples of pointers towards that conclusion include:

199.1. The Speaker's attempt on 29 May 2019 to entertain the DA's request to have the applicant removed from office, when there were no rules

[60] 2005 (3) BALR 353.

governing the Public Protector's removal from office. This further points to an unconstitutional position adopted by the Speaker.

199.2. On 6 December 2019, the DA through its Chief Whip, submitted a complaint motion to Speaker for applicant's removal from office. The Speaker leaked the motion to the media, on the other hand, refused the applicant access to the motion.

199.3. As if that was not enough, the Speaker approved the complaint motion which later turned out defective.

199.4. On 24 January 2020, the Speaker issued a media statement indicating *inter alia* that she had approved the DA's complaint motion in terms of the new rules, the Speaker did all this without contacting the applicant. At this stage, the applicant had not been furnished with a copy of the new rules.

199.5. The insistence by the Speaker that the rules be immediately implemented regardless of the fact that the case challenging the constitutionality of the rules is pending. Needless to say, her conduct seeks to undermine the rule of law and the applicant's constitutional right to challenge the constitutionality of the rules.

199.6. The failure by Speaker to give reasons for the urgent implementation of the rules which are a subject of challenge. There is absolutely no reason to subject the applicant to the process before this court has determined the constitutionality of the rules unless the Speaker has an ulterior motive. Whatever the reason an impartial Speaker cannot be expected

to implement the rules before ensuring their consistency with the Constitution.

199.7. The failure by Speaker to take cognisance of the fact that her failure and/or refusal to suspend the process or implementation of the rules whilst waiting for the outcome of Part B may turn out to be wholly unnecessary and unlawful and have far reaching implications which may be irreversible if the applicant succeeds in having the rules declared unconstitutional under Part B. It is clear that the Speaker's conduct is not motivated by the desire to uphold the rule of law.

Unreasonableness

200. Although the concept of unreasonableness is closely connected to the issues of the failure to give reasons and rationality, both of which have already been discussed above, we also seek to invoke it as a standalone ground of review and/or unconstitutionality, more particularly in relation to:

200.1. the unacceptability of the explanation for refusing to furnish reasons;

200.2. the inadequacy of the reasons eventually and belatedly provided in the answering affidavit;

200.3. the undue violation of the socio-economic rights contained, *inter alia*, in sections 22 and 23 of the Constitution; and

200.4. the apparent lack of equilibrium and consideration of the wider impact of implementing the rules in the prevailing circumstances.

201. In this section, reliance will be placed on the leading cases which have discussed unreasonableness as a standalone ground of review, albeit mainly in the context of PAJA, including *Bato Star*,[61] in which it was said that:

> "*What will constitute a reasonable decision will depend on the circumstances of each case, such as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-makers, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.*

202. Finally, in this regard, we link the issue of unreasonableness to the alleged infringement of the applicant's rights in terms of section 23 of the Constitution.

203. In her supplementary founding affidavit, the applicant contends that the impugned rules are also in breach of her constitutional rights as enshrined in section 23 of the Constitution, insofar as her conditions of employment are thereby altered unilaterally, without consultation and midstream into her term of employment.

204. We pause here to state that we have had regard to the supplementary answering affidavits filed by both the Speaker and the Democratic Alliance. They do not deal with the issue of section 23 as pleaded as a new ground by the applicant.

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[61] *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paragraphs [44] and [45]

205. Having noted the 1st and 10th respondents' failure to challenge the applicant's contention on this issue we continue to argue as follows.

206. First, since the issue stands uncontested, the court has to find in favour of the applicant insofar as this ground is concerned, alternatively, the second approach is to commence with the Constitution and in particular, whether in principle a person such as applicant enjoy constitutional rights in general and specifically those rights set out in section 23.

207. Section 23(1) provides that everyone has the right to fair labour practices. The term *"everyone"* which follows the wording of section 7(1) of the Constitution which provides that the Bill of Rights enshrines the right of all people in the country is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution. A point confirmed by Ngcobo J (as he then was) in *Khosa v Minister of Social Development*[62]:

> "*The word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system*."

208. The Constitutional Court has been consistent in this approach. In *S v Makwanyane*[63], Chaskalson P (as he then was) said that the right of life and dignity rests in every person, including criminals convicted by vile crimes.

209. The learned president went on to say that these criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to

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[62] 2004 (6) SA 505 (CC) para 111.
[63] 1995 (3) SA 391 (CC) at paragraph 137.

assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment.

210. The question arises thus as to whether section 23 affords protection to the Public Protector. In *NEHAWU v UCT*[64], the Constitutional Court emphasised that focus of section 23(1) of the Constitution was on the *"relationship between the worker and the employer and the continuation of that relationship on terms that are* ***fair*** *to both"*. That approach followed upon the judgment in *SANDU v Minister of Defence*[65]. Even if a person is not employed under a contract of employment, that does not deny the employee all constitutional protection. This conclusion is reached despite the fact they may not be employees in the full contractual sense of the word but because their employment in many respects mirrors those of people employed under a contract of employment.

