ORAL REPLY NOTE: DEMOCRACY IN ACTION

A. JURISDICTION, *LOCUS STANDI* AND AUTHORITY

1. There is simply no basis for these technical defences.

2. The Applicant's case is self-evidently a constitutional attack on the five pieces of legislation regulating 5 Chapter 9 Institutions.[1] It is also an attack on the constitutional validity of the New Rules.[2] The attack is both on the process by which the New Rules have been produced (without public participation) and on the content of the New Rules themselves (eg, their introducing a new basis for the removal of a Chapter 9 Institution office-bearer for which the Constitution makes no provision or allowance: eg, removal for a *"temporary condition that impairs a holder of a public office's ability to perform his or her work"*, including, conceivably, a virulent strain of common flu).

3. The Constitution confers the power on the high court to decide constitutional attacks on legislation[3] and other prescripts and documents, and many such cases appear in the law reports.[4]

4. In any event, the constitutional attack based on Parliament's failure to prepare, enact and implement legislation does not fall under the exclusive jurisdiction of the Constitutional Court. In this regard we refer to the judgment of the Constitutional Court in **Women's Legal Centre Trust v President of the Republic of South Africa and Others 2009 (6) SA 94 (CC)** which dismissed an exclusive jurisdiction access directly to that Court, by-passing lower courts, in similar circumstances. The Constitutional Court held that section 167(4)(e) of the Constitution

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1 NoM, paras 2-6

2 NoM, para 7

3 See section 172(2)(a) of the Constitution

4 This is so trite that it is not necessary to cite case law. But, to the extent that the court may require authority, see **Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC)** on a constitutional challenge on section 1(1)(b) of the Intimidation Act 72 of 1982**; Mlungwana and Others v S and Another 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC)** on a constitutional challenge on section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993**; Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC)** on a constitutional challenge to the Regulations promulgated in terms of section 51 of the Cross-Boarder Road Transport Act, 4 of 1998; **Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others 2020 (1) SA 90 (GP)** on constitutional challenge on a myriad provisions of the RICA, 70 of 2002.

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> "does not embrace the President when he or she acts as part of the national executive, nor Parliament when it is required to act not alone but as part of other constituent elements of the State. Were it to be otherwise, it would undermine the jurisdiction of the High Court and the Supreme Court of Appeal envisaged in s 172(2)(a)"

Significantly, Counsel for the Speaker in these proceedings conceded the point on that occasion.

5. The Constitutional Court said:

> "[20] … Constitutional duties the State and its organs must perform collaboratively or jointly do not fall within [the] purview [of section 167(4)(e)]. The provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament, and on them alone. It does not embrace the President when he or she acts as part of the national executive, nor Parliament when it is required to act not alone but as part of other constituent elements of the State. Were it to be otherwise, it would undermine the jurisdiction of the High Court and the Supreme Court of Appeal envisaged in s 172(2)(a).
> [21] This analysis has radical implications for the applicant's case in the form in which it has been brought. For the obligation to enact legislation to fulfil the rights in the Bill of Rights falls upon the national executive, organs of State, Ch 9 institutions, Parliament and the President. The obligation does not fall on the President and Parliament alone.
> [22] Counsel for the Women's Legal Centre rightly conceded this. But this concession is fatal to the proceedings in the form they have been brought. This is because the obligation the applicant invokes - the duty to prepare, enact and implement legislation in fulfilment of the Bill of Rights - cannot be distinguished from other obligations arising from the Bill of Rights, including securing the right to vote and the right to the progressive realisation of socioeconomic entitlements. Over these obligations other courts patently have jurisdiction. By contrast, the obligation that was at issue in Doctors for Life, namely the obligation to facilitate public involvement in its legislative processes, fell pointedly and solely upon Parliament.
> [23] The fact that the obligation on which the Women's Legal Centre relies may encompass the President and Parliament amongst other State actors (a matter we do not decide now) is not sufficient to bring it within the exclusive jurisdiction of this court. It must fall on the President and Parliament alone. Resisting the applicant's attempt to engage the court through s 167(4)(e), the respondents pointed out correctly that in terms of s 85 of the Constitution, the President exercises executive authority in collaboration with other members of the national executive. The responsibility for preparing and initiating legislation falls on the national executive as a whole, and not exclusively on the President acting as Head of State.
> [24] In trying to save the proceedings in their present form, the Women's Legal Centre and those organisations who supported its stance took recourse to statements this court made in Doctors for Life. The Women's Legal Centre submitted that, on the respondents' own account, the adjudication of the present dispute involved questions that relate to sensitive areas of separation of powers and would require a decision on a crucial political question. It would therefore fall within s 167(4)(e) and this court's exclusive jurisdiction. But, as indicated earlier, all exercise of judicial power in some way affects the separation of powers and may involve the judicial determination of questions with political overtones. That is not enough for this court's exclusive competency to be engaged. The

