IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION (CAPE TOWN)

CASE NO: 2107/2020

In the matter between:

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

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FIRST RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT – PART B RELIEF

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INTRODUCTION

1. Pursuant to paragraph 3 of the Judge President's order of 15 February 2021, these supplementary heads of argument have been prepared to respond to certain of the written submissions in the heads of argument for the Applicant ('**Adv Mkhwebane**' and '**the PP's HoA**') dated 4 December 2020 which are not addressed (or addressed fully) in our main heads of argument on behalf of the First Respondent ('**Speaker**') dated 4 December 2021 ('**our main HoA**).

2. We shall not respond to the abbreviated chronology in the PP's HoA,[1] save to say the following:

   2.1. the chronology is highly selective and far from sufficient;

   2.2. the report of the meeting of the Portfolio Committee on Justice and Constitutional Development ('**the Portfolio Committee**') on 6 March 2018 referred to in paragraphs 36-38 of the PP's HoA is dealt with in paragraphs 28 and 243 of our main HoA;

   2.3. as regards paragraph 39 of the PP's HoA, the judgments of the Constitutional Court in '*the Reserve Bank matter*' (i.e. *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), the appeal by Adv Mkhwebane against the Full Court's order in *Absa Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP) that she

[1] PP's HoA 9-13: 30-46.

personally to pay 15% of the South African Reserve Bank's costs on an attorney-and-client scale, including costs of three counsel) were handed down on 22 July 2019, a date long after the Portfolio Committee's meeting on 6 March 2018; and

2.4. contrary to what is stated in paragraph 45 of the PP's HoA, as appears from paragraphs 48 to 57 of our main HoA the New Rules of the National Assembly ('**NA**') governing the process in the NA for motions for the removal of officer bearers of Chapter 9 institutions in terms of section 194 of the Constitution of the Republic of South Africa, 1996 ('**Chapter 9**' and '**the Constitution**') which were adopted unanimously in the NA on 3 December 2019 ('**the New Rules**') were not drafted by the Democratic Alliance ('**DA**').

3. We shall not repeat submissions made in our main HoA or in the DA's heads of argument dated 11 December 2020.

4. We shall address the following issues in turn:

4.1. Adv Mkhwebane's reliance on the rule against retrospectivity.

4.2. The admissibility of the court judgments tendered as evidence in support of Ms Mazzone MP's motion.

4.3. Whether the New Rules tamper with the grounds of removal in section 194 of the Constitution.

4.4. Whether the New Rules compromise judicial independence for the reasons given in the *Amabhungane* litigation concerning the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.

4.5. Adv Mkhwebane's double-jeopardy defence.

4.6. Whether the New Rules infringe the right to freedom of trade, occupation and profession in section 22 of the Constitution.

4.7. Adv Mkhwebane's claim for the suspension of the New Rules.

THE RULE AGAINST RETROSPECTIVITY[2]

The source of the power to remove is section 194, and not the New Rules

5. In essence Adv Mkhwebane reasons that:

5.1. her conduct that preceded the adoption of the New Rules on 3 December 2021 is immune from scrutiny under the New Rules because the rule or presumption against retrospectivity limits the applicability of the New Rules to conduct following their adoption; and

5.2. consequently, the reliance on her conduct which preceded the adoption of the New Rules in Ms Mazzone MP's motion for her removal, breaches the rule or presumption against retrospectivity and the maxim *nulla poena*

[2] PP's HoA 34-37: 120-132.

sine lege and the Speaker could not validly have decided that the motion was in order and consistent with the Constitution and the law.

6. We submit this reasoning 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. The New Rules merely particularise the elements of the grounds for removal and elaborates on the mechanism for removal in section 194.

7. 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 and *nulla poena sine lege* points do not even arise.

Adv Mkhwebane misapplies the rule against retrospectivity

8. In any event, Adv Mkhwebane has incorrectly invoked and applied the rule or presumption against retrospectivity as the starting point of her interpretation of the New Rules.