211. We submit that once the court accepts that the constitutional right to fair labour practices rests in *"everyone"* and, further that it includes not only parties to a contract of employment but those persons in an employment relationship, we submit to the effect that persons, who engage in service pursuant to an employment relationship such applicants are covered by section 23.

212. We argue that the applicant is beneficiary of rights provided for in terms of section 23(1). Anything contrary would mean the Public Protector is stripped of the right to be treated with dignity by the National Assembly, in particular the Speaker. Once it is recognised that the Public Protector must be treated with dignity not only by the National Assembly but by the President, section 23

[64] (2003) 24 ILJ 95 (CC) at paragraph 40.
[65] (1999) 20 ILJ 2265 (CC) at paragraphs 28-30.

of the Constitution, which at its core, protects the dignity of those in an employment relationship, should also be of application. The enforcement of discipline at work remains a labour issue and a key component of the applicant's section 23 rights.

213. The impugned rules are unreasonable and arbitrary in that they allow the Speaker to accept and approve the complaint notice without affording the Public Protector a hearing. This goes against section 23, thus unconstitutional. The Speaker has also consistently argued that she is implementing the impugned rules, however, as we point out that the Public Protector has been unfairly treated within the framework of the impugned rules, which constitute an unfair labour practice in contravention of section 23(1) of the Constitution and the fair labour practices.

214. We submit that section 23(1) which provides that everyone has the right to fair labour practices, was designed to ensure that the dignity of all working people should be respected and that the work place should be predicated upon principles of social justice, fairness and respect for all.

215. The impugned rules goals and principles as they currently stand cannot be traced to section 23 of the Constitution. The impugned rules deprive the Public Protector of her right to a fair procedure. The rules which contravene the Constitution cannot stand as such ought to be declared unlawful and unconstitutional.

216. Nowhere in their papers had the 1st and 10th respondents contended that the impugned rules constitute the fair labour practices and the Constitution.

M: JUST AND EQUITABLE REMEDIES (DECLARATORS / REVIEW / STRUCTURAL RELIEF)

217. As already pointed out, the just and equitable relief sought can be classified into four clusters or categories, namely:

217.1. declaratory relief;

217.2. judicial review;

217.3. structural relief; and

217.4. personal and/or punitive costs.

218. The impugned conduct and/or decisions amount to constitutional breaches of the relevant provisions of PAJA and/or the principle of legality. The relief sought is accordingly primarily premised on sections 38 and/or 172 of the Constitution.

219. Section 38(a) provides, *inter alia*, that:

> "*(Anyone acting in their own interest) 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."*

220. I have been further advised that in terms of section 172 of the Constitution, when deciding a constitutional matter within its power, a court:

> "*(a) must declare that any law or conduct is inconsistent with the constitution is invalid in its inconsistency; and*
>
> *(b) may make an order that is just and equitable, including*
>
> *(i) an order limiting the retrospective effect of the declaration of invalidity; and*

(ii) *an order suspending the declaration of invalidity of any period and on any conditions, to allow the competent authority to correct the defect"* (emphasis added).

221. It is therefore my respectful submission that the Honourable Court should grant an order as prayed for in the Notice of Motion, including an order suspending the implementation of the Rules while the National Assembly will be redrafting new Rules governing the section 194 inquiry process. Strictly speaking, such relief is reserved for orders of statutory invalidity, but I am advised that it will be argued that this is an appropriate case for the said remedy to be extended to an important instrument, such as the rules for the lawful implementation of an impeachment in terms of section 194 of the Constitution. In this regard, reliance will be placed on a purposive interpretation of the provisions of section 172(2)(b) of the Constitution.

222. The proposed suspension should be for a period of six to twelve months or any period suitable to allow the National Assembly to perform this task within a reasonable time. I am advised that further legal argument will be advanced in this regard. Alternatively, consensus will be provisionally sought among the parties as to what a reasonable period might be in the circumstances.

J: PERSONAL AND PUNITIVE COSTS

223. It is my respectful submission that costs should be granted on the attorney-and-client scale against the respondents who opposed this application because, viewed on a cumulative scale, their conduct has repeatedly been characterised by misconduct, bias, bad faith and ulterior motives. In the case

of the Speaker, such conduct falls far short of the high standards expected of her, given her important constitutional role and functions.

224. She is correctly expected to be more familiar with the rules than the average member of the National Assembly. As the Constitutional Court put it:

> *"Although all members of the National Assembly are expected to know the Rules of the National Assembly, there is an expectation that the Speaker would know the Rules of the National Assembly better than anyone else."*[66]

225. I am advised that it will be amply demonstrated that in numerous ways, the conduct of the Speaker has been reckless, grossly unreasonable and in bad faith, sufficient to attract not only a punitive costs order but costs *de bonis propriis*, which she must pay personally and to the extent of 20% of the costs of this application, including the costs attendant upon the employment of three counsel. Such costs must include any costs which may have been reserved in respect of Part A of the application.