> obligations invoked must, in addition, entail an agent-specific focus on the President and Parliament alone. That is not the case here.
> [25] It follows that since the application was directed solely to this court and sought to engage its exclusive jurisdiction, bypassing other courts with constitutional jurisdiction, it was incorrectly conceived."

6. The obligation to enact legislation giving effect to section 194 of the Constitution is an obligation to fulfil the rights in the Bill of Rights of the targeted office holders in the Chapter 9 Institutions in question.[5] That obligation falls not exclusively upon the National Assembly or Parliament but collaboratively also upon the national executive, organs of state, Chapter 9 Institutions, and the President. The obligation does not fall on Parliament alone. On application of the *stare decisis* principle, this construction of the ambit of section 167(4)(e) of the Constitution by the Constitutional Court is binding on this Court even if it disagrees with it.

7. What is more, the National Assembly's obligation to prepare, enact and implement legislation intended to give effect to section 194 of the Constitution is one aimed by section 181(3) at *"organs of state"* (of which the National Assembly is one) to assist and protect Chapter 9 institutions in order to ensure their independence, impartiality, dignity and effectiveness. The submission is that the obligation that the National Assembly has failed to fulfil is one that it has failed to fulfil as an organ of state, not exclusively as the National Assembly. All organs of state, not just the National Assembly, have this section 181(3) obligation.

8. In any event – supposing that this Court is not persuaded by our reading of **Women's Legal Centre Trust** – prayer 1 of the Applicant's Notice of Motion is the invocation of the subsidiarity principle. That relief is supported, among others, in paras 27, 41, 44, 46, 47, 48, 49, 50, 51 of the founding affidavit.

9. But even if this Court were to find that prayer 1 of the Notice of Motion invites this Court to determine an issue that is within the exclusive jurisdiction of the Constitutional Court, the rest of the prayers are hardly tainted by that as each prayer stands independently of the other.

    9.1. In order to declare that the PP Act is unconstitutional for its failure to make provision for the removal of the Public Protector (prayer 2), this Court need not first declare that the National Assembly has failed to pass legislation giving effect to that removal provision (prayer 1). The constitutionality of the PP Act stands as a separate question to whether or not this Court has jurisdiction to determine that the National Assembly has failed to pass legislation.
    9.2. Similarly, the question of whether or not the New Rules are constitutionally compliant (prayer 7) stands independently of whether or not this Court has jurisdiction to declare that the National Assembly has failed to pass legislation

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[5] These rights include human dignity (s 10), freedom and security (s 12(1)(c) & (e)), fair labour practices (s 23(1)), property (s 25(1)), just administrative action (s 33(1)).

(prayer 1). It also stands independently of whether or not any of the 5 pieces of legislation are constitutionally compliant (prayers 2 to 6).

10. With respect, the Speaker and National Assembly are overreaching in lumping all these prayers under the umbrella of prayer 1. Prayer 1 stands on its own, and each of the other prayers stands on its own.

11. The *locus standi* and authority points are, with respect, also entirely without merit. The Applicant's Constitution – as does that of other non-governmental organisations like CASAC, Helen Suzman Foundation, Freedom Under Law and others – entitles it as a *"person"* to approach this court in the public interest alleging that the rights of the Public Protector (and other office holders in Chapter 9 Institutions) in the Bill of Rights have been or are being infringed or threatened. Its stated objectives include strengthening South Africa's constitutional democracy, protecting South Africa's Constitution and its institutions, and promoting human rights and the rule of law.[6]

12. In **Areva NP Inc in France v Eskom Holdings Soc Ltd & Another 2017 (6) SA 621 (CC)**, at para 40, the Constitutional Court affirmed the principle in **Giant Concerts**[7] that even where a litigant's standing is questionable, *"the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits"*. It added that *"there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable"*. That was an instance of a litigant approaching court in its own interests, although we can conceive of no reason in principle why the same approach should not apply in representative litigation under section 38(d) of the Constitution.