9. The correct legal position, we submit, is as articulated in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A).[3] In disagreeing with the *court a quo*'s identification of the initial inquiry being whether the provision at issue had retrospective effect, Hoexter JA held at 809F-H:

'*I venture to suggest that the first question which fell to be answered was rather this: What is the ordinary grammatical meaning of the words of the section? If such a meaning is apparent, and if it produces no obvious absurdity, repugnance or inconsistency, the inquiry ends there. The paramount principle, as has often been stated, is construction according to the plain import and effect of the words. In cases of ambiguity certain presumptions may be called in aid. One of them is the presumption against the retrospective operation of statutes. Legislation which is truly retrospective, and which operates ex post facto, may in some cases run counter to natural justice; and where there is ambiguity the presumption against retrospective operation is a strong one. The fact remains, however, that presumptions – whether they be weak or strong – have a purely auxiliary function; and they may be invoked in the process of interpretation only if the language in question is not clear.*'

10. NA Rule 129R provides in relevant part:

'*(1) Any member of the Assembly may, by way of a notice of a substantive motion in terms of Rule 124(b), initiate proceedings for a section 194(1) enquiry, provided that—*

(a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must prima facie show that the holder of a public office:

[3] Cited with approval by the Constitutional Court in *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) at fn 75 in relation to the general proposition that the presumption against statutory retrospectivity is an interpretive tool (*Adampol* at 805-807).

(i) committed misconduct;

(ii) is incapacitated; or

(iii) is incompetent;

(b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;

(c) all evidence relied upon in support of the motion must be attached to the motion; and

(d) the motion is consistent with the Constitution, the law and these rules.' (Underlining added.)

11. The term '*holder of a public office*' is defined in the New Rules as '*a person appointed in terms of Chapter 9 of the Constitution*'.[4] Insofar as Chapter 9 concerns the Public Protector, section 193(4) provides the President, on the recommendation of the NA, must '*appoint*' the Public Protector and section 183 provides that the Public Protector '*is appointed for a non-renewable period of seven years.*'[5]

12. We submit that, for the purposes of Rule 129R(1)(a) and (b), the charges in the motion initiating proceedings for a section 194(1) enquiry must, in this instance, relate to actions or conduct of Adv Mkhwebane personally in her capacity as the incumbent Public Protector in the period following her assumption of that office on 19 October 2016.[6]

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[4] Underlining added.

[5] Underlining added.

[6] Speaker's AA 188: 6.

13. Turning to the grounds for removal specified in section 194(1)(a) of the Constitution and elaborated upon in the New Rules, we submit that incompetence and incapacity, on the one hand, and misconduct, on the other, are distinguishable in the following presently relevant sense. While all three may (and, in the case of misconduct, must) be evidenced by a Chapter 9 incumbent's past actions or conduct – including, for the reasons just given, actions or conduct which preceded the adoption of the New Rules – a finding of incompetence or incapacity may only be made if the section 194 committee concludes that the incumbent *is* incompetent or incapacitated (i.e. it relates to a state of affairs which must be in existence when the finding is made). By contrast, a finding of misconduct is confined to the incumbent's actions or conduct at the relevant time(s) in the past.

14. For these reasons, we submit, the meaning and effect of section 194 of the Constitution and the New Rules is clear, the rule or presumption against retrospectivity cannot validly be invoked.

15. However, even if the Constitution and the New Rules are ambiguous as to *when* the action or conduct supporting a charge must have occurred, we submit that none of the South African authorities on which Adv Mkhwebane relies assists her.

