CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 251/22; CCT 252/22 and CCT 299/22

Case CCT 251/22

In the matter between:

DEMOCRATIC ALLIANCE	First Applicant
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Applicant

and

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

Case CCT 252/22

And in the matter between:

DEMOCRATIC ALLIANCE	First Applicant
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Applicant

and

PUBLIC PROTECTOR OF SOUTH AFRICA First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

CHAIRPERSON OF THE SECTION 194 COMMITTEE Third Respondent

ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY Fourth to Seventeenth Respondents

Case CCT 299/22

And in the matter between:

PUBLIC PROTECTOR OF SOUTH AFRICA Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

CHAIRPERSON OF THE SECTION 194 COMMITTEE Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent

ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY Fourth to Seventeenth Respondents

Neutral citation: *Democratic Alliance and Another v Public Protector of South Africa and Others* [2023] ZACC 25

Coram: Maya DCJ, Baqwa AJ, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J, and Tshiqi J.

Judgment: Maya DCJ

Heard on: 24 November 2022

Decided on: 13 July 2023

Summary: Section 194 of the Constitution — suspension of the Public Protector — Apprehension of bias — *Sub judice* rule — conflict of interest

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ORDER

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

1. The appeals by the Democratic Alliance (DA) and the President of the Republic of South Africa in CCT 251/22 and CCT 252/22 against the orders in paragraphs 187.5 and 187.6 of the Full Court's judgment delivered on 9 September 2022 (Part B judgment) are upheld.
2. The conditional application for confirmation of the said orders of invalidity is dismissed.
3. The orders of the Full Court in paragraphs 187.5 and 187.6 of the Part B judgment are set aside and replaced with the following order:

   "The prayers in paragraphs 3.2, 3.3 and 4 of the amended Notice of Motion to declare the decision to suspend the applicant issued on 9 June 2022 and the decision of the Section 194 Committee to commence the section 194 removal process to be irrational, unconstitutional and invalid and set aside in terms of section 172(1)(f) of the Constitution are dismissed."
4. The appeals by the DA and the President in CCT 251/22 and CCT 252/22 against the costs order in paragraph 187.7 of the Part B judgment are dismissed.
5. The Public Protector's conditional cross-appeals in CCT 251/22 and CCT 252/22 are dismissed.
6. The Public Protector's application for leave to appeal in CCT 299/22 is dismissed.
7. In CCT 251/22 and CCT 252/22 there is no order as to costs.

8. In CCT 299/22 the Public Protector shall pay the costs in her personal capacity, such costs to include the costs of two counsel.

JUDGMENT

MAYA DCJ (Baqwa AJ, Madlanga J Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J, Tshiqi J concurring):

Introduction

[1] This matter comprises three consolidated cases. The first is CCT 251/22, an appeal, alternatively an application for leave to appeal directly to this Court, in terms of section 172(2)(d)[1] of the Constitution, section 15[2] of the Superior Courts Act[3] and rule 16[4] of this Court's Rules. The appeal is brought by the Democratic Alliance (DA)

[1] Section 172(2)(d) states:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[2] This section, titled "Referral of order of constitutional invalidity to Constitutional Court", in relevant part states:

> "(1)(a) Whenever the Supreme Court of Appeal, a Division of the High Court or any competent court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172(2)(a) of the Constitution, that court must, in accordance with the rules, refer the order of constitutional invalidity to the Constitutional Court for confirmation.
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> (b) Whenever any person or organ of state with a sufficient interest appeals or applies directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court, as contemplated in section 172(2)(d) of the Constitution, the Court must deal with the matter in accordance with the rules."

[3] 10 of 2013.

[4] Rule 16 entitles a person or organ of state desirous of appealing against or applying for the confirmation of an order of constitutional invalidity as contemplated in section 172 of the Constitution, within 15 days of the making of such an order, to lodge a notice of appeal or an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

challenging the orders contained in paragraphs 187.5 to 187.7[5] of the judgment of a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Part B judgment),[6] in which the Full Court dealt with Part B of a review application brought by the Public Protector of South Africa (Public Protector). In the alternative, in the event that this Court decides that the High Court's judgment is not subject to confirmation in terms of sections 167(5)[7] and 172(2) of the Constitution, the DA applies in terms of rule 19[8] of this Court's Rules for leave to appeal against the said orders.

[2] The second matter, CCT 252/22, is an appeal, alternatively an application for leave to appeal directly to this Court, brought by the President of the Republic of South Africa, in which he challenges the same paragraphs of the Part B judgment impugned by the DA in CCT 251/22. This appeal is also brought in terms of section 172(2)(d) of the Constitution read with rule 16 of the Rules of this Court, with an alternative application for leave to appeal in terms of rule 19 of this Court's Rules.

[3] The Public Protector has filed a conditional application for leave to cross-appeal against a portion of the Part B judgment. She pleads that the Full Court erred in dismissing certain relief she sought from that Court, as discussed hereunder. In addition to the cross-appeal, the Public Protector brings a conditional application for confirmation of the Full Court's orders in her favour in the event that this Court finds that section 172(2)(a) of the Constitution applies to such orders. In that application, she

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[5] These parts of the judgment declare the decision of the President to suspend the Public Protector invalid, set aside the suspension effectively from the date of the order and order each party to pay its own costs.

[6] *The Public Protector of South Africa v The Speaker of the National Assembly* [2022] ZAWCHC 180; [2022] 4 All SA 417 (WCC).

[7] This section provides that—

> "[t]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force".

[8] This rule, inter alia, entitles a litigant who is aggrieved by the decision of a court on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, and who wishes to appeal against it directly to this Court, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, to lodge with the Registrar an application for leave to appeal.

seeks this Court's confirmation of paragraphs 187.5 to 187.7 of the orders of the High Court.

[4] The third matter is CCT 299/22. In this application, the Public Protector brings an urgent conditional application for leave to appeal directly to this Court against the whole judgment and order of the Full Court of the High Court, in which that Court dismissed her application in terms of section 18 of the Superior Courts Act for leave to execute the review judgment.[9]

Parties

[5] As indicated, the DA and the President are the applicants in CCT 251/22 and CCT 252/22, respectively. The Speaker of the National Assembly (Speaker), Chairperson of the Section 194 Committee[10] and All Political Parties Represented in the National Assembly (Political Parties) are the second, third and fourth to seventeenth respondents, respectively. The Political Parties are cited merely as interested parties. Of this cohort, only the tenth, eleventh and sixteenth respondents – the United Democratic Movement (UDM), African Transformation Movement (ATM) and the Pan Africanist Congress of Azania (PAC), respectively – are participating in these proceedings.

Background

[6] The matters arise from the same set of facts and impugned decisions of the President, the Speaker and the Section 194 Committee. On 4 February 2022, this Court, in *Speaker*,[11] declared rule 129AD(3) of the Rules adopted by the National Assembly

[9] *Public Protector of South Africa v Speaker of the National Assembly* [2022] ZAWCHC 197 (section 18 judgment).

[10] The Section 194 Committee is a committee established in terms of section 194 of the Constitution.

[11] *Speaker of the National Assembly v Public Protector; Democratic Alliance v Public Protector* [2022] ZACC 1; 2022 (3) SA 1 (CC); 2022 (6) BCLR 744 (CC) at para 2.

on 3 December 2019 (Rules)[12] unconstitutional to the extent that the rule limited the right to legal representation of a Chapter 9 institution office-bearer during proceedings concerning their removal from office. This Court severed the offending part of the rule to cure its invalidity and it 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."[13]

[7] Following the order of this Court in *Speaker*, on 22 February 2022, the Section 194 Committee resolved to proceed with the consideration of the motion for the removal of the Public Protector. Subsequently, on 10 March 2022, the Speaker wrote a letter to the President advising him of the latest developments in the matter. In the letter, the Speaker informed the President that: (a) the Section 194 Committee had previously paused its enquiry pending the outcome of the proceedings before the Constitutional Court in *Speaker*; and (b) having considered the Constitutional Court's judgment in *Speaker*, it resolved to continue with its consideration of the motion for the removal of the Public Protector.

[8] On 17 March 2022, the President wrote a letter to the Public Protector informing her of the Speaker's letter. He invited the Public Protector to provide him with reasons why he should not exercise his powers in terms of section 194(3)(a) of the Constitution and suspend her pending the finalisation of the enquiry of the Section 194 Committee.

[9] In response, on 18 March 2022, the Public Protector, through her attorneys, Seanago Attorneys Incorporated (Seanago), wrote to the Speaker demanding a retraction of the letter sent by the Speaker to the President on 10 March 2022. The

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[12] The Rules were passed to govern the removal of the heads and commissioners of institutions established in terms of Chapter 9 of the Constitution, which establishes state institutions, including the Public Protector, to strengthen constitutional democracy in the Republic. They were drafted pursuant to various motions submitted by the DA to the Speaker to have the Public Protector removed from office.

[13] *Speaker* above n 11 at para 3 of the order.

Speaker refused to do so. On 22 March 2022, the Public Protector wrote a letter to the President informing him that there were multiple instances of conflict of interest, which precluded the President from personally suspending her. The alleged conflicts of interest included various investigations that had been recently conducted, or were currently being investigated, by the Office of the Public Protector against the President. In response, the President, through the State Attorney, informed the Public Protector that he would act personally and did not consider himself to be disqualified from doing so.

[10] On the same day, Seanago wrote a letter to the Section 194 Committee demanding the suspension of its enquiry pending the Public Protector's application for the rescission of the *Speaker* judgment.[14] The Section 194 Committee considered the

[14] In that application, the Public Protector unsuccessfully sought the rescission of this Court's order in *Speaker*, above n 11, in terms of rule 42 of the Uniform Rules of Court, alternatively section 172(1)(a) of the Constitution. She argued that this Court had made patent errors by—

(a) ruling that a judge may perform non-judicial functions;

(b) enquiring into whether the appointment of a judge to the independent panel was prohibited, instead of enquiring into whether the appointment of a judge to the independent panel was authorised;

(c) failing to address the judicial reviewability of the decision to appoint a judge to the independent panel in terms of the principle of legality;

(d) failing to address the allegations that the Democratic Alliance acted mala fide in engaging in litigation against the Public Protector, and consider the allegation of mala fides in making its cost order;

(e) omitting to explain why it departed from the precedent set in its judgments in *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC), *NSPCA v Minister of Agriculture, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) and *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) (*AmaBhungane)*, and fostered ambiguity by not clearly outlining whether it upheld or departed from these judgments; and

(f) fostering ambiguity when it failed to deal with the political nature of the nomination stage, not the appointment stage, of the process of appointing a judge to the independent panel. The alternative argument was that it would be in the interests of justice for this Court to rescind its judgment to avoid the serious damage that could be caused to the separation of powers doctrine and the independence of the judiciary if the ruling that a judge can be appointed to the independent panel was sustained and that the outcome of the rescission application had implications for the continuation and integrity of the impeachment proceedings and could open the Public Protector up to an unfair suspension.

demand and resolved to continue with its work. The Public Protector did not accept this turn of events and approached the High Court for relief.

