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	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Third Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	Fourth Respondent
THE COMMISSION FOR GENDER EQUALITY	Fifth Respondent
THE AUDITOR-GENERAL OF SOUTH AFRICA	Sixth Respondent
THE INDEPENDENT ELECTORAL COMMISSION	Seventh Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Eighth Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Ninth to 22nd Respondents

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FIRST RESPONDENT'S HEADS OF ARGUMENT – PART B RELIEF

CONTENTS

INTRODUCTION

1. In February 2020 the applicant ('**Adv Mkhwebane**'), who is the incumbent Public Protector and hence one of the state institutions supporting constitutional democracy regulated by Chapter 9 of the Constitution of the Republic of South Africa, 1996 ('**Chapter 9**' and '**the Constitution**' respectively), instituted a two-part application in this Court, citing as respondents the Speaker of the National Assembly ('**the Speaker**' and '**the NA**' respectively), the President of the Republic of South Africa, ('**the President**'), the other Chapter 9 institutions and the political parties represented in the NA including the Democratic Alliance ('**DA**') and the African Transformation Movement ('**ATM**').

2. In Part B of her amended notice of motion,[1] which is currently pending before this Court and to which these submissions relate, Adv Mkhwebane seeks the following final relief:

    2.1. First, Adv Mkhwebane seeks an order declaring unlawful, unconstitutional, invalid and null and void[2] the New Rules governing the process in the NA for motions for the removal of officer bearers of Chapter 9 institutions in terms of section 194 of the Constitution of the

[1] Amended Notice of Motion 977: 1-6. The number/s before the colon is/are the page number/s. The number/s or letter/s after the colon, if any, is/are the para number/s or letter/s.

[2] Amended Notice of Motion 977: 1.

Republic of South Africa, 1996 ('**Chapter 9**' and '**the Constitution**') which the NA adopted on 3 December 2019 ('**the New Rules**').[3]

2.2. In the alternative to her first prayer, Adv Mkhwebane seeks an order declaring that the New Rules do not operate with retrospective effect against her, i.e. in relation to her actions before 3 December 2019.[4]

2.3. Third, Adv Mkhwebane seeks an order reviewing and setting aside the decision of the NA to adopt the New Rules.[5]

2.4. In the alternative to her third prayer, Adv Mkhwebane seeks an order reviewing and setting aside the decision of the Speaker approving the motion for her removal.[6] In her Supplementary Replying Affidavit ('**SRA**') she has clarified that the decision in question is the Speaker's decision of 26 February 2020 that the second (replacement) notice of motion of 21 February 2020 calling for Adv Mkhwebane's removal, submitted by the Chief Whip of the DA in the NA, Ms N Mazzone MP, described below, conformed with Rule 129R of the New Rules. (Adv Mkhwebane does not seek relief in relation to the Speaker's decision of 24 January 2020 that Ms Mazzone MP's first notice of motion

[3] The New Rules are Part 4 of Chapter 7 of the NA Rules and comprise six definitions and Rules 129R to 129AF. They were also accompanied by a consequential amendment to NA Rule 88. See annexure PPFA7 142-147: D-E; for a clearer copy, see annexure TRM37 475-480: D-E.

[4] Amended Notice of Motion 977: 2.

[5] Amended Notice of Motion 977: 3.

[6] Amended Notice of Motion 977: 3.

of 6 December 2019 calling for her removal, also described below, which Ms Mazzone MP withdrew on 21 February 2020 when submitting her second motion, conformed with Rule 129R.[7])

2.5. Fourth, Adv Mkhwebane seeks an order suspending the invalidity of the New Rules for a period of six months, within which the NA must effect the necessary amendments to bring the New Rules in line with the Constitution.[8] Adv Mkhwebane refers to this as '*structural relief*'.[9]

2.6. Fifth, Adv Mkhwebane seeks her costs of suit in Part B, including punitive costs on the attorney-land-client scale against the Speaker and the DA 'and/or' a contribution of 20% of such costs to be paid personally by the Speaker *de bonis propriis*.[10]

3. In Part A of her notice of motion,[11] the application concerning which was heard on 12, 13 and 24 August 2020 by a Full Court comprising Saldanha, Steyn and Samela JJ, Adv Mkhwebane sought, in the first instance, an interim interdict prohibiting the Speaker, pending the outcome of Part B, '*from taking any further steps in the implementation of the processes envisaged in section 194 of the Constitution and conducted in terms of the impugned Rules*'. The '*processes*' in

[7] Speaker's SAA 1113: 12, read with SRA 1298: 11.2.

[8] Amended Notice of Motion 977 : 4.

[9] SRA 1298: 11.3.

[10] Amended Notice of Motion 977: 5.

[11] Notice of motion 2-3: A.

question were those in terms of section 194 of the Constitution and the New Rules in relation to Ms Mazzone MP's motion calling for Adv Mkhwebane's removal from office ('**the impeachment process**').

4. In the alternative to the interim interdict, in Part A of her notice of motion, Adv Mkhwebane sought a final order prohibiting the Speaker and other (unnamed) members of the NA, who she alleges have a conflict of interest, '*from voting and/or participating in any way in the processes carried out in terms of section 194 of the Constitution and the Rules*'.[12] In this regard, Adv Mkhwebane also sought an order directing '*the conflicted persons*' to declare their interests to the Speaker.[13]

5. As a separate and final head of relief in Part A, which was not framed as an alternative to the interim interdict, Adv Mkhwebane also sought an order directing the Speaker to provide reasons for approving Ms Mazzone's first motion.[14]

6. Adv Mkhwebane's application for relief in terms of Part A was refused by the Full Court, with costs, on 9 October 2020.[15] An application by her for leave to appeal to the Supreme Court of Appeal was refused by the Full Court, with costs, on 30 November 2020.

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[12] Notice of motion 3: A.3.

[13] Notice of motion 4: A.4.

[14] Notice of motion 4: A.5.

[15] Full Court judgment Part A 1020-1108.

7. As a result, the issues raised by Part A have been finally determined and the impeachment process is underway. In the period since the filing of the Speaker's last affidavit on 30 October 2020,[16] the Speaker has appointed the members of the independent panel required by the New Rules to conduct a preliminary assessment of the evidence presented by Ms Mazzone MP in support of the charges in her notice of motion. They are retired Constitutional Court Justice Bess Nkabinde (the chairperson), Adv Dumisa Ntsebeza SC and Adv Johan de Waal SC. Shortly before the hearing, the Speaker will seek leave to file a short affidavit confirming their appointment and setting out the *status quo* with the impeachment process.

8. If necessary, in the run-up to the hearing we will also seek leave to file supplementary heads of argument dealing with any points raised in the Adv Mkhwebane's or the ATM's heads of argument which are not covered by our current heads of argument (i.e. what follows) – the reasons being that Adv Mkhwebane and the ATM have missed the agreed deadline for the filing of their heads of argument and the Speaker's senior counsel is not available from 5 December 2020 until 10 January 2021.

9. In what follows, we deal with the following matters:

    9.1. The chronology of the main events prior to and after the NA's adoption of the New Rules;

[16] Speaker's SAA 1163.

9.2. The relevant constitutional provisions and constitutional principles;

9.3. An overview of the impeachment process under section 194 of the Constitution and the New Rules;

9.4. The Speaker's response to each of the fourteen grounds of challenge or review which Adv Mkhwebane has raised in her founding affidavit ('**FA**') and supplementary founding affidavit ('**SFA**') and with which she is persisting; and

9.5. The Speaker's response to Adv Mkhwebane's claim for punitive costs *de bonis propriis* costs.

CHRONOLOGY OF EVENTS

Events prior to the adoption of the New Rules

10. The background facts, which are common cause, are set out in detail in the Speaker's main answering affidavit ('**AA**'). With reference to that affidavit, we set out a précis of the events which are most relevant to the relief sought in Part B of Adv Mkhwebane's amended notice of motion.

11. On 19 October 2016, a date during term of the the Fifth Parliament constituted after the fifth general election in April 2014, Adv Mkhwebane assumed office as Public Protector.[17]

12. To give effect to the NA's obligation under section 55(2)(b)(ii) of the Constitution to provide for mechanisms to maintain oversight over the Public Protector ('**PP**') (an organ of state), both the Speaker in the Fifth Parliament, Ms Baleka Mbete MP, and the current Speaker, Ms Thandi Modise MP, acting pursuant to Rule 225 of the general Rules of the NA made in terms of section 57(1)(b) of the Constitution ('**the NA Rules**'), and with the concurrence of the NA's Rules Committee ('**the Rules Committee**'), established a portfolio committee, which was previously called the Portfolio Committee on Justice and

[17] Speaker's AA 188: 6.

Constitutional Development and now called the Portfolio Committee on Justice and Correctional Services ('**the Portfolio Committee**').[18]

13. At all times material to this matter:[19]

13.1. the Portfolio Committee was (and remains) responsible for overseeing the Department of Justice and Constitutional Development and other institutions, including the PP, that receive their budgetary allocation under the Justice and Constitutional Development Vote; and

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

14. The members of the Portfolio Committee appointed to it by the political parties represented in the NA in terms of NA Rule 155, have freedom of speech in the Committee (as indeed they also do in the NA itself), subject to the rules and orders of the NA.[20]

15. The Portfolio Committee reports to the NA.[21]

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[18] Speaker's AA 188: 9.

[19] Speaker's AA 188-189: 10.

[20] Speaker's AA 189: 11.

[21] Speaker's AA 189: 12.

16. Since Adv Mkhwebane's appointment as the PP in October 2016, she has appeared before the Portfolio Committee on several occasions. She has also had several engagements with the Speaker or her office, the most important of which are described in the Speaker's answering affidavit.[22]

17. On 19 June 2017 Adv Mkhwebane published her *Report on an Investigation into Allegations of Public Funds and Failure by the South African Government to Implement the CIEX Report* ('**CIEX PP Report**').[23] The factual findings and conclusions in the CIEX PP Report include that the South African Government had improperly failed to implement the initial CIEX report which dealt with alleged stolen state funds, after commissioning the report from CIEX and paying for it; the Government and the South African Reserve Bank ('**the SARB**') had improperly failed to recover R3,2 billion from Bankorp Limited/ABSA; and that the South African public had been prejudiced by the conduct of the Government and the SARB.[24] Para 7.2 of the CIEX PP Report obliged the Chairperson of the Portfolio Committee to initiate a process to amend section 224 of the Constitution to alter the mandate of the SARB.[25] Para 8.1 obliged the Chairperson of the Portfolio Committee to report back to Adv Mkhwebane within 60 days on the steps taken to implement para 7.2.[26]

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[22] Speaker's AA 189: 13.

[23] Speaker's AA 190: 16.

[24] Speaker's AA 190-191: 17.

[25] Speaker's AA 191: 18.

[26] Speaker's AA 191: 19.

18. The SARB instituted judicial review proceedings in the Gauteng Division of the High Court, Pretoria, challenging the CIEX PP Report and remedial action insofar as it pertained to the SARB. The SARB joined the Speaker of the NA (then Ms Mbete) and the Chairperson of the Portfolio Committee (then Dr Mathole Motshekga MP) as respondents in those proceedings.[27] Because the remedial action in paras 7.1 and 8.1 of the CIEX PP Report intruded on the law-making terrain of Parliament, the Speaker and Chairperson of the Portfolio Committee supported the SARB's challenge to that remedial action and successfully applied for admission as co-applicants.[28] After initially opposing the application brought by the SARB, the Speaker and the Chairperson, Adv Mkhwebane filed an answering affidavit in which she conceded the merits and consented to all the relief sought. Adv Mkhwebane agreed that the remedial action in paras 7.1 and 8.1 was unlawful in that only Parliament has the power to amend the Constitution and that she had no power to dictate to Parliament that it do so.[29]

19. On 17 August 2017 Murphy J, sitting in the Gauteng Provincial Division of the High Court, upheld the challenge to the remedial action in paras 7.2 and 8.1 of the CIEX PP Report on the basis raised by the Speaker and the Chairperson of the Portfolio Committee (and conceded by Adv Mkhwebane in her answering affidavit), as well as on other grounds not raised by the Speaker and the

[27] Speaker's AA 191: 20.

[28] Speaker's AA 191-192: 21.

[29] Speaker's AA 192: 22.

Chairperson.[30] The findings in that judgment, which is reported as *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP) ('***SARB v PP I***'), underlie one of the charges in the DA's current notice of motion for Adv Mkhwebane's removal from the office of PP. There was no appeal against Murphy J's judgment or any of his orders.[31]

20. In review proceedings in which the Speaker and the Chairperson did not participate, the SARB also challenged paras 7.1 and 8.1 of the remedial action in the CIEX PP Report, which required the President to re-open enquiries by the Special Investigating Unit ('**SIU**') for the recovery of R1,125 billion of misappropriated public funds unlawfully given to ABSA Bank ('**ABSA**') and to recover them. This remedial action obliged the SARB to cooperate in the investigation and recovery of those funds, and similarly obliged the SARB to report back to Adv Mkhwebane within 60 days on the steps it had taken.[32] ABSA launched its own review proceedings against Adv Mkhwebane's adverse remedial action, as did the Minister of Finance and Treasury. Those two cases were consolidated with the SARB's challenge. The consolidated matter was later (on 16 February 2018) decided by a Full Court of the Gauteng Provincial Division of the High Court, discussed below.[33]

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[30] Speaker's AA 192: 23.

[31] Speaker's AA 192: 23.

[32] Speaker's AA 192-193: 24.

[33] Speaker's AA 193: 24.

21. Prior to that Court's decision, on 13 September 2017 Mr J Steenhuisen MP, the then Chief Whip of the Official Opposition in the Fifth Parliament, the DA, requested that the NA initiate proceedings to remove Adv Mkhwebane from the office of PP, in terms of NA Rule 337(b)[34] and section 194 of the Constitution. Mr Steenhuisen's request was based on certain of the Court's findings in *SARB v PP I* adverse to Adv Mkhwebane (namely that she had sacrificed her independence and impartiality when she consulted with the Presidency and the State Security Agency ('**SSA**') on remedial action to be recommended in the CIEX PP Report). Mr Steenhuisen also alleged that her conduct over the preceding ten months had demonstrated that she was not fit to hold the office of PP.[35]

22. On 5 October 2017, at a meeting of the Portfolio Committee, Adv Mkhwebane briefed the Committee on her Annual Report for 2016/2017. During the course of this meeting the Portfolio Committee raised with Adv Mkhwebane their concern that *SARB v PP I* had affected public confidence and trust in the PP.[36]

23. On 25 October 2017 the Portfolio Committee deliberated on Mr Steenhuisen's request that the NA initiate proceedings to remove Adv Mkhwebane from the

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[34] NA Rule 337 provides in relevant part:

> '***337. Tabling of written instruments in the Assembly***
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> *The Speaker must table the following instruments without delay, or if the Assembly is in recess, on the first day when the Assembly resumes its sittings: … (b) all requests, applications and other written submissions made to the Assembly in terms of legislation to activate a parliamentary process prescribed by such legislation*'.

[35] Speaker's AA 193-194: 25.

[36] Speaker's AA 194-195: 27.

office of PP. The Portfolio Committee resolved not to recommend that the NA initiate an inquiry into Adv Mkhwebane's fitness to hold office.[37]

24. On 15 November 2017 the Portfolio Committee's recommendation was presented to the NA[38] and on 29 November 2017 the NA resolved, by a majority of votes, to refuse Mr Steenhuisen's request that the NA initiate an inquiry into Adv Mkhwebane's fitness to hold office.[39]

25. On 16 February 2018 a Full Court of the Gauteng Provincial Division of the High Court decided the consolidated review proceedings brought by SARB, ABSA and the Minister of Finance and the Treasury of paras 7.1 and 8.1 of the remedial action in the CIEX PP Report referred to in para 20 above. In its judgment, which is reported as *Absa Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP) ('***ABSA v PP***'), the Full Court (*per* Fourie, Mngqibisa-Thusi and Pretorius JJ) made certain findings adverse to Adv Mkhwebane, including the following:[40]

25.1. she had failed to disclose in the CIEX PP Report that during her investigation she had held meetings with the Presidency on 25 April and 7 June 2017;

[37] Speaker's AA 195-197: 28.

[38] Speaker's AA 197-199: 29.

[39] Speaker's AA 199:30.

[40] Speaker's AA 199-200: 32.

25.2. in her answering affidavit she had admitted only to having held the first meeting;

25.3. she had acted in a procedurally unfair manner; and

25.4. in her answering affidavit she said her averments relating to economics were based on advice received from economic experts during her investigation, whereas in fact the economic expert's report had been obtained after the final CIEX PP Report had been issued.

26. The Full Court in *ABSA v PP* ordered Adv Mkhwebane personally to pay 15% of the SARB's costs on an attorney-and-client scale, including costs of three counsel.[41]

27. On 16 February 2018 Mr Steenhuisen submitted to the then Speaker, Ms Mbete MP, a second request for the removal of Adv Mkhwebane from the office of PP and, further, that the necessary procedures be expedited.[42] He based this second request, in part, on the Full Court's judgment in *SARB v PP II.*[43] He alleged that Adv Mkhwebane was '*unfit to hold office as a result of her gross incompetence*'.[44]

[41] Speaker's AA 200: 32.

[42] Speaker's AA 199: 31.

[43] Speaker's AA 199: 32.

[44] Speaker's AA 200: 34.

28. On 6 March 2018 Adv Mkhwebane appeared before the Portfolio Committee to brief it on her *Report on Allegations against Maladministration Against the Free State Department of Agriculture – Vrede Integrated Dairy Farm Report* (‘**Vrede Dairy Report**’), on the CIEX PP Report and in the litigation in the High Court concerning them.[45]

29. The Vrede Dairy Report was the culmination of nearly four years of investigation by Adv Mkhwebane and her predecessor as the PP, Adv Thuli Madonsela, into allegations of widespread corruption, maladministration and impropriety in respect of the Free State Province’s Department of Agriculture’s Vrede Integrated Dairy Project, which included the appointment by the Department of Estina (Pty) Ltd (‘**Estina**’) to manage the project and the payment of substantial sums of money to Estina. The Vrede Dairy Report had received widespread attention, amongst other things because it revealed that Adv Mkhwebane had not investigated the most detailed of the complaints about the Vrede Dairy Project or the roles played and ‘kick-back’ benefits allegedly received by senior politicians in the Free State Province.[46]

30. By 6 March 2018, when Adv Mkhwebane appeared before the Portfolio Committee, the DA and a non-governmental organisation, the Council for the Advancement of the South African Constitution (‘**CASAC**’), had launched proceedings in the Gauteng Division of the High Court, Pretoria, for judicial

[45] Speaker’s AA 201: 37.

[46] Speaker’s AA 202: 38-39.

review of the Vrede Dairy Report, and those proceedings were pending at the time.[47] (Adv Mkhwebane's extensive allegations in her founding affidavit regarding the events at this meeting are dealt with in para 243 below.)

31. On 14 March 2018, after receiving advice from the NA Table[48] that she should refer Mr Steenhuisen's second request for Adv Mkhwebane's removal from office to the Portfolio Committee for consideration and report, the then Speaker (Ms Mbete MP) duly did so and published her decision in the NA's Announcements, Tablings and Committee Reports ('**ATC Reports**').[49]

32. On 17 April 2018 Adv Mkhwebane appeared before the Portfolio Committee to present her Annual Performance Plan and Budget.[50] At that meeting members of the Committee expressed concern at reports of institutional instability at the PP's office due to constant staff turnover and redeployment, especially among senior staff. They also expressed concern about the legal costs associated with the increased number of the PP's findings that are being taken on review. They asked Adv Mkhwebane to ensure that her reports were of the highest standard to lessen the prospects of successful challenges for procedural reasons.[51]

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[47] Speaker's AA 201-202: 40.

[48] The NA Table, which is headed by the Secretary to the NA (the most senior parliamentary official serving the NA), provides procedural and technical advice and guidance to the NA.

[49] Speaker's AA 203: 43-44.

[50] Speaker's AA 203-204: 45.

[51] Speaker's AA 204-205: 46.

33. On 6 June 2018 the Portfolio Committee discussed Mr Steenhuisen's second request for Adv Mkhwebane's removal from office. Adv Mkhwebane was invited to the meeting, but sent an apology the day before. The Committee decided to afford Adv Mkhwebane an opportunity to respond.[52]

34. On 13 June 2018 Adv Mkhwebane appeared before the Portfolio Committee, where Mr Steenhuisen gave a briefing on his second request. The Committee decided to give Adv Mkhwebane an opportunity to respond in writing to his letter requesting her removal from the office of PP.[53]

35. On 5 July 2018 Adv Mkhwebane delivered a lengthy written response, in which she placed considerable emphasis on the fact that *ABSA v PP* was '*currently on appeal to the SCA*' and was the subject of an application for direct access to the Constitutional Court ('**CC**').[54]

36. On 5 December 2018 the Portfolio Committee deliberated on Mr Steenhuisen's second request.[55] Following a debate, the Committee decided, by a majority vote, that it was premature to recommend the initiation of removal proceedings in respect of Adv Mkhwebane; and, consequently, that Mr Steenhuisen's request to expedite removal proceedings against her not be supported.[56]

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[52] Speaker's AA 206: 47-49.