    15.1. First, in *Genrec MEI (Pty) Limited v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and Others* 1995 (1) SA 563 (A), Van Heerden JA expressly linked the presumption against retrospectivity

to the question of whether retrospectivity would impact on vested rights or obligations.[7] The case concerned whether the industrial council had jurisdiction over a fixed-term undertaking for performance by employees on an oil rig located outside the territorial waters. The primary argument that the Labour Relations Act, 1956 applied to the dismissal of the employees in February 1991 failed on the facts, as the undertaking was to be executed extra-territorially. The secondary argument was that a subsequent amendment of the Act in 1991 retrospectively made it applicable to the undertaking. Van Heerden JA rejected the second argument, reasoning that the employer might well have acted within its contractual or common law rights by dismissing the employees and the legislature could hardly have intended to interfere so drastically with vested rights and obligations.

15.2. In this instance, the requirements in section 194(1)(a) of the Constitution that Adv Mkhwebane not commit misconduct or perform her tasks incompetently applied upon her appointment to office and were not altered by the New Rules. Equally, the NA's duty to oversee the proper performance of her functions as Public Protector stems from sections 55(2)(b)(ii) and 194(1) of the Constitution and is similarly neither augmented nor diminished by the New Rules.

[7] At 573A.

15.3. Adv Mkhwebane has no vested rights enforceable against the NA, nor has she pleaded any. Private law conceptions of vested rights do not apply to an incumbent Chapter 9 office bearer's constitutional relationship with the NA, delineated in Chapter 9 of the Constitution. And even if any such vested rights notionally existed, the constitutionally mandated removal power in section 194 would outrank them.

15.4. For these reasons, her reliance on *Petersen v Cuthbert & Company Limited* 1945 AD 420 is also misplaced, the issue in that case being whether the statute could retrospectively interfere with accrued rights in terms of a contract.

15.5. Secondly, Adv Mkhwebane relies on *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman National Transport Commission* 1999 (4) SA 1 (SCA) at para 12 as authority for the proposition that '*a retrospective interference with vested rights or the creation of new obligations or any imposition of new duties by the legislature is not lightly assumed.*'[8] However, that case concerned proceedings instituted in terms of a statute that had been amended after the hearing of an application for a permit had been completed. The question was whether the amendment deprived the decision-maker of the jurisdiction to finalise pending applications, in the absence of express language to that effect and transitional provisions to cater for pending applications. It is difficult to

[8] PP's HoA 37: 131.

see how *Unitrans* avails Adv Mkhwebane on the facts. It is also not the case that the New Rules impose any '*new obligations*' on Adv Mkhwebane, and indeed she has identified none.

15.6. Thirdly, relying on *Phaahla v Minister of Justice and Correctional Services and Others* 2019 (7) BCLR 795 (CC) at para 64, Adv Mkhwebane suggests that because removal from office is punitive in character, a link may be drawn to section 35(3)(n) of the Constitution,[9] which provides that every accused person has the right to a fair trial, which includes the right '*to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.*' While the majority of the Constitutional Court in *EFF (impeachment)* may have remarked that '*impeachment is punitive*',[10] it did so to explain why conditions on the power to impeach the President were necessary safeguards. It understood 'punitive' to imply the loss of benefits and being unable to occupy public office. However, it does not follow that impeachment is to be equated with punishment for a crime. In our law the fact that punitive measures exist outside the context of criminal law, such as administrative penalties, does not change their

[9] PP's HoA 36-37: 129-130.

[10] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) ('*EFF (impeachment)*') at para 138.

essential character as non-criminal remedies.[11] Accordingly, section 35(3)(n) of the Constitution is inapplicable.

THE ADMISSIBILITY OF COURT JUDGMENTS

16. Adv Mkhwebane seeks to draw a parallel between the Public Protector and judges, arguing that judges cannot be removed from office for incorrect decisions, and so the Speaker ought not to have approved the DA's motion for her removal because (so she contends) it is based solely on the judgments of courts in cases where her reports have successfully been reviewed.[12]

17. Like Chapter 9 office bearers, judges may be removed from office by a resolution of the NA on grounds similar to those in section 194.