13. **Compcare**,[8] however, involved a litigant doing so in the public interest. Applying what it termed the *"generous approach"* of the Constitutional Court to representative public interest *locus standi*, the SCA accepted that the Registrar and the Council for Medical Schemes had *locus standi*.[9] No right in the Bill of Rights appears to have been specifically invoked. The Registrar and Council only contended in their founding affidavit that they *"regulate medical schemes in the public interest"* and that therefore they had brought the application *"in the public interest, as envisaged by s 38(d) of the Constitution"*.[10]

14. The Constitutional Court's *"generous approach"* to representative public interest *locus standi* was articulated in **Albutt**[11] as follows:

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6 Record, page 80 para 3

7 **Giant Concerts CC v Rinaldo Inv (Pty) Ltd 2013 (3) BCLR 251 (CC)**

8 **Compcare Wellness Medical Scheme v Registrar of Medical Schemes & Others 2021 (1) SA 15 (SCA)**

9 Op cit., para 17

10 Op. cit., para 16

11 **Albutt v Centre for the Study of Violence and Reconciliation & Others 2010 (3) SA 293 (CC)**

> "[33] … Our Constitution adopts a broad approach to standing, in particular, when it comes to the violation of rights in the Bill of Rights. This is apparent from the standing accorded to persons who act in the public interest. This ground is much broader than the other grounds of standing contained in s 38. The NGOs have standing on at least two grounds.
> [34] First, they are litigating in the public interest under s 38(d) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under s 38(c). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, nor to be given the opportunity to make representations.
> [35] The primary purpose of the litigation is to safeguard and vindicate the asserted right of the victims of the offences in respect of which pardons are sought to have an opportunity to be heard..."

15. In **Albutt**, too, there is no indication in the judgment that a specific right in the Bill of Rights was pleaded.

16. So, too, in this case, *Democracy in Action* approaches this court in a representative capacity under section 38(d) of the Constitution. It asserts (as in **Albutt**) that it acts in the public interest because, among other things,

    16.1. Chapter 9 Institutions have been established in order to *"strengthen constitutional democracy in the Republic"*.
    16.2. By that measure, they exist in order to serve the South African public, not to serve Parliament and politicians.
    16.3. The South African public is the consumer of the constitutional democracy that these institutions exist to strengthen.
    16.4. That being so, the South African public has a right to participate fully in any law-making process intended to affect these Chapter 9 Institutions in a material way.
    16.5. These New Rules affect these Chapter 9 Institutions in a very material way, not least by introducing a new basis for the removal of an office-bearer that is not sanctioned by the Constitution or legislation: temporary incapacity.
    16.6. The failure of public participation in the making of these New Rules renders them unconstitutional.
    16.7. The objects of *Democracy in Action*, as its constitution makes plain,[12] include
        (a) Strengthening South Africa's democracy;
        (b) Protecting South Africa's Constitution and its Institutions; and
        (c) Promoting human rights and the rule of law.

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[12] Record, page 80 para 3

16.8. If these objects are good for CASAC to act in the public interest, they should be good for *Democracy in Action* to do the same.

16.9. In any event, given the baptism of fire to which the Public Protector has been subjected over the years, it is not difficult to imagine why the other Chapter 9 Institution heads may be reluctant to challenge Parliament for fear of being targeted and subjected to similar treatment. This is not speculative. The Public Protector is a living example of vitriolic attack by politicians, the media and, it must be said, unfortunate remarks by the bench that are aimed at her character rather than her work output.

B. OTHER ISSUES RAISED BY RESPONDENTS

17. Section 2(1)(c) of the PP Act: The Minister of Justice says the PP Act is not silent on the removal of the Public Protector. For this proposition, Counsel points to section 2(1)(c) of the PP Act. The section is self-evidently not an answer to the point that the PP Act is silent on the removal of the Public Protector.