The High Court litigation

The Part B application

[11] On 1 April 2022, the Public Protector launched application proceedings in the High Court. She sought orders declaring certain conduct and decisions of the Speaker, President and the Section 194 Committee irrational, unconstitutional and invalid. She launched the application in Parts A and B. In Part A, she sought urgent interdictory relief against the Section 194 Committee, the Speaker and the President. Part A is, however, not the subject of these proceedings. Part B is, and in it she sought orders declaring the conduct of the Speaker in writing the letter to the President, the conduct of the President in writing the letter initiating the suspension process, and the conduct of the Section 194 Committee in proceeding with the section 194 enquiry, irrational, unconstitutional and invalid.

[12] On 6 May 2022, this Court dismissed the Public Protector's application to rescind the *Speaker* judgment. On 10 May 2022, the Public Protector launched another rescission application in this Court, this time to have the order of 6 May 2022 refusing rescission rescinded.

[13] On 26 May 2022, Seanago addressed a letter to the President setting out the Public Protector's representations as to why she should not be suspended.

[14] On 1 June 2022, while Part A of the High Court matter was still pending, a former senior investigating officer and Deputy Director-General of Home Affairs, Mr Arthur Fraser, laid criminal charges against the President in relation to grave allegations of criminal misconduct involving foreign currency allegedly stolen at the President's Phala Phala farm. On 3 June 2022, the Office of the Public Protector received a complaint against the President from ATM's president, Mr Vuyo Zungula,

requesting an investigation into any part which the President might have played in the commission of the alleged crimes, specifically breaches of the Executive Members Ethics Act[15] or the President's oath of office.

[15] On 7 June 2022, the Public Protector wrote a letter to the President with the heading "The investigation into allegations of a violation of the Executive Ethics Code against the President of the Republic of South Africa, His Excellency Mr M C Ramaphosa". The letter contained 31 questions in respect of the Phala Phala incident. It required answers from him to be provided within 14 days. On 8 June 2022, the Public Protector publicly announced her intention to launch an investigation into the Phala Phala incident in terms of the law. The President submitted his reply to these questions on 22 July 2022.

[16] In the meantime, on 9 June 2022, the President suspended the Public Protector in terms of section 2A(7) of the Public Protector Act[16] and the Deputy Public Protector took over the functions of the Office of the Public Protector. On the next day, the High Court dismissed Part A of the Public Protector's application (Part A judgment).[17] As a result of the President's decision to suspend her, the Public Protector filed a notice to amend Part B of the original application. She now sought an order declaring the decision to suspend her irrational, unconstitutional and invalid. She also sought an order declaring all the decisions taken by the Section 194 Committee from 2 February 2022 null and void. Lastly, she sought an order declaring the implementation of the old version of rule 129AD(3) by the Section 194 Committee, without its amendment by the National Assembly in accordance with this Court's judgment in *Speaker*, unconstitutional. The High Court granted the amendment, which was unopposed.

[17] The issues before the High Court in relation to Part B were whether—

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[15] 82 of 1998.

[16] 23 of 1994.

[17] *Public Protector of SA v Speaker of the National Assembly* [2022] ZAWCHC 117.

(a) the letter of 10 March 2022 written by the Speaker to the President was unconstitutional;

(b) the enquiry of the Section 194 Committee and its activities conducted from 22 February 2022 were permissible; and

(c) the impugned conduct of the President of suspending the Public Protector ought to be declared irrational or inconsistent with the Constitution in terms of section 172(1)(a) of the Constitution.

The Speaker's letter of 10 March 2022

[18] The Public Protector argued that the Speaker's decision or conduct to write the letter of 10 March 2022 to the President constituted illegal conduct or an illegal decision. According to the Public Protector, this process was intended to trigger the suspension process and was based on an incorrect interpretation of section 194(3)(a) of the Constitution. The Public Protector further argued that the Speaker was not authorised by any empowering legislation to write the letter. She then referenced an investigation by her office of the President concerning the private use of an official aeroplane trip to Zimbabwe in September 2020 in which the Speaker, in her then capacity as the Minister of Defence and Military Veterans, was implicated and ultimately sanctioned. The suggestion was that in writing the letter, the Speaker was not acting in good faith and was driven by a mala fide intention to unlawfully trigger the process of the Public Protector's suspension.

[19] In her reply, the Speaker explained that in sending the letter to the President she was merely informing him of the factual developments within the National Assembly and, in particular, the Section 194 Committee. She stated that she wrote the letter in the context of the cooperative governance obligation imposed upon her by section 41(1)(h)(iii) of the Constitution,[18] and in the light of the precedent set by her predecessor who informed the President of the commencement of the enquiry of the

[18] In terms of section 41(1)(h)(iii) of the Constitution all spheres of government and all organs of state within each sphere "must . . . co-operate with one another in mutual trust and good faith by . . . informing one another of, and consulting one another on, matters of common interest".

Section 194 Committee, which was later deferred pending the outcome of the judgment in *Speaker*.

[20] The High Court rejected the Public Protector's argument. It endorsed the Speaker's reliance on section 41(1)(h)(ii) of the Constitution and held that the proceedings envisaged in section 194 of the Constitution are a matter of common interest between the Legislature and the Executive. Thus, so reasoned the High Court, the Speaker, as a representative and leader of the National Assembly, is obliged to inform the President when the section 194 proceedings begin and was, in this case, obliged to inform the President of the decision of the Section 194 Committee to resume its proceedings, in line with what the previous Speaker did in similar circumstances.

[21] The Court dismissed the imputation that the letter was intended to trigger the Public Protector's suspension and said that it did no more than convey a correct factual position, namely the decision of the Section 194 Committee to continue with its enquiry. Regarding the Speaker's involvement in the saga of the private use of an official aeroplane, the Court held that this did not detract from the obligations placed on her by section 41(1)(h)(iii) of the Constitution and the fact that what she conveyed to the President was correct. She remained constitutionally obliged to inform the President of developments within the Section 194 Committee. There was, therefore, no basis for an order declaring the Speaker's conduct unlawful, so held the Court.

The impugned conduct and decisions of the Section 194 Committee

[22] The Public Protector submitted that the Committee's decision and conduct in pressing ahead with the enquiry breached rule 89 of the Rules which provides that "[n]o member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending".

[23] According to the Public Protector, properly interpreted, the *sub judice* rule should operate to render the current activities of the Section 194 Committee strictly

prohibited by rule 89. This argument was made in light of the Public Protector's rescission application in *Speaker*, which was pending in this Court.[19]

[24] The High Court found no merit in this submission. In its view, the Section 194 Committee would not be reflecting on the substantive strengths and weaknesses of the Public Protector's rescission application or the challenge to the constitutionality of the Rules. Instead, the Committee would be considering whether the Public Protector committed misconduct or is incompetent for any of the reasons alleged in the motion for her removal. The Court reiterated that the *sub judice* rule does not preclude members of the National Assembly from carrying out their oversight functions and holding Chapter 9 institutions accountable.[20]

[25] The Court then considered whether the proceedings of the Section 194 Committee were vitiated by the failure of the National Assembly to amend rule 129AD(3) as enjoined by the order of this Court in *Speaker*. On this ground, the Public Protector submitted that, despite this Court's amendment of rule 129AD(3) of the Rules, so as to cure its constitutional defect and make provision for full participatory legal representation during removal proceedings, the rule still had to be amended by the National Assembly following the order of this Court. This submission was also dismissed by the High Court, which held that there was no need for the National Assembly to amend the rule because this Court had already made the necessary amendment.

[26] The High Court also gave short shrift to the Public Protector's argument that the proceedings of the Section 194 Committee were vitiated by the unilateral determination by its Chairperson of the 30-day period she was afforded to respond to the allegations

[19] Judgment in the rescission application was delivered a day after the Speaker had written to the President, on 11 March 2022.

[20] It highlighted that this was an issue it had already decided twice in its judgments in *Public Protector v Speaker of the National Assembly* 2020 (12) BCLR (WCC) at para 18 and in the judgment dealing with Part A of the application which was refused.

against her, and the Chairperson's failure to accede to her request for an extension of time within which to respond to the charges against her.

[27] The Court pointed out that the section 194 enquiry was in progress when the application was heard and it was thus open to the Public Protector to place before the Court evidence of the prejudice she suffered as a result of the unilateral determination of the 30-day period and the refusal to extend it, which she had not done. There was no evidence on record to support a finding that the enquiry was vitiated by unfairness and the Public Protector had, in any event, been given an extension of two weeks.

The impugned conduct and decisions of the President

[28] The Public Protector relied on five grounds to attack the President's decision to suspend her, namely that—

(a) the President took the decision prematurely and the decision was ultra vires because the proceedings envisaged in section 194(3)(a) of the Constitution had not commenced by 17 March 2022 (when the President invited her to give reasons why he should not suspend her) or by 9 June 2022 (when the President suspended her) or at all;

(b) an agreement concluded by her counsel and the President's counsel precluded the President from exercising the power to suspend her when he did;

(c) the President committed contempt of court and breached section 165 of the Constitution when he suspended her whilst judgment was still pending in respect of Part A of the application;

(d) the President breached section 96 of the Constitution by suspending her; and

(e) a conflict of interest arising from six investigations of the President by her precluded the President from acting personally in exercising the suspension powers.

[29] Only ground (e) found favour with the High Court – namely that there was bias or a reasonable apprehension of bias on the part of the President, which disqualified him from personally exercising the power to suspend her. This claim was based on various complaints the Public Protector had received or was investigating against the President. The complaints included the: (a) BOSASA and CR17 investigations;[21] (b) investigation into allegations of judicial capture made by the Anti-Poverty Forum;[22] (c) complaint lodged by Mr Zungula, requesting an investigation into whether the President breached the provisions of the Executive Members Ethics Act by undertaking remunerative work in contravention of section 96(2)(a); and (d) investigation into the use of an official aeroplane on a private trip to Zimbabwe.

[30] The Court confined its assessment to events that occurred after the hearing of Part A of the Public Protector's application. It did so to avoid impermissibly sitting as a court of appeal, reasoning that the Full Court that dealt with Part A of the application had already found that the evidence presented by the Public Protector failed to establish bias or a reasonable apprehension of bias on the part of the President.