18. Section 177 of the Constitution provides:

'*(1) A judge may be removed from office only if—*

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

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[11] *Pather and Another v Financial Services Board and Others* 2018 (1) SA 161 (SCA) at para 34 and *Brown v Economic Freedom Fighters* 2019 (6) SA 23 (GJ) at para 53.

[12] PP's HoA 38-39: 134-135 and 49: 162-165

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).'

19. While we accept that the remedy for a judgment by a judge which is merely incorrect is to be found in our system of appeals, a judgment can be used as evidence in proceedings for the impeachment and removal of the judge concerned in instances where the incorrectness of the judgment is evidence of gross incompetence or incapacity or is compounded by gross misconduct in relation to the judgment, or the preparation of the judgment is marred by gross misconduct (something which can occur even if the judgment is correct).

20. By parity of reasoning, we submit that a report by the Public Protector may be used as evidence in proceedings for the impeachment and removal of the incumbent.

21. 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), a case cited in the PP's HoA.[13] 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 cause 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

[13] PP's HoA 41: 140

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.

22. In review proceedings brought by the losing party, the High Court found that the magistrate had misconducted himself,[14] had engaged in improper conduct,[15] had been dishonest[16] and had '*abdicated his judicial office and thus put the judiciary as an institution into disrepute.*'[17] The High Court castigated the attorney in similar terms for her shocking behaviour.[18] The judges of the High Court concluded that '*the only reasonable conclusion is that the conduct of the respondents was indeed an unconstitutional, disgraceful dishonest and unlawful abuse of the judicial authority which the Constitution vests in the courts. In our view the misconduct under review is beyond the pale. The costs are to be awarded on a punitive scale as a mark of our disapproval of the respondents' misconduct*'.[19]

23. In its order, the High Court referred its judgment to the Legal Practice Council to investigate the conduct of the attorney. Had the magistrate not died before the

[14] At para 27.

[15] At para 30.

[16] At para 31

[17] At para 34.

[18] At para 31.

[19] At para 43, underlining added.

date of hearing,[20] the High Court would doubtless have ordered that the judgment be referred to the Magistrates' Commission for it to investigate his conduct too.

24. 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.

25. None of the charges of misconduct and incompetence in Ms Mazzone MP's motion based on the papers and judgments in proceedings for judicial review of reports by Adv Mkhwebane[21] are 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. Ms Mazzone alleges such actions and conduct constitute misconduct by Adv Mkhwebane or are evidence that she is incompetent.

26. We accordingly submit that the papers in the matters relied upon by Ms Mazzone MP, and the judgments of the courts which adjudicated those matters, may competently and properly be considered by a committee of the NA and the Assembly itself in the section 194 impeachment process.

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[20] At para 2.

[21] TRM60 540-550.

NO 'TAMPERING' WITH THE GROUNDS FOR REMOVAL IN SECTION 194

27. Adv Mkhwebane asserts that the New Rules '*t[a]mper*'[22] with the grounds for removal in section 194 of the Constitution by adding the phrases '*intentional*' and '*gross*' to misconduct and by introducing '*temporary incapacity*' as a new ground.[23] This complaint is misconceived.

28. First, Adv Mkhwebane does not explain why the inclusion in the New Rules of the requirements that misconduct be intentional or that negligence be gross is incompatible with the NA's duty to put in place rules to operationalise section 194 of the Constitution by, amongst other things, giving meaning to the grounds of misconduct, incapacity and incompetence set out in section 194(1).[24]

29. Secondly, it would follow from her objection that she considers misconduct, which is not intentional or grossly negligent, to be sufficient for her removal. It is hard to understand the rationale for her objection and nothing cogent has been proffered.

30. Thirdly, it is not correct that the New Rules introduce a new ground of temporary incapacity. Instead, they define '*incapacity*' as including '*a permanent or*

[22] PP's HoA 47: 158, (presumably) incorrectly stated as '*temper*'.

[23] PP's HoA 47-48: 158-160.

