PUBLIC PROTECTOR / THE SPEAKER

ORAL ARGUMENT FOR THE SPEAKER

JUNE 2020

1. In Part B of her amended notice of motion Adv Mkhwebane seeks the following final relief (paras 1-6 vol 10 p 977):

   1.1. First, an order declaring unlawful, unconstitutional, invalid and null and void the New Rules governing the process in the National Assembly ('NA') for motions for the removal of officer bearers of Chapter 9 institutions in terms of section 194 of the Constitution which the NA adopted on 3 December 2019 ('the New Rules').

   1.2. Alternatively, 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.

   1.3. Third, an order reviewing and setting aside the decision of the NA to adopt the New Rules.

   1.4. Fourth, and in the alternative to her third prayer, an order reviewing and setting aside the decision of the Speaker on 26 February 2020 that a notice of motion dated 21 February 2020 calling for Adv Mkhwebane's removal, submitted by the Chief Whip of the Democratic Alliance ('the DA'), Ms Mazzone MP, conforms with Rule 129R of the New Rules.

   1.5. Fifth, 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. Adv Mkhwebane refers to this as '*structural relief*'.

   1.6. Sixth, such further, alternative, just and equitable relief as the court may deem appropriate (in terms of sections 38 and/or 172 of the Constitution).

1.7. Seventh, Adv Mkhwebane seeks her costs of suit in Part B, including punitive costs on the attorney-and-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.*

2. We shall deal with nine topics:

2.1. First, we deal with the application for the admission of the Speaker's affidavit of 1 June 2020 outlining the main relevant developments since she last deposed to an affidavit in these proceedings on 30 October 2020.

2.2. Second, to frame the rest of our submissions, we deal with section 194 of the Constitution, focusing on:

2.2.1. first, the constitutional function it serves, namely as the ultimate mechanism for holding accountable incumbent Chapter 9 office-bearers; and

2.2.2. second, the respective roles and responsibilities of the NA and the President in impeachment proceedings under section 194 of the Constitution.

2.3. Third, we outline what we submit are the key features of the New Rules.

2.4. Fourth, we deal with the threshold question of whether the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') applies to the making, content and implementation of the New Rules – we submit it does not and, consequently, the touchstone for the validity of the New Rules and for reviewing their implementation is the principles of legality and rationality in the Constitution. When dealing with these issues we shall also respond to Adv Mkhwebane's reliance on a right to 'fairness'.

2.5. Fifth, we deal in turn with each of the grounds on which Adv Mkhwebane seeks the orders invalidating the New Rules, alternatively reviewing and

setting aside the NA's decision on 3 December 2019 to adopt the New Rules.

2.6. Sixth, we deal with Adv Mkhwebane's request for an order suspending the declaration of invalidity of the New Rules she seeks for a period of six months, within which the NA must effect the necessary amendments.

2.7. Seventh, we deal with the claim made in Adv Mkhwebane's counsel's heads of argument, but not foreshadowed in her notice of motion, for an order suspending the implementation of the New Rules should she succeed with her claim for the invalidation of the New Rules.

2.8. Eighth, we deal in turn with each of the grounds on which Adv Mkhwebane seeks the order reviewing and setting aside the Speaker's decision on 26 February 2020 that Ms Mazzone's motion of 21 February 2020 is in order (i.e. conforms with Rule 129R of the New Rules).

2.9. Lastly, we deal with Adv Mkhwebane's prayer for a personal and punitive costs order against the Speaker.

I. THE ADMISSION OF THE SPEAKER'S SUPPLEMENTARY AFFIDAVIT

3. The Speaker applies for the admission of a short supplementary affidavit by her, dated 2 June 2021, outlining the main relevant developments since she last deposed to an affidavit in these proceedings on 30 October 2020.

4. The content of this affidavit is uncontentious, concerning as it does matters of public record.

5. It is relevant to Adv Mkhwebane's request for an order suspending the declaration of invalidity of the New Rules she seeks for a period of six months, as well as to her counsel's request for an order suspending the implementation of the New Rules during that period. No prejudice would be occasioned by its admission.

6. We submit that, in the exercise of the discretion conferred upon this Court by the last sentence of Uniform Rule 6(5)(e), it should admit this affidavit.

II. SECTION 194 OF THE CONSTITUTION

7. In our heads paras 108-118 pp 55-59 we discuss section 194 of the Constitution, including the constitutional function of impeachment proceedings and the respective roles and responsibilities of the NA and the President in section 194 impeachment proceedings.

8. 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.'

9. Section 194 is similar to s 89(1) of the Constitution, which provides:

'***89 Removal of President***

(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of-

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.'

10. The similarities between the two provisions are both confer the power of removal on the NA, both require the NA to exercise that power by means of a resolution and both contain grounds of removal.

11. The main differences between the two provisions are:

    11.1. The grounds of removal in section 194(1)(a) include '*incompetence*', whereas s

    11.2. The equivalent in section 194(1)(a) to the grounds of removal in s 89(1)(a) and (b) is '*misconduct*'.

    11.3. The equivalent in section 194(1)(a) to the ground of removal in s 89(1)(c) is '*incapacity*'.

    11.4. Section 89(1) has a single-stage process, i.e. simply a resolution by the NA removing the President. Section 194(1) and (2) contains a three-stage process, requiring first a finding by a NA committee that a ground of removal is present; next a resolution by the NA that the Chapter 9 office-bearer be removed from office; and third the removal of the office-bearer by the President (which is a formal act because the President 'must' remove the office-bearer upon adoption of the resolution by the NA).

    11.5. Section 194(2) imposes a lower threshold for the removal of most Chapter 9 office-bearers (a majority of the 400 members of the NA), except for the Public Protector and the Auditor-General where, like the President, a two-thirds majority is required.

12. As the Court would have seen, our discussion of section 194 is based largely on the following authorities:

    12.1. *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) ('***UDM***') (bundle 685), a unanimous judgment of the Constitutional Court ('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;

12.2. *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) ('***EFF (impeachment)***') (bundle 173), in which the majority of the CC held that the NA was obliged to adopt rules (1) defining the grounds on which the President may be removed from office in terms of s 89(1) and (2) 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 paragraphs 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)** (bundle). We submit the similarities between sections 89(1) and 194 are such that the NA is similarly obliged to adopt rules (1) defining the grounds on which a Chapter 9 office-bearer may be removed from office in terms of section 194(1)(a) and (2) regulating the process in the NA for their impeachment in terms of section 194.

12.3. *Institute for Accountability in Southern Africa v Public Protector and Others* [2020] 2 All SA 469 (GP) ('***Institute for Accountability***') (bundle 274), in 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.

13. We emphasize the following eight points relating to section 194 of the Constitution.

14. First, all Chapter 9 institutions – including the Public Protector – 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.

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

16. 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 and other Chapter 9 institutions being organs of state).

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

18. Fifth, the NA is obliged to adopt rules which give meaning to the grounds of misconduct, incapacity and incompetence set out in section 194(1) (*EFF (impeachment)* paras 176-178 (bundle 213-214), referring to s 89(1) of the Constitution), i.e. to clarify those terms. We point out that the CC made this finding in relation to s 89(1), even though it describes the grounds for impeachment of the President in more detail than s 194(1)(a) does in relation to the Chapter 9 office-bearers.

19. Sixth, the NA is obliged to adopt rules 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 whether a Chapter 9 office-bearer is incapable or incompetent or has misconducted himself or herself (*EFF (impeachment)* paras 180-182 and 189-190 (bundle 214-216).

20. Seventh, 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 Public Protector 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.

21. Eighth, 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 (*Institute for Accountabi*lity para 43 (bundle 558)). 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 (*Institute for Accountabi*lity paras 46-47 (bundle 558)). (We deal later with the implications of the separation of powers principle for the judicial review of the Speaker's decision to accept that Ms Mazzone's motion is in order.)

III. THE KEY FEATURES OF THE NEW RULES

22. As the Court knows, on 3 December 2019 the NA unanimously adopted New Rules.

23. 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. They are to be found in a report of the NA's Rules Committee, a copy of which is annexure PPFA 7 vol 2 pp 142-147 sections D-E. For a somewhat clearer copy, see annexure TRM 37 vol 5 pp 475-480 sections D-E.

24. In our heads paras 119-144 pp 60-67 we describe the 17 steps for the impeachment process under section 194 of the Constitution and the New Rules. We shall not repeat the details of that description. Instead, we shall limit our oral submissions on this aspect to emphasizing the two key features of the New Rules.

