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

Before:
The Hon Mr Justice L G Nuku
The Hon Mr Justice M Francis
The Hon Mr Justice J D Lekhuleni

Case No: 8500/2022

In the matter between:

THE PUBLIC PROTECTOR OF SOUTH AFRICA	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE CHAIRPERSON OF THE SECTION 194 COMMITTEE	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Fourth to Seventeenth Respondent

Dates of hearing	:	25 & 26 July 2022
Post hearing note submitted on	:	05 August 2022
Date of judgment	:	09 September 2022

J U D G M E N T

THE COURT :

Introduction

[1] The applicant applies to this Court in terms of the provisions of section 172(1) of the Constitution[1] for orders declaring certain conduct and/or decisions ("***the impugned conduct or decisions***") of the first, second and third respondents to be irrational, unconstitutional and invalid, as well as for consequential relief of a just and equitable remedy.

[2] The impugned conduct or decision in respect of the first respondent relates to a letter she wrote to the third respondent dated 10 March 2022 advising him of the decision of the committee established by the National Assembly in terms of section 194 of the Constitution read with Part 4 of Chapter 7 of the Rules of the National Assembly ("***the Section 194 Committee***") to continue with its consideration of the motion for the removal of the applicant.

[3] The impugned conduct and/or decisions in respect of the second respondent relate to the decisions of the Section 194 Committee:

(a) to continue with the consideration of the motion for the removal of the Public Protector while the matter is still pending before the courts;

(b) taken between 22 February 2022 until the date of any order granted by this Court; and

[1] The Constitution of the Republic of South Africa, 1996

(c) the implementation of Rule 129AD(3) of the Rules of the National Assembly ("***the Rules***") without it being amended to align it with the judgment of the Constitutional Court in the matter of the ***Speaker of the National Assembly v Public Protector***[2].

[4] The impugned conduct and/or decisions in respect of the third respondent relate to his decision to suspend the applicant as well as the preliminary steps he took leading up to the suspension.

[5] The applicant also seeks an order developing the common law to include a rule automatically suspending the execution of an order which is the subject of a pending application for rescission, unless the relevant court rules otherwise upon application by the successful party. Lastly, the applicant seeks orders holding certain respondents personally liable for costs on an attorney and client scale.

The parties

[6] The applicant brings this application in her capacity as the Public Protector of South Africa duly appointed as such in terms of section 1A of the Public Protector Act, 23 of 1994 ("***the Public Protector Act***"). She also brought a conditional application to be joined in her personal capacity as the second applicant.

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[2] 2022 (3) SA 1 (CC)

[7] The first respondent is the Speaker of the National Assembly ("***the Speaker***") elected in terms of section 52 of the Constitution. The speaker is cited in these proceedings in her official capacity and also as a nominal respondent on behalf of the National Assembly as contemplated in section 23(1)(a) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("***the PPI Act***") read with section 2 of the State Liability Act 20 of 1957 ("***the State Liability Act***").

[8] The second respondent is the Chairperson of the Section 194 Committee ("***the Chairperson of the Section 194 Committee***") who is cited in his representative capacity as envisaged in section 23(1)(b) of the PPI Act.

[9] The Third Respondent is the President of the Republic of South Africa ("***the President***"). He is the head of State and of the National Executive of the Government of the Republic of South Africa, being elected as such in accordance with section 86 of the Constitution. The President is cited in his official capacity.

[10] The fourth to the seventeenth respondents are all political parties represented in the National Assembly and have been cited only as interested parties with no relief being sought against them. These respondents have not actively participated in this application except for the fifth, tenth, and eleventh respondents.

[11] The fifth respondent, the Democratic Alliance ("***the DA***"), the Speaker, and the Chairperson of the Section 194 Committee, opposed the application. The tenth respondent, United Democratic Movement ("***the UDM***"), and the eleventh respondent, the African Transformation Movement ("***the ATM***"), have filed papers in support of some of the relief sought by the applicant.

Factual Background

[12] The judgment of the Constitutional Court referred to in paragraph [3](c) above, succinctly sets out the history of the matter, including the related litigation which culminated in the said judgment, and it is not necessary to repeat same in any great detail. In summary, the DA submitted various motions for the removal of the applicant. Initially, the National Assembly did not have rules regulating the process arising from the motions for the removal of the Public Protector, the Auditor-General, or members of the commissions established in terms of Chapter 9 of the Constitution ("***the Chapter 9 institution office bearer***"). Upon the National Assembly adopting these rules, the applicant successfully challenged their constitutionality in this Court. The said challenge was successful with regard to the relief sought in respect of rule 129AD(3) and rule 129V(1). Rule 129AD(3) deals with legal representation and, in its original form, limited the participation of the Chapter 9 institution office bearer's legal representative or expert in the proceedings of the Section 194 Committee. Rule 129V(1) deals with the composition of an independent panel to determine whether there is *prima facie* evidence of misconduct, incapacity, or incompetence on the part of a Chapter 9 institution office

bearer and, in this regard, makes provision for the appointment of a judge to the said panel.

[13] Whilst the above challenge was still pending before this Court, the National Assembly constituted the Section 194 Committee which held its first meeting on 20 July 2021. This was followed by a letter dated 21 July 2021 written by the former Speaker of the National Assembly advising the President accordingly.

[14] Unhappy with the outcome of the full bench decision in this Court, the Speaker and the DA launched applications for direct appeal to the Constitutional Court. In the affidavit in support of the application, Mr Tsenoli MP, who was the Deputy Speaker, advised that he had decided to recommend to the Section 194 Committee to suspend the enquiry pending the outcome of the application for leave to appeal. The Section 194 Committee accepted this recommendation and resolved to suspend its proceedings pending the outcome of the application for leave appeal.

[15] The Constitutional Court delivered its judgment on 4 February 2022. It upheld the appeal in respect of rule 129V and dismissed the appeal in respect of rule 129AD(3). The Constitutional Court made an order severing the proviso in rule 129AD(3) which limited the participation of the Chapter 9 institution office bearer's legal representative or expert in the proceedings of the Section 194 Committee, and further ordered that:

"*The amended rule now reads 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.'*" [3]

[16] On 21 February 2022, the applicant's attorney wrote to the Speaker advising of the applicant's intention to apply for the rescission of the order made by the Constitutional Court upholding the appeal in relation to rule 129V, and requested that the proceedings of the Section 194 Committee be suspended pending the finalisation of the application for rescission.

[17] On 22 February 2022, the Speaker's attorney responded on behalf of the Speaker advising of the latter's refusal to accede to the applicant's request. The letter advised that the Section 194 Committee was scheduled to meet during the afternoon of the same day and that the request as well as the reply had been forwarded to the Chairperson of the Section 194 Committee. The letter further invited the applicant to indicate the basis upon which she would be seeking the rescission. These submissions were provided to the Speaker on the same day.

[18] The Section 194 Committee held its meeting during the afternoon of 22 February 2022 and resolved to proceed with the consideration of the motion for the removal of the applicant.

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[3] Paragraph 3 of the Order

[19] On 10 March 2022, the Speaker wrote to the President advising him of the latest developments in the matter. This is the letter which is at the centre of the impugned conduct or decision by the Speaker and it is necessary to reproduce its contents verbatim. The letter reads:

> *"RESUMPTION OF PROCEEDINGS OF COMMITTEE ON SECTION 194 ENQUIRY*
>
> *The former Speaker's letter to the President dated 21 July 2021 on the work of the above-mentioned Committee, bears reference. A copy is attached for ease of reference.*
>
> *As the President would be aware, the Committee had paused its proceedings pending the outcome of proceedings at the Constitutional Court regarding the constitutionality of the Assembly Rules governing removal processes for office bearers in institutions supporting constitutional democracy.*
>
> *Accordingly, I wish to advise the President that the Section 194 Committee, having considered the judgment of the apex court in this regard, resolved on 22 February 2022 to continue with its consideration of the motion for the removal of the Public Protector.*
>
> *The Committee has adopted terms of reference and a programme to guide its proceedings and progress."*

[20] On 11 March 2022, the applicant launched her first application for rescission of the order of the Constitutional Court which upheld the appeal in respect of rule 129V.

[21] On 17 March 2022, the President wrote to the applicant inviting her to provide him with reasons why he should not suspend her pending the finalisation of the work of the Section 194 Committee. We consider it necessary to also reproduce the contents of this letter verbatim as it is at the centre of the impugned conduct or decision relating to the President. The letter reads:

> *"RE: NATIONAL ASSEMBLY PROCEEDINGS IN TERMS OF SECTION 194 OF THE CONSTITUTION*
>
> 1. *The Speaker of the National Assembly has informed me that the National Assembly has decided to proceed with a process to consider your possible removal from office, in terms of section 194 of the Constitution. I attach her letter to me dated 10 March 2022 to this letter.*
> 2. *In terms of section 194(3)(a) of the Constitution, I may "suspend a [Public Protector, Auditor General or a member of a Commission established in terms of Chapter 9 of the Constitution] from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person".*
> 3. *It would therefore now be appropriate to consider whether or not you ought to be suspended pending finalisation of the Committee's work.*
> 4. *I therefore hereby ask you to provide me with reasons why I should not exercise my powers in terms of section 194(3)(a) of the Constitution, in writing, within 10 working days of the date of this letter.*
> 5. *I am certain that you are as anxious to have the matter dealt with expeditiously as I am, and that you share my commitment to supporting the National Assembly in the fulfillment of its constitutional obligations in terms of section 194 of our Constitution."*

[22] On 18 March 2022, the applicant's attorneys wrote to the Speaker, among other things, lamenting the fact that she had not copied the applicant in her letter dated 10 March 2022 addressed to the President and demanding that the Speaker withdraw same. The attorneys for the Speaker responded on the same day advising, among other things, that the Speaker and the National Assembly had no role to play in the future processes which may culminate in the suspension of the applicant by the President and that the Speaker was not going to withdraw her letter of 10 March 2022.

[23] On 22 March 2022, the applicant's attorneys wrote to the President in response to the President's letter dated 17 March 2022. The gist of the response was that there were multiple instances of conflict of interest which precluded the President from personally suspending the applicant. These conflicts of interest included various investigations which had been recently conducted, or that were currently being investigated, by the office of the Public Protector against the President.

[24] On 23 March 2022, the Office of the State Attorney responded on behalf of the President to the letter from the applicant's attorneys dated 22 March 2022. The gist of the response was that the President would act personally as he did not consider himself to be disqualified from acting for any of the reasons alleged by the applicant.

[25] On the same day, the applicant's attorneys wrote to the Chairperson of the Section 194 Committee demanding the suspension of the proceedings of the Section 194 Committee pending the finalisation of an application for rescission which the applicant

had launched against the judgment of the Constitutional Court of 4 February 2022. On 29 March 2022, the Section 194 Committee met and, among other things, resolved to continue with its work in accordance with its existing programme.