17.1. For one thing, it is instructive that section 2 deals with *"salary, allowances and benefits and vacancies in office of Public Protector"*, not the removal of the Public Protector.

17.2. For another, section 2(1)(d) is couched in similar terms as section 2(1)(c) by its reference to the removal of the Deputy Public Protector; yet section 2A(9) to (11), to which section 2(1)(d) refers, makes elaborate provision for the mechanism for the removal of the Deputy Public Protector that is lacking in relation to the Public Protector. This is clear indication that neither section 2(1)(c) (in relation to the Public Protector) nor section 2(1)(d) (in relation to the Deputy Public Protector) regulates removal from office. It is sections 2A(9) to (11) that regulate removal of the Deputy. But there is no section, in similar terms, that regulates removal of the Public Protector.

18. The section is not the answer to the point that the PP Act is silent on the removal process of the Public Protector, while the Act makes elaborate provision for the removal process of the Deputy.

19. Prescribing to Parliament: The Minister of Justice also says the Applicant seeks to prescribe to Parliament to legislate in a manner of its (the Applicant's) choosing. This is a variation of the theme advanced by the Democratic Alliance which says it is not enough for the Applicant to *"prefer"* that section 194 of the Constitution be given effect to by way of the enactment of legislation rather than by way of the making of rules.

19.1. This is a mischaracterization of the Applicant's case. The Applicant's case is rooted in a constitutional challenge of the process by which the rules of the National Assembly have come about. It is not an instance of the Applicant's *"preference"*. The Applicant says the manner of the conception of the rules does

not pass constitutional muster, in part because there has been no public participation as section 59(1)(a) of the Constitution demands, and the Constitutional Court has made eminently clear is the ultimate test in **Doctors for Life**.

19.2. The Applicant also challenges the constitutional validity of the 5 pieces of legislation for failing to give effect to a constitutional provision dealing with the removal of Chapter 9 office bearers. As we have argued in our main address, **My Vote Counts I** made it quite clear that the suggestion that a piece of legislation fails to give effect to a provision in the Constitution is an attack on the constitutional validity of that legislation. The pre-amble to the PP Act makes clear that the PP Act was enacted in order to give effect to section 194 of the Constitution. By failing so to give effect, the PP Act is unconstitutional. It's that simple.

19.3. Nothing in these submissions even remotely fits into the 6 Constitutional Court judgments cited on behalf of the Democratic Alliance for the proposition that the issue is not whether Parliament was right or wrong but rather whether the method chosen was rational. The question in this case is whether the method adopted by Parliament meets the constitutional standard in section 59(1)(a), among others. It does not, as we have plainly demonstrated with reference to Constitutional Court authority.

20. Section 194: The Minister of Justice says the Applicant accepts that section 194 of the Constitution does not require the enactment of legislation to give effect to it. This submission demonstrates, with respect, the *"rote"* reading of the Constitution to which we intimated in our main argument. In regard, we refer to **paras 29 to 41** of our Court Address document.

21. Conflict of Interest: It was submitted for the President that he is not conflicted. But at the same time the submission is that his conflict is confined to pending litigation between him and the Public Protector. We understood that the President has conceded that he is conflicted in the Public Protector case. So, we're not sure on what basis this submission can now be made in this case.

22. Counsel also says the conflict point is not foreshadowed in the Applicant's papers. We refer the Court to **Record page 94 para 61 et seq**.

23. The Applicant does not seek relief against the President and has cited him as an interested party. The conflict point is made as one of many examples of the unlawfulness of the New Rules, specifically as an affront to the principle *nemo iudex in sua causa debet*. We know the President is not a Member of Parliament. But he is the one who will ultimately pull the trigger in either suspending the Chapter 9 office bearer or removing her.

24. Accountability: The Democratic Alliance tells us that Chapter institution office bearers are accountable to the National Assembly. Of this the Applicant does not quibble, and never did. Section 181(5) of the Constitution is clear. What the conflict point, as relates

to MPs, is not that MPs may not judge the office bearers. What it says is that the idea that MPs, who are in the crosshairs of the Public Protector for maladministration and other infractions, can initiate a process for her removal is a classic conflict situation. It is no different from a boss victimizing an employee for calling him out on, say, sexual harassment in the office, or embezzlement of company funds. It's unarguable, with respect, that it is intolerable for the rules to allow MPs to initiate the process for the removal of the Public Protector while those MPs are either facing investigation by the Public Protector, or have had adverse findings made against them by the Public Protector, or are locked in litigation against the Public Protector following her biting findings and remedial action against them. That is just plain classic conflict of interest. Saying those MPs are conflicted and should be disqualified from initiating (or even participating in) the process for removal is not to deny the National Assembly its right to hold Chapter 9 institution office bearers to account.

