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Our Ref: TNS/PUB1/0034 **27 January 2021**

Your Ref:

To: The Secretary of the National Assembly
Mr M Xaso
mxaso@parliament.gov.za

Mr T Nage
tnage@parliament.gov.za

Attention: Chairperson of the Panel

Dear Chairperson

RE: AUDI NOTICE: IN RELATION TO THE MOTION BY NWA MAZZONE, MP TO INITIATE AN ENQUIRY IN TERM OF SECTION 194 OF THE CONSTITUTION READ TOGETHER WITH THE RULES OF THE NATIONAL ASSEMBLY APPLICABLE TO THE REMOVAL FROM OFFICE OF OFFICE BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY.

1. We act on behalf of the Public Protector in this matter and the related ongoing litigation pending before the Western Cape High Court (Part B thereof) and the Constitutional Court (Part A).

2. Please find attached hereto a copy of representations submitted by and on behalf of the Public Protector as per the invitation of the Panel for her to do so.

3. Please feel free to address any future correspondence either to us or directly to the Public Protector, or both.

4. We trust that the above is in order and look forward to hearing from the Panel if necessary.

5. Kindly acknowledge receipt hereof.

Yours Faithfully

SEANEGO ATTORNEYS INC.
Per: Theo Seanego

BEFORE THE INDEPENDENT PANEL
APPOINTED IN TERMS OF RULE 129

In the matter between:

NATASHA MAZZONE MP Complainant

and

THE PUBLIC PROTECTOR Respondent

REPRESENTATIONS ON BEHALF OF
THE PUBLIC PROTECTOR

INTRODUCTION

1. These representations / submissions concern the fairly unchartered waters of the principles which ought properly to guide an independent panel ("the panel") appointed by the Speaker of the National Assembly ("the Speaker") in order to determine whether there is *prima facie* evidence to show that the Public Protector ("the Public Protector") may be found "*guilty as charged*".

2. Simply put, the task or duty of the panel is fourfold:

   2.1. to conduct a preliminary assessment;

   2.2. to make a determination;

   2.3. to compile a report; and

   2.4. to make recommendations, with reasons.

3. The primary purpose of these submissions or representations is to seek to persuade the panel that in its report, it should return a determination to the effect that, upon a holistic evaluation of the complaint motion, there is no *prima facie* evidence to show the alleged misconduct and/or incompetency on the part of the Public Protector and accordingly to recommend that the section 194 impeachment process be terminated and taken no further.

4. The accent we put on "holistic" is the epitome of the approach we adopt in these submissions. The panel may choose a narrow approach in terms of which it would only look at the literal words used to support the complaint and determine whether, if true, the words used in the motion would constitute a "*case to answer*". Alternatively, the panel may adopt a broader and more holistic approach, in terms of which it looks at the words used and the accusations made in the context of the relevant provisions of the South African Constitution, the pivotal requirements of fairness, the public interest and the legal context within which the alleged conduct took place, including the ongoing litigation in various civil and criminal courts. Needless to say, we commend the latter broader and holistic approach.

5. In our humble submission, it would be impossible, undesirable and even improper for the panel to make the requisite determination without taking into account the meaning of section 194 of the Constitution and other relevant provisions of Chapter 9 thereof, as well as the relevant provisions of the Bill of Rights and constitutional values. Against that background, a careful examination of the provisions of the new Rule 129 of the Rules of the National Assembly (which is, incidentally, itself the subject of a separate

comprehensive challenge to its constitutional validity, based on 12 separate grounds).

6. The preferred holistic approach is consistent with the provisions of Rule 129X(1)(c)(vii), which limit or define the parameters of the panel's assessment to "*the written and recorded information placed before it by members, or by the holder of a public office (in this case, the Public Protector), in terms of the rule (ie Rule 129)*" (emphasis added).

7. In terms of the rules, the nature of the information which the Public Protector and the members of the National Assembly are required or permitted to place before the panel is circumscribed only by the legal standard of relevance. When once the information supplied to the panel is relevant, then the panel must take it into account in its assessment and in making the consequential determination.

8. As to what is relevant, regard must be had to the applicable provisions of Rule 129, including:

8.1. Is the complaint motion before the panel proper, valid and "*in order*"?

8.2. Is the panel properly constituted, taking into account our constitutional dispensation?

8.3. Can the panel operate without regard to the requirements of Rule 129X(1)(a) that:

> "*The panel must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice*";

8.4. Can the panel discharge its functions without completely applying the provisions of Rule 129X(1)(b) that:

> *"The panel must, within 30 days of its appointment, conduct and finalise a preliminary assessment relating to the motion proposing a section 194 inquiry to determine whether there is prima facie evidence to show that the holder of public office:*
>
> *(i) committed misconduct;*
> *(ii) is incapacitated; or*
> *(iii) is incompetent*" (emphasis added)

9. In a nutshell, the narrow approach would only focus on what is stated at paragraph 8.4 above, while the more appropriate holistic approach must consider all of 8.1 to 8.4, failing which the panel's mandate will not have been properly and rationally discharged.

10. For the avoidance of any doubt, it is readily conceded that the panel must generally proceed from the premise that, until they have been lawfully set aside by a court of law, the rules must be regarded as constitutionally valid *per se*. This however cannot prevent the panel, in the discharge of its mandate and prescribed duties and without necessarily duplicating or usurping the function of the courts, from making a holistic assessment, as advocated above, in order to make the requisite determination. In the event that in so doing, there may be a coincidence or overlap with some of the questions raised in the court papers, that would be an inevitable consequence of the fact that both forums are interpreting the same set of rules, albeit for different purposes.

11. Whether by design or inadvertently, for some inexplicable reason, the panel has seemingly not been furnished with the original motion of the Democratic Alliance ("the DA") which was submitted within 72 hours of the resolution approving the rules. It is impossible to understand the true genesis of the current process without having regard to that motion, its unlawful approval without giving the Public Protector a hearing, its public announcement in the media without even informing the Public Protector of its existence and the correspondence which was exchanged between the Public Protector and the Speaker before the motion was suddenly "withdrawn" only to be replaced on the same day with the present motion submitted on 21 February 2020. Accordingly, we annex hereto, marked "**BM1(a)**" to "**BM1(f)**", a bundle of the relevant documentation relevant to those issues.

12. With all the above in mind, we now proceed to deal with the broad topics or issues postulated at paragraph 8 above, on the basis that if the answer to any single one of the four broad questions framed there is in the negative, the panel must return a determination against the further continuation of the section 194 process which is underway.

QUESTION 1 : Is the motion in order?

13. Upon a proper interpretation of the rules, it will be obvious that the only trigger for the appointment and jurisdiction of the panel is the objective existence of a complaint motion which is "*in order*". Absent such a motion, the panel must not be appointed and if it is, it will lack jurisdiction to perform any duties.

14. The legal principles which underlie this topic will be illustrated by making reference to the requirements of a valid charge in the context of a criminal trial.

This illustration must obviously not be taken literally but *mutatis mutandis* by allowing for the necessary adjustments stemming from the differences between the present section 194 proceedings, which are more akin to disciplinary proceedings than criminal proceedings. However, certain principles and considerations of fairness clearly apply equally in both types of proceedings which are intended to have punitive consequences against a person or citizen. This much was authoritatively confirmed by the Supreme Court of Appeal, per Swain JA, in the case of *Coetzee*,[1] as follows:

> "*There is authority for the proposition that a charge sheet in a disciplinary enquiry does not have to be framed with the same particularity, or with all the formalities of a charge in a criminal trial. However, the better view is that although the same degree of formality is not required, the same degree of particularity of the factual information underlying the allegations made, is required to enable the accused to know what case he or she has to meet. This is particularly so where the disciplinary body has the power (as in the present case) to make findings with far-reaching consequences*" (emphasis added).

15. The simple principle is that if the charges (or the charge sheet) are indeed shown to be defective, then it can hardly be proper for the panel (or any adjudicative body charged with making a determination as to the existence of a *prima facie* case in respect of a punitive process) to ignore that fact and to give the go-ahead for the process to proceed further, regardless of such defects.

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[1] *Coetzee v Financial Planning Institute of South Africa* [2014] ZASCA 205 (unreported, SCA case No 1079/13, 28 November 2014; 2014 JDR 2356 (SCA) at paragraph [17]

16. As a matter of logic, the panel cannot determine the existence or non-existence of a *prima facie* case in the air but only by referencing or juxtaposing the evidence presented against the charges as framed. If the charges themselves are fatally defective, there can be no question of *prima facie* evidence to resuscitate them by breathing new life into them like the biblical Lazarus.

17. Subject to the qualifications mentioned above, reference will be broadly made to the relevant provisions of the Criminal Procedure Act relating to the charge (ie sections 80 to 104). Specific reliance will be placed on sections 83 and 85. Section 85 states in a nutshell that an accused person may object to a charge, even before pleading thereto, and that the prosecuting body may, in appropriate cases, be ordered to amend the charge, failing which the charge may be quashed upfront.

18. In this context, the task of the panel may be likened to the determination in terms of section 174 of the Criminal Procedure Act, whether or not a *prima facie* case has been made out and the trial ought therefore to proceed any further or be summarily terminated by discharging the accused. That principle is self-evidently rooted in fairness. The purpose of instituting the independent panel stage is clearly meant to serve as a similar mechanism to sift out undeserving cases and not to further waste the time, money and effort of all the parties on an obvious wild goose chase which is bound to fail.

19. The logical starting point in this analysis is Rule 129R(2), which provides that:

"*For the purposes of proceedings in terms of s 194(1), the term 'charge' must be understood as the grounds for averring the removal from office of the holder of a public office*" (emphasis added).

20. Secondly and crucially, it must be appreciated that the existence of a motion which is "*in order*" is the necessary trigger and jurisdictional prerequisite for:

20.1. the valid appointment of the panel; and

20.2. the referral by the Speaker of the motion to the panel.

21. That much is clear from the wording of Rule 129T, which provides that:

"*When the motion is in order, the Speaker must:*

(a) immediately refer the motion and supporting documentation provided by the member to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and

(b) inform the Assembly and the President of such referral without delay." (emphasis added).

22. In turn, it will be clear that, in the present case, the initiation of the section 194 inquiry and, more specifically, the declaration of the "*in order*" decision of the Speaker was fatally defective in that, by her own admission or confession, she failed to make the prescribed assessment of the substantive validity of the motion and only confined herself to the question of form. This is a peremptory duty.

23. The Speaker, by her own admission, elevated form over substance and did so in spite of the clear provisions of Rule 129P that:

"*Any member of the Assembly may by way of a notice of a substantive motion in terms of Rule 124(6), initiate proceedings for a s 194 enquiry, provided that:*

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

(i) committed misconduct;
(ii) is incapacitated; or
(iii) is incompetent.

(b) …

(c) …

(d) The motion is consistent with the Constitution, the law and these rules" (emphasis added).

24. It can never be seriously suggested that the abovementioned duties of the Speaker in making the "*in order*" decision refer only to form. If anything, only the requirements of Rule 129R(b) and (c) relate to formalistic requirements. By way of contrast, the requirements of Rule 129(a) and (d) deal with matters of substantive law.

25. Despite the above and upon being requested by the Public Protector in her letter dated 28 January 2020 (see annexure "BM1(d)"), the Speaker made the frank admission that she had in fact not considered matters of substance. This admission or confession was made in the Speaker's signed letter dated 30 January 2020 (see annexure "BM1(e)"). Due to its importance, it is apposite to quote the relevant portion of the letter:

"*I therefore confirm that:*

(a) *the substantive motion complied with the form requirements in the rules;*

(b) *no decision has been made as to the required prima facie assessment, as the independent panel has yet to be established, after which the panel must conduct and finalise a preliminary assessment, which will include an invitation to the holder of the public office to comment on the substance of the motion*" (emphasis added)

26. To call the above articulation a blatant misreading of the applicable rules would be a gross understatement.

27. In view of the aforegoing indisputable and fatal defect, the jurisdictional requirement for the appointment of the panel and/or the referral of the motion to it was never met. The proper determination that the motion is "*in order*" is a *sine qua non* for a valid appointment of and a lawful referral of the motion to the panel.

28. Any determination by the panel that the Speaker and/or the National Assembly must nevertheless forge ahead with the enquiry, in spite of such a glaring omission and irregularity, will only serve to sanction a time-wasting exercise which is doomed to fail. It will only perpetuate the illegality and postpone the inevitable.

29. In any event, it is patent that what the drafters of the rules actually intended was that the first *prima facie* assessment must be conducted by the Speaker before making the "*in* order" determination and that the independent panel's assessment be the second external and independent assessment. The Speaker herself has subsequently conceded in the Part A court papers that

what was envisaged was a "*double-filtering mechanism*". It is unlawful for the panel to conduct the *prima facie* assessment as a forum of first instance, which is the case here. The "*double-filtering mechanism*" was clearly intended to ensure maximum fairness. (This is akin to the assessment of a *prima facie* case by the NPA, which must precede the assessment of a *prima facie* case by a magistrate or judge at the closure of the state's case in criminal proceedings.)

30. Such a double-filtering mechanism is hardly surprising in any multi-staged process such as that envisaged in the Constitution and the rules. Each stage is important and it ought to attract a separate right of hearing and the opportunity to make representations before an adverse decision is made. The Speaker failed in this regard. This is an incurable defect which will fatally taint this process until it is corrected by starting the process *de novo*, or simply aborting it at the earliest available opportunity, which is here and now.

31. The glib response by a public official making a discreet adverse finding against a person that the latter will "*get your audi later*" and from a separate entity, just cannot wash in the case of a multi-staged process such as the present.

32. On the above ground alone, the panel cannot conceivably give its go-ahead to the further conduct of the present enquiry, which is the product of such a gross deviation from the rules which form the foundation of the entire section 194 enquiry. The present motion was dealt with in the same way.

33. At the risk of repetition, it is a jurisdictional requirement that the motion be *"consistent with the Constitution, the law and these rules*". For the reasons advanced above, the present motion does not meet that standard.

The unlawful retrospective application of the rules

34. Arguably, the most glaring defect of the current process is that the Speaker, without justification, wrongly assumed that the rules could be applied with retrospective effect.

35. The alleged transgressions which form the subject matter of Charges 1 to 4 took place before the promulgation of the rules on 3 December 2019. As the first DA motion was submitted 72 hours later on 6 December 2019, the only transgressions which could have been properly raised would have had to be committed between the 3rd and the 6th of December 2020. Similarly, the second motion could only deal with transgressions committed between 3 December 2019 and 21 February 2020. In short, any conduct which took place before the rules were in place was legally out of bounds.

36. The legal rule or presumption against retrospectivity is a fundamental constitutional rule based on fairness and the rule of law, in short due process.

37. Legal instruments such as the present rules are presumed to only operate prospectively, unless the contrary is clearly stated or was intended .the presumption applies with equal force in respect of procedural rules. It has for example been recently and authoritatively affirmed in respect of the non-retrospectivity of the new Rule 32 of the Uniform Rules of Court.[2]

38. There is nothing in the present rules which evinces an intention by the drafters to deviate from the general rule against retrospectivity.

[2] See the recent judgment of the Full Court in *Raumix Aggregates v Richter Sound* 2020 (1) SA 623 (GJ) at paragraphs [7] to [9]

39. Incidentally, the failure of the Speaker to even realise this irregularity stems directly from two other fatal errors, namely:

39.1. her failure to assess the substantive validity of the motion (as discussed above); and

39.2. her egregious omission to inform the Public Protector of the motion and to afford her an opportunity to be heard before making the crucial "*in order*" decision. Had such an opportunity been granted, then the Public Protector would have pointed out this glaring defect in the charges. This may well have been the end of the matter. Instead, the Speaker saw it fit to inform the media and the public of the charges and only communicated them to the Public Protector subsequently. Not only is such conduct unfair but it offends against all motions of *ubuntu* and common decency.

40. The process ought to be halted on these separate considerations. At best for the Speaker, the rules need to be amended to provide for retrospective application, if indeed that was the intention of the National Assembly when passing the resolution. However, as the rules currently stand, they do not disclose an offence in respect of conduct which predates their enactment. In such circumstances, there can be no *prima facie* case or evidence to support a conviction under section 194.

Double jeopardy and/or duplication of convictions

41. The charges based solely on various court judgments are defective in that they principally offend against the principle of double jeopardy, another

fundamental principle of fairness which is applicable to all punitive proceedings.

42. The judgments relied upon constitute clear evidence that the Public Protector has already been punished for the very same offences and/or transgressions alleged by the complainant, albeit by a different arm of the state. In the case of the *SARB / CIEX* matter, she was already punished twice, with punitive costs allocated personally to her.

43. Although admittedly said in a minority judgment, reference can still be made to the words of Mogoeng CJ in the *SARB / CIEX*[3] judgment, when he said:

> "*When a representative litigant is ordered to pay not only ordinary costs but also costs on an attorney and client scale from her own pocket, it amounts to an unmasked double punishment*" (emphasis added).

44. Significantly, the majority judgment concurred with the abovementioned characterisation of the Chief Justice. Justice Khampepe, writing for the majority, stated:

> "*An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment, be viewed as 'double punishment'*"[4] (emphasis added).

45. The rhetorical question which arises is: Can it be constitutionally justifiable to visit the Public Protector with the further punishment of removal from office in

[3] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (GP) at paragraph [39]
[4] At paragraph [220]

addition to the double punishment already imposed and in relation to the very same offence(s)? We submit not.

46. This would in fact result in "triple jeopardy" in the present circumstances.

47. The National Assembly would then be exceeding its jurisdiction in that it would potentially be subjecting the Public Protector to a process intended to impose a sanction in addition to the punishment(s) already imposed. In total, the Public Protector would incur a double or triple punishment for the same offence. This is the very mischief which the rule of fairness, known as the double jeopardy rule, seeks to prevent.

48. As correctly stated by Ebrahim J in *S v Radebe*:[5]

> "*The rule against a duplication of convictions is a rule previously aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused person in the form of double jeopardy, that is being convicted or punished twice for the same offence when in fact he or she only committed one offence*" (emphasis added).

49. In this regard, it ought to be borne in mind that the punitive effect of the order which was granted and irreversibly confirmed by the Constitutional Court will probably run into millions of rand given the volume of papers, the number of parties and different courts traversed. This would be higher than any potential criminal fine which could have been imposed and it would have the effect of potentially "*(ending) her career and, at best for her, drown her in debt*", in the words of the Chief Justice in his minority judgment.

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[5] *S v Radebe* 2006 (2) SACR 604 (O) at paragraph [5]

50. In also correctly using the analogy of criminal punishment to describe the punitive costs order, Mogoeng CJ also said:

> "*… when any cost order is made, especially of a double punitive nature like ordering a representative litigant to not only pay costs out of her own pocket on an ordinary scale but also on an attorney and client scale, several factors must be taken into account. They are the economic realities that apply at the time of awarding costs, the capacity or predictable incapacity to pay and whether that order serves as constructive or corrective punishment … or whether it is in effect an instrument of destruction or irreparable harm. That would explain why, using crime as a comparator, removing people's limbs or organs is never an option and the possibility of being released on parole exists even for murderers. … No costs order ought ever to be made regardless of its consequences or impracticability or the injustice and inequity it would yield. Courts are all about justice and equity*" (emphasis added).

51. It is respectfully submitted that the mere fact that such multiple (double or triple) punishments happen to emanate from different arms of the same state ought not to make any difference if the matter is viewed from the point of view and in favour of the individual bearer of constitutional right. The impact on her remains oppressive and excessively harsh and beyond the contemplation of the Constitution. At worst, this is a moot point which ought to be decided in *favorem libertatis* and by the application of *ubuntu* and modern progressive theories of punishment.

52. To compound the problem, on a closer examination of the charges and the evidence tendered, it will be observed that there is a duplication of charges. Firstly, the same conduct is used to justify more than one charge. Secondly, the same evidence is relied upon to support "different" charges. For example,

the evidence relied upon in support of Charges 1 and 2 is also listed in support of Charge 3. Further, the evidence used in support of Charges 1, 2 and 3 is listed in support of Charge 4. This is a conceptual nightmare which presents all sorts of problems regarding the fairness of the process in relation to the interconnectedness of the "evidence".

53. Thankfully and for the purposes of this section, it matters not whether one uses the language of double jeopardy or duplication of convictions. The underlying principle is the same, namely that it would be unfair to convict or punish a person twice for committing the same offence or misconduct. The result will be excessive punishment which may even exceed the jurisdiction of the second forum. This can be best illustrated by a mathematical presentation, as follows:

> If *x* represents the magnitude of the punishment already meted out to the Public Protector; and
> *y* is the maximum limit of the punishment which the National Assembly can impose (ie removal); and
> *C* represents a section 194 conviction by the National Assembly;
> Then whenever x is greater than *zero*, such a conviction will inevitably result in a punishment which is in excess of its jurisdiction; or
> $C = x + y$

54. In simpler terms, the cumulative or total punishment will invariably be excessive and more importantly it will fall outside the penal jurisdiction of the National Assembly. Such a process is fundamentally flawed *ab initio*.

55. Bearing the above in mind, it is respectfully submitted that upholding the objection based on double jeopardy or duplication by this esteemed panel will

serve the ends of justice and equity. It will prevent the possibility and inherent unfairness of, having brought the Public Protector into financial ruin, also taking away her career, income and livelihood. That double death sentence belongs to the jungle not the law according to *ubuntu* and other values based on humanism.

Prematurity (self-incrimination and pending civil and Constitutional Court proceedings)

56. Next, we deal with the all-encompassing topic of prematurity as a reason why the panel ought to recommend a termination, alternatively a temporary suspension of the process, based on considerations of law and fairness.

57. This ground is based on two separate major recent developments which have taken place during the extended period within which these representations were requested.