[26] On 1 April 2022, the applicant launched the present application which was in two parts. Part A was aimed at securing urgent interdictory relief essentially (a) prohibiting the Section 194 Committee from continuing with its work, (b) directing the Speaker to withdraw her letter dated 10 March 2022, and (c) preventing the President from taking any steps aimed at suspending her pending the determination of the relief sought in Part B. In the original relief sought by the applicant in Part B, the applicant indicated that she would be seeking orders declaring the conduct of the Speaker (in writing the letter dated 10 March 2022), the conduct of the President (in initiating the suspension process) as well as the conduct of the Section 194 Committee (to commence or proceed with the enquiry) to be irrational, unconstitutional, and invalid.

[27] On 6 May 2022, the Constitutional Court dismissed the applicant's first application for rescission. On 10 May 2022, the applicant launched a second application for rescission. The second rescission application was aimed at rescinding the order of the Constitutional Court of 6 May 2022 dismissing the first application for rescission.

[28] On 7 June 2022, the applicant addressed a letter to the President titled:

"*The investigation into allegations of a violation of the Executive Ethics Code Against the President of the Republic of South Africa, His excellency Mr MC Ramaphosa.*"

The said letter contained 31 questions for the attention of the President. These questions were in respect of an alleged incident that took place at the Phala Phala farm owned by the President.

[29] On 8 June 2022, the applicant made a public announcement that she had decided to launch an investigation into the Phala Phala incident as she is enjoined in law to do. A media statement was issued to this effect.

[30] On 9 June 2022, the President suspended the applicant and in terms of section 2A(7) of the Public Protector Act, the Deputy Public Protector assumed the performance of the functions of the office of the Public Protector.

[31] On 10 June 2022, this Court (per Erasmus, Wille and Dolamo JJ) refused the interim relief sought by the applicant in Part A.

[32] On 17 June 2022, the applicant's attorneys delivered a notice of intention to amend the relief sought in Part B and, on 27 June 2022, the applicant's attorneys, acting with the consent of the legal representatives of the other parties actively participating in the application, approached the Judge President for the hearing of the matter by a full court and on an expedited basis.

[33] On 6 July 2022, the Deputy Public Protector wrote to the Registrar of this Court informing her, among other things, that the applicant's attorneys were not authorised to deliver the notice amending the relief sought by the applicant in Part B.

[34] On 7 July 2022, Salijee Govender Van Der Merwe Inc attorneys, acting on the instructions of the Deputy Public Protector, delivered a notice of withdrawal of this application.

Issues

[35] The joint practice note filed by the parties lists the following as issues to be determined by this Court, namely:

35.1 Whether Seanego Inc is authorised to represent the Public Protector in the period since the President suspended Adv Mkhwebane from office on 9 June 2022 - this challenge was mounted by the Speaker and the Chairperson of the Section 194 Committee;

35.2 Whether the current application constitutes an abuse of the process of court;

35.3 Whether the sending of the letter dated 10 March 2022 by the Speaker was unconstitutional;

35.4 Whether the current ongoing enquiry being conducted by the Section 194 Committee and/or the activities of the Section 194 Committee since 22 February 2022:

35.4.1 Infringes the *sub judice* rule and/or rule 89 of the Rules;

35.4.2 Is impermissible because the National Assembly has not amended its newly adopted rules to give effect to the order of the Constitutional Court declaring the proviso to rule 129AD(3) unconstitutional and invalid;

35.4.3 Is impermissible due to the refusal by the Chairperson of the Section 194 Committee to grant the applicant an extension for her to respond to the allegations against her, and for unilaterally determining the relevant 30-day response period; and

35.4.4 Due to the second rescission application brought by the applicant in the Constitutional Court, will it be impermissible for this Court to grant the applicant's prayer for the development of the common law to include a rule automatically suspending the execution of an order which is the subject of a pending rescission application.

35.5 Whether the common law ought to be developed in the manner sought by the applicant;

35.6 Whether the impugned conduct of the President ought to be declared to be irrational and/or inconsistent with the Constitution in terms of section 172(1)(a) of the Constitution because:

35.6.1 it was premature and/or *ultra vires* as the proceedings envisaged in section 194(3)(a) of the Constitution had not started as at 17 March 2022, 9 June 2022, or at all;

35.6.2 it was tainted by actual or reasonably apprehended conflicts of interests emanating out of six different and identified investigations;

35.6.3 of alleged breaches of section 96 of the Constitution;

35.6.4 of an alleged agreement that was concluded on a WhatsApp and orally between lead Counsels for the President and the applicant; and

35.6.5 of conduct in contempt of court and/or in breach of section 165 of the Constitution;

35.7 The just and equitable remedies that ought to be granted in terms of section 172(1)(b) of the Constitution; and

35.8 Whether the Speaker and/or the President and/or the DA and/or the applicant should be ordered to pay costs in their personal capacities and/or on a punitive scale.

[36] There are also the following preliminary issues that require determination before dealing with the merits of the application, namely, (a) the issue of urgency, (b) the amendment of the notice of motion, and (c) the application for joinder. For convenience, we deal with these issues as well as the issue of the authority of Seanego Inc under the umbrella of preliminary issues.

[37] The preliminary issue raised by the Speaker that the relief sought by the applicant against the Speaker and the Chairperson of the Section 194 Committee is an abuse of the process of court is, for convenience, dealt with after the consideration of the merits of the substantive relief; the consideration of this issue is, in our view, inextricably linked to the merits of the relief sought by the applicant.

Preliminary issues

Urgency

[38] As already stated, the application was instituted in two parts: Part A for interim interdictory relief, and Part B for final declaratory relief. It appears that the parties had no issue with the urgency in respect of the relief sought in Part A. What transpired after the delivery of the judgment in respect of Part A, is that the applicant's attorneys, after having

consulted the legal representatives of the parties to the litigation, approached the Judge President requesting an expedited date for the hearing of this matter by a full court.

[39] The applicant, in justifying urgency in respect of the relief she seeks in Part B, contended in her supplementary founding affidavit that the urgency of the application is self-evident and indisputable because:

39.1 this matter concerns allegations relating to the abuse of power by public officials and, as was held in ***Apleni v Minister of Home Affairs***[4]:

> *"Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally be urgently considered."*

39.2 of the ongoing violation of her dignity and professional reputation arising from her unlawful suspension by the President, and, as was held in ***Prinsloo v RCP Media Ltd t/a Rapport***[5]**,**

> *"... the violation of an individual's privacy and dignity ... creates a degree of urgency which is at least sufficient to justify a ruling that the matter not be struck off the roll and therefore have to wait for a court date in three or four months further into the future.";* and

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[4] 2018 1 All SA 728 (GP) (25 October 2017) at p 732, paragraph [10]
[5] 2003 (4) SA 456 (T) at p 462 I – 463 A

39.3 the suspension is *ultra vires* because the proceedings envisaged in section 194(3)(a) of the Constitution have not started and, as such, it was premature for the President to suspend the applicant;

[40] The President took issue with urgency and, in this regard, it was submitted on his behalf that the grounds advanced by the applicant in support of urgency do not withstand scrutiny. It is not necessary to engage with each of the submissions made on behalf of the President given the conclusion reached by this Court on this issue.

[41] The applicant's main justification for urgency centres around her suspension by the President on 9 June 2022, which she alleges to be unlawful. As the applicant correctly submitted with reference to ***20th Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd***[6], for the purposes of deciding upon the urgency of this matter, this Court must assume, as it has to do, without deciding, that the applicant's case was a good one, and that the suspension is unlawful and infringes on her constitutional rights.

[42] If it is assumed that the suspension is unlawful, this perforce places this matter among those matters which may impact upon the rule of law, and which may have a detrimental impact on the public purse. As such, as was stated in ***Apleni***, the relevant relief sought ought normally to be urgently considered. Notably, the issues raised in this matter are quite weighty and raise issues of great importance to our constitutional jurisprudence. This matter involves the interaction between the President who is the Head

[6] 1982 (3) SA 581 (W) at 586 F - G

of State and the head of a Chapter 9 institution whose mandate is to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety. The matter also involves the head of the Legislature and the Chairperson of the Section 194 committee. Accordingly, we are satisfied that the relief sought in Part B ought to be considered on an urgent basis and not in the ordinary cause.

The rule 7(1) application

[43] On 29 June 2022, the Speaker and the Chairperson of the Section 194 Committee delivered their Notice in terms of rule 7(1) of the Uniform Rules of Court dated 23 June 2022, seeking orders:

43.1 granting them leave to dispute the authority of Seanego Attorneys Inc to represent the Public Protector of South Africa following the suspension of Adv Busisiwe Mkhwebane by the President on 9 June 2022; and

43.2 directing that such authority be proved by the filing of a power of attorney to so act signed by the Deputy Public Protector, Adv Kholeka Gcaleka, in terms of the authority conferred upon her by section 2A(7) of the Public Protector Act.

[44] The challenge to the authority of Seanego Attorneys Inc to act for the applicant after her suspension is premised on the argument that the prosecution of this application, as well as the appointment of Seanego Attorneys Inc to continue as attorneys of record for the applicant, are functions that ought to be performed by the office of the Public

Protector. The Deputy Public Protector, as the official responsible for the performance of these functions since the applicant's suspension, has made it clear that she has not authorised the continued prosecution of this application and has not mandated Seanego Attorneys Inc to act as attorneys of record for the applicant.

[45] The notice of withdrawal of the application was signed by attorneys, Salijee Govender Van Der Merwe Inc, purportedly acting as attorneys of record for the applicant, the Public Protector of South Africa. It was submitted on behalf of the Speaker and the Chairperson of the 194 Committee that the relief sought in Part B, if granted, is aimed at benefiting Adv Busisiwe Mkhwebane, personally, not the office of the Public Protector, as it will terminate the impeachment enquiry and reverse her suspension by the President.

[46] It was submitted on behalf of the applicant that the challenge to the authority of Seanego Attorneys Inc to represent her is ill-conceived and bad in law because section 1A of the Public Protector Act provides that *"there shall be a Public Protector for the Republic"*, meaning that there can only be one Public Protector in the Republic and, in this instance, Adv Busisiwe Mkhwebane, despite her suspension, remains the Public Protector of the Republic appointed in terms of section 1A of the Public Protector Act. It was submitted further that Adv Busisiwe Mkhwebane instituted the application both in her personal capacity and in her official capacity as the Public Protector of South Africa and she continues to prosecute the application in such capacities.

[47] Rule 7 of the Uniform Rules of Court serves a very narrow and limited purpose, that is, as stated in ***Erasmus***[7],

> *"to prevent a person whose name is being used throughout the process from afterwards repudiating the process altogether and saying he had given no authority, and to prevent persons bringing an action in the name of a person who never authorised it."*

Thus, the question to ask where a rule 7(1) challenge has been raised is whether there are facts which cast some doubt on the legal representative's mandate to continue to act for the named litigant.

[48] In the present matter, the named litigant is the Public Protector of South Africa. In the founding affidavit, Adv Busisiwe Mkhwebane states that she is:

> *"(T)he Public Protector in terms of the Constitution of the Republic of South Africa 1996 ("the Constitution") and appointed as such in terms of section 1A (2) of the Public Protector Act 23 of 1994 ("the Public Protector Act") by the President of the Republic of South Africa. I am the Applicant in this application in my aforementioned capacity as the Public Protector...."*

[49] All the affidavits filed by the applicant in the application have been deposed to by Adv Busisiwe Mkhwebane and there is no suggestion that she, as the applicant, has not authorised Seanego Attorneys Inc to prosecute the application.