[53] Speaker's AA 206-209: 50-52.

[54] Speaker's AA 210: 54. The PP's response is annexed to the FA as 'PPPFA 5' (FA 115-139).

[55] Speaker's AA 210: 56.

[56] Speaker's AA 210-211: 56-58.

37. On 27 February 2019 the Portfolio Committee's report was tabled before the NA,[57] and on 20 March 2019 it was added to the NA's Order Paper.[58] However, as things turned out, this item lapsed in terms of NA Rule 351 because the Fifth Parliament was then dissolved for the 2019 general election before it was considered by the NA.[59]

38. On 8 May 2019 our sixth democratic general election was held.[60]

39. On 22 May 2019, pursuant to the election, the Sixth Parliament was constituted and the current Speaker, Ms Modise MP, was elected as such by the members of the NA.[61] In addition, the Portfolio Committee was reconstituted, and Mr Gratitude Magwanishe replaced Dr Motshekga as its Chairperson.[62]

40. On 20 May 2019 Tolmay J, sitting in the Gauteng Division of the High Court, Pretoria, upheld the DA and CASAC's judicial review challenge to the Vrede Dairy Report referred to in para 30 above, but postponed her decision on the appropriate costs order in the light of the facts that the DA and CASAC had asked that Adv Mkhwebane be ordered to pay the costs of the proceedings in her personal capacity; and that, at that juncture, the CC had heard (on 27 November 2018) and reserved its judgment on an application for leave to appeal by Adv

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[57] Speaker's AA 211-213:59-61.

[58] Speaker's AA 213: 61.

[59] Speaker's AA 213: 61-62.

[60] Speaker's AA 213: 64.

[61] Speaker's AA 213: 64.

[62] Speaker's AA 213-214: 64.

Mkhwebane against the personal costs order made against her by the Full Bench in *Absa v PP* (referred to in para 26 above). Tolmay J's judgment is reported as *Democratic Alliance v Public Protector and a related matter* [2019] 3 All SA 127 (GP) ('***DA v PP I***').

41. On 23 May 2019 Mr Steenhuisen submitted a third request on behalf of the DA for the removal of Adv Mkhwebane from the office of PP in terms of Rule 337(b) and section 194 of the Constitution.[63] In this request he relied on (a) the judgment of Murphy J in *SARB v PP I*; (b) the CIEX PP Report; (c) a supplementary affidavit on behalf of the SARB in *SARB v PP I*; and (d) the judgment of Tolmay J in *DA v PP I*.[64]

42. On 5 July 2019 Adv Mkhwebane wrote to the Speaker, contesting the validity of Mr Steenhuisen's third request for her removal from the office of PP.[65]

43. On 10 July 2019 the Speaker replied to Adv Mkhwebane's letter, referring to the relevant provisions of the Constitution and the NA Rules, as they then stood, which the Speaker said obliged her to table Mr Steenhuisen's request and which empowered the NA to remove the PP from office.[66] On the same day the Speaker wrote to the Chairperson of the Portfolio Committee, advising him that the Committee was empowered to determine its own working arrangements and that

[63] Speaker's AA 214: 66. NA Rule 337(b) is quoted in above n 34.

[64] Speaker's AA 214-215: 67-68.

[65] Speaker's AA 216: 71.

[66] Speaker's AA 216: 72.

it was to consider and report to the NA on the request to conduct an inquiry in terms of section 194 of the Constitution.[67]

44. On 22 July 2019 the CC handed down judgment in Adv Mkhwebane's application for leave to appeal against the personal costs order made against her by the Full Bench in *Absa v PP* (referred to in para 26 above). By a majority, the CC dismissed the challenge. The judgments are reported as *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) ('***PP v SARB (CC)***').[68]

45. In its judgment in *PP v SARB (CC)*, the majority severely criticised the CIEX PP Report and Adv Mkhwebane's conduct.[69] The criticisms included the following:

45.1. '*In this Court, the Public Protector has contended that the adverse findings made against her by the High Court were based on innocent errors on her part. The Public Protector's persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation. The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report. The Public Protector's conduct in the High Court warranted a de bonis propriis (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner*' (para 205);

[67] Speaker's AA 216: 73.

[68] Speaker's AA 217: 75-76.

[69] Speaker's AA 217-220: 76.

45.2. '*The Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. This type of conduct falls far short of the high standards required of her office*' (para 207);

45.3. '*There is no merit in any of the grounds of appeal advanced by the Public Protector to justify this Court's interference in the High Court's exercise of its true discretion to order that the Public Protector pay 15% of the Reserve Bank's costs in her personal capacity*' (para 218); and

45.4. '*Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous 'misstatements', like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report. The punitive aspect of the costs order therefore stands*' (para 237).

46. On 15 August 2019 Tolmay J handed down her judgment on costs in the judicial review proceedings by the DA and CASAC for judicial review of the Vrede

Dairy Report referred to in para 40 above. Tolmay J's judgment has been reported as *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 4 All SA 79 (GP) ('***DA v PP II***'). Tolmay J ordered that the PP, in her personal capacity, pay 7.5% of the attorney-and-client costs of each of the DA and CASAC including the costs of two counsel.[70]

47. Tolmay J's judgment contains severe criticisms of the Vrede Dairy Report and Adv Mkhwebane's investigation, and of her conduct in the ensuing judicial review proceedings by the DA and CASAC, including the following:[71]

'*The failures and dereliction of duty by the Public Protector in the Estina matter are manifold. They speak to her failure to execute her duties in terms of the Constitution and the Public Protector Act. In my view her conduct in this matter is far worse, and more lamentable, than that set out in the Reserve Bank matter. At least there her failures impacted on institutions that have the resources to fend for themselves. In this instance her dereliction of her duty impacted on the rights of the poor and vulnerable in society, the very people, for whom her office was essentially created. They were deprived of their one chance to create a better life for themselves. The intended beneficiaries of the Estina project were disenfranchised by the very people who were supposed to uplift them. Yet the Public Protector turned a blind eye, did not consult with them and did not*

[70] Speaker's AA 220: 77.

[71] Speaker's AA 220-221: 78.

investigate the numerous irregularities that allegedly occurred properly and objectively. She even completely failed to investigate the third complaint. In the judgment on the merits this Court dealt in detail with the failures of the Public Protector to properly investigate and to propose an appropriate remedial action. What was said there stands and requires no repetition. Her conduct during the entire investigation constitutes gross negligence. She failed completely to execute her constitutional duties in the ways illustrated in the judgment on the merits' (para 25).

48. On 27 August 2019 the Portfolio Committee reported to the Speaker on Mr Steenhuisen's third request to remove Adv Mkhwebane from the office of PP. The Portfolio Committee noted that no rules were in place to regulate the removal of office bearers of Chapter 9 institutions. It was of the view that rules were necessary to ensure the fairness of the process. It said it appreciated the importance of the matter and the urgency with which it should be addressed. It therefore requested that the Speaker urgently refer the matter to the Rules Committee, which she duly did.[72]

49. On 2 September 2019 Mr Steenhuisen submitted to the Speaker's office a set of draft rules for the removal of the head of a Chapter 9 institution.[73]

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[72] Speaker's AA 222: 79.

[73] Speaker's AA 222: 80.

50. On 10 September 2019 the NA's Rules Committee met to consider the Portfolio Committee's recommendation that it develop rules governing the process of removing office-bearers of Chapter 9 institutions.[74] After considering a discussion document prepared by the Secretary to the NA, Mr Masibulele Xaso ('**NA Secretary**'), and following a lengthy discussion, the Rules Committee decided to delegate the development of the new rules to a Subcommittee on Review of the NA Rules ('**the Subcommittee**').[75]

51. Mr Xaso's presentation and the ensuing discussion in the NA Rules Committee on 10 September 2019 addressed the following matters:[76]

51.1. Mr Xaso's discussion document outlined a four-stage process for the removal of an officer bearer of a Chapter 9 institution, in terms of section 194 of the Constitution. They were: (a) the initiation process; (b) the preliminary assessment of evidence (*prima facie*); (c) an inquiry by a committee; and (d) a decision by the NA.

51.2. NA Rule 88 concerned substantive motions.[77] As Rule 88 then stood, it required the Speaker to assess whether there were sufficient grounds for a process of this nature to be initiated.

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[74] Speaker's AA 222: 81.

[75] Speaker's AA 222-226: 82-83.

[76] Speaker's AA 222-226: 82

[77] As it then read, NA Rule 88 provides:

'**Reflection upon judges and certain holders of public office**

51.3. When formulating rules for the impeachment of the President in terms of section 89 of the Constitution, the NA had allocated the responsibility of assessing whether the supporting evidence made out a *prima facie* case for removal to an independent panel, instead of to the Speaker. The Subcommittee, therefore, had to consider what role the Speaker would play in the process to give effect to section 194 of the Constitution.

51.4. If there was a *prima facie* case to answer, the ensuing inquiry could be conducted by a special committee, an *ad hoc* committee or the Portfolio Committee.

51.5. The DA's draft rules were mentioned. Notably, the DA pointed out that most – but not all – of their proposals had found their way into the NA Speaker's discussion document.

51.6. The gravity of the process for removing the head of a Chapter 9 institution was emphasised. The resultant rules had to be fair, open, transparent and guard against arbitrariness. In other words, they had to be rational.

No member may reflect upon the competence or integrity of a judge or a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in Section 194 of the Constitution, or any other holder of an office (other than a member of the government) 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 charges <u>which, if true, would in the opinion of the Speaker prima facie warrant such a decision</u>' (underlining added). When the New Rules were adopted by the NA on 3 December 2019, the NA also decided to amend this rule to exclude the underlined words. See annexure PPFA7 147: E and annexure TRM37 480: E.

51.7. The resultant rules also had to comply with section 194 of the Constitution and address each of the grounds for removal from office, i.e. incompetence, misconduct and incapacity. They had to be clear and provide certainty to Chapter 9 office-bearers and the public.

51.8. The process had to be prioritised and completed as expeditiously as possible.

52. On 20 September 2019 the Subcommittee held its first meeting and discussed a range of issues, including the following: (a) the process under section 194 could not be identical to that under section 89 of the Constitution; (b) it was imperative to define the grounds for removal; (c) the rules should cover all office-bearers of Chapter 9 institutions, and not just Adv Mkhwebane; and (d) legal experts could be involved in the process and an independent panel should be considered, as well as a special committee for an ensuing inquiry under section 194(1)(b) of the Constitution. The Subcommittee resolved that the NA Secretary should have regard to its deliberations and draft rules for its consideration.[78]

53. On 18 October 2019 the Subcommittee met for a second time to consider draft rules presented by the NA Secretary for its consideration. During this meeting, the members of the Subcommittee made various proposals, including the following: (a) the independent panel should be able to receive additional evidence, be empowered to reach conclusions of fact and law, elect a chairperson

[78] Speaker's AA 226-227: 85 (including subparas 85.1 to 85.5).

and table its report for the NA to consider whether to appoint a committee for an inquiry; (b) suggestions were made regarding the definitions of the grounds for removal; (c) the independent panel should include a judge and make findings, not mere recommendations; and (d) if the NA resolved to convene an inquiry in terms of section 194(1)(b) of the Constitution, the committee should be proportionally constituted.[79] The meeting concluded with a resolution by the Subcommittee that the Secretariat should prepare a further draft of the rules based on the inputs of members.[80]

54. On 9 November 2019 the Subcommittee met for a third time. At this meeting the Subcommittee considered amended draft rules prepared by the Secretariat, along with a revised proposal by the DA, a proposal by the EFF and a submission by a non-governmental organisation, the Organization Undoing Tax Abuse (OUTA). During the meeting: (a) members of Parliament's Legal Services gave a briefing about the amended definitions of '*incapacity*', '*incompetence*' and '*misconduct*'; (b) Mr Xaso gave a briefing about the other draft rules, highlighting the amendments; (c) all members of the Subcommittee present contributed to the ensuing discussions, during which certain further amendments were suggested and agreed to; and (d) the Subcommittee eventually resolved to agree to the draft rules, taking into account the views expressed.[81]

[79] Speaker's AA 227-228: 87.

[80] Speaker's AA 228: 88.

[81] Speaker's AA 228-229: 89-90.

55. On 26 November 2019 Parliament issued a media statement indicating that the NA Rules Committee had agreed to draft rules for the removal of heads of Chapter 9 institution to give effect to section 194 of the Constitution. It also briefly explained the contents of the draft rules.[82]

56. On 28 November 2019 the proposed rules were tabled in the NA as part of the Third Report of the NA Rules Committee for 2019.[83]

57. On 3 December 2019 the NA unanimously adopted the Rules Committee's report, which was introduced by the Deputy Chief Whip of the Majority Party (i.e. the African National Congress). The NA thereby adopted the New Rules.[84]

A brief description of the New Rules

58. Later in these heads of argument (paras 119-144 below), we describe in more detail the seventeen steps for the impeachment process under section 194 of the Constitution and the New Rules.[85] For the purpose of the chronology of events, we however emphasize the following two key features.

59. First, in line with the judgment of the majority in of the CC in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) ('***EFF (impeachment)***') paras 176-178, the New Rules

[82] Speaker's AA 229: 91.

[83] Speaker's AA 229: 92.

[84] Speaker's AA 229-230: 93.

[85] The New Rules themselves are at PPFA 7 142-147: D-E and repeated at TRM 37 475-480: D-E.

define the grounds of misconduct, incapacity and incompetence set out in section 194(1).

60. Second, in line with *EFF (impeachment)* paras 180-182 and 189-190, the New Rules regulate the process in the NA, including the following:

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

60.2. two sifting mechanisms to determine whether the Chapter 9 office-bearer has a case to answer, namely an initial assessment by the Speaker of whether the motion is compliant with the criteria for such motions in the New Rules as well as the Constitution and the law (Rule 129S, read with Rule 129R) and a subsequent assessment by a three-person independent panel of whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion (Rule 129X(1));

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

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

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

The relevant events following the adoption of the New Rules

61. On 6 December 2019 Ms Mazzone MP, the new Chief Whip of the Official Opposition in the Sixth Parliament (i.e. the DA), withdrew Mr Steenhuisen's third request for the removal of Adv Mkhwebane from the office of PP (referred to in para 41 above). On the same day Ms Mazzone submitted a new request, in terms of the New Rules, the main elements of which were the following:[86]

61.1. Ms Mazzone included a substantive notice of motion;

61.2. Ms Mazzone repeated the grounds for Adv Mkhwebane's removal set out in Mr Steenhuisen's letter of 23 May 2019;

[86] Speaker's AA 230-232: 94-96.

61.3. Ms Mazzone added a further ground based on the judgment of the majority of the CC in *PP v SARB (CC)*, specifically the finding that Adv Mkhwebane had acted in bad faith by not being honest about her investigation processes;

61.4. Ms Mazzone alleged that these grounds demonstrate '*that the Public Protector is too incompetent to properly execute her mandate, as she lacks the knowledge to carry out and ability to perform her duties effectively and efficiently*'; and

61.5. Ms Mazzone attached copies of the CC's judgments in *PP v SARB (CC)* and of the documents on which Mr Steenhuisen had based his third request.

62. On 24 January 2020, after considering Ms Mazzone's request and notice of motion, the Speaker was satisfied that the notice of motion complied with the formal requirements of New Rule 129R. The Speaker thereupon announced to the NA her receipt of Ms Mazzone's notice of motion, and invited the political parties to nominate candidates for appointment to the independent panel by 7 February 2020. The Speaker also circulated a memorandum in similar terms to the Chief Whips of all political parties represented in the NA.[87]

[87] Speaker's AA 232-233: 97-99.

63. On the same day, the NA Secretary advised Ms Mazzone that the Speaker had accepted her notice of motion and had invited political parties to nominate appointees to the independent panel by 7 February 2020.[88]

64. On 25 January 2020 Parliament released a media statement to that effect and stated that the panel would have 30 days in which to finalise its preliminary assessment and make its recommendation.[89]

65. On 28 January 2020 Adv Mkhwebane's attorneys wrote to the Speaker, disputing the validity of the New Rules and their '*purported retrospective application*' to her, complaining about the Speaker's allegedly unlawful conduct '*in making a public announcement of the process to remove [Adv Mkhwebane] without even informing her of the decision*' and demanding, amongst other things: (a) reasons for the Speaker's approval of the notice of motion; (b) an indication of how the Speaker would protect Adv Mkhwebane from a process of removal that may be '*tainted by the participation of individuals, too many to mention by name at this stage, who will have a lot to gain from [Adv Mkhwebane's] unlawful removal, as well as those who have long prejudged the issues under investigation*'; and (c) an undertaking that the process for her removal would be suspended until all of the issues she had raised had been adequately dealt with by agreement or by a court.[90]

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[88] Speaker's AA 233: 100

[89] Speaker's AA 233: 101.

[90] Speaker's AA 233-234: 102.

66. On 30 January 2020 the Speaker replied to Adv Mkhwebane's attorneys. The Speaker: (a) outlined the NA's constitutional obligations to oversee Adv Mkhwebane in the performance of her functions; (b) advised that Ms Mazzone's notice of motion satisfied the form requirements of the new Rules; (c) advised that no *prima facie* assessment had been made, as that was the function of the independent panel; (d) advised that Adv Mkhwebane would be invited to make representations to the independent panel; (e) advised that as Parliament's processes and rules were designed to ensure the fairness of the inquiry process, the implementation of the New Rules would not be suspended.[91]

67. On 31 January 2020 Adv Mkhwebane's attorneys replied that she was not satisfied with the Speaker's response and that Adv Mkhwebane would be instituting legal proceedings.[92]

68. On 2 February 2020 Parliament released a media statement advising the public of the exchange between Adv Mkhwebane and the Speaker. It explained that the PP's letter followed the Speaker's announcement that the motion complied with the relevant rules and that she would refer the motion to an independent panel, which was yet to be established. It further explained the role of the independent panel, its powers and its obligation to report its findings and recommendations to the NA, for a committee of the latter potentially to conduct an inquiry. It further explained that the Speaker had called on political parties to submit

[91] Speaker's AA 234-235: 103.

[92] Speaker's AA 235-236: 104.

nominees for the panel by 7 February 2020. Lastly, it drew attention to the fact that the parliamentary rules would ensure the fairness of the process.[93]

69. On 4 February 2020 Adv Mkhwebane launched this application. It required that the Speaker deliver her answering papers by 17 February 2020.[94]

70. On 5 February 2020 the ATM requested that the Speaker extend the time period for nominations for appointment to the independent panel.[95]

71. On 7 February 2020 the Speaker advised all Chief Whips that the deadline had been extended to 12 February 2020.[96]

72. On 10 February 2020 the Speaker delivered her notice to oppose this application.[97]

73. On 13 and 14 February 2020 the State Attorney, acting on behalf of the Speaker, requested an extension for the delivery of the Speaker's answering affidavit, saying it was not practically possible for the Speaker to prepare her answering affidavit between 6 and 17 February 2020 because that was a particularly busy time of year in the Parliamentary calendar in which the Speaker is heavily

[93] Speaker's AA 236: 105.

[94] Speaker's AA 236: 106.

[95] Speaker's AA 236: 107.

[96] Speaker's AA 237: 108.

[97] Speaker's AA 237: 110.

engaged – there are the President's State of the Nation Address and the Minister of Finance's budget speech and the NA debates on them.[98]

74. On 17 February 2020 Adv Mkhwebane's attorneys refused to grant the extension, unless the Speaker gave them an undertaking that she would suspend the processing of Ms Mazzone's motion pending the determination of Part B. In other words, Adv Mkhwebane demanded that the Speaker give an undertaking in line with the interim interdictory relief she was seeking in Part A.[99]

75. On the same day the President (who is the second respondent in the current proceedings and is abiding the decision of the Court) delivered an explanatory affidavit in which he referred to an application he had instituted against the PP in the Gauteng Division of the High Court, Pretoria, under case number 5578/2019, for judicial review of her report No. 37 of 2019/20 issued on 19 July 2019 entitled '*Report on an investigation into allegations of a violation of the Executive Ethics Code through an improper relationship between the President and African Global Operations (AGO), formerly known as BOSASA*' (**'the *BOSASA* matter'**). (As explained more fully below, although the Speaker was cited as the second respondent in the *BOSASA* matter she applied for and was granted admission as the second applicant in that matter because she too sought judicial review of that report, though only insofar as it concerns the Speaker and the constitutional mandate of the NA.) Returning to the President's affidavit, he

[98] Speaker's AA 237-238: 113.