[31] Of relevance for present purposes, which was considered by the High Court, is the Phala Phala incident which was investigated to establish whether the President breached the Executive Members Ethics Act[23] by undertaking remunerative work in contravention of section 96(2) of the Constitution.[24]

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[21] This investigation concerned a violation of the Executive Ethics Code through an improper relationship between the President and African Global Operations, formerly known as BOSASA. One of the key findings in the investigation report, which was released on 19 July 2019, was that the President had breached his duties under the Code by failing to disclose donations that had been made to an internal party-political campaign which supported his election as President of the African National Congress, commonly known as the CR17 campaign. See also *AmaBhungane* above n 14 at para 4.

[22] The concept of judicial capture can be understood as the antithesis of judicial independence. In a broad sense, it describes a situation where the institution of the judiciary has lost its independence. In a narrower sense, it refers to a situation where individual judges have fallen under the control of private interests, in violation of section 165 of the Constitution.

[23] 82 of 1998.

[24] Section 96(2) states that:

[32] In determining the applicable test for bias or a reasonable apprehension of bias by a member of the Executive, the Full Court in the Part B judgment expressed doubt as to whether the double reasonableness test is, as held by the Full Court in the Part A judgment, applicable to a member of the Executive.[25] It assumed, without deciding, that the principles of recusal that govern judges are the applicable standard. Applying this standard, the Court found that there were a number of reasons why the President would reasonably be perceived to be unable to bring an impartial mind to bear when considering whether to suspend the Public Protector.

[33] The High Court took into account that the Public Protector was previously found by this Court to have not had an open and enquiring mind when investigating the President and that she was unduly suspicious of him. The President had to contend with responding, on fairly short notice, to the expansive 31 questions on an incident which occurred two years previously. Suspending the Public Protector would, so the Full Court reasoned, be a way of delaying the investigation into the Phala Phala complaint. The President, in the Full Court's view, might well have concluded that "he was better off with any person but [Ms Mkhwebane]."[26]

[34] The Court further found the chain of events leading to the suspension significant. The particular facts in the Court's view were that on 7 June 2022, the Public Protector

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> "Members of the Cabinet and Deputy Ministers may not—
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> (a) undertake any other paid work;
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> (b) 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; or
>
> (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

[25] As is apparent from paragraph 100 of the Part A judgment, that Court understood, by double reasonableness, that a reasonable apprehension of bias has two objective elements:

> "(a) What a reasonable, informed and right-minded observer would conclude, after having obtained all the required information and having thought the matter through and, (b) whether such a reasonable, objective and informed person would on the facts reasonably apprehend that an impartial mind would not bear on the adjudication of the case."

[26] Part B judgment above n 6 at para 154.

informed the President that she was investigating him, gave him 14 days to answer the 31 questions listed in her letter and, on 8 June 2022, announced this to the public. This was followed by the President's decision on 9 June 2022 to suspend her. And the Part A judgment was delivered on 10 June 2022.

[35] The Court's evaluation of these events led it to the following conclusion:

> "On these objective facts, it is reasonable to form the perception that the suspension of the [Public Protector] was triggered by [her] decision . . . to institute an investigation against the President. There was no other plausible or logical explanation for the premature suspension of the [Public Protector] on the eve of a judgment meant to determine the very lawfulness of the suspension.
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> [T]he hurried nature of the suspension of the [Public Protector] in the circumstances, notwithstanding that a judgment 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 [Public Protector]."[27]

[36] Accordingly, as the Full Court saw it, there was an objectively reasonable apprehension of bias which prevented the President from exercising his powers under section 194(3)(a) of the Constitution. This bias also meant that the President acted contrary to section 96(2)(b) of the Constitution in terms of which 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.

[37] The Court found that, from the questions posed by the Public Protector to the President in respect of the Phala Phala investigation, it appeared that there was a risk that, in suspending the Public Protector, the President acted in a manner which exposed

[27] Id at paras 155 and 157.

him to a situation involving the risk of a conflict between his official responsibilities and private interests. The Court found it reasonable to assume that the investigation would relate to the President's private interests, given the nature of the allegations made against him regarding the Phala Phala incident which involved monies he earned in his private capacity.

[38] The High Court set aside the Public Protector's suspension prospectively, so that decisions taken in the interim by the Deputy Public Protector would not be invalidated, and, in relevant part, made the following order:

> "187.5 The decision of the President to suspend the Public Protector is declared invalid.
> 187.6 The suspension is set aside effectively from the date of the order.
> 187.7 Each party is to pay their own costs."

Section 18 application

[39] The DA took the view that the judgment was wrong and that the High Court ought to have dismissed the challenge to the President's decision to suspend the Public Protector. Furthermore, paragraphs 187.5 and 187.6 of the High Court judgment were ineffective in the absence of confirmation by this Court in terms of sections 167(5) and 172(2) of the Constitution, because the two paragraphs are orders declaring that "conduct of the President" is unconstitutional and unlawful. The DA noted an appeal in terms of section 172(2)(d) of the Constitution, section 15(2)(b) of the Superior Courts Act and rule 16 of the Rules of this Court. Alternatively, as a matter of caution, it applied for leave to appeal directly to this Court in terms of rule 19(2). The Public Protector disagreed with the DA and announced that she would resume office with immediate effect.

[40] The Public Protector then brought an application in the High Court, on an extremely urgent basis in terms of section 18(1) and (3)[28] of the Superior Courts Act, to

[28] Section 18(1) and (3) provides:

render the Part B judgment operational and executable pending any appeal or application for leave to appeal delivered in respect thereof.

[41] The Public Protector argued that the Part B order was not made in terms of section 172(2)(a) of the Constitution and was thus not subject to confirmation by this Court. According to her, the order was executable in the interim, provided a successful application was made in terms of section 18(1) and (3) of the Superior Courts Act. She contended that the relevant parts of the order – the declaration of invalidity and the setting aside of her suspension – were two self-standing orders and should be interpreted separately. In her submission, it is only "conduct" and not "decisions" of the President that must be referred to this Court for confirmation in terms of sections 172(2)(a) and 167(5) of the Constitution. The President's decision to suspend her did not constitute "conduct" of the President which, if declared invalid, would require confirmation by this Court. The order in paragraph 187.5 refers to the President's "decision" and not his "conduct" and does not fall to be confirmed by this Court. She argued that the President's impugned decision was contested on the basis of the common law ground of bias or reasonable apprehension of bias, and separately there was reliance on a constitutional ground of a conflict of interest in terms of section 96(2)(b) of the Constitution.

[42] The Public Protector further argued that even if section 172(2)(a) of the Constitution applied to the part of the order declaring the President's decision invalid, it did not follow that section 18 of the Superior Courts Act does not apply. This was because section 18 applies to any decision that is the subject of an application for

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(1) Subject to subsections (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, is suspended pending the decision of the application or appeal.

(2) . . .

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

leave to appeal. Moreover, if the order must still be confirmed by this Court that means it is interim in nature and not final in effect. Therefore, it should be dealt with as an interlocutory order under section 18(2) of the Superior Courts Act. The Public Protector persisted with these arguments in this Court.

[43] The Full Court (the same panel that decided the Part B review) referred to *Pharmaceutical Manufacturers Association,*[29] in which this Court held that the use of the words "any conduct" of the President shows that section 172(2)(a) is to be given a wide meaning. The Court also cited *Von Abo*[30] in which this Court held that sections 167(5) and 172(2)(a) of the Constitution serve separate, but complementary purposes: section 172(2)(a) confers jurisdiction on the Supreme Court of Appeal, aHigh Court or a court of similar status, subject to this Court's oversight, to make orders concerning the constitutional validity of the President's conduct (and Acts of Parliament or provincial Acts), whilst section 167(5) delineates the power of this Court in relation to the same class of orders of constitutional invalidity made by the High Court or the Supreme Court of Appeal. Accordingly, this Court makes the final decision on whether the conduct of the President is unconstitutional and no order to this effect has any force until this Court has pronounced on the issue. Therefore, a High Court order declaring the conduct of the President inconsistent with the Constitution must be confirmed by this Court before it has any effect.

[44] The Court found that the President's decision to suspend the Public Protector amounted to "conduct of the President" under sections 172(2)(a) and 167(5). It did not accept the distinction sought to be drawn by the Public Protector between a "decision" and "conduct" and found no merit in her argument that "conduct" had to be confirmed by this Court, but not "decisions". According to the Full Court, the High Court, having declared the President's conduct inconsistent with the Constitution, then made a just

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[29] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 56.

[30] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 31.

and equitable order in terms of section 172(1)(b). Thus, the order of the High Court was to be interpreted as a composite one; the relevant orders were not self-standing and did not exist separately and independently of each other as contended by the Public Protector.

[45] Regarding the application of section 18 of the Superior Courts Act to the Part B order, the Full Court held that section 18 contemplates a binding decision. A decision that is subject to confirmation by this Court has no force. Thus, the order of the High Court had no independent existence but was instead conditional upon confirmation by this Court. On this basis, the Court found that section 18 did not apply to the application before it. In the result, the application was dismissed.

In this Court

Submissions in the appeal against paragraphs 187.5 to 187.7 of the Part B judgment

DA submissions

[46] The DA submits that on the facts of the matter suspension was the only rational decision for the President to take. The President would not gain anything from suspending the Public Protector, because the investigation into his conduct at Phala Phala would be continued by the Acting Public Protector regardless and her bias against the President is no evidence that he would be biased against her. The suspension was necessary in the circumstances to protect the integrity of the Office of the Public Protector and the effectiveness of the section 194 process while an investigation into her removal was underway, to allow the Public Protector to defend herself and to prevent interference in the enquiry. The DA submits that the President's decision to suspend the Public Protector was a necessary precaution and is not punitive as it is a suspension with full pay. Its timing is no evidence of bias and fits perfectly with the President taking the decision in the ordinary course, as he testified he did.

[47] As to the standard for apprehending bias, the DA submits that the ordinary test for bias or a reasonable apprehension of bias applies. Furthermore, the Public Protector

never challenged the decision to suspend her on substantive grounds or irrationality, and even her representations to the President focused on procedural obstacles.

[48] On remedy, the DA submits that if this Court confirms the Part B order, the appropriate remedy is to suspend the order of invalidity for 30 days so as to allow the Deputy President to take a decision in terms of section 90(1)(a) of the Constitution. The Court should also ensure that the declaration does not affect the validity of decisions taken by the Acting Public Protector during the Public Protector's suspension.

[49] Regarding costs, the DA asks that, if the appeal succeeds, the Public Protector be ordered to pay the costs in her personal capacity. It submits that this is warranted because the Public Protector's litigation was never to further the interest of the Office of the Public Protector, but her own. But the DA does accept that it was reasonable for her to defend the Part B judgment and thus does not seek costs on a punitive scale.