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[7] Van Loggernberg, Erasmus Superior Court Practice 2nd ed, Vol 2 at D1-93

[50] The Speaker and the Chairperson of the Section 194 Committee's motivation to challenge the authority of Seanego Attorneys Inc appears to be based on the Deputy Public Protector's purported withdrawal of this application on the latter's assumption of the functions and powers of the office of the Public Protector subsequent to the applicant's suspension.

[51] In writing to the Registrar of this Court advising that Seanego Attorneys Inc were not authorised to amend the notice of motion in respect of the relief sought by the applicant in Part B and in purporting to withdraw the application, the Deputy Public Protector ignored the obvious: she is not, and never was, a party to the litigation and, as such, could not authorise Seanego Attorneys Inc to prosecute the application or withdraw it.

[52] Whilst the Deputy Public Protector may have legitimate concerns about the exposure of the office of the Public Protector to adverse costs orders in relation to the present application, such concerns, however, do not cast doubt on the authority of Seanego Attorneys Inc to prosecute the application on behalf of the applicant.

[53] What the Speaker and the Chairperson of the Section 194 Committee require the Deputy Public Protector to do - to sign a power of attorney confirming the authority of Seanego Attorneys Inc to prosecute the application - would be a *brutum fulmen* as the Deputy Public Protector is neither the applicant nor the Public Protector appointed in terms of section 1A of the Public Protector Act. This is because, apart from the fact that there is no basis to doubt the authority of Seanego Attorneys Inc to prosecute the

application, a power of attorney signed by her would, in any event, be of no assistance as she is not the named litigant. For all these reasons, the application for leave to challenge the authority of Seanego Attorneys Inc to act for the applicant cannot succeed.

Application for joinder

[54] The joinder application was conditional upon the success of the challenge to the authority of Seanego Attorneys Inc to prosecute the application. It was also necessitated by, among other things, a notice of withdrawal of the application filed by Salijee Govender Van Der Merwe Inc dated 7th July 2022, purportedly acting as attorneys of record for the applicant, the Public Protector of South Africa.

[55] The challenge to the authority of Seanego Attorneys Inc has failed and Salijee Govender Van Der Merwe Inc were never properly authorised to act on behalf of the applicant. Their purported notice of withdrawal of the application was based on the wrong premise that the Deputy Public Protector, by assuming the functions and powers of the Office of the Public Protector, became the Public Protector appointed in terms of section 1A of the Public Protector Act and hence the applicant. As a matter of fact, and law, that is not so. In light of this, it is not necessary to consider the joinder application.

Amendment of the notice of motion

[56] This application was launched prior to the suspension of the applicant as well as the commencement of the enquiry by the Section 194 Committee. The subsequent suspension of the applicant as well as the commencement of the enquiry by the Section

194 Committee has consequently necessitated some amendment to the relief sought by the applicant.

[57] In respect of the suspension, in the proposed amended notice of motion, the applicant seeks an order declaring her suspension to be irrational, unconstitutional, and invalid. In relation to the commencement of the enquiry by the Section 194 Committee, the applicant, in the proposed amended notice of motion, seeks an order declaring all the decisions taken by the Section 194 Committee from 22 February 2022 onwards to be null and void. In addition, the applicant seeks an order declaring the implementation of rule 129AD(3) of the Rules, without its due processing and amendment by the National Assembly, to be irrational, unconstitutional, and invalid.

[58] The proposed amendment of the notice of motion is a logical consequence of developments which occurred after its initial formulation. Not surprisingly, none of the parties formally objected to the proposed amendment. Accordingly, the amendment is granted. We now turn to the merits of the application starting with the impugned conduct and/or decision of the Speaker.

The impugned conduct/decision of the Speaker

[59] It is common cause that the Speaker addressed the letter dated 10 March 2022 to the President which is referred to in paragraph [19] above. In her supplementary affidavit dated 17th June 2022 filed in support of the relief sought in Part B in so far as it relates to the Speaker, the applicant stated that there are no new facts or developments and that

the grounds for the relief are based on what she had stated in her papers in relation to the relief she sought in Part A of the application. She went on to submit that the writing of the letter by the Speaker is what constitutes the illegal conduct and/or decision, that this was intended to trigger the suspension process, and that it was based on an incorrect interpretation of section 194(3)(a) of the Constitution.

[60] In her affidavit dated 31 March 2022 filed in support of the relief sought in Part A, the applicant stated that the conduct of the Speaker in writing the letter dated 10 March 2022, was illegal because the Speaker failed to take into account, or to apply her mind to, a relevant consideration, namely the actual delivery of the rescission application. The Speaker also took into account an irrelevant consideration, namely the earlier decision of the Section 194 Committee which had been overtaken by events.

[61] During argument, counsel for the applicant submitted that the conduct of the Speaker in writing the letter was unlawful as it is not authorised by any empowering legislation. He also argued that in considering the letter, this Court should not lose sight of the Speaker's involvement in a matter where the applicant investigated the President in relation to the private use of an official aeroplane on a trip to Zimbabwe. This investigation had resulted in her (the Speaker) being sanctioned. The suggestion was made that in writing the letter, the Speaker was not acting in good faith but was driven by the *mala fide* intention of wanting to unlawfully trigger the process for the applicant's suspension.

[62] In her response, the Speaker explained that in sending the letter to the President, she was merely informing the President of factual developments within the National Assembly, more specifically in the Section 194 Committee. The letter was factually accurate and when writing the letter, she was mindful of the co-operative governance obligation imposed on her by section 41(1)(h)(iii) of the Constitution. She also made reference to a letter dated 21 July 2021 written by the previous Speaker of the National Assembly to the President informing him (the President) of the commencement of the proceedings of the Section 194 Committee, which proceedings were subsequently paused pending the outcome of the judgment of the Constitutional Court.

[63] Section 41 of the Constitution deals with the principles of co-operative government and intergovernmental relations and places certain obligations on all spheres of government and all organs of the state within each sphere of government. Of particular relevance to this application is section 41(1)(h)(iii) which provides that:

> "*All spheres of government and all organs of state within each sphere must co-operate with another in mutual trust and good faith by informing one another of, and consulting one another on, matters of common interest.*"

[64] The relevance of section 41(1)(h)(iii) of the Constitution arises from the fact that the processes envisaged in section 194 of the Constitution involves the legislature and the executive. The legislature must enquire into the fitness to hold office of the office bearer of a Chapter 9 institution and the President may suspend the office bearer of a Chapter 9 institution after the start of the proceedings of the committee of the National Assembly

for the removal of that person. The proceedings envisaged in section 194 of the Constitution are thus a matter of common interest between the National Assembly and the President.

[65] The Speaker, as a representative and leader of the National Assembly, is obliged to inform the President when the Section 194 proceedings start. Accordingly, the argument that the conduct of the Speaker is unlawful because it is not authorised by any empowering legislation has no merit. On the contrary, the Speaker was obliged to inform the President of the decision of the Section 194 Committee to resume its proceedings. This is in line with what was done by the previous Speaker in similar circumstances.

[66] Furthermore, the wording of the letter does not support the applicant's submission that it was intended to trigger the suspension process. In the letter, the Speaker does no more than convey to the President the decision taken by the Section 194 Committee on 22 February 2022 to continue with its consideration of the motion for the applicant's removal. It is a fact that on 22 February 2022, the Section 194 Committee took the decision to proceed with its consideration of the motion for the applicant's removal. What the Speaker said was nothing more than to articulate the correct factual position.

[67] The argument that the Speaker failed to take into account the delivery of an application, which is said to be a relevant consideration, is also without merit because the application for rescission was delivered on 11 March 2022, a day after the Speaker had written to the President. Thus, the Speaker could not have taken it into account when she

wrote the letter to the President. In any event, even if the application for rescission had been delivered prior to the dispatch of the letter, the Speaker would still have been obliged to inform the President of the decision of the Section 194 Committee to resume its proceedings.

[68] As to the Speaker's involvement in a matter wherein the applicant investigated the President in relation to the private use of an official aeroplane on a trip to Zimbabwe which resulted in her (the Speaker) being sanctioned, this cannot detract from the obligations placed on the Speaker by section 41(1)(h)(iii) of the Constitution and the fact that what the Speaker stated in the letter was factually correct. Indeed, the Speaker would have risked failing to fulfil a Constitutional obligation had she not written the letter. There is thus no basis for making an order declaring the conduct of the Speaker, in sending the letter dated 10 March 2022 to the President, as irrational, unconstitutional, and invalid. We deal next with the relief regarding the development of the common law.

The development of the common law

[69] The applicant submitted that this relief is based on a purely legal question. Should the common law be developed to include a rule for the automatic suspension of a court order which is the subject of a pending application for rescission? If so, this would result in the treatment of an application for rescission in the same way as an application for leave to appeal as currently dealt with in section 18 of the Superior Courts Act 10 of 2013 (***"the Superior Courts Act"***).

[70] It was further submitted that the most efficient way of codifying the new common law rule would be to recommend to Parliament that it effect an amendment to section 18 of the Superior Courts Act by adding the words "*or of an application for rescission*" after the words "*or of an appeal*" to the current wording of section 18(1) of the Superior Courts Act, resulting in section 18(1) reading:

> "*Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal or of an application for rescission, is suspended pending the decision of the application or appeal.*"

[71] It was further argued that the amendment to section 18(1) of the Superior Courts Act would necessitate consequential changes to section 18(3) of the Superior Courts Act as well as to rule 45A of the Uniform Rules of Court. Rule 45A states that:

> "*The court may suspend the execution of any order for such period as it may deem fit*".

[72] The legal basis for seeking the relief, so it was submitted, is that on a proper interpretation of section 34 of the Constitution, there is no rational basis for the differentiation between an application for leave to appeal or an appeal from an application for rescission in that the rationale for preserving the *status quo* of a decision subject to an application for leave to appeal or an appeal applies with equal force whether such

decision is set aside as a result of a successful appeal or rescission. Section 34 of the Constitution states that:

> *"Everyone has the right to have any disputes that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[73] It was submitted on behalf of the Speaker and the Chairperson of the Section 194 Committee that the argument relating to the consequential amendment to section 18(3) of the Superior Courts Act by the applicant is a concession that rule 45A read with section 18 provides for the opposite of the common law rule the applicant seeks this court to develop.

[74] It was further submitted that the applicant ignores the hierarchy of our sources of law in that regardless of whether the common law rule is developed in the terms she seeks, rule 45A would still apply and undermine any proposed change in the common law. In order to alter the terms of rule 45A, the applicant would need to mount a frontal challenge to the constitutionality of rule 45A on the basis that it limits some fundamental right in the Bill of Rights.

[75] Lastly, it was submitted that as section 18 of the Superior Courts Act is a source of law superior to the common law, the applicant cannot claim an alteration to its terms without challenging its constitutionality.