58. The first of these relates specifically to the first charge or Charge 1, which deals with allegations of misconduct in the *SARB / CIEX* matter.

59. As the panel must be aware, on 15 December 2020, the National Prosecuting Authority announced its decision to institute criminal charges of perjury against the Public Protector under case No CAS 436/08/2019 (Hillbrow). Her first appearance took place in the Pretoria Regional Court on 21 January 2021. The matter has been remanded to 25 March 2021.

60. The charges relate directly to the very same subject matter of Charge 1 and the evidence relied upon is exactly that listed in the motion of impeachment,

as can be observed from a copy of the charge sheet, which is annexed hereto marked "**BM2**".

61. This development automatically triggers the application of section 35(3) of the Constitution, read with section 203 of the Criminal Procedure Act, in terms of which the Public Protector intends to exercise her rights to silence and/or the privilege against self-incrimination.

62. Insofar as the Public Protector's further participation in the section 194 enquiry will certainly infringe upon her aforesaid constitutional rights and protections, it would be premature to recommend a further continuation of the said enquiry and it ought accordingly to be stayed until the finalisation of the criminal proceedings.

63. In this regard, it is worthy of emphasis that the privilege against self-incrimination is not confined to criminal proceedings and it applies in civil proceedings, as well as administrative or quasi-judicial hearings such as the present section 194 impeachment enquiry. The Constitutional Court, per Ackerman J, explained it as follows:[6]

> "*In South African law, the privilege is not limited to criminal or civil trial proceedings because … it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial or during the trial.*
>
> *The privilege has been described as one of the personal rights to refuse to disclose admissible evidence, the particular right in terms whereof 'a witness may refuse to answer a question where the answer may tend to expose him to a criminal charge' and is also available, for example, to a*

[6] *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) at paragraph [96}

person called as a witness in inquest proceedings. With reference to the above-quoted passage from R v Camane, Thirion J observed in S v Khumalo that:

'(t)here is indeed even a greater need for protection of the accused against force self-incrimination before the trial than there is at the trial.'

Hoffman and Zeffert also point out that the privilege may be claimed in administrative or quasi-judicial hearings."

64. This argument ought to put paid to the ripeness of the section 194 enquiry, more particularly in relation to Charge 1. In relation to that charge and taking into account what has been said in the preceding section, the Public Protector will have been exposed to quadruple jeopardy at the end of it all, for the same single offence!

65. In respect of the right against self-incrimination in the analogous context of a section 174 application in criminal proceedings, the following words of Nugent AJA in *Lubaxa* are significant:

> "*The failure to discharge an accused in these circumstances, <u>if necessary mero motu</u>, is in my view a breach of the rights that area guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusi8vely upon (the assured person's) self-incriminatory evidence.*"[7]

66. Regarding the rest of the charges, it also needs to be taken into account that the judgment of the Western Cape High Court dismissing Part A of the ongoing application to declare the rules unconstitutional is now the subject of an ongoing appeal process in the Constitutional Court. The essence of the

[7] *S v Lubaxa* 2001 (2) SACR 703 SCA at paragraph [18]

relief sought is to suspend the section 194 enquiry pending the final declaration of unconstitutionality or otherwise. The relevant application for leave to appeal was duly delivered in December 2020 and the respondents have since delivered their answering affidavits. The directions of the Chief Justice are awaited shortly. In the meantime, it would be prejudicial and unfair to proceed as if the said application for interim relief does not exist. This is a factor which the panel is fully entitled to take into account in conducting its own assessment and making recommendations as to the way forward given the constitutional context.

67. In the totality, the current process is premature. Most certainly in respect of Charge 1, it cannot continue without violating the Public Protector's constitutional rights. Arguably, in respect of the remainder of the charges, the other aforestated considerations of fairness would militate against a continuation.

68. It is in any event doubtful if the charge sheet can be split up into separate parts, which are subjected to separate processes. It is either the entire section 194 enquiry is proceeded with or halted for lack of a *prima facie* case or evidence upon which the National Assembly may lawfully impeach.

69. Given the obvious symbiotic interconnectedness between all the charges, as referred to in paragraph 51 above in the context of duplication, if Charge 1 is incapable of present prosecution, then the entire charge sheet must fall. On a plain reading of the charge sheet, more specifically paragraphs 8.1 and 12.1 (read with 7.1 and 7.2) thereof, all the charges are interlinked and dependent on the same evidence. They therefore stand or fall together.

Summary in respect of the first question

70. It is respectfully submitted that on the basis of any one or more or all of the grounds advanced above, the panel ought to determine that there is no legal basis and/or *prima facie* evidence upon which a reasonable legislature may convict or remove the Public Protector at this stage or at all, as the case may be. She certainly cannot possibly be found guilty "*as charged*", ie on the basis of the charge sheet as it is currently articulated in annexure A of the motion.

71. The first question must therefore be answered in the negative. If so, there should be no need to proceed any further with the assessment. We however do so in the event that the panel holds otherwise.

QUESTION 2 : Is the panel in any event properly constituted?

72. Like any statutory body, organisation, board or committee which is a creature of statute or other governing instrument, its first order of business ought to be making a determination that it is properly constituted, failing which its decisions will be *ipso facto* null and void. Such an enquiry would normally extend to issues such as the quorum, stipulated frequency or meetings, and the like.

73. In one sense, it has already been demonstrated above that the panel was improperly or prematurely appointed and that the referral of the motion to it was also unwarranted at this stage. This has been articulated as a jurisdictional defect. In administrative law terms, lack of jurisdiction is synonymous with *ultra vires* or illegality.

74. Secondly and tied up with the ongoing litigation, one of the grounds of unconstitutionality is that the Speaker has no constitutional power to appoint a judge to perform a non-judicial task. The fact that this was purportedly done with the involvement of the Chief Justice is an aggravating factor as neither the Speaker nor the Chief Justice, individually or in combination, possess the requisite power to so appoint. It is trite law that no public functionary can exercise a power which is not specifically conferred upon them, either by the Constitution or valid legislation. The panel will be familiar with the well-known leading cases of *Pharmaceutical*[8] and *Fedsure*.[9]

75. For these reasons, it is respectfully submitted that the panel is not properly constituted, alternatively considerations of fairness in any event dictate that the determination of the Constitutional Court appeal (Part A) and the pending Full Court hearing in respect of Part B should preferably be decided before the legality or otherwise of the panel can be assumed.

76. The second question accordingly must also be answered in the negative. If so, the panel is enjoined to return a verdict to the effect that there is no *prima facie* basis for taking any further steps on the basis of these additional considerations on the grounds that, even if the charges were properly articulated, which is still denied, there is a sufficient degree of doubt in the collective mind of the panel regarding the propriety of its constitution.

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[8] *Pharmaceutical Society of SA v The President of the RSA* 2000 (2) SA 674 (CC)
[9] *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metro Council* 19999 (1) SA 374 (CC)

QUESTION 3 : Can the panel lawfully operate outside of the parameters imposed in Rule 129(1)(a)?

77. Assuming that the panel nevertheless determines that it is indeed properly constituted, it is respectfully submitted that the wording of Rule 129(1)(a) makes it abundantly clear that the panel must be:

(i) independent;

(ii) impartial; and

(iii) subject only to the Constitution, the law and these rules.

78. In this regard, it should be unnecessary to point out that, although it is appointed by the Speaker, the panel must exercise its powers in the public interest, independently, impartially and without fear, favour or prejudice. This is a burdensome task. For the record, we are confident that this panel is up to this task but we merely wish to highlight the scope of its operations in that regard, namely that the three criteria prescribed above give the panel a very wide discretion in the performance of its duties and that despite its parentage from the Speaker, it is not a panel of the Speaker but an independent panel representing the people and bound by the Constitution.

79. Regarding the important requirement that the panel should be subject to the Constitution, the law and these rules, we wish to highlight that the panel is therefore entitled to apply the constitutional values and principles, such as equality before the law, the rule of law (non-retrospectivity), rationality, fairness, human dignity and *ubuntu* in its consideration of the material placed before it. It will be a sad day if the panel interprets the ambit of its powers and discretion narrowly. It must be borne in mind that the panel is a creature of

rules without which no impeachment process can take place. All the parties agree that these rules are, with the necessary adjustments, a direct or indirect product of the judgment of the Constitutional Court in the so-called *EFF Impeachment* case,[10] in which Jafta J correctly pointed out that:

> "*Without rules defining the entire process, it is impossible to implement section 89 (of the Constitution)*"[11] (emphasis added).

80. Jafta J went on to say, significantly, that:

> "*Without accepting that one of the listed grounds existed, the Assembly could not authorise the commencement of a process which could result in the removal of (the President) from office … If that motion had succeeded, it would not have constituted impeachment and removal of the President, as contemplated in s 89(1). Instead, it would have been an unconstitutional removal of the President from office and would have been liable to be set aside on review*"[12] (emphasis added).

81. The relevance of these dicta to the present exercise is that the panel ought properly to see its intended purpose and role as being to be a filter for preventing the (further) implementation of a process which does not constitute an impeachment process, as contemplated in section 194(1) and which will accordingly be "*liable to be set aside on review*".

82. The panel therefore has a wide discretion and a relatively free hand in the performance of its task, subject, of course, to the limits imposed by the text of the relevant rules. More specifically, the panel has no obligation to adopt the

[10] *EFF v Speaker, National Assembly* 2018 (2) SA 57 (CC)
[11] *EFF v Speaker*, at paragraph [182]
[12] At paragraphs [205] and [206]

narrow approach in favour of the more appropriate holistic approach, as defined in the introduction section above. Neither can the panel justifiably give the go-ahead to the continuation of a process which is inherently and patently unfair, prejudicial, *ultra vires* and unconstitutional. That would be nothing short of an irrational exercise of its pivotal "gatekeeping" powers. Needless to say, this being a multi-staged process, such irrationality or illegality will necessarily have a domino effect on any subsequent stage and on what Jafta J referred to as "*the entire process*".

83. The third question should accordingly also be answered in the negative.

QUESTION 4 : Does the material listed, tendered and provided constitute *prima facie* evidence to show the commission of the offence(s) identified in the charge sheet?

84. In the unlikely event that, in spite of all the aforegoing, the panel is nevertheless inclined to adopt the narrow approach or, having adopted the broader approach, it rejects all the above contentions, it is respectfully submitted that the charges in any event do not disclose an impeachable offence, and the above fourth question also falls to be answered in the negative.

85. Sub-rule Rule 129R(2), quoted in paragraph 19 above, provides a basis for borrowing from the principle which governs criminal and/or disciplinary proceedings, where applicable, and with the necessary adjustments. At a minimum, the standard of fairness, which is advocated in the so-called *Jockey Club* cases, must be employed and the maximum, the criminal standards of fairness contained in section 35(3) of the Constitution, be used as points of

reference. Our law generally imposes certain duties upon the accuser in the pursuance of any process intended to have punitive consequences on the rights-bearing individual.

86. Before dealing *ad seriatim* with each charge, it is appropriate at this stage to raise a further pertinent impediments to any possible finding that there is *prima facie* evidence to show impeachable conduct, based on the exclusionary rules of the law of evidence on the one hand and the principle of separation of powers on the other, as well as the combined or cumulative effect of those two principles. The combined objection relates specifically to charges 1 to 3, which are solely premised on court findings or opinions to support the allegations of misconduct and/or incompetence, bearing in mind the interlinked articulation of all the charges, as previously pointed out.

Opinion evidence and the rule in *Hollington v Hewthorn*

87. Given the general rule that the judgment of a court is inadmissible in subsequent proceedings as evidence of the truth of its contents, it is doubtful whether the DA's sole reliance on court judgments constitutes admissible evidence, let alone *prima facie* evidence, in respect of the contemplated impeachment proceedings. If not, then this would be the final nail in the coffin for charges 1 to 3. The panel would therefore have no independent basis to determine that the requisite *prima facie* evidence exists.

88. In addition, the so-called rule derived from the English case of *Hollington v Hewthorn*,[13] in terms of which the findings of a prior court are inadmissible in

[13] [1943] KB 587 (CA); [1943] 2 All ER 35 (CA)

subsequent proceedings of a civil or non-criminal nature. The rule still forms part of South African law, albeit not without controversy.

89. The panel is enjoined to take these issues into account in assessing the "evidence" presented by the DA and in making its determination as to whether it meets the threshold of *prima facie* evidence specifically within the context of an impeachment enquiry.

90. In so doing, it is important to highlight the qualitative difference between findings made within a judicial context in order to determine liability for costs and proceedings aimed at the removal from office of a constitutional office bearer. While the punitive consequences may be comparable, the two processes are different.

91. It is therefore undesirable to expect the panel to sanction the DA's effort to transplant as "evidence" for an impeachment process the conclusions made by judges in a completely different type of exercise. To meet the standard of *prima facie* evidence in relation to a section 194 enquiry, more evidence and/or witnesses would need to be produced. More reliance on court judgments is woefully inadequate.

92. Additionally and more significantly, such direct reliance on court judgments, without more, also constitutes a blatant breach of the separation of powers principle. It is a transparent stratagem aimed at using findings made by the judiciary to impeach the Public Protector in terms of section 194 of the Constitution, full knowing that a section 194 process is the sole and exclusive terrain of the legislature in which the judicial arm of the state can play no role.

To clothe the findings of the judiciary as "evidence" cannot successfully mask this stark reality.

93. Once such "evidence" is suitably excluded, as it must be, then there will certainly be no remaining evidence, *prima facie* or otherwise, upon which such an enquiry may be further conducted.

The impermissible expansion of the definitions of the offences

94. Lastly and/or for the sake of completion in respect of the preliminary legal objections, it needs to be pointed out that the panel will have to inescapably consider the issue also raised in the pending litigation, namely that the National Assembly may have impermissibly exceeded its powers in expanding the definitions of the impeachable offences listed in section 194(1) of the Constitution.

95. In relation to "*misconduct*", this relates primarily to the introduction of the element of gross negligence.

96. More ominously and in respect of "*incapacity*", the objection goes to the introduction of "*temporary incapacity*" as an impeachable offence. There is no evidence to support the view that the drafters of the Constitution intended holders of such important offices to be removed due to temporary incapacity, such as hospitalisation for a broken limb, maternity leave and the like, without qualification as to the seriousness or duration thereof.

97. This issue need not necessarily be decided by the panel. However, the panel must be aware thereof since it cannot realistically be expected to discharge its function without referencing the evidence to the offences as defined. Doing

so in its own right cannot be mistaken for usurping the role of the court or pre-empting its ultimate finding in this regard.

98. At the minimum, this factor may be used to support the proposal that it would be prudent to await the outcome(s) of one or both pending processes of litigation referred to above. This would be justifiable on the basis of the analogous application of the equitable considerations which underlie and characterise the principle of fairness known as *lis pendens*.

Synopsis of legal points

99. To recap and before turning to representations based on the merits of the individual charges, the principal submission is that the panel ought to find in favour of the discontinuation of the current process, based, *inter alia*, upon the following 10 considerations which arise from the Constitution, the law and/or the rules themselves:

99.1. The validity of the charge;

99.2. The retrospectivity issue;

99.3. Double jeopardy and/or duplication of convictions;

99.4. Prematurity;

99.5. The jurisdiction of the panel;

99.6. The scope of the panel's mandate in terms of Rule 129;

99.7. Opinion evidence and the rule in *Hollington v Hewthorn*;

99.8. The rule against self-incrimination;

99.9. Separation of powers; and

99.10. The impermissible expansion of the definitions of offences.

100. However and in the event that the panel does not uphold some or all of the aforesaid grounds, attention will now be turned to dealing with the charges read together with the alleged evidence submitted in support thereof to demonstrate that they do not meet the requisite standard for disclosing at a *prima facie* level *"grounds for averring the removal from office of (the Public Protector)*". In support of that broad submission, we now turn to an assessment of the individual charges and the evidence provided in support thereof.

101. In so doing, we shall deal separately with the cluster of related charges presented as Charges 1 to 3 on the one hand and the unique Charge 4.

CHARGES 1 TO 3 : Alleged misconduct and/or incompetence regarding the *SARB* and *Vrede Dairy* litigation

102. The majority of the preliminary objections or criticisms already dealt with relate principally to these charges.

103. To the extent that explanations have already been given under oath by the Public Protector in the pleadings, no useful purpose can be served by repeating them here. These must be assumed to be incorporated by reference. Similarly, the reports of the Public Protector speak for themselves, except to the extent that they may have been qualified or further clarified by her in the pleadings.

104. In short, all the allegations of misconduct and/or incompetence are disputed.

105. The further submissions contained hereunder are made in amplification of that broad denial.

Ad paragraph 1.1 of Annexure A to the Motion

106. Upon a close examination of the allegations contained herein, it will be observed that, if one casts aside the bare adjectives used, such as "*dismissive*", "*high-handed*" and/or "*biased*", the charges relate to an overall allegation that the Public Protector denied various parties their right to *audi alteram partem*. Regarding the allegations of bias, it must be pointed out that the Constitutional Court did not put the issue higher than a perception of bias.[14]

107. By no stretch of the imagination can such allegations, without more, support a charge of misconduct and/or incompetence.

108. Every single day, public officials, MECs, Ministers, the President, Premiers, Mayors, etc are found by courts to have denied one party or the other the right to *audi*. It has never been suggested that such conduct constitutes impeachable offences. Even magistrates and judges are often found wanting in this regard. Such cases do not then qualify as *prima facie* evidence for impeachment before Parliament or the Judicial Service Commission, as the case may be.

109. Incidentally, the law equates the office of the Public Protector to that of a judge and/or a judge of the SCA in relation to both her conditions of service, as well as protection against contempt. Reference is made to the provisions of section 9 of the Public Protector Act and the Public Protector Service Conditions, a copy of which is annexed hereto marked "**BM3**".

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[14] See *SARB* Constitutional Court judgement at paragraph [99]

110. In all comparable situations, the constitutional consequence for such reviewable conduct is invalidity and/or reversal but not removal from office. Were it so, then the wheels of the state would grind to a halt.

111. To regard such conduct as *prima facie* evidence for impeachment would constitute what the Honourable Chief Justice referred to as "*being symptomatic of a desperation to find fault*"[15] and "*a lot of nit-picking and exaggeration of what (the Public Protector's) conduct entails*".[16]

112. For the avoidance of any doubt and to remove any misunderstanding, it is readily acknowledged that the office of the Public Protector is not the same as judicial office. The only point being made is that in the eyes of the law, the two offices are comparable, more particularly in respect of not just conditions of service and benefits but also the extent to which their independence must be protected from the undue interference of the powerful. A careful philosophical distinction ought properly be conceptually made between the imperative of accountability, which is essential, and the ulterior motives of aggrieved parties motivated by vengeance, prejudice, political goals and ;the like.

113. In making its assessment as to the existence of a *prima facie* case or evidence, this esteemed panel will be fully entitled to take into account not only the views of the majority in the *SARB* judgment but also the explanations tendered by the Public Protector and the remarks of the minority judgment, albeit they admittedly did not prevail. That is not to say it may not find favour in the context of a section 194 enquiry.

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[15] *SARB* judgment (*supra*) at paragraph [58]
[16] At paragraph [102]

114. In predicting what may or may not happen in such an enquiry, it must be keenly appreciated that the findings of a court of law such as the Constitutional Court, as articulated by Honourable Khampepe J, are invariably influenced by curial or judicial norms and standards and protocols such as the *Plascon-Evans* rule and the rule that a court of appeal may not interfere with the decision of a lower court simply on the grounds that such a decision was wrong but only when a misdirection is alleged and proved. These considerations have no place in the envisaged section 194 process, which is a legislative rather than a judicial process. The call for a *holus bolus* transplantation of court judgments into the present section 194 enquiry, as the complainant would have it, must therefore be approached with extreme caution and the necessary dose of scepticism. Ultimately it must be rejected.

Ad paragraph 1.2 of Annexure A

115. Similarly, the conduct outlined herein in respect of failing to give full disclosure, misrepresentations and contradictory evidence, etc, these are commonplace criticisms routinely levelled by the courts against litigants. They do not form the basis for impeachment. The suggestion that they do must be rejected out of hand by the panel.

Ad paragraphs 2 and 3 of Annexure A

116. Regarding the alleged “evidence”, which is solely constituted of the Public Protector’s report, court judgments and the pleadings, and in addition to the remarks already made hereinabove, I wish to reiterate that such material cannot be used to support the existence of *prima facie* evidence to impeach.

117. It must be assumed that the said material constitutes the entire “evidence” intended to be relied upon by the complainant at the proposed enquiry.

Ad paragraph 4 of Annexure A (the *Vrede Dairy* matter)

118. The remarks made above at paragraph 110 of these representations, regarding reviewable conduct, apply with equal force hereto.

Ad paragraphs 5 and 6

119. The remarks made above at paragraph 115 of these representations apply with equal force hereto.

Ad paragraph 7 (Alleged incompetence in respect of the *SARB* and *Vrede* matters)

120. Apart from the regurgitation of the words of the judges and the duplication of charges and evidence, there is nothing contained in these paragraphs which constitutes *prima facie* evidence of incompetence, as envisaged in section 194 of the Constitution or even the disputed definition thereof contained in the rules.

Ad paragraph 8.1

121. The criticisms of the “evidence” referred to herein are contained hereinabove and need not be repeated.

Ad paragraphs 8.2, 8.3 and 9

122. There is miraculously simply no additional evidence tendered to support the allegations made at paragraphs 7.1 and 7.2 of the charge sheet. This is due

to the fact that these allegations amount to the unlawful splitting and/or duplication of charges, in that the same evidence is relied on as for Charges 1 and 2.

