CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 257/21 and CCT 259/21

Case CCT 257/21

In the matter between:

SPEAKER OF THE NATIONAL ASSEMBLY	Applicant
and	
PUBLIC PROTECTOR	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
DEMOCRATIC ALLIANCE	Third Respondent
AFRICAN TRANSFORMATION MOVEMENT	Fourth Respondent
UNITED DEMOCRATIC MOVEMENT	Fifth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Sixth Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus Curiae
CORRUPTION WATCH	Second Amicus Curiae

Case CCT 259/21

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	

PUBLIC PROTECTOR First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

AFRICAN TRANSFORMATION MOVEMENT Third Respondent

DEMOCRACY IN ACTION Fourth Respondent

and

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION First Amicus Curiae

CORRUPTION WATCH Second Amicus Curiae

Neutral citation:	*Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1
Coram:	Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgment:	Mhlantla J (unanimous)
Heard on:	8 November 2021
Decided on:	4 February 2022
Summary:	Section 194 of the Constitution — rules of the National Assembly — removal of a Chapter 9 institution office-bearer Separation of powers — appointment of a Judge to an independent panel — procedural fairness — rationality

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ORDER

On direct appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal directly to this Court on an urgent basis is granted.
2. Save as set out in paragraph 3 below, the appeal against the order in paragraph 118(a)(i) of the High Court is dismissed.
3. Paragraph 118(a)(i) of the order of the High Court is amended to read: "(i) the phrase 'provided that the legal practitioner or other expert may not participate in the committee' is irrational, and inconsistent with the Constitution and is declared invalid. The proviso is severed from rule 129AD(3). The amended rule now provides that the section 194 committee:

   'must afford the holder of a public office the right to be heard in his or her defence and to be assisted by a legal practitioner or other expert of his or her choice.'"
4. The appeal against the order in paragraph 118(a)(ii) of the High Court is upheld.
5. Paragraph 118(a)(ii) of that order is set aside and replaced with the following order:

   "The application relating to the constitutionality of rule 129V is dismissed".
6. Leave to cross-appeal is granted.
7. The cross-appeal is dismissed.
8. In CCT 257/21, each party must pay their own costs.
9. In CCT 259/21, the Public Protector must pay the costs of the Democratic Alliance, such costs to include the costs of two counsel.

JUDGMENT

MHLANTLA J (Madlanga J, Madondo AJ, Majiedt J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] Society has always been concerned about the accountability of persons or institutions who operate the levers of power. In recognising this, our Constitution provides for state institutions that are mandated with the task of supporting our constitutional democracy. But all powers have limits, and even the officers employed to support accountability must be held accountable in a state that propagates accountability and governance based on the will of the people.

[2] The two applications, which were brought on an urgent basis, concern the constitutionality of the Rules adopted by the National Assembly on 3 December 2019 (the Rules). These Rules were passed to govern the removal of the guardians and promoters of our constitutional democracy – these being the heads and commissioners of institutions established in terms of Chapter 9 of the Constitution. In the first application, the Speaker of the National Assembly (Speaker) is the applicant and in the second application, the Democratic Alliance (DA) is the applicant.[1] Advocate Busisiwe Mkhwebane, the Public Protector, is the only respondent opposing the applications.[2] In both matters, this Court admitted two amici curiae (friends of the court) – Council for the Advancement of the South African Constitution and Corruption Watch. The Public Protector also filed a conditional application to cross-appeal.

[3] The applicants seek leave to appeal directly to this Court against the judgment and order of the High Court of South Africa, Western Cape Division, Cape Town

[1] As the two applications concerned the same judgment, they were consolidated and heard together.

[2] The other respondents in the first application are: the President of the Republic of South Africa (second respondent), the Democratic Alliance (third respondent), the African Transformation Movement (fourth respondent), the United Democratic Movement (fifth respondent) and the Pan Africanist Congress of Azania (sixth respondent). The respondents in the second application, not opposing the application, are: the Speaker of the National Assembly (second respondent), the African Transformation Movement (third respondent) and Democracy in Action (fourth respondent).

(High Court).[3] The High Court first held that it was not desirable to appoint a Judge to the independent panel mandated to consider whether there is prima facie evidence for the removal of a Chapter 9 institution office-bearer. That appointment, according to the High Court, offends the principle of separation of powers. The High Court thus severed, from rule 129V of the Rules, the words "which may include a judge".[4] Second, it held that the limitation of legal representation in rule 129AD(3) of the Rules, was irrational and consequently severed the proviso limiting legal representation.

[4] For a better understanding of this case, it is necessary to start by outlining the constitutional scheme pertaining to it.

Constitutional scheme

[5] Chapter 9 of the Constitution provides for the establishment of state institutions that strengthen constitutional democracy. These institutions perform a dual role: they play an oversight role on the government to enhance accountability and contribute to the constitutional project of transformation.[5] Although these institutions are independent and subject only to the Constitution, there is a duty on other organs of state to assist these institutions to perform their functions without fear, favour or prejudice.[6] Important for the purposes of the two applications, is section 181(5) of the Constitution, which confirms that these institutions are accountable to the National Assembly.[7]

[3] *Public Protector v Speaker of the National Assembly* unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 2107/21 (28 July 2021) (High Court judgment) per Baartman J, (Dolamo J and Nuku J concurring).

[4] While the High Court was referring to the contents of rule 129V, it erroneously referenced rule 129E. See: High Court judgment id at para 118.

[5] Murray "Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?" (2006) 9 *Potchefstroom Electronic Law Journal* 121 at 129.

[6] Section 181(2) and (3) of the Constitution.

[7] Section 181(5) of the Constitution provides:

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

[6] Just as the Constitution provides for the appointment of office-bearers to Chapter 9 institutions, the Constitution makes provision in section 194 for the removal from office of heads and commissioners of Chapter 9 institutions. It is important to cite the section in full:

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

[7] Section 194(1) establishes the grounds for removal, and these are: misconduct, incapacity, or incompetence. The National Assembly does not have the powers to remove any Chapter 9 institution office-bearer but on the grounds of removal established in section 194(1)(a). For the removal procedure, the Constitution mandates that such a process can only take place once the National Assembly has adopted a resolution calling for the removal of that person from office, followed by a vote in the National Assembly. The Constitution does not prescribe the process the

National Assembly must follow for the removal, other than the need for a resolution and a vote.

[8] The National Assembly may adopt rules that will govern its processes. Section 57(1) of the Constitution expressly provides:

> "(1) The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) *make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."* (Emphasis added.)

[9] The National Assembly is obliged by section 55(2)(b)(ii) of the Constitution to provide mechanisms to maintain oversight over organs of state. The Public Protector, the Auditor-General and other Chapter 9 institutions are organs of state. With this in mind, the National Assembly adopted the Rules to govern the process for the removal from office of these office-bearers.

[10] By way of drawing a parallel analogy, similar processes are followed in relation to the removal of the President. In *EFF II*,[8] this Court had to decide whether the National Assembly had failed to determine whether the President of the Republic of South Africa had breached section 89(1)(a) of the Constitution.[9] Jafta J held that the National Assembly's failure to make rules regulating the removal of a President in terms

[8] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) (*EFF II*).

[9] Section 89 provides:

> "(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—
>
> (a) a serious violation of the Constitution or the law;
>
> (b) serious misconduct; or
>
> (c) inability to perform the functions of office.
>
> (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

of section 89(1) constitutes a violation of this section. He emphasised the necessity to have rules governing the entire process for the removal of the President in terms of section 89 of the Constitution, stating that "[w]ithout rules defining the entire process, it is impossible to implement section 89".[10] The National Assembly was accordingly directed to adopt rules. Similar to the process for removal of the President, the removal of a Chapter 9 institution office-bearer is governed by the Rules of the National Assembly.

[11] Against the backdrop of the constitutional scheme, what follows is the factual background and the process that led to the adoption of the Rules and which eventually caused the Public Protector to challenge their constitutionality.

Factual background

[12] Advocate Mkhwebane was appointed as the Public Protector on 19 October 2016. Some of the Public Protector's reports were successfully challenged in various courts, and adverse findings were made against her. Almost a year after her appointment, on 13 September 2017, the DA submitted its first request to the Speaker to have the Public Protector removed from office, citing the adverse findings against the Public Protector in *SARB I*.[11] The Portfolio Committee on Justice and Correctional Services (Portfolio Committee), which was tasked to make the decision, voted against the DA's request. This outcome was adopted by the National Assembly.

[13] On 16 February 2018, the DA launched its second motion to have the Public Protector removed from office, this time citing the adverse finding in *ABSA*.[12] In July 2018, the Public Protector responded that appeal proceedings in that matter were pending at the Supreme Court of Appeal, as was an application for direct access to this Court. Thus, she cautioned the National Assembly not to engage in parallel

[10] *EFF II* above n 8 at para 182.

[11] *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) (*SARB I*).

[12] *Absa Bank Limited v Public Protector* [2018] 2 All SA 1 (GP) (*ABSA*).

proceedings. On 5 December 2018, the Portfolio Committee considered: the DA's second request to remove Advocate Mkhwebane; Advocate Mkhwebane's request that the National Assembly members who appeared biased against her should recuse themselves; and her request that the procedure to remove a Public Protector from office be akin to the process to remove a Judge. The Portfolio Committee also discussed what would constitute misconduct in accordance with the wording of section 194 of the Constitution. The Portfolio Committee decided that the second request was premature and need not be entertained. This recommendation was communicated to the National Assembly; however, because that National Assembly was dissolved before the May 2019 general elections, the second request lapsed.

[14] On 22 May 2019, the National Assembly elected its new Speaker – Ms Thandi Ruth Modise. The next day the DA launched its third motion to have Advocate Mkhwebane removed from office, again relying on pending matters. On 3 July 2019, the request was referred to the Portfolio Committee; and the Public Protector opposed this motion. On 22 July 2019, this Court handed down *SARB II*.[13] Thereafter, on 15 August 2019, the High Court of South Africa, Gauteng Division, Pretoria delivered its judgment in *Democratic Alliance*.[14] In light of these developments, on 27 August 2019, the Portfolio Committee submitted a report on the third request, in which it indicated that there were no rules in place for the removal of the heads and commissioners of Chapter 9 institutions. Relying on the Portfolio Committee's recommendation, the Speaker then referred the issue to the Rules Committee.

[15] On 2 September 2019, the DA submitted draft rules to the Speaker and these were considered by the Rules Committee. The Rules Committee delegated the drafting task to the Subcommittee on Review of National Assembly Rules (Subcommittee),

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

[14] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 4 All SA 79 (GP).

which in turn decided that the secretariat should draft rules for the Subcommittee's consideration. On 9 November 2019, the Subcommittee considered the secretariat's amended draft rules as well as input from other political parties and the public. The Subcommittee approved the draft rules and these were tabled in the National Assembly. On 3 December 2019, the Rules were adopted.

The Rules

[16] The Rules are in Part 4 of Chapter 7 of the Rules of the National Assembly and provide for a 17-step process for the removal of an office-bearer. The grounds for removal include misconduct,[15] incapacity[16] or incompetence[17] and are defined in the Rules. As this application concerns the constitutionality of the removal process established by the Rules, it is necessary to have regard to the steps prescribed by the Rules.

[17] The process commences when any member of the National Assembly gives notice by way of a motion to initiate removal proceedings of an office-bearer as contemplated in section 194 of the Constitution.[18] The Speaker must ensure that the motion is compliant with the criteria set out in rule 129R.[19] If the motion is found to be compliant, the Speaker *must* immediately refer the motion to an independent panel that

[15] Misconduct is defined as: "the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office".

[16] Incapacity, as defined, includes—

> "(a) a permanent or temporary condition that impairs a holder of a public office's ability to perform his or her work; and
>
> (b) any legal impediment to employment".

[17] Incompetence—

> "includes a demonstrated and sustained lack of—
>
> (a) knowledge to carry out; and
>
> (b) ability of skill to perform,
>
> his or her duties effectively and efficiently".

[18] Rule 129R.

[19] Rule 129S.

she has appointed to conduct a preliminary assessment of the matter.[20] The independent panel is appointed after political parties represented in the National Assembly are afforded an opportunity to nominate persons to the panel.[21] In respect of composition, the Rules provide that the independent panel must consist of three fit and proper South African citizens, one of whom may be a Judge.[22] If the Speaker decides to appoint a Judge to the panel, the Speaker must do so in consultation with the Chief Justice.[23]

[18] The independent panel does not have the power to remove the office-bearer. What it must do, within 30 days of its appointment, is to conduct and finalise a preliminary assessment to determine whether there is prima facie evidence to remove the office-bearer.[24] This period may, at the discretion of the Speaker, be extended if the panel so requests. The panel has the discretion to afford any member of the National Assembly an opportunity to place relevant information before it. It must provide the office-bearer with copies of all the information before it and also a reasonable opportunity to respond to all relevant allegations.[25] The panel must include in its report any recommendations and reasons for such recommendations, including minority views.[26]

[19] The report of the independent panel must be considered by the National Assembly. If the National Assembly resolves that a section 194 enquiry should be held, the matter must be referred to a committee, established in terms of rule 129AA, consisting of members of the National Assembly, for a formal enquiry.[27] The committee must ensure that the enquiry is conducted in a reasonable and

[20] Rule 129T.

[21] Rule 129U and rule 129V(2).

[22] Rule 129V(1).

[23] Rule 129V(3).

[24] Rule 129X.

[25] Rule 129X(c).

[26] Rule 129X(c)(v).

[27] Rule 129Z and rule 129AB.

procedurally fair manner.[28] During the enquiry, the office-bearer has the right to be heard in her or his defence and to be assisted by a legal practitioner or expert, however, such legal practitioner or expert may not participate in the proceedings of the committee.[29] The committee must provide a report with its findings and recommendations, including reasons therefor, to the National Assembly.[30] If the report recommends that the office-bearer must be removed, the removal must be put to the National Assembly to vote and if the requisite majority is achieved, in accordance with section 194(2) of the Constitution, the office-bearer must be removed from office.

[20] Soon after the Rules were adopted, the DA renewed its motion calling for the removal of the Public Protector. On 6 December 2019, the DA withdrew the request dated 23 May 2019; however, it immediately filed a new motion, on the same grounds. On 24 January 2020, the Speaker considered this motion and concluded that it complied with rule 129R. She announced this to the National Assembly and invited political parties to nominate candidates to serve on the independent panel.

[21] On 28 January 2020, the Public Protector wrote to the Speaker alleging that the Speaker had acted unlawfully when announcing the commencement of the process for the Public Protector's removal, without first informing the Public Protector that the motion was compliant with the Rules. The Public Protector further alleged that the Rules were unconstitutional on several grounds and that the Speaker should refrain from taking any further steps until the issues raised in the letter had been resolved. The Speaker responded that Parliament had met its constitutional obligations by adopting rules to govern the removal process. She further stated that the motion received complied with these Rules, the independent panel had, at that stage, not yet been established, and the Public Protector would be duly invited to make representations to the panel. The Speaker thus refused to suspend the implementation of the Rules.

[28] Rule 129AD(2).

[29] Rule 129AD(3).

[30] Rule 129AF.

[22] On 2 February 2020, the Public Protector launched an application in the High Court. Part A of the notice of motion was an application for urgent interdictory relief suspending the National Assembly proceedings. On 21 February 2020, the DA withdrew its motion dated 6 December 2019 in the National Assembly and immediately submitted a new motion. The Speaker again certified that motion to be compliant with the Rules and invited nominations for the independent panel in accordance with the Rules. The further processing of the matter was delayed due to the Covid-19 pandemic suspending the business of the National Assembly. On 8 June 2020, the Speaker resumed the processing of the motion. Part A of the application was heard in the High Court during August 2020, and dismissed in October 2020.

[23] After the dismissal of Part A of the application, and having followed the prescribed nomination process, the Speaker, in November 2020, appointed the independent panel which was to be chaired by Justice Nkabinde, a retired Justice of this Court. On 24 February 2021, the panel submitted its report in which it stated that there was prima facie evidence that the Public Protector had committed misconduct and was incompetent to hold office.

Litigation history

High Court

[24] As stated above, in the midst of the removal process, in February 2020 the Public Protector instituted an application in the High Court. She challenged the validity of the Rules on 12 separate grounds and sought an urgent interdict to halt the removal process pending the finalisation of the constitutionality challenge. Part A of the urgent application was dismissed by a Full Court of the High Court on 9 October 2020. In Part B, the Public Protector sought an order declaring the Rules unconstitutional. The Public Protector alleged that the Rules were unconstitutional under one or more of the following grounds:[31]

[31] High Court judgment above n 3 at para 22.

(a) *Audi alteram partem* (hear the other side) rule, procedural irrationality and the provision of reasons;
(b) Deviations from established procedure (failure to give prior notice);
(c) Unlawful and premature referral (prior assessment of prima facie guilt);
(d) The right to legal representation;
(e) Recusal and right to be protected from conflicts of interest;
(f) The rule against retrospectivity;
(g) The right to decisional and institutional independence;
(h) The interpretation of section 194(1) read with the Rules;
(i) Separation of powers grounds and/or ultra vires;
(j) Double jeopardy;
(k) Mala fides, ulterior and/or improper motives; and
(l) Unreasonableness.

[25] The High Court considered each of the grounds raised by the Public Protector and upheld the challenge relating to the right to legal representation and separation of powers. The other ten grounds were dismissed. The findings of the High Court relating to the dismissed grounds, which the Public Protector pursues in her conditional cross-appeal, will be discussed when I consider that application. What follows is a summary of the findings of the High Court in respect of the two grounds that were upheld.

The right to full legal representation

[26] The Rules provide that a holder of public office has a right to legal representation provided that the legal practitioner may not participate in the committee.[32] The Speaker confirmed in her answering papers that this proviso was intended to mean that the holder of public office may be assisted by a legal practitioner – for example, the holder of public office could seek adjournments to consult with his or her legal representative, but the legal practitioner may not participate in the committee proceedings in order to

[32] Rule 129AD(3).

lead or cross-examine witnesses or make submissions. The case was argued on the basis that this was the import of the proviso. The High Court compared the removal process of a Chapter 9 institution office-bearer to that of the President as set out in section 89 of the Constitution. As rule 129AD(2) provides that the process must be reasonable and procedurally fair, the High Court held that in this matter, flexibility to allow for full legal representation was required to achieve procedural fairness.[33] The fact that the applicant is legally trained was of no consequence, because the same rules will apply if the Auditor-General, for example, is subject to a section 194 process. The High Court thus upheld the challenge and severed the part of the rule which limited the office-bearer's right to legal representation.[34]

Appointment of a Judge to the panel

[27] The High Court held that in other section 194 enquiries it might be appropriate to involve a Judge; however, in the Public Protector's case, at least 10 Judges were involved in litigation that culminated in personal costs orders against the Public Protector. And it must be borne in mind that she will seek relief from the Judiciary if she were to be removed from office.[35] Therefore, the High Court held that it was undesirable for a Judge to be part of the independent panel due to the process being inherently politically charged.[36] Regarding the separation of powers argument, the High Court held that the *NSPCA* test[37] had not been met and, therefore, the Judge's appointment to the independent panel offends the doctrine of separation of powers.[38] This challenge was upheld and the reference to "Judge" in the Rules was severed.[39]

[33] High Court judgment above n 3 at para 64.

[34] Id at para 66.

[35] Id at para 53.

[36] Id.

[37] *NSPCA v Minister of Agricultural, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) at para 38.

[38] High Court judgment above n 3 at para 57.

[39] Id at para 58.

In this Court

[28] The Speaker seeks leave to appeal against the order relating to the appointment of a Judge to the independent panel and the order declaring the limitation of legal representation as unconstitutional. The DA is only challenging the order relating to the appointment of a Judge to the independent panel. The Public Protector has filed a conditional cross-appeal against the High Court's decision on eight of the 10 grounds dismissed by the High Court. The cross-appeal is conditional upon this Court granting leave to appeal to the Speaker and/or the DA.

Issues

[29] The issues for determination are as follows:

(a) Do these applications engage this Court's jurisdiction?

(b) Should leave to appeal directly to this Court on an urgent basis be granted?

(c) If the answers to (a) and (b) are in the affirmative, then the following issues relating to the merits must be determined:

(i) Whether rule 129AD(3) of the Rules limits a Chapter 9 institution office-bearer's right to legal representation during the section 194 enquiry into his or her removal from office.

(ii) Whether a Judge may be appointed to the independent panel established in terms of rule 129V to determine whether there is prima facie evidence to show that the Chapter 9 institution office-bearer committed the misconduct, is incapacitated or is incompetent, in light of the separation of powers doctrine.

(iii) Is the Public Protector's conditional application for leave to cross-appeal properly before this Court, and if so, should leave to cross-appeal be granted?

(iv) In the event that leave to cross-appeal is granted, whether the High Court erred when it dismissed the other grounds on which the Rules were challenged and the punitive costs order sought.

(v) In the event that an order of invalidity is granted, should the order be prospective or retrospective?

Jurisdiction

[30] The jurisdiction of this Court will only be engaged if there is a constitutional issue or an arguable point of law of general public importance.[40] It is trite that whether this Court has jurisdiction is determined on the pleadings.[41] The nature of the issues raised in this application goes to the heart of the separation of powers doctrine[42] and invokes the constitutional values of accountability[43] and rationality as well as the extent

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

> "(3) The Constitutional Court—
>
> (a) is the highest court of the Republic; and
>
> (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."

[41] In *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75, the principle was set out as follows:

> "Jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits. . . . In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence."

[42] The role of the separation of powers doctrine in our constitutional dispensation was emphasised in *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 29. In that matter, the Court recognised that the separation of powers not only implicitly forms part of our Constitution, but is part of its foundational values:

> "It is by now axiomatic that the doctrine of separation of powers is part of our constitutional design. Its inception in our constitutional jurisprudence can be traced back to Constitutional Principle VI, which is one of the principles which governed the drafting of our Constitution. It proclaimed that—
>
> '[t]here shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'"

[43] Section 181 of the Constitution provides for the establishment and principles governing Chapter 9 institutions. It provides:

> "(1) The following state institutions strengthen constitutional democracy in the Republic:
>
> (a) The Public Protector.
>
> (b) The South African Human Rights Commission.

of the power of the National Assembly to regulate its own processes. These are constitutional issues and, accordingly, this Court's jurisdiction is engaged.

Direct appeal and urgency

[31] The Speaker argues that it would be in the interests of justice for this Court to grant direct leave to appeal as this application concerns the doctrine of the separation of powers. This is the golden thread that the Speaker submits runs through the grounds of appeal in this matter. The Speaker sets out four specific grounds for why this Court should grant direct appeal on an urgent basis as: (a) the nature of the constitutional issues raised cry out for the attention of this Court as they go to the heart of the separation of powers doctrine; (b) the issues are purely legal in nature; (c) there remains a live dispute which requires urgent resolution because of the public importance of the impeachment process of Chapter 9 institution office-bearers in the National Assembly; and (d) should the matter go to the Supreme Court of Appeal, there is a high probability that the matter will come back before this Court; thus, the Speaker submits, leave to appeal directly to this Court should be granted because the issues are of significant constitutional importance and in the public interest, the exigencies of time require the by-passing of the Supreme Court of Appeal.

[32] On urgency, the Public Protector denies that the applicants have established any basis for urgency. She submits that the applicants have failed to set out the grounds of urgency as no explanation is proffered for why substantial redress cannot be sought and

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(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commission for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

. . .

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

obtained at a hearing in due course. This is "queue jumping", she asserts. Further, there are no exceptional circumstances that justify the matter being heard. The impeachment process has been suspended, pending finalisation of legal proceedings; therefore, there is no longer the danger of having their outcome invalidated belatedly. The Public Protector accordingly submits that the application should be dismissed for lack of urgency.

[33] The Public Protector submits that leave to appeal directly to this Court should not be granted, because no basis has been laid therefor. Furthermore, the application does not enjoy good prospects of success, as it is unlikely that this Court, or any other court, would find that Chapter 9 institution office-bearers are not entitled to legal representation. Advocate Mkhwebane also avers that the inclusion of a Judge to the panel offends the doctrine of separation of powers. This, she submits, is exacerbated by the serious consequence that looms over the office-bearer – that is impeachment. Ergo, the Public Protector submits that leave to appeal directly to this Court ought not to be granted.

[34] I now proceed to consider whether these applications are urgent and whether direct leave to appeal should be granted.

[35] The granting of leave to appeal directly to this Court entails the exercise of a discretionary power.[44] Such leave may only be granted if it is in the interests of justice.[45] This provision must be read together with rule 19 of this Court's Rules.[46] Importantly,

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[44] *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30.

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

[46] Rule 19 of this Court's Rules provides for appeals generally and direct appeals. It provides, in relevant part:

> "(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.
>
> (2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order

the rule requires that the applicant sets out fully the grounds upon which she requests that this Court entertains a direct appeal.

[36] I agree with the Speaker that this matter is urgent, purely legal in nature, concerns matters of public importance, and that direct appeal should be granted.

[37] Of course, it may be argued, as the Public Protector does, that the matter concerns only clandestine agendas to remove her from office and, in any event, the impeachment process has been suspended pending finalisation of this matter. As I see it, the first point is misguided as it does not go to the fact of urgency. On the second point, impeachment processes are the means through which accountability and fidelity to the rule of law can be attained. To leave such processes suspended in mid-air, as it were, for as long as it would take for the matter to be heard in the ordinary course does not accord with the public interest in the finalisation of the important issues raised in this matter.[47] After all, Chapter 9 institution office-bearers perform an important role in upholding a constitutional democracy, and the determination of the validity of the rules that hold these office-bearers to account cannot be thwarted or subjected to delays. It is manifestly clear that there would be a saving in time and costs if leave to appeal

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against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.

(3) An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—

(a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;

(b) a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter."

[47] As held in *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 13, the public interest is a consideration in what may form part of the interests of justice analysis for the purposes of determining whether to grant leave to appeal. Albeit in the context of the regulation of the broadcasting sector, the remarks of the Court are still instructive. The Court stated:

> "The dispute is a burning issue and one that is necessary in the public interest to resolve, involving as it does a provision that is fundamental to the regulation of broadcasting and more particularly what may be broadcast and what may not."

Quite clearly, the interest of the public in the expeditious and final determination of issues which are not only born of curious interest but genuine public concern, merit consideration in the interests of justice analysis.

directly to this Court is granted.[48] This is of some importance where the term of office of the office-bearer is of limited duration. In the present case, the Public Protector's term of office will come to an end in October 2023, less than two years from now. The administration of justice runs the risk of being brought into disrepute if a matter of this kind is dragged out.

[38] During the hearing of this matter, counsel for the Public Protector argued that as leave to appeal directly to this Court was refused in *SARS*,[49] this application should suffer the same fate due to lack of urgency. Notwithstanding the fact that in this matter there is a clear public interest element requiring the finalisation of this matter without delay, the Public Protector is misguided in comparing this matter to *SARS*. In *SARS*, the Public Protector sought leave to appeal directly to this Court against the declarator issued by the High Court, Gauteng Division, Pretoria. Instead of limiting the appeal to the issues before the High Court, the Public Protector argued in this Court – in an indirect manner – that section 69(1) of the Taxation Administration Act[50] is constitutionally invalid.[51] Madlanga J considered the Public Protector's prospects of success in the determination of the question whether to grant direct leave to appeal and held that "absent a direct frontal challenge to the validity of section 69(1), there are no reasonable prospects of success".[52] Unlike in *SARS*, this application has reasonable prospects of success and cannot be classified as a backdoor challenge to the constitutionality of legislation.

[39] Further, although it would be desirable to have the views of the Supreme Court of Appeal, the issues in this matter are crisp and do not require the development of the common law. Instead, they require the direct application of the Constitution and its foundational values, specifically, accountability and the separation of powers

[48] *Dudley v City of Cape Town* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC) at para 7.

[49] *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28; 2020 JDR 2735 (CC); 2021 (5) BCLR 522 (CC) (*SARS*) at para 28.

[50] 28 of 2011.

[51] *SARS* above n 49 at para 26.

[52] Id at para 27.

doctrine.[53] We also have the benefit of the judgment of the Full Court. Lastly, as I will demonstrate below, the applications have reasonable prospects of success. For those reasons, I conclude that the matter is urgent, and it is in the interests of justice to grant leave to appeal directly to this Court. I now proceed to consider the merits of the appeal.

Legal representation – rule 129AD(3)

[40] The Speaker is appealing against the High Court's finding where it severed the proviso in rule 129AD(3) that provides that an office-bearer is entitled to legal representation, provided that the legal practitioner does not participate in the enquiry. The Speaker argues that the limitation on legal representation is rational because, "when section 181(5) of the Constitution provides that Chapter 9 office-bearers are accountable to the National Assembly, it means that they are accountable personally". Further, the differentiation between the removal of the President and a Chapter 9 institution office-bearer is rational, because section 89(2) of the Constitution prescribes very serious consequences for the removal of the President, namely the loss of financial benefits after leaving office.

[41] The Public Protector in turn argues that the denial of full legal representation is a denial of the right to legal representation and, thus, of the guaranteed right to procedural fairness. The denial of full legal representation is irrational as the means selected are not rationally related to the objective sought to be achieved, namely, a fair and transparent process. Moreover, not all Chapter 9 institution office-bearers are

[53] In *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 36 this Court emphasised that:

> "We have already determined that the dispute raises a constitutional issue that has a grave bearing on the soundness of our constitutional democracy. The constitutional validity of the Rules is interwoven with the matters that arise in the appeal. Both invoke constitutional construction of section 102(2) and the Rules that regulate the ordering and scheduling of the business of the Assembly. Hearing the direct access application together with the appeal would avoid prolonged and piecemeal litigation and bring certainty over the constitutional validity of the affected Rules. Furthermore, the issues before us are crisp and well-defined, and do not raise disputes of fact or require factual resolution. Moreover, we are here not confronted with a dispute related to customary law or the common law, but one that requires an interpretation of the Rules in light of the Constitution."

In so saying, these considerations are equally applicable in the present.

legally trained, and being legally trained has no relevance to the office-bearer's accountability to the National Assembly; therefore, the limitation is inherently irrational. Thus, she avers, that ground of appeal must fail.

[42] At the heart of this enquiry is rationality. Is the limitation rationally connected to the objective – being personal accountability – sought to be achieved?[54] I do not think so. The limitation would be rationally connected if accountability can be achieved by this proviso. The Speaker argues that if instances arise where "reasonableness or procedural fairness required that the office-bearer be afforded time to consult their legal representatives . . . a reasonable or fair period must be afforded to them for that purpose". In my view, this can lead to a situation where reasonableness and fairness require the section 194 enquiry to be repeatedly interrupted to provide the office-bearer with an opportunity to consult with their legal representative. Furthermore, one must not lose sight of the possibility that section 194 enquiries can be grounded on factual disputes and complex legal issues. Fairness would demand that the office-bearer be fully assisted by a legal practitioner in such instances.