[99] Speaker's AA 238: 114.

said that because he was involved in that litigation, he accepted that a potential conflict of interest had arisen as he may be called upon to suspend Adv Mkhwebane from the office of PP under section 194(3) of the Constitution while the litigation is pending – the *BOSASA* matter had been argued on 4 and 5 February 2020 and judgment was reserved. Accordingly, the President said, if the need for him to consider whether or not to exercise the power of suspension were to arise, he would delegate the exercise of the power under section 194(3) of the Constitution to another member of the Cabinet who does not have a similar conflict of interest.[100]

76. On 21 February 2020 the Speaker received from Ms Mazzone a letter formally withdrawing her notice of substantive motion of 6 December 2019 and simultaneously submitting a new substantive motion for the removal of Adv Mkhwebane from the office of PP, in terms of Rule 129R.[101]

77. On 25 February 2020 the State Attorney advised Adv Mkhwebane's attorney that there had been a material development which required further instructions from the Speaker.[102]

78. On the same day, the NA Secretary, Mr Xaso, wrote to Ms Mazzone, acknowledging receipt of her notice of motion of 21 February 2020 and of her

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[100] Speaker's AA 238-239: 115.

[101] Speaker's AA 239-240: 119-120, read with annexures TRM59 539 (Ms Mazzone's letter) and TRM60 540-550 (Ms Mazzone's new notice of motion and the charges against Adv Mkhwebane).

[102] Speaker's AA 240: 122.

request to withdraw her motion of 6 December 2019. Mr Xaso indicated that the matter had been brought to the Speaker's attention.[103]

79. Shortly thereafter, Parliament issued a media statement to the effect that Ms Mazzone had withdrawn her notice of motion of 6 December 2019 and replaced it with a new one, which meant that the process initiated by the submission and acceptance of her first notice of motion, including the establishment of the independent panel, had terminated. The statement added that the Speaker would apply her mind to the new notice of motion, to determine if it meets the requirements provided for in the NA rules, and make a fresh decision.[104]

80. On 26 February 2020 the Speaker considered the second notice of motion and was satisfied that it conformed with Rule 129R for the following reasons, which are set out in her AA:[105]

80.1. the motion calls on the NA to initiate an inquiry in terms of section 194(1) of the Constitution for Adv Mkhwebane's removal from the office of PP;

80.2. the motion contains five clearly formulated and substantiated charges, contained in Annexure A, relating to actions or conduct by or ascribed to Adv Mkhwebane:

[103] Speaker's AA 240-241: 123.

[104] Speaker's AA 241-242: 124.

[105] Speaker's AA 242-244: 125, which must be read with annexure TRM60 540-550.

80.2.1. the first charge is a charge of misconduct by her in her investigation and report into allegations of the failure by the South African Government to implement the original CIEX Report and to recover public funds from ABSA Bank (i.e. the CIEX PP Report) and in the litigation challenging the CIEX PP Report;

80.2.2. the second charge is a charge of misconduct by her in her investigation and report into allegations of maladministration against the Free State Department of Agriculture in the Vrede Integrated Dairy Project (i.e. the Vrede Dairy Report);

80.2.3. the third charge is a charge of incompetence ascribed to her based on (a) her investigation and report in the matter that is the subject of the first charge, and her conduct in the ensuing litigation to review that report; (b) her investigation and report in the matter that is the subject of the second charge, and her conduct in the ensuing litigation to review that report; and (c) her investigation and report into allegations of maladministration, abuse of power and improper conduct by the former Executive Officer of the Financial Services Board, Adv. D. P. Tshidi, as well as systemic corporate governance deficiencies at the Financial

Services Board (the Public Protector's Report No. 46 of 2018/19), and her conduct in the ensuing litigation to review that report;

80.2.4. the fourth charge is a charge of misconduct based on her alleged intimidation, harassment and/or victimisation of staff in the Office of the Public Protector, alternatively her alleged failure to prevent the alleged intimidation, harassment and/or victimisation of staff in the Office of the Public Protector by the erstwhile Chief Executive Officer of that Office, particularised in para 10 of Annexure A to the motion (i.e. the first sub-charge of the fourth charge in that Annexure); and

80.2.5. the fifth charge of misconduct and/or incompetence by or ascribed to her particularised in para 11 of Annexure A to the motion (i.e. the second sub-charge of the fourth charge in that Annexure);

80.3. *prima facie* (i.e. on the face of the motion):

80.3.1. the charges of misconduct, if established by the evidence, will constitute misconduct as defined by the NA on 3 December 2019 in and for the purposes of the new Part 4 of Chapter 7 of the Rules of the NA (i.e. the intentional or

gross negligent failure by Adv Mkhwebane to meet the standard of behaviour or conduct expected of a holder of public office); and

80.3.2. the charges of incompetence, if established by the evidence, will constitute incompetence as so defined (i.e. as including a demonstrated and sustained lack of knowledge by her to carry out, and of ability to skill by her to perform, her duties effectively and efficiently);

80.4. all the evidence relied upon in support of the motion (i.e. the evidence particularised in paras 2, 5, 8 and 12 of Annexure A to the motion) was attached to the motion; and

80.5. the motion was consistent with the Constitution (especially section 194), the law (it related to functions performed by the PP in terms of the Public Protector Act 23 of 1994, as amended) and the Rules of the NA (especially the New Rules).

81. The content of the second notice of motion differs from the first notice of motion materially, in that it relies on additional grounds for removal from office (i.e. grounds of misconduct), relies on additional facts in support of the new charges of misconduct and is accompanied by evidence to sustain those charges which did not accompany the first notice of motion. We submit the second notice of motion is an entirely distinct parliamentary instrument, which is not linked to the

(withdrawn, and hence moot) first notice of motion for its existence or validity. It fell and falls to be evaluated on its own merits in terms of the New Rules.

82. Returning to the chronology, on 26 February 2020 the Speaker caused a memorandum to be circulated to Party Whips and Representatives, indicating the following:[106]

82.1. Ms Mazzone had withdrawn her motion of 6 December 2019;

82.2. Ms Mazzone had tabled a new motion on 21 February 2020 requesting the initiation of a process for the removal of Adv Mkhwebane from the office of PP in terms of section 194 of the Constitution and the New Rules;

82.3. the new motion was in order;

82.4. Rule 129U obliged the Speaker to establish an independent panel to conduct a preliminary enquiry, to establish whether there was *prima facie* evidence to support the charges against Adv Mkhwebane in the new motion;

82.5. Rule 129V stipulated who may comprise the panel and that the Speaker must appoint the panel after giving political parties in the NA a reasonable

[106] Speaker's AA 245: 126.

opportunity make nominations and after giving due consideration of all the nominees; and

82.6. political parties should submit written nominations by 6 March 2020 for that purpose, along with a motivation for the nomination (having regard to the legal or other competencies or experience of the nominee to conduct the assessment under NA Rule 129V).

83. On the same day the Speaker also wrote to Adv Mkhwebane:[107]

83.1. informing her of the events on Friday 21 February 2020;

83.2. attaching copies of Ms Mazzone's motion of 6 December 2019, Ms Mazzone's new motion of 21 February 2020 and the Speaker's memorandum to the political parties represented in the NA of 26 February 2020;

83.3. advising Adv Mkhwebane that the Speaker had decided that the new motion was in order and had consequently asked the political parties to submit their nominations for appointment to the independent panel by 6 March 2020;

83.4. advising her that after 6 March 2020 the Speaker would establish the independent panel in terms of Rule 129U, appoint its three members in

[107] Speaker's AA 245-246: 127.

accordance with Rule 129V and appoint one of the panellists as its chairperson in terms of Rule 129W; and

83.5. advising her that, once the Speaker had done so, the Speaker would immediately refer the motion and the supporting documentation provided by Ms Mazzone to the panel in terms of Rule 129T, advise the panel that it is required by Rule 129X to conduct and finalise its assessment and report relating to the motion within 30 days of its appointment and inform NA and the President of the referral to the panel as required by Rule 129T.

84. What followed was an exchange of correspondence between the parties' attorneys, including letters from Adv Mkhwebane's attorneys containing allegations of unlawful conduct by the Speaker and further entreaties and demands that the Speaker suspend the processing of Ms Mazzone's motion, to which the Speaker did not accede because, in her view, there was no basis either in fact or law for Adv Mkhwebane's urging that the Speaker undertake to suspend the processing of the new motion. On the contrary, section 194 of the Constitution and the Rules of the National Assembly together require that the process started by Ms Mazzone's motion of 21 February 2020 continue.

85. On 27 February 2020 the DA delivered its answering papers.

86. On 3 March 2020 the Speaker delivered her answering papers.

87. On 9 March 2020 the ATM delivered an affidavit in support of Adv Mkhwebane.

88. On 11 March 2020, by agreement between the parties participating in Part A, Adv Mkhwebane's attorneys wrote to the Judge President requesting that it be heard on 26 and 27 March 2020.

89. On 13 March 2020 the Speaker delivered a supplementary affidavit in answer to the ATM's affidavit and on the same day the DA did likewise.

90. On 16 March 2020 Adv Mkhwebane delivered her replying affidavit.

91. On 17 March 2020 the Judge President made an order setting Part A down for hearing on 26 and 27 March 2020.

92. On 18 March 2020 the ATM delivered its replying affidavit.

93. On 20 March 2020 Adv Mkhwebane's attorneys addressed a letter to the Judge President dated 20 March 2020.[108] This letter recorded that due to impact of the Covid-19 pandemic, which resulted in the business of the NA being suspended, the parties agreed to postpone Part A *sine die*. The letter recorded the terms of the parties' agreement that Part A be postponed *sine die*; and, further, that the parties had '*agreed that if in the future any of them wishes that the application be re-enrolled for hearing, the parties shall request* [the Judge President] *to set the matter down on a further mutually agreed date and after giving reasonable notice of not less than two weeks to allow for allocation of judges, the exchange of Heads of Argument and other practical matters.*'

[108] Attached to the Speaker's Supplementary Answering Affidavit ('**SAA**') as 'TRM 73' 1164

94. As explained below, after the lifting of the 'hard lockdown' on 30 April 2020, the Speaker decided to approach possible appointees to the independent panel, she informed Adv Mkhwebane and Ms Mazzone of her decision and, as a result, a series of letters were exchanged especially between the Speaker (and her attorneys) and Adv Mkhwebane's attorneys. These letters are attached to Adv Mkhwebane's Supplementary Founding Affidavit ('**SFA**').[109] We describe them in some detail because they are one of the foundations of Adv Mkhwebane's claim against the Speaker for punitive costs *de bonis propriis*.

95. On 5 May 2020 Ms Mazzone MP wrote to the Speaker requesting an update on the establishment and appointment of the independent panel in terms of rules 129U and 129V of the New Rules.[110]

96. On 29 May 2020 the Speaker signed letters to both Ms Mazzone MP and Adv Mkhwebane and on 8 June 2020 she sent them off.[111] The information conveyed in both letters was, in substance, the same. The letter to Adv Mkhwebane reads as follows:

> '***UPDATE ON THE PROCESSING OF THE MOTION CALLING FOR YOUR REMOVAL FROM THE OFFICE OF THE PUBLIC PROTECTOR***
>
> *As you are aware, like all other business, the processing of the motion the Chief Whip of the Official Opposition, Ms NWA Mazzone MP, calling for your removal from the office of the Public Protector was placed on hold in the second half of*

[109] Attached to SFA as PPSA5(a) to PPSA5(f) 990-1019.

[110] This letter forms part of annexure PPSA5(a); see 994-995.

[111] Speaker's SAA 1118: 28 read with these letters which are the second and third attachments to PPSA5(a) 996 and 998 respectively.

March when Parliament suspended its business as a precautionary measure in light of the Covid-19 pandemic. As a result of the suspension the parties to the legal proceedings for urgent relief brought by you agreed that they be postponed sine die.

As you are probably also aware, the resumption of parliamentary business since mid-April has been phased and priority-based due to the limitations imposed by the Covid-19 pandemic on the normal operations of Parliament.

On 5 May 2020 I received the accompanying letter from Ms Mazzone.

As appears from my response, which also accompanies the present letter, I am now in a position to resume the processing of Ms Mazzone's motion, albeit in the manner and subject to the constraints outlined below.

The first step in the resumed process will be the establishment and appointment of the members of the Independent Panel to conduct the preliminary assessment into the motion described in Rule 129X.

In this regard, kindly note the following:

1. *I have identified my preferred appointees to the Independent Panel.*
2. *Today I shall be sending each of them copies of the new Rules governing the process adopted by the NA on 3 December 2020 and Ms Mazzone's notice of motion together with the supporting evidence she submitted.*
3. *I have asked each of them to revert within two weeks as to whether they are willing to be appointed to the Independent Panel and, further, whether they believe the Independent Panel will be able to complete its task 'remotely' (using email and audio- or video-conferencing, rather than in-person meetings) within the prescribed period of thirty days from the date of the panel's appointment.*
4. *Once I receive their responses, I will decide whether it is feasible to appoint the Independent Panel at this juncture. If all the responses are positive, I will make the appointments. If, on the other hand, not all the responses are positive then, depending on the issues raised, I will either hold over the appointment of my preferred appointees until a later date or take steps aimed at the appointment of other person(s) to the Independent Panel.*

I will announce my decision on the way forward as soon as practically possible after receiving the responses from my preferred appointees' (underlining added).

97. On 12 June 2020 the Speaker's attorneys addressed a letter to Adv Mkhwebane's attorneys, in copy to all the parties cited as respondents in this matter or who had indicated their intention to be admitted as *amici curiae* (or their attorneys), providing them with copies of Ms Mazzone MP's letter of 5 May 2020, and of

the Speaker's response to her and of the Speaker's letter to Adv Mkhwebane, both dated 29 May 2020 and sent on 8 June 2020.[112] The letter continued as follows:

'*As you will see from the latter two letters [i.e. the letters sent to Ms Mazzone MP and Adv Mkhwebane on 8 June 2020], although the Speaker has started the process aimed at the appointment of the members of the Independent Panel, which must conduct a preliminary assessment as to whether there is prima facie evidence to show that Adv Mkhwebane has committed the misconduct alleged in the motion and/or is incompetent for the reasons alleged in the motion, the Speaker has not yet decided whether or not the Independent Panel can be constituted at this juncture given the likely constraints on its operation arising from the Covid-19 pandemic.*

More specifically, this week the Speaker has written to her preferred appointees, asking each of them to revert within two weeks as to whether they are willing to be appointed to the Independent Panel and, further, whether they believe the Independent Panel will be able to complete its task 'remotely' (using email and audio- or video-conferencing, rather than in-person meetings) within the prescribed period of thirty days from the date of the panel's appointment.

Once the Speaker has received their responses, she will decide whether it is feasible to appoint the Independent Panel at this juncture. If all the responses are positive, she will make the appointments. If, on the other hand, not all the responses are positive then, depending on the issues raised, she will either hold over the appointment of my preferred appointees until a later date or take steps aimed at the appointment of other person(s) to the Independent Panel.

The Speaker will announce her decision on the way forward as soon as practically possible after receiving the responses from her preferred appointees' (underlining added).

98. In the light of the content of the letter by Adv Mkhwebane's attorneys to the Judge President dated 20 March 2020[113] and the clear explanations and statements in both the Speaker's letter to Adv Mkhwebane sent on 8 June 2020 and the Speaker's letter to Adv Mkhwebane's attorneys dated 12 June 2020 that the Speaker had not yet decided whether or not the Independent Panel could be

[112] PPSA5(a) 990-993.

[113] Annexure TRM73 to Speaker's SAA 1164.

constituted at that juncture and would make an announcement on the way forward after receiving the responses from the preferred appointees, it was remarkable when, on 19 June 2020, the Speaker's attorneys received a letter from Adv Mkhwebane's attorneys[114] alleging that the Speaker had breached the terms of the agreement on which the hearing of Part A was postponed in March 2020, because, as Adv Mkhwebane's attorneys put it in para 10:

'*... the Speaker had appointed three members of the Panel as prescribed in the impugned rules subject to those members' acceptance of: 10.1 their appointment (which would be superfluous if they had already accepted nomination); and 10.2 her proposal that their task be performed 'remotely"* (underlining added).

99. On this basis, Adv Mkhwebane's attorneys went on to demand that the Speaker '*give an undertaking to desist from breaching the agreement of the parties by refraining from taking any further step in connection with or in pursuance of the impeachment process ...'*[115]; and said that should the Speaker fail or refuse to give such undertaking, the matter be heard on proposed dates in the then upcoming court recess or in the first week of the new (third) court term.[116]

100. By 19 June 2020, as things had turned out, only one of the persons the Speaker had approached to be appointed as members of the Independent Panel had responded affirmatively, and the others had declined.[117]

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[114] Annexure PPSA5(b) to SFA 1000.

[115] Annexure PPSA5(b) to SFA, 1002: 14.

[116] Annexure PPSA5(b) to SFA, 1002: 15.

[117] Speaker's SAA 1122: 32.

101. Accordingly, the Speaker instructed her attorneys to respond to Adv Mkhwebane's attorneys' letter of 19 June 2020 as follows, which they duly did on 24 June 2020:[118]

'*1. We refer to our letter of 12 June and your reply of 19 June 2020.*

2. Your statement that the Speaker has already appointed the three members of the independent panel, is incorrect.

3. As explained in our letter of 12 June 2020 and the correspondence annexed thereto, the Speaker approached her preferred appointees with a request that they indicate, within two weeks, whether they are willing to be appointed and, if appointed, they will be able to perform their functions within the prescribed 30-day period, given the current Covid-19 disaster. On the same day the Speaker notified your client and Ms Mazzone that she had approached her preferred appointees.

3. Your allegation that the Speaker has breached the terms of the agreement regarding the postponement sine die of Part A of your client's application in late March, is accordingly denied.

4. As things have turned out, only one of the persons the Speaker approached has responded affirmatively, and the others have declined.

5. As a result, the Speaker will now have to identify other potential appointees and approach them on the same basis.

6. The situation thus remains that it is unclear when the Speaker will be in a position to appoint the independent panel. When the Speaker makes the appointment, she will announce publicly that she has done so as well as the names of the appointees.

7. In the circumstances, there is no need for Part A to be enrolled during the upcoming court vacation (your first two sets of suggested dates) or during the first week of the third term which is normally used for Full Bench appeals (your third set of suggested dates).

8. In the circumstances, we suggest the parties participating in Part A approach the Judge President jointly with a request that he constitute a Full Court of three judges to hear it on two consecutive days in the week starting on Monday 3 August 2020.'

[118] Speaker's SAA 1123: 33; Annexure PPSA5(c) to the SFA 1005.

102. On 25 June 2020 Adv Mkhwebane's attorneys replied.[119] What is significant for present purposes, is that by means of this reply Adv Mkhwebane altered her stance that the Speaker had appointed the three members of the Independent Panel (stated in their letter of 19 June 2020, annexure PPSA5(b)), by alleging instead that '*the Speaker makes it clear that she intends to take four steps without any prior notification, namely that she will: 3.1 identify potential appointees (presumably from the pool of nominees); 3.2 approach them to find out if they are agreeable to being appointed and, if so, conducting the process electronically; 3.3 make the appointment(s); and 3.4 publicly announce the names of the appointees*'[120] (underlining added).

103. The Speaker's attorneys then addressed a response to Adv Mkhwebane's attorneys on 25 June 2020,[121] in which, after explaining why the Speaker disputed the allegations in para 3 of her attorneys' letter (annexure PPSA5(d)), they went on to say that the Speaker was amenable to the procedural arrangements proposed in para 6 of her attorneys' letter, namely the agreement reached between senior counsel for Adv Mkhwebane, the DA and the ATM that Part A be heard on 12 and 13 August 2020 and a timetable for the delivery of heads of argument; and, further, to request that Adv Mkhwebane's attorneys prepare a draft letter to the Judge President and a draft order for the parties' consideration and approval.

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[119] Annexure PPSA5(d) to SFA 1010.

[120] Annexure PPSA5(d) to the SFA 1010: 3.

[121] Annexure PPSA5(e) to the SFA 1013.