25. The first key feature of the New Rules is that, in line with the judgment of the majority of this Court in *EFF (impeachment)* paras 176-178 (bundle 213-214), the New Rules define the grounds of misconduct, incapacity and incompetence set out in section 194(1).

26. The second key feature of the New Rules is that, in line with *EFF (impeachment)* paras 180-182 and 189-190 (bundle 214-216), the New Rules regulate the entire process in the NA, including the following:

    26.1. 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);

26.2. 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 in Rule 129R (Rule 129S) 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));

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

26.4. the conduct of the enquiry by a specially-appointed committee of the NA ('the section 194 committee') 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

26.5. after receiving the section 194 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)).

IV. THE TOUCHSTONE FOR THE VALIDITY OF NEW RULES AND FOR CHALLENGES TO THEIR IMPLEMENTATION

27. In our heads paras 148-62 pp 69-76 we deal with the threshold question of whether PAJA applies to the making, content and implementation of the New Rules and with Adv Mkhwebane's reliance on a right to 'fairness' (as to which see the passages in her papers cited in our heads para 148.2 pp 69-70).

28. As the Court will know, certain of Adv Mkhwebane's challenges to the New Rules or the Speaker's decision that Ms Mazzone's motion was in order, are based on the rules of natural justice. She also contends the New Rules and Ms Mazzone's motion are unreasonable and unfair.

29. The issues raised by this contention are:

    29.1. First, whether PAJA applies to the making, content and implementation of the New Rules; and

    29.2. Second, whether the touchstone for the validity of the New Rules and their implementation – which we submit is the constitutional principles of legality and rationality – sustains Adv Mkhwebane's reliance on a right to fairness.

Is PAJA applicable?

30. Before addressing this question, we point out that 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. The reason is that, 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 (*Bato Star Fishing (Pty) Ltd v*

Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) paras 21-26 (bundle 73-75)).

31. For three reasons, PAJA – including the provisions regarding procedurally fair administrative action in sections 3 and 4, the provisions regulating the right to written reasons for administrative action in section 5 and the grounds for judicial review of administrative action in section 7(1) including unreasonableness – does not apply to the making or the implementation of the New Rules by the NA:

    31.1. First, 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*' (*Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24 (bundle 254));

    31.2. Second, 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

    31.3. Third, 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) of that definition.

Adv Mkhwebane's reliance on (un)fairness

32. We consequently submit that the touchstone for the validity of the New Rules is the constitutional principle of legality (see, e.g., *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC) para 38 (bundle 28)), which includes substantive rationality (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 (bundle 429)) and procedural rationality

33. 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 (see *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 49-51 (bundle 50); *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 39 (bundle 117) 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*') paras 61-65 (bundle 315-316)).

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

35. The New Rules however make specific provision for procedural fairness in the section 194(1)(b) committee. Rule 129AD(2) and (3) provide the committee must ensure the enquiry is conducted in a reasonable and procedurally fair manner, and must afford the office-holder the right to be heard in his or her defence.

V. ADV MKHWEBANE'S CHALLENGES TO THE VALIDITY OF THE NEW RULES

36. Adv Mkhwebane challenges the validity of the New Rules on twelve grounds. We shall address each in turn.

37. First, Adv Mkhwebane (supported by the African Transformation Movement ('ATM')) contends it was incumbent on the NA to consult her before making the New Rules, for two reasons. The first is because (so she alleges) the NA acts as the employer of the Public Protector and the other Chapter 9 office-bearers and the New Rules changed their conditions of employment. She invokes the rule of law and sections 7(2) and 23 of the Constitution as support for the proposition that their conditions of employment cannot be altered without first consulting them.

38. Adv Mkhwebane's second reason for contending the NA had to consult her before making the New Rules is because section 57(1)(b) of the Constitution requires the NA '*to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement*'.

39. We deal with Adv Mkhwebane's contentions that the NA is her employer and has changed the conditions of her employment in our main heads paras 173-175 pp 85-87.

40. The main difficulty with this contention is the Public Protector is not employed by anyone, be it the NA or anyone else. The incumbent Public Protector, like the other Chapter 9 office-bearers, is the holder of an office created by Chapter 9 of the Constitution to strengthen constitutional democracy in our country. Hence, section 181(2) of the Constitution makes it clear that the Public Protector is independent, and subject only to the Constitution and the law.

41. The Public Protector's relationship with the NA is a special one founded in the Constitution. The Constitution assigns three specific functions to the NA in relation to the Public Protector.

41.1. First, the Public Protector is appointed by the President on the recommendation of the NA in terms of section 193(4) and (5) of the Constitution;

41.2. Second, the Public Protector 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

41.3. Third, the Public Protector must be removed from office by the President upon the adoption by the NA of the resolution calling for her removal envisaged by section 194 of the Constitution.

42. None of the elementary requirements for an employment relationship between the Public Protector and the NA are present. In particular, unlike an employee, the Public Protector does not work for the NA or assist the NA in carrying on or conducting its business; and there is no contract between the NA and the Public Protector, let alone an employment contract.

43. Finally on this issue, even assuming the Chapter 9 office-bearers are employed by someone, the definitions of 'misconduct', 'incompetence' and 'incapacity' in the New Rules do not alter their conditions of employment. They were adopted to give meaning to the grounds of misconduct, incapacity and incompetence set out in section 194(1), in line with the CC's holding in *EFF (impeachment)* paras 176-178 (bundle 213-214)) in relation to the comparable provision for the impeachment of the President in the Constitution (section 89(1)).

44. We deal with Adv Mkhwebane's contention that section 57(1)(b) of the Constitution required the NA to consult her before making the New Rules in our main heads paras 215-221 pp 113-117.

45. In summary our response is as follows.

46. In line with section 59(1)(a) of the Constitution, the NA rules facilitate public involvement in the legislative and other processes of the NA. In particular, as the Speaker explained in her supplementary answering affidavit, 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 (Speaker's SAA vol 11 p 1140 para 59.2).

47. Turning to the process followed by the NA when making the New Rules, as pointed out in the Speaker's supplementary answering affidavit:

    47.1. 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 (Speaker's SAA vol 11 p 1139 para 58.1, read with TRM74 vol 11 p 1170 and TRM75 vol 11 p 1172);

    47.2. 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*' (Speaker's SAA vol 11 p 1139 para 58.2, read with TRM76 vol 11 1174);

    47.3. In response, the Organisation Undoing Tax Abuse ('OUTA') submitted representations about the draft New Rules to the Subcommittee. OUTA's representations 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 (Speaker's SAA vol 11 1140 para 58.3).

48. We therefore submit there is no merit in Adv Mkhwebane's contention that she should have been consulted before the New Rules were made.

49. Finally, as regards her reliance on section 57(1)(b) of the Constitution, her raising it in this Court gives rise to an issue with this Court's jurisdiction. Although she 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). 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 (*SA Veterinary Association v Speaker of the National Assembly and Others* 2019 (3) SA 62 (CC) paras 15-17 (bundle 632-633) and the cases cited there).

50. Adv Mkhwebane's second challenge to the New Rules is they impermissibly change the thresholds for impeachment in section 194 of the Constitution.

51. We deal with this issue in our main heads paras 193.3 and 198 pp 96 and 99, and in our supplementary heads paras 27-30 pp 17-18.

52. For three main reasons this contention is unsound:

    52.1. First, while Adv Mkhwebane is right that section 194(1)(a) of the Constitution says simply that the Public Protector, Auditor-General or a member of a Chapter 9 Commission may be removed from office only on the ground of misconduct, incapacity or incompetence, in *EFF (impeachment)* paras 176-178 (bundle 213-214), dealing with the comparable s 89(1) of the Constitution, the CC held that the NA is obliged to adopt rules which give meaning to the grounds of impeachment (i.e. the

drafters of the Constitution left the details relating to these grounds to the NA to spell out in its rules regulating the impeachment process).

52.2. Second, it is permissible for the NA, when defining the grounds on which Chapter 9 office-bearers may be removed from office in terms of s 194(1)(a), to qualify the terms '*misconduct*', '*incompetence*' and '*incapacity*'. In so doing, the NA may permissibly make impeachment more difficult than would otherwise be the case. The NA's defining the grounds of impeachment in this way does not involve an impermissible amendment of the Constitution. The reason is that, in *EFF (impeachment)* the CC did not merely authorise the NA to adopt rules defining the grounds of impeachment. It made it obligatory for the NA to do so.

52.3. Third, the definitions in the New Rules of '*incompetence*' and '*misconduct*' impose higher thresholds for impeachment than the ordinary meaning of those words would otherwise impose, and the definition of '*incapacity*' does not change the threshold either way.

52.4. '*Misconduct*' is defined to mean '*the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of public office*'.

52.5. 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 (b) ability or skill to perform, his or her duties efficiently*'.

52.6. Turning to the definition of '*incapacity*', although paragraph (a) (which reads '*a permanent or temporary condition that impairs the holder of a public office's ability to perform his or her work*') includes temporary incapacity, that does not alter the threshold because the word '*temporary*' relates to the cause of the incapacity and not the incapacity itself. In cases

of both temporary and permanent alleged incapacity, the question for decision (i.e. the requirement) remains the same, namely whether the condition results in the impairment of the Chapter 9 office-bearer's ability to perform his or her work. To take the example of a Public Protector, they are appointed for a non-renewable period of seven years (section 183 of the Constitution). It is conceivable that a Public Protector may develop a condition which, though temporary, impairs their ability to perform their work and is likely to continue doing so for the balance of their term of office or for a significant portion of their term (say, the next two years). If in such circumstances the Public Protector does not request the NA's permission to vacate their office on account of continued ill health in terms of section 2(3)(a) of the Public Protector Act 23 of 1994, it would be rational and consistent with section 194(1)(a) for the NA to remove them from office of its own accord.

53. Adv Mkhwebane's third challenge to the New Rules is they are unreasonable because she cannot be expected to conform to the new requirements imposed by the definitions in the Rules at a time before they came into existence.

54. As the Court will appreciate, this point also underlies Adv Mkhwebane's claim for the first alternative order she is seeking, namely an order declaring that the New Rules do not operate in relation to her actions before 3 December 2019.

55. We deal with the issue of retrospectivity in our main heads paras 192-194 pp 94-94 and in our supplementary heads paras 5-15 pp 5-13.

56. The fundamental problem with Adv Mkhwebane's reasoning is it mistakenly presupposes that the New Rules themselves are the source of the NA's power to remove office-bearers of Chapter 9 institutions on the grounds of misconduct, incapacity or incompetence. They are not. That power derives from section 194 of the Constitution, which came into operation on 4 February 1997. The New

Rules merely particularise the elements of the grounds for removal and elaborates on the mechanism for removal in section 194.

57. Once it is accepted, as we submit it should be, that the date upon which the Constitution came into effect is the date from which the NA became empowered to remove an office-bearer of a Chapter 9 institution in terms of section 194 – and not the date on which the New Rules were adopted – Adv Mkhwebane's retrospectivity point does not arise.

58. Moreover, as the Full Court pointed out in paras 98-100 of its judgment on the relief Adv Mkhwebane was seeking in Part A (*Public Protector v Speaker of the National Assembly and Others* [2020] 4 All SA 776 (WCC)):

58.1. 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 (*Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424G (bundle 713-714)).

58.2. Second, one of the circumstances in which such an inference can be drawn is when holding that a measure is not retrospective would lead to an absurdity (*Lek v Estate Agents Board* 1978 (3) SA 160 (C) at 169F-G (bundle 334)).

58.3. Third, it would be absurd to interpret the New Rules as applying only to events after their adoption. If the New Rules did not operate retrospectively in the sense of regulating 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 2019, 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.

58.4. Fourth, the New Rules mainly regulate the procedure to be followed in the future (i.e. after 3 December 2019) for impeachment processes in terms of section 194 of the Constitution, including by providing the two screening mechanisms to 'weed out' motions which are not worthy of serious consideration, i.e. the Speaker's screening of the notice of motion in terms of Rule 129R and 129S and the independent panel's screening of the evidence in support of the charges in terms of Rule 129X.

59. Finally, insofar as the New Rules regulate matters of substance, i.e. define '*incompetence*', '*misconduct*' and '*incapacity*', as explained earlier they impose higher thresholds for impeachment than the ordinary meaning of those words would otherwise impose (in the case of '*incompetence*' and '*misconduct*') or do not alter the threshold (in the case of '*incapacity*'). Consequently, if anything, the New Rules favour the incumbents of Chapter 9 offices by making it more difficult to remove them on the grounds of '*incompetence*' and '*misconduct*'. Issues with retrospectivity arise only in respect of changes to 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 because the retrospective operation of the New Rules inures to the benefit or at least not to the detriment of the Chapter 9 office-bearers (*Ex Parte Christodolides* 1959 (3) SA 838 (T) 841A-B (bundle 245)).

60. Adv Mkhwebane's fourth challenge to the New Rules is they are specifically targeted at her as an individual, in spite of being clothed as rules of general application to all Chapter 9 office-bearers – they are a 'Sobukwe clause'.

61. We deal with this issue in our main heads para 199 pp 100-104.

62. 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. Under the clause, he remained in prison for a further six years.

63. In this regard we refer the Court to the following statements by the Speaker in her supplementary answering affidavit in particular:

63.1. 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 (Speaker's SAA vol 11 p 1130 para 49.1).

63.2. 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 (Speaker's SAA vol 11 pp 1130-1131 para 49.2).

63.3. 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 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 (Speaker's SAA vol 11 p 1131 para 49.3 and TRM28 vol 5 p 431).

63.4. 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 …*' (Speaker's SAA vol 11 p 1131 para 49.4 and TRM 37 vol 5 p 475).

64. To sum up, 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 Full Court in its judgment on Part A therefore rightly rejected the references to the Sobukwe Clause (footnote 19 to para 43 of the Judgment).

65. Adv Mkhwebane's fifth challenge to the New Rules is they do not differentiate between the requirements for the impeachment of the President in s 89 of the Constitution and the requirements for the impeachment of the holder of an office in a Chapter 9 institution in section 194.

66. We deal with this issue in our main heads para 208 p 109.

67. The short answer is that, in drafting and adopting the New Rules the NA acted rationally and the New Rules themselves are rationally related to section 194. 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 (Speaker's AA vol 3 pp 222-229), 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. As appears from the definitions of '*misconduct*', '*incompetence*' and '*incapacity*' in the New Rules and from description of the interaction between the New Rules and section 194 in our heads paras 119 to 144 pp 60 to 67 (i.e. the resulting seventeen-step process for the impeachment of a Chapter 9 office-bearer), the New Rules are rationally related to their purpose.

68. Adv Mkhwebane's sixth challenge to the New Rules is they are irrational because they fail to make provision for filtering malicious and/or dishonest 'complaints' by conflicted and compromised individuals or any other abuse-of-process manoeuvres.

69. The answer to this challenge appears from the parts of the New Rules described in our main heads paras 122-125, 128-131 and 133 pp 60 to 62. As explained earlier when outlining the key features of the New Rules, these include:

    69.1. two sifting mechanisms to determine whether the Chapter 9 office-bearer has a case to answer, namely the initial assessment by the Speaker of whether the motion is compliant with the criteria in Rule 129R (Rule 129S) and the 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)); and

69.2. after receipt of the panel's recommendations, the NA must take an initial decision as to whether an enquiry in terms of section 194 should be proceeded with (Rule 129Z(2)).

70. Generally as to these and the other provisions of the New Rules allocating powers and functions to the Speaker, the independent panel, the NA as a whole and the section 194 committee, we endorse the point made by the DA in its heads that although these powers, like any powers conferred upon organs of state, are capable of being abused, that possibility has no bearing on the constitutionality of the New Rules. Should a power be abused the remedy lies not in invalidating the provision of the New Rules conferring it or the New Rules as a whole, but in the remedies afforded by our law for abuses of public power. In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 37 Chaskalson CJ said:

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

71. Adv Mkhwebane's seventh challenge to the New Rules is they deny her the benefit of *audi alteram partem* 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.

72. We deal with this issue in our main heads paras 161-162 and 164-165 pp 74-77.

73. Generally as regards this challenge, for the reasons given earlier we submit that as the implementation of the New Rules is not administrative action regulated by section 33 of the Constitution or PAJA, the applicable standard is procedural rationality and not procedural fairness.

74. The Speaker accepts 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 Chapter 9 office-bearers, i.e. for the process to be procedurally rational.

75. 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 the office-bearer with two opportunities to answer the charges against her.

76. 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). During the independent panel proceedings the office-bearer will be 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.

77. The second opportunity is during the proceedings of the section 194 committee. 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.

78. Finally in this regard, Adv Mkhwebane seeks to make something of the fact that, on 26 February 2020, the Speaker decided on 26 February 2020 to provide Adv Mkhwebane with copies of both Ms Mazzone's motions. We deal with this later when addressing her claim for personal and punitive costs against the Speaker, this being the first of the factors on which she relies for that.

79. Adv Mkhwebane's eighth challenge to the New Rules is they do not provide for her to be given reasons for decisions adverse to her.

80. We deal with this issue in our main heads paras 179-181 pp 89-90.

81. For two main reasons we submit that Adv Mkhwebane (like the incumbent of any other Chapter 9 office-bearer whose impeachment is sought) has no right to reasons for any of the following:

81.1. a decision of the Speaker in terms of Rule 129S that a notice of motion for the removal of the office-bearer is in order;

81.2. a decision by the independent panel in terms of Rule 129X that there is prima facie evidence substantiating the charge(s), although the rule does require the panel to submit a report to the NA which must include the reasons for its recommendations;

81.3. a resolution by the NA in terms of Rule 129Z that a section 194 inquiry be proceeded with;

81.4. a decision by the section 194 committee in terms of section 194(1)(b) and Rule 129AE that the office-bearer has committed the misconduct or is incompetent or incapacitated for the reasons alleged in the motion, although Rule 129AF does require the committee to submit a report to the NA which must include the reasons for its findings; and

81.5. a resolution by the NA that the office-bearer be removed from office in terms of section 194(1)(c) and Rule 129AF(2).

82. The first reason is that none of these decisions or resolutions is administrative action subject to PAJA, section 5 of which confers a right to reasons for administrative action.

83. The second reason is that there is no requirement in the Constitution, in any other law or in the NA Rules that reasons be given to the office-bearer for the decisions or resolutions. Nor does procedural rationality or any other

constitutional rule or principle applicable to the impeachment process require the giving of reasons to the office-bearer.

84. Where, however, the NA requires reasons in order to fulfil its functions in a rational manner – i.e. reasons for the independent panel's findings and recommendations and reasons for the section 194 committee's findings – the New Rules expressly provide their reports to the NA must contain the necessary reasons. As the proceedings of the plenary NA in impeachment matters will invariably be conducted in an open manner, the office-bearer will be entitled to access to those reports.

85. Adv Mkhwebane's ninth challenge to the New Rules is 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. She also contends that no law authorises the Speaker to appoint judges to parliamentary structures.

86. We deal with these issues in our main heads paras 210-211 pp 110-112 and in our supplementary heads paras 31-38 pp 18-22.

87. Dealing first with Adv Mkhwebane's contention that no law authorises the Speaker to appoint judges to parliamentary structures, in line with *EFF (impeachment)* paras 180-182 and 189-190 (bundle 214-216), the New Rules regulate the process in the NA, including the two sifting mechanisms to determine whether the Chapter 9 office-bearer has a case to answer. As the Court knows, the second of these is the appointment of the independent panel to assess whether there is *prima facie* evidence supporting the charge(s). The adoption by the NA of rules regulating the process of impeachment in terms of section 194, was something the NA was obliged to do. It follows that the New Rules can validly provide the authority for the Speaker to appoint a judge to the independent panel.

88. Turning to Adv Mkhwebane's separation of powers point, before dealing with the applicable legal principles, we point out that while the Speaker is obliged to give due consideration to all persons nominated by the political parties represented in the NA, she is not obliged to appoint the independent panel from among the nominees. See Rule 129V.

89. That brings me to the applicable legal principles. We submit that 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 (*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 (bundle 497 and 503-504)).

90. We submit the NA may validly make provision for the Speaker to enlist a member of the judiciary to participate in the non-adjudicative screening function entrusted to the independent panel. The essential reason is 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.

91. 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 (*South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 34 (bundle 655)). In other words, it is a function closely connected with the core function of the judiciary. Moreover, 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. This safeguard deals with the point raised in argument yesterday, that the appointment of a judge nominated by a particular political party may give rise to an incorrect perception that the judge is aligned with the party in question.

92. As appears from the Speaker's affidavit of 2 June 2021, and as mentioned earlier when outlining the present case, in the present instance she did not appoint any serving judge to the independent panel. She appointed two senior counsel and a retired justice of the CC, namely Justice Nkabinde, who has been discharged from active service as a Constitutional Court judge and is not performing active service as a judge in any other court. We submit that the appointment of Justice Nkabinde did not implicate the separation of powers.

93. This brings us to Adv Mkhwebane's reliance on *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* 2021 (3) SA 246 (CC) ('*Amabhungane*') (bundle 887), a case which concerned the definition of '*designated judge*' in section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 ('*RICA*'). The definition conferred on the Minister of Justice the power to designate any judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, or any retired judge, to perform the functions of a '*designated judge*' for purposes of RICA. Generally speaking, those functions entail issuing directions authorising various types of surveillance including directions for the interception of communications.

94. In *Amabhungane* the CC upheld a finding by the High Court that RICA failed to ensure the independence of the designated judge because:

94.1. '*At present, the designated Judge is appointed by the Minister of Justice – a member of the Executive – without the involvement of any other person or entity. And in practice, terms of designated Judges have been renewed. Also, the lack of specificity on the manner of appointment and extensions of terms raises independence concerns*' (*Amabhungane* para 92 (bundle 911-912)); and

94.2. '*Additionally, [surveillance] directions are sought and issued in complete secrecy, and, therefore, without public scrutiny, or the possibility of review or appeal, which points to a lack of "mechanisms for accountability and oversight"*' (*Amabhungane* para 93 (bundle 912)).

95. We submit the appointment by the Speaker of a judge to the independent panel, in terms of NA Rule 129V, is not comparable to the designation of a judge by the Minister under RICA; and neither is the functioning of the independent panel under the New Rules comparable to the functioning of the designated judge under RICA. The reason is the New Rules contain six important safeguards:

95.1. First, before making the appointments the Speaker must consider nominees put forward by the political parties represented in the NA (Rule 129V(2)).

95.2. Second, the New Rules specify objective criteria for appointments to an independent panel, namely the panel must consist of three fit and proper South African citizens who collectively possess the necessary legal and other competencies and experience to conduct the assessment described in Rule 129X (Rule 129V(1)).

95.3. Third, as we have already mentioned, if a judge is appointed by the Speaker, the appointment must be made in consultation with the Chief Justice (Rule 129V(3)).

95.4. Fourth, the judge and the other members of the independent panel are appointed for the purpose of evaluating a specific complaint (Rule 129U), and not for a term of office.

95.5. Fifth, the independent panel must provide the Chapter 9 incumbent with copies of all information available to the panel relating to its assessment of the motion proposing a section 194 enquiry and provide the incumbent with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her (Rule 129X(1)(c)(ii) and (iii)).

95.6. Sixth, the Panel must produce a report containing recommendations, which must be tabled in the NA (i.e. made public) (Rules 129X(1)(c)(v) and 129Z(1)).

96. If, however, this Court were to uphold the separation-of-powers challenge to the New Rules, it could simply sever the relevant parts of Rule 129V, i.e. the phrase '*, which may include a judge,*' in Rule 129V(1) and Rule 129V(3). We submit severance would be appropriate. See *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) para 16 where the test for severance is set out:

'*Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute.*'

97. Adv Mkhwebane's tenth challenge to the New Rules is they unfairly deny her the right to an oral hearing by the independent panel.

98. We deal with this issue in our main heads para 171 pp 83-84.

99. It will be recalled that Rule 129X(1)(c)(iv) provides that the independent panel may determine its own working arrangements, but it may not hold oral hearings and must limit its assessment to the written and recorded information placed before it.

100. The issue is whether this restriction on the panel's functioning is rational.

101. We submit it is, for three reasons:

101.1. 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 where the requirement of a reasonable opportunity to make representations can be met by written submissions. See Hoexter C, *Administrative Law in South Africa*, Second Edition, p 371 (bundle 1046) and the authorities in footnote 52.

101.2. 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 do so.

101.3. 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.

102. Adv Mkhwebane's eleventh challenge to the New Rules is they 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.

103. We deal with this issue in our main heads paras 183-188 pp 90-93.

104. It concerns Rule 129AD(3), which provides that the section 194 committee '*must afford the holder of a public office the right to be heard in his or her 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*'.

105. The issue is whether this restriction on the section 194 committee's functioning is rational.

106. We submit it is rational, because, as the Speaker explains in her answering affidavit paras 179-180 vol 3 p 269 and in her supplementary answering affidavit para 66.1 vol 11 p 1143, the New Rules rationally require that a Chapter 9 office bearer must participate personally in the proceedings of the section 194 committee, and not do so through a legal representative participating on their behalf. When section 181(5) of the Constitution provides that they are accountable to the NA, it means that they are accountable personally. Section 194 of the Constitution, which as stated is the ultimate accountability-ensuring mechanism, similarly requires that they answer the charges against them personally.

107. This restriction must also be seen in the context of the rest of Rule 129AD, which provide section 194 committee 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 para 89 of its Judgment in respect of Part A. Thus, while the committee may not permit a Chapter 9 office-bearer's legal representative 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.

108. Adv Mkhwebane's reliance in this context on *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA) is misplaced. In that case the SCA held (*Hamata* para 8 (bundle 266)) that the 'interim' Constitution of 1993 did not recognise an absolute right to legal representation outside criminal proceedings – the same applies to the 'final' Constitution of 1996. Moreover, the *dictum* on which Adv Mkhwebane relies (*Hamata* para 13 (bundle 267)) pertains to legal representation before administrative bodies, which the NA and its committees are not when exercising their functions in terms of section 194 of the Constitution.

109. Finally in this regard, Adv Mkhwebane seeks to make something of the fact that the rules governing the process for the impeachment of the President in terms of s 89 do not contain any restriction on the participation of the President's lawyers in the proceedings of the NA committee. As the Speaker points out in her supplementary answering affidavit paras 97.1 to 97.3 vol 11 p 1158-1159, however, this criticism is misguided. The test is not whether the NA could have included different mechanisms to the ones it did, but whether the New Rules contain a rational scheme for the conduct of the proceedings in a section 194 committee. We submit the Speaker has given a rational explanation for the restriction on lawyers' participation in a section 194 committee.

110. If however this Court were to uphold this challenge to the New Rules, it could simply sever the relevant part of Rule 129AD(3), i.e. the proviso '*, provided that the legal practitioner or other expert ma not participate in the committee*'. We submit severance would be appropriate.

111. Adv Mkhwebane's <u>twelfth and last</u> challenge to the New Rules is they do not preclude or contain safeguards against the participation in the section 194 process of members of the national Cabinet against whom complaints have been

lodged with the Public Protector which are being investigated by Adv Mkhwebane or who are currently involved in acrimonious litigation against Adv Mkhwebane (i.e. persons who may reasonably be suspected of bias against her).

112. More specifically, she alleges that 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 criticized her CIEX and Vrede Dairy investigations and reports, but the New Rules do not require that they recuse themselves.

113. We deal with this issue in our main heads paras 222-245 pp 118-131.

114. Dealing first with the section 194 committee, we 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. The reason is the function of the committee is to make a finding as to whether or not the office-bearer has misconducted themself or is incompetent or incapacitated 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, incompetence or incapacity. Compare *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP) paras 130-147 (bundle 534-536).

115. The political parties represented in the NA must therefore ensure that the members they appoint to serve on 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.

116. This brings us to the participation of members in impeachment matters in the NA as a whole (i.e. when the NA is in plenary), and specifically to the voting on an impeachment motion in the NA if the section 194 committee finds that the office-bearer has misconducted themself or is incompetent or incapacitated on the grounds set out in the charges.

117. We submit that when considering this issue the New Rules cannot be considered in isolation from section 194 of the Constitution and the remainder of the NA Rules.

118. Section 194 of the Constitution requires that the NA as a whole must decide whether or not to remove a Chapter 9 office bearer from office. In the case of the Public Protector and the Auditor-General, section 194(2)(a) of the Constitution requires for their removal a supporting vote of at least two thirds of the 400 members of the NA. In the case of the other Chapter 9 office-bearers, section 194(2)(b) of the Constitution requires for their removal a supporting vote of a majority of the 400 members of the NA.

119. It would be inimical to the proper functioning of the impeachment mechanism and to our system of party-political representative democracy, if members of the NA were to be precluded from participating or voting in the proceedings of the NA relating to the impeachment of a Public Protector, simply because they know or have reason to suspect the Public Protector is investigating complaints against them or because they are involved in litigation against the Public Protector involving reports containing findings of wrongdoing by them.

120. It is in other words necessarily implicit in section 194(2)(a) of the Constitution that all the members of the NA are entitled to vote on a motion for the impeachment of the Public Protector.

121. We submit 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.

122. This obligation is underscored and enforced by Rule 30 of the NA Rules and the Parliamentary Ethics Code. 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 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.

123. 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).

124. 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 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).

125. In short, Rule 30 of the NA Rules and the Ethics Code contain adequate safeguards against conflicts of interest.

126. Turning, briefly, to the apprehension of bias Adv Mkhwebane alleges she reasonably holds in the present instance:

126.1. We emphasize that in the present matter Adv Mkhwebane is not seeking to interdict the impeachment process which is currently under way in the NA.

126.2. We submit that whether or not her apprehension of bias is reasonable, is not an issue relevant to her attack on the validity of the New Rules.

126.3. One of the grounds on which Adv Mkhwebane seeks an order reviewing and setting aside the Speaker's decision that Ms Mazzone's motion is in order, and on which Adv Mkhwebane seeks punitive and personal costs against the Speaker, is her allegation that the Speaker unnecessarily took sides in the dispute between the President and her in the litigation about

her BOSASA report. We shall address that allegation later, when dealing with those issues.

127. To cater for the possibility of this Court not accepting our submission that Adv Mkhwebane's allegation that she has a reasonable apprehension of bias on the part of certain members of the NA (besides the Speaker) is irrelevant to the relief she is seeking in the present matter, we make the following brief submissions regarding her apprehension of bias on the part of the NA members who in the past have criticized her CIEX and Vrede Dairy investigations and reports. Here, she places particular reliance on the meeting of the Portfolio Committee on 6 March 2018. We make three points in this regard.

127.1. The first point is that the statements ascribed to the Portfolio Committee as a whole by Adv Mkhwebane in her founding affidavit (especially in paras 31 to 35 vol 1 pp 23-26) come from the Parliamentary Monitoring Group's meeting summary in annexure PPFA 3 to her founding affidavit (vol 1 p 95, which is inaccurate in so ascribing the statements), and not from the PMG meeting report (which contains an accurate account of what the individual members of the Portfolio Committee actually said). See paras 37 to 42 of the Speaker's main answering affidavit vol 3 pp 201-202.

127.2. Second, what the PMG meeting report 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 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.

127.3. Third, 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.

VI. ADV MKHWEBANE'S REQUEST FOR AN ORDER SUSPENDING THE DECLARATION OF INVALIDITY FOR SIXTH MONTHS

128. For the reasons just given in response to Adv Mkhwebane's twelve attacks on the New Rules, we submit all of them are unfounded.

129. In the event that one or more of them are successful, however, Adv Mkhwebane asks for an order suspending the declaration of invalidity of the New Rules she is seeking for a period of six months, within which the NA must effect the necessary amendments (amended notice of motion para 4 vol 10 p 977).

130. The Speaker agrees that should this Court declare the New Rules to be invalid, it should exercise the discretion conferred on it by section 172(1)(b) of the Constitution to suspend the declaration of invalidity for a period of 6 months to avoid a *lacuna* and to allow the NA to correct the defect(s).

131. In this regard we point out that suspension is not an exceptional remedy. It is an obvious use of the courts' remedial power under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants, while ensuring that there is no disruption of the regulatory aspects of the provision that is invalidated (*Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) para 55).

132. Depending on the defect(s) giving rise to the declaration of invalidity, this Court may make a further order reading-in a remedial provision(s) into the New Rules or otherwise qualifying them, but before doing so we respectfully submit that it should afford the parties the opportunity to make submissions regarding the change(s) it intends making.

133. It is only where the defect(s) found by the Court are so fundamental that their continued operation in any form would be anathema to the Constitution (i.e. where no reading-in of remedial provisions can address the defect(s)), or where a reading-in will have unacceptable implications for the separation of

powers between the courts and the NA, that the Court should refuse a suspension.

VII. ADV MKHWEBANE'S REQUEST FOR AN ORDER SUSPENDING THE IMPLEMENTATION OF THE NEW RULES

134. In her counsel's heads of argument Adv Mkhwebane asks, for the first time, for an order in terms of section 172(1)(b) of the Constitution '*suspending the implementation of the Rules while the National Assembly will be redrafting the new Rules governing the section 194 inquiry process*' (Adv Mkhwebane's HoA para 221 p 66, read with para 6 p 2).

135. We deal with this issue in our supplementary heads paras 47-52 pp 26-30

136. Our response is as follows.

137. First, as stated, nowhere in Adv Mkhwebane's papers has any suspension of the operation of the New Rules, as distinct from a suspension of any order of constitutional invalidity of the New Rules (discussed above), been sought. The amended NOM is silent on this score, and there are no allegations in any of Adv Mkhwebane's affidavits to support such remedy. Because it has been proposed for the first time in written argument, the Speaker has been denied an opportunity to address in her papers the suitability of an order suspending the operation of the New Rules. The belated request for suspension of the New Rules should, consequently, be disallowed for this reason alone.

138. Second, and in any event, for four reasons the suspension of the operation of the New Rules which Adv Mkhwebane is now seeking, would not be just and equitable, which is the touchstone for any relief in terms of section 172(1)(b) of the Constitution.

138.1. First, it would be illogical for the Court to order, as Adv Mkhwebane apparently now seeks, that: (i) the New Rules be declared constitutionally invalid; (ii) the declaration of constitutional invalidity of the New Rules be suspended to allow the NA to correct the defect; and (iii) the operation of the New Rules be suspended (based on paragraph 221 of her heads of

argument) while the NA corrects the defect. This is because the effect of the suspension of an order of constitutional invalidity allows the law which has been declared invalid to remain in operation for the stipulated period or until such time as the competent authority amends the law to remedy the defect, whichever occurs first. Put differently, a suspension of the operation of the New Rules during the period of suspension of the declaration of invalidity would have the net effect of a bald declaration of invalidity.

138.2. Second, a bald declaration of invalidity would result in the re-emergence of the very *lacuna* that prompted the NA to adopt the New Rules in the first place, pursuant to the Constitutional Court's decision in *EFF (impeachment)*.

138.3. Third, as already mentioned, if the Court may grant a suspension of the declaration of invalidity, it may do so subject to a reading-in which will remedy the defect(s) it has found during the period of suspension.

138.4. Fourth, limiting the inoperability of the New Rules to Adv Mkhwebane's impeachment process alone (as envisaged in paragraph 6 of her heads of argument), would result in the irrational situation where the New Rules applying to every other Chapter 9 office-bearer except her; and it would be inconsistent with the general principle that a litigant before the court should not be singled out for the grant of constitutional relief concerning a generally-applicable law, but rather relief should be afforded to all people who are in the same situation as the litigant (*S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 32 (bundle 1045)).

VIII. ADV MKHWEBANE'S CHALLENGES TO THE SPEAKER'S DECISION THAT MS MAZZONE'S MOTION IS IN ORDER

139. Adv Mkhwebane challenges the Speaker's decision on 26 February 2020 that Ms Mazzone's motion of 21 February 2020 is in order on nine grounds. We shall deal with each in turn.

140. First, Adv Mkhwebane contends that most of the charges in Ms Mazzone's motion concern events which pre-dated the adoption of the New Rules on 3 December 2019, whereas the New Rules do not operate with retrospective effect (because retrospectivity would be inconsistent with the rule against retrospectivity and the maxim *nulla poena sine lege*). Adv Mkhwebane consequently alleges that insofar as the charges in Ms Mazzone's motion relate to events before that date, it is not 'in order' and is not a valid foundation for an impeachment process in relation to her.

141. We dealt with the essence of this challenge when answering Adv Mkhwebane's contention that the New Rules cannot validly apply with retrospective effect.

142. Adv Mkhwebane's second contention is many of the charges in Ms Mazzone's motion concern things done or not done in the course of her investigations or things said in her reports, thus infringing the independence of the institution of the Public Protector guaranteed by section 181(2) of the Constitution.

143. We deal with this issue in our main heads paras 200-205 pp 104-107 and in our supplementary heads paras 16-26 pp 13-16.

144. To put this contention into its proper factual context, we point out that the charges Ms Mazzone has levelled against Adv Mkhwebane are based on, amongst others:

144.1. the findings of the majority of the CC in *PP v SARB (CC)*, which 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; and

144.2. the findings of the High Court in *DA v PP II*, which include findings in relation to things done and not done by Adv Mkhwebane in the course of her investigation into the Vrede Dairy matter.

145. We submit that if, following a section 194 inquiry and a consideration of the evidence the section 194 committee reaches the same or similar conclusions, a legitimate outcome may be a finding by the section 194 committee that Adv Mkhwebane misconducted herself or is incompetent within the meaning of those terms as defined in the New Rules.

146. We further 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 Public Protector's actions or omissions in the course of her investigations, or things said by her in her reports, were impermissible bases for a decision by the NA that she be removed from office.

147. These submissions are illustrated by the facts giving rise to, and the findings and orders in *Minister of Police v Vowana and Another* 2019 (4) SA 297 (ECM) (bundle 837). As the Court will recall, in that case a magistrate (the first respondent) had allowed an attorney (the second respondent) who had appeared for one of the parties in the case before him, to rewrite a draft of his judgment unbeknownst to the other (losing) party. The rewritten judgment contained significant amendments and additions. The magistrate adopted the rewritten judgment as his own and signed it. The losing party did not find out about all this until several months later when the winning party's attorney sought to enforce the payment the magistrate had ordered the losing party to make.

148. In review proceedings brought by the losing party, the High Court found that the magistrate had misconducted himself (para 27), had engaged in improper conduct (para 30), had been dishonest (para 31) and had '*abdicated his judicial office and thus put the judiciary as an institution into disrepute*' (para 34) (bundle 844-845).

149. We submit that if the judicial officer in that case had been a judge, it would have been competent and proper for the Judicial Service Commission to consider the papers in that matter and the judgment of the High Court, and to decide in terms of section 177(1)(a) of the Constitution that the judge was guilty of gross misconduct, and for the NA to adopt a resolution calling for the judge's removal from office in terms of section 177(1)(b) of the Constitution.

150. Returning to the Speaker's decision that Ms Mazzone's motion is in order, none of the charges of misconduct and incompetence in the motion based on the papers and judgments in proceedings for judicial review of reports by Adv Mkhwebane is based merely on the incorrectness of the findings in those reports. The charges relate to her actions and conduct in relation to the relevant investigations and reports and in relation to the litigation about them. The charges allege her actions and conduct constitute misconduct or are evidence that she is incompetent.

151. Adv Mkhwebane's third contention is many of the charges in Ms Mazzone's motion are based on the findings of judges in litigation concerning her, whereas the NA must decide for itself whether she has misconducted herself or is incompetent.

152. We deal with this issue in our main heads para 207 pp 108-109.

153. It is strongly arguable that a finding by a court of competent jurisdiction adverse to a Chapter 9 office-bearer, which has become final (or is a decision of a final court of appeal), may, in and of itself be a sufficient basis for the NA to find that

the officer-bearer is guilty of misconduct (e.g. a verdict that the office-bearer is guilty of corruption).

154. However, for purposes of addressing this complaint we accept that Adv Mkhwebane is right in contending that the NA must make its own decision on the charges levelled against, i.e. it may not simply conclude she misconducted herself when conducting her CIEX investigation and in the ensuing litigation about it because that is what the majority of the CC found when dismissing her appeal against the punitive and personal costs order made against her.

155. We point out that 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.

156. The charges in Ms Mazzone's motion invite the NA to make the relevant findings for itself. The fact that she attached the judgments of certain courts as evidence in support of those charges, does not detract from this.

157. What this means in practical terms is 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).

158. However, on our approach to addressing this challenge, at the end of the inquiry the members of the committee will have to decide for themselves whether or not any or all of the charges of misconduct or incompetence have been established.

159. Adv Mkhwebane's <u>fourth</u> contention is the NA is precluded by the rule against double jeopardy from impeaching her on the basis of conduct mentioned in Ms Mazzone's motion for which she has already been punished by the courts when imposing punitive and personal costs orders.

160. We deal with this issue in our main heads paras 212-214 pp 112-113 and in our supplementary heads paras 39-42 pp 22-25.

161. 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.*'

162. The rule against double jeopardy is one of our criminal law, and is now entrenched in section 35(3)(m) of the Constitution, which provides that every accused person's right to a fair trial includes the right '*not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted*'.

163. In *S v Basson* 2005 (1) SA 171 (CC) para 64 (bundle 964) the Constitutional Court commented on the defence of double jeopardy with specific reference to section 35(3)(m) of the Constitution. The majority held that '*[f]or the plea to be sustained, the accused must show that he or she was in jeopardy of conviction in the first prosecution. An accused will have been in jeopardy if the previous court had jurisdiction to try him or her; the trial was based on a charge on which a conviction could have been obtained; and the acquittal was on the merits.*'

164. Section 35(3)(m) of the Constitution does not avail Adv Mkhwebane. None of the cases for judicial review of her reports put up by Ms Mazzone MP in support of the motion of her removal was a criminal matter. The costs orders made against her in those matters were not punishments for criminal offences committed by her. The present impeachment proceedings are not criminal proceedings either.

165. In any event, assuming (without conceding) that the rule against double jeopardy operates outside criminal proceedings, none of the judgments relied upon by Ms Mazzone were proceedings for removal of Adv Mkhwebane as Public Protector or findings as to her fitness to occupy office for the purposes of section 194 of the Constitution. She was, therefore, never in jeopardy of being removed from office or found to have committed misconduct or be incompetent, as envisaged in section 194, in any of those proceedings. That there was no threat of the Public Protector being competently removed by any court is evidenced by *Institute for Accountability* (bundle 274) in which the applicant sought the removal of the Public Protector. Coppin J dismissed the application as it would have violated the principle of the separation of powers for a court to order the removal of the Public Protector. Thus, there could not have been a credible threat of her being removed by any of the Courts in which her reports were challenged.

166. We point out that 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.

167. We submit the imposition of a criminal sanction on the incumbent of a Chapter 9 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.

168. Adv Mkhwebane's fifth contention is the Speaker failed to '*assess the substantive requirements of* [Ms Mazzone's] *motion'* and to perform the '*requisite prima facie assessment*'. The underlying argument is that Rule 129S requires the Speaker to evaluate the strength of the evidence supporting and attached to the motion. That argument is incorrect.

169. We deal with this issue in our main heads para 170 pp 82-83.

170. The task the Speaker had to perform under Rule 129S was to assess the motion against the form and content requirements of Rule 129R, to consider whether it was consistent with the Constitution, the law and the New Rules and to determine whether, *prima facie* (i.e. on the face of the motion):

170.1. 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 Rules (i.e. the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of public office); and

170.2. 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, and ability or skill to perform or to carry out, her duties effectively and efficiently).

171. In contrast, the task of the independent panel was 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).

172. In oral argument, counsel for Adv Mkhwebane criticized the Speaker's letter of 30 January 2020 (annexure TRM 46 vol 6 p 502), saying, if we understood him correctly, that it did not contain adequate reasons for her decision on 25 January 2020 that Ms Mazzone's first motion is in order. We submit the criticism is unfounded. Though relatively brief, the relevant part of letter does explain the Speaker's decision (i.e. Ms Mazzone's motion complied with the form requirements of the New Rules and the independent panel would make the required *prima facie* assessment). That said, this point is irrelevant because on

21 February 2021 Ms Mazzone withdrew her first motion and replaced it with a second one, which it is common cause is the operative motion.

173. The Speaker's answering affidavit shows that on 26 February 2020 she carefully considered Ms Mazzone's second notice of motion, and was satisfied that it conformed with Rule 129R (see Speaker's answering affidavit vol 3 pp 242-244 para 125, which must be read with annexure TRM60 vol 6 pp 540-550).

174. Adv Mkhwebane's sixth contention is the Speaker wrongly decided that there was *prima facie* evidence of intention in the form of *dolus*.

175. We deal with this issue in our main heads para 191 p 94.

176. The short answer is 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).

177. Adv Mkhwebane's seventh contention is the Speaker's decision to continue with the impeachment process initiated by Ms Mazzone, while the current challenge to the validity of the New Rules was pending, was grossly unreasonable.

178. We deal with this baseless allegation in our main heads para 248 pp 132-133.

179. We submit that in refusing to accede to Adv Mkhwebane's demands that the impeachment process initiated by the tabling of Ms Mazzone's motion be stalled because of her bringing the present proceedings, the Speaker has acted as required by the Constitution and the New Rules.

180. 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.*'

181. Adv Mkhwebane's eighth contention is the Speaker should have given her prior notice and an opportunity to be heard before deciding that Ms Mazzone's motion was in order.

182. For two main reasons, this contention is unfounded:

182.1. First, Adv Mkhwebane (like the incumbent of any other Chapter 9 office whose impeachment is sought) has no right to prior notice and an opportunity to be heard before the Speaker takes a decision on whether or not a motion for their impeachment is in order. Although section 3 of PAJA confers a right to *audi* for administrative action which adversely affects a person's rights or legitimate expectations, the Speaker's decision that a motion is in order is not administrative action subject to PAJA. Moreover, and in any event, a decision that a motion is in order does not adversely affect the rights or legitimate expectations of a Chapter 9 office-bearer; and, as the DA explains in its heads para 40 pp 19-23, in our law there is no right to hearing before a decision is taken to refer a complaint for investigation during which the respondent will be heard. Finally, there is no requirement in the Constitution, in any other law or in the NA Rules that *audi* be given to the office-bearer before the taking of a decision that a motion is in order. Nor does procedural rationality require the giving of *audi* for the performance by the Speaker of her preliminary screening task under Rules 129R and 129S.

182.2. Second, the New Rules do provide the Chapter 9 office-bearer with a fair opportunity to address the charges against them at any early stage in the process; and, if it proceeds to an enquiry in terms of 194(1)(b), a further opportunity to do so in the section 194 committee. As regards the early-stage opportunity to be heard, rule 129X(1)(c)(ii) requires that the independent panel, once established, must without delay provide the office-bearer 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. Rule 129X(1)(c)(iii) adds that the panel must provide the office-bearer with a reasonable opportunity to respond, in writing, to all relevant allegations against them.

183. Adv Mkhwebane's last attack is the Speaker is biased against her, as evidenced by the Speaker unnecessarily taking sides in the dispute between the President and her in the litigation about her BOSASA report; and, further, that because of her participation in that litigation the Speaker should have recused herself from managing the impeachment processes consequent upon Ms Mazzone's motions.

184. We deal with this issue in our main heads paras 75, 244, 250 and 268 pp 37, 130, 134 and 143.

185. There is no merit in these complaints. The Speaker's reason for participating in the BOSASA litigation has been explained in para 115 of the Speaker's answering affidavit (Speaker's answering affidavit vol 3 pp 238-239 para115) and again in para 71 of the Speaker's SAA (Speaker's SAA vol 11 p 1146 para 71). 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 Public Protector's remedial action being is inappropriate and inconsistent with section 182(1)(c) of the Constitution because it impacts, inappropriately the Speaker

believes, on Parliament's constitutional sphere. The President and the Speaker are thus in materially different positions, and there is no reasonable basis for perceiving the Speaker's involvement in the BOSASA litigation as evidence of bias against the Public Protector.

IX. ADV MKHWEBANE'S CLAIM FOR PERSONAL AND PUNITIVE COSTS AGAINST THE SPEAKER

186. Adv Mkhwebane claims that costs should be awarded on a punitive scale against the Speaker, and that the Speaker personally should pay 20% of such costs, on the grounds that she has acted in bad faith, recklessly and grossly negligently. In what follows, after briefly explaining the applicable legal principles, we shall address, in turn, each of the main reasons or factors on which Adv Mkhwebane relies.

187. In *PP v SARB (CC)* (2019 (6) SA 253 (CC)) para 223 (bundle 590), referring to *Orr v Solomon* 1907 TS 281, the majority of the CC said:

'*More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.*'

188. In the same case at para 221 (bundle 590), referring to *Ka Mtuze v Bytes Technology Group SA (Pty) Ltd* 2013 (12) BCLR 1358 (CC) paras 4-5 and 9 and *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 84, the CC added:

'*This court has endorsed the principle that a personal costs order may also be granted on a punitive scale. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant.*'

189. As we shall demonstrate, in the present matter there is no basis to mulct the Speaker's office with punitive costs or the Speaker in her personal capacity with

punitive costs. She has merely been performing her duties as required by the Constitution and the New Rules, and has done so reasonably and in good faith.

190. First, Adv Mkhwebane cites the Speaker's failure to notify her of the removal process that had been initiated by Ms Mazzone MP on two occasions. The first was when the Speaker issued the media statement about Ms Mazzone's first motion on 25 January 2020. The second was when the Speaker accepted Ms Mazzone's second motion on 26 February 2020.

191. For three reasons, this complaint is unfounded:

191.1. First, Rules 129S and 129T do not provide that the Speaker should notify a Chapter 9 office-bearer of a motion to initiation proceedings for a section 194(1) enquiry. By contrast, Rule 129X(1)(c)(ii) requires that the independent panel, once established, must without delay provide the office-bearer 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.

191.2. Second, as regards the Speaker's media statement on 25 January 2020 (annexure TRM 44 vol 5 p 493)), the context is that on 24 January 2020, after considering Ms Mazzone's notice of motion, the Speaker was satisfied that it complied with the formal requirements of New Rule 129R and the Speaker consequently announced to the NA her receipt of Ms Mazzone's notice of motion; invited the political parties to nominate by 7 February 2020 candidates for appointment to the independent panel in terms of Rule 129V; and circulated a memorandum in similar terms to the Chief Whips of all political parties represented in the NA (see our heads para 62 p 33).

191.3. In her answering affidavit para 207 p 279 the Speaker gives three reasons why she made a public announcement at that juncture, namely (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 her memorandum to the political parties meant it was bound to receive some publicity and (c) she wanted to ensure that the media was able to report accurately on what was happening. We submit the Speaker cannot be faulted for making the announcement.

191.4. Third, as regards the Speaker's acceptance of Ms Mazzone's second motion on 26 February 2020, the context is (a) the Speaker received the motion on 21 February 2020, (b) on 25 February 2020 Parliament issued a media statement to the effect that Ms Mazzone had withdrawn her first motion and replaced it with a new one, and the Speaker would apply her mind to the new motion to determine if it meets the requirements provided for in the NA rules and (c) on 26 February 2020 the Speaker considered the second notice of motion, was satisfied that it conformed with Rule 129R, notified the Chief Whips and Adv Mkhwebane of the events of 21 February 2020 and of her decision and provided Adv Mkhwebane with copies of both of Ms Mazzone's motions (see our heads paras 76-83 pp 38-45).

191.5. In her answering affidavit para 169 p 265 the Speaker explains why she decided on 26 February 2020 to provide Adv Mkhwebane with copies of both Ms Mazzone's motions. She did so 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 (annexure TRM60 vol 6 pp 541-550), 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).

191.6. We submit the Speaker acted properly in dealing with these developments in the manner she did.

192. Adv Mkhwebane's second reason for seeking a personal and punitive costs order, concerns the fact that the Speaker did not give her an opportunity to be heard before deciding whether Ms Mazzone's motions were in order. As explained earlier, she had no right to be heard before the taking of those decisions and in any event she had the right to be heard by the independent panel.

193. The third reason given by Adv Mkhwebane for the personal and punitive costs order she is seeking, is the Speaker's failure to '*assess the substantive requirements of* [Ms Mazzone's] *motion'* and to perform the '*requisite prima facie assessment*'. We have responded to these contentions when dealing with Adv Mkhwebene's challenge to the Speaker's decision that Ms Mazzone's motion was in order. For the present suffice it to say that:

193.1. 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 – that is a task for the independent panel (see the Speaker's answering affidavit vol 1 pp 266-267 para171); and

193.2. on 26 February 2020 the Speaker carefully considered Ms Mazzone's second notice of motion and was satisfied that it conformed with Rule 129R (see Speaker's answering affidavit vol 3 pp 242-244 para 125, which must be read with annexure TRM60 vol 6 pp 540-550)

194. Adv Mkhwebane's fourth reason for seeking a personal and punitive costs order, is that the Speaker failed to provide reasons for decisions that Ms Mazzone's two motions were in order.

195. For three reasons, this complaint is unfounded:

195.1. First, as explained when responding to her eighth challenge to the New Rules, Adv Mkhwebane (like the incumbent of any other Chapter 9 office whose impeachment is sought) has no right to reasons for those decisions. Although section 5 of PAJA confers a right to reasons for administrative action, the Speaker's decision that a motion is in order is not administrative action subject to PAJA. There is no requirement in the Constitution, in any other law or in the NA Rules that reasons be given a decision that a motion is in order. Nor does procedural rationality require the giving of reasons.

195.2. Second, as already mentioned, in any event on 30 January 2020 the Speaker gave Adv Mkhwebane brief reasons for her decision that Ms Mazzone's first motion was in order, saying it complied with the form requirements of the Rules and no decision had been made as to the required *prima facie* assessment, as the independent panel was yet to be established (see Speaker's answering affidavit para 103 vol 3 p 234; annexure TRM46 vol 6 p 502).

195.3. Third, as also already mentioned, in her answering affidavit the Speaker gave Adv Mkhwebane detailed reasons for her decision that Ms Mazzone's second motion was in order (see Speaker's answering affidavit para 125 vol 3 pp 242-244, repeated in our heads para 80 pp 39-42).

196. Adv Mkhwebane's fifth reason for seeking a personal and punitive costs order, is her criticism of the Speaker's decision to accept Ms Mazzone's motions despite the fact that the evidence on which they are based concerns her conduct before

the New Rules were adopted on 3 December 2019. For the reasons set out earlier, the New Rules do indeed operate retrospectively. Moreover, and in any event, there was nothing unlawful, sinister or blameworthy about this aspect of the Speaker's decisions, which is fully explained in her answering papers.

197. Adv Mkhwebane's sixth reason for seeking a personal and punitive costs order is 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 and recused herself from managing the impeachment processes consequent upon Ms Mazzone's motions. For the reasons given earlier, there is no merit in this complaint.

198. The seventh reason Adv Mkhwebane gives for seeking a personal and punitive costs order against the Speaker concerns her failure to take action against alleged breaches by members of the NA of the *sub judice* rule (i.e. NA Rule 89), which provides that no member may reflect on the merits of any matter on which a decision in a court of law is pending.

199. There are three fundamental difficulties with this complaint.

199.1. First, the events on which this complaint are mainly based – namely, the statements critical of Adv Mkhwebane made by Members during the meeting of the Portfolio Committee on 6 March 2018 and all but one of the motions by Mr Steenhuizen calling for her removal – all happened during the Fifth Parliament, i.e. before the Sixth Parliament was constituted and the current Speaker, Ms Modise MP, was elected on 20 May 2020. The main factual foundations of the complaint are thus deficient.

199.2. Second, the complaint is legally unfounded as well. As appears from the Speaker's response in her answering affidavit para 261 pp 296-297, 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. At all material times, ss 55(2)(b)(ii), 181(5) and 194 of the Constitution have been in operation and have authorised members of the NA to oversee the Public Protector, hold her to account and seek her removal from office.

199.3. Third, and most fundamentally, even if the Speaker is wrong in her interpretation of the *sub judice* rule, there is no evidence of her interpretation being reckless, grossly unreasonable or in bad faith.

200. Adv Mkhwebane's eighth reason for seeking a personal and punitive costs order is her allegation that the Speaker has failed to recognise the reasonable views of members of the NA in respect of the handling of the litigation and the process, e.g. by refusing the give the ATM a reasonable extension to allow the ATM to apply its mind to the legal issues in the Part A application before nominating persons to serve on the independent panel. The other example she gives is the Speaker's decision not to halt the section 194 process pending the outcome of Part B.

201. There are two difficulties with this contention.

201.1. First, as regards her first example, the facts show that the Speaker acceded to the ATM's request and granted a reasonable extension. On 24 January 2020 she invited the political parties represented in the NA to nominate appointees to the independent panel by 7 February (see our heads para 63 p 34). On 5 February the ATM requested that she extend the time period (see our heads para 70 p 36). On 7 February the speaker advised all Chief Whips that the deadline had been extended to 12 February (see our heads para 71 p 36).

201.2. Second, as regards the Speaker's opposition to the relief sought by Adv Mkhwebane in this application, her opposition to the Part A relief was

found by the Full Court to be justified and her opposition to the Part B relief is reasonable and *bona fide*.

201.3. As regards Adv Mkhwebane's criticism of the Speaker's opposition to Part A, as the Full Court found, with respect correctly in its judgment 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.*'

201.4. As regards Adv Mkhwebane's criticism of the Speaker's opposition to Part B, she is merely defending rules adopted by the NA and a decision of hers to approve a motion taken with reference to those rules. The NA supported her decision to proceed with the impeachment process and by implication her approval of the motion as being in order, when on 16 March 2021 it voted in favour of the establishment of a section 194 committee.

202. Adv Mkhwebane's ninth and final reason for seeking a personal and punitive costs order is her allegation that on 8 June 2020 the 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.

203. We deal with this issue in our heads paras 254-257 pp 136-139, with reference to the factual matrix which is set out in our heads paras 93-104 pp 46-53.

204. 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.

205. 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.

206. When the Speaker communicated with Adv Mkhwebane on 8 June 2020 and with 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.

207. 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*, or in breach of the terms of the postponement agreed in March 2020, or '*inexplicable*', 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.

208. 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, in which they said the Speaker was amenable to the

procedural arrangements proposed in para 6 of her attorneys' letter, namely that Part A be heard on 12 and 13 August 2020.

209. 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.

210. 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.

CONCLUSION AND PRAYER

211. The Speaker accordingly prays for an order refusing the relief sought in Part B of the notice of motion with costs, including the costs of two counsel, payable by the Public Protector in her official capacity.

A M BREITENBACH SC

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First Respondent's counsel

Cape Town

8 June 2021