25. "Mere legal error": The Democratic Alliance says the removal process is not about *"mere legal error"*. In other words, as we understand the proposition, the removal is not triggered by mere legal errors of the incumbent. If the Public Protector makes an error, says the Democratic Alliance, it cannot be said that this is misconduct. Nor, by necessary extension, can it be said to be incompetence. Yet, that is precisely what the panel made findings on. The panel considered what it considered errors of law committed by the Public Protector and concluded that these may be *prima facie* evidence of incompetence. It then recommended that an inquiry into the Public Protector's incompetence on that score be referred to a committee of the National Assembly. But by then the panel had already made the finding of *prima facie* incompetence based on the errors of law it found the Public Protector had committed. In this regard we refer the Court to **page 42 para 103.1** of the Full Report of the panel which, in our view an oversight by all parties, does not form part of the record. We attach it.

26. Recommendations not findings?: More than one of the respondents have made the point that the independent panel makes recommendations and not findings. It is incorrect both with reference to the rule pertaining to the functions of the panel (rule 129X) and what the panel itself says in its report. In rule 129X nowhere does one find reference to *"assessment"* being mere recommendations. Indeed, the rule says the panel must

    26.1. *"conduct and finalise"*, not recommend, a preliminary assessment,
    26.2. *"determine"*, not recommend, *prima facie* evidence of incompetence, incapacity or misconduct, and
    26.3. *"include ... any recommendations"*. This seems to suggest that recommendations are not the purpose of the panel's report but rather something that may be included in it.

27. But recommendations on what exactly? Rule 129Z (read together with 129X) seems to suggest what the panel recommends is not so much its findings on the *prima facie* incompetence or misconduct or incapacity of the office bearer; it is rather the question of whether or not the office bearer should be removed on such *prima facie* evidence.

The panel's findings themselves are a *fait accompli*. Not only is this clear from the words used in rule 129X as demonstrated above; it is also clear from what the panel itself says in its report. In this specific regard we refer the Court to **page 117 para 262** of the Final Report (attached). It is clear that these are the panel's findings on the charges and not recommendations. Even the panel calls them findings. There is no basis for saying they are not what the panel says they are.

28. Also, the panel's understanding of its role under Rule 129X is not that of recommending *prima facie* evidence of incompetence or misconduct. The *prima facie* findings are those of the panel. It does not *"recommend"* them. It makes them based on evidence presented to it. These findings are final. What is not final is the question of whether or not the office bearer should be removed. It is in that respect that the panel makes recommendations. Nowhere does the panel make this clearer than in **paras 78 et seq** of its Final Report (attached) where it articulates its function as it understand it under rule 129X in the following terms:

    28.1. The panel *"conducts a preliminary assessment"* to ascertain whether information at its disposal is out of place or fits within the parameters of the charges (**para 79 of the Final Report**).
    28.2. The panel understands its role as making a recommendation for the removal process (not for the finding of the existence of *prima facie* evidence of incompetence or misconduct or incapacity) only where it establishes *prima facie* evidence of misconduct, incapacity or incompetence to warrant a recommendation for removal (**para 81**).
    28.3. The panel considers its assessment of *prima facie* evidence of misconduct, incapacity or incompetence under rule 129X as being the same as that used in cases for an interim interdict (**paras 91 to 94 of the Final Report**).
    28.4. After listing the charges and evidence relating to each (**paras 97 to 101**) the panel sees its role as assessing *"whether the evidence regarding these actions and reports substantiate the charges"* (**para 102**). This is not language that is synonymous with a recommendatory role.
    28.5. That the panel takes the view that it would have been *"greatly assisted"* if the Public Protector had provided it with her grounds of appeal or heads of argument in those high court cases where unflattering remarks were made about her conduct of investigations, is a clear indication that the panel considers its role as making findings on the Public Protector's misconduct or incompetence based on those remarks (**para 103.2**).
    28.6. The panel then considers a number of judgments and the Public Protector's response to the panel in relation to them. It then concludes that her response *"does not come close to casting doubt on the findings"* in these judgments about her conduct (**para 130**). This is a clear finding by the panel that the judgments are correct in their finding of incompetence, dishonesty, carelessness, bad faith, etc against the Public Protector. That is not a recommendation capable of being accepted or rejected by the National Assembly.