123. Regarding paragraph 7.3 and the *Financial Sector Conduct Authority* case,[17] it would seem that the alleged incompetence is solely hinged upon the fact that the Public Protector, upon obtaining legal advice, filed a notice to abide. This was motivated *inter alia* by her desire to expand on her report due to obtaining subsequent relevant information, as well as the subsequent discovery of information which had been wrongly concealed by one of the investigators. She therefore desired to do further investigations of the complaint in any event. It would have been wasteful and illogical to "defend" the report in such circumstances. For ease of reference, the self-explanatory memorandum which contains legal advice obtained from Adv Smith SC is annexed hereto marked "**BM4**". Although such advice was admittedly obtained after the notice of abide had been filed, it crucially confirmed the views of the Public Protector and her internal legal experts.

124. Litigants file notices to abide frequently and that act cannot, without more, constitute *prima facie* evidence of "incompetence" on their part. More would have to be alleged and/or produced.

125. The inferences which the complainant seeks to be drawn from the mere act of abiding, that the Public Protector therefore and "thereby":

[17] *Financial Sector Conduct Authority and Another v Public Protector*, Case no. 39589/19 (Gauteng Division, Pretoria), granted on 9 October 2020.

> "*conceded that irrationality, forensic weakness, misunderstanding and/or misapplication of legal principles is demonstrated in such report*" and "*demonstrated a failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.*"

are baseless and do not even meet the most basic requirements of the cardinal rules of logic on which legal inferences can be made.

126. Inferences can only be drawn from proven facts. In this case, the only proven fact is that the Public Protector filed a notice to abide. Everything else contained in paragraph 7.3 is pure and wild speculation and cannot constitute *prima facie* evidence to show anything, let alone the inference of impeachable conduct on the part of the Public Protector.

CHARGE 4 : MISCONDUCT / INCOMPETENCE IN RELATION TO INDIVIDUAL EMPLOYEES

127. This charge, which was clearly and opportunistically added to the second motion submitted in February 2020 in a stillborn attempt to overcome the deficiencies pointed out in the Public Protector's letter of demand dated 28 January 2020 (annexure "BM1(d)" above) is woefully deficient, both in respect of the details furnished with reference to the alleged conduct, as well as the alleged "evidence" tendered in support thereof.

Ad paragraph 10

128. Save for the case of Sphelo Samuel (which is dealt with separately below at paragraph 134), no basis is alleged for attributing the conduct referred to in this paragraph to the Public Protector:

128.1. *Inter alia*, it is not made clear whether direct or vicarious liability is relied upon and, if so, on what basis? As a matter of law, the Public Protector does not get involved in operational issues such as disciplinary action. Such is the sole preserve of the CEO as the accounting officer. There is no allegation that the Public Protector crossed these strict legal lines;

128.2. No dates or locations are provided as to when or where the alleged violations took place or how the Public Protector is personally linked thereto;

128.3. To the extent that the said victimisation was allegedly committed by the erstwhile CEO, it is not alleged that the Public Protector was made aware thereof, when and by whom;

128.4. To the extent that disciplinary action was allegedly taken "*unlawfully*" and on "*trumped-up charges*", no charge sheets have been furnished nor has the panel been favoured with the outcome(s) of such disciplinary proceedings.

129. Simply put, there is no evidence to support any finding of *prima facie* evidence in this regard.

Ad paragraph 11

130. Similarly, no details of date, place, amounts, names of individuals and/or examples have been furnished to the panel in support of these allegations.

131. They must accordingly be rejected as completely unsubstantiated or supported by <u>any</u> evidence.

132. Regarding the alleged mismanagement of resources, it has been widely reported that under the current Public Protector, the office has for the first time in 26 years received a clean audit from the Auditor-General. That is contrary and objective evidence of competence.

Ad paragraph 12.1

133. The evidence referred to herein bears no logical relevance or relationship to the alleged offences contained in Charge 4.

Ad paragraph 12.2

134. In respect of the affidavit of Mr Sphelo Samuel, its origins are at best unclear, and to date no opportunity has been given to the Public Protector by the Speaker to deal with the merits of the allegations contained therein.

135. The affidavit is an *ex post facto* contrivance which must have been solicited and prepared for the sole purpose of seeking to cure the defect related to retrospectivity once it was pointed out in the Public Protector's letter dated 28 January 2020 (annexure "BM1(d)") and the Part A application. This explains the simulated "withdrawal" of the first motion and simultaneous "replacement" thereof with the current motion. That the complainant had to resort to such disingenuous methods betrays the fact that it dawned on her that there was no credible and relevant *prima facie* evidence to sustain the motion. The timing of the affidavit is, at the barest minimum, extremely suspicious. The affidavit which was signed on 11 February strangely refers to events of 8 February 2020, which were reported on a day or two later. This shows that it was hastily drafted, either overnight or within a day or two thereafter. Within the space of

about a week thereafter, it had found its way into the DA's amended charge sheet. The facts speak for themselves.

136. The allegations are nothing short of the irrelevant rantings of a disgruntled employee, who has been convicted of the crime of assaulting a member of the public. In referring to complaints by other employees without any confirmatory affidavits, the allegations constitute inadmissible hearsay.

137. Even if the allegations contained therein were true, which is denied, they cannot constitute *prima facie* proof of impeachable misconduct and/or incompetence, as envisaged in section 194 of the Constitution.

138. The covering letter of Mr Samuel, also dated 11 February 2020, is addressed to the Speaker and it calls for an investigation. If the Speaker decided it necessary, she would have referred the complaint to the Portfolio Committee on Justice. She has to date not done so. It would be reasonable to assume or infer that the Speaker must have decided not to take any action due to the frivolity of the complaint. Otherwise, it would have long been processed by now as it was submitted exactly one year ago.

139. It is improper and irregular for Ms Mazzone to have simply attached the affidavit as part of her "evidence" in the section 194 process. Firstly, the complaint cannot be part of two parallel legal processes. Secondly, Mr Samuels' complaint cannot be "converted" into a section 194 motion by stealth. The rules make it clear that a section 194 complaint can only be instituted by a member of the National Assembly, which Mr Samuel is certainly not. Mr Samuel's remedies reside in the internal processes of the office of the Public Protector and the courts. He is, of course, also free, in his capacity as

a citizen, to approach the democratic Parliament, but no in respect of section 194.

140. In the totality, the affidavit of Mr Samuels does not add anything to the present process. It must be excluded for the reasons advanced. It is proverbially not worth the paper it is written on. In relation to section 194, it is totally irrelevant and inadmissible. For the sake of completion, it is hereby indicated and disclosed that Mr Baloyi has since been dismissed in December 2020 following an independent disciplinary process. It remains to be seen whether he will elect to exercise his rights in terms of the applicable labour legislation as he is entitled to do and whether he will succeed. For now, it must be accepted that the disciplinary charges were not "*trumped up*".

Ad paragraph 12.3

141. The pleadings in the Basani Baloyi matter cannot, by any stretch of the imagination, constitute *prima facie* evidence as required in that this matter is *sub judice* and as yet unresolved. The merits of the Basani Baloyi application have never even been adjudicated upon. In the High Court, that application was decided in favour of the basis of a preliminary point *in limine* regarding jurisdiction. The Constitutional Court has more recently reversed that judgment and the matter has been remitted to the High Court to hear the merits of the case *de novo*. For ease of reference, a copy of the Constitutional Court judgment is annexed hereto marked "**BM5**". The matter is awaiting a fresh set-down date in the High Court, as directed by the Constitutional Court.

Ad paragraph 12.4

142. The pleadings referred to herein and presented as “evidence” relate to the well-known and ongoing *BOSASA*[18] matter involving the President of South Africa.

143. They bear no logical relevance whatsoever to the charges referred to in Charge 4.

144. In any event and even if the matter was somehow relevant, which is still denied, the matter is *sub judice* in that the judgment of the Constitutional Court in respect thereof was reserved and is still pending. Incidentally, that Court will decide for the first time the question whether parties are entitled to additional *audi* in respect of remedial action in addition to the opportunity always given to them in terms of section 7(9), which has been the practice for the 26-year existence of the Public Protector’s office.

Ad paragraph 12.5

145. The pleadings referred to herein and presented as “evidence” relate to the other well-known “*Rogue Unit*” matter involving allegations made against Minister Pravin Gordhan.

146. The matter bears no relevance whatsoever to the charges referred to in Charge 4.

147. Even if the matter were relevant, which is still denied, its outcome would operate in favour of the Public Protector in that, in respect of Part A thereof

[18] *President of the Republic of South Africa v The Public Protector*

and insofar as the High Court had fashionably mulcted the Public Protector with punitive costs on the basis of her alleged improper conduct, the Constitutional Court unanimously reversed that order on the basis that the High Court had committed a material misdirection. In so doing, Khampepe ADCJ had this to say:

> "*It cannot be gainsaid that personal costs orders are punitive in nature and a court must be satisfied that the conduct of a particular incumbent, in the execution of their duties or conduct in litigation, warrants the ordering of a personal costs order. This cannot be done in the abstract and the facts must plainly support a costs order of this nature … The High Court ordered costs against Ms Mkhwebane in her personal capacity without furnishing any reasons for that portion of the costs order … The traditional tests of bad faith or gross negligence, albeit with a constitutional flavour, were not satisfied*"[19] (emphasis added).

148. It is the height of irony that the complainant has made herself guilty of the very same conduct of which she accuses the Public Protector. In failing to disclose the Constitutional Court judgment and requiring the panel to rely on the overturned High Court judgment in case No 233/2019, she herself has committed an impeachable offence by her own (incorrect) standards. It is improbable that the complainant is not aware of the subsequent Constitutional Court judgment and yet no reference is made thereto in her latest letter dated 11 December 2020.[20]

[19] *Economic Freedom Fighters v Gordhan* 2020 (8) BCLR 916 (CC) at paragraphs [92] to [94]
[20] See bundle 1 (A-E) page 11A-11C

149. In any event, the merits of the matter are the subject of a very recent Full Court decision in respect of which an application for leave to appeal to the SCA has recently been lodged.

150. There is no discernible reason why the panel and the record must be burdened with the bulky documentation contained in Annexures 5, 6 and 7 of the charge sheet.

151. In relation to Charge 4, no *prima facie* evidence can conceivably be found to exist by this esteemed panel.

Purported further evidence

152. It has also been observed that included in the record is a letter from the complainant dated 11 December 2020 and annexures thereto, purportedly in terms of Rule 12(1)(c)(i) and in response to an undisclosed letter from the Secretary of the National Assembly dated 7 December 2020.

153. This material ought to be discarded on the preliminary ground that it is based on a misreading of the rule in that the further information envisaged therein cannot be relevant to the charges if it relates to separate events which only took place after the submission of the charge sheet.

154. Accordingly, any reference to new matters, such as the matter of *Commissioner for SARS* and the *GEMS* matter, ought to be excluded as totally irrelevant.

155. Insofar as the new material refers to judgments which do form part of the original charge sheet, nothing contained in the letter takes those matters any further than what has already been submitted herein in relation thereto.

156. In the unlikely event that the panel may still be inclined to entertain the "*evidence*" referred to in the said letter, the following brief submissions are made:

Ad paragraph 4 of the letter of 11 December 2020

157. These annexures do not add anything new in respect of the above discussion on the *Vrede Dairy* matter.

Ad paragraphs 5.1 and 5.2 of the letter

158. This matter is irrelevant to any of the conduct relied upon in the charge sheet.

159. In any event and to the knowledge of the complainant, the *BOSASA* matter was heard in the Constitutional Court in November 2020 and judgment is still reserved. It is disingenuous of the complainant not to disclose and to actively conceal this material fact from the panel.

160. Similarly, the High Court judgment in the matter of *Commissioner for SARS* presented by the complainant as "*Annexure 10A*" was reversed by the Constitutional Court in respect of the personal costs order. In so doing, the Constitutional Court significantly and unanimously made the following remarks:

160.1. "*There appears to be a developing trend of seeking personal costs orders in most of not all matters involving the Public Protector. Of these,*

a total of four, including this one, have reached us. … Out of the four applications that have landed here, it is only in one that this court has sanctioned a personal costs order (the SARB case)."

160.2. "… *courts must be wary not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. Whether inadvertently or otherwise, the High Court judgments in the EFF v Gordhan (the Rogue Unit case) and in the instant matter are instances where the High Court fell into that trap.*"

160.3. "*Needless to say, as the Judiciary, we must not be guilty of contributing to the weakening of that office. You weaken it, you weaken our constitutional democracy. Its potency, its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity.*"

160.4. "*I voice these words of caution because of the disturbing frequency and regularity of applications for, and awards of, personal costs against the Public Protector. What is particularly disturbing is that it is clear that the applications and awards are not always justified. That much is apparent from the fact that two out of three personal costs awards that have come before us, including this one, have been set aside. Crucially, these two typify the worst examples of personal costs orders. And in the fourth matter, where there was no personal costs order by the High Court but there was an insistence that this court should make such an award, we declined that invitation*."

(Emphasis added)

[See annexure "**BM6"** for a copy of the Constitutional Court Judgment]

161. These words, said in December 2020, represent the last and the latest word of the apex court on this sorry saga of the types of costs orders and remarks which form the backbone of the present motion before the panel. Accordingly, heed thereof ought to be taken.

Ad paragraphs 5.3 and 54.4

162. Annexures 10B and 11B have no relevance herein.

Ad paragraphs 5.8 and 5.9

163. Both of these matters, including Part B of the *Rogue Unit* matter, are the subjects of pending applications for leave to appeal in the High Court to the SCA. They cannot justifiably be relied on only based on the remarks of the first stance. They ought accordingly to be excluded on this basis alone and cannot possibly constitute *prima facie* proof of anything. In terms of section 18 of the Superior Courts Act, the operation of these judgments is, in any case, suspended.

164. In the totality, the extra material does not advance the case of the complainant. Neither does it enhance the quality of the purported *prima facie* evidence tendered. On the contrary, some of the material, disclosed and undisclosed, put a further question mark and dent on the entire evidential architecture of the proposed section 194 enquiry. The panel ought accordingly to frown upon the thinly veiled attempts to mislead it and will hopefully express itself thereon in making its recommendations.

CONCLUSION

165. These representations go into some detail because there will be no opportunity for their oral presentation. Although they are mainly attributable to the Public Protector personally, they are presented in the third person to accommodate the fact that they have been prepared with the assistance of her legal representatives.

166. In the totality of the submissions made hereinabove, there is no basis upon which it can be found that there is *prima facie* evidence to show cause for the removal of the Public Protector.

167. It is not the aim of these representations fully to traverse the defences available to the Public Protector. The aim is merely to demonstrate that there is no *prima facie* evidence on the table.

168. The vast majority of the objections raised hereinabove are inherent to the charges and/or purported evidence presented. The charges are accordingly incurable by way of any possible amendment.

169. In terms of section 85 of the Criminal Procedure Act, the analogous general rule was expressed as follows in *S v Nathaniel*:[21]

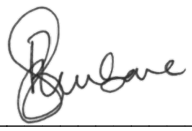
> "… *where a court sustains an objection to the charge sheet, the State must be given an opportunity for remedying such charge sheet. If, for some reason, the charge sheet is not capable of amendment or if particulars will not remedy the defect, the charge is quashed forthwith*" (emphasis added).

[21] *S v Nathaniel and Others* 1987 (2) SA 225 (SWA) at 228H

170. It is submitted that this matter falls in the category of inherent and incurable defects.

171. Whether the upholding of the objection(s) may be termed as quashing, a discharge or merely a finding that there is no *prima facie* evidence is a matter of semantics. The end result remains the same, namely that the process must not be allowed to go any further.

172. In the circumstances, the only competent determination that this esteemed panel can return must be that the requisite *prima* facie evidence is lacking. Such a determination would be consistent with the requirements of fairness and fulfil the very purpose of the introduction of the independent panel as an important filtering mechanism into the section 194 process for the purposes of preventing the perpetuation of an unjust, unwarranted and unfair and fatally flawed process, such as this one.



SIGNED BY ADVOCATE
BUSISIWE MKHWEBANE
AT PRETORIA
ON 27 JANUARY 2021

BM 1(a)
9288

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF WHIP OF THE OPPOSITION
PO Box 15 Cape Town 8000 Republic of South Africa
Tel: +27 (21) 403-3372, Fax: +27 (086) 724 6398
e-mail: dewhip@da.org.za

6 December 2019

Ms T R Modise MP
Speaker of the National Assembly
Parliament of the Republic of South Africa

Via Email: sedem@parliament.gov.za

Dear Madam Speaker,

TABLING OF NOTICE OF A SUBSTANTIVE MOTION TO INSTITUTE REMOVAL PROCEEDINGS AGAINST THE PUBLIC PROTECTOR

The request to institute removal proceedings against the Public Protector sent to you by our former Chief Whip on 22 May 2019, and all subsequent correspondence on the matter has reference.

Following the adoption of the New Rules pertaining to the removal of office-bearers in Institutions Supporting Constitutional Democracy, I write to you to withdraw the request sent to you on 22 May 2019, and to request again, in terms of National Assembly Rule 337(b), that Parliament initiate proceedings in accordance with section 194(1) of the Constitution of the Republic of South Africa, 1996, to remove the Public Protector, Adv B Mkhwebane, as soon as the Second Session of the Sixth Parliament commences. I attach the notice of the substantive motion which I am tabling in terms of National Assembly Rule 124(6) with the Secretary of the National Assembly, Mr M Xaso.

Section 194 of the Constitution deals with the removal of the Public Protector from office. Specifically, section 194(1) states that the Public Protector may be removed from office on a finding of "misconduct, incapacity or incompetence" by a committee of the National Assembly, followed by the adoption of a resolution on said removal by two thirds of the members of the National Assembly.

It is our submission that the conduct of the Public Protector since the beginning of her term in October 2016 has amply demonstrated that she is not fit to hold the office she presently occupies. The conduct referred to includes, but is certainly not limited to:

VJ

[redacted]

TRM

- That she grossly over-reached her powers when she recommended, in her report 8 of 2017/18 ("Report into allegations of maladministration, corruption, misappropriation of public funds and failure by the South African government to implement the CIEX report and to recover public funds from ABSA Bank" – hereafter referred to as the "ABSA/Bankorp report"), that the Constitution be amended to alter the mandate of the South African Reserve Bank;

- That she grossly over-reached her powers when she sought, in the ABSA/Bankorp report, to dictate to Parliament, to whom she is accountable in terms of section 181(5) of the Constitution, how and when legislation should be amended. Her actions in this regards compromised the independence of Parliament and the effectiveness of Parliamentary procedures;

- That in doing the above she has shown a poor understanding both of the law as well as of her own powers in relation thereto;

- That she sacrificed her independence and impartiality when she consulted – as revealed in a supplementary affidavit filed by the South African Reserve Bank in the North Gauteng High Court on or about 11 September 2017 - with the Presidency and the State Security Agency on remedial action to be recommended in the ABSA/Bankorp report;

- That the North Gauteng High Court – in a judgment by Murphy J handed down on 15 August 2017 in case number 43769/17 - found *inter alia* that the Public Protector had "unconstitutionally and irrationally" intruded on Parliament's exclusive authority and that she had gone about crafting her recommendations in the ABSA/Bankorp report in a "procedurally unfair" manner. This is the same case in which your office was one of several parties seeking to set aside the aforementioned recommendations.

- That the North Gauteng High Court found on 20 May 2019 that the Public Protector failed to properly investigate a complaint from a DA Member of the Free State provincial legislature, Mr. Roy Jankielsohn in relation to the infamous Vrede Dairy Farm. In this case (Case no. 11311/2018), Tolmay J deemed the Public Protector's report into the matter unconstitutional and invalid, and ordered that it be set aside.

- That the Constitutional Court (case CCT 107/18) found in July 2019 that Adv Mkhwebane acted in bad faith by not being honest regarding her investigation processes, upholding a personal cost order made against her by the North Gauteng High Court.

This demonstrates in no uncertain terms that the Public Protector is too incompetent to properly execute her mandate, as she lacks the knowledge to carry out and ability to perform her duties effectively and efficiently, and for this reason I initiate proceedings for a section 194(1) enquiry in order that removal proceedings may be instituted against her.

For your ease of reference, I will attach hereto:

V.J

TRM

1. A copy of the North Gauteng High Court judgement in case number 43769/17;
2. A copy of the ABSA/Bankorp report by the Public Protector;
3. A copy of the supplementary affidavit filed by the South African Reserve Bank, mentioned above.
4. A copy of the North Gauteng High Court judgment in case number 11311/2018, the Vrede Dairy matter.
5. A copy of the Constitutional Court judgement in case number CCT 107/18.

It is our belief that Adv Mkhwebane's conduct should be closely scrutinised by Parliament, and we therefore request that you table this letter in terms of Rule 337(b) of the Rules of the National Assembly, and refer the motion and supporting documentation to an independent panel to conduct a preliminary enquiry in terms of section 194(1) of the Constitution.

I trust that you will find the above in order and look forward to your response in this matter.