[24] As explained in our main heads at para 116, the NA is obliged to adopt rules which give meaning to the grounds of misconduct, incapacity and incompetence set out in section 194(1): see *EFF (impeachment)* at paras 176-178, referring to section 89(1) of the Constitution.

temporary condition that impairs a holder of public office's ability to perform his or her work'. 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 (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. (In any event, as Adv Mkhwebane is not charged with incapacity, this issue does not arise for decision.)

JUDICIAL INDEPENDENCE NOT COMPROMISED FOR THE REASONS GIVEN IN *AMABHUNGANE*

31. Adv Mkhwebane asserts that the New Rules breach the separation of powers impermissibly by providing for a judge to be appointed to the independent panel.[25]

32. In support of this assertion she relies on the judgment of Sutherland J in *Amabhungane Centre for Investigative Journalism and Another v Minister of Justice and Others* 2020 (1) SA 90 (GP). That judgment has now been superseded by the judgments of the Constitutional Court in the ensuing appeal, namely *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 (CC)***').

[25] PP's HoA 50-57: 170-188.

33. The presently relevant aspect of *Amabhungane CC* concerns 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*'), which 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.

34. As surveillance infringes the right to privacy in section 14 of the Constitution, the issue for decision in *Amabhungane CC* was whether the limitation was reasonable and justifiable in terms of section 36(1) of the Constitution. That issue, in turn, required the court to consider whether RICA contained adequate safeguards against unwarranted infringements of privacy.

35. In the Constitutional Court, as in the High Court, the applicants contended that RICA failed to ensure the independence of the designated judge, something which is an important safeguard to ensure that any authorised interceptions of communications and surveillance are within constitutionally compliant limits. The High Court agreed, finding that the selection of a designated judge by the Minister of Justice alone, through a secretive process and for a potentially indefinite term (through renewals of his or her term), compromised the perceived

and actual independence of a designated judge. The High Court accordingly declared RICA unconstitutional to that extent.

36. The majority of the Constitutional Court agreed, saying, amongst other things that:

36.1. '*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 CC* para 92); and

36.2. '*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 CC* para 93).

37. As is apparent, this aspect of *Amabhungane (CC)* is different from the judicial-independence issue raised by Adv Mkhwebane in the present matter. The question decided in *Amabhungane (CC)* was whether the manner of appointing the designated judge and the manner in which the designated judge issued surveillance directions contained the safeguards necessary for the designated judge to be, and to be perceived as being, independent of the executive. The question raised for decision in the present case is whether the appointment by the Speaker of a judge to the independent panel tasked with undertaking the

preliminary assessment of the evidence required by Rule 129X and reporting to and making recommendations to the NA regarding the impeachment motion will compromise the independence of the judiciary.

38. In any event, 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 the following important safeguards.

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

38.2. Secondly, 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)).

38.3. Thirdly, if a judge is appointed by the Speaker, the appointment must be made in consultation with the Chief Justice (Rule 129V(3)).

38.4. Fourthly, 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.

38.5. Fifthly, 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)).

38.6. Sixthly, 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)).

DOUBLE JEOPARDY

39. Adv Mkhwebane submits that the principle of double jeopardy debars the NA from taking any disciplinary measures against her in relation to conduct for which the courts have already imposed punitive or personal cost orders. Essentially, she argues that she should not be '*punished twice for the same incident of misconduct or poor performance.*'[26]

40. 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

[26] PP's HoA 57-58: 190-198.

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*'.

41. In *S v Basson* 2005 (1) SA 171 (CC) 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.*'[27]

42. Adv Mkhwebane's attempt to deploy the defence of double jeopardy is misconceived for the following reasons:

    42.1. First, none of the cases for judicial review of Adv Mkhwebane's reports put up by Ms Mazzone MP in support of her motion of Adv Mkhwebane's removal was a criminal matter, and the costs orders made against Adv Mkhwebane in those matters were not punishments for criminal offences committed by her; and, as explained in para 15.6 above, the present impeachment proceedings are not criminal proceedings either.