President's submissions

[50] The President's submissions are, for the most part, very similar to those of the DA and – to that extent – do not bear repeating. However, the following submissions must be noted.

[51] Regarding the alleged conflict of interest in breach of section 96(2)(b), the President submits that the High Court erred in its finding that because the Public Protector had started an investigation against the President on 7 June 2022, he risked a conflict of interest in making the decision whether to suspend her, and was therefore precluded from doing so. The President had already taken the first steps towards a possible suspension of the Public Protector by way of his letter dated 17 March 2022, more than two months before the Public Protector initiated her Phala Phala investigation.

[52] The President argues that the exercise of official responsibilities while having private interests is not prohibited. Further, a risk of a conflict of interest does not mean

that the conflict has materialised, and section 96(2)(b) deals with real risks, not hypothetical risks. Thus, there could only be a real risk of a conflict of interest if it was shown that the President would benefit his private interests if he exercised his public responsibility in a particular way. No such evidence had been shown, it is argued. Furthermore, the Acting Public Protector, who filed an affidavit, indisputably established that there had been no delay in the investigation and that its quality would not be compromised. In the absence of a real risk of a conflict of interest, section 96(2)(b) was not triggered, so goes the argument.

[53] Regarding the issue of bias, the President submits that it raises the questions whether the prohibition against bias in the Promotion of Administrative Justice Act[31] (PAJA) forms part of the doctrine of legality in executive action, where bias is alleged in respect of executive action; if it does, the test to be applied, where bias is alleged in respect of executive action such as in this case; and whether, on the evidence, bias has been demonstrated.

[54] The President submits that PAJA does not apply because the decision of a President to suspend a Public Protector does not constitute administrative action. The doctrine of legality, however, applies to the exercise of the President's power to suspend. But if bias forms part of the doctrine of legality in the present context, it is a very attenuated part. He argues that it is not necessary to debate the question of the test of "double reasonableness" and that it is sufficient to find that the test for an apprehension of bias is whether it is reasonable. The President cannot shirk his constitutional obligations by passing the task onto someone else on the basis of discomfort or speculation.

[55] The evidence demonstrates neither actual bias nor a reasonable apprehension of bias, continue the submissions. And like the DA, the President also submits that his decision to suspend must be viewed upon a consideration of the timeline of events in

[31] 3 of 2000.

this matter. He points out that the history of the matter goes back to 2019 when the DA submitted a request to Parliament for the removal of the Public Protector from office. Following numerous events, on 17 March 2022, he invited the Public Protector to make representations regarding whether or not he should suspend her. After giving her several extensions, she finally submitted her representations on 26 May 2022. He then took two weeks to consider the matter and consequently decided, on 9 June 2022, to suspend her. Thus, it was incorrect for the High Court to make a finding that his decision to suspend the Public Protector was made hurriedly or that it was prompted by the Phala Phala investigation. This was particularly so when the Acting Public Protector was obligated to continue with that investigation. The precautionary suspension of the Public Protector would achieve nothing at all to the benefit of the President.

Public Protector's submissions

[56] The Public Protector's main contention is that there is no valid section 172(2)(d) application before this Court. Accordingly, this Court cannot reach the grounds of the direct appeal advanced by the DA and the President. The Public Protector submits that paragraph 187.5[32] of the High Court's order does not relate to the conduct of the President as contemplated in section 172(2)(a). Thus, no confirmation is required by this Court.[33] Furthermore, even if paragraph 187.5 of the order of the High Court fell within the ambit of section 172(2)(a), it is a stand-alone order issued in terms of section 172(1)(b). This part of the order was issued, not to deal with a constitutional issue, but to address the violation of the common law rule against bias known as the *nemo iudex in sua causa* (no one should be a judge in their own case).

[57] The Public Protector submits that not every action or conduct attributed to the President amounts to "conduct of the President" within the ambit of section 172(2)(a).

[32] In this part of the Part B judgment, above n 6, the High Court declared the President's decision to suspend the Public Protector invalid.

[33] Id at para 12.

Declarations of invalidity in respect of conduct falling outside the ambit of the section do not require this Court's confirmation.[34] According to the Public Protector, neither the breach of the rule against bias nor of section 96(2) amounts to conduct within the ambit of section 172(2)(a).[35]

[58] The Public Protector submits that conduct of the President may be categorised into three separate classes, namely: (a) conduct falling within the ambit of section 172(1) (which does not require confirmation); (b) conduct falling within the exclusive jurisdiction of this Court in terms of section 167(4)(e); and (c) conduct of the President which falls within the concurrent jurisdiction of the High Court and this Court in terms of section 172(2)(a) (conduct that requires confirmation). The Public Protector contends that, in the present case, the President's conduct falls within the section 172(1) category. Ultimately, so the argument goes, the orders of the High Court are section 172(1) orders and not section 172(2) orders. This is so because: they do not relate to "conduct" but to a suspension "decision"; they flow from findings of common law breaches and not any orders of constitutional validity; even if it is conduct of the President, it is not of the class which is confirmable, but of a class which falls within the scope of section 172(1); and, in any event, no automatic appeals are competent in the absence of valid confirmation proceedings, and qualifying appellants as defined in section 172(2)(d).

[59] Regarding the alternative rule 19 applications for leave to appeal, the Public Protector contends that the rule's peremptory provisions have not been met. The first charge is that the DA did not indicate whether it had applied or intended to apply for leave or special leave to appeal to any other court so as to enable this Court to assess whether it is in the interests of justice to grant leave when it is also being sought elsewhere. She further contends for the dismissal of the applications on the merits on the basis that they have no prospects of success.

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[34] Id at para 15.

[35] Id at paras 17-9.

[60] The Public Protector agrees with the applicants' submission that bias does not form part of the principle of legality and argues that this reinforces her point that the orders were based on breaches of the common law rule against bias and not on the principle of legality. In accordance with the supposed rule of avoidance,[36] she argues that a finding that the President's conduct was tainted by actual bias or a reasonable apprehension of bias dispenses with the need to consider whether the risk of conflict of interest as provided in section 96(2)(b) has been established. She argues that the High Court's determination of the question was thus an obiter dictum from which the orders could not flow.

[61] The Public Protector dismisses the "timeline" ground of appeal in respect of bias as wrong on the basis that bias can occur at any point of a multi-stage decision-making process to which fairness must be applied. She then challenges each of the applicants' grounds of appeal as to why the evidence does not support the High Court's findings in respect of a conflict of interest and bias.

[62] In response to the President's submission that her bias against him referenced by the High Court cannot be the basis for her perception of bias, she defends the High Court's finding. She argues that the hostility between her and the President is a sufficient basis to ground a perception of bias; not reactive bias, but the President's inherent bias as the decision-maker.

[63] She then turns to the President's attacks on the High Court's findings that: (a) her suspension would delay the Phala Phala investigation; (b) the expansive nature of the questions she had posed to him, to which he had to respond in a short space of time, provided an inducement for him to remove her from her office; and (c) "in response" to

[36] I say "supposed" because changes to this Court's jurisdiction have resulted in the abandonment of its earlier approach of avoidance of constitutional issues and the adoption of the opposite view, namely that "constitutional approaches to rights determination must generally enjoy primacy": *Jordaan v City of Tshwane Metropolitan Municipality; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited; Ekurhuleni Metropolitan Municipality v Livanos* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) at paras 6-8.

the Public Protector's questions and her public announcement of the Phala Phala investigation, he decided to suspend her. These attacks, she contends, are based on a wrong premise. She argues that these findings and her corresponding submissions were not based on the suggestion that her replacement, the Deputy Public Protector, would compromise the investigation but rather on the President's impermissible forum-shopping bid to avoid being investigated by her.

[64] She also argues that, in implementing the suspension, the President reneged on his undertaking, supposedly made in a WhatsApp exchange between their respective senior counsel, to indicate to her whether or not he would give her an undertaking not to suspend her before delivery of the Part A judgment. She contends that the President's conduct entitles the Court to infer that he had an ulterior or improper motive by not honouring his undertaking.

[65] She rejects the President's attack on the High Court's finding that there was no plausible or logical explanation other than an ulterior motive for her premature suspension on the eve of a judgment meant to determine the very lawfulness of the suspension and that the President knew that the judgment was pending. She argues that the President's denial falls flat, as he conceded that he was aware that the pending judgment, which would be expedited, would have far-reaching implications. Indeed, the President and the DA addressed this issue during argument in the High Court and in the present proceedings. She argues that the President, by pre-empting the outcome of the Part A judgment, was guilty of constructive contempt. That is, improper and unlawful conduct which is inconsistent with his other legal and constitutional obligations and is prohibited by section 96(2)(b).

[66] As to the DA's appeal grounds, the Public Protector argues that the suspension has no merit and denies the assertion that she did not challenge the reasons for the suspension. She contends that she wrote a long letter in response to the President's invitation in which she raised substantive and procedural objections to the suspension. Even if she had remained supine, so she argues, that would not validate the ultra vires

actions of a disqualified decision-maker acting without authority. She contends that it is irrelevant that the President stood to gain nothing from the suspension, as he was acting out of vengeance and in pursuit of retaliation in breach of the law.

[67] She insists that her suspension is prima facie punitive in light of the reputational consequences. She challenges the DA's reliance on *Long*[37] on the basis that the case only applies in the labour law context and deals only with the issue of a hearing and not the other substantive requirements for a suspension. She disputes the test for a breach of section 96(2)(b) posited by the DA and argues that the provisions set a lower threshold than the ordinary standard of bias, because it targets a particular category of persons wielding executive power. She argues that a similar test for section 96(2)(b) and common law bias makes no sense, given that the framers of the Constitution made a special provision for conflicts of interest and the risks thereof, which apply only to members of the Cabinet and Deputy Ministers. She disputes the contention that a breach of section 96(2)(b) does not result in the invalidity of the accompanying decision or conduct it taints, arguing that the provisions impose extra duties upon members of the Executive so as to protect society and mitigate their overwhelming power which is particularly susceptible to abuse and corruption.

[68] The Public Protector seeks a dismissal or striking from the roll of the automatic appeals, a dismissal of the applications for leave to appeal or resultant appeals and personal costs on the scale as between attorney and client.