226. Without any unnecessary repetition of some of the issues already canvassed hereinabove, which are relevant to the question of costs, it may be necessary to list the factors upon which reliance will be placed in seeking a punitive and personal order against the Speaker. They include:

226.1. Her admitted failure to assess the substantive requirements of the motion;

[66] *EFF v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at paragraph [55].

226.2. Her similarly admitted failure to perform the requisite *prima facie* assessment despite the clear duty imposed by the rules;

226.3. Her reckless failure to notify the accused Public Protector of the removal process, accompanied by releasing the details to the media on 24 January 2020;

226.4. Her repetition of the improper conduct referred to in the previous subparagraph of 24 February 2020, even when she was in possession of correspondence and court papers pointing out its inappropriateness. The explanation given by the Speaker as to the differences in her approach to the two motions in fact aggravate the problem is logically unsustainable and simply provides aggravation in respect of her already unacceptable and improper conduct. She now abrogates to herself the royal prerogative to determine when the charged person is deserving to be informed of his or her predicament in relation to the media and the general public. This is plainly unconstitutional and unethical.

226.5. Her refusal to give reasons for her decision(s) when repeatedly requested to do so. The giving of reasons is one of the essential duties of a person performing a public function, moreso when penal consequences are involved. This is so that the accused person can be enabled to protect his or her rights;

226.6. Her acceptance and approval of the first and second motions when they were patently defective, in that they relied on the retrospective

application of the rules, even after this defect had been pointed out to her in correspondence and court papers;

226.7. Her failure to follow the good example of the President in recognising the reasonableness of the perception of bias on her part for her role in the ongoing *BOSASA* litigation;

226.8. Her failure and/or refusal to enforce the National Assembly Rules in that when evidence was brought to her attention regarding the breach of Rule 88 by those members who had made utterances which prejudiced the guilt of the Public Protector, the Speaker ought to give unsustainable excuses and justifications for such unlawful conduct, instead of discouraging it, reprimanding it and/or distancing herself from it. By defending such unacceptable conduct, she associated herself with it;

226.9. Her failure to give recognition to the reasonable views of members of the National Assembly regarding the handling of the litigation and the process. An example of this was the Speaker's refusal to grant the ATM a reasonable extension in order for it to apply its mind to the legal issues raised in the Part A application, without giving any justification for the rush;

226.10. Finally and perhaps most significantly, the Speaker's conduct in unreasonably forging ahead with the litigation and turning down all reasonable appeals for her to suspend the process pending the necessary determination by the courts as to the constitutionality or otherwise of the rules. In this regard, it is necessary to reiterate that:

226.10.1. it was solely this unreasonable attitude which gave rise to the Part A application;

226.10.2. but for the said conduct, the necessity for Part A would have been obviated and the Part B application would have been heard not later than April and/or May 2020. In all probability, by now judgment would have been handed down. Depending on the outcome of the process of appeal or the amendment of the rules, it would be underway and nearly complete. A lot of money and time would have been saved and the public interest in holding public officials accountable would have been served without undue delay.

227. In actual fact, it is not for the Speaker to defend the rules, no matter what and even in the face of a legitimate challenge thereto. The rules belong to the members of the National Assembly, to whom she is totally accountable. They do not belong to her personally. If the real owners of the rules are willing to await the voice of the courts, so must she.

228. In aggravation of all the aforegoing, and even after failing twice to inform the Public Protector of her intended actions in June 2020, the Speaker once again embarked on unilateral actions which are averse to the Public Protector's rights. This time she did so in breach of a clear undertaking to give prior notice. Even without such an undertaking, she had a duty to observe even the common rules of decency and courtesy to the applicant and other parties in these proceedings, which she failed to do.

229. All of the above is totally inconsistent with the legal duties of an impartial and reasonable Speaker of the National Assembly, who should harbour no personal feelings or attitudes towards any of the parties. The principles which have been developed by our courts, including the Constitutional Court, in respect of this area of law need to be seen to be applied fairly, evenly and consistently, irrespective of the identity of the alleged culprit.[67]

230. Such conduct, as outlined in the papers as a whole, is deserving of both personal and punitive costs *de bonis propriis* against the Speaker. In support thereof, particular reliance will be placed on the most recent jurisprudence developed by the Constitutional and High Courts in this important area of law. The main appeal will be to consistency and indiscriminate application, no matter who the public official or incumbent of a constitutional office happens to be and how popular or unpopular he or she might be with those accused of wrongdoing.

K: CONCLUSION

231. In the totality of the aforegoing submissions we pray that it may please this Honourable Court to grant an order in terms of the amended notice of motion.

DC MPOFU SC
B SHABALALA
H MATLHAPE

Counsel for the Applicant
Sandton
4 December 2020

[67] Notably *Public Protector v SA Reserve Bank* 2019 (9) BCLR 113; and *Economic Freedom Fighters v Gordhan* 2020 (8) BCLR 916 (CC).

LIST OF AUTHORITIES

1. *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
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3. *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A)
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