[43] The High Court relied on *Hamata*[55] to support the notion that, in the circumstances of this case, flexibility to allow for full legal representation is required in order to achieve procedural fairness.[56] The Speaker argues that the High Court's reliance on *Hamata* is misplaced because it pertains to legal representation before administrative bodies. Indeed, *Hamata* did concern procedurally fair administrative

[54] As held in *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51, the question is not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.

[55] *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* [2002] ZASCA 44; 2002 (5) SA 449 (SCA). In *Hamata*, the Supreme Court of Appeal considered a rule which provided that a student appearing before a disciplinary committee at the Peninsula Technikon may be assisted by another student or member of staff of the establishment. That Court held that in the absence of a formal exclusion of legal representation before a disciplinary committee, procedural fairness should allow for legal representation. At para 23, the Supreme Court of Appeal held:

> "If, in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion."

[56] High Court judgment above n 3 at para 64.

proceedings; however, the Supreme Court of Appeal said that it was using the words "administrative proceedings" in the "most general sense i.e. to include, *inter alia*, quasi-judicial proceedings".[57] It is also true that our courts have recognised that there is no free-standing or absolute right to legal representation in *fora* other than courts of law.[58] However, the Rules already provide for legal representation, and what the High Court merely did was to make an order which will entitle the incumbent to *full* legal representation during the section 194 enquiry.

[44] I agree with the High Court that the reasons for the differentiation between the removal of the President in section 89 and that of a Chapter 9 institution office-bearer in section 194, offered by the Speaker are, unfortunately, formalistic. The consequences – although not prescribed by the Constitution – for the removal of a Chapter 9 institution office-bearer, especially a head of a Chapter 9 institution, are grave. The loss of financial benefits is not a sufficient reason for there to be a differentiation between the rules for the removal of the President and the removal of a Chapter 9 institution office-bearer.

[45] I pause to repeat that section 194 does not only apply to the Public Protector, who, as we know, must be someone with a legal background, but also to the Auditor-General and any member of a Commission established under Chapter 9. The Commissions include the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, and the Electoral Commission – some of these members do not have any legal background. The accountability of the Chapter 9 institution office-bearer is sufficiently secured by the fact that a legal representative cannot give evidence on behalf of the office-bearer. If there are factual disputes concerning the office-bearer's conduct, she will need to give evidence and can be cross-examined by the committee. Furthermore, the fact that the office-bearer is

[57] *Hamata* above n 55 at para 11.

[58] *Fransman v Speaker of the Western Cape Provincial Legislature* [2016] 4 All SA 424 (WCC) at para 57.

entitled to legal representation does not imply that the committee cannot ask the office-bearer directly to respond to certain questions, even if she is not at that time giving evidence under oath.

[46] Due to the nature of the work undertaken by the Auditor-General and some of the Commissions, legal training is not a prerequisite and these office-bearers should not be prejudiced because they do not have such training. To deny them the opportunity to be fully legally represented may compromise their ability to understand some of the complex legal issues that arise during the process. In fact, even Judges are entitled to full legal representation during a hearing held by the Judicial Conduct Tribunal to determine whether a Judge should be removed due to allegations of incapacity, gross incompetence or gross misconduct.[59] Therefore, I see no reason why Chapter 9 institution office-bearers should be treated differently. I agree with the High Court that the legal training of the Public Protector is irrelevant; the Rules apply equally and should not be rationalised based on the experience of one Chapter 9 institution office-bearer. In any event, even trained legal minds may falter when dealing with personal or subjective issues.

[47] Rule 129AD(2) states that the committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner. A reasonable and fair procedure requires full legal representation. It does not rationally follow that full legal representation detracts from accountability. I repeat, the committee is at liberty to cross-examine the office-bearer, and to request the office-bearer to directly respond to the questions posed. It must be borne in mind that this is an impeachment process that will by its nature place any incumbent under stress, regardless of whether the office-bearer is legally trained. Rather than ensuring personal accountability, by placing a limit on legal representation, the National Assembly runs the risk that the Chapter 9 institution office-bearer may be removed because they did not, perhaps due to anxiety or stress resulting from the pressure of the proceedings, do a sufficiently good job in

[59] Section 28(2) of the Judicial Service Commission Act 9 of 1994.

cross-examining witnesses or advancing oral submissions. This cannot be so. As the prolonged 17-step removal process envisages adequate safeguards, full legal representation must be included in this process.

[48] In the result, I agree with the High Court that full legal representation should be allowed as the aim sought to be achieved is not rationally connected to the means employed.[60] It follows that the appeal against the order of the High Court on this aspect must fail.

[49] The Speaker submitted that in the event that this Court decides to uphold the order of the High Court, that order should be amended by issuing a declaration of invalidity before confirming the order of the High Court. This will, according to the Speaker, be the "proper order" as an order of severance should follow an order of invalidity. I agree with the Speaker and this will be reflected in the order to be made by this Court. That is the proper order, as required by section 172(1)(a) of the Constitution.[61] Accordingly, the proviso to rule 129AD(3) is unconstitutional and invalid, and the proviso will be severed from the rule.

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[60] *Electronic Media Network Limited v e.tv (Pty) Limited* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) at paras 84-5. In this matter, this Court emphasised that:

> "The enquiry is whether there is a rational connection between the means and the purpose. Since the answer is yes, and e.tv together with nine other television licencees were consulted, judicial intrusion is constitutionally impermissible. It is not for interested persons or courts to determine the means but for the Executive. And it is for the Executive to chop and change the means as many times as they wish to achieve the same objective, provided they do so within the bounds of the Constitution and the law. They may even change it in a way that accommodates e.tv's proposals at any time before or after the delivery of this judgment. That is their judgement call, not the courts'.
>
> What courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available, on the other arms of the State. Separation of powers forbids that. Again we say, that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so."

[61] Section 172(1) reads:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—

Appointment of a Judge to the independent panel – rule 129V

[50] The DA submits that the High Court misdirected itself when it held that it was not desirable to have a Judge on the independent panel. It submits that rule 129V is constitutionally valid, does not breach the separation of powers doctrine, and does not threaten judicial independence. As such, the High Court misdirected itself in reaching a different conclusion. If this is not so, the DA argues for a prospective declaration so that the parliamentary process may continue despite the flaw in the independent panel's composition. The Speaker argues that rule 129V does not breach the separation of powers doctrine and is aligned with the correct position in law. That is, members of the Judiciary are not precluded from performing non-judicial functions, particularly if they are closely connected to judicial functions. Again, because of the advisory nature of the function performed by the Judge on the panel, there is no disruption to the performance of her judicial function. The Speaker further submits that there is an adequate mechanism for the protection of the Judiciary's independence, in that the Chief Justice is required to assent to the particular Judge's appointment onto the panel or veto the appointment. Lastly, the period during which the Judge will sit on the panel is limited and is not an indefinite term.

[51] Returning to the question of constitutional invalidity, the DA begins its submissions by stating that in this Court's decisions of *Heath*[62] and *NSPCA*,[63] this Court recognised that various non-judicial functions can be performed by members of the Judiciary. In its view, they are given these roles, not arbitrarily, but due to their knowledge, skills set and independence. Consequently, judicial officers are often called upon to chair commissions of inquiry, and these appointments cannot be seen as

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[62] *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) (*Heath*).

[63] *NSPCA* above n 37.

breaching the separation of powers doctrine. On the contrary, it upholds the doctrine by ensuring adequate support for each arm of the state.

[52] The Public Protector submits that the complaint that instigated impeachment proceedings against her is based on judicial views of her reports, and this infringes on her office's independence. This is because, in effect, the Judiciary, if allowed to be part of the panel, is then given an opportunity to determine her fate and play a role in her removal. She further submits that the appointment of a Judge to participate in the panel gives further weight to the possible breach of the separation of powers doctrine. In her view, mere consent by the Chief Justice does not negate the concerns regarding judicial independence. This, instead of mitigating such risks, simply aggravates them. Neither the Chief Justice nor the Speaker is empowered to appoint a Judge. That Judges can perform non-judicial functions does not give the Legislature license to vest any function in them. This causes a breach of the separation of powers and the principle of the rule of law.

[53] The amici curiae filed written submissions and made oral submissions, which were helpful. In this regard, the Court expresses its gratitude. The amici curiae submitted that there were instances where Judges have been appointed to, for example, commissions of inquiry. They further submitted that it is more desirable to appoint a retired Judge than a sitting Judge as this position is consistent with section 181(3) of the Constitution. Lastly, on the issue of the Speaker appointing a Judge, the amici curiae argue that the Speaker's role is to act as a neutral arbiter and the Speaker has a duty to ensure that the Public Protector is accountable to the National Assembly. The separation of powers doctrine is protected, according to the amici curiae, by the requirement that the Speaker must consult the Chief Justice before an appointment is made.

[54] Before considering whether the appointment of a Judge to the independent panel is appropriate, the content of rule 129V should be recalled. It reads:

> "(1) The panel must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct such an assessment.
>
> (2) The Speaker must appoint the panel after giving political parties represented in the Assembly a reasonable opportunity to put forward nominees for consideration for the panel, and after the Speaker has given due consideration to all persons so nominated.
>
> (3) If a judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice."

[55] The dispute relates to the permissibility of an appointment of a Judge to the independent panel. It is important to consider this question within the correct context. In other words, as the DA submitted, it is not a question of whether it is *desirable* to appoint a Judge to the panel; rather, the question is whether it is *permissible* to appoint a Judge.

[56] The High Court erroneously asked the question whether it is *desirable* to appoint a Judge to an independent panel as contemplated in rule 129V.[64] The result of this fallacious point of departure is that it may very well never be appropriate to appoint a Judge to such panels, under any circumstances. To the extent that the conclusion of the High Court was based on this case only and on any heightened political controversy that may be associated with the case, it was decided subjectively. This matter cannot be decided subjectively as, not only will there be other Public Protectors after Advocate Mkhwebane, but there are also other Chapter 9 institutions' office-bearers who will be affected by the decision reached in this matter. Therefore, the High Court misdirected itself. Should there be a need to apply this rule in their cases, which may arise for several similar or different reasons, the rule will have to be applied fairly and objectively. This Court should ask, objectively, whether it is permissible for a Judge to play a role on the independent panel involved in the removal of any Chapter 9 institution office-bearer. The Rules will apply to all Chapter 9 institution office-bearers alike; and

[64] High Court judgment above n 3 at paras 53-5.

this is the context in which the decision should be made. Accordingly, it must be read with this in mind.

[57] The Public Protector argued that the Judicial Service Commission and the President are "the only authorities with the power to appoint judges". While this may be true in respect of the President, it is irrelevant. The impugned Rules do not deal with the appointment of a person to the office of a Judge, but concern the non-judicial roles an *appointed* Judge may fulfil. This Court's decision in *Heath* is instructive in this regard. In *Heath*, the Court had to consider the constitutional validity of provisions that related to the functioning of the Special Investigating Unit (SIU) that was headed, at the time, by Heath J – a sitting judge of the High Court.[65] The SIU had as its mandate and so, by extension, did Heath J, the powers to investigate malpractice and maladministration of public funds in state institutions. The applicant in that matter challenged, inter alia, the constitutional permissibility of appointing a Judge to serve in the SIU, as in its view this undermined judicial independence. Chaskalson P held that it is permissible for a Judge to fulfil a non-judicial role with the caveat "that the performance of functions incompatible with judicial office would not be permissible".[66] The jurisprudence of this Court tells us, then, that a Judge may perform a non-judicial function, unless it is incompatible with her judicial office. The Constitution also allows, recognises, and calls for the fulfilment of non-judicial roles by Judges.[67] The question then becomes: is this role, of being appointed to the independent panel, and providing advice or recommendations in the case of the removal of Chapter 9 institutions' office-bearers, incompatible with judicial office? The answer to this question is a resounding no.

[58] Beyond being permissible, it should also be borne in mind that it may even be desirable for Judges to be placed on those panels. This is so because Judges are

[65] *Heath* above n 62 at paras 2 and 5.

[66] Id at para 27.

[67] See for example sections 48, 51(1), 52(2), 62(6), 86(2) and (3), 87, 95, 107, 128(2) and (3), 129 and 135 of the Constitution. In *Heath* above n 62 at para 32, the Court held that Judges' roles in the Judicial Service Commission is also counted as the performance of a non-curial function.

well-placed to carry out matters impartially and in accordance with constitutional requirements. To this end, in *Heath* it was held that "[a] Judge is appointed to perform these functions to ensure that they are carried out impartially and strictly in accordance with constitutional requirements and this is not inconsistent with the role of the Judiciary in a democratic society."[68] The fulfilment of this role is not a danger to the removal process, but an appropriate precondition for ensuring the fairness of the process. Therefore, the appointment of a Judge to the independent panel is permissible.

[59] The Public Protector argued that the appointment of a Judge to the panel would amount to a violation of the separation of powers doctrine in that the Judiciary should play no direct or indirect role in her removal. This view is erroneously premised on the assumption that the separation of powers doctrine is absolute. In *NSPCA*, this Court had to decide whether a statutory provision that required a magistrate to decide applications for, and issue, animal training and exhibition licences – an administrative task – was consistent with the doctrine of the separation of powers.[69] Zondo J recognised that the separation of powers doctrine is neither fixed nor rigid, but can be expressed in many different ways, subject to checks and balances, and that our Constitution does not provide for a total separation of powers between the Legislature, the Executive and the Judiciary.[70] This Court went on to develop a four-step test known as the *NSPCA* test and held that—

> "an appropriate approach to the determination of whether the performance of a function by a member of the Judiciary offends the separation of powers would involve the following questions:
>
> (a) Whether the function complained of is a non-judicial function. If it is a judicial function, that is the end of the inquiry as there can be no concern. If it is a non-judicial function, the inquiry proceeds to (b) below.

[68] *Heath* above n 62 at para 32.

[69] *NSPCA* above n 37 para 2.

[70] Id at para 13.

(b) Whether the performance of the non-judicial function by a member of the Judiciary is expressly provided for in the Constitution. If it is, that is the end of the inquiry as there can be no infringement of the separation of powers. If it is not, the inquiry proceeds to (c) below.

(c) Whether the non-judicial function is closely connected with the core function of the Judiciary. If it is, then the doctrine of the separation of powers is not offended. If it is not, the inquiry proceeds to (d) below.

(d) Whether there is any compelling reason why a non-judicial function which is not closely connected with the core function of the Judiciary should be performed by a member of the Judiciary and not by the Executive or a person appointed by the Executive for that purpose. If there is, the separation of powers is not offended. If there is not, the separation of powers is offended and the relevant statutory provision, or, the performance of such a function by a member of the Judiciary, is inconsistent with the Constitution and must be declared unconstitutional."[71]

[60] An application of the test to the facts of the present case reveals the following: the first step is not fulfilled, as the function complained of here is non-judicial in nature. The second step is also not fulfilled, as the non-judicial function to be performed is not provided for by the Constitution. The third step, which asks "[w]hether the non-judicial function is closely connected with the core function of the Judiciary",[72] is fulfilled. It is, precisely, the core function of the Judiciary to carry out matters in a manner that is impartial and in compliance with constitutional requirements. As noted in *Heath*, this function may, positively, be transposed from the courtroom to other platforms – from judicial settings to non-judicial settings.[73] In the alternative, it may be said that, if the third step is not fulfilled, then, for the same reasons mentioned above, the fourth step is fulfilled. Indeed, if it is said that the concerned non-judicial function is not closely connected to the core function of the Judiciary, it can, at the very least, be said that there is a compelling reason why it should be performed by a member of the Judiciary.

[71] Id at para 38.

[72] Id.

[73] *Heath* above n 62 at para 32.

Simply put, it is the impartiality, independence and lack of bias of a Judge that places the Judge in the perfect position to perform this function.

[61] At this juncture, the question should be asked: what is the role played by the Judge who sits on this independent panel? The answer is that the Judge considers whether there is a prima facie case against the office-bearer; she does not play any decision-making role in the removal of the incumbent. Moreover, the Judge does this as an impartial and independent person. This is permissible, as this Court has already held in *Heath* where it stated that—

> "[t]he giving of advice on the administration of justice is also related to the subject-matter of the judicial office. Government is not bound by the advice given and, if the subject on which advice is sought is contentious, the Judges concerned can decline to participate in the giving of such advice."[74]

[62] Importantly, in this instance too, the Judge is appointed to the independent panel, not to make a binding decision, but to give advice on the subject of the removal of a Chapter 9 institution office-bearer. Therefore, the envisioned role of the Judge on this independent panel is not contentious or binding; rather, it is in line with the role contemplated and approved of in *Heath*. Moreover, it bears emphasis that the Judge is but one of a three-person panel. She may thus well find herself in the minority in decisions on the recommendations to be made by the independent panel.

[63] The Public Protector argues that "the facts [of *AmaBhungane*[75]] are different but the legal principles are identical". Legal principles from one matter cannot blindly be applied to another without consideration whether it is appropriate, given the particular facts of the matter. *AmaBhungane* dealt with the right to privacy, and the limitation thereof through the implementation of the Regulation of Interception of

[74] Id.

[75] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) (*AmaBhungane*).

Communications and Provision of Communication-Related Information Act (RICA).[76] The High Court, in that matter, had held that the selection of a designated Judge, as referred to in RICA,[77] "by the Minister of Justice alone, through a secretive process and for a potentially indefinite term (through renewals of terms) compromises the perceived and actual independence of a designated Judge."[78] In this Court, the applicants submitted that RICA did not provide limits to the designated Judge's term of office, which meant that the Minister could, at a whim, extend this term indefinitely.[79] Furthermore, this meant that the appointment of the designated Judge is made exclusively by a member of the Executive (without the involvement of the Judicial Service Commission, Parliament, or the Chief Justice) in a non-transparent manner.[80] Madlanga J, after setting out the process of appointment of Judges in terms of section 174(3) of the Constitution, held that, while "the requirement of independence is a constitutional imperative",[81] there were "no protective processes or structures in place for the designated Judge in RICA".[82]

[64] It becomes clear, then, that the matter at hand is distinguishable from *AmaBhungane*. While that matter dealt with judicial independence in the context of considering whether "the mooted lack of independence detracted from the sufficiency of safeguards for purposes of the section 36(1) justification exercise",[83] that is not so in this matter. Here, the question to consider is whether serving on the panel will so denude a Judge's actual or perceived independence that such a role is incompatible with judicial office. And this question must be answered in the negative.

[76] 70 of 2002.

[77] RICA section 1.

[78] *AmaBhungane* above n 75 at para 17.

[79] Id at para 81.

[80] Id.

[81] Id at para 92.

[82] Id.

[83] Id at para 55.

[65] These two matters can, therefore, be distinguished in three respects. First, the appointment process: while in *AmaBhungane,* it was the Minister alone who had the power to appoint the designated Judge,[84] in the present case it is the Speaker, in consultation with the Chief Justice, who appoints a Judge to the panel.[85] This process is also transparent, as Parliament is aware of the Speaker's choice. Second, the appointers: it is important to emphasise that, *if* the Speaker appoints a Judge to the panel, she *must* do so in consultation with the Chief Justice.[86] That was not the case in *AmaBhungane* where the Minister was the sole appointer. Finally, the appointment period: while in *AmaBhungane* it was revealed that the designated Judge's term could be extended indefinitely by the Minister,[87] on a reading of the Rules, the panel's term, including the Judge's term if there is one serving, expires 30 days after appointment.[88] Thus, the independence of appointed Judge in this context is protected by and in the Rules.

[66] It also behoves me to mention that I am not blind to the fact that if political parties are allowed to elect or appoint a Judge to the panel, there may, at the very least, be a perceived lack of independence. However, the relevant process here does not include such a scenario. Instead, it is the Speaker who appoints the panel, the political parties merely nominate panel candidates. As regards the appointment of a Judge to that panel, the Speaker is obliged to consult with the Chief Justice before making this appointment. In my view, this role played by the Chief Justice is an important one and is sufficient to guard against the concerns that a Judge will be perceived as acting at the behest of a particular political party, or that the Judge is a particular political party's Judge.

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[84] Id at para 76.

[85] Rule 129(V)(3).

[86] Id.

[87] *AmaBhungane* above n 75 at para 81.

[88] Rule 129(X)(1)(b). In the current removal process before the National Assembly, the independent panel requested an extension of the 30-day period. It should be noted that the extension is within the discretion of the Speaker and that due to the nature of the panel, being that it is appointed for one specific purpose, it cannot be foreseen that a situation will arise which would lead to prolonged extensions.

[67] The impugned rule places an explicit time limit on the duration of the Judge's appointment, being a 30-day period. In this case, the independent panel requested an extension to 90 days, which was considered and granted by the Speaker. However, the extension of the time period upon request does not render the time period unlimited. Further, Parliament and the Chief Justice have an undisputed role in the appointment of the Judge – the Speaker appoints the Judge *in consultation with the Chief Justice.* The Rules, therefore, contain exactly the type of safeguards that this Court in *AmaBhungane* held were missing from RICA.[89]

[68] Lastly, the amici curiae's submissions on the practices of other jurisdictions and the distinction between appointing retired and sitting Judges were helpful. It is not necessary, though, for the purposes of this case, to make any finding whether it would have been permissible to appoint a sitting Judge.

[69] In the result, the High Court erred when it severed part of rule 129V which relates to the appointment of a Judge to the independent panel. The appeal on this ground must be upheld and the order set aside.

Conditional cross-appeal

[70] The Public Protector, in her answering affidavit, included a conditional application to cross-appeal against eight[90] of the 10 grounds dismissed by the High Court. The cross-appeal is conditional upon leave to appeal being granted in the main applications. As leave to appeal in these applications has been granted, and one of the orders of the High Court order will be set aside, it becomes necessary to consider whether leave to cross-appeal should be granted, and if so, whether any of the grounds of appeal has any merit.

[89] *AmaBhungane* above n 75 at para 92.

[90] Being: (a) irrationality in the form of ultra vires, (b) procedural irrationality, (c) *audi alteram partem*, (d) retrospectivity, (e) interpretation of section 194, (f) severance, (g) reviewability and (h) costs order and/or mala fides.

[71] The Speaker and the DA argue that it is not in the interests of justice to grant the Public Protector leave to cross-appeal directly to this Court. The Speaker offers three reasons in support of this submission: first, the cross-appeal is pleaded laconically and without any reference to the particular passages in the judgment of the High Court that are impugned. Second, the Public Protector is effectively challenging the Rules again, and if the Public Protector desired to challenge the High Court's findings, she should have sought leave to appeal from the High Court. The Speaker makes the point that the conditional nature of the Public Protector's proposed cross-appeal means that she is willing to accept defeat on all the grounds rejected by the High Court, provided only that this Court does not entertain the applicants' appeals on the two grounds in respect of which the Public Protector succeeded in the High Court. Last, the appeal, in any event, does not have reasonable prospects of success. Alternatively, if this Court does uphold any of the challenges to the Rules, the Speaker submits that such a declaration of invalidity must be suspended for six months pending the curing of the defect by the National Assembly. The DA likewise complains that the Public Protector has failed to identify precisely where the High Court supposedly erred, and submits that it is impermissible for her "merely to piggy-back on the main application for leave to appeal".

[72] Before considering the grounds of the cross-appeal, it should be mentioned that the Public Protector elected not to bring a formal application to cross-appeal in terms of rule 19(5)(a) of this Court's Rules.[91] She merely notified this Court and the applicants of her intention to conditionally cross-appeal in her answering affidavit. This non-compliance with the Rules, especially from the head of a Chapter 9 institution, is regrettable. Litigants in this Court are bound by the Rules of this Court and should not deem the Rules to be mere guidelines on how to conduct litigation.

[91] Rule 19(5)(a) provides:

> "A respondent or respondents wishing to lodge a cross-appeal to the Court on a constitutional matter shall, within 10 days from the date upon which an application in subrule (2) is lodged, *lodge with the Registrar an application for leave to cross-appeal*." (Emphasis added.)

[73] Beyond the procedural non-compliance, there are no reasonable prospects of success in the cross-appeal. Nonetheless, I am inclined to entertain the cross-appeal for four reasons. First, to dismiss the conditional application to cross-appeal for pure procedural non-compliance would lead to unnecessary litigation and a waste of judicial resources, as the Public Protector may decide to pursue the appeal in the Supreme Court of Appeal.[92] Second, there is a need to bring this matter to finality without further delays. The section 194 enquiry has been suspended pending the finalisation of litigation, and without certainty on the Rules, the Speaker is unable to perform part of her constitutional duties, which is to ensure the transparency and accountability of office-bearers of Chapter 9 institutions. Third, we have the benefit of the Full Court judgment which fully ventilated the issues raised in the cross-appeal. Lastly, compliance with the Rules of this Court aims to prevent, amongst others, prejudice to one party in litigation and seeks to ensure all parties have an opportunity to be heard. Fortunately, the Speaker and the DA responded to the merits of the conditional cross-appeal in their written submissions and during oral argument. Therefore, I do not think that the applicants are prejudiced by the non-compliance. Accordingly, leave to cross-appeal should be granted. I now turn to consider the grounds of the cross-appeal.

Irrationality in the form of ultra vires

[74] The High Court held that the National Assembly is obliged to determine whether to remove the Public Protector and it cannot delegate that function to another entity. However, nothing prevents it from taking advice from a panel.[93] The independent panel makes preliminary assessments and submits a report to the National Assembly, but the panel has no powers other than to submit a report. The National Assembly is at liberty to follow or ignore the independent panel's recommendations.[94] The High Court held that the facts would indicate whether the National Assembly merely rubber stamped the

[92] In *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 23 this Court recognised that delays in the finalisation of cases bear testimony to the scarcity of judicial resources.

[93] High Court judgment above n 3 at para 45.

[94] Id.

panel's recommendations, in which case the incumbent would have remedies.[95] It, therefore, held that the appointment of the panel was rational.

[75] The Public Protector submits that the High Court failed to consider her argument on the irrationality of the Rules. The argument goes like this: neither the Chief Justice nor the Speaker is empowered to appoint a Judge and, as a result, the appointment of a Judge to the independent panel is not a lawful exercise of public power, rendering the Rules ultra vires.

[76] The DA points out that the Public Protector now seeks to raise the rationality and ultra vires argument for the first time before this Court. This is different to the case pleaded before, wherein, relying on *Heath*, she argued that the separation of powers doctrine had been breached. Notwithstanding, it submits that the National Assembly lawfully appointed Justice Nkabinde, as the appointment does not seek to make her a Judge; she already is a Judge and now assumes an advisory role to assist the National Assembly. Nothing in this is irrational or unlawful. The Speaker submits that in *EFF II* this Court directed the National Assembly to adopt Rules defining the grounds for removal from office for the President, and regulating the removal process. This is exactly what the National Assembly did for the removal of Chapter 9 institution office-bearers. Therefore, the Rules are not irrational.

[77] As held above, I do not agree that the appointment of a Judge to the independent panel is irrational. During the hearing of this matter, counsel for the Public Protector shifted this ground of appeal into a much broader ground by arguing that the Speaker has no power to appoint *anyone* to an independent panel, irrespective of whether that person is a Judge. It is necessary to emphasise that this was not the pleaded case in this Court. The pleadings were limited to the argument that no provision or law empowers the Speaker and/or the Chief Justice to appoint a Judge to any position.

[95] Id at para 48.

[78] I will first dispose of the argument that neither the Chief Justice nor the Speaker has the power to appoint a Judge. Indeed, this is correct. But it cannot be disputed that the allocation of a Judge to a panel is not equivalent to the appointment of a person as a Judge. In terms of section 174 of the Constitution, the President appoints a Judge on the advice of the Judicial Service Commission. After the appointment, the person will be designated as a Judge. Rule 129V(3) states that "[i]f a Judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice". Therefore, the Rules make provision for a person already designated as a Judge to be appointed to serve on the independent panel. The Rules do not, by some dubious manner, bypass section 174 of the Constitution, in that a person not designated as a Judge and appointed to serve on the independent panel miraculously becomes a Judge. This argument is without a doubt unmeritorious.

[79] Turning to the novel argument introduced during the hearing, that is, the Speaker does not have the power to appoint *anyone*; it is necessary to consider the Rules and the Constitution. The Speaker's power to appoint an independent panel comes from the Rules. During the hearing, counsel for the Public Protector argued that this is insufficient, as it is necessary to ask where the power comes from to make these Rules. I agree with the Public Protector that the "exercise of public power must comply with the Constitution which is the supreme law and the doctrine of legality which is part of that law". Unsurprisingly, in this instance the power to make such rules can be found in the Constitution, more particularly in section 57. Section 57, governing the internal arrangements, proceedings and procedures of the National Assembly, provides that the National Assembly "may make rules and orders concerning its business with due regard to representative and participatory democracy, accountability, transparency and public involvement".

[80] The enquiry into the removal of Chapter 9 institution office-bearers is inherently a National Assembly proceeding, and therefore the power of the National Assembly to make the Rules governing the process is located within section 57 of the Constitution. Since the Rules must inevitably contain provisions for the composition and appointment

of committees, it follows that the Rules may permissibly confer powers of appointment on the Speaker and on other parliamentary functionaries. Further, the Rules of the National Assembly confer the powers of appointment on the Speaker, on political parties and on parent committees of subcommittees in several Rules catering for different circumstances concerning the business of the National Assembly.[96] Therefore, this is not an irregular power that only applies in the context of the removal of Chapter 9 institution office-bearers.

[81] The Speaker, before appointing the independent panel, invited the political parties represented in the National Assembly to nominate persons to serve on the panel. This step in the removal process further promoted section 57(1)(b) of the Constitution, as it made provision for representative and participatory democracy.

[82] In addition to the clear power, it is disingenuous to ignore that this Court's own jurisprudence directed the National Assembly to adopt rules regulating the process to remove the President in terms of section 89(1) of the Constitution.[97] Similar to what this Court directed the National Assembly to do in *EFF II*, the National Assembly adopted rules to define the grounds for removal and to regulate the process of removal.

[83] This Court also expressly stated in *EFF II* that the removal process of the President, a process similar to the current process, must be preceded by a preliminary enquiry.[98] The Speaker, by appointing the independent panel to determine whether there is prima facie evidence for the removal of the office-bearer, fulfilled the preliminary enquiry requirement set by this Court. Further, during the preliminary enquiry, the office-bearer is provided with an opportunity to be heard. If the preliminary stage is bypassed, so will the office-bearer lose a valuable opportunity to be heard. The

[96] See for example: in terms of rule 194(2) the Speaker may appoint task teams to assist the Speaker in the implementation of policy determined by the Rules Committee; in terms of rule 216(c) the Speaker may designate any members to serve on the Disciplinary Committee; in terms of rule 253(1) the Speaker may establish an ad hoc committee; in terms of rule 155(1) the political parties appoint members of a committee; and in terms of rule 172(2)(a) a parent committee of a subcommittee must appoint members of the subcommittee.

[97] *EFF II* above n 8.

[98] Id at para 180.

Public Protector is arguing for more opportunities to be heard, but ironically the bypassing of the preliminary stage will only be prejudicial to the incumbent. This provides further support for the rationality of the construction of the Rules and the appointment of the panel.

[84] On the last point, the appointment of the independent panel conducting the preliminary enquiry protects the Chapter 9 institution office-bearer against vexatious and persistent enquiries in terms of section 194. The purpose of the preliminary enquiry is to determine whether the motion for removal has any merit. If, on the advice of the panel, the National Assembly decides not to proceed with a section 194 enquiry, the office-bearer is protected against unmeritorious removal motions. The appointment of the independent panel, sifting through the removal motion, therefore, supports the principle that Chapter 9 institution office-bearers should not be subjected to repeated, unmeritorious enquiries in terms of section 194 of the Constitution. This sifting mechanism is an important component in the jurisdictional requirements of section 194.

[85] For all these reasons, the Public Protector's argument that the appointment of an independent panel "offends the principle of legality" is without merit and rejected.

Procedural irrationality and audi alteram partem

[86] Grounds two and three, which are procedural irrationality and *audi alteram partem*, cannot be separated and were argued jointly by the Public Protector. Therefore, I will consider them simultaneously.

[87] In terms of the Rules, the Speaker does not afford the Chapter 9 institution office-bearer an opportunity to be heard before the motion is filed and the Speaker determines whether the motion is compliant with the Rules. The Speaker *may*, however, consult the complainant before making a determination. The High Court held that the issue was whether the Public Protector is entitled to a hearing at every stage of the multi-stage process. The absence of an opportunity to be heard must be procedurally

connected to a purpose.[99] The High Court considered *Kubukeli*[100] and held that similar to it, the Speaker's decision involves a prima facie finding, and even the finding by the independent panel has no binding force and can be challenged at the committee enquiry.[101] In this matter, the Speaker does no more than assess whether the motion complies with the form in terms of the Rules.[102] In concluding this analysis, the High Court held that this does not mean that input at this stage is not preferred, but a court's preference is not the test.[103] The High Court, thus, dismissed the challenge.

[88] The Public Protector contends that the Rules fail to afford an office-bearer the opportunity to give his or her side of the story before deciding whether the motion is in order. The Speaker argues that the High Court was correct in finding that a hearing at such an early stage is not a prerequisite for legality. The DA submits that there is no right in law to be given a "hearing before a hearing". Consequently, there was no breach of the principle of legality.

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[99] High Court judgment above n 3 at para 34.

[100] *National Treasury v Kubukeli* [2015] ZASCA 141; 2016 (2) SA 507 (SCA) (*Kubukeli*). In *Kubukeli* the Supreme Court of Appeal was tasked with deciding whether Mr Pumlani Kubukeli was denied a right to make representations to a team appointed by the National Treasury to conduct an in-depth investigation into alleged financial irregularities in respect of hiring of motor vehicles by the executive mayor of the OR Tambo District Municipality. Mr Kubukeli argued that he never received notice from the Treasury team to avail himself for an interview. The Supreme Court of Appeal, at para 24, held that—

> "the National Treasury exercised the public power to investigate any system of financial management and internal control of the Municipality, and to recommend improvements, with the object of securing sound and sustainable management of the fiscal and financial affairs of the Municipality. The purpose for which the power was given was not to investigate the conduct of any particular person and to make final findings in respect thereof. What a particular person did or did not do was incidental to the object of the power. It follows that the request, that Mr Kubukeli and others attend interviews, did not constitute recognition of a right to be heard, but was intended to assist the National Treasury to achieve its purpose. The Treasury team was in no way to blame for the absence of that assistance."

The Court held that in the context of the report, it is clear that what was said regarding Mr Kubukeli's involvement were only prima facie findings. As a result, the Court held that the investigations, report and recommendations of Treasury without the involvement of Mr Kubukeli, were founded on reason and not arbitrary or irrational.

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

[102] Id at para 41.

[103] Id at para 43 referencing *Minister of Justice v SA Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) at para 55.

[89] In terms of the 17-step process, a Chapter 9 institution office-bearer facing a removal motion is granted two opportunities to be heard. The first opportunity, as provided for in rule 129X(1)(c)(iii), is during the preliminary stage when the office-bearer can make written submissions to the independent panel. Rule 129X, governing the proceedings of the independent panel, is couched in mandatory language – the independent panel must provide the office-bearer with a reasonable opportunity to respond to the allegations levelled against him or her. If the National Assembly decides to proceed with the enquiry after the preliminary stage, the office-bearer is afforded a second opportunity to respond to allegations insofar as he or she has a right to be heard during the formal removal enquiry in terms of rule 129AD(3). The Public Protector argues that these two opportunities are insufficient, and as a result the procedure is irrational.

[90] The argument by the Public Protector is without merit. In terms of rule 129S read with rule 129T, after a motion is received, the Speaker has an obligation to certify the motion as being compliant with the Rules. This is a procedural step that does not touch on the merits of the motion. The Chapter 9 institution office-bearer's submissions will have no bearing on this step as the Speaker does not engage with the merits of the motion. The first stage where the merits of the motion are considered is during the preliminary enquiry by the independent panel. As stated above, the office-bearer does indeed have an opportunity to respond to allegations at this stage. In *EFF II*, this Court held that "[i]t is also up to the Assembly to decide whether the President must be afforded a hearing at the preliminary stage".[104] In this instance, the National Assembly exercised its discretion to afford the office-bearer an opportunity to be heard during the preliminary stage.

[91] I agree with the High Court that the Speaker's decision involves a prima facie finding that the motion is compliant, and the section 194 enquiry has not yet commenced at that stage. Our courts have on several occasions confirmed that a "hearing before a

[104] *EFF II* above n 8 at para 180.

hearing" is not a prerequisite for legality.[105] It should again be reiterated that, although a hearing before a hearing is not necessary, the office-bearer is effectively given a hearing before a hearing as the office-bearer is afforded two opportunities to respond to the allegations levelled against him or her. The process is therefore not irrational.

Retrospectivity

[92] The issue here is whether the Rules, which it will be recalled were adopted by the National Assembly on 3 December 2019, apply to alleged misconduct committed before that date. The High Court considered the rule against retrospectivity and held that it is rebuttable in that: (a) the grounds for removal already existed when the Rules were adopted – such grounds were specified in section 194 of the Constitution; (b) the Rules were adopted to give effect to section 194 of the Constitution; (c) the absence of a reference to retrospectivity in the Rules does not render the Rules non-retrospective; (d) the drafters intended to adopt rules to render section 194 of the Constitution operational; and (e) the National Assembly's oversight function would otherwise be rendered inoperable in respect of misconduct perpetrated at any time from the inception of the Constitution until 3 December 2019,[106] which would lead to absurdity.[107] Having considered the above, the High Court concluded that by necessity the Rules operate retrospectively.[108]

[93] The Public Protector argues that the High Court erred because the Rules are presumed to operate prospectively and to only apply to facts that came into existence after their passing. In her view, had the National Assembly intended for the Rules to apply retrospectively it would have indicated this, but it did not. Further, the Rules are

[105] See for example: *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at paras 37-9; *Langa v Hlophe* [2009] ZASCA 36; 2009 (8) BCLR 823 (CC) at para 40; *Chairman, Board on Tariffs and Trade v Brenco Inc* [2001] ZASCA 67; 2001 (4) SA 511 (SCA) at para 71; and *Park-Ross v Director: Office for Serious Economic Offences* 1998 (1) SA 108 (C) at para 18.

[106] Being the date the new Rules were adopted.

[107] High Court judgment above n 3 at para 68.

[108] Id at para 69.

not purely procedural; they affect the Public Protector's substantive rights. Thus, the Rules cannot be applied retrospectively.

[94] I disagree with the Public Protector. The effect of this argument, if upheld, will be that any conduct of the Public Protector, and other Chapter 9 institution office-bearers, before 3 December 2019 cannot be the subject of a motion for removal from office. The Public Protector failed to distinguish between the Rules, which provide for the process for removal, and the grounds for removal contained in section 194 of the Constitution. The grounds for removal have existed since 1996 in the Constitution. The question of retrospectivity would have been relevant if the grounds for removal were introduced by the Rules, which is not the case. It is recognised that there is no hard line between legislation affecting rights and procedural legislation, as legislation that seems to be procedural can impact on substantive rights.[109] This, however, also does not assist the Public Protector. The presumption against retrospectivity is exactly that – a presumption. In *Mhlope*,[110] Madlanga J held that the presumption "is not a magic wand that must trump a discernible purpose of a legislative instrument".[111] If the presumption against retrospectivity does kick in, it is rebutted by the clear intention to hold Chapter 9 institution office-bearers accountable. This is the purpose of the Rules. A contrary interpretation would eviscerate this purpose.[112]

[95] In *EFF I*,[113] Mogoeng CJ held that "constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of

[109] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) at para 15.

[110] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*).

[111] Id at para 29.

[112] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90, this Court held that "[t]he emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous". In this matter before this Court, the context in which the Rules were adopted clearly delineate an intention to hold office-bearers accountable in terms of section 194 of the Constitution.

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

impunity off its stiffened neck".[114] The Rules were drafted in this spirit of accountability. It is unimaginable that the drafters of the Rules intended for the Rules not to apply to the very removal process that was before the National Assembly. The prospective order the Public Protector seeks stands juxtaposed against the constitutional principles of accountability.[115] Any order that will prevent Chapter 9 institution office-bearers from being held accountable for conduct committed before the Rules were drafted, which merely govern the process for removal, will lead to impunity. This cannot be so.

Interpretation of section 194 of the Constitution

[96] The High Court considered the definitions of misconduct, incapacity and incompetence. It held that, in terms of incapacity, any condition permanent or temporary, must relate to the time in office, being seven years, and a temporary condition may render the incumbent incapacitated for this period.[116] It mattered not, according to the High Court, whether the office-bearer will, years after their appointment has come to an end, be able to perform their duties; what is relevant is whether they can perform their duties in relation to the time in office. For the definition of misconduct, the High Court held that the Rules set the operational standards, accordingly, the definitions of the grounds of removal do not alter the constitutional grounds.[117]

[114] Id at para 1.

[115] The Public Protector argues that:

> "One cannot imagine a situation where overnight all Chapter 9 heads are faced with complaints of misconduct, for things that happened prior to the adoption of the Rules, that would result in chaos and absurdity, unless of course the Rules are aimed at targeting the Public Protector alone."

Much rather, one should imagine a situation where all Chapter 9 institution office-bearers are held accountable for alleged misconduct. This is evident from section 194 of the Constitution and would not lead to "chaos and absurdity" but rather constitutional accountability.

[116] High Court judgment above n 3 at para 83.

[117] Id at para 84.

[97] For this ground of appeal, the Public Protector argues that the High Court erred by not finding that the Rules altered the grounds of removal found in section 194 of the Constitution. According to the Public Protector, the grounds are altered in the following manner: (a) the definition of "incapacity" in the Rules now includes "temporary incapacity"; and (b) the definition of "misconduct" now refers to "gross negligence" and "intent".

[98] On the first point, section 194 only mentions "incapacity". It is important to note that section 194 does not contain the definitions for the removal grounds, being misconduct, incapacity, and incompetence. It merely lists the grounds. Therefore, the Rules are unable to "amend the constitutional definitions", as argued by the Public Protector, because the Constitution contains no definitions. The definition contained in the Rules does not stop at stating that incapacity can include a temporary condition. It goes on to explain that incapacity is a temporary condition "that impairs a holder of a public office's ability to perform his or her work". I caution against a selective reading of a definition, as the link to the office-bearer's ability to perform her work is undoubtedly an essential element of the definition. I, therefore, agree with the High Court that even if a Chapter 9 institution office-bearer is temporarily incapacitated, it can be a proper ground for removal in terms of section 194.[118]

[99] The Public Protector further argues that the Rules extend the definition of misconduct as it includes "gross negligence" and "intention". It is difficult to imagine a definition of "misconduct" without a reference to negligence and intention. The Rules cannot be said to "extend" the definition of misconduct because the Rules require not mere negligence, but "gross negligence". The onus was on the Public Protector to show that the definitions in the Rules are impermissibly broad or narrow. The Public Protector did not succeed in this regard.

[100] I can do no better than to quote from what this Court held in *EFF II*:

[118] Id at para 83.

> "It is evident that the drafters left the details relating to these grounds to the Assembly to spell out. But the drafters could not have contemplated that members of the Assembly would individually have to determine what constitutes a serious violation of the law or the Constitution, and conduct on the part of the President which, in the first place, amounts to misconduct and whether, in the second place, such conduct may be characterised as serious misconduct. If this were to be the position, then we would end up with divergent views on what is a serious violation of the Constitution or the law and what amounts to serious misconduct envisaged in the section.
>
> And since the determination of these matters falls within the exclusive jurisdiction of the Assembly, it and it alone is entitled to determine them. This means that there must be an institutional pre-determination of what a serious violation of the Constitution or the law is. The same must apply to serious misconduct and inability to perform the functions of the office. The Acting Speaker describes the first two grounds as exhibiting wrongdoing on the part of the President. I could not agree more. This is evident from the language of section 89(2), which stipulates that a President removed from office on any of these two grounds may lose benefits. Once more, it is left to the Assembly to determine circumstances under which the President removed from office on one of those grounds may forfeit benefits."[119]

[101] Similar to the removal of the President, when it comes to section 194, the National Assembly is tasked with determining the definitions of "misconduct", "incapacity" and "incompetence". The Rules are intended to provide greater detail to guide members of the National Assembly. Guidance from the Rules is not only beneficial, but imperative to ensure fairness and consistency in section 194 proceedings. Therefore, I do not agree with the Public Protector's argument that the definitions are ultra vires.

Severance

[102] The Public Protector argues that the High Court, when severing portions of rules 129AD(3) and 129V, "exceeded the boundaries of judicial interference" and "purport[ed] to rewrite the Rules for the Legislature". According to her, the severance

[119] *EFF II* above n 8 at paras 177-8.

encroached on the doctrine of separation of powers. In support of this contention, the Public Protector relies on *Coetzee*[120] to argue that this is not a case where the "good can be separated from the bad".[121]

[103] Section 172(1)(a) of the Constitution confirms that when deciding constitutional matters, a court "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". In applying the test for severability articulated in *Coetzee*, one should ask two questions: first, is it possible to sever the invalid provision; and, second, if so, does the remainder give effect to the purpose of the legislative scheme?[122] As I am setting aside the order of the High Court which removes the provision for a Judge to be appointed to the independent panel, the test for severability only needs to be applied to rule 129AD(3) and how the High Court severed the unconstitutional section. The High Court merely excised the proviso that said: "provided that the legal practitioner or other expert may not participate in the committee". It is, therefore, possible, without difficulty, to sever the invalid provision. The next step is to compare the remains of the provision to the purpose of the legislation. The purpose of rule 129AD(3) is to provide legal assistance and expert support to the Chapter 9 institution office-bearer and in the greater scheme of things, this rule is to ensure fairness during the section 194 proceedings. The good is clearly separated from the bad and severance was correctly applied by the High Court.

[104] The proper relief, according to the Public Protector, would have been for the High Court to remit the Rules to the National Assembly for redrafting. I disagree. This can only be interpreted as a tactic to delay the proceedings as, in the Public Protector's own written submissions before this Court, she argues for the Rules to be "severable to the extent of the alleged excess" concerning the definitions of the grounds of removal.

[120] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

[121] Id at para 75.

[122] Id at para 16.

The Public Protector, therefore, recognises that severance is suitable when it counts in her favour.

Reviewability

[105] The final ground of appeal, aside from the costs order, is that of "reviewability"; in other words, that the High Court supposedly failed to consider that grounds such as *audi alteram partem*, retrospectivity and the inclusion of a Judge on the panel were attacked not only on the grounds of being unconstitutional but on the alternative basis that they were subject to judicial review. The High Court held that there was no merit in the unreasonableness ground. It found that not giving the Public Protector an opportunity to be heard at every stage of the enquiry was not arbitrary or irrational. Further, the functions of the National Assembly and the Speaker in respect of the adoption and implementation of the Rules were fulfilled in terms of section 57(1) of the Constitution, and they are expressly excluded from the definition of administrative action in the Promotion of Administrative Justice Act.[123] Therefore, these actions are not reviewable.[124]

[106] I agree with the Speaker that the Public Protector's argument is difficult to understand in substance. The High Court considered the merits of all the grounds raised by the Public Protector and, therefore, it is unnecessary to say more on whether the conduct of the Speaker should be reviewed.

Costs order and/or mala fides

[107] The final ground of appeal is based on the allegation that the Speaker acted in bad faith. The High Court rejected the argument of mala fides and ulterior motive against the Speaker. It held that the Speaker had to implement and follow the Rules as the High Court rejected the interdictory relief in Part A of that application; therefore, the Speaker was not interdicted from proceeding with the enquiry. Accordingly, a

[123] 3 of 2000.

[124] High Court judgment above n 3 at paras 77 and 79.

finding that the Speaker acted with mala fides in those circumstances was unwarranted.[125]

[108] The Public Protector submits that the High Court erred when it refused to award punitive and/or personal costs against the Speaker. The finding of bad faith is a prerequisite in upholding this ground of appeal. I agree with the High Court that the Speaker was obliged to implement and follow the Rules. The Public Protector attempted to stop the proceedings pending the legality challenge in the High Court, and the High Court dismissed the interdict. The Speaker, therefore, had no legal obligation, or any other obligation, towards the Public Protector to pause the proceedings pending the finalisation of the litigation. Rather, the Speaker has an obligation towards the Constitution. I am unable to find any malice in the actions of the Speaker warranting a punitive costs order.

[109] It follows, then, that the cross-appeal must fail.

Conclusion

[110] This brings me to the final issue, the retrospectivity of the order in relation to the right to legal representation. The office-bearer is entitled to full legal representation at the stage of the section 194 enquiry, that is, during the enquiry before the committee established in terms of rule 129AA. The current processes before the National Assembly to remove the Public Protector from office have been suspended pending the outcome of this litigation, and the process has not yet reached the stage of the section 194 enquiry before the rule 129AA committee. As a result, the retrospectivity of the order of constitutional invalidity will have no bearing on the lawfulness of the current process and will not disrupt the steps already undertaken. When the section 194 enquiry formally proceeds, the Public Protector will be entitled to full legal representation in the committee proceedings.

[125] Id at para 73.

Costs in the main application

[111] The Speaker is partially successful in her application; however, the Speaker does not seek a costs order against the Public Protector as both are organs of state. Therefore, each party will bear their own costs in the application by the Speaker.

[112] The DA has been successful against the Public Protector. I see no reason to deviate from the general principle that costs should follow the result. The DA is, therefore, entitled to its costs in this Court.

Order

[113] The following order is made:

1. Leave to appeal directly to this Court on an urgent basis is granted.
2. Save as set out in paragraph 3 below, the appeal against the order in paragraph 118(a)(i) of the High Court is dismissed.
3. Paragraph 118(a)(i) of the order of the High Court is amended to read: "(i) the phrase 'provided that the legal practitioner or other expert may not participate in the committee' is irrational, and inconsistent with the Constitution and is declared invalid. The proviso is severed from rule 129AD(3). The amended rule now provides that the section 194 committee:

   > 'must afford the holder of a public office the right to be heard in his or her defence and to be assisted by a legal practitioner or other expert of his or her choice.'"
4. The appeal against the order in paragraph 118(a)(ii) of the High Court is upheld.
5. Paragraph 118(a)(ii) of that order is set aside and replaced with the following order:

   "The application relating to the constitutionality of rule 129V is dismissed".
6. Leave to cross-appeal is granted.

7. The cross-appeal is dismissed.
8. In CCT 257/21, each party must pay their own costs.
9. In CCT 259/21, the Public Protector must pay the costs of the Democratic Alliance, such costs to include the costs of two counsel.

For the Applicant in CCT 257/21:	A Breitenbach SC, U K Naidoo and A Toefy instructed by State Attorney, Cape Town
For the Applicant in CCT 259/21:	S Budlender SC and M Mbikiwa instructed by Minde Schapiro & Smith
For the First Respondent in CCT 257/21 and CCT 259/21:	D Mpofu SC, B Shabalala and H Matlape instructed by Seanego Attorneys Incorporated
For the Amici Curiae:	M Le Roux SC and M Vassen instructed by Webber Wentzel