ATM, PAC and UDM's submissions

[69] These political parties support the Public Protector, in their words, to ensure "that effect is given properly to the values of the Constitution in seeking to hold the Public Protector accountable". They stand by their submissions in the High Court and argue that the Full Court declared the suspension invalid under section 172(1)(a) and set it aside under section 172(1)(b); and that the orders are self-standing and must be

[37] *Long v South African Breweries (Pty) Ltd* [2019] ZACC 7; (2019) 40 ILJ 965 (CC); 2019 (5) BCLR 609 (CC).

interpreted disjunctively. They argue that the order in paragraph 187.5 declaring the President's decision to suspend the Public Protector invalid is subject to confirmation by this Court. They contend, however, that the order in paragraph 187.6 setting aside the suspension was granted as a just and equitable order in terms of section 172(1)(b) and is not subject to confirmation because it was granted to mitigate the effects of an order of constitutional invalidity granted under section 172(1)(a) pending confirmation of that order by this Court.

Submissions in the conditional cross-appeal

Public Protector's submissions

[70] The Public Protector accepts that if the DA and President's appeals fail and the Full Court decision accordingly stands, or the declaration of invalidity is confirmed, the cross-appeal will fall away. The cross-appeal is brought on ten grounds grouped into three clusters, as she describes it. The main ground relates to the interpretation of section 194(3)(a) of the Constitution.[38] She argues that the President acted prematurely, ultra vires and in the absence of a jurisdictional pre-requisite for a valid suspension, namely that the suspension may occur only "after the start of the proceedings of a committee of the National Assembly for the removal of that person". She argues that the proceedings in question had not started by 17 March 2022 (when the President set the suspension process in motion) nor by 9 June 2022 (when the suspension letter was issued). The proceedings started only on 11 July 2022, when the Section 194 Committee first began to hear evidence. She criticises the Full Court for finding that the proceedings "started" when the Committee notified her of the charges. In any event, she contends that the Full Court failed to conduct a comparative analysis between section 194 and section 177 of the Constitution, which deals with the removal of a Judge.

[38] Section 194(3)(a) reads:

> "[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."

[71] The Public Protector then submits that what she describes as the "Removal Committee", namely the committee referred to in section 194(3)(a), is not the same as what she calls the "Veracity Committee", namely the committee envisaged in section 194(1)(b),[39] which is tasked only with making a finding as to the veracity of the charges. She cites the *EFF*[40] judgment of this Court, among others, as support for this submission, which, she argues, is evident from the fact that the words "for the removal of that person" are not used to describe the Section 194(1)(b) Committee and that the section refers to "a" committee rather than "the" committee. The removal stage therefore starts only after the determination of guilt, which has not yet occurred on a proper reading of the above provisions.

[72] The next cluster of grounds concerns the *sub judice* rule and the supposed non-amendment of National Assembly rule 129AD(3) by the National Assembly in line with this Court's judgment in *Speaker*. The Public Protector argues that the Full Court erred in gauging the applicability of the *sub judice* rule only against the alleged "second rescission" application when it was also invoked in relation the Part B application. She argues that as a result of this error a significant part of the pleaded argument was not adjudicated, including the question whether it was lawful for the Section 194(1) Committee to start when it did. She also argues that the National Assembly should have amended the rules to align with the judgment and orders of this Court in *Speaker* and that, because of this omission, the section 194(1) enquiry is being conducted under the auspices of the original unconstitutional rules.

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[39] Section 194(1) provides:

> "The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—
>
> (a) the ground of misconduct, incapacity or incompetence;
>
> (b) a finding to that effect by a committee of the National assembly; and
>
> (c) the adoption by the Assembly of a resolution calling for that person's removal from office."

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

[73] In the last cluster of grounds, the Public Protector contends that: (a) the President breached an undertaking made by his senior counsel on his behalf not to suspend her before indicating whether or not he was amenable to giving her time to mount a legal challenge; (b) the conduct of the President in deliberately or recklessly pre-empting a "looming" judgment was in breach of section 165(3) and (4) of the Constitution, irrespective of whether it amounted to contempt of court; and (c) the Part B Full Court erred in considering itself bound by the interim findings of the Part A Full Court in respect of the alleged BOSASA conflict of interest.

[74] With regard to (a), it is argued that the Full Court misinterpreted the clear WhatsApp exchange, which embodied the agreement between the parties. As to (b), it is argued that the Full Court erred in failing to distinguish between section 165 of the Constitution and common law contempt of court, which are not synonymous. It is possible, the Public Protector submits, for conduct which does not satisfy all the elements of the criminal offence of common law contempt of court, which governs the consequences of undermining the authority of the courts, to still amount to a breach of section 165(3) and (4) of the Constitution, which reinforces the supremacy of the Constitution. The result of the Full Court's error is that section 165 was not adjudicated on its own merits as a stand-alone ground of unlawfulness. Regarding (c), it is argued that the President correctly stated under oath in the BOSASA incident that it would have been in breach of his duties under section 96(2)(b) of the Constitution and potentially undermine the integrity of his office for him to play any role in the suspension of the Public Protector. But in the Phala Phala matter he inexplicably felt entitled to suspend her without delegating the decision to another member of the Cabinet who was not tainted by such conflict. This conduct, she argues, goes to intention, *dolus eventualis* and improper motives.

DA's submissions

[75] The DA opposes the cross-appeal. It submits that the *sub judice* rule does not prevent the Section 194 Committee from proceeding with its work, as contended by the Public Protector. It argues that the Section 194 Committee did not breach rule 89 of the

Rules. If the Public Protector's submission were correct, any person subject to section 194 proceedings would be able to halt the process by bringing litigation related to the process or the underlying allegations.

[76] The DA argues that there is no need for rule 129AD(3) to be amended following this Court's judgment in *Speaker* in which this Court used the tool of severance to cure the invalidity, thus altering the content of rule 129AD(3).[41] Therefore, the section 194 enquiry is not proceeding under an unconstitutional rule.

[77] The DA also disputes the Public Protector's argument that the President's decision to suspend her was premature. It argues that, in determining when the proceedings started, one must ask when the public will reasonably be concerned that allowing an incumbent to remain in office could be inconsistent with the integrity of the Office. It then submits that when the National Assembly has determined that the proceedings are serious enough to be referred to a committee for investigation, and the matter is referred to a committee, the proceedings have started. According to the DA, here, section 194(3)(a) was triggered on 16 March 2021 when, following the report of the Independent Panel, the National Assembly referred the DA's complaint to a committee as contemplated in section 194(3)(a) of the Constitution.

[78] The DA challenges the Public Protector's argument that section 194 of the Constitution contemplates two committees. It criticises the argument for inconsistency with the text and purpose of section 194 and highlights the absurdity of an argument which postulates that a Public Protector may be removed following a finding of only one committee but that there must be a second committee to trigger suspension. The DA also contends that the argument violates the principle of subsidiarity. This is so, it argues, because Part 4 of the Rules of the national Assembly is the law that gives effect to section 194 and envisages that one committee determines whether the Public Protector is incompetent, incapacitated or guilty of misconduct and

[41] Id at paras 14-8.

whether to recommend removal. Establishing another committee to consider the work of the first committee before the National Assembly deliberates upon and votes on its report would be inconsistent with the Rules of the National Assembly. Since the Public Protector did not challenge the Rules, they must stand as valid, so goes the argument.

President's submissions

[79] The President also opposes the conditional cross-appeal and submits that it is not in the interests of justice to allow it as it has no prospects of success. He does not deal with the ground of appeal relating to the alleged infringement of the *sub judice* rule as it does not implicate him. He argues that all the other grounds have no merit. He challenges the contention that the Full Court erroneously considered itself bound by distinguishable judgments and failed to apply binding decisions such as *EFF*.[42]

[80] The President further challenges the ground of illegality based on the National Assembly's failure to amend its current Rules to reflect the order of this Court in *Speaker*. He argues that: no relief was sought by the Public Protector in respect of the Rules; this Court did not impose an obligation on the National Assembly to amend its rules but instead issued a declaratory order setting out the amended rule; and, as the Full Court observed, the Public Protector has not explained why it was necessary to amend the rule.

[81] The President supports the Full Court's rejection of the Public Protector's "two-committees" argument. He submits that the finding that section 194(3)(a) does not require a separate committee for the determination of culpability or ascertaining the veracity of the alleged grounds for dismissal accords with the text and context of section

[42] Above n 40.

194. He argues that the Public Protector's reliance on decisions such as *EFF* and *Nxumalo*[43] is misplaced as they dealt with different sets of circumstances.

[82] The President refutes the argument that the Section 194 Committee proceedings had not started as envisaged in section 194(3)(a) when he took the decision to suspend the Public Protector. He relies on the finding of the Part A Full Court that the proceedings started when the Section 194 Committee informed the Public Protector of the allegations against her, and invited her to respond within a period of 30 days. Delaying the power to suspend until evidence is heard would, he argues, be inconsistent with the constitutional purpose for which the power is designed. He also challenges this ground on the basis that the Public Protector sought leave to appeal against the judgment of the Part A Full Court on the same issue and argues that this Court cannot entertain it while it is under consideration by another court.

[83] The President contends that the Public Protector impermissibly, in her written submissions, raises a new challenge not made in her affidavits or as a ground of appeal. This new submission is that the suspension decision was invalid because the Section 194 Committee proceedings had not started as of 17 March 2022, when the President initiated the suspension process by inviting the Public Protector to give reasons as to why she should not be suspended. Her case on the papers, which the Full Court rejected, was that the jurisdictional facts in section 194(3)(a) of the Constitution had not been met because the Section 194 Committee's proceedings had not started when the President made his decision on 9 June 2022. The President also argues that this new ground fails on a reading of section 194(3) as to when he may suspend and that the Public Protector's reliance on *Speaker* is misguided as the findings there arose in a different context – the right to legal representation.

[84] The President dismisses the argument concerning the alleged failure of the Full Court to give a proper interpretation to the WhatsApp communication between

[43] *Nxumalo v President of the Republic of South Africa* [2014] ZACC 27; 2014 (12) 1457 (CC); 2014 (12) BCLR 1457 (CC).

senior counsel as resting on inadmissible hearsay. He further points out that the Full Court correctly assessed the messages and that in any event there was no interdict preventing him from taking a decision. He denies committing contempt of court or breaching section 165(3) and (4) of the Constitution in respect of which the Public Protector relied on the same facts. He argues that there was no agreement in place and no order precluding him from taking the decision. Lastly, he submits that the Full Court correctly held that it was bound by the findings of the Part A Full Court and that the Public Protector failed to establish that any of that Court's findings were clearly wrong.