[27] Id at para 64.

42.2. Secondly, assuming (without conceding) that the rule against double jeopardy operates outside criminal proceedings, none of the judgments relied upon by Ms Mazzone MP 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. As Coppin J held in *Institute for Accountability*, the drawing of conclusions about Adv Mkhwebane's fitness to hold office as Public Protector is a function that falls outside the constitutional scope of authority of the Courts.[28] It would not have been legally competent for her to be in jeopardy of removal in court proceedings reviewing her remedial action.

42.3. Adv Mkhwebane impliedly recognises this when she submits that '*while the Public Protector frequently has to hold Parliament itself and its individual members accountable, they are also constitutionally enjoined to hold her accountable. It is a unique constitutional relationship.*'[29] It is this '*unique constitutional relationship*' which makes it impermissible for a Court to exercise any of the power in section 194 of the Constitution. Indeed, that was the very argument that she advanced before Coppin J.[30]

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[28] *Institute for Accountability in Southern Africa v Public Protector and Others* 2020 (5) SA 179 (GP) para 48.

[29] PP's HoA 46: 152.

[30] *Institute for Accountability* at para 35.

It must follow, on her own argument, that she was never previously in jeopardy of impeachment. For this further reason, therefore, her plea of double jeopardy must fail.

SECTION 22 OF THE CONSTITUTION

43. In heads of argument, for the first time, Adv Mkhwebane indicates that she intends to rely on reasonableness as a 'standalone' ground of review and/or unconstitutionality, '*particularly in relation to . . . the undue violation of the socio-economic rights contained,* inter alia*, in sections 22 and 23 of the Constitution*'.[31]

44. However, nowhere in her founding papers has Adv Mkhwebane pleaded reliance on the right to choose a trade, occupation or profession freely and to practise it, enshrined in section 22 of the Constitution. Moreover, the PP's HoA do not elaborate on her reliance on section 22.

45. An applicant seeking constitutional relief may not rely on grounds that have not been clearly articulated in the founding papers.[32] It is, therefore, impermissible at this stage for Adv Mkhwebane to attempt to introduce an argument based on section 22 of the Constitution.

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[31] PP's HoA 60: 200.3, underlining added. In our main HoA we have addressed Adv Mkhwebane's reliance on the right to fair labour practices.

[32] *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at para 40; *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 114.

46. In any event, Adv Mkhwebane's performance of her functions as Public Protector do not constitute the practice of a trade, occupation or profession, as envisaged in the second sentence of section 22 of the Constitution.[33] That right inheres in '*every citizen*', whereas the right and duty to exercise the powers and perform the functions of the Public Protector inheres only in the single citizen appointed to that office by the President, on the recommendation of the NA, in terms of section 193(4) of the Constitution.

ADV MKHWEBANE'S CLAIM FOR THE SUSPENSION OF THE NEW RULES

47. In paragraph 4 of Part B of her amended NOM[34] Adv Mkhwebane seeks the suspension of any order by this Court declaring the New Rules invalid.[35] She relies on section 172(2)(b)(ii) of the Constitution for that purpose.[36]

48. At paragraphs 142 and 143 of her supplementary affidavit ('**SA**') Adv Mkhwebane accepts that, if she succeeds in having the New Rules declared invalid, the Court will have a discretion to suspend the order of invalidity. She indicates that a period of six to 12 months or any other reasonable period would suffice, to afford the NA the opportunity to correct any such defect.

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[33] *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC), generally and see para 59.

[34] Amended NOM 911: 4.

[35] Amended NOM 977: 1.

[36] PP's supplementary affidavit ('**SA**') 968: 142-143.