Yours faithfully,

Natasha Mazzone MP
Chief Whip of the Official Opposition
Parliament of RSA

VJ
TRM

BM1(b)
9291

NATIONAL ASSEMBLY
NOTICE OF MOTION

Internal Ref Number: 044 - 2019

Date: 06.12.2019

Member: Mrs N W A Mazzone

Motion:

I hereby move on behalf of the Democratic Alliance that the House:

1. Notes that the National Assembly passed new Rules pertaining to the removal of office-bearers in institutions supporting constitutional democracy on 3 December 2019;

2. Further notes that office-bearers may be removed from Office on a finding of misconduct, incapacity or incompetence following a finding of a committee of the National Assembly and the subsequent adoption of a resolution on said removal;

3. Acknowledges that the conduct of the Public Protector, Adv B Mkhwebane, since the beginning of her term in October 2016 has amply demonstrated that she is not fit to hold the Office she currently occupies;

4. Further acknowledges that various courts made findings against Adv Mkhwebane, stating *inter alia* that she grossly over-reached her powers when she recommended that the Constitution be amended to alter the mandate of the SA Reserve Bank, and when she sought to unconstitutionally and irrationally dictate to Parliament – to whom she is accountable - how and when legislation should be amended; and failed to properly investigate a complaint in relation to the infamous Estina Dairy Farm;

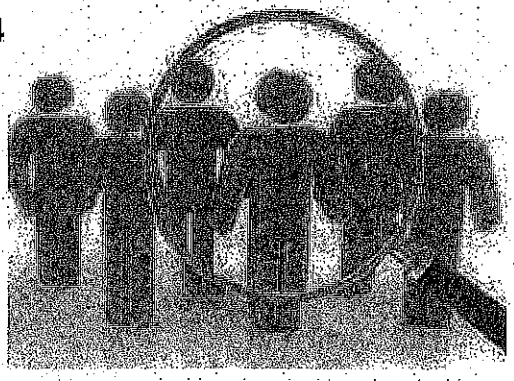
5. Recognises that the Constitutional Court also found in July 2019 that Adv Mkhwebane acted in bad faith by not being honest regarding her investigation processes, upholding a personal cost order made against her by the North Gauteng High Court;

6. Further recognises that Adv Mkhwebane is therefore incompetent to occupy her Office as she has demonstrated that she lacks the knowledge to carry out and the ability to perform her duties effectively and efficiently;

7. Resolves to initiate a section 194(1) of the Constitution enquiry to remove Adv Mkhwebane from Office.

TRM VJ

SPEAKER APPROVES MOTION FOR INITIATION OF PROCEEDINGS TO REMOVE PUBLIC PROTECTOR



Parliament, Friday 24 January 2020 – The office of National Assembly Speaker Ms Thandi Modise has approved a motion received from the Chief Whip of the Democratic Alliance requesting that Parliament initiate proceedings for removal of Public Protector, Advocate

DID YOU KNOW?

The copy of an Act of Parliament signed by the President is the official version of that Act and is given to

Busisiwe Mkhwebane.

On 3 December, the National Assembly adopted new Rules concerning the removal of office-bearers in the institutions supporting constitutional democracy. These institutions include the Office of the Public Protector.

The new Rules expand on the broad parameters in section 194 of the Constitution (which provides for the removal of heads of chapter 9 institutions) and previous National Assembly Rules.

The Democratic Alliance's draft substantive motion for the removal of Advocate Mkhwebane will thus be considered in terms of these new Rules.

The new Rules provide for any member of the National Assembly to initiate, through a substantive motion, proceedings for a section 194 inquiry.

If the Speaker is satisfied that the motion meets all requirements, the National Assembly Speaker must refer the motion and any supporting documents for preliminary assessment to an independent panel. The Speaker must also, without delay, inform the Assembly and the President of this referral.

Having approved the motion, the Speaker has thus written to political parties to put forward proposed nominees to serve on the panel made up of fit and proper South African citizens. The rules stipulate that the panel must collectively have the necessary legal and other competencies and experience to conduct the assessment. A judge may be appointed to the panel but the Speaker must make such an appointment in consultation with the Chief Justice.

the Constitutional Court for safekeeping.

LEARN MORE (/DID-YOU-KNOW)

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Parties have until February 7th to submit their recommended nominees, after which a panel will be appointed.

Within 30 days of its appointment, the panel must conduct and finalise a preliminary assessment on the motion proposing a section 194 inquiry and make a recommendation to the Speaker.

ISSUED BY THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA
Enquiries: Moloto Mothapo 082 370 6930

FEATURED MEMBER

(/person-details/107)

Ms Thembisile Angel Khanyile (/person-details/107)

National Assembly (/group-details?chamber=2)

Party: **Democratic Alliance** (/group-details?party=DA)

(/group-details?party=DA) on the provincial list for the province of Mpumalanga

Email: n/aThembisile

AngelKhanyile (mailto:nAThembisileAngelKhanyile)

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Our Ref: TNS/0026
Your Ref:

28 January 2020

TO: **MS THANDI MODISE, MP**
THE SPEAKER OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDING,
ROOM E118,
PARLIAMENT STREET,
CAPE TOWN

URGENT

PER EMAILS: speaker@parliament.gov.za;
larendse@parliament.gov.za; snjikela@parliament.gov.za ;
zadhikarie@parliament.gov.za

Dear Honourable Madam Speaker

PARLIAMENTARY RULES FOR THE REMOVAL OF OFFICE-BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY: PUBLIC PROTECTOR

1. We act for and on behalf of the Public Protector, Advocate Busisiwe Mkhwebane, herein after referred to as "our client".

2. Our client is aware that the Rules for removal of office-bearers in institutions supporting constitutional democracy were adopted on 3 December 2019, and having sought and obtained legal advice, she is of the firm view that these Rules are unconstitutional and unlawful as they amount to a violation of the constitutionally prescribed duty to protect the independence of chapter 9 institutions. Neither do they adequately provide for *audi alteram partem* at all in their application and implementation. All in all, the Rules are fatally tainted by irrationality and several other breaches of the rule of law.

3. Despite the bold promise of fairness and justice, the Rules are *inter alia* unfair and in breach of our client's rights in terms of section 34 of the Constitution, *inter alia*, in that the Rules do not make provision for the requisite non-participation or recusal of a number of seriously conflicted parties in any of the envisaged processes contemplated therein, including the making of crucial decisions. Such parties include but are not limited to all individuals, both in the Executive and the Legislature, who are currently or have recently been placed under investigation by the Public Protector in respect of very serious allegations of impropriety and breach of law, as well as those, like members of the Portfolio Committee on Justice and Correctional Affairs in the 5th Administration, who have publicly pronounced and passed judgment on the very issues which reportedly form the subject of the complaint by the DA. Imagine if a judge, magistrate or arbitrator could behave in that manner and still be expected to conduct a fair trial.

4. The principle invoked above was established as follows by Mlambo JP in *President of the RSA v Public Protector* 2018 (2) SA 100 (GP) at paragraph 146:

> *"There is no reason why the recusal principle should not apply to the President. The principle of recusal applies here because the President has an official duty to select a judge to lead the commission (of inquiry), but he is conflicted, as he himself has been personally implicated, whether directly or indirectly, through his family and associates, in allegations of state capture.*

5. The alleged complaint by the DA is a contrived smokescreen which forms part of a web of political marriages of convenience by persons and parties who all have an axe to grind with our client related to the normal performance of her constitutional duties. The DA itself is currently involved in litigation instituted by our client in which the DA is called upon to substantiate its allegations that she is a "spy", which is false and a malicious insult and is calculated to undermine the office of the Public Protector in violation of section 181 of the Constitution. As Chief Justice Mogoeng remarked in the matter of *EFF v The Speaker of the National Assembly* 2016 (5) BCLR 618 CC, at paragraph [55]:

"An unfavourable finding of unethical or corrupt conduct, coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated."

6. The DA's complaint pertains to matters which, even on the DA's version, allegedly occurred long before the adoption of the Rules. This purported retrospective application of the Rules is in flagrant violation of the rule of law, including the time-tested principle of *nulla poena sine lege.*

7. Section 181(3) of the Constitution prescribes that other organs of state, including the National Assembly, *"must assist and protect (the Public Protector) to ensure (its) independence, impartiality, dignity and effectiveness"*. The conduct described above is diametrically opposed to and incongruent with these constitutional directives.

8. The Speaker's own conduct in making a public announcement about the process to remove our client without even informing her of the decision, with the effect that our client only learnt about it in the media, is yet another blatant violation of her rights of dignity, privacy and confidentiality and is calculated to undermine the effectiveness of the office of the Public Protector. Since when does the Speaker make public announcements about the processing of a motion submitted by a Member of Parliament?

9. The pronouncements made by Dr Mathole Motshekga, speaking on behalf of the Portfolio Committee on Justice and Correctional Services, previously pronounced on the very issues which reportedly form part of the complaint. *Inter alia*, he accused our client of *"acting at odds with her constitutional duty (sic)"*, making statements *"which border on contempt of court"*. He questioned her fit and proper status and proposed that *"she should do the honourable thing and should resign, just as the former President had done"*. All these remarks were made despite the known fact that all the court cases remarked upon were still pending before the courts and in breach of:

   9.1. Rule 89 of the National Assembly, which provides that:

"*No member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending*"; and

9.2. Rule 88 of the National Assembly, which provides that:

"*No member may reflect upon the competence or integrity of a judge of a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in section 194 of the Constitution, or any other holder of an office (other than a member of government) whose removal from such office is dependent upon a decision of the House ...*"

10. The rationale for these fundamental requirements of fairness ought to be self-explanatory and obvious. The current Rules make no provision for the recusal of such delinquent members implicated in the breach of the Rules referred to in the preceding paragraph, with the result that they too are therefore permitted to sit in "independent" assessment of our client's fitness for office.

11. Rule 129R provides that the Speaker shall only approve a motion once a *prima facie* case has been made. Generally speaking, it would be logically and legally impossible to conclude that a *prima facie* case has been made against a person without having afforded that person a hearing. The conduct of the Speaker in purporting to "approve" Ms Natasha Mazonne's motion is illegal on that basis alone. This principle was properly articulated by the Constitutional Court (per Jafta J) at paragraph 179 in *EFF v Speaker, National Assembly* 2018 (2) SA 571, also known as the impeachment case, as follows:

"*For the impeachment process to commence, the Assembly must have determined that one of the listed grounds exists. This is so because those grounds constitute conditions for the President's removal. A removal of the President where none of the grounds is established would not be a removal contemplated in section 89(1). Equally, a process of removal of the President where none of the grounds exists would amount to a process not authorised by the section ... Without rules defining the entire process, it is impossible to implement section 89.*"

12. The same considerations must apply equally to section 194 of the Constitution.

13. In terms of Rule 129T, only once the motion is "in order" may the Speaker refer it to the next stage of the independent panel and inform the President of such referral. The DA motion is not in order in that it is solely based on either ongoing or completed litigation and reports of the Public Protector thereby seeking to outsource the removal of the Public Protector to the judiciary in breach of the principle of separation of powers. The Speaker is accordingly not entitled to refer such an inherently defective motion.

14. The deficiencies of these Rules are simply too numerous to mention herein. Suffice to say that, as currently formulated, the said Rules are riddled with glaring violations of the Constitution and are woefully inadequate to cater for the fair impeachment of the Public Protector or any other head of a chapter 9 institution. If it becomes necessary, such deficiencies will be more exhaustively catalogued in the forthcoming court papers.

15. Notwithstanding all of the above, the National Assembly has unlawfully and out of the blue issued a media statement on 24 January 2020 stating that the Speaker has approved a motion brought by the Democratic Alliance and thereby purporting to initiate proceedings for the removal of the Public Protector. Our instructions are that our client has never ever been accorded the courtesy of being informed about the initiation of this process aimed at her removal from office, let alone being invited to comment thereon. She had to read about it in the media – all in the name of fairness, justice and ubuntu.

16. In light of the above, our client hereby requests the Honourable Speaker to provide forthwith:

    16.1. a copy of the motion that the Democratic Alliance has launched against our client;

    16.2. written reasons for making the decision to approve the motion by the Democratic Alliance;

    16.3. written reasons for making the decision that a *prima facie* case has been made;

    16.4. confirmation as to whether or not the requirements of rule 129R have been complied with;

    16.5. an explanation of which part of the rules authorize the speaker to make a public announcement regarding her "approval" of the motion that has been brought in Parliament,

in light of your duty to protect the office of the Public Protector and to ensure its integrity, dignity and effectiveness; and

16.6. a detailed statement on what mechanisms, if any, are in place in order to protect our client from being subjected to a predetermined "removal" tainted by the participation of individuals, too many to mention by name at this stage, who have a lot to gain from her unlawful removal, as well as those who have long prejudged the issues under "investigation".

17. Furthermore, our client hereby requests an undertaking from the Speaker that the grossly unfair process which has been unlawfully initiated in terms of the impugned rules be temporarily suspended until all the above issues have been adequately dealt with, either amicably between the parties or, failing which and if needs be, by a court of law.

18. In the meantime, we are instructed further to demand, as we hereby do, that you refrain from taking any further steps in the purported impeachment process until the resolution of the issues raised herein. An undertaking to that effect must be made in writing.

19. Finally, we trust and hope that in your consideration of the above, you will take the words of Deputy Judge President Zondo seriously, when he correctly said at paragraph 55 of the impeachment judgment (*EFF v The Speaker*):

> *"Although all members of the National Assembly are expected to know the Rules of the National Assembly, there is an expectation that the Speaker would know the Rules of the National Assembly better than everyone else."*

20. Kindly furnish us with a response to the above by close of business on 30 January 2020, failing which our client reserves all its rights, including approaching a court of law for appropriate relief.

Regards

SEANEGO ATTORNEYS INC.

Per: Theo Seanego

BM1(e)
9303

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY
THE SPEAKER
PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
speaker@parliament.gov.za
www.parliament.gov.za

30 JANUARY 2020

Mr T Seanego
Seanego Attorneys Inc
53 Kyalami Boulevard
MIDRAND, 1684

[WITHOUT PREJUDICE]

Dear Mr Seanego

PARLIAMENTARY RULES FOR THE REMOVAL OF OFFICE-BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY: PUBLIC PROTECTOR

Your letter, dated 28 January 2020, bears reference, and its contents have been noted.

Parliament has by way of legislation as well as the rules, including those which give effect to section 194 of the Constitution, met its constitutional obligations, specifically those imposed by section 181.

Together with section 181, the Constitution simultaneously provides for the removal of such office-bearers as the Public Protector. To this end, the Constitutional Court certified that section 194 serves as a mechanism with which to ensure the effective execution (at the required standard of care) of the duties associated with such independence. The section 181 required independence cannot be read as excluding the operation of section 194.

I therefore confirm that –

a) the substantive motion complied with the form requirements in the rules;

b) no decision has been made as to the required prima facie assessment, as the independent panel has yet to be established, after which the panel members must conduct and finalise a preliminary assessment, which will include an invitation to the holder of the public office to comment on the substance of the motion; and

c) the National Assembly and the Joint Rules safeguard against any risk of abuse of power or unfairness, including the inquiry process outlined in the new rules.

Parliament's processes and the rules adhere to the rules of natural justice, including the *audi alteram partem* rule, and are informed by the relevant constitutional principles of fairness, transparency and accountability. There is accordingly, at present, no reason to suspend the implementation of the new rules.

Yours sincerely

Ms TR Modise, MP

SPEAKER OF THE NATIONAL ASSEMBLY

BM1(f)

9305

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INCORPORATED

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1686

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Direct Fax: 086 694 3430
Email: info@seanego.co.za

Our ref: TNS/SZ/PUB1/0026
Your Ref: MS THANDI MODISE

31 January 2020

TO: MS THANDI MODISE
THE SPEAKER OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDING
ROOM E118
PARLIAMENT STREET
CAPE TOWN

PER EMAIL: phahndiek@parliament.gov.za; vabrahams@parliament.gov.za ; dngcozela@parliament.gov.za tnage@parliament.gov.za ; speaker@parliament.gov.za

Dear Madam,

RE: PARLIAMENTARY RULES FOR THE REMOVAL OF OFFICE-BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY: PUBLIC PROTECTOR

1. We note the content of your letter dated 30 January 2020.

2. Our client is of the view that your letter does not substantially address the issues raised in our letter dated 28 January 2020, as you have failed and/or neglected to reply adequately to the various issues or furnish our client with the requested information and documentation relating to the motion for her removal (paragraph 16 of our letter).

3. As a consequence, we have received instructions from our client and confirm herein that she intends to institute legal proceedings for appropriate relief. Kindly furnish us with the details of your legal representatives so as to facilitate service.

Yours Faithfully

SEANEGO ATTORNEYS INC.

Per: Theo Seanego

BM2

G.P.-S. 11/14

HILLBROW CAS: 436/08/2019
COL. SJ MOJELA - 082 411 6772

J 17 (81...

9307

Summons No./Dagvaarding No. 16/2020

REPUBLIC OF SOUTH AFRICA

COPY: To be handed to accused/AFSKRIF: Moet aan beskuldigde oorhandig word.

Case No./Saak No. ...../.....

SUMMONS IN CRIMINAL CASE • DAGVAARDING IN STRAFSAAK

Magistrate's Court **Landdroshof**

District / Distrik: TSHWANE		Regional Division / Streekafdeling: GAUTENG	
Held at / Gehou te: MAGISTRATE COURT PRETORIA	Court / Hof: 3	Date of trial / Verhoordatum: 21/01/2021	

TO THE ACCUSED

1. You are hereby summoned to appear in person before the above-mentioned court at **08:30** on the above-mentioned date and place in connection with the charge(s) of which the particulars is/are mentioned hereunder and to remain in attendance.
2. An admission of guilt fine of

   ..... N/A .....

   may be made on or before

   .....

   to the Clerk of the above-mentioned Magistrate's Court or at any police station within the area of jurisdiction of the said Court.

AAN DIE BESKULDIGDE(S)

1. U word hierby gedagvaar om persoonlik om **08:30** op die bovermelde datum en plek voor die bovermelde hof te verskyn en aanwesig te bly insake die aanklag(te) waarvan die besonderhede hieronder verskyn.
2. 'n Skulderkenningsboete ten bedrae van

   .....

   mag voor of op

   .....gemaak word

   aan die Klerk van bogenoemde Landdroshof of by enige polisiestasie binne die regsgebied van voormelde Hof betaal word.

Name / Naam: BUSISIWE MKHWEBANE					
Address / Adres: 175 LUTHULI STREET, HILLCREST OFFICE PARK BROOKLYN					
Gender / Geslag: FEMALE	Occupation / Beroep: PUBLIC PROTECTOR	Age / Ouderdom: ADULT	Id No		

Particulars of charge(s):
Besonderhede van aanklag(te):

Accused is/are guilty of the offence of
Beskuldigde(s) is skuldig aan die misdryf van.....

.....

in that upon or about the ..... day of ..... In the year
deurdat op of omtrent die ..... dag van ..... in die jaar.....

and at or near
en te of naby.....

the accused did wrongfully
die beskuldigde(s) wederregtelik..... AS PER ANNEXURE

.....

.....

.....

.....

3. Warning: (i) Should any change in above-mentioned address take place before the proceedings are finally disposed of you are compelled to inform the official who served this summons upon you thereof.

   (ii) Failure to comply with either the above-mentioned warning or this summons renders you liable to a fine or a term of imprisonment not exceeding three months.

4. Should you decide to dispute the charge(s) against you, and you wish to make use of legal practitioner, you may, if you cannot afford a legal practitioner, apply for legal aid at the local Legal Aid office.

3. Waarskuwing: (i) U is verplig om die beampte wat hierdie dagvaarding op u bestel het van enige adresverandering in kennis te stel indien sodanige verandering geskied voordat die strafregtelike vervolginge finaal afgehandel is.

   (ii) Versuim om te voldoen aan bogenoemde waarskuwing of hierdie dagvaarding stel u bloot aan 'n boete of gevangenisstraf vir 'n tydperk van hoogstens drie maande.

4. Indien u die aanklag(te) teen u betwis en u van 'n regspraktisyn wil gebruik maak, kan u, indien u nie self 'n regspraktisyn kan bekostig nie, aansoek om regshulp doen by die plaaslike Regshulpbeampte.

2020-12-15

Date stamp of issuing office
Datumstempel van kantoor van uitvoering

Director of Public Prosecutions
Gauteng, Pretoria

NATIONAL PROSECUTING AUTHORITY
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Date: 31 August 2020

10/3/5 – P11/2020

Brig. Z Basi
DPCI: Serious Corruption Section Head Office
421 Pretorius Street
PREORIA
0002

(Email: ZamaB@saps.gov.za)

HILLBROW CAS 436/08/2019
MKHWEBANE PERJURY MATTER

1. The Director of Public Prosecutions remarks as follows:

   BUSISIWE MKHWEBANE

   must be arraigned in the Pretoria Regional Court on a charge of:

   PERJURY READ WITH SECTION 101 OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977 (THREE COUNTS)

2. The prosecution will be conducted by one of the prosecutors in our office.

3. The prosecutor allocated to the matter will make the necessary arrangements regarding the enrolment of the matter in liaison with Col. Mojela the investigating officer.

4. The case docket, Hillbrow CAS 436/08/2019, is retained at this office and will be handed to the investigating officer by the allocated prosecutor.

ADV. S MZINYATHI
DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG, PRETROIA

IN THE REGIONAL DIVISION OF GAUTENG

HELD AT THE REGIONAL COURT, PRETORIA

CASE NUMBER:

In the matter of:

THE STATE

versus

BUSISIWE MKHWEBANE

(hereinafter referred to as **"the Accused"**)

CHARGE SHEET

PREAMBLE

WHEREAS:

1. Perjury is a common law offence in South Africa. It is the unlawful and intentional making of a false statement in the cause of judicial proceedings by a person who has taken the oath or has made an affirmation before, or has been admonished by somebody competent to administer or to accept the oath, affirmation or admonition.

2. Section 101 of the Criminal Procedure Act, No. 51 of 1977 (hereinafter referred to as the "Criminal Procedure Act"), deals with charges for giving false evidence:

(1) A charge relating to the administering or making of an affirmation or the giving of false evidence or the making of a false statement or the procuring of false evidence or a false statement-

(a) need not set forth the words of the oath or the affirmation or the evidence or the statement, if it sets forth so much of the purport thereof as is material;

(b) need not allege, nor need it be established at the trial, that the false evidence or statement was material to any issue at the relevant proceedings or that it was to the prejudice of any person.