Speaker and Section 194 Committee's submissions

[85] These parties oppose the relief sought by the Public Protector in the cross-appeal to the extent that, if two questions are answered in the Public Protector's favour, that may interfere with or halt the section 194 proceedings. The two questions are whether the enquiry conducted by the Section 194 Committee infringes rule 89 of the Rules of the National Assembly and whether the Section 194 Committee's enquiry is impermissible because the National Assembly has not amended its rule to give effect to the order of this Court in *Speaker*. Like the DA, these parties argue that: (a) the Section 194 Committee has not considered the merits of any of the litigation concerning the Public Protector's impeachment; (b) the *sub judice* rule, understood in conformity with the Constitution, does not preclude members of the National Assembly from carrying out their oversight functions and holding office-bearers of Chapter 9 institutions accountable in terms of section 194 of the Constitution and the related Rules; and (c) there was no need for the National Assembly to amend the rule.

Section 18 appeal

[86] Following the dismissal of the Public Protector's application in the High Court under section 18 of the Superior Courts Act, to put the Part B order into effect pending the appeal in this Court, she filed an urgent application for leave to appeal to the Supreme Court of Appeal against that decision. That application too was dismissed

and she was ordered to pay the costs of the DA and the President personally. She seeks leave from this Court to appeal that decision with the support of the ATM, PAC and UDM.

[87] The parties presented various opposing arguments and the opposing parties each sought a personal costs order against the Public Protector. I do not propose to summarise these arguments[44] as I ultimately find that the application has become moot and that I can conceive of no interests of justice considerations for this Court to entertain it for the reasons set out later in this judgment.

Issues

[88] The core issues to be decided are whether: (a) in suspending the Public Protector, the President acted in breach of section 96(2)(b) of the Constitution; (b) the President's decision to suspend the Public Protector was shown to have been biased, alternatively the Public Protector's apprehension that the President would not bring an open mind in deciding whether to suspend her was reasonable; and (c) if the appeal is successful, whether the Public Protector should pay costs in her personal capacity.

[89] In the cross-appeal they are whether (a) the enquiry being conducted by the Section 194 Committee infringes rule 89 of the Rules; (b) the enquiry is impermissible because the National Assembly has not amended its Rules to give effect to the order of this Court in *Speaker* declaring the proviso to rule 129AD(3) unconstitutional and invalid; (c) the section 194 enquiry had started when the President suspended her; (d) sections 194(1)(b) and 194(3)(a) envisage two committees to make a finding as to the veracity of the charges and the removal of the person concerned, respectively; (e) the High Court failed to give a proper interpretation to the WhatsApp exchange between the parties' counsel concerning whether the President had undertaken not to suspend her before giving her notice so she could mount a legal challenge against the suspension; and (f) the President committed contempt of court by suspending her.

[44] These arguments are, in any event, the same ones that were raised in the High Court and are discussed extensively earlier in the judgment.

Analysis - DA and President's appeals

The rationality of the suspension

[90] The Constitution in section 181 establishes a group of state institutions for the purpose of strengthening constitutional democracy in the country. These institutions are independent and subject only to the Constitution and the law, and must be impartial and exercise their powers and perform their functions without fear, favour or prejudice. One of them is the Office of the Public Protector.[45]

[91] In *Economic Freedom Fighters*, this Court described the institution as follows:

> "The Public Protector is thus one of the most valuable 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. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for the average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.
>
> Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental 'embarrassment' and censure."[46]

[92] However, the power that comes with public office comes with responsibilities, and public office-bearers who occupy positions of high authority must be held

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[45] Section 181 in relevant part provides:

> "(1) The following state institutions strengthen constitutional democracy in the Republic:
>
> (a) The Public Protector."

[46] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 52-3.

accountable in the exercise of their powers.[47] And, as this Court pointed out in *United Democratic Movement*:

> "Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system. This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office-bearers, in all arms of the State, must regularly explain how they have lived up to the promises that inhere in the offices they occupy."[48]

[93] The Constitution has a built-in checks and balances mechanism for a Public Protector who does not live up to the responsibilities that come with her office. In terms of its section 194(1) and (2), she may be removed from office by a two-thirds majority of the National Assembly for misconduct, incapacity or incompetence. And as the process of her removal unfolds, the President is empowered to take steps to ensure that she does not remain in office and exercise the wide powers that inhere in it. Thus, in terms of section 194(3)(a), the President may suspend the Public Protector from office at any time after the start of the proceedings of a committee of the National Assembly for her removal.

[94] These provisions vest the President with the power to impose a precautionary suspension to protect and preserve the office during an enquiry. In deciding whether to suspend, he is required to consider the need to uphold the integrity of the office, the need to prevent interference in the disciplinary enquiry and the need to allow the incumbent to defend themselves.

[95] In *Long*[49] this Court affirmed the principle that where the suspension is precautionary, there is no need to afford the employee an opportunity to make

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[47] *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at paras 7-8.

[48] Id.

[49] Above n 37 at paras 24-5.

representations, as it is not punitive and does not materially prejudice the employee. This Court then held that in determining whether the precautionary suspension is permissible, the fairness of the suspension is determined by assessing whether there is a fair reason for the suspension and whether it prejudices the employee. A suspension for an investigation to take place is a fair reason and where suspension is on full pay, cognisable prejudice will be ameliorated.

[96] The President invoked the provisions of section 194(3)(a) in this matter and suspended the Public Protector pending the conclusion of the section 194 process. The DA and the President argue that her suspension was not a punishment but a necessary precaution in the light of credible allegations of misconduct and incompetence against her and the ongoing process to remove her. Allowing a person who is potentially dishonest and incompetent to continue to exercise the wide powers of the Office of the Public Protector threatens democracy and accountability. The purpose of the suspension was to protect the integrity of the office and the effectiveness of the section 194 process while the allegations of misconduct or incompetence are investigated.

[97] It does appear that the justifications for a precautionary suspension existed in this matter. For a start, this Court has made gravely adverse credibility findings against the Public Protector. In *South African Reserve Bank*, it was held that she had "acted in bad faith and in a grossly unreasonable manner";[50] had "not been candid"[51] and "was not honest" with the courts;[52] had advanced a number of falsehoods in litigation;[53] and that her conduct fell far short of the high standards required of her office.[54] Following this decision, the National Prosecuting Authority publicly announced that it would charge

[50] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 205.

[51] Id at para 216.

[52] Id at para 207.

[53] Id at para 237.

[54] Id.

her with perjury for her conduct. In *President of the Republic of South Africa* [55] this Court said that "[t]he nature and number of errors committed by the Public Protector here call into question her capacity to appreciate what the law requires of her when she investigates complaints".[56] The Court also said that she had failed to display an "open and enquiring mind", made findings that were not supported by the facts and it appeared that she was "unduly suspicious" of the person she was investigating.[57]

[98] Moreover, an independent panel[58] found prima facie evidence of incompetence on her part based on a number of repeated instances, including what it described as grossly overreaching and exceeding the bounds of her powers in terms of the Constitution by unconstitutionally trenching on Parliament's exclusive authority when she directed it to initiate a process to amend the Constitution; incorrect interpretation of the law; failure to take relevant information into account; failure to provide affected persons with a right to be heard; incorrect factual analysis; and sustained lack of knowledge to carry out her duties or ability or skill to perform the duties of the Public Protector effectively and efficiently.

[99] The independent panel also found prima facie evidence of misconduct in the sense of an intentional or grossly negligent failure to meet the standard of behavior expected of a holder of public office in a number of instances, including her insistence on compliance with a subpoena and bullying the targets of a moot investigation despite a court challenge having been instituted. The independent panel concluded that the charges required investigation and could, if established, lead to the removal of the Public Protector.

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[55] *Public Protector v President of the Republic of South Africa* [2021] ZACC 19; 2021 (6) SA 37 (CC); 2021 (9) BCLR 929 (CC) at para 138.

[56] Id.

[57] Id at para 140.

[58] An independent panel chaired by retired Justice Nkabinde, established in terms of section 194 following a motion from Mrs NWA Mazzone, MP to initiate an enquiry in terms of section 194(1) of the Constitution for the removal of Adv Mkhwebane from the office of the Public Protector on grounds of misconduct and/or incompetence. The panel submitted its report on 24 February 2021.

[100] These allegations which are, inter alia, based on the judicial findings of no less than this Court, would undoubtedly cause grave public concern about the integrity of the Office of the Public Protector were the incumbent to remain in office while they are being investigated.

[101] It must be taken into account too that, at the time the President decided upon suspension, the Public Protector was facing a section 194 enquiry which would likely take a long time to conclude, as has indeed proved to be the case. If the Public Protector remained in office for the duration of the section 194 enquiry, she would have had to manage the office she leads whilst simultaneously preparing for and attending the enquiry. Quite obviously, she would not be able to both carry out her duties as Public Protector and defend herself in the enquiry effectively. The suspension therefore allows her to centre her attention on her defence in the enquiry and benefits both her and her office.

[102] The suspension also eliminates the risk of interference in the section 194 enquiry. It is well established that where a high ranking official has access to potential witnesses and documents in the workplace which may be used in a disciplinary enquiry, there is a real risk that they may use their power to influence the witnesses and conceal the documents. In this case, the Section 194 Committee needs to hear evidence from, among others, employees in the Office of the Public Protector, and access documents under the Office's control.

[103] The cumulative effect of all these factors makes clear that a decision to suspend the Public Protector was, on the merits, the only possible rational outcome. At any rate, it cannot be said that the President's decision to suspend her was irrational, even if there were other rational courses open to him. And it is telling that she has not challenged the suspension on substantive grounds, contrary to her protestations that she did. This is not surprising considering that the President's reasons were based mainly on the findings of the independent panel and provided a compelling basis why the suspension

was necessary. She largely relied on the arguments that the President's power to suspend had not yet been triggered and that he was biased or reasonably apprehended to be biased. The substantive reasons which formed part of her representations to the President, which she sought to incorporate in her supplementary founding affidavit on the promise that she would rely on them to argue that the President's decision to suspend her was irrational, were ultimately not used. In any event, they do not appear to have any objective evidence.

[104] The Public Protector stated that her suspension would disrupt the work of her Office, and that the chances of a guilty finding in the section 194 enquiry, and of the DA motion for her removal receiving a two-thirds majority in the unlikely event of such a finding, were remote. Relying on an alleged short message service (SMS) leak of the outcome of her second rescission application in this Court before the order was issued, the Public Protector further contended that her suspension would play into the hands of alleged criminals and sinister forces in civil society and possibly in the judiciary, who seek her illegal suspension and impeachment.

[105] As I have said, none of these reasons seem to be supported by objective evidence. Her lieutenant, the Deputy Public Protector, would stand in for her as Acting Public Protector in her absence in terms of section 2A(7) of the Public Protector Act and in fact has done so quite effectively according to her undisputed affidavit. It is also not possible to predict the outcome of the section 194 proceedings, especially in view of the findings of the independent panel, or the outcome of any vote which may take place in the National Assembly. In the face of the information available to the President, it would not have been proper for him to allow speculation on such matters to influence the suspension decision. There was also no substantiation for the existence of the alleged sinister forces and an investigation by the Chief Justice and, subsequently, by retired President of the Supreme Court of Appeal, Judge Mpati, found no proof to bolster the purported SMS leak.