[76] Stripped bare of legal niceties, what the applicant requires this Court to do is to direct the legislature to amend the provisions of section 18 of the Superior Courts Act without any constitutional challenge thereto. In our view, this is not competent. As it was submitted on behalf of the Speaker and the Section 194 Committee, section 18 of the Superior Courts Act as well as rule 45A are sources of law superior to the common law and their terms can only be altered on the basis of a successful constitutional challenge. The applicant has not brought any such constitutional challenge.

[77] The amendment of the provisions of section 18 of the Superior Courts Act is a matter that falls within the preserve of the legislature and absent any identified unconstitutionality, the Courts are not at liberty to interfere in that regard. This is in keeping with the doctrine of separation of powers. The relief sought by the applicant for the development of the common law cannot succeed. We consider next the impugned conduct and/or decisions of the Section 194 Committee.

The impugned conduct and/or decisions of the Section 194 Committee

[78] The applicant relied on four grounds for seeking to impugn the conduct and/or decisions of the Section 194 Committee, namely:

(a) The infringement of the *sub judice* rule and/or rule 89 of the Rules;

(b) The failure of the National Assembly to amend rule 129AD(3) to bring it in line with the judgment of the Constitutional Court;

(c) The unilateral determination by the Chairperson of the Section 194 Committee of the 30-day period within which she was required to respond to the allegations as well as the failure and/or refusal to grant an extension; and

(d) An order by this Court developing the common law to include a rule automatically suspending the execution of an order which is the subject of a pending application for rescission.

[79] For convenience, we deal first with the ground relating to the development of the common law. The finding that the applicant has not made out a case for the development of the common law to include a rule automatically suspending the execution of an order which is the subject of an application for rescission disposes of this ground. Without such an order, there is no legal impediment on the Section 194 Committee proceeding with the enquiry. Next to consider is whether the current ongoing enquiry being conducted by the Section 194 Committee and/or the activities of the Section 194 Committee since 22 February 2022 infringes the *sub judice* rule and/or rule 89 of the Rules.

[80] Rule 89 of the Rules deals with the rules of debate in the National Assembly and provides that:

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

[81] It was submitted on behalf of the applicant that the basis for the relief sought against the Committee is that, properly interpreted, the *sub judice* rule as articulated in rule 89 of the Rules, should operate to render the current activities of the Section 194 Committee to fall within the conduct strictly prohibited by the rule 89. This was raised in the context of the applicant's second application for rescission referred to above.

[82] The applicant, however, placed no facts before this Court to demonstrate why the enquiry by the Section 194 Committee would result in the members of that Committee having to reflect on the merits of her second application for rescission. Rather, she deferred to the UDM and ATM, who, for their part, also placed no facts before the court to demonstrate the factual basis upon which it could be concluded that the enquiry by the Section 194 Committee would result in members of the said committee reflecting on the merits of the applicant's second application for rescission.

[83] It was submitted on behalf of the Speaker and the Chairperson of the Section 194 Committee, correctly so in our view, that members of the Section 194 Committee will not be reflecting on the substantive strengths or weaknesses of the applicant's second application for rescission. Nor would they be reflecting on the applicant's challenge to the constitutionality of the Rules. Instead, members will be considering whether the applicant has committed misconduct or is incompetent for any of the reasons alleged in the motion for her removal.

[84] Again, as correctly submitted on behalf of the Speaker and the Chairperson of the Section 194 Committee, this is an issue that has already been decided by this Court on two previous occasions in ***Public Protector v Speaker of the National Assembly and others***[8] and in the judgment dealing with Part A of this application[9]. In both these cases, it was held, among other things, that the application of the *sub judice* rule does not preclude the members of the National Assembly from carrying out their oversight functions and the holding of office bearers of Chapter 9 institutions accountable in terms of section 194 of the Constitution and the Rules. No argument was advanced on behalf of the applicant, the UDM, and the ATM to persuade this Court that these decisions were clearly wrong. We are of the view that this ground lacks merit. We consider next whether the proceedings of the Section 194 Committee are vitiated by the failure of the National Assembly to amend rule 129AD(3) to align it with the order of the Constitutional Court of 4 February 2022.

[85] The applicant's challenge to the constitutionality of rule 129AD(3) was successful to the extent that the proviso, which limited the participation of the office bearer of the Chapter 9 institution's legal representative or expert in the proceedings of the Section 194 Committee, was found by the Constitutional Court to be irrational and inconsistent with the Constitution, and was declared invalid.

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[8] 2020 (12) BCLR 1491 (WCC) at para 108
[9] At paragraphs 41 – 43

[86] As already stated above, when declaring the proviso to be irrational, inconsistent with the Constitution and declaring it invalid, the Constitutional Court went on to make an order that 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*".

[87] The applicant, in her supplementary affidavit, asserted that the proceedings of the Section 194 Committee are irredeemably illegal because of the failure by the National Assembly to amend rule 129AD(3) to align it with the order of the Constitutional Court referred to above. However, the applicant does not, and cannot, explain the necessity to still process and amend rule 129AD(3) in light of the order made by the Constitutional Court which effectively amended rule 129AD(3).

[88] Quite simply, the Constitutional Court amended rule 129AD(3) and there is no need for the National Assembly to still amend it again. The failure of the National Assembly to amend the rule which has been amended cannot vitiate the proceedings of the Section 194 Committee. Last to consider, in relation to the Section 194 Committee, is whether its proceedings are vitiated by the unilateral determination by the Chairperson of the Section 194 Committee of the 30-day period afforded to the applicant to respond to the allegations against her and the failure of the Chairperson to accede to the applicant's request for an extension of time within which to respond to the charges against her.

[89] The applicant raised this issue in paragraph 82 of her supplementary affidavit wherein she states:

> "*The only material new development in respect of the Committee Chairperson was his refusal to grant me an extension, which would have compensated for the period during which the matter was postponed due to the Abramjee saga. Despite numerous efforts, the Chairperson unreasonably and irrationally refused to grant me more time to submit a response to the charges. I maintain that even the original unilaterally determined 30-day period was, in the circumstances, inadequate and insufficient.*"

Thereafter, the applicant annexed copies of correspondence exchanged between the Chairperson of the Section 194 Committee and her legal representatives and states that she persists in seeking the relief set out in Prayer 3.4 of the Part B of the amended notice of motion.

[90] The relief sought by the applicant in Prayer 3.4 of Part B of the amended notice of motion is an order declaring the conduct and/or decision of the Section 194 Committee to commence and/or proceed with the section 194 removal process while the matter is *sub judice* to be unlawful. This is an aspect that has already been dealt with above. It is difficult to understand how the unilateral determination of the 30-day period by the Chairperson of the Section 194 Committee, and/or his refusal to grant the applicant an extension of time within which to respond, would infringe the *sub judice* rule as embodied in rule 89 of the Rules.

[91] It is common cause that the enquiry by the Section 194 Committee was in progress when this application was heard and it would thus have been open to the applicant to place evidence before this Court to demonstrate the prejudice she suffered as a result of the unilateral determination of the 30-day period as well as the alleged refusal to grant an extension of time. She has not done so. Aside from the fact that the Chairperson of the Section 194 Committee disputes that he refused to grant an extension, there is no evidence before this Court to support a finding that such a refusal, if any, vitiated the fairness of the proceedings of the Section 194 Committee. In any event, she was given an extension of two weeks. Accordingly, the application against the Chairperson of the Section 194 Committee must fail. Next to consider is the impugned conduct of the President.

The impugned conduct and/or decisions of the President

[92] This application appears to have been triggered by the letter written by the President to the applicant inviting her to make representations on why she should not be suspended. The applicant relies on the following five grounds to attack the President's decision to suspend her, namely:

92.1 that the President took the decision to suspend her prematurely and that, as such, the decision is *ultra vires* as the proceedings contemplated in section 194(3)(a) of the Constitution had not started as at 17 March 2022, 9 June 2022, and/or have not started at all (*the prematurity* issue);

92.2 an agreement concluded between the lead counsels for the applicant and the President precluded the President from exercising the suspension powers at the time that he suspended the applicant (*the agreement not to exercise the suspension powers*);

92.3 the President committed contempt of court and/or breached section 165 of the Constitution when he suspended the applicant whilst judgment was still pending in respect of Part A of this application (*the contempt of court and/or breach of section 165 of the Constitution*);

92.4 the conflict of interest emanating from six investigations of the President by the applicant precluded the President from acting personally in exercising the suspension powers (*the bias argument*); and

92.5 the President, in suspending the applicant, committed a breach of section 96 of the Constitution (*the breach of section 96 of the Constitution*);

The prematurity issue

[93] The determination of the prematurity issue turns on a proper interpretation of the provisions of section 194(3)(a) of the Constitution which states:

> "*The President 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.*"

[94] Up until the applicant filed her supplementary founding affidavit, she accepted that the Section 194 Committee is the committee referred to in section 194(3)(a). Her argument was that its proceedings had not started on 17 March 2022 when the President invited her to make written representations on why she should not be suspended. This issue was determined by the full court dealing with Part A when it found that the proceedings of the Section 194 Committee start when the complaint is referred to the Section 194 Committee. The full court held further that on a liberal interpretation, the proceedings started when the Section 194 Committee informed the applicant of the allegations against her and invited her to respond thereto within a period of 30 days.

[95] In her supplementary founding affidavit, the applicant confirmed that there were no new material facts and that she intended to rely on the averments contained in her affidavit filed in support of the Part A relief. She, however, went on to state that:

> "*The suspension is clearly ultra vires because the proceedings envisaged in section 194(3)(a), when properly interpreted, have not yet started, had not started on 17 March 2022 and in any event, the current process does not yet constitute the removal proceedings*...."

[96] This point was developed further in the heads of argument filed on her behalf where it was submitted that the current process has not yet reached the stage of removal proceedings but is busy with the institutional predetermination of the existence of the grounds for removal. It was further submitted that the respondents had failed to deal with

this issue which was pertinently raised in the applicant's supplementary affidavit. It was suggested that it is only after a finding of the existence of the grounds for removal that there can be talk of a committee for the removal of the person who is the subject of an enquiry. In this regard, reliance was placed on the following passage contained in the judgment of the Constitutional Court in ***EFF v The Speaker of the National Assembly and Others*** (**"the EFF Impeachment case**") where Jafta J stated:

> *"For the impeachment process to commence, the Assembly must have determined that one of the listed grounds exists"*[10].

[97] It was submitted on behalf of the President that the interpretation given to section 194(3)(a) of the Constitution by the Full Court in Part A cannot be faulted because the Full Court arrived at its interpretation after following well established principles of interpretation in our jurisprudence and, notably, the heads of argument filed on behalf of the applicant did not take issue with any of the findings of the Full Court in this regard. It was also submitted that the applicant's reliance on the EFF Impeachment judgment was misplaced as that judgment dealt with a very different subject matter to the present case.