AND WHEREAS

3. The Accused is the Public Protector and was appointed in terms of section 1A of the Public Protector Act, No. 23 of 1994, on 15 October 2016 and assumed her duties on 17 October 2016.

AND WHEREAS

4. During 2010, a complaint was submitted to Office of the Public Protector in respect of a report by CIEX, an asset recovery company in the United Kingdom, and a subsequent SIU enquiry pertaining to money owed by ABSA and other companies to the South African Reserve Bank (hereinafter referred to as the "SARB"). The debt originated from the so-called "lifeboat" lending agreement between the Reserve Bank and the defunct Bankorp that was taken over by ABSA.

5. The investigation was initially conducted by the previous Public Protector and taken over by the Accused when she assumed her duties. On 20 December 2016, the Accused sent a provisional report to various parties in the matter for them to respond to her preliminary finding that the SARB improperly failed to recover funds (R1,125 billion) from ABSA. The parties were also requested to provide inputs regarding her proposed remedial orders. The parties amongst other included the President of the Republic of South Africa (hereinafter referred to as the "President"), the SARB and ABSA.

6. On 19 June 2017 the Accused published the final report wherein she made the finding that the South African Government failed to implement the CIEX report and together with the SARB failed to recover R3.2 billion from Bankorp and/or ABSA. Amongst other the remedial action set out by the Accused directed that the chairperson of the Parliamentary Portfolio Committee take steps to amend section 224 of the Constitution in order to strip the SARB of its primary objective to protect the value of the currency and to change the consulting obligation with the Minister of Finance. It also ordered that the 1998 SIU Proclamation needed to be reopened and amended.

7. The SARB launched an urgent application for the High Court to review the findings of the Public Protector pertaining to the amendment of its mandate. This review application was not opposed by the Public Protector and the remedial action was set aside.

8. The SARB launched a second review application (Case Number 43769/17) wherein the Gauteng High Court was requested to review and set aside the remedial action pertaining to the reopening and amendment of the 1998 SIU Proclamation. Separate review applications were also instituted by ABSA (Case

Number 48123/17) and the Minister of Finance and Treasury (Case Number 52883/17) in respect of the remedial action. All three the review applications were combined. The Accused opposed these review applications and in her capacity as the Public Protector deposed to an Answering Affidavit at Pretoria on 24 November 2017 to Mr Oscar Rikhotso of Maphosa Mokoena Attorneys.

9. On 16 February 2018, the Gauteng High Court handed down judgment in respect of the review applications under case numbers 43769/17, 48123/17 and 52883/17.

10. On 28 March 2018, the Accused applied to the Gauteng High Court for leave to appeal to the Supreme Court of Appeal in respect of some of the order that it made. The application was dismissed.

11. On 30 April 2018, the Accused applied to the Constitutional Court (Case Number 107/2018) for direct access in terms of Rule 18(1) or alternatively for leave to appeal in terms of Rule 19(2) of the Constitutional Court. The Accused in her capacity as the Public Protector deposed to an affidavit in support of her application for direct access in terms of Rule 18(1) or alternatively for leave to appeal in terms of Rule 19(2) of the Constitutional Court, at Pretoria on 26 April 2018 to Ms Yingisani Nyambi of Adams & Adams Attorneys.

12. The SARB opposed the application and filed an Answering Affidavit by Mr. Johannes Jurgens de Jager dated 15 May 2018. In reply to Mr. de Jager's Answering Affidavit the Accused in her capacity as the Public Protector deposed to a Replying Affidavit at Pretoria on 5 June 2018 to Mr Condred Kunzmann.

NOW THEREFORE THE ACCUSED IS GUILTY OF THE FOLLOWING:

COUNT 1:

Perjury read with section 101(1) of the Criminal Procedure Act.

IN THAT upon or about 24 November 2017 and at or near Pretoria in the Regional Division of Gauteng, the Accused unlawfully and intentionally under oath deposed to an answering affidavit in a Gauteng High Court review application under case numbers 43769/17, 48123/17 and 52883/17, wherein she declared that she only had one meeting with the President which was on 25 April 2017, whilst knowing that the declaration was false.

COUNT 2:

Perjury read with section 101(1) of the Criminal Procedure Act.

IN THAT upon or about 26 April 2018 and at or near Pretoria in the Regional Division of Gauteng, the Accused unlawfully and intentionally under oath deposed to an deposed to an affidavit in support of her application for direct access in terms of Rule 18(1) or alternatively for leave to appeal in terms of Rule 19(2) of the Constitutional Court (Case Number 107/2018), wherein she declared that she had a second meeting with the President on 7 June 2017 and that the purpose thereof was to clarify the President's response to the provisional report, whilst knowing that the purpose declared was not correct.

COUNT 3:

Perjury read with section 101(1) of the Criminal Procedure Act.

IN THAT upon or about 5 June 2018 and at or near Pretoria in the Regional Division of Gauteng, the Accused unlawfully and intentionally under oath deposed to a replying affidavit in her application for direct access in terms of Rule 18(1) or alternatively for leave to appeal in terms of Rule 19(2) of the Constitutional Court (Case Number 107/2018), wherein she declared that she did not discuss the final report / new remedial action with the President on 7 June 2017 whilst knowing that it was not true.

referred to in subsection (2) as are reasonably necessary to refresh his or her memory.

(9) If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, the Public Protector shall afford such person an opportunity to be heard in connection therewith by way of the giving of evidence, and such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.

(10) The provisions of this section shall be applicable to any person referred to in subsection (9).

Publication of findings

8. (1) The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

(2) The Public Protector shall submit to Parliament half-yearly reports on the findings in respect of investigations of a serious nature, which were conducted during the half-year concerned: Provided that the Public Protector shall, at any time, submit a report to Parliament on the findings of a particular investigation if —

(a) he or she deems it necessary;
(b) he or she deems it in the public interest;
(c) it requires the urgent attention of, or an intervention by Parliament;
(d) he or she is requested to do so by the Speaker of the National Assembly; or
(e) he or she is requested to do so by the President of the Senate.

(3) The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.

Contempt of Public Protector

9. (1) No person shall—
(a) insult the Public Protector or a Deputy Public Protector;
(b) in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court.

(2) Nothing contained in this Act shall prohibit the discussion in Parliament of a matter being investigated or which has been investigated in terms of this Act by the Public Protector.

Compensation for expenses

10. The Public Protector may, with the specific or general approval of the Minister of Finance or any person authorised by the said Minister to so approve, order that the expenses or a portion of the expenses incurred by any person in the course of or in connection with an investigation by the Public Protector, be paid from State funds to that person.

Offences and penalties

11. (1) Any person who contravenes the provisions of sections 3(14), 7(2) and 9 of this Act, or section 111(3) of the Constitution, shall be guilty of an offence.

(2) Any person who fails to disclose an interest contemplated in section 3(14), shall be guilty of an offence.

(3) Any person who, without just cause, refuses or fails to comply with a direction under section 112(3)*(a)* of the Constitution or section 7(4)*(a)* of this Act or refuses to answer any question put to him or her under those paragraphs or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence.

Annexure A

PUBLIC PROTECTOR SERVICE CONDITIONS

1. SALARY

An annual salary at a rate equal to that of a Judge of Appeal of the Supreme Court of South Africa.

2 NON-TAXABLE ALLOWANCE

A non-taxable allowance of **R (X[1])** per annum, which increases on October of each year with 5%.

2A ENTERTAINMENT ALLOWANCE

An entertainment allowance of **R (X)** per annum, which increases on October of each year with 5%.

3. GRATUITY

3.1 On vacation of office a gratuity calculated in accordance with the formula-

D/7 x 2 x (E+3) x F,

In which formula the factor

(a) D represents the salary (basic per annum) which at the time of his or her vacation of office was applicable to the office of the Public Protector;

(b) E represents the period in years of his or her period in such office; and

(c) F represents the provision for the calculation of income tax calculated at a marginal rate of 40 %.

3.2 The surviving spouse of the Public Protector who died before his or her term of office as Public Protector has expired, shall be paid an amount equal to the amount of the gratuity which would in terms of paragraph 3.1 have been payable to the Public Protector had he or she not died but, on the date of his or her death, vacated his or her office in terms of that paragraph: Provided that factor E in the formula referred to in paragraph 3.1 shall be deemed to be no less than 4.

4. MEDICAL SCHEME

A contribution is made towards a medical scheme equal to the contribution made in respect of a Judge of Appeal.

5. MOTOR VEHICLE SCHEME

A motor vehicle owned by the State may, on such conditions as the Minister for Justice and Constitutional Development may determine with the concurrence of the Minister of Transport in respect of Judges of the Supreme Court, be made available to the Public Protector for use,

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[1] Updated Annually

in accordance with the conditions so determined, in the course of his or her official functions as well as his or her private purposes.

6. LEAVE

The Speaker may grant leave to the Public Protector for a period of three and a half months for every period of four years' service completed by the Public Protector, or for such shorter period and subject to such conditions as the Speaker may in any particular case deem fit.

6.1A In addition to the leave referred to in subparagraph 6.1, the Public Protector may take vacation leave for a period not exceeding 36 calendar days per year.

6.2 If according to a certificate of a medical practitioner, it appears that owing to illness the Public Protector cannot perform his or her duties for a specified period, the Speaker may grant the Public Protector sick leave for that period.

6.3 If, in exceptional circumstances, the Speaker is satisfied that leave for which no provision has been made in this determination, should be granted in a specific case, he or she may grant such leave on such conditions as he or she may deem necessary.

6.4 No leave which may be granted in terms of this determination shall be accumulative, and no salary or allowance shall be claimed in respect of leave which could have been taken but which was not utilized.

6.5 The Chief Administrative Officer (CEO) appointed in terms of section 3(1) (b) of the Public Protector Act, 1994 (Act No. 23 of 1994), shall keep a record of leave taken by and granted to the Public Protector.

7 SETTLEMENT ALLOWANCE

7.1 An allowance of **R(X)** per month shall be paid to the Public Protector for purposes of settlement at the seat of the Public Protector's office which allowance shall be adjusted from time to time in accordance with the settlement allowance payable to a Judge of Appeal residing permanently at the seat of the court

7.2 If the amount payable in terms of subparagraph 7.1 is less than the amount which the Public Protector reasonably had to spend in respect of his or her settlement at his or her seat, an amount equal to the amount so spent may be paid to the Public Protector:

Provided that the period during which such higher amount may be paid, shall not exceed three months from the date of taking up office by the Public Protector: Provided further that such higher amount shall not exceed **RX** per month.

7.3 An allowance equal to the minimum wage determined by law plus 20%, shall be paid to the Public Protector for the payment of a domestic help at his residence in Pretoria.

8 TRANSPORT AND SUBSISTENCE ALLOWANCE

8.1 If the Public Protector is required to perform official duties away from the seat of the Public Protector's office, he or she may make use of government transport: Provided that in the case of motor vehicle transport, an official driver shall be made available to the Public Protector if or she certifies that he or she cannot reasonably dispense with the services of an official driver.

8.2 If the Public Protector uses private transport in performing any official duties referred to in paragraph 8.1, he or she may be compensated at a tariff equal to the compensation paid to a

Judge of Appeal for use of private transport in performing any official duties away from headquarters

8.3 The Public Protector shall be entitled to be accompanied by his or her spouse on official journeys at state expense if he or she uses the same vehicle as the Public Protector, and may claim in respect of such spouse a subsistence allowance equal to an allowance payable to the spouse of a Judge of Appeal, if the Public Protector attends occasions in his or her official capacity.

8.4 The Public Protector, when on official duty away from the seat of the Public Protector's office, is entitled to an all-inclusive subsistence allowance] that he or she is actually absent from the seat , equal to the allowance payable to a Judge of Appeal who is absent from his or her headquarters in the case of a national visit and in the case of an international visit, equal to an allowance payable to a Minister as determined by the Department of Public Service and Administration from time to time. The allowance for an uncompleted period of 24 hours shall be calculated proportionately according to the number of full hours of absence.

8.5 For a period of absence on official duties of less than 24 hours in the circumstances referred to in paragraph 8.4, an all-inclusive subsistence allowance equal to the allowance payable to a Judge of Appeal who is absent from his or her headquarters for a period of less than 24 hours shall be paid.

8.5A If the amount payable in terms of subparagraphs 8.3, 8.4 or 8.5 is less than the amount which the Public Protector reasonably had to spend in respect of subsistence, an amount equal to the amount so spent may be paid to the Public Protector.

8.6 When a person is appointed to the office of Public Protector and the seat of the Public Protector's office is not situated at the place where he or she resides on appointment, the cost of the transport of the Public Protector and his or her family, domestic workers and effects to the seat of the Public Protector's office shall be defrayed from public funds.

8.7 When effects have to be transported the office of the Public Protector shall obtain written tenders from at least three cartage contractors for the packing, loading, unloading and unpacking of the effects for transport by train and, should the Public Protector so prefer, for the transport thereof by road.

8.8 The lowest tender for the packing, loading, unloading and unpacking of the effects shall be accepted by the office of the Public Protector, but the Speaker may approve the acceptance of a higher tender if, in his or her opinion, there are good reasons for rejecting the lowest tender.

8.9 The State shall not be responsible for any insurance premiums in respect of the transportation of effects: Provided that premiums in respect of insurance cover in the case of the transport of effects by road may be paid from public funds if the lowest tender for road transport includes such premiums as an integral part thereof.

8.10 .The Speaker may in exceptional cases approve the transportation of the effects of the Public Protector at State expense and their storage in a warehouse at his or her previous home and at the seat of the Public Protector's office for a period not exceeding 12 months, and, thereafter, their transport to his or her new home: Provided that the office of the Public Protector shall call for at least three tenders for the performance of the services and the lowest tender shall be accepted by him or her: Provided further that the Speaker may approve the acceptance of a higher tender if, in his or her opinion, there are good reasons for rejecting the lowest tender.

8.11 On-

(i) removal from office;

(ii) vacation of his or her office; or

(iii) the death of the Public Protector,

his or her effects may be transported, once only, at State expense to any place in the Republic of South Africa where he or she or the surviving spouse, as the case may be, is to settle.

PP salary breakdown 2019/20

Earnings	**Amounts**	**Per annum**
Cash salary		
Entertainment All		
Settlement Allowance		
Non Pensionable Allowance		
Non Taxable		
Total		

BM 9321

FINANCIAL SECTOR CONDUCT AUTHORITY ("*THE FSCA*")

DUBE PHINEAS TSHIDI N.O.

AND

THE PUBLIC PROTECTOR

THE ECONOMIC FREEDOM FIGHTERS

M E M O R A N D U M

THE ISSUES TO BE DETERMINED

1. We have been instructed to prepare a memorandum on the following issues:

   (a) Whether a new investigation may be launched following the complaint that was originally lodged by the president of the Economic Freedom Fighters on 15 March 2017 ("*the original complaint*"),

   (b) alternatively;

   Whether the complaint should be lodged a fresh.

(c) How the investigators and ultimately the Public Protector should apply the provisions of section 6(9) of the Public Protector Act.[1]

THE COMPLAINT

2. At the outset we need to highlight that the order granted on 9 October 2020 does not prohibit the Public Protector from investigating the complaints again.[2]

3. We previously expressed our opinion that a new report may be based on the existing complaint or on a new complaint, properly assessed and substantiated.[3] We do not see the need for a new complaint to be submitted, unless the complainant is of the view that further complaints need to be investigated.

4. That being said, the Public Protector Act does not restrict the Public Protector's investigation of a complaint, to the ambit of the complaint as laid by the complainant. Section 6(4) of the Act clearly provides that the "...*Public Protector shall, be competent-(a) to investigate, on his or her own initiative or on receipt of a complaint...*" the matters referred to in subsections (i) to (v). Section 6(5) further provides that "*In*

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[1] Act 23 of 1998

[2] Paragraph [21] of the Judgment

[3] Memorandum dated 1 November 2019

addition to the powers referred to in subsection 4, the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate…" the matters referred to in subsections (a) to (d).

5. The complaint merely provides the basis for an investigation and the Public Protector is not limited to what is set out in the complaint. It may also be prudent and especially with regard to the provisions of rule 5(6)[4] that the offices of the Public Protector assist the complainant in the formulation of the complaint, especially with regard to compliance with the criteria as enunciated in rule 10[5].

6. We wish to raise the issue that in the formulation of the issues to be investigated, additional care should be taken in doing so, especially in light of the fact that the FSCA and Adv Tshidi will seek to review any new report. In this regard and without being prescriptive, the second issue identified in the erstwhile report, that Adv Tshidi did not properly manage the conflict between Mr Mostert and his law firm, is a good example.

7. As we understand the complaint, the issue was not only that

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[4] Promulgated in terms of section 7(11) of the Public Protector Act

[5] Promulgated in terms of section 7(11) of the Public Protector Act

Mr Tshidi favoured Mr Mostert for appointment as a curator, but more importantly that Mr Mostert and his firm debited a vast amount of fees. The issue that was raised by Judge Nichols was not that a conflict of interest existed as between Mr Mostert in his capacity as curator and the appointment of his law firm, but rather the manner in which he acted following upon his appointment. In this regard Judge Nichols stated the following "*What is more disturbing is Mostert's use of his own law firm, AL Mostert, to litigate on his behalf. Although this is not prejudicial or necessarily results in a conflict, there is no escaping the inference that this may create an incentive to litigate unnecessarily. Moreover, this litigation which has been described as lavish, is at the expense of CPF. Undoubtedly the actions of Nash, in thwarting Mostert's attempt to obtain information, were a major contributing factor to the legal costs. Mostert's affidavits in response to the counter application were excessive. The affidavit of 144 pages with approximately 1000 pages of annexures was unnecessary and unwarranted. The perception of being motivated by self-interest is aggravated. The application was that of the FSB and it was for the FSB to put up whatever evidence they saw fit, including an affidavit by Mostert if required. It was not for Mostert to enter the fray using the resources of CPF to do so…*".

8. On a reading of this portion of the judgment, the following questions arise. Firstly, why did the FSCA and/or Adv Tshidi not act against Mr Mostert for incurring these costs after the matter was heard and why did they permit Mr Mostert to participate in the application when it was obviously not necessary for him to become involved in the matter. Secondly, whether there are other instances in which Mr Mostert similarly litigated in a lavish style and if the FSCA and/or Adv Tshidi questioned his actions or merely turned a blind eye.

9. As we have stated above, a new complaint is not required unless the complainant wishes to add thereto.

10. We also wish to add that consideration should be given to serve a section 7(9)(a) notice upon the FSCA in respect of certain of the complaints that were raised by the president of the EFF. This was an aspect that was raised in the review application.

SECTION 6(9) OF THE PUBLIC PROTECTOR ACT

11. Section 6(9) of the Public Protector Act stipulates as follows:

"Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public

Protector within two years from the occurrence of the incident or matter concerned."

12. Section 6(9) clearly provides that if a complaint is lodged two years after the occurrence of an event, that such a complaint can only be entertained if special circumstances exist. The special circumstances are to be determined by the Public Protector exercising her discretion in that regard.

13. The Public Protector is guided by Rule 10 promulgated in terms of section 7(11) of the Public Protector Act. Rule 10(1) state as follows:

"*10(1) The Public Protector shall, when making a decision regarding the late lodging of a complaint provided for in section 6(9) of the Act, consider-*

(a) *The information provided by the complainant;*

(b) *The nature of the complaint, the reasons for the complaint's grievance and the redress being sought;*

(c) *The reason given by the complainant for the delay;*

(d) *Whether the outcome of an investigation could rectify a systemic problem in the public administration;*

(e) *The likelihood of being able to investigate the matter due to the delay having regard to the nature of the allegations and the availability of information, evidence, witnesses and records; and*

(f) *Any other relevant factor that the Public Protector regards as special circumstances.*"

14. These factors as enunciated in Rule 10 should be applied to each of the issues investigated, in order to meet the test for rationality in the exercise of the Public Protector's discretion as is envisaged in section 6(9) of the Public Protector Act. It is important and in order to meet the test for rationality that a factual basis is provided in order to establish that special circumstances do exist. In this regard the Public Protector's attention is drawn to the following extract from Gordhan v Public Protector[6] "*[15] ... In view of the provisions of this section[7] and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this claim...*"

15. Regard should also be had to the judgment in Leisching and Others v S , where the Constitutional Court had the following to say in assessing the meaning of special circumstances as used in section 17(2)(f) of the

[6] [2019] 3 ALL SA 743(GP)

[7] Court referring to section 6(9) of the Public Protector Act

Superior Courts Act:

"[132] The meaning of the phrase "exceptional circumstances" has been considered by the Courts on numerous occasions. The Courts have been reluctant to lay down a general definition as each case is to be considered on its own facts. It has been held that it is neither desirable nor possible to lay down a precise rule or definition as to what constitutes exceptional circumstances. The meaning and interpretation given by the Courts to the phrase has been wide ranging. Circumstances which may be regarded as "ordinary" in one matter may be considered "exceptional" in another. Ultimately, it is the function of the presiding officers to determine whether, on a case by case basis, the circumstances can be found to be exceptional."

"[51] What then is the meaning that should be ascribed to the phrase "exceptional circumstances" in section 17(2)(f) of the Superior Courts Act? Construed strictly, I consider the words "rare", "extraordinary", "unique", "novel", "atypical", "unprecedented", and "markedly unusual" to more fittingly exemplify the meaning of the phrase contemplated by section 17(2)(f) of the Superior Courts Act. What we must remain mindful of though, is that what is

exceptional must be determined on the merits of each case. It is a factual inquiry."

16. This is particularly important as the complaints date back to events as far back as 2007. The new report should specifically deal with the special circumstances that were taken into consideration in investigating each particular complaint.