Does the decision to suspend constitute "conduct" of the President that is subject to confirmation by this Court?

[106] The question to be determined here is whether the President's exercise of the power afforded to him in section 194(3)(a), to suspend the Public Protector from office, constitutes "conduct" as envisaged in sections 167(5) and 172(2)(a) of the Constitution. If it is such conduct, then the declaratory order of the High Court is subject to confirmation by this Court and the DA and the President may appeal to this Court as of right in terms of section 172(2)(d) of the Constitution.

[107] Section 167(5) reads, in relevant part:

> "The Constitutional Court makes the final decision whether . . . conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[108] This section must be read with section 172(2)(a), which provides that "[t]he Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of . . . any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[109] In *Von Abo*,[59] this Court held that these two sections are "two sides of the same coin", serving separate but complementary purposes, mapping out the respective areas of jurisdiction of the Supreme Court of Appeal and the High Court, on the one hand, and of this Court, on the other. This Court further described the provisions as follows:

> "[S]ection 172(2)(a) forms part of a collection of provisions that confer constitutional jurisdiction on the Supreme Court of Appeal and High Courts subject to the express oversight of this Court in relation to orders on the constitutional validity of national

[59] *Von Abo* above n 30.

> and provincial legislation and conduct of the President. On the other hand, section 167(5) delineates the power of this Court in relation to the same class of orders of constitutional invalidity made by the Supreme Court of Appeal and the High Court. This suggests that the 'conduct of the President' envisaged in the two provisions ordinarily bear the same meaning. In other words, if particular conduct of the President is liable to be confirmed under the one provision, ordinarily it should also be so under the other provision. Both provisions serve the vital purpose of ensuring that orders of invalidity directed at the appropriate class of the President's conduct have no force unless confirmed by this Court."[60]

[110] The meaning of "any conduct" of the President was discussed by this Court in *Pharmaceutical Manufacturers*,[61] where it held:

> "The use of the words 'any conduct' of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of state. That purpose would be defeated if an issue concerning the legality of conduct of the President, which raises a constitutional issue of considerable importance, could be characterised as not falling within section 172(2)(a), and thereby removed from the controlling power of this Court under that section."[62]

[111] Not every dispute about the conduct of the President falls within the scope of sections 167(5) and 172(2)(a). For example, there is conduct of the President in the form of a failure to fulfil a constitutional obligation as envisaged in section 167(4)(e), which is within the exclusive jurisdiction of this Court. However, the present does not fall among those exclusions.

[112] This Court has, in a number of varied cases, determined that a decision of the President constituted conduct which required confirmation. One such example is

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[60] Id at para 32.

[61] *Pharmaceuticals Manufacturers* above n 29.

[62] Id at para 56.

DA v President of the RSA,[63] which concerned the President's decision to appoint the National Director of Public Prosecutions in terms of section 179 of the Constitution read with sections 9 and 10 of the National Prosecuting Authority Act.[64] There, the DA successfully sought a declaration in the High Court that the President's decision was inconsistent with the relevant provisions. The declaration was found to be subject to confirmation by this Court. Another example is, *Corruption Watch NPC*,[65] which concerned orders of constitutional invalidity granted by the High Court in respect of a settlement agreement concluded by the President and other persons terminating the tenure of the National Director of Public Prosecutions. The settlement agreement was determined to be conduct of the President which was subject to confirmation by this Court. The Public Protector has not been able to distinguish these analogous cases, which both dealt with decisions that were set aside for constitutional invalidity and were subject to confirmation by this Court within the ambit of sections 167(5) and 172(2)(a).

Conflict of interest

[113] The Public Protector submits that the President was disqualified by section 96(2)(b) of the Constitution from suspending her due to conflicts of interest allegedly arising from various complaints involving serious and impeachable conduct against him, which had been or were still being investigated. According to her, the fact of those investigations disqualified the President from being involved in a decision to suspend her because of the conflict of interest or the risk of a conflict between his official responsibilities and private interests. And the mere risk of a conflict suffices to render his decision unlawful, even if there is no reasonable apprehension of bias.

[114] Section 96(2)(b) of the Constitution provides that members of the Cabinet and Deputy Ministers may not—

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[63] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

[64] 32 of 1998.

[65] *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC).

> "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."

[115] In this regard, the High Court found:

> "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 relates to the President's official responsibilities, namely, a breach of the Executive Members Ethics Act and the 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'."[66]

[116] Without determining the meaning of a risk of a conflict of interest, the Court concluded:

> "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."[67]

[117] The essential elements of a conflict between official responsibilities and private interests are: "(a) official responsibilities; (b) private interests; (c) the risk of a conflict between (a) and (b); and (d) a member's conduct that exposes him to that risk".[68] Applying this to the present matter, the official responsibility at issue here is the exercise

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[66] Part B judgment above n 6 at para 170.

[67] Id at para 171.

[68] *President of the Republic of South Africa* above n 55 at para 66.

of the power of suspension under section 194(3)(a). Based on the contentions by the Public Protector, the private interests would be the President's desire to thwart the investigation by her against him. In the face of the existence of this desire, the prospect of the exercise of the section 194(3)(a) power would give rise to the risk of a conflict between the exercise of the power and the desire. Of these elements, one that I need focus on is whether here there is, indeed, a risk of conflict.

[118] This Court has observed that "[t]o find oneself on the wrong side of section 96, all that needs to be proven is a risk . . . [i]t does not even have to materialise."[69] The Court also usefully attached the adjective "real" to the risk;[70] the risk must be *real.* This means the risk must not be imaginary, flimsy or far-fetched. What then is the standard? At the risk of sounding as if I am importing the test for bias, for the risk to be real, it must – as the DA argued – be of such a nature that it would reasonably be apprehended by a reasonable person. A standard lower than the reasonableness standard would result in the exercise of executive power being hamstrung; even if remote, with no room for apprehension by a reasonable person, the risk would be capable of inhibiting executive action. And a standard requiring more, from the person asserting the risk of a conflict, than the reasonableness standard would not be appropriate because it would unnecessarily shield the executive from the necessary public scrutiny; public scrutiny that helps ensure that members of the Executive do not place private interests above official responsibilities.

[119] Having established the standard, on the facts of this matter is there a basis for holding that the President exposed himself to a situation involving the risk of a conflict between his official responsibilities and private interests? In this regard, I will focus only on whether – employing the above standard – there was exposure to the risk envisaged in section 96(2)(b). If there was not, that is the end of the matter.

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[69] *EFF* above n 40.

[70] Id at para 9.

[120] The Public Protector stated that the Phala Phala investigation had been unduly delayed because of her suspension and that her continued suspension inevitably destabilised and delayed it. But the Acting Public Protector's detailed affidavit about the progress of the investigation, which the Public Protector did not dispute, leaves no doubt that the investigation was anything but delayed by the suspension and in fact progressed well and in accordance with the requirements of the Constitution and the Public Protector Act. Furthermore, the President co-operated with that process.

[121] The only basis on which the High Court found that the President could be biased was that he had suspended the Public Protector shortly after she initiated an investigation into allegations about his conduct at Phala Phala. However, it is necessary to understand that whether the President's decision to suspend the Public Protector was biased depends on the assumption that he stood to gain a benefit from the decision. The mere fact that the Public Protector is investigating him cannot create a reasonable apprehension of bias or, on the approach I take, expose him to a risk of conflict between his official responsibilities and private interests.

[122] As the DA rightly argues, the suspension of the Public Protector is not a power that the President can exercise without safeguards; it is a tightly constrained power with no practical impact on investigations by the Office of the Public Protector. There are indeed a number of legal constraints. The High Court pointed out that the President cannot exercise the power to suspend the Public Protector "on a whim or for flimsy reasons" and can only do so after a committee of the National Assembly commences proceedings for her removal. Importantly, before the National Assembly can convene a committee, an independent panel must determine whether there is a prima facie case for removal and the National Assembly must vote to establish a section 194 committee. These are not insignificant constraints.

[123] The President neither determines the duration of the suspension nor decides whether there are credible allegations against the Public Protector. That depends on the National Assembly and its processes. His role is confined to imposing a precautionary

suspension to protect the Office of the Public Protector which achieves nothing for his benefit because it does not delay, let alone end, the investigation against him. The Acting Public Protector must continue with the investigation. Moreover, the President has no power to choose who will replace the Public Protector or to influence them as this is governed by section 2A(7) of the Public Protector Act.

[124] In my view, the evidence does not show that the President acted in a manner which exposed him to a situation involving the risk of a conflict between his official responsibilities and private interests. First, as appears above, the President stood to gain nothing from suspending the Public Protector. There is no support on the record for the submission that the President suspended the Public Protector to influence the outcome of the Phala Phala investigation and benefit from the delay that the suspension would cause. The Acting Public Protector, who has not been shown to be incompetent or to lack independence, continued with the investigation diligently and insisted on a response to the 31 questions posed by the Public Protector to the President, which were then furnished.

[125] Secondly, the President did not suspend the Public Protector to prejudice her. The suspension is only a precautionary one and does no harm to her as she remains on full pay and has time to properly attend to her defence in the section 194 enquiry. It also does not cause her reputational harm as she is already subject to a highly public enquiry in which the allegations leading to her suspension have been (and continue to be) ventilated.[71]

[126] Thirdly, the evidence of the Public Protector's bias against the President, which was correctly pointed out by the High Court's finding: (a) that she had previously been found not to have acted with "an open and enquiring mind" when investigating the

[71] *Democratic Alliance v South African Broadcasting Corporation Limited* [2014] ZAWCHC 161; 2015 (1) SA 551 (WCC) at para 101; and *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93; 2017 (5) SA 402 (SCA); [2017] 3 All SA 589 (SCA) at para 46.

President and (b) that she was unduly suspicious of him, militates against the possibility of a risk of conflict and detracts from the idea that the President is disqualified from suspending her. In an analogous setting, this Court decisively rejected the notion of the so-called "reactive bias" in *Turnbull-Jackson*.[72] There, the applicant had insulted the official deciding whether to approve his neighbour's building plans by accusing him of bias, corruption and incompetence and had then contended that the official ought to have recused himself as the decision-maker as he was not impartial.