[98] The submissions made on behalf of the DA were along similar lines as those made on behalf of the President. What became clear, however, was that both these arguments were premised on the previous acceptance by the applicant that the Section 194 Committee was the committee referred to in section 194(3)(a) of the Constitution and that

[10] EFF v The Speaker of the National Assembly and Others 2018 (2) SA 571 (CC) at paragraph [179]

it was the start of its proceedings that would trigger the powers of the President to suspend the office bearer of a Chapter 9 institution. In the meantime, the applicant had now significantly shifted the goal post and her argument, as set out above, was that the Section 194 Committee is not the committee referred to in section 194(3)(a) of the Constitution. There are in fact two committees: a committee to consider whether there were grounds to impeach (that is, the Section 194 Committee), and a committee for the removal of the subject of the enquiry once grounds for impeachment were established (the removal committee).

[99] This Court invited the parties to file post hearing notes dealing with the applicant's new argument that the Committee referred to in section 194(1)(b) is not the committee referred to in section 194(3)(a) of the Constitution.

[100] In the post hearing note filed on behalf of the President, it was submitted that this Court should not determine the new argument because; (a) it was not properly raised on the pleadings, (b) it is contrary to the applicant's pleaded case, and (c) it violates the subsidiarity principle. It was further submitted that, in the event of the court being minded to consider the new argument, the new argument has no merit in that on a proper interpretation of the provisions of section 194 of the Constitution, it would serve no purpose to have a separate committee contemplated in section 194(1)(b) for the determination of the existence of the grounds of removal and another committee contemplated in section 194(3)(a) for the removal of the office bearer of a Chapter 9

institution because all that is left after the determination of the existence of the grounds of removal is for the National Assembly to vote on the motion.

[101] In a post hearing note filed on behalf of the DA, it was submitted that the applicant's new argument is inconsistent with the text, the purpose of section 194, and violates the principle of subsidiarity.

[102] In the post hearing note filed on behalf of the applicant it was conceded that the prematurity argument was initially raised on the assumption that the Section 194 Committee was the committee referred to in section 194(3)(a) of the Constitution. It was also conceded that the manner in which the new argument was raised in the supplementary founding affidavit may have resulted in the parties not appreciating its import. However, it was submitted that the applicant would have been allowed to raise the point for the first time in argument, provided that it was foreshadowed in the pleadings.

[103] It was submitted further that, in any event, the court would have been entitled to raise the point on its own accord. In this regard, reliance was placed on the following passage in the judgment of the Constitutional Court in ***Amabhungane***[11] where Madlanga J stated:

> *"Since the issue was not raised by the parties, can this Court consider it mero motu (of its own accord)? This Court in Director of Public Prosecutions, Transvaal held that a court may raise a constitutional issue of its own accord. Additionally, '[w]here*

[11] Amabhungane Centre for Investigative Journalism v Minister of Justice 2021 (3) SA 246 (CC) at paragraph [58]

a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact obliged, mero motu, to raise the point of law'. This is rooted in the supremacy of the Constitution."

[104] Developing the applicant's new argument further, it was submitted that the proceedings for the removal of the office bearer of a Chapter 9 institution can only start and/or proceed after a finding of the existence of the grounds for removal. What this argument suggests is that the Section 194 Committee must enquire into the existence of the grounds of removal and make a finding to that effect. Only thereafter can the proceedings for the removal of the office bearer of a Chapter 9 institution then start. An analogy was drawn with the provisions of section 177(1)(a) of the Constitution in relation to the removal of a judge.

[105] It was further submitted that the interpretation of section 194(3)(a) of the Constitution contended for by the applicant is textually sound in that the reference to "*a committee of the National Assembly*" in section 194(3)(a) is a clear indication of the legislature's intention of referring to a new, separate and distinct committee than the one referred to in section 194(1)(b), that is the Section 194 Committee. It was submitted that this interpretation is supported by the use of the words "*a person*" followed by reference to *"that person*" in section 194(3)(a). Before considering the submissions relating to the applicant's new argument, it is necessary to first consider the submissions relating to the applicant's initial position in assuming that the Section 194 Committee is the removal committee referred to in section 194(3)(a).

[106] In the heads of argument filed in Part A, it was accepted by the applicant that the proceedings for the removal of the Public Protector would at best start when notification and witness statements are given to the applicant. It is common cause that the proceedings of the Section 194 Committee had gone past this stage at the time of the applicant's suspension.

[107] The applicant had also relied on the reasoning in the case of ***Nxumalo v Minister of Justice and Others***[12] in support of her argument that it would be logically impossible for proceedings to commence before all the requisite formalities, notifications, and rules of engagement are in place. In ***Nxumalo***, Kuper J, dealing with the phrase "*the commencement of the proceedings*" in the context of a civil action, said:

> "*Now when is it that an action is commenced? It is quite clear in my view that once a summons has been issued, i.e. once it has been signed by the Registrar of this Court and handed to the plaintiff's attorney to enable him to have the matter served, the litigation has commenced and that such a summons has consequences. It cannot for example be amended by the plaintiff's attorney without obtaining the Registrar's signature to that amendment, and if a summons is so amended, the summons itself has no longer any force or effect … the meaning of the words 'the commencement of proceedings' was the time when the summons was issued.*"

[12] 1961 (3) SA 663 at 667A-668A (WLD)

[108] It was then submitted that the following parallels may be drawn from the ***Nxumalo*** matter. Firstly, that the equivalent of the issue of the summons in this matter would be when the applicant is notified by the Section 194 Committee of the allegations against her. Secondly, the *dictum* confirms the view that until the Rules have been duly "*amended*", either by the Constitutional Court, by the National assembly, or even by the Committee, the removal proceedings could never be said to have "*started*" or "*commenced*".

[109] As already stated, by the time that the applicant was suspended, she had already been notified by the Section 194 Committee of the allegations against her. Also implicit from the submission made on behalf of the applicant, the Constitutional Court could "amend" the rules to the extent that they are inconsistent with the Constitution. This is in effect what the Constitutional Court did in its judgment of 4 February 2022. Thus, on the applicant's version, the proceedings of the Section 194 Committee had started by the time she was suspended.

[110] The above is in addition to the finding by the Full Court in Part A that the proceedings of the Section 194 Committee started at the earliest when the matter was referred to the Section 194 Committee after the finding of the existence of *prima facie* evidence to support the grounds of removal by the independent panel and, adopting a liberal interpretation, on 22 April 2022 when the Section 194 Committee held its meeting. As submitted on behalf of the President and the DA, this finding cannot be said to be clearly wrong. There is, in our view, no basis to interfere with this finding of the Full Court and

the applicant's old argument cannot succeed. Next to consider is the applicant's new argument.

[111] In as much as the Constitutional Court sated in ***Amabhungane*** that the court may raise a constitutional issue, it went on to state that:

> *"Since the courts are required to decide only issues properly raised, constitutional issues should only be raised mero motu in exceptional circumstances:*
>
> > *'The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interest of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue there are compelling reasons that this should be done.*
> >
> > *...*
> >
> > *It is neither necessary nor desirable to catalogue circumstances in which it would be in the interests of justice for a court to raise, of its own accord, a constitutional issue. This is so because this depends upon the facts and circumstances of a case.'"* (footnotes omitted)

[112] The question whether the Section 194 Committee is the committee referred to in section 194(3)(a) of the Constitution is undeniably a constitutional issue which falls within both circumstances. Firstly, the determination of the issue is necessary for the purposes of making a proper assessment of the existence of the jurisdictional requirements for the President to exercise the power to suspend the office bearer of a Chapter 9 institution.

Secondly, it is in the interests of justice to determine the issue because avoiding determining the issue may lead to the determination of the matter on a wrong principle. With that said, we now turn to consider the issue.

[113] The rules of interpretation are trite:

113.1 Consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production[13];

113.2 Individual provisions of the Constitution must not be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole[14]; and

113.3 The provisions of the Constitution must be interpreted in harmony, rather than in conflict, with each other[15];

[114] Section 194 of the Constitution deals with the removal from office of the office bearers of the Chapter 9 institutions who may only be removed:

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[13] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18
[14] Matatiele Municipality and Others v President of the RSA and Others (No. 2) 2007 (6) SA 477 (CC) para 36
[15] United Democratic Movement v President of the RSA and Others (1) 2003 (1) SA 495 (CC) para 83

114.1 by the President;

114.2 upon adoption by the National Assembly of the resolution calling for that person's removal; and

114.3 after a finding of the existence of any of the grounds of removal by a committee of the National Assembly.

[115] What is clear from the text of section 194 is that the removal of the office bearers of the Chapter 9 institutions is a process which involves three players, namely (a) the committee of the National Assembly which must make a finding of the existence of one of the grounds of removal, (b) the National Assembly which must adopt a resolution calling for the removal and (c) the President who must remove the office bearer of the Chapter 9 institution upon the occurrence of the events referred to in (a) and (b). The only involvement of the Committee of the National Assembly in the removal process is the determination of the existence of the grounds of removal whereafter the matter proceeds to the National Assembly for a vote.

[116] Viewed in the light of what is stated in the preceding paragraph, it would make no sense, and indeed it would be absurd, to interpret section 194 as requiring two committees of the National Assembly, that is the one referred to in section 194(1)(b) to determine the existence of the grounds of removal and the other referred to in section

194(3)(a) being the committee of the National Assembly for the removal, when the only involvement of the committee of the National Assembly is to determine the existence of the grounds of removal.

[117] As correctly submitted on behalf of the DA, the absurdity of the applicant's argument is apparent from the fact that office bearers of the Chapter 9 institutions may be removed following a finding of one committee, the Section 194 Committee, and that the suspension would require an additional committee for the removal. This is, indeed, not a plausible interpretation as it is a trite principle of our law that courts should avoid an interpretation that leads to absurdity. There is thus no merit in the applicant's argument that the Section 194 Committee is not the committee referred to in section 194(3)(a) of the Constitution. The result is that the applicant's new argument cannot succeed as the proceedings of the Section 194 Committee had started by the time she was suspended. We consider next whether the agreement between the lead counsels for the President and the applicant precluded the President from suspending the applicant.

The agreement not to exercise the suspension powers

[118] Prior to the suspension of the applicant, her legal representatives had engaged with the President's legal representatives with a view to, among other things, seeking an undertaking that the President would consider the representations made by the applicant after the delivery of the judgment in Part A. These engagements culminated in a WhatsApp message from the President's lead counsel to the applicant's lead counsel recording the President's position as follows:

"*1. The Public Protector must file her representations by 26 May 2022 as agreed.*

2. The President will consider those representations carefully prior to taking any decision.

3. After the President has received the PP's representations, he will be better placed to have an indication of his anticipated timeframe for taking a decision. At that point, he will advise you as to whether he is amenable to any undertaking and if so, the terms thereof."

[119] According to the applicant, she agreed to the arrangement as contained in the WhatsApp message on the understanding that there will be an intermediate step between her filing the representations and the President taking the decision on her suspension.

[120] It is common cause that the applicant filed her representations and that the President never reverted to her to advise whether he was amenable to any undertaking. Instead, he proceeded to suspend the applicant, and this is what the applicant characterises as the breach of agreement which renders the decision of the President to suspend her irrational and/or unreasonable. The applicant further describes the President's conduct as "*a clear basis for substantive and/or procedural irrationality and illegality*" which should be declared irrational, unconstitutional, and invalid.

[121] In the heads of argument filed on behalf of the applicant, the President's conduct referred to above is described as indicative of bad faith and in breach of the rule of law.

[122] The President denies that he had agreed that there would be an intermediate step between him receiving the representations and making a decision on the suspension. His explanation for not reverting to the applicant before taking the decision to suspend is that it would have served no purpose to revert to the applicant only to advise her that he was not amenable to any undertaking.

[123] It was submitted on behalf of the President that even if the applicant is correct that there was an agreement in the terms which she understood as set out in her papers, the agreement would still not found a basis for the declaratory order she seeks because there was no interdict to prevent the President from taking the decision to suspend her. The applicant had previously sought various undertakings and the President had refused to grant any further undertakings.

[124] It was further submitted that there is no basis for the declaratory order sought by the applicant as it is clear from the WhatsApp message that no two-stage process was agreed. The President, in any event, advised the applicant in the suspension letter that he was not amenable to any undertaking.

[125] What the WhatsApp message seems to convey is that the President gave an indication that he would consider the representations after which time he would be in a position to decide whether he was amenable to any undertaking and, if so, the terms thereof. As it is clear from the conduct of the President that he was not amenable to any

undertaking, the fact that he had given an indication that he would revert in the event he was amenable to giving an undertaking does not assist the applicant.

[126] What would have been relevant is what the WhatsApp message does not deal with; what would happen in the event of the President not being amenable to any undertaking. The President says that as he was not amenable to an undertaking, it would not have been necessary for him to first revert to the applicant, and only thereafter proceed to decide on the suspension. This would have served no purpose.

[127] In our view, the applicant's contention that there was an agreement that there would be an intermediate step, even in the event of the President not being amenable to giving an undertaking, is not supported by the text of the WhatsApp message as the WhatsApp message does not deal with the eventuality of the President not being amenable to give an undertaking. In any event, the applicant had made her representations and an intermediate step would have not served any purpose. This ground of impugning the agreement, in our view, lacks merit. We deal next with the contempt of court and/or breach of section 165 of the Constitution

The contempt of court and/or breach of section 165 of the Constitution

[128] At the time of the applicant's suspension, the judgment had been reserved in respect of Part A and was delivered a day after her suspension. The applicant alleges that the President knew that the delivery of judgment in Part A was imminent because the presiding judge in Part A had indicated that an order would be made within a period of

about a week or two. This, taken together with the fact that the President had given an undertaking that there would be an intermediate step before his decision on suspension as well as the fact that he did not withdraw the suspension on becoming aware that judgment was to be delivered the following day, makes the President guilty of contempt of court or, alternatively, of breaching the provisions of section 165 of the Constitution.

[129] The President denies that he acted in contempt of court on the basis that, at the time that he took the decision to suspend the applicant, he knew that no court order interdicting him from taking the decision had been handed down, had no indication as to when the judgment was to be delivered, and had been advised that his prospects of success in respect of the relief sought by the applicant in Part A were very good.

[130] The requirements for contempt of court are trite and the Constitutional Court restated them as follows in ***Matjhabeng***[16]: (a) the existence of the court order; (b) the order must be duly served on, or brought to the notice of the contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be willful and *mala fide*.

[131] The applicant's case, however, is not that there was a court order in existence which was not complied with by the President. Her case is similar to the case advanced by Afriforum in ***Tshwane City v Afriforum***[17], namely that the President was not entitled to

[16] Matjhabeng Local Municipality v Eskom Holdings Limited and others 2018 (1) SA 1 (CC) at para [73]
[17] Tshwane City v Afriforum 2016 (6) SA 279

suspend her pending the outcome of her application for an interim interdict in Part A. This is the species of contempt that is concerned with "*the interference with the administration of justice by taking a decision which is bound to prevent the Court granting a remedy*" as was stated in ***Li Kui Yu***[18] and as qualified in ***Roberts v Chairman, Local Road Transportation Board***[19] on the basis that "*for an act to constitute contempt, it was necessary that there be an intention to defeat the course of justice.*"

[132] The issue in ***Tshwane City v Afriforum*** was the change of the street names by the Council of the Tshwane City whilst there was a pending application to interdict the name change. The court, in setting out what would have been required in order for Afriforum to succeed, stated that: "*The effect of the authority is that Afriforum was required to satisfy the court that the Council knew that the interim order was certainly going to be granted and its expeditious execution of the name-changing project was intended to frustrate the enforcement of the anticipated court order and thereby defeat the course of justice.*"[20]

[133] By parity of reasoning, what is required of the applicant is to satisfy this Court that the President knew that the interim interdict was certainly going to be granted and hurried the decision to suspend the applicant with the intention of frustrating the enforcement of the anticipated court order and thereby defeat the course of justice. The applicant made no averments to that effect in her supplementary founding affidavit and, at best for her in

[18] 1906 TS 181
[19] 1980 (2) SA 472 (C)
[20] Tshwane City v Afriforum at para [72]

her composite replying affidavit, she stated that she had been advised that her application for an interim interdict in Part A had good prospects of success.

[134] Even accepting that the applicant was advised that her application for an interim interdict had good prospects of success, that would still not be sufficient. It does not answer the question whether the President knew that the interim interdict was certainly going to be granted. Furthermore, it does not answer the question whether the President's hurried decision to suspend the applicant was intended to frustrate the enforcement of the anticipated court order, and thereby defeat the course of justice.

[135] In the heads of argument filed on her behalf, no argument is made that the President knew that an interim order was going to be granted. Instead, the granting of an interim order is stated as a possibility in the following terms,

> *"the President knew or ought to have known about the the possibility that the court might shortly find that he was disqualified from being the suspending authority and/or that the suspension powers had not yet been triggered when he started the suspension process".*

This, in our view, falls short of establishing the requirements for contempt of court. We now turn to consider the breach of section 165 of the Constitution.

[136] Section 165 of the Constitution deals with judicial authority and states, in relevant parts, that:

"(1) The judicial authority of the Republic is vested in the courts.

(2) ...

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[137] It was submitted on behalf of the applicant that, based on the same facts relied upon in respect of contempt of court, the President's conduct is also illegal because it is clearly in breach of section 165 of the Constitution, more especially subsection 165(1), 165(3) and/or 165(4) thereof, in that such conduct was calculated or objectively had the effect of undermining the independence, authority, dignity and/or impartiality of the judiciary.

[138] There is a reason why the applicant can only rely on the same facts in respect of both the contempt of court and the section 165 argument. Section 165 of the Constitution is the constitutional provision establishing judicial authority and contempt of court proceedings are a mechanism designed to give effect to judicial authority. This is made clear by the following passages in ***Matjhabeng***:

"[45] Section 165 of the Constitution, indeed, vouchsafes judicial authority. This section must be read with the supremacy clause of the Constitution. It provides that courts are vested with judicial authority, and that no person or organ of state may interfere with the functioning of the courts. The Constitution enjoins organs of

state to assist and protect the courts to ensure, among other things, their dignity and effectiveness.

[46] To ensure that courts' authority is effective, s 165 (5) makes orders of court binding on 'all persons to whom and organs of state to which it applies'. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibility, continual non-compliance with court orders imperils judicial authority." (footnotes omitted)

[139] It follows, therefore, that the issue of a breach of section 165 of the Constitution involves a consideration of the very issue of contempt of court and, of necessity, a finding of the contempt of court applies in respect of the issue of a breach of section 165 of the Constitution. Consequently, the applicant's failure to make out a case for contempt of court must necessarily mean that she has failed to make out a case for a breach of section 165 of the Constitution by the President. Next to consider is whether the power of the President was vitiated by bias or reasonable apprehension of bias. The joint practice note refers to this as,

"*actual or reasonable apprehension of conflicts of interests emanating out of six different and identified investigations.*"

Bias or reasonable apprehension of bias

[140] The issue of bias or reasonable apprehension of bias disqualifying the President from personally exercising the powers to suspend the applicant was dealt with by the Full Court in Part A which came to the conclusion that the applicant had,

"failed to put up any 'convincing' or 'cogent' evidence to rebut the presumption that the third respondent is impartial and has failed to discharge the onus of satisfying the double reasonable test."

[141] The applicant's claim of bias or reasonable apprehension of bias on the part of the President was based on the following complaints she had received or was investigating against the President:

141.1 The BOSASA/ CR17 investigation;

141.2 An investigation into the serious allegations of judicial capture, made by Anti-Poverty Forum;

141.3 An investigation emanating from a complaint by the Chief Whip of the Standing Committee on Public Accounts in connection with the allegations that the President has violated the Executive Ethics Code; and

141.4 An investigation emanating from a complaint by the Honourable Mr Vuyolwethu Zungula, MP, pertaining to the use of an official airplane on a trip to Zimbabwe.

[142] We do not intend interrogating the findings of the Full Court to the extent that it found that the evidence presented by the applicant failed to establish bias or reasonable apprehension of bias as that would amount to this Court impermissibly sitting as a court

of appeal. For that reason, the consideration of this issue is confined to events that transpired after the hearing of Part A.

[143] There are two events in the main that transpired after the hearing of Part A. The first is the complaint received by the applicant from the Honourable Mr Bantu Holomisa, MP relating to admissions by Glencore PLC, a United States of America company, that it had violated the United States Foreign Corrupt Practices Act and manipulated commodity prices to the value of approximately USD1.2 billion ("***the Glencore investigation***"). The second is the complaint received by the applicant from the Honourable Vuyo Zungula, MP requesting an investigation to establish whether the President had breached the provisions of the Executive Members Ethics Act by undertaking remunerative work in contravention of section 96(2)(a) of the Constitution. The complaint arose from an incident where Mr Arthur Fraser had laid a criminal charge against the President involving foreign currency at the President's Phala Phala farm ("*the Phala Phala investigation*").

[144] The applicant does no more than merely mention the complaint relating to the Glencore investigation and annexing a copy thereof. She does not say that she has written to the President requiring his response. As such, it is not clear how the President would have become aware that the applicant was investigating a complaint against him in this regard.

[145] In addition, the content of the complaint does not relate to the President but to a United States company, Glencore PLC. The President explains that he never held any

interest in the Glenore companies that were implicated in the Glencore investigation and that prior to 2014, he held an interest in Shanduka Resources which company held an interest in Glencore South Africa. The Glencore investigation appears to be nothing more than a makeweight to bolster the claim for bias or reasonable apprehension of bias and is certainly not sufficient to found bias or reasonable apprehension of bias.

[146] The Phala Phala investigation, however, stands on a different footing. On the President's account, he signed the suspension letter on 9 June 2022. It is common cause that by that time he had received a letter from the applicant about the Phala Phala investigation which required him to respond within 14 days from 7 June 2022. As it were, the clock was ticking when the President signed the suspension letter. The applicant's case, paraphrased, is that this would give rise to reasonable apprehension of bias on the part of the President which disqualified him from personally exercising the suspension powers.

[147] The President did not address the substance of the allegations in relation to the Phala Phala investigation because there were already pending investigations. He, however, denied that the Phala Phala investigation would disqualify him from exercising the suspension powers on the basis of reasonable apprehension of harm because:

147.1 the Full Court in Part A had already ruled that:

147.1.1 Without any special showing of bias, a mere complaint (even a reasonable one) about his alleged conduct is not enough to prevent him from acting in terms of his constitutional obligation, and the applicant had not established any special showing of bias; and

147.1.2 There is nothing wrong with affording a member of the executive the power to suspend someone who might investigate them (or their associates), as long as the suspension has adequate safeguards, is not without pay, and is not for an indefinite duration - the applicant's suspension had adequate safeguards in that she was suspended with pay and for a limited duration pending the finalisation of the section 194 enquiry;

147.2 The Deputy Public Protector, consistent with section 2A(7) of the Public Protector Act, steps in and, as such, the suspension would not in any manner negatively affect the investigation;

147.3 There is no basis in fact for the contention that the suspension was retaliatory as the process relating to the suspension predated the commencement of her investigation; and

147.4 The Deputy Public Protector was continuing the investigation.

[148] During the hearing of Part A, it appears that the DA accepted that the President can be prevented from exercising his powers under section 194(3)(a) of the Constitution if there is an objectively reasonable apprehension of bias. In this regard, it referred to the following two cases which make this apparent, namely, the Full Bench in the ***State Capture judgment***[21] and ***Corruption Watch***[22]. Furthermore, the Full Bench in the ***State Capture judgment*** relied on the principles of recusal that apply to judges, namely,

> *"a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court."*

[149] Before us, the position of the DA appeared to have shifted in that it was now argued that the ability of an office bearer of a Chapter 9 institution to rely on pending investigations to shield himself or herself from suspension would have constitutionally untenable implications. This, we understand to be suggesting that a pending investigation could never give rise to a reasonable apprehension of bias.

[150] The DA also aligned itself with the President's reliance on the Part A judgement to the effect that there is nothing wrong in affording a member of the executive with power to suspend someone who might investigate them. The DA alluded to the fact that the suspension of the applicant could not be done on the President's whim but was the natural

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[21] President of the Republic of South Africa v Office of the Public Protector and Others 2018 (2) SA 100 (GP)
[22] Corruption Watch (RF) and Another v President of the Republic of South Africa and Others: Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others 2018 (1) SACR 317 (GP)

outcome of evidence that she has conducted her duties with incompetence, negligence, and/or dishonesty.

[151] Although we have grave doubts whether the "so-called double reasonable test" applies to a member of the executive, we are prepared to accept for present purposes that the principles of recusal that apply to judges are the applicable standard. Even on this standard, there are, in our view, a number of reasons why the President would reasonably be perceived to be unable to bring to bear an impartial mind when considering whether or not to suspend the applicant.

[152] The first is that, as pointed out by the DA in their heads of argument filed in Part A, the applicant has been previously found by the Constitutional Court not to have investigated the President with an "*open and inquiring mind*" and that she was "*unduly suspicious*" of the President.

[153] The second is, against that backdrop at the time of suspension, the President was sitting with a letter from the applicant with a long list of questions that the President was required to answer within 14 days, and he had about 12 days to do so at the time of suspending the applicant. To suggest that such a suspension would not have any effect on delaying the course of investigation would be a difficult proposition to convincingly sustain.

[154] Thirdly, the expansive nature of the questions that the President was required to answer in the said short space of time in respect of events that took place some two years ago may well have caused the President to conclude that "there she goes again'; in those circumstances, rather than to have to contend with the applicant, he was better off with any person but the applicant.

[155] Significantly, the sequence of events leading to the suspension of the applicant cannot be discounted or overlooked. As explained above, on 7 June 2022, the applicant informed the President in writing that she was instituting an investigation against him with regard to allegations relating to a violation of the Executive Ethics Code in respect of the Phala Phala farm incident. Thirty-one questions were raised and the President had to respond thereto within 14 days. This correspondence was followed by a public announcement by the applicant on the 8 June 2022 that she had decided to launch an investigation against the President in respect of the Phala Phala matter. In response, on the 9 June 2022, the President decided to suspend the applicant. On these objective facts, it is reasonable to form the perception that the suspension of the applicant was triggered by the decision of the applicant to institute an investigation against the President. There was no other plausible or logical explanation for the premature suspension of the applicant on the eve of a judgment meant to determine the very lawfulness of the suspension.

[156] It must be stressed that at the time the applicant was suspended, the President was aware that the judgment of the Full Court in respect of Part A was pending. The

application in respect of Part A was brought on an urgent basis. All the parties involved were aware that judgment would be delivered in due course. Indeed, the full court gave an undertaking on the last day of the hearing that the Part A judgment would be delivered in a week or at the latest in two weeks' time. Notably, the judgment of the full court in Part A was in respect of an interdict that the applicant sought to obtain to restrain the President from suspending her. A notice was issued by the registrar on 9 June 2022 to all the parties concerned that judgment in respect of Part A would be given on 10 June 2022. According to the President, when the notice was issued by the Registrar, he had already issued the letter of suspension. In other words, the President only became aware that judgment would be delivered on the following day, after he had already issued the suspension letter.

[157] In our view, the hurried nature of the suspension of the applicant in the circumstances, notwithstanding that a judgment of the full court was looming on the same subject matter, leads this court to an ineluctable conclusion that the suspension may have been retaliatory and, hence, unlawful. It was certainly tainted by bias of a disqualifying kind and perhaps an improper motive. In our view, the President could not bring an unbiased mind to bear as he was conflicted when he suspended the applicant.

[158] The above considerations do not detract from the fact that the suspension was long in the making. However, at the time the suspension was finalised, the President was dealing with an investigation by the applicant, the substance of the allegations of which he could not discuss as he had done with the other investigations, and this, in our view,

is the critical time to assess whether it was still tenable for the President to exercise the suspension powers.

[159] It was submitted on behalf of the President that he was empowered by section 194(3)(a) of the Constitution to suspend the applicant. It was also contended that the suspension of the applicant was based on her incompetence as detailed in a number of judgments and that the President could have suspended her long before 9 June 2022. It was further argued that the applicant's suspension had already commenced well before her letter was addressed to the President on 7 June 2022. Furthermore, that the suspension of the applicant makes no difference to the President in that, notwithstanding the applicant's suspension, the investigation against the President is continuing with the Acting Public Protector at the helm of this investigation.

[160] That may be so. However, this argument, in our view, misses the point. In this case, one has to draw a distinction between the process relating to the applicant's suspension which commenced on the 17 March 2022 - when she was requested to furnish reasons why she should not be suspended - and the decision to suspend her which was taken on 9 June 2022. What is relevant here is the decision of 9 June 2022. In our view, it was still open to the president after considering the representations of the applicant to decide not to suspend the applicant. However, from the objective facts, the decision of the applicant to investigate the President and to put 31 questions to him, prompted the President not to wait a day more and to immediately suspend her. Clearly, when the events that

unfolded between the 7 - 10 June 2022, discussed above, are objectively examined, it is irresistible to conclude that the decision of the President was improper.

[161] More importantly, the President as a servant of the Constitution, is under an obligation to obey its commands.[23] He is enjoined to uphold, defend and respect the Constitution. The President had a duty to exercise his public power within the parameters of the law. It is trite that the exercise of public power must comply with the Constitution and the doctrine of legality. To this end, we share the views expressed by the Full Court in **President of the *Republic of South Africa v Office of the Public Protector and Others***,[24] where the court noted that the principle of legality, being an incident of the rule of law, dictates that those who exercise public power, including the President, must comply with the law. The Full Court noted that the role of the rule of law as a form of constitutional control on the exercise of public power was given expression in ***Affordable Medicines Trust and another v Minister of Health and another***,[25] where Ncgobo CJ stated:

> *"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond*

[23] President of the Republic of South Africa and another v Hugo 1997 (4) SA 1 (CC) at para 65.
[24] 2018 (2) SA 100 (GP) at para 66.
[25] 2006 (3) SA 247 at para 49.

that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundations for the control of public power."

[162] In addition, the office of the Public Protector is a very important office in our Country as it strengthens our constitutional democracy. In ***Economic Freedom Fighters v Speaker of the National assembly and Others***[26],the Constitutional Court described the purpose of this office as follows:

> *"The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen."*

[163] The suspension of an office bearer of a Chapter 9 institution, in our view, must be lawful and be exercised within the confines of the law and the Constitution lest there be a degradation of our Constitutional democracy. The President notes quite correctly that he has the power to suspend the applicant; however, he cannot exercise that power on a whim or for flimsy reasons.

[164] The legal position as alluded to by the DA and referred to in paragraph [148] above, namely that the President can be prevented from exercising his powers under section 194(3)(a) of the Constitution if there is an objectively reasonable apprehension of bias, is

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[26] 2016 (3) SA 580 (CC) at para 52

the correct legal position. For the above reasons, we are of the view that, indeed, there was an objectively reasonable apprehension of bias which prevented the President from exercising his powers under section 194(3)(a) of the Constitution.

[165] The argument about the existence of the jurisdictional facts to trigger the suspension powers is of no assistance as it does not answer the relevant question of reasonable apprehension of bias.

[166] Also, the argument that it would be constitutionally untenable if an office bearer of a Chapter 9 institution could shield himself or herself from suspension, presupposes that it is only the President who has the power to suspend. That is not the case as the Constitution has put in place adequate measures to deal with situations where the President is not able to personally perform Constitutional functions. This is clear from section 90 (1) of the Constitution, which provides:

> "*When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of the President, an office-bearer in the order below act as President:*
>
> *(a) The Deputy President.*
> *(b) A Minister designated by the President.*
> *(c) A Minister designated by other members of the Cabinet.*
> (d) *The Speaker, until the National Assembly designates one of its other members.*"

[167] The President is acutely aware of the above provisions and in fact had alluded to them in previous related litigation. Also clear from the above provisions of section 90 of the Constitution is that the President is able to completely remove himself from a situation where he cannot act in that he does not have to be the person delegating the power to act but the members of the Cabinet are able to do the delegation. We consider next the conflict of interest in terms of section 96 of the Constitution.

The section 96 of the Constitution conflict of interest

[168] Relying on the same facts relating to bias or reasonable apprehension of bias, the applicant asserts that the provisions of section 96 of the Constitution disqualified the President from suspending her due to a conflict of interest. In this regard, she relies on the provisions of section 96(2)(b) which state:

> *"Members of the Cabinet and Deputy Ministers may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests."*

[169] The applicant relies on that part of section 96(2)(b) which precludes members of the Cabinet from acting in a way that exposes them to any situation involving the risk of *"a conflict between their official responsibilities and private interests."*

[170] The official responsibilities relied upon by the applicant relate to the exercise of the suspension powers. On the issue of private interests, the applicant relies on her investigation of the President. The investigation by the applicant also relate to the

President's official responsibilities, namely, a breach of the Executive Members Ethics Act and Executive Ethics Code. It certainly appears from questions posed by the applicant in respect of the Phala Phala incident that there is indeed a risk that the President, in suspending the applicant, acted in a manner which exposed him to a situation involving the risk of "*a conflict between (his) official responsibilities and private interests.*"

[171] Given the nature of the allegations made against the President with regard to the Phala Phala incident, involving as it does monies not earned by the President in his official capacity, it is reasonable to assume that the investigation will relate to the President's private interests as well; hence, there is a strong argument to be made that the Phala Phala incident involves a risk of conflict between the President's official and private interests. As the Constitutional Court stated:

> *"To find oneself on the wrong side of section 96 all that needs to be proven is a risk. It does not even have to materialise."*[27]

We now turn to consider the just and equitable remedy.

The just and equitable remedy

[172] The just and equitable remedy sought by the applicant is the setting aside of her suspension. The President made no submissions regarding the just and equitable remedy in the event of this Court setting aside the suspension.

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[27] Per Mogoeng CJ in Economic Freedom Fighters v Speaker of the National Assembly and others 2016 (3) SA 580 (CC) at paragraph [9] (also known as the "EFF (Nkandla) Judgment")

[173] It was submitted on behalf of the DA that this Court, in the design of a just and equitable remedy, should exercise its power to limit the retrospectivity of its order. In this regard, this Court was referred to the judgment of the Constitutional Court in ***Minister of Police v Kunjana***[28] where the following was stated:

> "*In S v Zuma this Court held that the ability to limit the retrospective effect of orders of invalidity can be used to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under the invalidated statute. The Court further held that the interests of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from old to the new.*" (footnotes omitted)

[174] The office of the Public Protector performs a very important function in our Constitutional democracy. By virtue of the provisions of section 2A(7) of the Public Protector Act, the Deputy Public Protector has had to step in and there is no doubt that she has had to make decisions, which would be invalidated if the suspension of the applicant is set aside retrospectively .

[175] An order setting aside the suspension retrospectively would have no practical positive effect. On the other hand, it would risk disrupting the affairs of the office of the Public Protector. We are, thus, of the view that a just and equitable remedy would be to set aside the suspension prospectively. We turn now to the issue of abuse of process.

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[28] Minister of Police and Others v Kunjana 2016 (9) BCLR 1237 (CC) para 25

Abuse of process

[176] The Speaker, the Chairperson of the Section 194 Committee, and the DA decried the application as an abuse of process by the applicant. On the part of the Speaker and the Chairperson of the Section 194 Committee, the relief sought by the applicant against them was characterised as an impermissible attempt to relitigate the relief she had sought and failed to obtain in Part A. It was submitted that although the relief was somewhat convoluted, in practical terms, the order the applicant sought in both Part A and B were orders:

176.1 prohibiting the National Assembly, and specifically the Section 194 Committee, from continuing with the process under section 194 of the Constitution for her removal pending the outcome of her second application for rescission; and

176.2 directing the Speaker to withdraw her letter to the President dated 10 March 2022.

[177] For its part, the DA recounting related previous litigation, described the application as a 'Stalingrad' litigation strategy which is nothing more than a relentless attempt by the applicant to avoid accountability at all costs.

[178] It is common cause that the relief sought by the applicant against the Speaker and the Chairperson of the Section 194 Committee has failed. That, notwithstanding, in Part A, the relief sought by the applicant was for interim relief pending the application of the final relief she sought in Part B. This was made clear from the start when the applicant

launched the application and it is not a matter of the applicant changing course after failing to obtain interim relief. It is not uncommon for parties to approach the court on an urgent basis seeking interim relief pending the determination of the final relief.

[179] The recounting of the previous related litigation by the DA does not necessarily support the argument that the applicant was, is, and has always been hell-bent on avoiding accountability. A cursory glance at the process relating to the motion to remove the applicant reveals that:

179.1 at the time of the tabling of the first motion for the applicant's removal, the National Assembly had not adopted rules to deal with such motions and it was the applicant who pointed this out. At the time the National Assembly was gearing to deal with the motion, and upon reflection, it held back and embarked on a process which resulted in the adoption of the Rules; and

179.2 upon the National Assembly adopting the Rules, the applicant challenged their Constitutionality on various grounds one of which was ultimately upheld by the Constitutional Court.

[180] The above two points demonstrate that it may not necessarily be fair to describe the applicant's grappling with the matter as a so-called 'Stalingrad' litigation strategy designed to avoid accountability at all costs. This is more so if one considers the potential consequences of the limited legal representation that would have been applicable had

the Constitutional Court not intervened. In the result, we are not satisfied that the application constitutes an abuse of process.

Residual issues

[181] A few residual issues remain before dealing with costs. The first is the application by the President for admission of evidence in terms of rule 6(5)(e) of the Uniform Rules of Court. The application concerned the undertaking the President had made to this Court to make available to the Court his answers to the letter dated 7 June 2022 from the applicant. The purpose of the application was to place before the court an affidavit by his attorney explaining the difficulty the President had in placing his answers before the court as he had been advised by those investigating him not to disclose the answers to third parties. The application was not opposed and was accordingly granted.

[182] Related to the said application, the applicant brought a counter-application that she be provided with the answers by the President. She had already been suspended at the time of her request and it was not immediately clear why she wanted to be provided with the answers. In addition, having regard to the affidavit filed on behalf of the President which demonstrated that the request not to disclose his answers came from the office of the Public Protector, making an order that the applicant be provided with the answers would be tantamount to making an order against the office of the Public Protector without hearing from that entity. This would amount to a breach of one of the basic tenets of our law, the *audi alteram partem* principle, that you need to hear the other side before determining the issue.

[183] The last residual issue relates to an application in terms of rule 6(5)(e) by the Speaker and the Chairperson of the Section 194 Committee in which they sought to place further evidence relating to the outcome of the applicant's second application for rescission she had filed in the Constitutional Court. We considered it unnecessary to admit the new evidence as it would not have had any significant impact on the outcome of the matter. It now remains to deal with costs.

Costs

[184] The Speaker and the Chairperson of the Section 194 Committee have been successful but their counsel made it clear that his clients would not be seeking costs against the applicant in her official capacity. Their prayer for costs against the applicant was contingent on the success of their rule 7 challenge as that would have resulted in the applicant litigating in her personal capacity. The rule 7 challenge was unsuccessful and, accordingly, it appears that an appropriate order would be that the Speaker and the Chairperson of the Section 194 Committee bear their own costs.

[185] The applicant sought an order that the President pays costs personally and on an attorney and client scale. Although the applicant has been successful as against the President, there is no basis for ordering costs against him. The costs of both the applicant and the President have been funded through the public purse and there is certainly no conduct on the part of the President deserving of censure.

[186] The DA has had mixed fortunes in that on the one hand it was successful in so far as its support for the Speaker and the Chairperson of the Section 194 Committee is concerned. On the other hand, it was not successful in so far as the relief against the President is concerned. Having regard to the foregoing, our view is that an appropriate order would be that each party pays its own costs.

Order

[187] In the result, the following order is made:

187.1 It is directed that the matter be heard as one of urgency and the normal rules are dispensed with in terms of rule 6(12)(a);

187.2 The application to amend the notice of motion is granted;

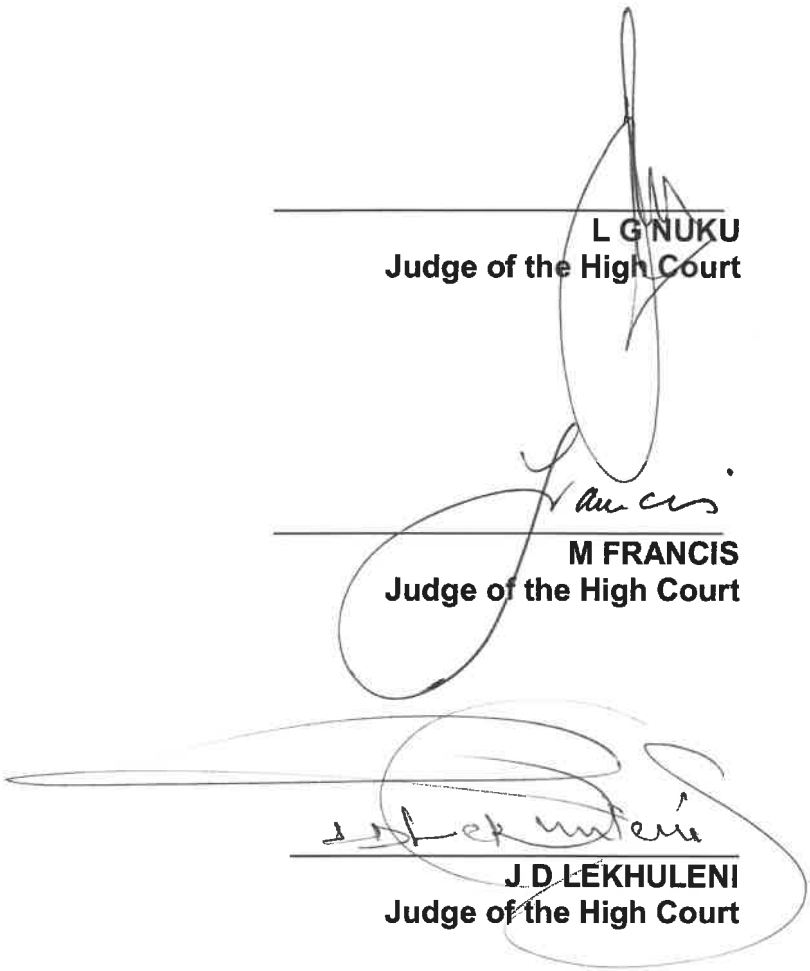
187.3 The application for leave to challenge the authority of Seanego Attorneys Inc to represent the applicant is refused;

187.4 The relief sought in paragraphs 3.1, 3.4, 3.5, 3.6 and 5 of the amended notice of motion is dismissed;

187.5 The decision of the President to suspend the applicant is hereby declared invalid,

187.6 The suspension of the applicant is hereby set aside effectively from the date of this order;

187.7 Each party is to pay its costs.



L G NUKU
Judge of the High Court

M FRANCIS
Judge of the High Court

J D LEKHULENI
Judge of the High Court

APPEARANCES

For the Applicant	Advocate D Mpofu, SC Advocate B Shabalala Advocate H Matlhape
Instructed by:	Seanego Attorneys Inc (ref: Ms N Patel)
For the 1st & 2nd Respondents:	Advocate A Breitenbach, SC Advocate U Naidoo Advocate A Toefy
Instructed by:	Office of the State Attorney, Cape Town (ref: Mr L Manuel)
For the 3rd Respondent:	Advocate K Pillay, SC Advocate N Luthuli
Instructed by:	Office of the State Attorney, Cape Town (ref: Mr M Owen)
For the 5th Respondent:	Advocate S Budlender, SC Advocate M Bishop
Instructed by:	Minde Shapiro & Smith Attorneys (ref: Ms E Jonker)
For the 10th & 11th Respondents:	Advocate T Masuku, SC Advocate M Simelane
Instructed by:	Mabuza Attorneys (ref: Mr E Mabuza)