28.7. The panel makes clear that the question it had to determine was whether the Public Protector committed misconduct or is incompetent (**para 130.5**). It did. That is not a recommendation. It is a finding of the panel.

28.8. The panel in fact said: *"Having regard then to the evidence we find that there is prima facie evidence of incompetence"* (**paras 132 & 164**).[13] This is not a recommendation. It is a conclusive finding of the panel. All 6 grounds (in para 132) and 4 grounds in para 164, on which the panel relies for this finding are reviewable irregularities for which no Judge, to our knowledge, has ever been removed.

28.9. The panel also said: *"We find prima facie evidence of misconduct in the sense of intentional or gross negligent failure to meet the required standard of behaviour or conduct expected of a holder of a public office"* (**paras 133 & 165**)[14]. Again, this is not language synonymous with a recommendation.

29. The panel then recommends referral of the charges of incompetence and misconduct to the National Assembly *"as provided for in the NA rules"* (**paras 260 & 261**). This, on a proper reading of rule 129X, is self-evidently not a referral for the committee of the National Assembly to investigate whether or not there is *prima facie* evidence of incompetence or misconduct. That investigation has already been *"conducted and finalized"* and *"determined"* by the panel as rule 129X(1)(b) in what the panel itself says is a process similar to that of determining an application for an interim interdict (**paras 91 to 94 of the Final Report**). What is referred is whether the office bearer should be removed for incompetence and/or misconduct.

30. It is thus not correct to say the panel makes no findings but recommendations on the *prima facie* incompetence or misconduct or incapacity of the office bearer. What it does recommend to the National Assembly is the question of whether or not the office bearer should be removed on that *prima facie* evidence of incompetence or misconduct or incapacity.

31. Subsidiarity: The Minister tells us that this principle is not intended to stymie state action. The Applicant made no argument to any such effect. So, this submission answers a case that was never made. The Democratic Alliance, pointing to the exchange we had with Justice Nuku about the application of the principle, says **Mazibuko** does not support our proposition and that in any event the proposition is unsustainable in law. We have explained in our main argument that the absence of a provision in legislation that should be there as required by the Constitution triggers constitutional invalidity. As **My Vote Counts I** tells us in para 122:

> "The suggestion that PAIA has certain shortcomings is, in fact, an attack on its validity. Because – in that sense – the validity of PAIA is challenged and PAIA is the legislation envisaged in section 32(2), the principle of subsidiarity applies. On these alleged shortcomings, the applicant ought to have challenged the constitutional validity of PAIA

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13 See also paras 174, 175, 213, 214, 231, 232, 252, 253, 254 of the panel's Final Report

14 See also paras 176, 183, 184, 215, 231, 233, 235, 249, 255 of the panel's Final Report

> frontally in terms of section 172 of the Constitution in the High Court (frontal challenge)."

32. Similarly, the suggestion that the PP Act has certain shortcomings (in the sense that it lacks the provision that gives effect to section 194 as intended by the PP Act in its pre-amble) is, in fact, an attack on its validity. Because the validity of the PP Act is the legislation envisaged in the pre-amble and section 181(3), the principle of subsidiarity applies. That is why the Applicant has challenged frontally the constitutional validity of the PP Act in this Court.

33. **Mazibuko** makes plain that the principle applies both to assert a particular right and to challenge conduct that impinges on a particular right. These are two separate and distinct instances of the invocation of the principle. We submit that in enacting rules and not legislation for purposes of asserting its right to hold Chapter 9 institutions to account ultimately by removing them, the National Assembly breached the principle of subsidiarity. It should have realized that the PP Act, for example, is silent on the process or mechanism for the removal of the Public Protector and remedied that shortcoming instead of by-passing that process by initiating a political quick fix process of enacting rules.

34. The Democratic Alliance invokes **Mazibuko v Sisulu**, on which we never relied, and concludes that the case is against the Applicant. We rely on **Masuku v City of Johannesburg 2010 (4) SA 1 (CC) para 73** and still maintain that the case posits two instances of the application of the subsidiarity principle as we explain in our main argument and court address.

35. New point: To the extent that it may have been suggested that the Applicant has raised legal points for the first time in argument, we would commend the following authorities to the Court for the proposition that this is not proscribed

    35.1. **Matatiele Municipality and Others v President of the RSA and Others 2006 (5) SA 47 (CC)** at para 67.
    35.2. **Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others** 1996 (4) SA 671 (CC) at para 16.

36. The question of subsidiarity is apparent from the founding affidavit. See, for example, paras 27, 41, 44, 46, 47, 48, 49, 50, 51.

37. In any event, a court cannot reasonably decline to consider and decide a point of law simply because it was not raised expressly in the pleadings, although in this case it was indeed foreshadowed in the paras just mentioned. In this regard there is a long line of cases beginning with **Van Rensburg 1963 (1) SA 505 (A) at 510A-B**, where the SCA said

> "In iedere geval meen ek dat 'n uitleg van die Hofreël wat die Hof sou verhinder om 'n aansoek op 'n regspunt uit te wys wat uit die beweerde feite ontstaan, slegs omdat die aansoekdoener nie in sy aansoek uitdruklik daarop gesteun het nie, vermy kan en moet

word, anders sou dit kon lei tot die onhoudbare posisie dat die Hof deur 'n regsdwaling aan die kant van die aansoekdoener gebonde kan wees."

38. In any event, it is trite that a party may raise a matter of law for the first time in argument, or a court may do so of its own accord [**Business Partners Ltd v Yellow Star Properties (7188/2011) [2012] ZAKZDHC 96 (17 July 2012***)*]. There are of course at least two qualifications to this. The first is that the raising of the law point at this stage must not be unfair to the respondent. The second is that the point must be foreshadowed in the pleadings.

39. As regards unfairness: The respondents cannot complain of the unfairness of the point because they have known about it from as long ago as Friday 28 May 2021 when the Applicant's attorneys filed the Applicant's written submissions.

40. As regards the pleadings: The point is foreshadowed in, among others, paras 27, 41, 44, 46, 47, 48, 49, 50, 51 of the founding affidavit.

41. We also refer the court to the following judgement on this topic, should it require them:

    41.1. **Alexkor v Richtersveld Community 2004 (5) SA 409 (CC) at paras 42-44**
    41.2. **CUSA v Tao Ying Metal Industries (Pty) Ltd 2009 (2) SA 204 (CC) at para 68**
    41.3. **Maphango v Aengus Lifestyle 2012 (3) SA 531 (CC) at para 109**
    41.4. **Mostert v Nash 2018 (5) SA 409 (SCA) at para 61**

42. Take away: We urge this Court, from all the arguments presented to it in this case, to take away with it the following, if nothing else:

    42.1. The New Rules introduce something new that section 194 of the Constitution does not contain. It says the Chapter 9 institution office bearer can be removed from office for a "*"temporary condition that impairs a holder of a public office's ability to perform his or her work"*. That means an office bearer can be fired for a virulent strain of common flu. This is not a ground of removal that section 194 of the Constitution countenances.
    42.2. The failure of public participation in the making of the New Rules dealt a death knell to them all. Severance cannot rescue any single rule from that failure. The Constitutional Court in **Doctors For Life** (**paras 106, 116, 235**) makes this clear as we have indicated in our Court Address. This Court is bound by that decision.
    42.3. The failure of each of the 5 pieces of legislation to make provision for the removal of the Chapter 9 institution office bearer is a shortcoming and therefore a constitutional infirmity. **My Vote Counts I** (**para 122**) makes this clear.
    42.4. This Court clearly has jurisdiction to hear this application. **Women's Legal Centre Trust** is binding on this Court as regards the proper construction of section 167(4)(e) of the Constitution.

42.5. In any event, even if this Court were to find it has no jurisdiction to determine prayer 1, the other prayers clearly are self-standing and do not lean on prayer 1 for their efficacy.

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