17. We have also noted that the original complaint does not meet the criteria set out in Rule 5(6). Rule 5(6) clearly requires that when a complaint is lodged after two years from the occurrence of the incident, that the complaint shall contain the following information:

17.1 The reasons for the delay in lodging the complaint.

17.2 The special circumstances that will inform the Public Protector why the compliant must be investigated; and

17.3 Any other information that might assist the Public Protector in determining the availability of evidence, witnesses or records to facilitate the investigation.

18 Should the need arise to discuss this memorandum we will make ourselves available and a consultation can be arranged.

H J SMITH SC

B TSHABALALA

Sandton Chambers

12 January 2020

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/20

In the matter between:

LOUISAH BASANI BALOYI	Applicant
and	
PUBLIC PROTECTOR	First Respondent
BUSISIWE MKHWEBANE	Second Respondent
CHIEF EXECUTIVE OFFICER IN THE OFFICE OF THE PUBLIC PROTECTOR	Third Respondent
VUSSY MAHLANGU	Fourth Respondent

Neutral citation:	*Baloyi v Public Protector and Others* [2020] ZACC 27
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Theron J (unanimous)
Decided on:	4 December 2020
Summary:	Labour Relations Act 66 of 1995 — section 157(1) — concurrent jurisdiction — unlawful termination

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. Leave to appeal directly to this Court is granted only in relation to the High Court's holding on jurisdiction.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside.
4. The matter is remitted to the High Court to determine the merits and the costs of the first hearing.
5. The first respondent is ordered to pay the applicant's costs in this Court.

JUDGMENT

THERON J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Tshiqi J and Victor AJ concurring):

Introduction

[1] What this matter essentially raises for determination is whether the High Court has jurisdiction over an allegedly unlawful termination of a fixed-term contract of employment. The extent of the High Court's jurisdiction in respect of disputes arising in the employment setting is a vexed question on which courts and legal commentators

have long been divided. In a series of cases culminating in *Gcaba*,[1] this Court has provided guidance regarding the proper extent of the High Court's jurisdiction in relation to claims that arise in the labour context. While these judgments were specifically concerned with administrative law claims arising in the labour context, they nevertheless provide general principles to guide the determination of whether the High Court enjoys jurisdiction over a labour dispute. However, there continue to be varied approaches by the courts to when a matter falls within the exclusive jurisdiction of the Labour Court.

Background

[2] The applicant is Ms Louisah Basani Baloyi, the former Chief Operations Officer in the Office of the Public Protector, which is the first respondent. The Public Protector, Ms Busisiwe Mkhwebane, is cited in her personal capacity as the second respondent. The third respondent, Mr Vussy Mahlangu, is the Chief Executive Officer of the Public Protector. He is also cited in his personal capacity as the fourth respondent. Ms Baloyi seeks personal costs awards against Ms Mkhwebane and Mr Mahlangu.

[3] Ms Baloyi was employed by the Office of the Public Protector on a five-year contract with effect from 1 February 2019. The contract provided for a six-month probation period (ending on 31 July 2019), which could be extended for not more than twelve months. At the end of the probationary period, the Office of the Public Protector would be entitled to either terminate Ms Baloyi's employment in terms of clause 5.3 or confirm her appointment if it was satisfied with her "level of performance" in terms of clause 5.5.

[4] Ms Baloyi's six-month probation period ended on 31 July 2019. On 8 October2019, Ms Baloyi received a letter from Mr Mahlangu inviting her to make

[1] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); and *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693; 2002 (2) BCLR 113 (CC).

representations on the confirmation of her employment contract.[2] She did so in writing on 15 October 2019. On 21 October 2019, Ms Baloyi received a further letter from Mr Mahlangu, stating that the Office of the Public Protector was unable to confirm her permanent employment and that her contract would terminate on 31 October 2019. The reasons provided were that she was "not suitable for the role of COO taking into account her overall capability, skills, performance and general conduct in relation to the position".

[5] Ms Baloyi launched an urgent application in the High Court, Gauteng Division, Pretoria, on the basis that the termination of her employment was unlawful and that Ms Mkhwebane, in her capacity as the Public Protector, had not complied with her constitutional obligations in terms of section 181(2) of the Constitution. The alleged unlawfulness of the termination had two aspects: first, the termination amounted to a breach of contract and, secondly, it amounted to an exercise of public power that breached the principle of legality, a standard to which all exercises of public power are measured. Ms Baloyi founded her case on "contract, the Constitution and the Public Protector's public duties as an organ of state".[3]

[6] The relief sought by Ms Baloyi in the High Court was three-fold. Ms Baloyi approached the High Court seeking, first, a declaratory order that the decision to terminate her employment contract was unconstitutional, unlawful, invalid and of no force and effect and, secondly, flowing from that, an order setting aside the termination decision. Thirdly, Ms Baloyi sought a declaratory order to the effect that Ms Mkhwebane, in her official capacity, had failed to fulfil her obligations under section 181(2) of the Constitution.

[7] The High Court dismissed Ms Baloyi's application on the basis that it did not have jurisdiction over the dispute and that it should have been brought before the

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[2] *Baloyi v Office of the Public Prosecutor* [2019] ZAGPPHC 993 (High Court judgment) at para 8.

[3] Id at para 17.

Labour Court. The High Court reasoned that Ms Baloyi's contention that her employment contract had been terminated unlawfully rested on the allegation that it was terminated contrary to the Policy on Probation and Disciplinary Policy of the Office of the Public Protector and was taken by an official without the necessary authority. It also attributed significance to the fact that Ms Baloyi's employment contract contained a clause stating that the employment relationship could be terminated at the end of the probationary period in accordance with the requirements of the Labour Relations Act (LRA).[4] The High Court also noted that Ms Baloyi's employment contract incorporated the Policy on Probation of the Office of the Public Protector, which stipulates that "following the recommendation to annul the appointment, Human Resource Division should take the necessary steps as per the provisions of the Labour Relations Act".

[8] The High Court concluded that not only did Ms Baloyi make allegations that in essence raised "a labour dispute as envisaged by the LRA", the employment contract itself "point(ed) to the LRA as the vehicle for vindicating the rights under it".[5] Relying on dicta from this Court's judgments in *Chirwa* and *Gcaba*, the High Court concluded that it was precluded from hearing the matter. The High Court did not consider whether the decision to terminate Ms Baloyi's employment was taken for an ulterior purpose, nor did it consider whether the conduct of the second respondent was otherwise unconstitutional insofar as it allegedly fell short of what is required by section 181(2) of the Constitution. It made no ruling regarding the declaratory relief.

[9] Ms Baloyi's application to the High Court for leave to appeal to the Supreme Court of Appeal was conditional on leave for direct appeal to this Court being refused. In this Court, she seeks a review of the decision to terminate her employment and an order for reinstatement (review relief). She also seeks a declaratory order that the second respondent violated her constitutional obligations under section 181(2) of the Constitution (declaratory relief). Ms Baloyi also challenges the High Court's finding

[4] 66 of 1995.

[5] High Court judgment above n 2 at paras 55 and 57.

that it did not have jurisdiction in relation to both the declaratory relief and the review relief (jurisdictional challenge).

Jurisdiction

[10] Ms Baloyi contends that this Court has jurisdiction to adjudicate on the merits of her application (concerning the review and declaratory relief) as well as her jurisdictional challenge. The respondents contend that this Court lacks jurisdiction in relation to both aspects. They submit that the jurisdictional challenge hinges on the interpretation of the applicant's pleadings in the High Court and that this turns on a question of fact insofar as the Court has been asked to determine which cause of action Ms Baloyi raised in her pleadings before the High Court. Furthermore, they argue that, even if the interpretation of pleadings were a "residual question of law", it would not raise a constitutional matter. The respondents submit further that this Court is also not called upon to interpret the LRA since the parties are *ad idem* as to the interpretation of the applicable statute and even the interpretation of the leading cases.

[11] Ms Baloyi's jurisdictional challenge turns on a question of law. Simply put, Ms Baloyi asks this Court to answer the following question: does section 157(1), read with section 157(2) of the LRA, extend the Labour Court's exclusive jurisdiction over an alleged unlawful termination of a fixed-term contract of employment? This raises a constitutional issue because it involves the interpretation of section 157(1) of the LRA, read with section 157(2). The interpretation of the LRA axiomatically raises a constitutional issue.[6]

[12] The declaratory relief sought calls for adjudication on whether Ms Mkhwebane, in her capacity as the Public Protector, has complied with her constitutional obligations and the review relief requires this Court to determine whether the Public Protector, who performs an essential constitutional function, has abused her power and, in doing so,

[6] *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (NEHAWU) at para 15.

breached the Constitution and the principle of legality. This Court's jurisdiction is therefore engaged in relation to the substantive relief sought by Ms Baloyi (comprising the review and declaratory relief) as well as her jurisdictional challenge.

Leave to appeal

[13] Should leave to appeal be granted in relation to either or both the jurisdictional challenge and the merits? In general, whether leave to appeal should be granted depends on a number of factors, including whether the matter raises only factual issues, the public interest in the matter and the applicant's prospects of success.[7] This Court has held that a direct appeal should similarly be allowed if it is in the interests of justice to do so, taking into consideration "whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success".[8]

[14] The respondents offer several reasons for why a direct appeal to this Court should not be entertained, including: that Ms Baloyi has not raised a legal issue, let alone a constitutional one; that this Court should have the benefit of a decision by the Supreme Court of Appeal; that Ms Baloyi's prospects of success are poor; and that in relation to the declaratory relief there are disputes of facts that are not capable of being resolved without the leading of oral evidence and which should not be resolved by this Court as a court of first and last instance.

The jurisdictional challenge

[15] At the outset, it must be noted that, in principle, it would be in the interests of justice to grant leave to appeal in relation to Ms Baloyi's jurisdictional challenge. The challenge raises an important constitutional issue, which this Court has yet to rule on.

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[7] *S v Jacobs v* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC) at para 57.

[8] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 21.

It is also readily apparent that Ms Baloyi has reasonable prospects of success, taking into consideration the dicta from this Court weighing in her favour. In *Chirwa*, the majority of this Court stated that "the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations",[9] which directly contradicts the rationale underpinning the High Court's judgment and the respondents' submissions.

[16] There are also several factors that weigh in favour of granting Ms Baloyi leave to appeal directly to this Court in relation to her jurisdictional challenge. For example, the constitutional issue raised by Ms Baloyi's jurisdictional challenge has been answered by the Supreme Court of Appeal on a number of occasions,[10] but has not been expressly addressed by this Court.[11] This Court therefore has the benefit of judgments by the Supreme Court of Appeal on this issue.

The merits

[17] Ms Baloyi contends that a direct appeal in relation to the merits should be allowed because the matter has been fully ventilated on the papers, the papers contain sufficient facts to justify the relief sought and, finally, because the matter is urgent and a referral back to the High Court would lead to "unnecessary and unneeded delay". I disagree. The merits of Ms Baloyi's application were not ventilated in the High Court and Ms Baloyi's submissions on the urgency of these aspects of her application, while not entirely without merit, do not justify this Court adjudicating upon these issues as a

[9] *Chirwa* above n 1 at para 60.

[10] *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114; 2019 JDR 1750 (SCA) at para 9; *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) at paras 11 and 18; *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA) (*McKenzie*) at para 7; *Manana v King Sabata Dalindyebo Municipality* [2010] ZASCA 144; 2010 JDR 1423 (SCA) at para 23; and *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; 2002 (1) SA 49 (SCA) (*Fedlife*) at para 4.

[11] In *Fredericks*; *Chirwa*; and *Gcaba* (above n 1), this Court considered whether the High Court has jurisdiction over administrative law claims in the employment setting. In each of those cases, the claimant had not attempted to enforce contractual rights – he or she had attempted to enforce administrative-law rights. In the present application, this Court is asked to consider the High Court's jurisdiction over contractual claims arising in the employment setting.

court of first and last instance. This Court should not grant leave to appeal in relation to the merits.

[18] The respondents point out that, even if this Court were to entertain and uphold only the direct appeal on the jurisdictional challenge, that would only result in the matter being remitted to the High Court for adjudication on the merits. The argument continues that Ms Baloyi will therefore derive no practical or financial advantage from being granted direct leave to appeal in relation to the jurisdictional challenge only.

[19] It is true that if this Court were to entertain Ms Baloyi's appeal in relation to the jurisdictional challenge only, and find in her favour, she would be obliged to approach another court to take the matter further. But the respondents' submissions on this score ignore the fact that, if this Court refuses to adjudicate on the jurisdictional challenge, Ms Baloyi will have no option but to approach the Labour Court for an adjudication on the merits of her application. However, if this Court allows her jurisdictional challenge to proceed and finds in her favour, she will be at liberty to approach either the Labour Court, or the High Court, the forum she chose to approach in the first place. Moreover, the respondents have not shown that an order in relation to the jurisdictional challenge only would cause them any prejudice. The jurisdictional challenge will either be considered by this Court or, in the event that leave to appeal directly to this Court is refused, by the Supreme Court of Appeal, to which Ms Baloyi has applied for leave to appeal, conditional upon leave being denied by this Court.

[20] In sum, it is in the interests of justice to allow a direct appeal in relation to the jurisdictional challenge, but not to allow a direct appeal in relation to the merits. The merits of Ms Baloyi's application should be determined by a lower court once the jurisdictional challenge has been answered by this Court. Ms Baloyi's jurisdictional challenge involves an important constitutional issue on which this Court is well placed to make a determination and resolving the jurisdictional challenge now will likely save both parties time and costs.

Applicable legislative framework

[21] The crisp question that this Court is called upon to answer is whether the High Court erred in holding that it lacked jurisdiction to hear Ms Baloyi's claim. In assessing the merits of this conclusion, it is necessary briefly to outline the legislative framework that is relevant to the interplay between the respective jurisdictional bounds of the High Court and the Labour Court.

[22] The High Court has jurisdiction to adjudicate any matter, except those matters that: (i) fall within the exclusive jurisdiction of this Court in terms of section 167(4) of the Constitution; (ii) this Court has agreed to hear directly in terms of section 167(6); or (iii) have been assigned by legislation to another court with a status similar to that of the High Court.[12] The Labour Court, which the respondents contend is the proper forum to hear Ms Baloyi's claim, is designated as a court with a status similar to that of a High Court.[13]

[23] The legislation in terms of which an assignment would be made in the context of the present matter is the LRA.[14] Section 157(1) of the LRA provides for the exclusive jurisdiction of the Labour Court in all matters that – in terms of the LRA or other law – are to be determined by the Labour Court. In doing so, it fulfils one of the stated purposes of the LRA, which is to establish the Labour Court and the

[12] Section 169(1) of the Constitution reads:

> "The High Court of South Africa may decide—
>
> (a) any constitutional matter except a matter that—
>
> (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
>
> (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
>
> (b) any other matter not assigned to another court by an Act of Parliament."

[13] Section 151(2) of the LRA.

[14] For the reasons elucidated below, the other potentially relevant legislation in this context, the Basic Conditions of Employment Act 75 of 1997 (Employment Act), is not applicable in this matter.

Labour Appeal Court as superior courts, with "exclusive jurisdiction to decide *matters arising from the Act*".[15] Section 157(1) reads:

> "Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

Sections 68(1),[16] 77(2)(a),[17] 145[18] and 191[19] of the LRA proffer examples of matters that "are to be determined by" the Labour Court and are therefore, by virtue of section 157(1), within the exclusive jurisdiction of the Labour Court. This Court has found, moreover, that the High Court's jurisdiction in respect of employment-related disputes is ousted only where the dispute is one for which the LRA creates specific remedies, including, for example, unfair dismissal disputes.[20]

[24] Crucially, section 157(1) does not afford the Labour Court general jurisdiction in employment matters and, as a result, the High Court's jurisdiction will not be "ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations".[21]

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[15] Preamble to the LRA.

[16] Section 68(1) provides: "[i]n the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction [to grant certain interdicts and orders]".

[17] Section 77(2)(a) provides that furtherance of protest action that does not comply with the requirements for permissible protest set out in section 77(1), "[t]he Labour Court has exclusive jurisdiction to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of protest action".

[18] Section 145(1) provides that parties alleging defects in any arbitration proceedings in the CCMA "may apply to the Labour Court for an order setting aside the arbitration award". Section 145(3) provides further that the Labour Court "may stay the enforcement of the award pending its decision" and section 145(4) provides for the powers of the Labour Court in the event that the award is set aside. See also *Gcaba* above n 1 at para 70.

[19] Section 186 of the LRA deals with unfair dismissals, which, in terms of section 191, must be referred to arbitration following a failed attempt at conciliation and which will ultimately be for review by the Labour Court. See also *Gcaba* at para 29.

[20] *Gcaba* above n 1 at para 73.

[21] *Fredericks* above n 1 at para 40. See also *Fedlife* above n 10 at para 25, in which Nugent JA held that "section 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees". The approach endorsed in *Fredericks* and *Fedlife*

[25] The Basic Conditions of Employment Act (Employment Act),[22] which constitutes one such "other law", echoes the provisions of section 157(1) of the LRA in its section 77(1):

> "Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act."

[26] By virtue of section 157(1), the Labour Court will enjoy exclusive jurisdiction over any matter "in terms of" the Employment Act. Matters governed by or concerning the enforcement of a provision of, the Employment Act accordingly fall within the ambit of the Labour Court's exclusive jurisdiction. The Labour Court and the Labour Appeal Court have held on a number of occasions that "the provisions of section 77(1) do no more than confer a residual exclusive jurisdiction on the Labour Court to deal with those matters that the [Employment Act] requires to be dealt with by the court".[23]

[27] However, both the LRA and the Employment Act expressly recognise that there are certain matters in respect of which the Labour Court and the High Court enjoy concurrent jurisdiction. Section 157(2) of the LRA provides, in relevant part:

> "The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—
>
> (a) employment and from labour relations;
>
> (b) . . .
>
> (c) . . . ."

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was also followed in various judgments of the High Court, including *Jacot Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T) at 600E-G and *Runeli v Minister of Home Affairs* 2000 (2) SA 314 (TkH) at 323-4.

[22] 75 of 1997.

[23] See *Lewarne* above n 10 at para 7.

[28] Section 77(3) of the Employment Act provides, similarly, that the Labour Court "has concurrent jurisdiction with the civil courts to hear and determine any matter concerning *a contract of employment*, irrespective of whether any basic condition of employment constitutes a term of that contract". That disputes arising from contracts of employment do not, without more, fall within the exclusive jurisdiction of the Labour Court is further made clear by section 77(4) of the Employment Act, which emphasises that the exclusive jurisdiction of the Labour Court referred to in section 77(1)—

> "does not prevent any person relying upon a provision of [the Employment Act] to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement."

[29] It is plain from these sections that the parameters of the scope of the exclusive jurisdiction of the Labour Court is not cast in Manichean terms. Section 157(1) of the LRA does not refer to specific sections of that Act as sources of the Labour Court's exclusive jurisdiction. It only provides that they are to be found elsewhere in the Act. In some instances, their location is clear: for example, sections 68(1), 77(2), 145 and 191. In others, it is left to the courts to determine whether a matter is one that arises in terms of the LRA and is, in terms of that Act, or another law, to be determined solely by the Labour Court.

[30] The reason for this delineation is that the Labour Court and the Labour Appeal Court were "designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining".[24] While accepting that section 157(1) does not confer exclusive jurisdiction on the Labour Court in every employment-related matter, this

[24] *Motor Industry Staff Association v Macun N.O.* [2015] ZASCA 190; 2016 (5) SA 76 (SCA) at para 20.

Court, in *Chirwa*, made it clear that the Labour Court and other specialist tribunals created under the LRA are uniquely qualified to handle labour-related disputes:

> "The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolutions mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes."[25]

[31] The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of section 77(3) of the Employment Act and section 157(2) of the LRA adds to, rather than diminishes, their jurisdiction.[26] In doing so, it affords litigants an additional right to approach either court where a dispute falls within the ambit of those sections.

[32] In order to determine whether the High Court lacked jurisdiction to adjudicate Ms Baloyi's claim, it is necessary to determine whether the claim is of such a nature that it is required, in terms of the LRA or the Employment Act, to be determined exclusively by the Labour Court.

The nature of Ms Baloyi's claim

[33] In *Gcaba*, this Court made clear that an assessment of jurisdiction must be based on an applicant's pleadings, as opposed to the substantive merits of the case. It held:

> "In the event of the Court's jurisdiction being challenged . . . the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant seeks to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the

[25] *Chirwa* above n 1 at para 47.

[26] *Gcaba* above n 1 at para 71; *Motor Industry Staff Association* above n 23 at para 20; *Mbayeka v The MEC For Welfare, Eastern Cape* 2001 JDR 0017 (TkH) at para 19.

> legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction."[27]

[34] Ms Baloyi contends that the cause of action underlying the review relief flows from both public law and contract. The contractual basis for the review relief is that her contract was terminated out of time, well after her probation period had ended and in conflict with its terms relating to termination. In particular, she points out that her contract made it clear that, if the employer neither confirmed, nor terminated her contract at the end of the stipulated probation period, the appointment would be deemed to be confirmed. She also notes that certain policies of the Office of the Public Protector, which were incorporated into her contract by reference, were not complied with.

[35] The public law basis for the review relief has two parts. The first is that Mr Mahlangu lacked the requisite statutory authority to terminate Ms Baloyi's employment. The second is that the decision to terminate her employment was made *mala fide*, with an ulterior motive and contrary to the stated employment policies of the Office of the Public Protector. In short, Ms Baloyi alleges that her employment was terminated because Ms Mkhwebane and Mr Mahlangu wanted to "get rid of" her after she raised concerns about their "unlawful and deeply concerning" conduct.

[36] Finally, the constitutional aspect, which is the basis for the declaratory relief, is Ms Mkhwebane's alleged non-compliance with the obligations imposed on her office by section 181(2) of the Constitution. She submits that the abovementioned instances of unlawfulness and/or unconstitutionality clearly generate a cause of action wholly independent of the LRA. The High Court judgment expressly acknowledges that Ms Baloyi disavowed any reliance on her rights under the LRA.

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[27] *Gcaba* above n 1 at para 75.

The competence of the High Court to hear Ms Baloyi's claim

[37] The High Court held that the matter is essentially a labour dispute arising from an employment relationship that falls within the Labour Court's exclusive jurisdiction. For the reasons that follow, the High Court erred in reaching this conclusion.

[38] It is trite that the same set of facts may give rise to several different causes of action. In some instances, the forum in which a particular cause of action may be pursued is prescribed in terms of legislation. In the labour context, where more than one potential cause of action arises as a result of a dismissal dispute, a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly. Had Ms Baloyi sought to pursue a claim of unfair dismissal, she would have been required, in terms of section 157(1) of the LRA, to approach the Labour Court. This is because unfair dismissal claims fall within the exclusive jurisdiction of the Labour Court.

[39] Crucially, however, where a litigant is required to bring a certain cause of action before a specifically competent forum, it does not follow that they are bound to pursue a claim under that cause of action simply because it is possible to do so. Put differently, the fact that a cause of action is limited to certain fora must not be interpreted as obliging an applicant only to pursue that particular cause of action. The respondents cite the dictum of the Labour Appeal Court that "[i]f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established under the LRA for their resolution".[28] In this case, they submit that, because Ms Baloyi has a claim meeting the definitional requirements of an unfair labour practice or unfair dismissal claim, she is obliged to pursue that claim in the Labour Court. In this regard, the respondents also place reliance on this Court's statement in *Steenkamp*[29]

[28] *Hendricks v Overstrand Municipality* [2014] ZALAC 49; (2015) 36 ILJ (LAC) at para 30.

[29] *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC).

that "[a] cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanism of the LRA to obtain a remedy provided for in the LRA".[30]

[40] The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right). The following dictum of the Supreme Court of Appeal in *Makhanya*,[31] which squarely addressed a contractual cause of action in the employment context, is apposite in this regard:

> "The LRA creates certain rights for employees that include the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices. . . . Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract.
>
> When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."[32]

[41] The approach endorsed in *Makhanya* aligns with a series of judgments from the Supreme Court of Appeal that have confirmed that a contractual claim arising from

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[30] Id at para 137.

[31] *Makhanya* above n 10. See also *Gcaba* above n 1 at para 73.

[32] *Makhanya* above n 10 at paras 11 and 71.

breach of a contract of employment falls within the ordinary jurisdiction of the High Court, notwithstanding the fact that the contract is one of employment.[33]

[42] Finally, it is important not to conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action.[34] When assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so. However, these views are irrelevant to the court's competence to hear the matter.

[43] In this matter, the High Court based its finding on a holistic assessment of whether the dispute was located "within the compass of labour law" instead of determining whether the *specific causes of action* relied on by Ms Baloyi fall within the jurisdiction of the High Court or the Labour Court (or both). This approach is based on a misinterpretation of this Court's judgment in *Chirwa,* where it was expressly found that the jurisdiction of the High Court is not ousted merely because a dispute falls within the sphere of employment relations.[35]

[44] The exclusive jurisdiction of the Labour Court is engaged where legislation mandates it, or where a litigant asserts a right under the LRA or relies on a cause of action based on a breach of an obligation contained in that Act. As held in *Gcaba*, disputes that fall within the exclusive jurisdiction of the Labour Court are "labour and employment-related disputes for which the LRA creates specific remedies".[36] The corollary of a litigant's reliance on an LRA *right* is, of course, reliance on an LRA *remedy*.

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[33] *Lewarne* above n 10 at para 9; *McKenzie* above n 10 at para 7; *Manana* above n 10 at paras 11-3; *Fedlife* above n 10 at paras 4-5 and 24.

[34] *Gcaba* above n 1 at 75. See also *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

[35] See *Chirwa* above n 1 at para 60.

[36] *Gcaba* above n 1 at para 73.

[45] In sum, the mere fact that a dispute is located in the realm of labour and employment does not exclude the jurisdiction of the High Court. As this Court held in *Gcaba*:

> "[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. . . . If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies."[37]

[46] Indeed, contractual rights exist independently of the LRA. As the Supreme Court of Appeal has on numerous occasions emphasised, section 23 of the Constitution does not deprive employees of a common law right to enforce the terms of a fixed-term contract of employment and the LRA, in turn, does not confine employees to the remedies for "unfair dismissal" provided for in the Act.[38] Chapter VIII of the LRA is "not exhaustive of the rights and remedies that accrue to an employee upon termination of a contract of employment".[39]

[47] Matters "concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract", are expressly noted in section 77(3) of the Employment Act as falling within the *concurrent* jurisdiction of the High Court and the Labour Court. The question whether contractual claims arising from employment contracts fall within the concurrent jurisdiction of the High Court and the Labour Court has not explicitly arisen before this Court. However, as noted above, the Supreme Court of Appeal has explained on numerous occasions, with reference to the reasoning of this Court regarding jurisdiction over claims based on administrative action in the labour sphere, that the High Court retains its jurisdiction in respect of

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[37] Id.

[38] See cases mentioned above n 10.

[39] *Fedlife* above n 10 at para 22.

claims arising from the enforcement of contractual rights in the employment context.[40] This finding is borne out by the plain language of section 77(3) of the Employment Act, quoted above, and sections 157(1) and 157(2) of the LRA.

[48] A claim for contractual breach, absent reliance on any provision of the LRA, can be identified on Ms Baloyi's papers. The LRA does not extinguish contractual remedies available to employees following a breach of their contract of employment, or unlawful termination thereof. While she may also have a claim for unfair dismissal in terms of the LRA, Ms Baloyi has elected not to pursue this claim. Nothing in the LRA, or the Employment Act, required her to advance that claim in the Labour Court.

[49] The High Court did not consider the public law basis for the review relief: that is, the claim that Mr Mahlangu lacked the requisite statutory authority to terminate Ms Baloyi's contract of employment and the claim that the termination decision was made in bad faith for the ulterior purpose of furthering nefarious political objectives.[41] The High Court also did not consider Ms Baloyi's request for declaratory relief based on Ms Mkhwebane's alleged flouting, in her capacity as the Public Protector, of her constitutional duties. However, Ms Baloyi's pleadings before this Court militate against the conclusion that the High Court was not competent to adjudicate on those aspects. As pleaded, neither of these claims fall within the exclusive jurisdiction of the Labour Court, in terms of section 157(1) of the LRA.

[50] The High Court erred in dismissing Ms Baloyi's application on the basis that it was "essentially a labour dispute" and that its jurisdiction was not engaged. Accordingly, her appeal against the High Court's finding on jurisdiction must be upheld

[40] See, for example, *Makhanya* above n 10 at paras 12-13 and 18; *Fedlife* id; *Manana* above n 10 at para 23; and *McKenzie* above n 10 at paras 7-9.

[41] It is pertinent to note that, while the High Court did not address this claim, it did note, at para 46 of its judgment, that the allegation that Ms Baloyi's employment contract was terminated for ulterior motives was distinct from the other claims, which were "essentially labour disputes".

and the matter be remitted to the High Court, Gauteng Division, Pretoria for a hearing *de novo*.[42]

Costs

[51] It is trite law that costs are awarded to the successful party, subject to certain limited exceptions.[43] The purpose underlying this principle is to indemnify the successful litigant against the expenditure incurred as a result of "having been unjustly compelled to either initiate or to defend litigation as the case may be".[44] Ms Baloyi has been successful in relation to her jurisdictional challenge and her costs should therefore be paid by the first respondent. Though Ms Baloyi has sought personal costs against the second respondent, she has not advanced any reasons for why a personal costs order would be appropriate in the circumstances.

[52] For these reasons, the following order is made:

1. Leave to appeal directly to this Court is granted only in relation to the High Court's holding on jurisdiction.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the High Court of South Africa, Gauteng Local Division, Johannesburg is set aside.
4. The matter is remitted to the High Court to determine the merits and the costs of the first hearing.

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[42] A hearing *de novo* refers to a hearing where the matter is re-heard as if for the first time. No regard will be had to any of the prior findings made by the court in relation to the matter.

[43] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) at para 155.

[44] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 14, citing *Texas Co. SA Ltd v Cape Town Municipality* 1926 AD 467 at 488.

For the Applicant:	T Ngcukaitobi SC, M Bishop, P Olivier and M Lengane instructed by Mabuza Attorneys
For the First and Second Respondents:	D C Mpofu SC, and S B Nhlapo instructed by Seanego Attorneys Incorporated

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 63/20

In the matter between:

PUBLIC PROTECTOR	Applicant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MMUSI MAIMANE	Third Respondent
ROYAL SECURITY CC	Fourth Respondent

Neutral citation:	*Public Protector v Commissioner for the South African Revenue Service and Others* [2020] ZACC 28
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgment:	Madlanga J (unanimous)
Heard on:	3 September 2020
Decided on:	15 December 2020

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. Leave to appeal against the declarator by the High Court of South Africa, Gauteng Division, Pretoria that a South African Revenue Service official is entitled to withhold taxpayer information in terms of section 11(3) of the Public Protector Act 23 of 1994 read with section 69(1) of the Tax Administration Act 28 of 2011 is refused.
2. Leave to appeal against the High Court's dismissal of the Public Protector's counter-application is refused.
3. Leave to appeal against the High Court order that the Public Protector must pay *de bonis propriis* 15% of the taxed costs of the Commissioner of the South African Revenue Service is granted.
4. The appeal is upheld and the High Court order referred to in paragraph 3 is set aside.
5. Each party must pay her or his costs in this Court.

JUDGMENT

MADLANGA J (Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] Does the power to subpoena under the Public Protector Act[1] trump the proscription under the Tax Administration Act[2] of the disclosure of confidential taxpayer information? That is the question. It arises in an application by the Public Protector for leave to appeal directly to this Court against a judgment of the High Court of South Africa, Gauteng Division, Pretoria.[3]

Background

[2] In 2017 a journalist published a book in which he alleged that former President Jacob Gedleyihlekisa Zuma, the second respondent, was on the payroll of, and received a salary from, an entity called Royal Security CC, the fourth respondent, for at least four months after becoming President in 2009. The former President allegedly failed to pay income tax on this salary. Mr Mmusi Maimane, the third respondent and then leader of the opposition in the National Assembly, laid a complaint with the Public Protector, requesting her office to investigate the alleged payments. In 2018, in the course of the investigation, the Public Protector issued a subpoena for the Commissioner for the South African Revenue Service (Commissioner), the first respondent, to appear before her and bring the former President's taxpayer information. The Commissioner objected to the disclosure of the taxpayer information on the basis that disclosure was prohibited by the secrecy and confidentiality regime under the Tax Administration Act. The Public Protector took the view that this regime was no bar to her subpoena powers.

[3] During discussions at a meeting, the Commissioner suggested that the High Court be approached for a declarator on the divergent views. The Public Protector advised that, due to financial constraints, she could not afford litigation. The parties agreed to jointly seek senior counsel's opinion, which would be paid for by the South African Revenue Service (SARS). The solo funding too was as a result of the Public

[1] 23 of 1994.

[2] 28 of 2011.

[3] *Commissioner, South African Revenue Service v Public Protector* 2020 (4) SA 133 (GP).

Protector's lack of funds. Advocate Maenetje SC subsequently gave an opinion (first opinion) to the effect that there is no conflict between the Public Protector's subpoena powers and the Tax Administration Act, and that the Public Protector's subpoena powers do not include the power to compel the disclosure of taxpayer information.

[4] The Public Protector felt that this opinion did not engage sufficiently with the Constitution and she was, therefore, not happy with it. She informed the Commissioner that she would seek a second opinion. She briefed Advocate Sikhakhane SC to provide a second opinion. She did not provide him with a copy of the first opinion. She explains that she wanted to get an objective second opinion uninfluenced by the earlier opinion. When the second opinion came, it stated that the Public Protector's subpoena powers are constitutional powers that cannot be trammelled by the secrecy and confidentiality regime of the Tax Administration Act. Therefore, the Public Protector was entitled to subpoena taxpayer information. On the basis of this opinion, the Public Protector issued a second subpoena, still requiring production of former President Zuma's taxpayer information. This she did without sharing with the Commissioner the fact that she now had a second opinion whose conclusion differed from that of the first. She says her failure to share the opinion was purely due to inadvertence.

[5] The Commissioner approached the High Court for a declarator that SARS officials are permitted under the proviso of "just cause" in section 11(3)[4] of the Public Protector Act read with section 69(1) of the Tax Administration Act to withhold taxpayer information, and that the Public Protector's subpoena powers do not extend to taxpayer information. He further sought an order that the Public Protector pay 15% of the costs of the application *de bonis propriis* (in her personal capacity). The Public Protector opposed the application. Stating her argument briefly,[5] she contended that her subpoena power is implied in the power to investigate contained in section 182(1) of the Constitution. She also argued that the subpoena power under the

[4] See [7] below.

[5] I will substantiate on the argument later.

Public Protector Act is an additional power envisaged in section 182(2) of the Constitution. As such, it is a power that is "umbilically linked to the Constitution".[6] As a conditional counter-application, she asked the High Court to order the Commissioner in terms of section 69(2)(c) of the Tax Administration Act to disclose former President Zuma's taxpayer information.

[6] Let me interpose this to the narrative. The Public Protector's subpoena powers are contained in section 7(4)(a) of the Public Protector Act. The section provides:

> "For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

[7] Section 11(3) of the Public Protector Act criminalises failure to comply with a subpoena in these terms:

> "Any person who, without just cause, refuses or fails to comply with a direction or request under section 7(4) or refuses to answer any question put to him or her under that section or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence."

[8] Section 69 of the Tax Administration Act provides:

> "(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.
>
> (2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official—

[6] On this the Public Protector uses Moseneke DCJ's words in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

> . . .
>
> (c) by order of a High Court;
>
> . . .
>
> (6) Subsection (1) does not prohibit the disclosure of information—
>
> (a) to the taxpayer; or
>
> (b) with the written consent of the taxpayer, to another person."

Section 236 of the same Act criminalises a contravention of section 69(1).

[9] Reverting to the narrative, the High Court accepted that the prohibition of disclosure of taxpayer information under section 69(1) constitutes just cause for purposes of section 11(3) of the Public Protector Act. The High Court appeared to accept that this interpretation commends itself as it is consonant with a taxpayer's constitutional right to privacy.[7] Also, held the Court, confidentiality of taxpayer information serves the important purpose of encouraging voluntary disclosure by taxpayers.[8] It dismissed the conditional counter-application on a variety of grounds, one procedural and others substantive. I need say nothing more about those grounds.

[10] Using a number of epithets that – in paraphrasing – I would say adjudged the conduct of the Public Protector as having been most reprehensible, the High Court ordered her to pay 15% of the Commissioner's costs *de bonis propriis*. She was to pay the remaining 85% in her official capacity.

[11] The Public Protector is now before us seeking leave to appeal directly to this Court against the High Court judgment on the questions of her subpoena power and costs, and the dismissal of her conditional counter-application. Only the Commissioner opposes the application.

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[7] High Court judgment above n 3 at para 29. Section 14 of the Constitution provides that "[e]veryone has the right to privacy".

[8] High Court judgment at para 3.4.3.

Jurisdiction and leave to appeal

Conditional counter-application

[12] Both on the procedural and substantive grounds of dismissal of the counter-application, the Public Protector says nothing more than that the High Court erred in its application of well-established legal principles. It is trite that an application that simply demands the reconsideration of the application of an uncontroversial legal question does not engage this Court's jurisdiction.[9] The application raises neither a constitutional issue nor an arguable point of law of general public importance which ought to be considered by this Court.[10]

[13] Thus leave to appeal the decision of the High Court regarding the counter-application is refused for lack of jurisdiction.

Power to subpoena taxpayer information

[14] As indicated, the Public Protector's contention that her subpoena power trumps the prohibition of disclosure provided for in section 69(1) of the Tax Administration Act is based on section 182(1) and (2) of the Constitution. The argument entails the interpretation of section 182 of the Constitution. That interpretative exercise also involves the power of subpoena under the Public Protector Act and its relationship with section 182 of the Constitution. And the Public Protector Act is itself legislation envisaged in section 182 of the Constitution. Axiomatically, all of this does engage our constitutional jurisdiction.

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[9] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33.

[10] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
>
> ...
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court . . ."

[15] Also, the interpretation advocated by the Public Protector implicates the right to privacy of taxpayers. Thus this too raises a constitutional issue.

[16] As has been said a few times before, that a matter raises constitutional issues is not enough; leave to appeal is granted only if it is in the interests of justice to do so.[11] And in an application for leave to appeal directly to this Court, the interests of justice enquiry requires proof of exceptional circumstances. As Mogoeng CJ held in *United Democratic Movement*, a "direct appeal is certainly not available for the asking. Proof of exceptional circumstances . . . must demonstrably be established."[12] Although the nature of exceptional circumstances will depend on the facts of each case, they often include urgency, prospects of success on appeal, the public interest and the saving in time and costs.[13] The reasons advanced by an applicant must be persuasive enough to compel this Court to deviate from the normal procedure and appellate hierarchy.[14]

[17] The Public Protector's argument for a direct appeal rests, firstly, on urgency. The alleged urgency is grounded in the need to finalise the investigation with expedition. The Public Protector contends that an appeal to the Full Court of the High Court or Supreme Court of Appeal before approaching this Court will take years. She contends thus without reference to the possibility of seeking leave to appeal to the Full Court or Supreme Court of Appeal by way of urgency.

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[11] In *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12 Langa DP held:

> "A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court and in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry."

See also *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) (*EFF v Gordhan*) at paras 45-6.

[12] *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 23.

[13] *EFF v Gordhan* above n 11 at para 46 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) (*MEC for Development Planning and Local Government, Gauteng*) at para 32.

[14] *EFF v Gordhan* at para 74.

[18] If acting expeditiously was any consideration, the Public Protector would not have gone on a power-testing expedition which could potentially – and actually turned out to be – protracted. She could have done the simple thing of obtaining the taxpayer's written consent in terms of section 69(6)(b) of the Tax Administration Act. In its judgment, the High Court deals with the admissibility of an affidavit that former President Zuma sought to file late and out of turn in that Court. That Court refused to accept the affidavit. Of importance for our purposes is that – even though we did not have sight of that affidavit – the parties gave us to understand that it appeared from it that the former President was not averse to the disclosure of his information. It is for this reason that I say the simple thing to do was for the Public Protector to approach former President Zuma for the written consent. In the unlikely event of consent being withheld, an alternative was to seek a High Court order in terms of section 69(2)(c). Like the option of seeking the taxpayer's written consent, this too would have been more direct. If the Public Protector's reasons for needing the information were cogent enough, this alternative would have been better suited to delivering the desired results. And it cannot possibly lie in the Public Protector's mouth that she did not believe in the cogency of the reasons for which she needed the taxpayer information.[15] An approach to the High Court is a legal vehicle that exists, whereas testing whether courts will agree that the mooted power does exist is unknown, uncertain terrain. So, the urgency argument is contrived and – as it is the most important point for the direct appeal – that detracts significantly from the Public Protector's entitlement to a direct appeal.

[19] The Public Protector further contends that she has strong prospects of success. Does she? First, she argues that her power to subpoena under section 7(4) of the Public Protector Act provides a mechanism to give effect to her power to investigate

[15] Whether the reasons were, in fact, cogent is something else altogether.

under section 182(1) of the Constitution.[16] Relying on *EFF v Speaker*,[17] she contends that this power flows directly from the Constitution. The power, she contends, is thus not a statutory power, but is part and parcel of the constitutional power to investigate. Putting it differently, she submits that the section 7(4) power is implied in section 182(1). This *constitutional* power, therefore, cannot be limited by the *statutory* proscription of disclosure contained in the Tax Administration Act. The argument concludes that the constitutional power must take precedence over the statutory proscription contained in section 69(1) of the Tax Administration Act.

[20] Second, the Public Protector relies on section 182(2) of the Constitution, which provides that "[t]he Public Protector has the additional powers and functions prescribed by national legislation". According to her, the subpoena power under the Public Protector Act is an additional power envisaged in this section. As such, it is a power that is inextricably linked to the Constitution.

[21] Third, section 181(3) of the Constitution compels all organs of state to assist and protect Chapter 9 institutions, of which the Public Protector is one, "to ensure [their] independence, impartiality, dignity and effectiveness". Interpreting section 69(1) of the Tax Administration Act in the manner contended for by the Commissioner is inconsonant with this obligation. The argument continues that there is, therefore, no legal basis to exclude SARS from the expansive reach of section 181(3).

[22] The upshot of these three arguments is that the constitutional provisions relied upon entitle the Public Protector as of right to taxpayer information upon the issue of a

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[16] Section 182(1) of the Constitution provides, in part:

> "The Public Protector has the power, as regulated by national legislation—
>
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice . . ."

[17] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF v Speaker*).

subpoena. The effect is that section 69(1) of the Tax Administration Act is as good as non-existent.

[23] Fourth and lastly, relying on a *Hyundai*-type interpretation,[18] the Public Protector submits that section 69(1) does not constitute an absolute prohibition of the disclosure of taxpayer information. If it did, it would be unconstitutional. The prohibition is not absolute because it admits of many exceptions.[19] The Public Protector suggests that it cannot be that – whilst the importance of her office is constitutionally elevated in comparison to other Chapter 9 institutions – the Auditor-General, a Chapter 9 institution, enjoys an exemption that is not enjoyed by the Public Protector. She argues that the prohibition on disclosure should thus be interpreted not to apply to the Public Protector. This interpretation, concludes the contention, would render section 69(1) constitutionally compliant, as it would not conflict with the Public Protector's constitutional powers under section 182(1) and (2). I think it apposite to deal with this argument before dealing with the first three.

[24] Let me first make it clear that I will not grapple with the submission that there is some constitutional hierarchy within Chapter 9 institutions. That is not necessary for present purposes. Section 69(1) of the Tax Administration Act provides that SARS

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[18] In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22 Langa DP held:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

[19] See, for example, the following exceptions provided for in the Tax Administration Act:

(a) Section 69(2)(c) allows disclosure pursuant to a High Court order.

(b) Section 70(2) provides that "[a] senior SARS official may disclose to the Statistician-General the taxpayer information as may be required for the purpose of carrying out the Statistician-General's duties".

(c) In terms of section 70(3) "[a] senior SARS official may disclose to the Governor of the South African Reserve Bank . . . the information as may be required to exercise a power or perform a function or duty under the South African Reserve Bank Act, 1989".

(d) Section 70(6) provides that "SARS must allow the Auditor-General to have access to information in the possession of SARS that relates to the performance of the Auditor-General's duties under section 4 of the Public Audit Act, 2004".

officials "must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official". Thereafter, the Act creates narrow exceptions to this prohibition. The disclosure of taxpayer information in compliance with a subpoena issued by the Public Protector is not one of the exceptions. SARS officials are thus enjoined to withhold taxpayer information even in the face of such subpoena. Any other interpretation is at odds with the clear wording of section 69(1). *Hyundai* is about an interpretation that not only conforms with the Constitution, but is also viable. The interpretation advocated by the Public Protector is not viable. If that be so, we are left with the question whether the Public Protector is entitled as of right to taxpayer information based on her remaining interpretation of the Constitution. That question arises from the first three arguments, which I next deal with.

[25] The effect of the Public Protector's argument is that – in the face of the constitutional power she is asserting – section 69(1) is constitutionally invalid. I use "effect" because she does not argue that the section is invalid. According to her, she is entitled as of right to taxpayer information upon the issue of a subpoena. Her case is fundamentally flawed. Section 69(1) can only not have its force – which is to deny the Public Protector access to taxpayer information – if it is invalid. But – according to *MEC of the Executive Council for Development Planning and Local Government, Gauteng* – she is not entitled to any relief that effectively flows from the unconstitutionality of an Act which has not been declared by a Court.[20] Yacoob J held:

> "[T]he Council and the appellant did not apply for an order declaring section 16(5) invalid. Instead, they relied on the invalidity of the section as the foundation for the relief claimed. It was submitted on behalf of the appellant in support of the procedure followed that an applicant who was not really interested in the declaration of invalidity of a provision of an Act of Parliament, but who sought relief consequent upon that invalidity, ought not to be put to the inconvenience, delay and expense necessarily occasioned by the additional requirement of confirmation . . .

[20] *MEC for Development Planning and Local Government, Gauteng* above n 13 at paras 61-2.

> It is sufficient to point out here that considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision."[21]

[26] Even though the Public Protector does not expressly argue that section 69(1) is constitutionally invalid, the effect is the same. Thus the authority I have just referred to stands in her way. She cannot wish section 69(1) away. She should have brought a direct frontal challenge to the constitutionality of the section for including her office within its sweep, or to the Tax Administration Act for failing to include the office in the exceptions it creates. The Public Protector's reliance on *EFF v Speaker* is misplaced. That case never suggested that there should not be a constitutional challenge where one is necessary. The course of proceeding from unconstitutionality that has not been declared proposed by the Public Protector "appears to be incompatible with . . . [s]ection 172(1) [of the Constitution which] obliges a court to declare a statutory provision which is inconsistent with the Constitution invalid to the extent of the inconsistency".[22] This course could also give rise to uncertainty about the status of section 69(1).[23]

[27] As a result, absent a direct frontal challenge to the validity of section 69(1), there are no reasonable prospects of success.

[28] In the circumstances, other reasons for seeking leave to appeal directly to this Court, like a saving in costs and time, the absence of disputes of fact, the inevitability of the matter reaching this Court and the fact that this Court is well-placed to consider the application, pale into insignificance. Leave to appeal directly to this Court falls to be refused.

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[21] Id at paras 60-1.

[22] Id at para 62.

[23] Id at paras 63.

Costs

[29] The office of the Public Protector is a constitutional creation. It and other Chapter 9 institutions exist for the purpose of "supporting constitutional democracy".[24] Its independence and proper, unhindered functioning are at the core of our constitutional democracy.[25] Unwarranted costs orders against the Public Protector in her personal capacity in work-related litigation may have a chilling and deleterious effect on the exercise of her powers. Because of this likely impact on the exercise of constitutional powers, unwarranted – not just any – costs orders engage this Court's constitutional jurisdiction. Also, costs orders against organs of state serve the constitutional function of holding organs of state to account.[26]

[30] For the reasons that follow, there are reasonable prospects of success on the issue of costs. As was done recently by this Court in *EFF v Gordhan*,[27] it is in the interests of justice to grant leave to appeal on this limited issue.

[31] As is well-known, a court of appeal interferes with the exercise of a true discretion[28] – including in costs orders – only in circumscribed circumstances.[29] Moseneke DCJ explained thus in *Florence*:

> "Where a court is granted wide decision making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court

[24] Heading of Chapter 9 of the Constitution.

[25] See *EFF v Gordhan* above n 11 at para 99.

[26] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (*SARB*) at para 157.

[27] See *EFF v Gordhan* above n 11, where this Court dismissed the application for direct leave to appeal the merits, but granted leave to appeal the costs order on the basis of prospects of success on that limited issue.

[28] On what this is see *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 85 where Khampepe J held:

> "A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible."

[29] *SARB* above n 26 at para 144.

> has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision making."[30]

[32] More specifically on costs, in *SARB* Khampepe J and Theron J said that "[i]t is not sufficient, on appeal against a costs order, simply to show that the lower court's order was wrong".[31]

[33] Personal costs orders against public officials, even if on the party and party scale, are by nature punitive; punitive because ordinarily public officials get mulcted in costs in their official capacity. So, the very idea of costs attaching to them personally is out of the ordinary and punitive in that sense.[32] Such punitive costs orders are justified if the conduct of public officials "showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner".[33] As to the first, i.e. conduct showing a gross disregard of professional responsibilities, it is to the prescripts – be they imposed by the Constitution, statutes, ethical rules or code of conduct – governing the conduct of the office, the exercise of powers and performance of functions of the office that we must look. What constitutes inappropriate or egregious conduct depends on the circumstances of each case and is something to be determined by the court on an objective basis.[34] Thus there is no closed list. I will not derogate from this expansiveness by giving examples. It is for each court in the exercise of its discretion to decide what meets this standard.

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[30] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 113. See also *Giddey N.O. v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 22.

[31] *SARB* above n 26 at para 144.

[32] Id at paras 37 and 220.

[33] Id at para 146.

[34] Id.

[34] I must now decide whether the High Court exercised its discretion judicially in ordering the Public Protector to pay 15% of the Commissioner's costs *de bonis propriis*. What led to this order were the following: in issuing the subpoena the Public Protector acted *in fraudem legis* (literally, in fraud of the law);[35] in first saying she had no funds for the first opinion but later seeking and paying for a second opinion, the Public Protector's conduct was mala fide; other facts that evinced mala fides were the Public Protector's failure to invite the Commissioner to participate in briefing Advocate Sikhakhane SC and not sharing the opinion obtained from him with the Commissioner; the Public Protector was adjudged to have acted unreasonably, arbitrarily and in bad faith because she had a "proclivity" to operate outside of the law, and a "deep rooted recalcitrance to accept advice from senior and junior counsel"; and it was expected of the Public Protector to act with a "high degree of perfection". I deal with these in turn.

Subpoena issued in fraudem legis

[35] The Public Protector's view that she was entitled to issue the subpoena regardless of the prohibition in section 69(1) is misguided. But it appears to have been a genuinely held view. Based on that genuinely held view, there is no cogent basis for suggesting that the subpoena was issued for any purpose other than the investigation the Public Protector was conducting. The High Court's conclusion that it was issued *in fraudem legis* is without factual foundation and constitutes a misdirection on the facts.

Mala fides re lack of funds

[36] The Public Protector explains that the first opinion was sought and obtained in one financial year and the second opinion was sought and obtained in the ensuing financial year. She did not have funds in the first financial year and she had them in the following financial year. That sounds like a perfectly sensible explanation. The High Court's conclusion of bad faith is thus a leap in logic and yet another misdirection.

[35] The concept refers to something done to circumvent or evade the law.

Mala fides re not inviting Commissioner to participate in second opinion and not sharing that opinion with him

[37] An incontrovertible (or even common cause) fact is that the Public Protector did advise the Commissioner beforehand that she would seek a second opinion; she was not cagey about it. She was not required to involve the Commissioner in seeking that second opinion. And she was entitled to obtain it if she was not satisfied with the first opinion. In those circumstances, failure to share the second opinion hardly justifies a conclusion of mala fides. Had she been acting mala fide in this regard, she would not even have shared with the Commissioner the fact that she was going to seek a second opinion. Also, as the Commissioner was aware that the Public Protector was to seek a second opinion, he could have asked for it. Or, at the very least, he could have asked if the Public Protector eventually got the second opinion she was to seek. Nothing suggests that she might have withheld it; not when she had volunteered information that she was to seek it.

Proclivity to operate outside of the law, and a deep rooted recalcitrance to accept advice from counsel

[38] According to the High Court, a "proclivity" to operate outside of the law, and a "deep rooted recalcitrance to accept advice from senior and junior counsel" were proof of unreasonable, arbitrary and mala fide conduct.[36] A dictionary meaning of "proclivity" is: "a tendency to do something regularly; an inclination";[37] "an inclination or predisposition toward something".[38] What we have on the facts of this case is only the one instance of not being happy with the first opinion and, as a result, seeking a second opinion. How that becomes a proclivity escapes me. As they say, one swallow does not a summer make. Also mind-boggling is the holding that the Public Protector acted outside the law in seeking a second opinion, when she was perfectly entitled to

[36] High Court judgment above n 3 at para 24.

[37] Compact Oxford Dictionary.

[38] Merriam-Webster, available at https://www.merriam-webster.com/dictionary/proclivity.

seek it. In fact, in addition to being entitled to seek the second opinion, the Public Protector acted on the basis of it. Strangely, the High Court regards the opinion of the one senior counsel as gospel and that of the other not. The reality is that the Public Protector had two conflicting opinions and she preferred one: the correct legal position could have been what was stated in the one or the other, or in neither. The conclusion that – by picking the one opinion – she acted unreasonably, arbitrarily and in bad faith thus beggars belief and is gratuitous. In fact, it was wrong of the High Court to assume that the Public Protector was *obliged* to take the advice of senior counsel and to conclude that failure to take it is per se reckless or mala fide.

Expectation that the Public Protector must act with a "high degree of perfection"

[39] As stated before, the High Court held that it was expected of the Public Protector to "always act with a high degree of perfection".[39] It is one thing to expect the highest possible standard of performance from a public official within whatever set parameters at the workplace. But it is quite another to hold that the slightest deviation from that standard must result in a personal costs order in the event that the deviation leads to litigation. If the latter were true, all litigation in which public officials came second best would result in personal costs orders against them. And that would be because the slight deviation does not meet the standard of "perfection". This has never been our law. It is not any deviation from the set norm that results in personal costs orders. To attract such order, the deviation must be reprehensible or egregious[40] or it must constitute a gross disregard of professional responsibilities.[41] That is a far cry from ordering costs *de bonis propriis* as a result of a dip even by a slight margin from perfection.

[39] High Court judgment above n 3 at para 50.

[40] *SARB* above n 26 at para 146.

[41] Id.

[40] If the conduct of a public official has fallen short of the required standard and given rise to litigation, it may attract a costs order against her or him in her or his official capacity. It is only where there is reprehensibility in whatever form[42] that the punitive[43] step of ordering costs *de bonis propriis* may then be taken. So, the High Court's standard of "a high degree of perfection" was yet again a misdirection.

Concluding remarks

[41] There was simply no basis for the High Court's award of costs *de bonis propriis*. The award must be set aside. And this conclusion cannot be affected by an issue I deal with when I deal with costs in this Court.[44]

[42] When a *de bonis propriis* costs award against the Public Protector is warranted, it is certainly within a court's remit to order it. After all, as Froneman J said in *Black Sash II*, personal costs orders against public officials serve to vindicate the Constitution.[45] However, courts should grant personal costs orders against the Public Protector only when that is warranted. There appears to be a developing trend of seeking personal costs orders in most if not all matters involving the Public Protector.[46] Of these a total of four, including this one, have reached us.[47] And in three, the High Court granted personal costs orders against the Public Protector.[48]

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[42] See *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash II*) at paras 8-9; *SARB* above n 26 at para 207; *EFF v Gordhan* above n 11 at para 91.

[43] I explained earlier that in this sense "punitive" does not denote the attorney and client scale. I say "punitive" because the public official is being mulcted in costs *de bonis propriis* when ordinarily she or he would bear them in her or his official capacity. See *SARB* above n 26 at paras 37 and 220.

[44] That is an issue concerning a charge by the Commissioner that the Public Protector litigated in bad faith before this Court.

[45] *Black Sash II* above n 42 at para 8.

[46] See, for example, *Gordhan v Public Protector* [2020] JOL 49105 (GP); *Institute for Accountability in Southern Africa v Public Protector* 2020 (5) SA 179 (GP); *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 (7) BCLR (GP); and *Absa Bank Limited v Public Protector* [2018] 2 All SA 1 (GP).

[47] The other three were *Baloyi v Public Protector* [2020] ZACC 27; 2020 JDR 2618 (CC); *EFF v Gordhan* above n 11 and *SARB* above n 26.

[48] In *Baloyi*, which is one of the four cases in which personal costs orders were sought against the Public Protector and which have reached this Court, the High Court did not grant a personal costs order. The applicant persisted in seeking a personal costs order in this Court. This Court, too, did not grant that order.

What made one of those cases stand out was that a personal costs order was granted based on the "usual rule" that costs follow the result, with no consideration whatsoever of special circumstances that justified the order.[49] This is a far cry from the stringent test for the award of personal costs orders. And in the instant matter the High Court – in its conclusions – has carefully selected and used epithets and particular nouns that are suited to awards of personal costs orders, but there is not a scintilla of evidence to support those epithets and particular nouns and, therefore, the conclusions. Thus the conclusions simply cannot stand up to scrutiny.

[43] Out of the four applications that have landed here, it is only in one that this Court has sanctioned a personal costs order.[50] Of course, that does not mean litigants who – on cogent grounds – believe they are entitled to the award of personal costs against the Public Protector must not push for such awards and that – where such costs are warranted – courts should not grant them. But it does mean that courts must be wary not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. Whether inadvertently or otherwise, the High Court judgments in the *EFF v Gordhan* matter and in the instant matter are instances where the High Court fell into that trap.

[44] Personal costs orders may have a chilling effect on the exercise of the Public Protector's powers, including litigating where necessary. Hers, an office specially created together with others under Chapter 9 of the Constitution, is an important cog in our constitutionalism as it and the others were created to "strengthen constitutional democracy".[51] Axiomatically, the Public Protector's office is more important than any incumbent. The impact of certain types of conduct that shake its operations at the foundations may outlive the terms of office of a number of incumbents. Needless to say, as the Judiciary, we must not be guilty of contributing to the weakening of that office. You weaken it, you weaken our constitutional democracy. Its potency,

[49] *EFF v Gordhan* above n 11 at para 93.

[50] *SARB* above n 26.

[51] Section 181(1) of the Constitution.

its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity.

[45] I voice these words of caution because of the disturbing frequency and regularity of applications for, and awards of, personal costs orders against the Public Protector. What is particularly disturbing is that it is clear that the applications and awards are not always justified. That much is apparent from the fact that two out of the three personal costs awards that have come before us, including this one, have been set aside. Crucially, these two typify the worst examples of personal costs awards. And in the fourth matter where there was no personal costs order by the High Court but there was an insistence that this Court should make such an award, we declined that invitation.[52]

[46] Surely, this does demonstrate that the words of caution have not been necessitated by maudlin sympathy for the Public Protector. Not at all. I am not even saying personal costs orders against the Public Protector must be made sparingly. That is not the law. I am saying courts must apply the existing law properly and not make personal costs awards where there are no bases to do so. But where the awards are warranted, courts must not hesitate to make them. And the frequency of such awards should not be a curb. In each case the question is: is the award warranted?

Costs in this Court

[47] The Commissioner submitted that even before this Court the Public Protector litigated in bad faith and that this has a bearing on the question of costs. In substantiation, he pointed out that in her founding affidavit in this Court the Public Protector alleged that she had not received notice that a personal costs order would be sought against her. According to the Commissioner this was an untruth. Indeed, the true position is that both in the notice of motion and founding affidavit filed at the High Court the Commissioner did indicate that he was seeking a personal costs order against the Public Protector. What was not done was to have her mentioned by

[52] *Baloyi* above n 47.

her name, Ms Busisiwe Mkhwebane, as a party. But saying that she had not received notice that a personal costs order would be sought against her was simply not true. The truth is that in her answering affidavit in the High Court she stated under oath that she had read the founding affidavit in which the Commissioner sought a personal costs order against her. On the face of it, therefore, her assertion before us that there was no notice in this regard is astounding and warrants censure and perhaps more. But we must look at the full picture.

[48] In her High Court answering affidavit the Public Protector protested her liability for a personal costs order by saying:

> "I deny that my conduct does not accord with the standard as set out by the Constitutional Court and costs *de bonis propriis* are not justified under the circumstances. The prayer for costs is illogical and contradictory to the [Commissioner's] own position that it is in the public interest to obtain certainty in respect of the issues raised in the application."

[49] The claim that she did not get notice that a personal costs order would be sought against her surfaced for the first time, not in her affidavit filed in this Court, but in a memorandum prepared by her senior and junior counsel. This memorandum was in response to a request by the High Court to both sets of counsel for substantiation on their respective positions on the question whether the Public Protector must pay costs *de bonis propriis*. Here is what counsel said in the memorandum:

> "[A]s it was pointed out by counsel at the end of his oral submissions, it is trite that this Court is not permitted to order a personal costs order, such as the one issued in the *Reserve Bank* case, when the applicant neglected to cite her in her personal capacity. She has not been brought before the Court in her personal capacity, as it is done when personal costs are to be brought. [C]ourts do not issue personal costs orders [against] non-parties, more so when they are public officials acting in good faith and in the execution of their duties, such as the Commissioner of SARS or the Public Protector."

Crucially, this quotation appears under the heading "*Non-citation of Ms Busisiwe Mkhwebane*".

[50] This sets the scene for how the Public Protector came to make the contentious assertion in the founding affidavit filed in this Court that she was not given notice that a personal costs order would be sought against her. In oral argument as well, her counsel owned up to the fact that it was his idea that the Public Protector must adopt this stance, an idea he wisely abandoned and did not pursue in oral argument as it was legally indefensible.[53] So, outlandish though the Public Protector's assertion appears to be, it would be ignoring all this reality if we were to take it at face value. What is crucial here is that the assertion was counsel's, not the Public Protector's, idea. We may criticise the Public Protector for failing to realise that the legal point she was obviously advised to advance was a non-starter. But can we really go far with that criticism? I think not. She got that advice from *senior counsel*. Of importance, we do not know whether the Public Protector has any experience in civil legal practice. And the Commissioner did not suggest that she does. That for me is the end of the matter.

[51] The Public Protector has failed in the application in which she was claiming that her powers trump the prohibition of disclosure contained in section 69(1) of the Tax Administration Act and in her conditional counter-application. But she has succeeded in the appeal to set aside the personal costs order. If there was clarity that – in pursuing this appeal – she engaged legal representation in her personal capacity and, therefore, has been or will be personally set back for legal costs in respect of the appeal, she would be entitled to an award of costs in her personal capacity. There is no such clarity. Of importance, she did not seek to *intervene* in her personal capacity in the

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[53] It is true that this idea is legally indefensible. For a personal costs order to be made against a non-party, she or he must have been given notice of the possibility of the order being made. Here is how this Court articulated this in *Black Sash II* above n 42 at para 4:

> "If the possibility of a personal costs order against a state official exists, it stands to good reason that she must be made aware of the risk and should be given an opportunity to advance reasons why the order should not be granted. Joinder as a formal party to the proceedings and knowledge of the basis from which the risk of the personal costs order may arise is one way – and the safest – to achieve this."

The Commissioner had given the requisite notice to the Public Protector.

proceedings before this Court. So, for all we know, the Public Protector in her official capacity has been financing the litigation. In the circumstances, we do not have enough material for us to make a costs order favourable to the Public Protector in her personal capacity. It seems to me a just costs order is that each party must pay her or his costs.

Order

[52] The following order is made:

1. Leave to appeal against the declarator by the High Court of South Africa, Gauteng Division, Pretoria that a South African Revenue Service official is entitled to withhold taxpayer information in terms of section 11(3) of the Public Protector Act 23 of 1994 read with section 69(1) of the Tax Administration Act 28 of 2011 is refused.
2. Leave to appeal against the High Court's dismissal of the Public Protector's counter-application is refused.
3. Leave to appeal against the High Court order that the Public Protector must pay *de bonis propriis* 15% of the taxed costs of the Commissioner of the South African Revenue Service is granted.
4. The appeal is upheld and the High Court order referred to in paragraph 3 is set aside.
5. Each party must pay her or his costs in this Court.

For the Applicants:	D C Mpofu SC and T Motloenya Modise instructed by Seanego Incorporated
For the First Respondent:	J J Gauntlett SC QC and F B Pelser instructed by Da Silva Attorneys