49. However, in paragraph 221 of the PP's HoA the submission is made that the Court should grant '*an order suspending the implementation of the Rules while the National Assembly will be redrafting the new Rules governing the section 194 inquiry process.*'[37] Similarly in paragraph 6 of the PP's HoA it is stated that '*[s]hould the suspension main application (sic) be successful, the applicant will also seek the interim halting of the process whilst the National Assembly attends to the corrective redrafting of the Rules, either in terms of section 172(1)(b) of the Constitution, alternatively in terms of a contextual purposive and/or generous interpretation of section 172(2)(b) of the Constitution*.'

50. This is the first time Adv Mkhwebane intimates that, despite her seeking in her Amended Notice of Motion an order suspending any declaration of invalidity of the New Rules, she will also seek the halting of the impeachment process.

51. It appears that Adv Mkhwebane belatedly sought this unheralded further relief in anticipation of the dismissal of her attempts to seek leave to appeal against this Court's dismissal of her Part A application.[38]

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[37] PP's HoA 66: 221, underlining added.

[38] On 30 November 2020 this Court dismissed her application for leave to appeal to the Supreme Court of Appeal on the grounds that the appeal bore no reasonable prospects of success and there was no other compelling reason why the appeal should be heard. Adv Mkhwebane thereupon applied directly to the Constitutional Court for leave to appeal, but on 10 March 2021 the Constitutional Court dismissed that application on the ground that no case had been made out for a direct appeal to that Court. Adv Mkhwebane has not applied to the Supreme Court of Appeal for leave to appeal to it.

52. Our response is as follows:

52.1. 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 below), been sought. The amended NOM is silent on this score, and there are no allegations in any of Adv Mkhwebane's affidavit 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.

52.2. Secondly, Adv Mkhwebane apparently misunderstands the effect of an order in terms of section 172(2)(b)(ii) of the Constitution: The suspension of an order of constitutional invalidity does not have the effect of suspending the operation of the invalid law itself; instead, it preserves the *status quo* – i.e. allows the invalid law to remain operative until such time as the competent authority remedies the defect within the stipulated period. An order in terms of section 172(2)(b)(ii) suspending a declaration of invalidity of the New Rules until a future date, therefore, would permit the New Rules to remain in operation until the NA corrects the defect within such period as the Court may stipulate or upon

expiration of that period, whichever is the earlier. It would not lead to the '*suspension*' of the New Rules.

52.3. Thirdly, 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.

52.4. Fourthly, Adv Mkhwebane's newfound relief would have the net effect of a bald declaration of invalidity of the New Rules. This 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)*.

52.5. Fifthly, and should Adv Mkhwebane seek to limit the inoperability of the New Rules to her impeachment process (as envisaged in paragraph 6 of her heads of argument) alone, she has not made out any case for this in her affidavits. Furthermore, this would result in the irrationality of 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.[39]

52.6. The second to fifth reasons mean the suspension of the operation of the New Rules 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.

A M BREITENBACH SC

U K NAIDOO

A TOEFY

First Respondent's counsel

Cape Town

3 May 2021

[39] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 32

LIST OF FURTHER AUTHORITIES

1. *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A)
2. *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC)
3. *Genrec MEI (Pty) Limited v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and Others* 1995 (1) SA 563 (A)
4. *Petersen v Cuthbert & Company Limited* 1945 AD 420
5. *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman National Transport Commission* 1999 (4) SA 1 (SCA)
6. *Phaahla v Minister of Justice and Correctional Services and Others* 2019 (7) BCLR 795 (CC)
7. *Pather and Another v Financial Services Board and Others* 2018 (1) SA 161 (SCA)
8. *Brown v Economic Freedom Fighters* 2019 (6) SA 23 (GJ) at para 53
9. *Minister of Police v Vowana and Another* 2019 (4) SA 297 (ECM)
10. *Amabhungane Centre for Investigative Journalism and Another v Minister of Justice and Others* 2020 (1) SA 90 (GP)
11. *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)
12. *S v Basson* 2005 (1) SA 171 (CC)
13. *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC)
14. *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC)
15. *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC)
16. *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC)