DIA:
ORAL ARGUMENT ON BEHALF OF
THE MINISTER OF JUSTICE (FOURTH RESPONDENT)

INTRODUCTION

1. There are two issues we intend addressing:

   1.1. The unconstitutionality of the Public Protector Act No 23 of 1994 ("**the Public Protector Act**") and the South African Human Rights Commission Act No 40 of 2013.

   1.2. The issue of subsidiarity.

2. We will not address the issue of jurisdiction in oral argument. We stand by the submissions made at pages 9 to 16 of our Heads of Argument and the arguments as advanced by Mr Breitenbach on behalf of the First to Third Respondents.

THE RELIEF SOUGHT

3. The Amended Notice of Motion seeks, inter alia:

   3.1. A declaratory order that Parliament has failed to carry out a constitutional obligation to pass legislation giving effect to section 194 of the Constitution in relation to the removal of the Public Protector and other chapter 9 members [**Record, NM, p 3, par 1**].

   3.2. A declaratory order that the Public Protector Act is inconsistent with the Constitution for "failing to provide for appropriate circumstances under which the Public Protector may be removed from office for misconduct,

incapacity or incompetence as envisaged in section 194 of the Constitution" [**Record, NM, p 3, par 2**].

3.3. Declaratory orders that the other statutes referred to in the Amended Notice of Motion are unconstitutional on a similar basis, except that in most instances they refer to the removal of members from the Chapter 9 institutions referred to (with the exception of the Auditor-General) [**Record, NM, p 3, par 3 - 6**].

3.4. A directive order that the statutes referred to in the Amended Notice of Motion must be amended and other measures must be taken "to provide for appropriate circumstances" under which office bearers of Chapter 9 institutions may be removed [**Notice of Motion, p 4, par 9**].

3.5. A suspension of the orders of invalidity for a period of two years [**Record: NM, p 5, par 10**].

THE CASE MADE OUT IN THE FOUNDING AFFIDAVIT

4. According to the founding affidavit:

4.1. In general terms, the challenge is identified as the failure of Parliament to take appropriate legislative measures to assist and protect Chapter 9 institutions insofar as it has passed constitutionally deficient laws "that do not address the specific circumstances under which office bearers of Chapter 9 institutions may be removed from office on account of misconduct, incompetence or incapacity".

Record: FA, p 24, par 20.

4.2. A careful examination of the laws dealing with Chapter 9 institutions reveal a failure by Parliament "to give effect to section 194" of the Constitution, with the consequence that there are no legislative measures "as envisaged in section 181 (3) of the Constitution to assist and protect the institutions to ensure their independence, impartiality, dignity and effectiveness."

Record: FA, p 24, par 20.

4.3. The substantive considerations or the jurisdictional requirements for the exercise of the removal power in section 194 of the Constitution "must" be set out in legislation. Parliament has failed "to pass appropriate legislation giving effect to section 194 of the Constitution, setting out the specific factors that make out a case for misconduct, incapacity and incompetence. The legislation passed by Parliament "does not give effect to section 194 of the Constitution."

Record: FA, p 26, par 26

4.4. Section 181 (3) of the Constitution "must be read to impose an obligation on Parliament to pass appropriate legislation giving effect to section 194 of the Constitution, for the removal of office bearers of Chapter 9 institutions."

Record: FA, p 26, par 27.

THE BASIS FOR THE DIA'S ARGUMENT THAT THERE IS A CONSTITUTIONAL OBLIGATION TO PASS LEGISLATION

5. In the first instance, the DIA appears to accept (correctly) that section 194 of the Constitution does not found a specific obligation to adopt legislation on the removal of the Public Protector and/or to give effect to section 194. Section 194 of the Constitution makes plain (on any reading) that it does not contemplate legislation in order to "give effect" to it. It reads:

> "194 Removal from office
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> (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on-
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> (a) the ground of misconduct, incapacity or incompetence;
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> (b) a finding to that effect by a committee of the National Assembly; and
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> (c) the adoption by the Assembly of a resolution calling for that person's removal from office.
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> (2) A resolution of the National Assembly concerning the removal from office of-
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> (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
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> (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.
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> (3) The President-
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> (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."

6. In the second instance, in oral argument for the DIA reference was made to section 2 of the Constitution which reads:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

7. Section 2 of the Constitution does not however, found a substantive obligation on Parliament (or any organ of state) to adopt legislation to give effect to section 194.

8. In the third instance, the DIA places reliance on section 181 (3) of the Constitution. Section 181 (in its entirety) reads:

> "181 Establishment and governing principles
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> (1) The following state institutions strengthen constitutional democracy in the Republic:
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> (a) The Public Protector.
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> (b) The South African Human Rights Commission.
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> (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
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> (d) The Commission for Gender Equality.
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> (e) The Auditor-General.
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> (f) The Electoral Commission.
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> (2) 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.

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

(4) No person or organ of state may interfere with the functioning of these institutions.

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

9. It is clear that there is no express obligation on an organ of state to specifically adopt legislation to "give effect" to section 194. The question then arises as to whether, on a reasonable interpretation, section 181(3) falls to be read so as to impose an obligation on an organ of state to adopt legislation in the way that the DIA contends for. That is the question that we now turn to.

DOES SECTION 181(3) SUPPORT THE DIA'S CONTENTION THAT IT PLACES AN OBLIGATION ON ORGANS OF STATE TO ADOPT LEGISALTION IN ORDER TO GIVE EFFECT TO SECTION 194 OF THE CONSTITUTION?

10. The Public Protector Act does deal (to some extent) with section 194 of the Constitution. Section 2(1) of the Public Protector Act reads:

"(1) The National Assembly shall refer to a committee of the National Assembly the-

(a) nomination of a person in terms of section 193 (5) (a) of the Constitution to be appointed as Public Protector;

(b) nomination of a person in terms of section 2A (3) to be appointed as Deputy Public Protector;

(c) consideration in terms of section 194 (1) (b) and (3) (a) of the Constitution of the removal from office of the Public Protector;

(d) consideration in terms of section 2A (9) (b) and (11) (a) (ii) of the removal from office of the Deputy Public Protector; and

(e) consideration of any other matter that can be referred to such a committee in terms of the Constitution or this Act."

11. We submit that there are at least six reasons as to why the DIA's interpretation that section 181(3) founds an obligation on Parliament to adopt legislation to give effect to section 194 of the Constitution, must fail:

11.1. First, section 181 is a general provision that expressly provides for legislative and other measures. On its own terms, it does not favour legislation as the exclusive means by which to give effect to its objectives.

11.2. Second, this provision falls to be contrasted with a range of other constitutional provisions in Chapter 9 (as addressed at par 30 of our Heads) where the Constitution contemplates the enactment of national legislation. Examples of this can be found in the provisions of Chapter 9, where national legislation is required to either regulate certain issues or legislation is prescribed [**Bundle, p 162**]. By way of example, we refer to sections 182(1), 181 (2), 184(2), 184(4), 185(1)(c), 185 (2), 187(2) and 188(2) of the Constitution. By contrast, there is no equivalent provision in section 194 or elsewhere in the Constitution, that obliges Parliament (or any other organ of state) to enact national legislation to give effect to the removal provisions of section 194 of the Constitution.

11.3. Third, given that the Public Protector Act does address the issue of removal to some extent, the principle of legislative discretion must guide this Court [**Authorities Bundle, p 119 and 137**]:

11.3.1. The Constitutional Court in **My Vote Counts NPC v Speaker of the NA** 2016 (1) SA 132 (CC) (2015 (12) BCLR 1407; [2015] ZACC 31) at par 155 and 156 (our Heads at par 40) stated:

> "The applicant wants information on the private funding of political parties to be made available in a manner preferred by it. It prefers that the legislation should require the disclosure of the information as a matter of continuous course, rather than once-off upon request. According to the minority judgment, what South Africa must have is systematic disclosure. It may well be that this is ideal; who knows? But that is not the issue. It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. Crucially, lack of rationality is not an issue in these proceedings.
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> Despite its protestation to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so? None, in the present circumstances. That attempt impermissibly trenches on Parliament's terrain; and that is proscribed by the doctrine of separation of powers."

11.3.2. In **President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177 (18 December 2020)** ('**WLC SCA**') the SCA held:

(a) The authorities "do not prescribe that s 7(2) could oblige the State to enact legislation on a specific subject, nor that a court may order it to do so. The authorities state that there may be a positive obligation on the State 'to provide appropriate protection to everyone through laws and structures designed to afford such protection.' What the appropriate protection should be, is for the State to determine" (par 34).

(b) In construing broad, general provisions (in that instance section 7(2)), regard must be had to the "context of the Constitution and specifically in the context of the carefully constructed separation of powers entrenched in the Constitution, which principle is crucial to our democracy" (par 35).

(c) The legislative authority provided for in sections 43 and 44 of the Constitution confer on the National Assembly and the National Council of Provinces the power to pass legislation. It is the responsibility of Parliament to make laws. The President and Cabinet are given a discretion as to the nature and content of the legislation that it prepares and initiates (par 42).

(d) That it knew of no authority and nor was it referred to any, where the court directed the enactment of

legislation outside of the parameters of international law and specific constitutional obligations, as opposed to solely under section 7(2) of the Constitution.

(e) For a court to order the State to enact legislation, on the basis of s 7(2) alone, in order to realise fundamental rights would be contrary to the doctrine of separation of powers, in light of the express provisions of ss 43, 44, and 85 of the Constitution. These sections "vest the power to initiate legislation in the President and Cabinet, and to adopt in Parliament. This is not to say that this Court is insulating itself from constitutional responsibility. It is for Parliament to make legislative choices provided that they are rational and constitutionally compliant. And if they are not, the court must act in terms of s 172 of the Constitution."

11.4. Fourth, where the Constitution imposes a duty to adopt legislation in respect of a specific subject, it says to in terms. By way of example, we refer to sections 9(3), 32(2) and 33(3) of the Constitution.

11.5. Fifth, the Constitutional Court has already accepted that Rules are a competent and appropriate mechanism. In **EFF v Speaker of the NA** 2018 (2) SA 571 (CC) (**EFF Impeachment**) [**Bundle, p 49**] the

Constitutional Court held in the context of section 89(1) of the Constitution, which regulates the removal of the President:

> "[176] The power to remove the President from office is available to the Assembly only if one of the listed grounds is established. One of those grounds is a serious violation of the Constitution or the ordinary law. What qualifies this ground is the word 'serious'. The second ground is serious misconduct and the third is inability to perform the functions of the office. None of these grounds is defined in the Constitution.
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> [177] It is evident that the drafters left the details relating to these grounds to the Assembly to spell out. But the drafters could not have contemplated that members of the Assembly would individually have to determine what constitutes a serious violation of the law or the Constitution, and conduct on the part of the President which, in the first place, amounts to misconduct and whether, in the second place, such conduct may be characterised as serious misconduct. If this were to be the position, then we would end up with divergent views on what is a serious violation of the Constitution or the law and what amounts to serious misconduct envisaged in the section.
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> [178] And since the determination of these matters falls within the exclusive jurisdiction of the Assembly, it and it alone is entitled to determine them. This means that there must be an institutional pre-determination of what a serious violation of the Constitution or the law is. The same must apply to serious misconduct and inability to perform the functions of the office. The Acting Speaker describes the first two grounds as exhibiting wrongdoing on the part of the President. I could not agree more. This is evident from the language of s 89(2), which stipulates that a President removed from office on any of these two grounds may lose benefits. Once more, it is left to the Assembly to determine circumstances under which the President removed from office on one of those grounds may forfeit benefits.
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> …..
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> [182] Without rules defining the entire process, it is impossible to implement s 89. The present facts, as set out in detail in the Acting Speaker's affidavit, confirm this point. Some of those facts were referred to earlier. It would appear that sometimes the Assembly treated an impeachment complaint as a motion to be processed in terms of rule 85(2). On another occasion an ad hoc committee was established but ceased to exist before completing its task. But notably, the Acting Speaker does not outline the procedure followed by that committee in carrying out

its mandate. However, the Acting Speaker accepts that if the ad hoc committee route is followed, there may be an investigation."

11.6. Sixth, it is impermissible to identify a constitutional obligation to adopt legislation based on what is contained in certain legislation. The DIA contends for a constitutional obligation because the Public Protector Act spells out the grounds for removal of the Deputy Public Protector, but is silent about the Public Protector. This, according to the DIA, makes it incumbent on the NA to amend the Public Protector Act itself to give effect to the grounds for removal of the Public Protector (**DIA's Heads, par 12**). We submit that a constitutional obligation to adopt legislation can only arise from the Constitution itself, not statute. In any event:

11.6.1. Section 2(1)(c) of the Public Protector Act addresses certain aspects of section 194 of the Constitution.

11.6.2. Unlike for the Public Protector, provisions governing the removal of the Deputy Public Protector are required in the Public Protector Act since the Constitution does not address the removal of the Deputy Public Protector Act at all.

11.6.3. Notably, in defining the mechanism and grounds for removal of the Deputy Public Protector, the Public Protector Act does so in terms that are almost identical to that of section 194 of the Constitution.

THE PRINCIPLE OF SUBSIDIARITY

12. In the DIA's Heads of Argument the following arguments are advanced:

12.1. First, that the process followed by the Speaker and the National Assembly for the removal of Chapter 9 officer bearers is at odds with section 181(3) of the Constitution.

DIA's Heads: p 7, par 9

12.2. Second, that the principle of constitutional subsidiarity precludes reliance directly on a constitutional provision "in order to vindicate a right conferred by that provision when there exists legislation enacted to give effect to that right." In this regard, it is contended that the Speaker and the NA purported to invoke section 194 of the Constitution to make New Rules of Parliament for the removal of office bearers in circumstances where legislation exists but which does not contain provisions which give effect to the removal provisions in section 194 of the Constitution.

DIA's Heads: p 9, par 13

12.3. Third, because the Public Protector Act has been enacted to give effect to a range of provisions in Chapter 9 of the Constitution and does not provide for removal, it presents a "constitutional lacuna that needs remedying by making provision for those mechanisms in the PP Act."

DIA's Heads: p 10, par 18

13. We submit that the principle of subsidiarity simply does not apply in this case for at least five reasons:

13.1. First, the principle of subsidiary does not serve as a constraint on the exercise of constitutional provisions. In other words, the principle of subsidiary does not preclude giving effect to a constitutional provision because there is no legislation in place. If this were the case, the effect would be that organs of state cannot give effect to constitutional provisions simply because there is no statutory provision (particularly in instances where there is no obligation to adopt legislation in order to give effect to a particular constitutional provision). This would impede the constitutional project, not advance it. We have been able to find no authority for this.

13.2. Second, the effect of the principle of subsidiary is as recognised in **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)** 2006 (2) SA 311 (CC) at par 437, Ngcobo J in a separate judgment and in the context of section 33 of the Constitution and PAJA, wrote of constitutional subsidiarity:

> "Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question."

13.3. Third, in **My Vote Counts NPC v Speaker of the NA** 2016 (1) SA 132 (CC), the Constitutional Court identified the three inter-related reasons from which subsidiary springs [**Bundle, p 120**]. It stated:

> "[160] Contrary to the suggestion in the minority judgment that our insistence on compliance with the principle puts form ahead of substance, this principle plays an important role. The minority judgment correctly identifies the 'interrelated reasons from which the notion of subsidiarity springs'. First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, 'would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation'. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, 'allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law'.
>
> [161] The principle of subsidiarity is a well-established doctrine within this court's jurisprudence. The essence of the principle was captured by O'Regan J in **Mazibuko**, where she held that —
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> > 'where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'."

13.4. Fourth, in **Pretorius v Transport Pension Fund** 2019 (2) SA 37 (CC) ([2018] ZACC 10) the Constitutional Court explained:

> "[50] The application of the principle of subsidiarity in relation to the LRA and other labour legislation is complex. The Constitution in some instances, like with the rights of access to information and just administrative action, requires national legislation to give effect to these rights. The same requirement is not made in s 23. The LRA itself, however, sets that as one of its objects. Nevertheless, there are other pieces of labour legislation that also cover aspects of potential unfair labour practices.
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> [51] The principle of subsidiarity was recently considered by this court in My Vote Counts. Neither the majority nor minority

judgment in that case are directly on point because the issue involved a provision of the Constitution that required Parliament to act. Section 23(1) lacks that requirement. A decision by Parliament not to cover the entire field would not fail to fulfil a duty in the Constitution. A fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient."

13.5. Finally, **Mazibuko and Others v City of Johannesburg and Others** 2010 (4) SA 1 (CC) (as referred to in oral argument for the DIA) [**Bundle, p 74**] is not authority for any proposition that the principle of subsidiarity has been refined or amended to apply to organs of state outside the realm of litigation. On the contrary, the Constitutional Court confirmed that it applies in the context of litigation as is apparent from the following dictum:

> "[73] Having abandoned the challenge, the question arises whether the applicants are nevertheless entitled to challenge the City's Free Basic Water Policy that is self-evidently based on the minimum water standards set by the Minister. The answer to this raises the difficult question of the principle of constitutional subsidiarity. This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.
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> [74] Does the subsidiarity principle apply here? It may not. The constitutional obligation imposed upon government by s 27(2) is to take reasonable legislative and other measures to achieve the right. If national government legislates for a national minimum, do other steps taken by other levels of government escape scrutiny as long as they comply with the national minimum, despite the fact that other spheres of government share the obligation to take reasonable steps? What national government has done is legislated a minimum. Does that mean that a municipality that has, for example, easily within its resources supplied that minimum to all, automatically acted reasonably? I am not sure that it does. However, given the conclusion I reach below, that the City's policy is in any event not

> unreasonable, it is not necessary to decide this question now. It can stand over for another day."

14. For all of these reasons, the DIA's arguments on subsidiarity must fail.

RELIEF

15. For all of these reasons, we ask that the relief sought in relation to the unconstitutionality of legislation be dismissed with costs.

16. We submit that **Biowatch Trust v Registrar, Genetic Resources and Others** 2009 (6) SA 232 (CC) does not find application. According to the Constitutional Court:

> "[56] I conclude, then, that the general point of departure in a matter where the State is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the State should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the State that had control over its conduct."

17. On the evidence in this matter:

    17.1. The DIA is a civil society organization "whose mandate and purpose is to advance, support and defend democratic principles and values in the Republic of South Africa and, in particular, support institutions established pursuant to Chapter 9 of the Constitution of the Republic of South Africa, 1996."

    17.2. The Public Protector is a state institution, who is, herself litigating and is seeking relief that is largely consistent with what the DIA seeks.

18. In these circumstances, we submit that the DIA is not entitled to the benefit of **Biowatch**.

Karrisha Pillay SC

Zaytoen Cornelissen

Chambers

21 June 2021