104. Adv Mkhwebane's attorneys duly prepared those documents, which were approved by the legal representatives of the Speaker, the DA and the ATM – all of whom had unfortunately omitted to liaise with the legal representatives of the President, who, as stated, had previously delivered an affidavit saying that although he would abide the decision of the Court in Part A he wished to be represented by counsel at the hearing. In the result, on 26 June 2020 Adv Mkhwebane's attorneys addressed a letter to the Judge President on behalf of the parties requesting that the matter be enrolled for hearing on 12 and 13 August 2020 in accordance with the agreement reached among senior counsel.[122]

105. The Judge President, in turn, acceded to the request, the parties delivered their heads of argument in accordance with the agreed timetable and, as stated earlier, the hearing proceeded on 12 and 13 August 2020 before a Full Court comprising Saldanha, Steyn and Samela JJ.

106. Judgment was delivered on 9 October 2020 in which the Full Court unanimously dismissed Adv Mkhwebane's application in respect of Part A. Adv Mkhwebane unsuccessfully applied for leave to appeal. The Full Court dismissed that application on 30 November 2020.

107. In the meantime, in accordance with an agreement reached among the parties, Adv Mkhwebane, as well as the ATM and the Pan Africanist Congress (which are supporting her), delivered supplementary founding papers, the Speaker and

[122] Annexure PPSA5(f) to the SFA 1018.

the DA delivered supplementary replying papers, the President delivered a supplementary affidavit and Adv Mkhwebane delivered a supplementary replying affidavit. As appears from these supplementary papers, to which we refers where necessary below, the application for relief in Part B is based on the papers filed in support of and in opposition to the application for relief in Part A, as supplemented in the parties' supplementary papers.

THE RELEVANT CONSTITUTIONAL PROVISIONS AND PRINCIPLES

108. In this section of our submissions, we deal with section 194 of the Constitution in its context, including the constitutional function of impeachment proceedings (i.e. as the ultimate mechanism for holding incumbent Chapter 9 office bearers accountable) and the respective roles and responsibilities of the NA and the President in section 194 impeachment proceedings.

109. Section 194 provides:

'***194 Removal from office***

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.
(2) A resolution of the National Assembly concerning the removal from office of—
(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.
(3) The President—
(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.'

110. Our submissions in respect of section 194 are based largely on the following authorities:

110.1. *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) ('***UDM***'), a unanimous judgment of the CC in which it was decided that the Speaker has the power to rule that voting on a motion of no confidence in the President in terms of section 102(2) of the Constitution be conducted by secret ballot. We refer the Court in particular to paras 9-10, 39-47, 57-59, 62-64, 68-69 and 82-88, of Mogoeng CJ's judgment;

110.2. *EFF (impeachment)*,[123] in which the majority of the CC held that the NA was obliged to adopt rules defining the grounds on which the President may be removed from office in terms of section 89(1) of the Constitution and regulating the process in the NA for the President's impeachment in terms of that section. We refer the Court in particular to the following paras of the judgment of Jafta J for the majority: paras 130-131, 133-136, 138-139, 164, 170-182 (which is the first set of key paragraphs) and 187-196 (which is the second set of key paragraphs).

110.3. *Institute for Accountability in Southern Africa v Public Protector and Others* [2020] 2 All SA 469 (GP) ('***Institute for Accountability***'), in

[123] That is, *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) first cited in para 59 above. We refer the Court in particular to the following paras of the judgment of Jafta J for the majority: paras 130-131, 133-136, 138-139, 164, 170-182 (the first set of key paragraphs) and 187-196 (the second set of key paragraphs).

which an application for orders by a court declaring Adv Mkhwebane unfit to hold the office of PP on grounds which bear a close resemblance to the charges in Ms Mazzone's motion before the NA, was dismissed. As regards the Institute's grounds, which were based on the findings critical of Adv Mkhwebane in *SARB v PP I*, *ABSA v PP*, *PP v SARB (CC)*, *DA v PP I* and *DA v PP II*, see paras 4-18 of Coppin J's judgment. As regards the significance of those findings, see para 31 of Coppin J's judgment. As regards Coppin J's reasons for dismissing the Institute's application, chief among them being that granting the relief sought would impinge upon the NA's power and duty to deal with Ms Mazzone's motion and consequently violate the separation of powers, see paras 34-53 of Coppin J's judgment.

111. We emphasize the following seven points relating to section 194 of the Constitution.

112. First, all Chapter 9 institutions – including the PP – are accountable to the NA. Section 181(5) of the Constitution provides the Chapter 9 institutions are accountable to the NA and must report to the NA on their activities and the performance of their functions at least once a year.

113. Second, section 194 of the Constitution, which empowers the NA to decide to remove Chapter 9 office-bearers from office, is the ultimate accountability-ensuring mechanism for all office-bearers of Chapter 9 institutions.[124]

114. Third, section 55(2)(b)(ii) of the Constitution obliges the NA to provide for mechanisms to maintain oversight over all organs of state (the PP being an organ of state).

115. Fourth, the rules of the NA are such a mechanism. Section 57(1)(b) empowers the NA to make rules concerning its business.

116. Fifth, the NA is obliged to adopt rules:

116.1. which give meaning to the grounds of misconduct, incapacity and incompetence set out in section 194(1),[125] i.e. to clarify those terms; and

116.2. which regulate the entire process in the NA, including but not limited to (i) describing the manner in which the impeachment process must be initiated, (ii) creating a sifting mechanism to determine whether the Chapter 9 office-bearer has a case to answer and (iii) regulating the proceedings of the NA committee which must consider and decide

[124] *UDM* para 10, referring to, amongst others, section 89(1) of the Constitution, which is the presidential equivalent of section 194.

[125] *EFF (impeachment)* para 59 above at paras 176-178, referring to section 89(1) of the Constitution.

whether a Chapter 9 office-bearer is incapable or incompetent or has misconducted himself or herself.[126]

117. Sixth, if, at the end of the impeachment process in the NA, the NA decides by the majority prescribed by section 194(2) – i.e. two thirds of its members in the case of the PP and the Auditor-General – that a Chapter 9 office-bearer must be removed, section 194(3) obliges the President to remove that person from office.

118. Seventh, and consequently, the principle of the separation of powers requires that this Court respect the fact that the power to determine the fitness of a person to continue to hold the office of PP has been assigned by the Constitution to the NA and the President.[127] This means that this Court should not interfere in the process of the NA unless interference is necessary to ensure that the NA acts within the law and fulfils its constitutional obligations.[128]

[126] *EFF (impeachment)* para 59 above at paras 180-182 and 189-190.

[127] *Institute for Accountability* para 43.

[128] *Institute for Accountability* paras 46-47.

OVERVIEW OF THE IMPEACHMENT PROCESS UNDER SECTION 194 OF THE CONSTITUTION AND THE NEW RULES

119. The procedure for the removal from office of the Public Protector, the Auditor-General or a member of a Commission established by Chapter 9 of the Constitution ('**a Chapter 9 office**' or '**the incumbent**') is governed by section 194 of the Constitution and the NA Rules, as amended by the New Rules.[129]

120. If the process runs its full course, it comprises seventeen steps.[130] (In this section, all references to rules are to the NA Rules.)

121. The first step is the submission by a member of the NA of a notice of a substantive motion in terms of Rule 129(6) requesting the NA to initiate proceedings for an inquiry by it to remove the incumbent from a Chapter 9 office in terms of section 194 ('**the motion**') (see Rule 129R(1), read with the definition of '*section 194 enquiry*' in the New Rules).

122. The motion must be limited to a clearly formulated and substantiated charge relating to an action performed by or conduct of the incumbent which, if established by the evidence, shows that the incumbent committed misconduct (i.e. the intentional or grossly negligent failure to meet the standard of behaviour or conduct expected of a person appointed in terms of Chapter 9 of the

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[129] As stated earlier, the New Rules are Part 4 of Chapter 7 of the NA Rules, they comprise six definitions and Rules 129R to 129AF and were accompanied by a consequential amendment to NA Rule 88. See annexure PPFA7 142-147: D-E and annexure TRM37 475-480: D-E.

[130] This description is based on the Speaker's AA 255-261: 134-160.

Constitution), is incapacitated (i.e. as including a permanent or temporary condition that impairs the incumbent's ability to perform her work, and any legal impediment to employment) or is incompetent (i.e. as including a demonstrated and sustained lack of knowledge to carry out, and of ability to skill to perform, her duties effectively and efficiently) (see paras (a) and (b) of the proviso to Rule 129R(1), read with the definitions of '*misconduct*', '*holder of a public office*', '*incapacity*' and '*incompetence*' in the New Rules and with Rule 129R(2)).

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

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

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

126. The third step is the giving by the Speaker to political parties represented in the NA ('**the political parties**') of a reasonable opportunity to put forward nominees for consideration for appointment to the independent panel to conduct the preliminary assessment into the motion described in Rule 129X ('**the panel**' and '**the preliminary assessment**') (see Rule 129V(2)).

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

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

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

130. The panel may determine its own working arrangements, subject to the following: (a) a *quorum* comprises the chairperson and one of the panellists;

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

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

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

133. The eighth step is the taking of a decision by the NA of a decision as to whether an inquiry by it to remove the incumbent from the Chapter 9 office in terms of

section 194 should be proceeded with. If the NA resolves that such an inquiry should be proceeded with, it must refer the matter to the section 194 committee for a formal inquiry (see Rule 129Z(2)).

134. The NA may also resolve to recommend to the President that the incumbent be suspended by the President from the Chapter 9 office pending the outcome of the formal inquiry (see Rule 129Z(3) s.v. '*any action or decision emanating from the recommendations*', read with section 194(3)(a)).

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

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

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

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

139. The thirteenth step is the conduct by the section 194 committee of an inquiry aimed at establishing the veracity of the charges against the incumbent in the motion. For the purpose of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and the NA Rules, subject to the following: (a) the committee must ensure that the inquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe; (b) the committee must afford the incumbent the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee; (c) a question before the committee is decided when a majority of the members is present and there is agreement among the majority of members present; (d) the committee must make a finding as to whether the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion; and (e) the committee must set out in a report its findings and recommendations, the reasons therefor and all views expressed in the committee including minority views (see Rules 129AD, 129AE and 129AF (introductory portion), read with Rule 162(2) and section 194(1)(b)).

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

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

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

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

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

THE SPEAKER'S ANSWER TO THE GROUNDS OF CHALLENGE

145. As appers from para 2 above, in the amended Notice of Motion (which relates solely to Part B), Adv Mkhwebane seeks relief in relation to two matters. The first is the constitutionality and lawfulness of the New Rules, alternatively their (non-)retrospectivity. The second is the decision of the Speaker, when implementing the New Rules, that Ms Mazzone MP's second motion for Adv Mkhwebane's removal complies with Rules 129R.

146. As also explained earlier, the provisions of section 194 of the Constitution and the New Rules are part of a constitutional scheme that gives effect to one of the NA's primary constitutional responsibilities, namely the responsibility to maintain oversight of all organs of state (section 55(2)(b)(ii) of the Constitution) and to ensure the PP (an organ of state) is and remains accountable to the NA (compare section 181(5) of the Constitution). As stated earlier, proceedings for the impeachment of Adv Mkhwebane are the ultimate mechanism for ensuring the accountability of Adv Mkhwebane to the NA.

147. Initially, in her FA, Adv Mkhwebane raised ten grounds of challenge. In her SFA, Adv Mkhwebane abandoned what she terms her 'one size fits all' challenge, but added five new challenges.[131] The new grounds are –

147.1. *Mala fides* and improper motives of the Speaker;[132]

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[131] SFA 939: 43.

[132] SFA 963-966: 122-132; Speaker's SAA 1116: 18.1.

147.2. Double jeopardy;[133]

147.3. Unreasonableness;[134]

147.4. An infringement of the right to fair labour practices;[135] and

147.5. Procedural irrationality / alleged breaches of sections 7(2) and 57(1)(b) of the Constitution.[136]

148. Before dealing in turn with each of Adv Mkhwebane's fourteen grounds of challenge, we address two preliminary issues which span a number of those grounds, namely:

148.1. the applicability of the Promotion of Administrative Action Act 3 of 2000 ('**PAJA**') to the making of the New Rules and to the impugned decision of the Speaker; and

148.2. Adv Mkhwebane's reliance, in her papers, on the '*constitutional value of fairness*',[137] '*the rules of fairness*',[138] the NA's and Speaker's '*duties and*

[133] SFA 966: 133-134; Speaker's SAA 1126-1127: 41-43.

[134] SFA 966-967: 135-137; Speaker's SAA 1127-1133: 45-49.8.

[135] SFA 942-944: 49-56; Speaker's SAA 1133-1137: 50-53.

[136] SFA 943: 54; Speaker's SAA 1138-1141: 54-59.4.

[137] FA 16: 14.

[138] FA 33: 49.

obligations of fairness',[139] '*the right to fairness and justice*'[140] and '*my rights to fairness, both substantively and procedurally*'.[141]

Is PAJA applicable?

149. Five of Adv Mkhwebane's grounds of challenge are based on the rules of natural justice, namely *audi alteram partem* and *nemo iudex in sua causa*, namely:

149.1. the Speaker should have given her prior notice and an opportunity to be heard before deciding that Ms Mazzone's motions were in order;[142]

149.2. the Speaker should have given her reasons for her decision that Ms Mazzone's first motion was in order;[143]

149.3. the New Rules unfairly deny her the right to an oral hearing by the independent panel;[144]

149.4. the New Rules unfairly deny her the right to full legal representation before the section 194 committee, i.e. to a legal representative who may speak on her behalf and not just assist her;[145]

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[139] FA 40: 70.

[140] FA 52: 97. See also FA 57: 110 ('*the rules are also unfair …*').

[141] FA 75: 163.

[142] FA52-53: 97 ff.

[143] FA 18: 17.

[144] FA 55: 105.

[145] FA 57-58: 110-113.

149.5. the New Rules do not contain safeguards against the involvement of persons who may reasonably be suspected of bias against her – she alleges she has a reasonable apprehension of bias on the part of the Speaker (due to her ongoing involvement in the BOSASA case), on the part of NA members who may be under investigation by the PP or are involved in litigation against the PP and on the part of NA members who in the past have trenchantly criticized her CIEX and Vrede Dairy investigations and reports, but the New Rules do not require that they recuse themselves.[146]

150. A sixth – unreasonableness – also has a basis in our administrative-law.

151. In this regard we submit the following.

152. First, the right to lawful, reasonable and procedurally fair administrative action in section 33(1) of the Constitution and the right to written reasons for certain administrative action in section 33(2) do not find direct application in proceedings for judicial review of administrative action, because following the enactment of PAJA in terms of section 33(3) to give effect to the rights in section 33(1) and (2), all proceedings for judicial review must be brought in terms of PAJA.[147]

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[146] FA 61-63: 122-130.

[147] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) paras 21-26, the first decision to give explicit recognition to what is now known as 'the doctrine of subsidiarity'. As to the doctrine generally, see *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para 53 n 100, *per* Cameron J, for the minority, approved by the CC in *Public Servants Association obo Ubogu v Head, Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) para 25.

153. Second, PAJA (including the provisions regarding procedurally fair administrative action in sections 3 and 4 and the provisions regulating the right to written reasons for administrative action in section 5), does not apply to the making or the implementation of the New Rules by the NA.

154. The reasons why neither the making nor the implementation of the New Rules by the NA is PAJA administrative action, are as follows:

154.1. the definitions of '*administrative action*' and '*decision*' in PAJA make it clear it applies to decisions '*of an administrative nature*', i.e. '*the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals*';[148]

154.2. neither the making nor the implementation of the New Rules by the NA entailed or will entail the bureaucratic carrying out of the daily functions of the State; and

154.3. moreover, the making of the New Rules entailed an exercise of the legislative functions of Parliament, which is expressly excluded from the definition of PAJA administrative action by para (dd) thereof.

[148] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24.

Adv Mkhwebane's reliance on (un)fairness

155. The touchstone for the validity of the New Rules, is the constitutional principle of legality, which includes substantive and procedural rationality,[149] the application and content of which must be assessed in the context of section 194 of the Constitution and the NA Rules.[150]

156. Generally speaking, procedural rationality entails looking at the process as a whole and determining whether the steps in the process are rationally related to the end sought to be achieved; and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.[151]

157. The aim of procedural rationality is thus not the same as the aim of procedural fairness, though in some instances they may yield the same result.[152]

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[149] Legality (see, e.g., *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC) para 38), substantive rationality (see, e.g., see, e.g., *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) para 55) and procedural rationality (see the cases cited in n 151 below) are constitutional requirements for all exercises of public power.

[150] Speaker's AA 266:175.

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

[152] Procedural fairness and procedural rationality will overlap where, as was held in *Albutt*, hearing persons who may be adversely affected by a decision is a requirement for a rational decision. *Albutt* concerned a special dispensation process announced by President Mbeki for applicants for pardons under s 84(2)(j) of the Constitution who claimed that they were convicted of offences that were politically motivated but who had not participated in the Truth and Reconciliation Commission amnesty process. The objectives that the special dispensation process sought to achieve were national unity and national reconciliation. The participation of the victims of the offences was crucial to the achievement of these objectives. In addition, their participation was necessary to determine the facts on which the pardons would be based. Consequently, a later decision to exclude the victims from participating in the

158. Procedural fairness, which is a requirement for valid administrative action (as distinct from the making of rules by the NA or a decision by the Speaker such as that required by Rule 129S), is reflected in the two rules of natural justice, namely the right to be heard (*audi alteram partem*) and the rule against bias (*nemo iudex in sua causa*). Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. Its specifics are now encapsulated in sections 3, 4 and 6(2)(a)(iii) of PAJA.

159. By contrast, as just explained, in its procedural sense, rationality requires that during the decision-making process all material relevant to achieving that purpose be considered, unless ignoring it is rationally related to achieving that purpose or does not colour the entire process with irrationality.

160. There is no free-floating standard of '*fairness*' that applies to decisions or actions that are not administrative action as contemplated in PAJA.

161. We accept that the participation of Adv Mkhwebane in the section 194 process is necessary for it to fulfil its function as the Constitution's ultimate accountability-enhancing mechanism for her and other Chapter 9 office bearers, i.e. for the process to be procedurally rational.

special dispensation process was irrational., hearing persons who may be adversely affected by a decision is a requirement for a rational decision.

162. However, there is no question of Adv Mkhwebane being excluded from the process, and consequently of the process being procedurally irrational. The New Rules provide Adv Mkhwebane with two opportunities to answer the charges against her:[153]

162.1. The first opportunity is when the independent panel conducts the preliminary assessment of whether there is *prima facie* evidence to show that she committed the misconduct with which she has been charged, or is incompetent for the reasons alleged by Ms Mazzone – see Rules 129X(1)(c)(ii) and (iii), which provide the panel must without delay provide her with copies of all information available to it relating to the assessment and provide her with a reasonable opportunity to respond, in writing, to all relevant allegations against her.

162.2. The second opportunity, which will arise if, after considering the report of the independent panel the NA decides that a section 194 inquiry be proceeded with, is when the section 194 committee proceeds with the inquiry to establish the veracity of the charges – see Rule 129AD(2) and (3), which provide that the committee must ensure that the enquiry is conducted in a procedurally fair manner and afford her the right to be heard in her own defence and to be assisted by a legal practitioner or other expert of her choice, provided that the legal practitioner or other expert

[153] Speaker's AA 262-263: 162.

may not participate in the committee. (We deal in the section starting at para 183 below with Adv Mkhwebane's attack on this latter aspect.)

163. Against this background, we now deal with each of Adv Mkhwebane's fourteen grounds of challenge. We first address those grounds that concerning the attack the New Rules themselves and thereafter attack the conduct of the Speaker, noting that there is some degree of overlap.

The first ground: the *audi alteram partem* rule and procedural irrationality[154]

164. When assessing this ground and Adv Mkhwebane's other allegations of procedural unfairness, it is important to bear in mind that, for the reasons just given, there is a material difference between, on the one hand, the *audi alteram partem* rule (or the requirements of procedural fairness) and, on the other hand, procedural rationality, and that compliance with the former is not a requirement for the validity of the New Rules.

165. Adv Mkhwebane however alleges that the New Rules deny her the benefit of the *audi alteram partem* rule because they do not make any provision for her to be notified by the Speaker of a complaint in the form of a motion that has been lodged against her.[155] This unsustainable for two reasons:[156]

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[154] FA 52-56: 97-106 and SFA 951-952: 83-88.

[155] FA 52-53: 97.

[156] Speaker's AA 263: 164.

165.1. First, although the New Rules do not provide for the Speaker to notify Adv Mkhwebane of a motion to initiate proceedings for a section 194(1) inquiry, nothing in the New Rules prohibits the Speaker from doing so, should she consider it appropriate in the circumstances arising in a particular case. Indeed, the Speaker did provide such notice on 26 February 2020 when she sent Adv Mkhwebane copies of both Ms Mazzone's first notice of motion of 6 December 2020 and her second notice of motion of 21 February 2020.[157]

165.2. Second, as explained, Rule 129X(1)(c)(ii) requires that the independent panel, once established, must without delay provide Adv Mkhwebane with copies of '*all information available to the panel relating to the assessment*.' That information will include the motion and the evidence attached to it.

166. Adv Mkhwebane alleges that the function performed by the NA under section 194 of the Constitution is '*quasi-judicial*'.[158] This characterisation is incorrect. What section 194 of the Constitution does, is require two main actions from the NA:[159]

166.1. First, as a pre-requisite for the removal from office of the PP or another Chapter 9 office bearer, it requires an investigation by a committee of the

[157] Speaker's AA 245-246: 127.

[158] FA 53: 98.

[159] Speaker's AA 263-264: 165.

NA into whether one or more grounds for removal exists. The investigation includes a fair hearing to allow the office bearer to respond to charges, and a finding by the committee that any such grounds do indeed exist. However, such a finding by the committee is necessary but not sufficient for removal from office.

166.2. Second, section 194 also requires a resolution of the NA adopted with a supporting vote of at least two thirds of its members. When voting on such a resolution the members of the NA, who are the representatives of the political parties elected by the people of this country in a general election, must assess whether, having regard to the report and findings of the committee and any other facts and circumstances they consider relevant, resort must be had to the ultimate accountability-ensuring mechanism of impeachment. That assessment is political rather than judicial in nature.[160] It is for this reason that the process is not '*quasi-judicial*'.

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[160] In *EFF (impeachment)* para 59 above at para 107, Zondo DCJ, albeit for the minority with whom the majority did not disagree on this score, said the following about the process for the impeachment of the President in terms of section 89 of the Constitution, after the facts are ascertained by the NA: '*What would remain is whether a resolution removing him in terms of section 89 should be passed. It would not follow that, just because the President is guilty of a serious violation of the Constitution or the law or serious misconduct, he is automatically removed from office. It would depend on the vote*.'

See further *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) paras 71-72, where the SCA considered the procedural fairness of a multi-staged process (i.e. an investigation which produced a report with recommendations that are to be accepted or rejected by the relevant Minister). The court concluded that the second stage – the Minister's decision – need not include a further hearing in light of the hearing provided to the interested parties during the investigation stage. This was particularly so since the investigating body was the one clothed with the duty of conducting the investigation.

167. Adv Mkhwebane alleges that the right of access to courts in section 34 of the Constitution applies to the NA process under section 194 of the Constitution (and, given the focus of this complaint, to the Speaker's role in assessing the regularity of the form of a notice of motion submitted in terms of New Rule 129R).[161] This is incorrect for two reasons.

167.1. First, an impeachment motion does not raise a dispute that can and should be resolved solely by the application of law, since it entails the exercise of political judgment on the part of MPs. The ultimate decision-making body – the NA – is not a court or an independent and impartial tribunal or forum. Section 34 of the Constitution applies only to the judicial arm of state and all independent public tribunals and for a which determine disputes through the application of the law (as distinct from the exercise of political judgment).[162] Although the impeachment process is governed by section 194 of the Constitution and the New Rules, as just explained the outcome – or resolution – of the process is determined by an exercise of political judgment made by a body comprising the representatives of the political parties elected by the people in a general election.[163]

167.2. Second, and in any event, the right of access to courts in section 34 of the Constitution cannot conceivably apply to the Speaker's role in assessing

[161] FA 52: 98.

[162] Compare *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC), where the majority held section 34 does not even apply to private arbitrations.

[163] Speaker's AA 264: 166.

the regularity of the form of a notice of motion submitted in terms of New Rule 129R to initiate the impeachment process. That assessment does not entail the determination of any a dispute.

168. Adv Mkhwebane alleges that the Speaker's refusal to furnish her with a copy of the complaint was procedurally irrational.[164] There are several difficulties with this allegation.

168.1. First, on 26 February 2020 the Speaker furnished Adv Mkhwebane with copies of both Ms Mazzone's first motion of 6 December 2019 and her new motion of 21 February 2020.[165]

168.2. Second, the reasons the Speaker did not initially furnish Adv Mkhwebane with Ms Mazzone's first motion of 6 December 2019 were that the Speaker had to consider whether it was in order (i.e. complied with the requirements of Rule 129R) and, having done so, the Speaker set in train the motion for the appointment of the independent panel and the Speaker knew that, once appointed, the panel would be obliged to provide her with a copy of the motion without delay in terms of Rule 129X(1)(c)(ii). This approach is not procedurally irrational. On the contrary, it was part of a procedurally rational[166] scheme which, had it run its course (i.e. not been

[164] FA 54: 100.

[165] Speaker's AA 265: 169, referring to Speaker's AA 245-246: 127.

[166] As to what procedural rationality entails, see in particular *DA v President* paras 39 and 67 (described in n 151 above).

terminated on 21 February 2020), would have included Adv Mkhwebane being given a copy of Ms Mazzone's first motion at an appropriate juncture (i.e. by the independent panel).[167]

168.3. Third, the reasons why the Speaker decided on 26 February 2020 to provide Adv Mkhwebane with copies of both Ms Mazzone's motions were to enable Adv Mkhwebane to take an informed decision as to whether or not she wished to carry on with the present application and if so to supplement her founding papers; and, given the length and relative complexity of Annexure A to Ms Mazzone's motion of 21 February 2020,[168] to give Adv Mkhwebane a longer period of time to prepare her response to the charges against her than would be the case if she received a copy of the motion from the independent panel (which must complete its work within 30 days of its appointment).[169]

169. Adv Mkhwebane alleges she was entitled to be involved in the process which culminated in the Speaker's decision that Ms Mazzone's first notice of motion was in order (i.e. complied with the requirements of Rule 129R).[170] This is incorrect. That process did not involve an assessment of the strength of the charges against Adv Mkhwebane – a task to be performed by the independent panel and, if appointed, the section 194 committee. As appears from the reasons

[167] Speaker's AA 265: 168.

[168] Annexure TRM60 541-550.

[169] Speaker's AA 265-266: 169.

[170] FA 54-55: 101-104.

for the Speaker's decision in relation to Ms Mazzone's new motion of 21 February 2020,[171] the Speaker's decision involved an assessment of the motion against the form and content requirements of Rule 129R and a consideration of whether it is consistent with the Constitution, the law and the New Rules. During the independent panel proceedings Adv Mkhwebane will have the opportunity to respond in writing to all the relevant allegations against her, and during the NA committee proceedings (if the NA resolves that a section 194 inquiry be proceeded with) she will be afforded the right to be heard in her own defence. On either or both of those occasions she is at liberty to assert and seek to establish that the motion is non-compliant either because it does not meet the form and content requirements of Rule 129R or because it is inconsistent with the Constitution, the law and/or the New Rules.[172]

170. If Adv Mkhwebane's stance concerning the Speaker's screening of the notice of motion in terms of Rule 129S is based on an argument that it requires the Speaker to evaluate the strength of the evidence supporting and attached to the motion, that is incorrect. The task the Speaker had to perform under Rule 129S was to determine whether, *prima facie* (i.e. on the face of the motion), (a) the charges of misconduct, if established by the evidence, will constitute misconduct as defined by the NA on 3 December 2019 in and for the purposes of the New Rules (i.e. the intentional or gross negligent failure to meet the standard of behaviour

[171] Speaker's AA 242-244: 125.

[172] AA 266: 170, referring to New Rules 129X(1)(c)(ii) and 129AD(2)-(3).

or conduct expected of a holder of public office) and (b) the charges of incompetence, if established by the evidence, will constitute incompetence as so defined (i.e. as including a demonstrated and sustained lack of knowledge by her, and ability or skill to perform or to carry out, her duties effectively and efficiently). In contrast, the task of the independent panel is to assess whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion. The New Rules cannot sensibly be interpreted to confer essentially the same functions on the Speaker under Rule 129S and the independent panel under Rule 129X(1)(b).[173]

171. Adv Mkhwebane alleges that the New Rules are unlawful and offend against the *audi* principle because Rule 129X(1)(c)(iv) precludes the independent panel from hearing oral evidence.[174] This contention loses sight of the following:[175]

171.1. First, the panel performs screening and advisory functions. Written evidence and submissions are sufficient for the proper performance of those functions. (Even in the sphere of administrative action – which the panel's function is not –there is no right to an oral hearing in instances

[173] Speaker's AA 266-267: 171.

[174] FA 55-56: 105.

[175] AA 267: 172.

where the requirement of a reasonable opportunity to make representations can be met by written submissions.[176])

171.2. Second, the panel must act expeditiously. Hearing oral evidence, especially in a case like the present where there are several, detailed charges, will make it hard or perhaps even impossible to complete its task within 30 days of its appointment, as it is required to do.

171.3. Third, if, after considering the panel's report, the NA decides that a section 194 enquiry be proceeded with, the section 194 committee will conduct an oral hearing which may include oral evidence if that is what procedural fairness requires. Rule 129AD(2) requires that the committee conduct the enquiry in a procedurally fair manner.

172. Under this subject of *audi alteram partem*, Adv Mkhwebane alleges that the NA acts as the employer of the PP and, consequently, it was incumbent on the NA to consult with her and the other Chapter 9 institutions of its intention to make the New Rules.[177] In her SFA, Adv Mkhwebane has elevated this issue to a separate ground of review.[178] We therefore deal with this issue separately hereunder.

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[176] Hoexter C, *Administrative Law in South Africa*, Second Edition, p 371 and the authorities cited therein at footnote 52.

[177] FA 52: 99.

[178] SFA 942-944 : 49-56; and Speakers response at Speaker's SAA 1133-1137 : 50-53.

The second ground: the PP's '*conditions of employment*' by the NA have been adversely affeced[179]

173. In her FA Adv Mkhwebane averred that the NA is the employer of the PP.[180] Accordingly, she reasoned, the NA was obliged to consult or notify her and other heads of Chapter 9 institutions about the New Rules prior to their adoption, because they changed their '*conditions of employment*'.

174. In her SFA Adv Mkhwebane maintains that she is an employee, despite the amendments to the Public Protector Act 23 of 1994 by the Determination of Remuneration of Office-bearers of Independent Constitutional Institutions Laws Amendment Act 22 of 2014 (with effect from 1 April 2019), which, as pointed out during the argument of Part A, excised the phrase '*terms and conditions of employment*' in relation to the PP. On this basis she relies on the right in section 23 of the Constitution,[181] which provides that '*everyone has the right to fair labour practices*',[182] alleges that the NA is her employer and further alleges that because she is the NA's employee she '*should not be treated unfairly*'.[183]

175. The Speaker's detailed responses to these allegations are to be found in the Speaker's AA 264:167 and in the Speaker's SAA 1133-1137: 50-53, to which

[179] This ground is set out in FA 53-54: 99 and SFA 942: 49-51.

[180] FA 53-54: 99.

[181] SFA 942: 51.

[182] SFA 942: 49-50.

[183] SFA 942: 50.

we refer the Court. For the present, we shall merely emphasize the principal reasons why her allegations are incorrect:

175.1. First, in terms of the Constitution (a) the PP is appointed by the President on the recommendation of the NA in terms of section 193(4) and (5) of the Constitution, (b) the PP is accountable to the NA and must report on her activities and the performance of her functions to the NA at least once a year in terms of section 181(5) of the Constitution and (c) the PP must be removed from office by the President upon the adoption by the NA of the resolution calling her removal envisaged by section 194 of the Constitution. None of this means or entails that the NA is her employer. On the contrary, the PP's relationship with the NA is a special one founded in the Constitution, which includes accountability to the NA.[184]

175.2. Second, none of the elementary of requirements for an employment relationship between the PP and the NA are present. In particular, unlike an employee, the PP does not work for the NA or assist the NA in carrying on or conducting its business,[185] and there is no contract between the NA and the PP, let alone an employment contract.

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[184] *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) at para 17.

[185] Compare the definitions of '*employee*' in section 213 of the Labour Relations Act 66 of 1995 and in section1 of the Basic Conditions of Employment Act 75 of 1997.

175.3. Third, the PP is a state institution created by the Chapter 9 of the Constitution to strengthen constitutional democracy in our country. The incumbent PP is the holder of a constitutional office.[186]

175.4. Fourth, as section 181(2) of the Constitution makes it clear that the PP is independent, and subject only to the Constitution and the law.[187]

175.5. Fifth, as section 182(1)(a) of the Constitution makes clear, the function of the PP is to investigate '*any conduct in state affairs*', a broad concept which entitles the PP, where necessary, to investigate the affairs of the NA.

The third ground: deviations from established procedure[188]

176. Adv Mkhwebane alleges that the New Rules '*flout*' four '*standard practices*' or '*acceptable norms*' for impeachment processes, namely (a) the right to be informed of the charges and its details at the earliest available opportunity in the process, (b) the right to refute the existence of the requisite grounds at an early stage and at the point of the first determination of a *prima facie* case to answer, (c) the right to reasons and (d) the option to be allowed full legal representation.[189]

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[186] Speaker's AA 264-265: 167.

[187] Section 181(2) of the Constitution states the following about Chapter 9 institutions – '*These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.*'

[188] This ground is set out in FA 56-57: 107-109.

[189] FA 56: 107.

177. We submit these alleged standard practices or norms (as to the existence of which no evidence has been put up) are not requirements for the validity of the New Rules. As explained in para 155 above, the real requirement for the validity of the New Rules, imposed by the Constitution, is their legality, including their substantive and procedural rationality. In this regard, we submit, their making was authorized;[190] and, viewed as a whole, they are substantively and procedurally rational – they achieve their objective of regulating the manner in which, and elucidating the grounds upon which, Chapter 9 office-bearers may be removed from office by the NA in terms of section 194 of the Constitution.

178. In any event, as regards (a) and (b) in para 176 above, the New Rules do provide for Adv Mkhwebane to be informed of the charges without delay after the appointment of the independent panel and afford her the right to refute the existence of the requisite grounds at the point of the first determination of a *prima facie* case to answer (i.e. while the panel is considering the matter).[191] (As regards Adv Mkhwebane's allegation in this section that she was entitled to be involved in the process which culminated in the Speaker's decision that Ms Mazzone's motion of 6 December 2019 was in order, this has been dealt with in para 169 above.[192])

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[190] The Rules are made in terms of section 57 of the Constitution which permits the NA to '*make rules and orders concerning its business…*'.

[191] Speaker's AA 266: 176.

[192] Speaker's AA 266: 170.

179. As regards (c) in para 176 above, for two main reasons we submit that Adv Mkhwebane (like the incumbent of any other Chapter 9 office whose impeachment is sought) has no right to reasons for any of the following:[193]

179.1. a decision of the Speaker that a notice of motion for the removal of Adv Mkhwebane is in order;

179.2. a resolution by the NA that a section 194 inquiry be proceeded with;

179.3. a resolution by the NA to recommend to the President that Adv Mkhwebane be suspended pending the outcome of the formal inquiry;

179.4. a decision by the section 194 committee that Adv Mkhwebane has committed the misconduct or is incompetent or incapacitated for the reasons alleged in the motion; and

179.5. a resolution by the NA that Adv Mkhwebane be removed from office.

180. First, none of these decisions or resolutions is administrative action subject to PAJA, section 5 of which confers a right to reasons for administrative action.[194] As explained in para 154.1 above, the definition of '*administrative action*' in

[193] Speaker's SAA 1152: 85.3.

[194] Speaker's AA 269: 178.

section 1 of PAJA requires that it be a decision '*of an administrative nature* and none of the decisions or resolutions in question fit this description.

181. Second, there is no requirement in the Constitution, in any other law or in the NA Rules that reasons be given for the decisions or resolutions described in para 179 above. Nor does procedural rationality or any other constitutional rule or principle applicable to the impeachment process require the giving of reasons.[195]

182. As regards (d) in para 176 above (ie the right to full legal representation), we deal with this in the separate section immediately below.

The fourth ground: the right to legal representation[196]

183. Adv Mkhwebane alleges that the New Rules are unfair because they do not grant a full or effective right to legal representation.

184. We submit Adv Mkhwebane does not have and should not have a right to full legal representation, if by that is meant the right to have a legal representative speak on her behalf during the inquiry by the section 194 committee. In addition to repeating paras 180 and 181 above *mutatis mutandis*, we submit that when section 181(5) of the Constitution provides that Adv Mkhwebane is accountable to the NA, it means that she is accountable personally. We submit further that section 194 of the Constitution, which as stated is the ultimate accountability-

[195] Speaker's AA 269: 178.

[196] FA 57-58: 110-113 and SFA 952-953: 89-91.

ensuring mechanism, similarly requires that she answer the charges against her personally.[197]

185. We further submit that Adv Mkhwebane (like the Auditor-General and the commissioners of the Chapter 9 commissions) is no hapless accused. To be appointed to the office of PP, section 1A(3) of the Public Protector Act 23 of 1994 requires that a person must be someone who (a) is a Judge of a High Court; or (b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or (c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or (d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or (e) has, for a cumulative period of at least 10 years, been a member of Parliament; or (f) has acquired any combination of experience mentioned in paras (b) to (e), for a cumulative period of at least 10 years.[198] Thus, Adv Mkhwebane is both legally required and capable of speaking for herself. She is not '*tongue-tied or nervous, confused or wanting in intelligence*', rendering her incapable of speaking for herself, as contemplated in

[197] Speaker's AA 269: 179-180; Speaker's SAA 1143: 66.1.

[198] Speaker's AA 269-270: 181.

Dladla.[199] In any event, Rule 129AD(3) does not deny her legal assistance. It permits her lawyer to be present and to advise her during the proceedings.

186. To the extent to which Adv Mkhwebane may wish to again rely on *Hamata*,[200] as she did in Part A, as authority for the proposition that she is entitled to legal representation in a parliamentary process for her removal from office, we submit such reliance is misplaced. The Supreme Court of Appeal ('**SCA**') in *Hamata*, to the contrary, held that the Constitution does not recognise an absolute right to legal representation outside courts of law. Indeed, it was never even contended before the SCA that such an entitlement would extend to another arm of state such as Parliament. Moreover, the *dictum* on which Adv Mkhwebane relies[201] pertains specifically to legal representation before administrative bodies, which the NA and its committees are not when exercising their oversight functions. The *dictum* also relates to procedural fairness as contemplated in PAJA, which for the reasons given earlier does not govern proceedings in terms of section 194 of the Constitution. The applicable standard is procedural rationality, with which the New Rules comply.

187. Adv Mkhwebane also alleges that Rule 129AD(3) is vague because it is not clear whether it excludes the participation of the legal practitioner during the leading

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[199] *Dladla and Others v Administrateur, Natal* 1995 (3) SA 769 (N) p775; and the extract from *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125 (CA) quoted therein.

[200] *Hamata v Chairperson, Peninsula Technikon IDC* 2002 (5) SA 449 (SCA).

[201] Id paras 12 and 13, that the discretion to permit legal representation should not be removed from the administrative body seized with the issue.

of evidence, cross-examination of witnesses and the like, or whether it only excludes the participation of the legal practitioner in the deliberations of the section 194 committee. The rule is not vague for the reasons given, or at all. On the contrary, it is straightforward and clear. Adv Mkhwebane may be assisted by a legal practitioner, but the legal practitioner may not participate in the section 194 committee in any of the ways mentioned.[202]

188. Furthermore, we emphasize that the section 194 independent panel has a duty to ensure that the enquiry is conducted in a reasonable and procedurally fair manner. This is expressly stated in Rule 129AD(2) and was highlighted by the Full Court in its judgment of Part A (para 89). Thus, while the committee may not permit a Chapter 9 office-bearer's legal representative himself or herself to participate in the proceedings of the committee, should a situation arise where reasonableness or procedural fairness require that the office-bearer be afforded time to consult their legal representative before proceeding (e.g. before questioning a witness against them either generally or on a particular issue), a reasonable/fair period must be afforded to them for that purpose.[203]

The fifth ground: unlawful and premature referral[204]

189. Adv Mkhwebane alleges that when the Speaker determines that a motion is compliant and in order, as contemplated by Rules 129S and 129T, she must

[202] Speaker's AA 270: 184.

[203] Speaker's SAA 1144: 66.2.

[204] FA 58-60: 114-119.

'*determine that* there *is prima facie evidence of intention in the form of dolus*' and a '*winnable case*'.[205] In this regard Adv Mkhwebane further alleges that in making that determination, the Speaker's position is comparable to that of a prosecutor.

190. We dispute the correctness of these allegations for the reasons set out in para 170 above.[206]

191. Furthermore, and in any event, intention in the form of *dolus* is not an essential requirement for impeachment contained in section 194(1)(a) of the Constitution or in the relevant definitions in the New Rules (i.e. the definitions of '*incompetence*' and especially '*misconduct*', which also encompasses gross negligence).[207]

The sixth ground: the rule against retrospectivity[208]

192. Adv Mkhwebane alleges that the New Rules do not apply to conduct by her before 3 December 2019 (i.e. the date when the NA adopted the New Rules), as that would be a violation of the rule or presumption against retrospectivity. She consequently alleges that insofar as the charges in Ms Mazzone's motion relate to events before that date, it is not 'in order' and consequently is not a valid

[205] FA 59-60: 118-119.

[206] Speaker's AA 271: 187.

[207] Speaker's AA 271: 187.

[208] FA 60-61: 120-121.

foundation for an impeachment process in relation to her. (We understand these allegations to be made in support of both Adv Mkhwebane's alternative prayer for a declaration that the New Rules do not operate with retrospective effect against her and her prayer for judicial review of the Speaker's decision on 26 February 2020 that Ms Mazzone's second (replacement) motion was compliant with Rule 129R.)

193. We dispute the correctness of these allegations for the following reasons.[209]

193.1. First, with the exception of criminal trials (as to which, see section 35(3)(l) of the Constitution), there is no rule against retrospectivity in our law. There is a presumption, but it can be rebutted either expressly or by necessary implication by the provisions or indications to the contrary in the enactment itself.[210] In this regard it has been held:

'*the presumption against retrospectivity does not apply when it must be inferred from the provisions of the Act that the Legislature intended the Act to be retrospective. Such an inference can be drawn when the consequences of holding an Act to be non-retrospective would lead to an absurdity or practical injustice.*'[211]

[209] Speaker's AA 271-272: 189.

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

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

193.2. Second, it would be absurd to interpret the New Rules as applying only to events after their adoption. Not only would that leave a *lacuna* (i.e. the NA could not validly impeach a Chapter 9 officer or commission member for anything done or not done before 3 December 2019, no matter how serious), but the New Rules mainly regulate the procedure to be followed for impeachment processes in terms of section 194 of the Constitution, a provision which has been in operation since the commencement of the Constitution on 4 February 1997 (a date long before Adv Mkhwebane's appointment to the office of Adv Mkhwebane). If the New Rules did not operate retrospectively in the sense of regulating proceedings for the grounds and process for the impeachment of a Chapter 9 office bearer based on their conduct or performance in the period after their appointment but before the adoption of the New Rules on 3 December 2020, the result would be the following: because the adoption by the NA of the New Rules is a requirement for all impeachment proceedings under section 194, no misconduct committed by a Chapter 9 office bearer during that period, or no incompetence manifested by a Chapter 9 office bearer during that period, however grave, could sustain their impeachment. On Adv Mkhwebane's approach, the NA could not impeach a Chapter 9 office bearer who admitted committing a serious crime in the period between her appointment and 3 December 2020.

193.3. Third, as explained more fully in para 198 below when addressing certain related points she makes under the rubric of 'unreasonableness', insofar

as the New Rules regulate matters of substance (i.e. define '*incapacity*', '*incompetence*' and '*misconduct*') they impose higher thresholds for impeachment than the ordinary meaning of those words would otherwise impose, alternatively they do not impose lower thresholds. Consequently, in this respect, the retrospective operation of the New Rules inures to the benefit or at least not to the detriment of Adv Mkhwebane. In this regard, it has been held:

'*First of all, a Statute which deals with a topic or subject which has been a matter of some doubt and which is intended to clarify and settle that doubt does operate retrospectively…Second, a statute which is intended to operate for the benefit of a subject is also so interpreted.*'[212]

194. In paras 92 to 95 of the SFA Adv Mkhwebane refers to the judgment of *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Services and Another* 2017 (6) SA 435 (GP). The ultimate points she makes, based on this judgment, set out in para 95 of the SFA, mirror those already made by Adv Mkhwebane in paras 120–121 of her FA. We have already responded to these points.

[212] *Ex Parte Christodolides* 1959 (3) SA 838 (T) at p841A-B, which dictum was more recently applied in *KLM Royal Dutch Airlines v Hamman* 2002 (3) SA 818 (W) para 5.2.

The seventh ground : unreasonableness[213]

195. In her SFA, under the heading '*Unreasonableness*', Adv Mkhwebane alleges that:

195.1. the New Rules are unreasonable as she '*could not have been reasonably expected to conform to the new requirements imposed by the offences defined in the New Rules at a time before those requirements or standards came into existence*';[214]

195.2. '*[g]iven their origins and the acrimonious history between [her] and the originators of the rules, it is also fair to conclude that the rules were specifically targeted at [her] as an individual, in spite of being clothed as aimed at all heads of Chapter 9 institutions*';[215] and

195.3. the complaint against her by Ms Mazzone MP is a '*manifestation of the Sobukwe Clause'* and '*is evidence of reviewable unreasonableness and/or overlapping irrationality*'.[216]

196. We submit these contentions are unsustainable, both in law and on the facts.

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[213] SFA 966-967: 135-137.

[214] SFA 966: 136.

[215] SFA 967: 137.

[216] Ibid.

197. As set out above, the adoption of the New Rules was not administrative action and, consequently, the standard of reasonableness is inapplicable. The New Rules have to meet the standard of rationality. In any event, even if the applicable standard is reasonableness, they are not unreasonable (and are rational) for the reasons which follow.

198. The allegation quoted in para 195.1 above is similar to the retrospectivity ground of review raised in her FA, in that Adv Mkhwebane now states that it would be unreasonable for the New Rules to operate retrospectively. We refer to the submissions above made in respect of retrospectivity and the Speaker's assertions in this regard.[217] We add the following in response to the retrospectivity ground in its reformulation in the SFA as an allegation of unreasonableness:[218]

198.1. As submitted above, the New Rules do not introduce a lower threshold for misconduct or incompetence, but instead impose a higher threshold for any decision by the NA to remove the Public Protector pursuant to Ms Mazzone MP's motion. The definitions in the New Rules add constraining qualifications to the ordinary meanings of '*misconduct'* and *'incompetence*'; and, consequently, if anything, favour the incumbents of Chapter 9 offices by making it more difficult to remove them on those grounds. Issues with retrospectivity arise only in respect of changes to

[217] Speaker's AA 271–272: 188-189.

[218] Speaker's SAA 1128-1133: 48-49.

the law which would impair existing rights and or create new obligations, which is not something that the New Rules do in any presently relevant sense.

198.2. '*Misconduct*' is defined to mean '*the intention or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of public office*'. The definition of '*incompetence*', though not exhaustive, includes the following exacting requirements in relation to the holder of a public office, namely '*a demonstrated and sustained lack of (a)* knowledge *to carry out; and ability or skill to perform, his or her duties efficiently*'. (The definition of '*incapacity*' in the New Rules, though not presently relevant, does not impose a lower threshold than the ordinary meaning of that term, and may even be construed as imposing a higher threshold.)

198.3. None of these definitions is irrational or unreasonable.

199. Turning to the allegations in her SFA[219] quoted in paras 195.2 and 195.3 above, we submit the New Rules are not, in any way, comparable to the Sobukwe Clause, a measure which was enacted by the apartheid parliament in 1963 and renewed annually so as to keep Mr Robert Sobukwe imprisoned despite his having reached the end of a three-year prison sentence imposed on him in 1960.

[219] SFA 967: 137.

Under the clause, he remained in prison for a further six years. In this regard we refer the Court to the following statements by the Speaker in her SAA:

199.1. The relevant distinguishing features of the New Rules are they are patently of general application and will remain in place for the foreseeable future. On the other hand, the Sobukwe Clause was created for use only against Mr Sobukwe and was renewed annually by the parliament under the apartheid regime to prolong his imprisonment. This is clearly not the intention behind the New Rules.[220]

199.2. Nothing in the process in the NA's Portfolio Committee on Justice and Correctional Services, or in its Rules Committee and sub-committee, which culminated in the adoption of the New Rules in the NA, without demur from any of the political parties represented in the NA, supports Adv Mkhwebane's allegation that they are specifically targeted at her.[221]

199.3. On the contrary, the New Rules were adopted because, following the referral of the third complaint against Adv Mkhwebane by Mr Steenhuisen MP to the Portfolio Committee, it reported to the Speaker on 27 August 2019 that when discussing the matter that day '*[t]he Committee noted the absence of rules on the removal of office bearers of institutions supporting constitutional democracy*' and was '*of the view*

[220] SAA 1130: 49.1.

[221] SAA 1130-1131: 49.2

that it is important to have rules in place to ensure uniformity in the manner in which similar issues are dealt with and fairness in the relevant parliamentary processes'. The Portfolio Committee accordingly recommended that the Speaker refer the matter to the Rules Committee, which she duly did.[222]

199.4. Thereafter, following a considered process, on 28 November 2019 the Rules Committee approved the formulation of the New Rules as generally applicable rules and recommended their adoption to the NA. Its report to the NA contained the following explanation for the New Rules: '*Section 194(1) of the Constitution, 1996 states that the office-bearers and commissioners in Institutions Supporting Constitutional Democracy (Chapter Nine of the Constitution) may be removed from office on specific grounds. While the Constitution and the [existing NA] rules do* set *out a broad framework for Parliament to exercise its functions in terms of Section 194, there was a view that, to ensure clarity and uniformity, specific rules were required in respect of the removal of these office-bearers and commissioners. To this effect, the Committee recommends the insertion of the following new rules …*'.[223]

199.5. The Speaker is not empowered to refuse to process a motion, which complies with the New Rules, calling for the impeachment of the holder

[222] SAA 1131: 49.3 and TRM28 431.

[223] SAA 1131: 49.4 and TRM 37 475.

of a Chapter 9 office. While the New Rules have thus far only been employed against Adv Mkhwebane, this is because no motion, as yet, has been submitted against any other Chapter 9 office bearer.[224]

199.6. Further, any member of the NA can lodge a complaint against an incumbent of any Chapter 9 institution. Thus, the initiation of a complaint does not fall within the exclusive domain of any particular political party. In the circumstances, it can hardly be said that the New Rules specifically target Adv Mkhwebane.[225]

199.7. There is specific legislation aimed solely at the removal of members of the Electoral Commission. The Electoral Commission Act 51 of 1996 provides for circumstances under which a member of the Electoral Commission may be removed from office as contemplated in section 194. It can hardly be said that there is anything untoward in having rules or laws that are specifically aimed at the removal of the head of a specific Chapter 9 institution. Adv Mkhwebane has not taken issue with the Electoral Commission Act and has instead lauded it.[226]

199.8. The New Rules were not adopted for an illegitimate purpose. They were adopted so that the NA may carry out its responsibility in respect of all Chapter 9 institutions as required by section 194 of the Constitution. The

[224] SAA 1132: 49.5.

[225] SAA 1132: 49.6.

[226] SAA 1132: 49.7.

Full Court in its judgment on Part A rightly rejected the references to the Sobukwe Clause (footnote 19 of the judgment).[227]

The eighth ground: the right to decisional and institutional independence[228]

200. Although Adv Mkhwebane's line of reasoning in relation to this challenge is somewhat hard to follow, it appears that she argues that she should not be liable to be impeached on account of things done in the course of investigations or things said in her reports because that would infringe the constitutional independence of the institution of the PP guaranteed by section 181(2) of the Constitution.

201. We submit the fallacy in this argument is demonstrated by the following:[229]

201.1. the findings of the majority of the CC in *PP v SARB (CC)*[230] include findings in relation to things done by Adv Mkhwebane in the course of her investigation into the CIEX matter and things said by her in the resulting CIEX PP Report;

[227] SAA 1132: 49.8.

[228] FA 64-65: 131-135.

[229] Speaker's AA 283: 216.

[230] The relevant parts are quoted in the Speaker's AA 217-220: 76.

201.2. the findings of the High Court in *DA v PP II*[231] include findings in relation to things done and not done by Adv Mkhwebane in the course of her investigation into the Vrede Dairy matter; and

201.3. if, following a section 194 inquiry and a consideration of the evidence the section 194 committee reaches the same or similar conclusions, the result may legitimately be a finding by the section 194 committee, in terms of section 194(1)(b) of the Constitution, that Adv Mkhwebane misconducted herself or is incompetent within the meaning of the those terms as defined in the New Rules.

202. We submit it would be absurd and incompatible with the purpose or function of section 194 of the Constitution, as the ultimate accountability mechanism provided by Chapter 9, if the incumbent PP's actions or omissions in the course of her investigations, or things said by her in her reports, if found by a section 194 committee, following a reasonable and procedurally fair inquiry in terms of the New Rules, to be misconduct by the PP or to reveal incompetence on the part of the PP, were impermissible bases for a decision by the NA that she be removed from office.[232]

[231] The relevant parts are quoted in the Speaker's AA 220-221: 78.

[232] Speaker's AA 283-284: 216.

203. In the first *Certification* judgment[233] the CC discussed whether the new text of the final constitution sufficiently protected the independence and impartiality of the PP. In refusing to certify the relevant provision of the then section 194, the Court stated in para 163:

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

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

204. The Constitutional Assembly consequently amended section 194 to read as it does now, and in the second *Certification* judgment[234] the CC certified the amended section 194, which requires a 66.6% majority vote in the NA to remove the PP, as satisfying the required independence and impartiality.

205. The New Rules operate within the paradigm of section 194 as endorsed by the second *Certification* judgment. It is accordingly submitted that the New Rules do not impinge upon the institutional independence of the PP.

The ninth ground: the New Rules are incompatible with section 194(1)[235]

206. Adv Mkhwebane's first challenge of this sort is that the inclusion by the NA of '*intentional*' and '*gross*' in the definition of '*misconduct*' in the New Rules, as well as of '*demonstrated*' and '*sustained*' in the definition of '*incompetence*' in the New Rules, impermissibly raise the thresholds for impeachment in section 194(1) of the Constitution. It is not correct that the NA's definitions of these terms are inconsistent with the Constitution. As with the grounds for the impeachment of the President in section 89(1) of the Constitution, the drafters of the Constitution left the details relating to these grounds to the NA to spell out in rules regulating the impeachment process.[236] The determination of those details, which the NA did by way of its definitions of '*misconduct*' and

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

[235] FA 65- 69:136-145.

[236] *EFF impeachment* para 59 above at para 177.

'*incompetence*' (and '*incapacity*') in the New Rules, falls within the authority of the NA. It follows that those details cannot validly be challenged in legal proceedings on the ground now sought to be advanced.[237]

207. Adv Mkhwebane's second allegation is to the effect that, in determining whether she has committed impeachable conduct, the NA cannot rely on the findings of judges in litigation concerning her (i.e. the NA must decide for itself whether she has misconducted herself or is incompetent). This is correct. Nothing in the New Rules binds the NA to the findings of judges in litigation concerning a Chapter 9 office-bearer whose impeachment is sought on the basis of such findings, i.e. obliges the NA to accept such findings. In the present instance, the charges in Ms Mazzone MP's motion of 21 February 2020, which as stated is the operative motion, invite the NA to make the relevant findings for itself. The fact that the DA has attached the judgments of certain courts as evidence in support of those charges, does not detract from this. What this means in practical terms is if the NA resolves that a section 194 inquiry be proceeded with, the members of the section 194 committee may, and probably will, derive guidance from the judges' reasoning, and they may ask the witnesses (including Adv Mkhwebane) questions based on the judges' reasoning (including whether they admit or dispute facts found by the judges and on which the charges are now based). However, at the end of the inquiry the members of the committee will

[237] Speaker's AA 284: 218.

have to decide for themselves whether or not any or all of the charges of misconduct or incompetence have been established.[238]

208. Adv Mkhwebane's third allegation under this heading is that the New Rules were adopted without any appreciation of the intention of the drafters of the Constitution to differentiate between the requirements for the impeachment of the President in section 89 of the Constitution and the requirements for the impeachment of the holder of an office in a Chapter 9 institution in section 194. This is incorrect. As appears from the detailed description of the process of formulation of the New Rules in paras 80 to 92 of the Speaker's answering affidavit,[239] the members of the Rules Committee, and particularly of the Subcommittee, gave careful consideration to a set of rules that would 'fit' and regulate the impeachment process outlined in section 194 of the Constitution; and the resulting New Rules do just that.[240]

The tenth ground: infringements of the separation of powers[241]

209. Adv Mkhwebane's first challenge of this sort is based on the misconception that Ms Mazzone's complaint is '*largely and seemingly based on opinions of the*

[238] Speaker's AA 284-285: 219.

[239] Speaker's AA 222-229.

[240] Speaker's AA 285: 220.

[241] FA 70-71:146 (second) - 151.

courts in their criticisms of [her] reports'.[242] This issue is dealt with in para 207 above.

210. Adv Mkhwebane's second allegation is that the provision made in Rule 129V for a judge to be appointed to the independent panel, in consultation with the Chief Justice, violates the principle of the separation of powers between the judiciary and the legislature. In her SFA Adv Mkhwebane elaborates on this allegation, referring to the '*Speaker's lack of power, authority and competency for the appointment of judges*',[243] saying '*no law authorises the Speaker to appoint judges*'[244] and saying the Speaker does not, '*acting alone,* [have] *the constitutional authority and power to appoint (or remove) a judge to serve in a parliamentary committee, such as the ad-hoc panel*.'[245]

211. This allegation is incorrect.[246]

211.1. Our model of the separation of powers is not one that requires a complete or total separation. It permits the performance of some non-judicial functions by the judiciary, especially if they are closely connected with the core function of the judiciary.[247]

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[242] FA 70: 146.

[243] SFA 961-962 : 115.

[244] SFA 961-962 : 116.

[245] SFA 962: 117.

[246] Speaker's AA 286-287: 225.

[247] *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* 2013 (5) SA 571 (CC) paras 13 and 38.

211.2. We submit the NA may validly enlist the aid of a member of the judiciary to participate in the non-adjudicative screening function entrusted to the panel. The performance of the panel's function, focussed as it is on a determination of whether there is *prima facie* evidence to show that the holder of a Chapter 9 office, committed misconduct, is incapacitated or is incompetent, is compatible with the office of a judge and will not be harmful to the institution or central mission of the judiciary. More specifically, the performance of the panel's function calls for qualities and skills required for the performance of judicial functions, including independence, the weighing up of information and the forming of an opinion based on information.[248] In other words, it is a function closely connected with the core function of the judiciary.[249]

211.3. Adv Mkhwebane misconstrues the nature and effect of the appointment of the members to the Independent Panel. The fact that a sophisticated system had been devised for the appointment and removal of judges by the Judicial Service Commission is irrelevant to the constitutionality of the New Rules for the removal of office-bearers of Chapter 9 institutions. The New Rules do not purport to appoint or remove judges to or from their office as such.

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[248] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 34.

[249] Speaker's AA 287: 225.

211.4. In order to ensure that the appointment of a judge to the Independent Panel does not disrupt the proper functioning of the court of which they are a member or imperil the independence of the judiciary, Rule 129V(3) expressly provides that if a judge is appointed to the Independent Panel, the Speaker must do so '*in consultation with the Chief Justice*'. Hence, no judge may be so appointed unless the Chief Justice, who is the head of the judiciary (section 165(6) of the Constitution), agrees.

The eleventh ground: double jeopardy[250]

212. In her SFA Adv Mkhwebane alleges that, because Ms Mazzone MP's motion is (largely) based on '*alleged conduct for which* [she has] *already been punished by the courts in the form of punitive costs and verbal reprimands*', the prospect of further punishment pursuant to the impeachment process '*may be inappropriate on the basis of double jeopardy*'.[251]

213. We submit the principle of double jeopardy is inapplicable to an impeachment process in terms of section 194 of the Constitution. Adv Mkhwebane's argument, if correct, would mean, for example, that an incumbent of a Chapter 9 office convicted by a Court of a crime, could not also be impeached in terms of section 194 of the Constitution on account of the misconduct which resulted in the conviction. The imposition of a sanction on the incumbent of a Chapter 9

[250] SFA 966:133-134.

[251] SFA 966:133-134. The Speaker's response is at Speaker's SAA 1126-1127: 41-44.

office, does not denude the NA of its original constitutional function and power to remove the incumbent from office in the circumstances and manner postulated in section 194.

214. This argument was raised by Adv Mkhwebane at the hearing of Part A. The Court, in dismissing the Part A application, stated, with respect correctly, the following in respect of this argument in para 106 of its Judgment: '*Other than in the context of criminal proceedings there is certainly no principle of double jeopardy of general application as Adv Mkhwebane contends. She need look no further than the very remedial action that she herself orders.*'

The twelfth ground: procedural irrationality – alleged breaches of sections 7(2) and 57(1)(b) of the Constitution and the rule of law[252]

215. As part of her averments in her SFA dealing with her alleged employment, Adv Mkhwebane contends that the NA should have invited the heads of the Chapter 9 institutions to '*participate and/or comment*' prior to the adoption of the New Rules; and not doing so was a '*fundamental breach of the rule of law and a breach of section 7(2) of the Constitution*', particularly in the context of '*serious inroads*' made into their '*vested rights and existing conditions of employment*'. She adds that the NA's conduct was in breach of the duty of accountability prescribed in section 57(1)(b) of the Constitution.[253]

[252] SFA 943: 54-55.

[253] SFA 943: 54-55.

216. For the reasons given or referred to earlier in relation to Adv Mkhwebane's allegation of unreasonableness (on account of retrospectivity) and her allegations based on her alleged status as an employee, we submit there was no breach of the rule of law or section 7(2) of the Constitution.

217. In this regard we reiterate that the legal principle applicable is that of procedural rationality, which, as explained in para 156 above, requires that during the decision-making process all material relevant to achieving that purpose be considered, unless ignoring it is rationally related to achieving that purpose or does not colour the entire process with irrationality.[254]

218. The purpose of the New Rules is to hold the heads of Chapter 9 institutions to account as contemplated in section 194 of the Constitution. They are aimed at operationalising the accountability-enhancing mechanism envisaged in the Constitution. It was not necessary for the Public Protector and the other incumbents of Chapter 9 offices to be consulted for the NA to adopt rules that fulfil this purpose in a rational manner.[255]

219. In any event, none of the issues raised by Adv Mkhwebane in the present application – she being the only incumbent of a Chapter 9 institution who has alleged the New Rules are deficient – points to material relevant to achieving

[254] Speaker's SAA 1138: 56.

[255] Speaker's SAA 1139: 57.

their purpose not being considered, let alone to the entire process being coloured with irrationality.[256]

220. As to the facts, we respectfully draw the Court's attention to the following:

220.1. All of the meetings of the Rules Committee and the Subcommittee in which the New Rules were considered were open to the public; and, at the time it was widely publicised that rules for giving effect to section 194 were being formulated.[257]

220.2. Furthermore, on 20 September 2019, Parliament issued a detailed press release headed '*Review of National Assembly Rules for Removal of Chapter 9 Institution Office Bearers Kicks-Off in Earnest Today*'.[258]

220.3. In response, the Organisation Undoing Tax Abuse (OUTA) submitted representations about the draft New Rules to the Subcommittee, which were tabled in the Subcommittee at its meeting on 9 November 2019. The Chapter 9 institutions could have made written submissions of their own, but they could have done so or requested the opportunity to make oral submissions.[259]

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[256] Speaker's SAA 1139: 57.

[257] Speaker's SAA 1139: 58.1, read with TRM74 1170 and TRM75 1172.

[258] Speaker's SAA 1139: 58.2, read with TRM76 1174.

[259] Speaker's SAA 1140: 58.3.

221. Turning to Adv Mkhwebane's allegation that the manner in which the NA proceeded when preparing and adopting the New Rules was in breach of the duty of accountability prescribed in section 57(1)(b) of the Constitution, we submit the following:

221.1. First, as just explained, the process followed by the NA when making the New Rules was conducted with due regard to representative and participatory democracy, accountability, transparency and public involvement. Moreover, the content of the New Rules themselves is wholly consonant with those constitutional values and principles, which is the focus of section 57(1)(b).[260]

221.2. Second, the obligation to facilitate public involvement in the processes of the NA and its committees is contained in section 59(1)(a) of the Constitution, and not in section 57(1)(b). However, section 59(1)(a) of the Constitution does not govern the process within the NA leading up to the making of rules governing its legislative and other processes and those of its committees. What section 59(1)(a) requires is that when the NA or any of its committees undertakes legislative and other processes in terms of the rules, it must facilitate public involvement. There is nothing in the NA Rules and the Joint Rules of the NA and the NCOP which precludes the NA or its committees from facilitating public involvement if and to the extent it is appropriate to do so. On the contrary, they require that the

[260] Speaker's SAA 1140: 59.1.

NA and its committees facilitate public involvement in their legislative and other processes. For example, Rule 167(b), (c) and (d) provide that for the purposes of performing its functions a committee may: receive petitions, representations or submissions from interested persons or institutions; permit oral evidence on petitions, representations, submissions and any other matter before the committee; and conduct public hearings. Moreover, Rule 170 provides generally that committees must ensure public involvement in accordance with the provisions of the Constitution and the NA Rules.[261]

221.3. Third, although Adv Mkhwebane does not rely on section 59(1)(a), in reality her attack on the rule-making process, based as it is on an alleged failure by the NA to facilitate the involvement of heads of Chapter 9 institutions, amounts to an allegation that the NA did not comply with section 59(1)(a).[262]

221.4. Fourth, and in any event, a decision as to whether or not the NA has complied with section 59(1)(a) in a particular instance, is something which falls within the exclusive jurisdiction of the Constitutional Court conferred by section 167(4)(e) of the Constitution, i.e. it falls outside the jurisdiction of this Court.[263]

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[261] Speaker's SAA 1140: 59.2.

[262] Speaker's SAA 1141: 59.3.

[263] Speaker's SAA 1141: 59.4; *SA Veterinary Association v Speaker of the National Assembly and Others* 2019 (3) SA 62 (CC) paras 15-17 and the cases cited there.

The thirteenth ground: recusal and the right to be protected against conflicts of interest[264]

222. Although Adv Mkhwebane's allegations in support of this ground are rather hard to follow, she appears to be alleging the following:

222.1. the office of the PP is currently dealing with a number of complaints involving allegations of serious impropriety or wrongdoing by members of the national Cabinet who are members of the NA, by conducting investigations into the complaints and by preparing reports on the investigations;

222.2. some national Cabinet members including the incumbent President are currently involved in acrimonious litigation against Adv Mkhwebane involving reports containing findings of wrongdoing by them;

222.3. the Speaker acted unlawfully in a range of respects alleged elsewhere in her affidavit (and which are dealt with from para 232 below);

222.4. there are members of the NA '*who by association are implicated in the unlawful conduct of the Speaker*'[265] (we identify and deal with her allegations concerning the members in question from para 241 below);

[264] FA 61- 63: 122-130 and SFA 955-959: 96-106.

[265] FA 61: 124.

222.5. '*the Speaker and Deputy Speaker have unnecessarily decided to take sides in the dispute between the President and the Public Protector [i.e. in the litigation about the BOSASA report referred to in para 75 above] by siding with the President against the Public Protector, instead of maintaining their independence*';[266]

222.6. all of these persons are '*indisputably conflicted in relation to the question posed in the [impeachment] motion*';[267] and

222.7. the New Rules are irrational because they '*fail to make provision for filtering malicious and/or dishonest 'complaints' by conflicted compromised individuals or any other abuse-of-process manoeuvres*'.[268]

223. It is convenient to deal, first, with the last of these allegations, which is incorrect because it fails to account for the three filtering mechanisms in the New Rules described in paras 122 to 125, 128 to 131 and 133 above.[269]

224. Subject to the submissions below, particularly in the section (starting at para 230 below) about NA Rule 30 and the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ('**Parliamentary Ethics Code**') (which is referred to in NA Rule 30 and is a

[266] FA 61-62: 125.

[267] FA 62: 126.

[268] FA 63: 129.

[269] Speaker's AA 274: 192.

schedule to the Joint Rules of the NA and the NCOP), the correctness of the allegations by Adv Mkhwebane summarised in paras 222.1 and 222.2 above is not disputed.[270]

225. We also accept that both procedural fairness (the standard made applicable by Rule 124AD (2) to the conduct of the inquiry by the section 194 committee) and procedural rationality (a standard for the validity of all exercises of public power) require that the members of the section 194 committee should not have or be reasonably perceived to have a personal interest in the outcome of the proceedings of the committee.[271] In this regard it is important to bear in mind that the function of the committee is to make a finding as to whether or not Adv Mkhwebane has misconducted herself or is incompetent on the grounds set out in the charges. In instances where the facts are in dispute, this will entail both fact-finding and determining whether the facts, as found, show misconduct, incapacity or incompetence. In instances where the facts are common cause, the function of the committee will solely be to determine whether the facts show misconduct, incapacity or incompetence.[272]

226. If the NA resolves that a section 194 inquiry be proceeded with in relation to Ms Mazzone's complaint, it is most unlikely that political parties in the NA with members in the national Cabinet will appoint any of those members to the

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[270] Speaker's AA 274: 193.

[271] Compare *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP) paras 130-147.

[272] Speaker's AA 274: 194.

committee. The reason is that national Cabinet members have never in the last five consecutive Parliaments been appointed to serve on NA committees.[273]

227. However, for three related reasons, we submit such national Cabinet members may indeed participate or vote in the proceedings of the NA which will ensue if the section 194 committee finds that Adv Mkhwebane did indeed misconduct herself in one or more of the ways alleged by Ms Mazzone or that she is indeed incompetent for one of more of the reasons alleged by Ms Mazzone.

228. The first reason is that if the committee makes such a finding, the NA as a whole must decide whether or not to remove her from office. A supporting vote of at least two thirds of the members of the NA is required for her removal. It would be inimical to the proper functioning of the impeachment mechanism and to our system of party-political representative democracy, if national Cabinet members (most of whom will be members of the majority party) were to be precluded from participating or voting in the proceedings of the NA simply because they know or have reason to suspect Adv Mkhwebane is investigating complaints involving allegations against them of serious impropriety or serious wrongdoing or because they are involved in litigation against Adv Mkhwebane involving reports containing findings of wrongdoing by them. It is necessarily implicit in section 194(2)(a) of the Constitution, the provision which requires that, to be adopted, a resolution calling for Adv Mkhwebane's removal from office must be supported

[273] Speaker's AA 274-275: 195.

by at least two thirds of the members of the NA, that all the members of the NA are entitled to vote.[274]

229. The second reason is that voting on such a motion entails an exercise of political judgment, more specifically whether the misconduct, incapacity or incompetence as found by the committee are so serious that removal from office – the ultimate accountability mechanism provided by Chapter 9 – is warranted. This means that when voting on such a motion, all members of the NA must put the public interest ahead of their personal interests.[275] See *EFF (impeachment)* where the CC stated:

'*The fact that members of the Assembly assume through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives.*'[276]

230. The third reason is the obligation just mentioned is underscored and enforced by Parliament, by means of Rule 30 of the NA Rules and the Parliamentary Ethics Code.[277] Rule 30 provides that if a member has a personal interest or a private financial or business interest in any matter before a forum of the Assembly of

[274] Speaker's AA 275: 197.

[275] Speaker's AA 275-276: 198.

[276] *EFF (impeachment)* para 59 above at para 144.

[277] Speaker's AA 276: 199, read with annexure TRM 79 591-622.

which he or she is a member, he or she must at the commencement of engagement on the matter by the forum immediately declare that interest in accordance with the code of conduct contained in the schedule to the Joint Rules and comply with the other provisions of the code. The code in question is the Parliamentary Ethics Code.[278]

231. In line with the oath or solemn affirmation to be taken by all MPs before they may perform their functions as such (see item 4 of Schedule 2 to the Constitution), the Parliamentary Ethics Code outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct. It specifically provides that all members of the NA must '*take decisions solely in terms of public interest and without regard to personal financial or other material benefits for themselves, their immediate family, their business partners, or their friends*' (clause 2.4.1), must '*declare private interests relating to public duties and resolve any conflict arising in a way that protects public interest*' (clause 2.4.5) and must '*discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests*' (clause 4.1.4). A member of the NA breaches the Parliamentary Ethics Code when he or she, amongst other things, '*contravenes or fails to comply with the requirements of the provisions for disclosing interests*' (clause 10.1.1.1) or contravenes clause 4.1 (clause 10.1.1.1.3). The Joint Committee on

[278] Speaker's AA 276: 199.

Ethics and Members' Interests as established by the Joint Rules of Parliament may consider complaints of alleged breaches of these provisions of the Parliamentary Ethics Code (clause 10.2.2.1) or acting on its own may consider any breach or alleged breach of the Code (clause 10.2.2.3). If the Committee finds on the balance of probabilities that a member has breached a provision of the Parliamentary Ethics Code (clause 10.7.6.1), then, depending on the provision breached, the Committee may impose certain sanctions including a reprimand in the NA or a fine of up to 30 days' salary (clause 10.7.7.1) or recommend to the NA any greater sanction it deems appropriate, in which event the NA shall decide on the appropriate sanction to be imposed (clause 10.7.7.2).[279]

232. Turning to Adv Mkhwebane's allegations of unlawful action by the Speaker, there are eight pertinent allegations, all of which are devoid of merit.

233. First, Adv Mkhwebane alleges that on about 29 May 2019 the Speaker '*unlawfully and unjustifiably entertained*' a request by the DA for her removal from the office of PP, even though the Speaker did not process the request when she pointed out that unless there were rules governing the process it would be unconstitutional.[280] The Speaker did not unlawfully and unjustifiably 'entertain' Mr Steenhuisen's third request. The relevant facts are set out in paras 66 to 73

[279] Speaker's AA 276-277: 200.

[280] FA 33: 50.

and 79 of the Speaker's answering affidavit.[281] In short, on 10 July 2019 the Speaker referred the request to the Portfolio Committee for consideration, and on 27 August 2019 the Portfolio Committee reported that the adoption by the NA of rules governing the section 194 process was necessary and requested that she refer the matter to the Rules Committee, which the Speaker duly did.[282]

234. Second, Adv Mkhwebane complains that the Speaker failed to reprimand the DA's former and current Chief Whips, Mr Steenhuisen and Ms Mazzone, for unconstitutionally attacking her (Adv Mkhwebane).[283] But Mr Steenhuisen and Ms Mazzone did not attack her unconstitutionally. What they did was make substantiated requests for the initiation of the impeachment process against her, something which is envisaged and permitted by section 194 of the Constitution and, more latterly, in Ms Mazzone's case, regulated by the New Rules. NA members are within their rights to propose a motion alleging that Adv Mkhwebane has misconducted herself or is incompetent and asking that the NA resolve that she be removed from office in terms of s 194 of the Constitution. None of their motions was frivolous or an abuse of that right.[284]

235. Third, Adv Mkhwebane complains that the Speaker did not provide her with a copy of Ms Mazzone's motion of 6 December 2019 and consequently violated

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[281] Speaker's AA 214-216 and 222.

[282] Speaker's AA 277: 202.

[283] FA 29: 68.

[284] Speaker's AA 278: 203.

'*the right to fairness and justice*',[285] '*the requirements of procedural rationality*'[286] and '*the right to be informed of the charge and the details at the earliest available opportunity in the* process'.[287] These allegations are dealt with in paras 168 and 178 above.

236. Fourth, Adv Mkhwebane complains that when the Speaker decided that she was satisfied Ms Mazzone's motion of 6 December 2019 was compliant with the criteria for such a motion set out in the new rules, the Speaker confined her assessment to '*the form requirements in the rules*', whereas the proviso to Rule 129R(1) requires that she assess the substance of the motion to determine whether, *prima facie*, it showed a ground for impeachment (i.e. whether it shows a '*winnable case*').[288] These allegations are dealt with in paras 170 and 189 above.

237. Fifth, Adv Mkhwebane complains that the Speaker did not allow her to participate in the process leading to her decision that the motion, *prima facie*, showed a ground for impeachment. She alleges that in so doing the Speaker breached her '*right to refute the existence of the requisite grounds at an early stage and at the point of the first determination of a prima facie case to answer*'.[289] These allegations are dealt with in para 169 above.

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[285] FA 52-53: 97.

[286] FA 54: 100.

[287] FA 56: 107.1.

[288] FA 44: 82 and 60: 119 respectively.

[289] FA 56: 107.2.

238. Sixth, Adv Mkhwebane complains that on 24 January 2020 (25 January 2020, in fact) the Speaker publicly announced her decision to proceed with the impeachment process without first informing her (Adv Mkhwebane) of the decision, and in so doing violated her rights and the office of the PP. It is not correct that in making the public announcement the Speaker violated any of Adv Mkhwebane's rights or the protections of her office (especially in sections 181(3) and (4) of the Constitution). We submit the Speaker's announcement that she had decided that Ms Mazzone's motion of 6 December 2019 was in order and had consequently called upon the political parties represented in the NA to submit their nominees for appointment to the independent panel, did not infringe Adv Mkhwebane's rights or the protections of her office. The main reasons the Speaker made a public announcement at that juncture were (a) the commencement of the process aimed at the establishment of the independent panel was the first public step by the NA in relation to a matter of public concern, (b) the sending of the Speaker's memorandum to the political parties meant it was bound to receive some publicity and (c) the Speaker wanted to ensure that the media was able to report accurately on what was happening.[290]

239. Seventh, Adv Mkhwebane complains that the Speaker refused or failed to give reasons for her decision to proceed with the impeachment process announced on 25 January 2020.[291] Adv Mkhwebane is correct that the Speaker did not accede

[290] Speaker's AA 279: 207.

[291] FA 45: 86 and 74: 158 respectively.

to her attorneys' demand on 28 January 2020 that the Speaker give written reasons for her decision that Ms Mazzone's motion of 6 December 2019 was in order. This is dealt with in paras 179 to 181 above. In any event, this issue is moot as Ms Mazzone has withdrawn her motion of 6 December 2019 and the Speaker has – in her main answering affidavit[292] – given reasons for her decision that Ms Mazzone's new motion of 21 February 2020 is in order.[293]

240. Eighth, Adv Mkhwebane alleges that the '*attitude of the Speaker and the approval of the motion and her failure to inform me about her decision to approve the motion lodged by the DA, all points to the narrative that the Speaker is acting with an ulterior motive*'.[294] There is no evidence the Speaker acted with an ulterior motive. We submit the objective facts and the Speaker's reasons for her actions and decisions, set out in in detail in the Speaker's affidavits, speak for themselves.[295]

241. Turning to the members of the NA who Adv Mkhwebane alleges '*by association are implicated in the unlawful conduct of the Speaker*', it appears from the remainder of Adv Mkhwebane's FA the members in question are (a) Mr Steenhuisen, (b) Ms Mazzone and (c) the members of the NA who on 6 March 2018 at a meeting of the Portfolio Committee on Justice and

[292] Speaker's AA 242-244: 125.

[293] Speaker's AA 280: 208.

[294] FA 73: 155.

[295] Speaker's AA 280: 209.

Correctional Services,[296] according to Adv Mkhwebane, '*publicly pronounced and passed judgment on the very issues which reportedly form the subject of the [current] complaint by the DA*'.[297]

242. As regards Adv Mkhwebane's complaints about Mr Steenhuisen and Ms Mazzone, these are dealt with in para 234 above.

243. Turning to the members of the NA who participated in the meeting of the Portfolio Committee on 6 March 2018, first, reference is made to what the Speaker said in paras 37 to 42 of her affidavit[298] about this meeting and about annexure 'PPFA 3' to the founding affidavit (i.e. the report of the Parliamentary Monitoring Group ('**PMG**') on the meeting). We emphasise that the statements ascribed to the Portfolio Committee as a whole by Adv Mkhwebane in her founding affidavit (especially in paras 31 to 35) come from the PMG's meeting summary (which are inaccurate in so ascribing the statements), not from its meeting report (which contains an accurate account of what the individual members of the Portfolio Committee actually said). What the latter reveals is a robust engagement between certain members of the Portfolio Committee and Adv Mkhwebane about the Vrede Dairy Report, and about the CIEX PP Report and the litigation in the High Court about it. Members of the Portfolio Committee are within their rights to engage robustly with Adv Mkhwebane

[296] As to which, annexure PPFA3 95-112.

[297] Annexure PPFA9 155: 3.

[298] Speaker's AA 201-202.

about her conduct especially in her capacity as Public Protector. She is accountable to the NA (s 181(5) of the Constitution), the Portfolio Committee is charged with exercising oversight over the performance of her function and members of the committee have freedom of speech in it (s 58(1)(a) of the Constitution). Indeed, as regards the robust nature of some of their comments, it is unexceptional that members of the NA, at times, express strong views of matters of public concern. We submit it would be inimical to the proper functioning of the NA if members who have previously had robust engagements with the incumbent PP, in the discharge of their constitutional power and duty to hold her to account, were, on that account, precluded from participating in later proceedings concerning Adv Mkhwebane under section 194.[299]

244. Turning to Adv Mkhwebane's allegation that the Speaker and the Deputy Speaker have unnecessarily decided to take sides in the dispute between the President and her in the litigation about the BOSASA report (referred to in para 75 above), by siding with the President against her, instead of maintaining their independence,[300] it is not correct the Speaker and the Deputy Speaker took sides unnecessarily.[301] The Speaker applied to intervene as a co-applicant in that matter because, in her estimation, certain of the remedial action and monitoring measures (namely, those contained in paras 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the BOSASA report) were is inappropriate and inconsistent with section

[299] Speaker's AA 281-282: 212.

[300] FA 61: 125.

[301] Speaker's AA 282: 213.

182(1)(c) of the Constitution. More specifically, they were incompatible with the Parliamentary Ethics Code (which does not apply to the President), were impermissibly vague and infringed the doctrine of separation of powers by subjecting to monitoring by Adv Mkhwebane the manner in which the NA exercises oversight over the executive. The Speaker's counsel's written submissions in the High Court are attached to her answering affidavit.[302] We submit they show the Speaker's intervention was quite proper, aimed as it was at upholding the integrity and constitutional autonomy of Parliament.[303] (In this regard we should add that when, on 26 November 2020, the CC heard an application by Adv Mkhwebene, amongst others, for leave to appeal directly to it against the decision of the High Court, the Speaker's counsel repeated those submissions and at no stage in those proceedings was it argued on Adv Mkhwebene's behalf that the Speaker's opposition to the intended appeal was *mala fide* or otherwise improper.)

245. Consequently, subject to paras 224 and 226 above, Adv Mkhwebane's assertion that all of the persons she has named or referred to in her affidavit are indisputably conflicted in relation to the question posed in the impeachment motion is incorrect.

[302] Annexure TRM72 623-652.

[303] Speaker's AA 282: 213.

The fourteenth ground: *Mala fides* and/or improper motives[304]

246. In her SFA Adv Mkhwebane alleges that the Speaker's conduct demonstrates *mala fides* and improper motives on her part and makes a range of allegations impugning the *bona fides* of the Speaker.

247. While many of the underlying factual allegations were already made in her FA, she now relies on them as a '*stand-alone ground of review*'; and, in addition, makes certain further (new) allegations in support of that ground of review. As she does not specify on which particular allegations in her FA she will rely for this purpose, we assume she relies on all of them. Consequently, we refer the court to all of the relevant parts of the AA. Unfortunately, Adv Mkhwebane has not clarified this aspect in her replying papers – despite the Speaker's invitation to do so.

248. In para 97 of her SFA Adv Mkhwebane implies that the Speaker's decision to continue with the impeachment process initiated by Ms Mazzone MP, while there is a challenge against the legality of the New Rules (i.e. while the current application is pending), is '*grossly unreasonable*' and reflects intransigent and inexplicable behaviour. We submit these allegations are baseless for the following reasons:

[304] SFA 955-959: 96-106 and 963-966: 122-132.

248.1. In proceeding with the section 194 process, and refusing to accede to Adv Mkhwebane's demands that the process be stalled because of her Part B challenges, the Speaker has acted as required by the Constitution and the New Rules.[305] The constitutional importance of the process was recognised by the Full Court in its judgment on Part A, where, when considering the prejudice to be suffered if the NA were to be interdicted from proceeding with the section 194 process, it stated in para 115:

> '*[I]t is apparent that the applicant completely lost sight of the responsibilities of the National Assembly in carrying out its Constitutional mandate in holding the applicant to account through the provisions of Section 194 and the processes under the new Rules. Moreover, the applicant fails to take into account the public interest in ensuring that the proceedings under the New Rules are proceeded with in light of the serious charges which have been preferred against the applicant.*'

248.2. We submit that, far from revealing irrational, grossly unreasonable and intransigent behaviour in which the Speaker failed to have an '*open and impartial mind*', her decision to proceed with the section 194 process was consonant with her duty under section 194 of the Constitution and the New Rules.[306]

249. In para 99 of the SFA Adv Mkhwebane alleges that the Speaker's acceptance of the first motion, which was subsequently withdrawn by Ms Mazzone MP, as being '*in order'*, shows the Speaker's bad faith or bias as that motion was '*ipso*

[305] Speaker's SAA 1145: 69.1.

[306] Speaker's SAA 1146: 69.2.

facto unlawful'. Adv Mkhwebane does not specify on what basis she alleges that the motion was *ipso facto* unlawful. What is clear is that the Speaker performed the function required of her by Rule 129S and 129T of the New Rules and concluded that the motion was in order, i.e. compliant with Rule 129R. Contrary to what Adv Mkhwebane implies in this paragraph and what she says in para 31.1 of the SFA, the fact that Ms Mazzone MP withdrew and replaced it is no indication that it was defective. The new motion included further charges and further substantiating evidence.[307]

250. In paras 100 to 102 of the SFA Adv Mkhwebane states that the President has '*correctly recused himself*' since he is currently locked in litigation against the Public Protector, and that the Speaker's failure to do the same is a basis for a reasonable perception of bias on her part. We have dealt with the Speaker's participation in the BOSASA litigation in paras 75 and 244 above. In short, the Speaker participated in that litigation because the remedial action ordered by the Public Protector, insofar as it relates to Parliament, is inappropriate and inconsistent with section 182(1)(c) of the Constitution.[308]

251. Adv Mkhwebane also states in para 103 of her SFA that the Speaker is not acting in the interests of the NA since the majority of its members are '*clearly not opposed to halting* the *present removal process until the courts have pronounced upon the constitutionality of the rules.*' On the assumption that Adv Mkhwebane

[307] Speaker's SAA 1146: 70.

[308] Speaker's SAA 1146: 71.

makes this statement in light of the majority of the political parties represented in the NA having not opposed her Part A application, we submit as follows:[309]

251.1. First, the contention is academic in the light of the Full Court's refusal of Part A of this application.

251.2. Second, Adv Mkhwebane's reasoning is flawed. The New Rules were adopted unanimously by the NA. It is, therefore, an NA decision that is under review and it is primarily the NA that has to respond to the application. That fact places the obligation on the Speaker, as the representative of the NA, to defend the New Rules. Adv Mkhwebane must know this, and presumably it is this knowledge that prompted her to cite the Speaker as the First Respondent.

251.3. Third, while political parties participating in the NA, or members of the NA are free to adopt whatever stance they choose in litigation like the present, their decisions are not relevant to the Speaker's decision to defend rules adopted unanimously by the House which are constitutionally and legally compliant.

251.4. Accordingly, the Speaker's actions are not a basis for a reasonable perception of bias or that they are improper or '*highly inappropriate*'.

[309] Speaker's SAA 1147: 72.

252. In any event, in terms of section 52 of the Constitution and NA Rule 14, the NA must elect a Deputy Speaker. Should the Speaker ever become conflicted or reasonably perceived to be anything other than impartial in discharging her functions as Speaker in relation to a particular matter – which is not the case in relation to the processing of the motion for Adv Mkhwebane's removal – she may designate the Deputy Speaker to discharge the functions of the Speaker in relation to that matter.[310]

253. Further in this regard we point out that Adv Mkhwebane may be labouring under a misapprehension as to the nature and scope of the Speaker's powers under Rule 129S and 129T of the New Rules. As explained, Rules 129S and 129T require an initial assessment by the Speaker of whether the motion is compliant with the criteria in Rule 129R. The Speaker's function is different from the subsequent assessment by the three-person Independent Panel under Rule 129X(1) of whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion. Adv Mkhwebane may also have overlooked the fact that, when the New Rules were adopted, simultaneously Rule 88 was amended so as to align the Speaker's screening function with that in Rule 129S and 129T.[311]

254. In support of her accusation of *mala fides* and improper motives, in paras 125 and 126 of her SFA Adv Mkhwebane avers that on or about 8 June 2020 the

[310] Speaker's SAA 1147: 73.

[311] Speaker's SAA 1147: 74.

Speaker breached an alleged '*agreement and/or understanding*' between the parties and their legal representatives by unilaterally resuming the processing of Ms Mazzone MP's motion under the New Rules, without giving prior notice to Adv Mkhwebane and the other affected parties.

255. This is incorrect, as appears from the Speaker's detailed response in her SAA[312] and from our discussion in paras 93 to 104 above of the full factual matrix relating to agreement between the parties as evidenced in the exchange of correspondence. The facts show that the Speaker did not breach the agreement, act in bad faith or with improper motives, or act in a way which precluded Adv Mkhwebane and the other parties participating in Part A from acting to protect their interests once the Speaker decided to approach the persons she wished to appoint as members of the independent panel to ascertain whether they were amenable to being appointed and, if so, whether they would be able to perform the task required of them within the 30-day period required by the New Rules. On the contrary, the Speaker notified Adv Mkhwebane and the other parties participating in Part A and when Adv Mkhwebane requested that the hearing of Part A be re-enrolled the Speaker co-operated with her to ensure that was achieved.

256. We point out that the change of stance by Adv Mkhwebane in her attorneys' letter of 25 June 2020 is significant as it necessarily entails an admission that, when the Speaker communicated with Adv Mkhwebane on 8 June 2020 and with

[312] Speaker's SAA 1117-1126: 24-40.

her attorneys on 12 June 2020, the Speaker was giving them notice of her intention to take the next formal step in the process, after the expiry of the two week period for responses specified in the letters to the Speaker's preferred appointees (also sent on 8 June 2020), namely the appointment of the members of the Independent Panel if, in the light of their responses, it was feasible to do so at that juncture. Not only did those letters to Adv Mkhwebane and her attorneys mean that they had ample prior notice to seek to have the hearing of Part A re-enrolled, but, we submit, the Speaker's actions in early June, far from being *mala fide*, as alleged in paras 124, 129, 131 and 132 of her SFA, or in breach of the terms of the postponement agreed in March 2020, as alleged in paras 125 and 126 of her SFA, or '*inexplicable*', as alleged in para 127 of the SFA, were fully and transparently explained to all concerned, did not breach the alleged agreement (which in any event did not contain the term on which Adv Mkhwebane relies) and were manifestly taken in good faith.[313]

257. We submit the Speaker's good faith dealing with Adv Mkhwebane in June 2020 is underscored by the response which the Speaker's attorneys addressed to her attorneys on 25 June 2020 (annexure PPSA5(e) to the SFA), in which, after explaining why the Speaker disputed the allegations in para 3 of her attorneys' letter (annexure PPSA5(d)), they went on to say that the Speaker was amenable to the procedural arrangements proposed in para 6 of her attorneys' letter, namely the agreement reached between senior counsel for Adv Mkhwebane, the

[313] Speaker's SAA 1124: 35.

DA and the ATM that Part A be heard on 12 and 13 August 2020 and a timetable for the delivery of heads of argument; and, further, to request that Adv Mkhwebane's attorneys prepare a draft letter to the Judge President and a draft order for the parties' consideration and approval.[314]

258. The Judge President, in turn, acceded to the request, the parties delivered their heads of argument in accordance with the agreed timetable and, as stated earlier, the hearing proceeded on 12 and 13 August 2020 before the Full Court.[315]

259. In all the circumstances, it is startling that Adv Mkhwebane has seen fit to make serious allegations of bad faith against the Speaker in relation to the events in June 2020 which led to the re-enrolment and hearing of Part A in August 2020.[316]

260. Finally in this regard, Adv Mkhwebane is incorrect when, in para 128 of the SFA that, by the time the Speaker informed her and the other interested parties of her actions in the week of 8 June 2020, the Speaker's preferred appointees to the Independent Panel had already reverted and indicated their reluctance to accept their proposed appointments. The Speaker wrote to her appointees on the same day she sent the letters to Ms Mazzone MP and Adv Mkhwebane, i.e. 8 June 2020.[317]

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[314] Speaker's SAA 1125: 36.

[315] Speaker's SAA 1126: 38.

[316] Speaker's SAA 1126: 39.

[317] Speaker's SAA 1126: 40.

PERSONAL AND PUNITIVE COSTS[318]

261. In paras 144 to 151 of the SFA, Adv Mkhwebane makes several allegations in support of her submission (in para 146) that the Speaker acted recklessly, grossly unreasonably and in bad faith. She asserts that costs should be awarded on a punitive scale against the Speaker (i.e. against the Speaker in her official capacity) and, that the Speaker personally should pay 20% of such costs.

262. There is no basis to mulct the Speaker's office with punitive costs or the Speaker in her personal capacity with punitive costs, in circumstances where she has merely been performing her duties as required by the Constitution and the New Rules and where she has done so reasonably and in good faith.[319]

263. In what follows we address each of the '*factors*' relied upon by Adv Mkhwebane in support of her allegations of bad faith, recklessness and gross unreasonableness. Given the nature of many of these 'factors', of necessity our submissions will cover some of the terrain dealt with earlier in response to Adv Mkhwebane's challenges to the New Rules and particularly to the Speaker's conduct. To avoid prolixity, as far as possible we shall limit our submissions in this section to what the Speaker has said in her SAA in answer to Adv Mkhwebane's claims for punitive costs.

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[318] SFA 969-973: 144-151.

[319] Speaker's SAA 1150: 84.

264. In paras 147.1 to 147.2 of the SFA Adv Mkhwebane cites the Speaker's failure to '*assess the substantive requirements of the motion'* and the failure to perform the '*requisite prima facie assessment*'. We have responded to these contentions in para 170 above. For the present suffice it to say that the New Rules do not place a duty on the Speaker substantively to assess the evidence presented in a motion to determine whether, *prima facie*, it shows the holder of office has committed the misconduct alleged or is incompetent or incapacitated as alleged (see the Speaker's AA 266-267:171); and, that, on 26 February 2020 the Speaker carefully considered the second notice of motion, which is the operative one, and was satisfied that it conformed with Rule 129R (see Speaker's AA 242-244: 125, which must be read with annexure TRM60 540-550).[320]

265. In paras 147.3 and 147.4 of the SFA Adv Mkhwebane cites the Speaker's allegedly '*improper conduct*' and '*reckless failure*' to notify her of the removal process that had been initiated by Ms Mazzone MP when she issued a media statement allegedly on 24 January 2020 and accepted the second motion by Ms Mazzone MP allegedly on 24 February 2020. These contentions are incorrect for the reasons given in paras 83, 165.1, 168.3, 238 and 265.2 above and in the parts of the Speaker's AA and SFA referred to below. The evidence shows the Speaker's actions were in compliance with the requirements of the New Rules. In any event, there was no obligation on either occasion to notify Adv Mkhwebane prior to the Speaker's assessment of the motions in terms of

[320] Speaker's SAA 1151: 85.1.

Rule 129S and 129T of the New Rules.[321] We refer in particular, to the following:

265.1. First, with regard to the media statement supposedly of 24 January 2020 (which was actually issued on 25 January 2020), the Court is referred to para 207 of the Speaker's AA (Speaker's AA 279:207).[322]

265.2. Second, with regard to the Speaker's acceptance of the second motion and the actions which she took on 26 February 2020 (and not 24 February 2020 as alleged), here too the Speaker was not obliged to notify Adv Mkhwebane prior to her assessment of the motion, as contemplated in Rule 129S and 129T. Furthermore, with regard to the alleged differences in the Speaker's approach to the two motions, the Court is referred to para 168 of the Speaker's AA (Speaker's AA 265:168).[323]

266. In para 147.5 of the SFA Adv Mkhwebane cites the Speaker's refusal to provide reasons for her decisions relating to the first and second motions of Ms Mazzone MP. Adv Mkhwebane is not entitled to reasons (Speaker's AA 268-269:177-178); in any event, the first motion had been withdrawn and thus is moot (Speaker's AA 280:208); and, with regard to the second motion, as the Full Court in its Part A judgment acknowledged, the Speaker indeed provided

[321] Speaker's SAA 1151: 85.2.

[322] Speaker's SAA 1151: 85.2.1.

[323] Speaker's SAA 1152: 85.2.2.

Adv Mkhwebane with reasons for her decision that the motion was in order in her AA (see, again, Speaker's AA 242-244: 125).[324]

267. In para 147.6 of the SFA Adv Mkhwebane criticises the Speaker for accepting the motions which turn on the retrospective application of the New Rules. For reasons set out in paras 193 and 198 above, the New Rules do indeed operate retrospectively, in order to give effect to a constitutional accountability-mechanism; and in any event there was nothing unlawful, sinister or blameworthy about the Speaker's decisions.[325]

268. In para 147.7 of the SFA Adv Mkhwebane states that the Speaker should have followed the example of the President and acknowledged the reasonable perception of bias borne out by the Speaker's own involvement in the BOSASA litigation. The Speaker's position has been explained in para 115 of the Speaker's AA (Speaker's AA 238-239:115) and again in para 71 of the Speaker's SAA (Speaker's SAA 1146: 71). See also paras 75 and 244 above. The material difference in the substantive positions of the President and the Speaker in that litigation is that he is seeking an order addressing a finding that his behaviour was improper, whereas the Speaker's involvement has nothing to do with her behaviour or personal circumstances, but rather with the PP's remedial action impacting, in appropriately, on Parliament's constitutional sphere. The President and the Speaker are thus in materially different positions, and there is

[324] Speaker's SAA 1152: 85.3.

[325] Speaker's SAA 1152: 85.4.

no reasonable basis for perceiving the Speaker's involvement in the BOSASA litigation as being biased against the PP.[326]

269. In para 147.8 of the SFA Adv Mkhwebane raises the alleged breach by members of the NA of the *sub judice* rule (i.e. NA Rule 89), which which provides that no member may reflect on the merits of any matter on which a decision in a court of law is pending. The Speaker has responded to this in her AA (Speaker's AA 296-297:261). The essence of her answer is that the *sub judice* rule does not preclude the members of NA from performing their oversight functions, or for that matter from initiating or participating in impeachment processes.[327]

270. In para 147.9 of the SFA Adv Mkhwebane cites the Speaker's alleged failure to recognise the reasonable views of members of the NA in respect of the handling of the litigation and the process. We, however, submit the Speaker is merely defending a decision taken by the NA. The Speaker is not obliged to take into account views of individual members of the NA or political parties represented in the NA when defending the lawfulness or otherwise of decisions of the NA. Her actions towards the parties in the present litigation, including those supporting Adv Mkhwebane (i.e. the ATM and the PAC), have not been unreasonable.[328]

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[326] Speaker's SAA 1153: 85.5.

[327] Speaker's SAA 1153: 85.6.

[328] Speaker's SAA 1153: 85.7.

271. In para 147.10 Adv Mkhwebane takes issue with the Speaker's decision not to halt the section 194 process pending the outcome of Part B, which in turn led to Adv Mkhwebane's making the Part A application. The Speaker's decision is presented by Adv Mkhwebane as proof of blameworthy behaviour. As explained, the Speaker was and remains of the view that the section 194 process should continue despite Adv Mkhwebane's challenge to the New Rules and her other challenges raised in Part B. The fact that Adv Mkhwebane launched what the Speaker believes to be an unmeritorious challenge does not warrant suspending the section 194 process, which is something of great constitutional import. We submit that if there were indeed cogent reasons to suspend the section 194 process pending the outcome of Part B, the Full Court adjudicating Part A would have interdicted the process, but it refused to do so in a judgment which, with respect, is clearly correct.[329]

272. Adv Mkhwebane also laments that Part B would have been adjudicated by now if the Speaker had not brought about the purported need for Part A. In this regard, we submit:

272.1. Part A was misconceived (as confirmed by the Full Court);[330] and

272.2. the processing of Ms Mazzone MP's motion and the present proceeings as a whole (including Part B) were interrupted by the Covid-19.[331]

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[329] Speaker's SAA 1154: 85.8.

[330] Speaker's SAA 1154: 85.9.1.

[331] Speaker's SAA 1155: 85.9.2.

273. In para 148 of the SFA Adv Mkhwebane avers that it is not for the Speaker to the defend the rules '*in the face of a legitimate challenge*' and that the rules '*belong to the members of the*' NA. In response we repeat para 170 above and, in addition, submit:[332]

273.1. first, with respect, Adv Mkhwebane's claim that the legitimacy of her challenge ought to disincline the Speaker from defending it begs the question; and

273.2. secondly, the Speaker's role obliges her to defend the New Rules where, as here, she believes the challenge to their validity lacks merit.

274. In para 149 of the SFA Adv Mkhwebane again cites the Speaker's failure to inform Adv Mkhwebane of her intended decisions in terms of Rule 129S and 129T. We reiterate that Adv Mkhwebane had no right to be so informed.[333]

275. Further, in the same paragraph of her SFA, Adv Mkhwebane again raises the Speaker's supposed breach of the alleged undertaking to give prior notice before recommencing the section 194 process. For the reasons given in paras 254 to 260 above, there was no such breach.

[332] Speaker's SAA 1155: 85.10.

[333] Speaker's SAA 1155: 85.11.

276. We therefore submit that Adv Mkhwebane has not made out a case for a punitive costs order against the Speaker in her official capacity or for a punitive costs order against the Speaker in her personal capacity.

CONCLUSION

277. We submit the Speaker's engagement of three counsel was a reasonable precaution given the wide scope and public importance of this matter.

278. The Speaker prays for an order refusing the relief sought in Part B of Adv Mkhwebane's notice of motion with costs, including the costs of three counsel.

A M BREITENBACH SC

U K NAIDOO

A TOEFY

First Respondent's counsel

Cape Town

4 December 2020

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