[127] This Court said:

> "This would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers. If I insult you enough – whatever enough may be – you are out. This is without substance. It proceeds from an assumption that officials with decision-making power would respond the same way to insults. It ignores the following: the training of the officials; their experience; possibly even their exposure to abuse and insults – from time to time – and the development of coping skills; and other personal attributes, all of which may render them impervious to, or tolerant of, insults. A finding of bias cannot be had for the asking. There must be proof; and it is the person asserting the existence of bias who must tender the proof."[73]

[128] And, describing the obligations that come with the office of President under section 83 of the Constitution, this Court stated that "[t]he President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant".[74] So the mere fact that the President was one of the subjects of the Public Protector's investigations could be no bar to his exercise of the constitutional responsibility of suspending her.

[129] The timeline of the President's decision to suspend on which the High Court squarely based its finding of bias is also relevant. The High Court reasoned that on

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[72] *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC).

[73] Id at paras 31-2.

[74] Id at para 26.

7 June 2022, the Public Protector informed the President that she was investigating him in relation to Phala Phala; on 9 June 2022, the President decided to suspend her; and on 10 June 2022, the High Court handed down its judgment in Part A, a judgment which the President knew was pending and would be delivered shortly.

[130] In the High Court's view these facts inexorably led to one conclusion, which it articulated as follows:

> "[I]t is reasonable to form the perception that the suspension of the [Public Protector] was triggered by [her] decision to institute an investigation against the President. There was no other plausible or logical explanation for the premature suspension . . . on the eve of a judgment meant to determine the very lawfulness of the suspension.
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> . . .
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> In our view, the hurried nature of the suspension of the [Public Protector] 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 [Public Protector]."

[131] It may well be asked why the President could not have waited for an impending court judgment which sought to restrain him from suspending the Public Protector and which would have judicially determined, albeit on an interim basis, the lawfulness of the very decision he was about to make. When confronted with this question during the oral argument in this Court, his counsel, in his words, conceded that the "optics are awkward". Not to wait for the imminent judgment could be seen as imprudent and showing a lack of caution on the part of the President. But, whatever the case, that is not the legal test and the High Court's reasoning is wrong.

[132] Its judgment, which inexplicably isolated the events of 7 to 9 June 2022, overlooked critical evidence that amply shows that the suspension was long in the making; that the President became aware that the Full Court's judgment in Part A would

be delivered on 10 June 2022 only after he had already issued the suspension letter; and, importantly, that the Public Protector's suspension would in any event not stop the investigation, as the complaint had already been lodged with her office.

[133] The saga of the Public Protector's impeachment began in May 2019 when the DA submitted a request to Parliament for her removal from office. That request evolved over many months and went through the relevant processes stipulated by the rules of the National Assembly until, in February 2021, the independent panel submitted its report recommending that charges of incompetence and misconduct, in respect of which it found prima facie evidence, be referred to a committee of the National Assembly. In March 2021, the National Assembly considered the independent panel's report and resolved that an enquiry in terms of section 194 should take place. The National Assembly established the Section 194 Committee in April 2021 and it held its first meeting in July 2021. The work of the Committee was, however, delayed by the Public Protector's application which culminated in this Court's judgment in *Speaker* in February 2022. The Committee then decided to resume its work.

[134] On 17 March 2022, the President started communicating with the Public Protector and gave her ten days to furnish him with her written reasons on why he should not suspend her. So he was giving consideration to a suspension several weeks before the Public Protector, on 31 March 2022, launched the review application which is now before us, and about two and half months before the Phala Phala allegations surfaced. After his letter of 17 March 2022, and through the months of March, April and May 2022, the President granted the Public Protector no less than four extensions and undertakings not to make a decision.

[135] On 12 May 2022, the State Attorney notified Seanego that the Public Protector's representations had been due by 4 May 2022, that no further extension had been agreed, but that the President was now willing to afford the Public Protector until 20 May 2022 to make representations. Ultimately, on 20 May 2022, a final line was drawn in the sand when the President's senior counsel informed the Public Protector's senior counsel

that the Public Protector could file her written representations by 26 May 2022. The President would then consider her representations carefully before taking any decision whether or not to suspend her; and would advise her as to whether he was prepared to provide her with any undertaking in regard to a decision about her suspension and, if so, the terms of the undertaking. There was, at this stage, unequivocally no undertaking by the President to refrain from deciding on her suspension, a fact which was brought to the High Court's attention. The Public Protector submitted her representations by 26 May 2022. It was only after all of these events that the Phala Phala allegations came to light and a complaint in that regard against the President was lodged with the Public Protector. The decision to suspend followed shortly thereafter.

[136] These facts clearly do not support the High Court's finding of a "hurried" or "retaliatory" decision. This is particularly so in the light of the President's evidence that the suspension letter had been prepared over several days and that a revised draft thereof was finally sent to him for consideration on the evening of 8 June 2022. But for the late emergence of the Phala Phala complaint, nobody could have suggested anything sinister about the timeline. If anything, there might have been a complaint that the President should have acted sooner to suspend the Public Protector. Indeed, that is a view which the DA, through its attorneys, expressed in letters to the State Attorney, but the President declined to be pressured into acting. These facts tend to suggest an intent to afford the Public Protector further time to make representations. The late emergence of the Phala Phala allegations cannot taint a process which was neither hurried nor irrational.

[137] Neither is there any merit in the High Court's other finding of further evidence of bias. That Court held that when the President made the decision to suspend, he was dealing with an investigation by the Public Protector concerning allegations the substance of which, unlike her other investigations into his conduct, he could not discuss. By "discuss", the High Court presumably meant that the President could not ventilate in court papers his version of events in the Phala Phala matter. In the

High Court's view, this was a critical time for the President to assess whether it was still tenable for him to exercise the suspension powers. But the record shows that the President was willing to make his response to the 31 questions available to the High Court and that the Office of the Public Protector requested that it not be made public. The Public Protector did not seek to have it disclosed in these proceedings.

[138] It is also clear on the record that the President did not know, when he took the decision to suspend the Public Protector, that the High Court was going to deliver judgment in the Part A matter on the following day. Notice of the judgment only reached his office after he had sent the suspension letter to the Public Protector, a fact which the High Court judgment acknowledged but puzzlingly accorded no weight.

[139] It bears mention that in any event, a pending judgment does not preclude a decision-maker from taking a lawful decision. This Court in *City of Tshwane*[75] held that the Supreme Court of Appeal's decision in *Gauteng Gambling Board*[76] is not authority for the proposition that "an apparently lawful decision may not be implemented purely because an application has been launched either to interdict implementation or to have the underlying decision set aside". This Court continued:

> "It needs to be stated categorically, that no aspect of our law requires any entity or person to desist from implementing an apparently lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order, as opposed to the sheer hope or fear of one being granted, that can in law restrain. To suggest otherwise, reduces the actual grant of an interdict to a superfluity."[77]

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[75] *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at paras 73-4.

[76] *Gauteng Gambling Board v MEC for Economic Development, Gauteng Provincial Government* [2013] ZASCA 67; 2013 (5) SA 24 (SCA) at para 51.

[77] *City of Tshwane* above n 75 at para 74.

[140] In all the circumstances, there was therefore no exposure on the President's part to the risk envisaged in section 96(2)(b). Having reached this conclusion, it becomes unnecessary to decide the question of bias. At the level of facts (that is, whether there was a reasonable apprehension of bias), the conclusion would plainly be the same as the one I have reached in discussing the facts under section 96(2)(b).

Conclusion on the DA and President's appeals

[141] Subject, therefore, to the Public Protector's cross-appeal, the DA and the President's appeals must succeed, and the orders in paragraphs187.5 and 187.6 must be set aside.

Analysis – the Public Protector's cross-appeal

Alleged infringement of the sub judice rule

[142] The Public Protector argues that rule 89 of the National Assembly Rules prevented the Section 194 Committee from proceeding with the enquiry because the Committee was required to reflect upon the merits of her rescission applications in this Court and of her application in the High Court to stop the enquiry and set aside her suspension. In terms of rule 89, "[n]o member may reflect upon the merits of any matter on which a judicial decision of a court of law is pending".

[143] Regarding the Public Protector's bid to interdict the section 194 proceedings, the Full Court held that the National Assembly's obligation to hold her accountable would have been stultified if the *sub judice* rule was applicable. Indeed, this must be so as otherwise any person subject to the section 194 process would be able to stop the proceedings by simply bringing litigation related to the process or the underlying allegations. In any event, the Section 194 Committee is not required to determine the merits of any of the claims she made in the Part B application. The Committee is solely concerned with whether she is incompetent or has committed misconduct.

Supposed failure of the National Assembly to amend the Rules

[144] With regard to the Public Protector's submission that the Full Court erred in dismissing the ground of illegality based on the failure of the National Assembly to amend its current Rules to reflect the order of this Court in *Speaker*, I agree with that Court's view that this Court had "amended rule 129AD(3) and that there is no need for the National Assembly to still amend it again" and that "[t]he failure of the National Assembly to amend the rule which has been amended cannot vitiate the proceedings of the Section 194 Committee".

[145] This Court in *Speaker* rejected the Public Protector's prayer that the Rules should be remitted to the National Assembly for redrafting and described her request as a tactic to delay the proceedings. It then crafted a remedy which would not delay or impede the National Assembly proceedings by using the tool of severance to cure the invalidity. It severed the offending words "provided that the legal practitioner or other expert may not participate in the committee" and pertinently declared: "[t]he 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'". Undoubtedly, the effect of this order was to immediately alter the content of rule 129AD(3). The reading which the Public Protector ascribes to it is inconsistent with its clear meaning and has no merit.

The section 194 proceedings had allegedly not started

[146] The Full Court in the Part A application held that the proceedings of the Section 194 Committee started, for purposes of section 194(3)(a), when the complaint was referred to it.[78] This, it held, was in March 2021, when the National Assembly resolved that there should be a section 194 enquiry or perhaps in April 2021, when the Committee was established to conduct that enquiry. The Full Court's alternative finding was that, "on a liberal interpretation" (that is in favour of the Public Protector), the Committee's proceedings started at the latest in April 2022 when the Committee

[78] Part A judgment at paras 107-110.

informed the Public Protector of the allegations against her and invited her to respond thereto within a period of 30 days.[79] It is unnecessary to decide in this case which of these views is right. I am satisfied that the Full Court's alternative view is the latest date by which the Committee's proceedings started. It follows that when the President took the decision to suspend the Public Protector on 9 June 2022, the Section 194 Committee's proceedings had already started.

The contention about two-committees

[147] The Full Court found it to be clear from the text of section 194 that the removal of the public office-bearers it affects, involves: (a) a 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 upon the occurrence of the events referred to in (a) and (b). They are the three actors and there is no further committee. The High Court concluded that "it would be absurd, to interpret section 194 as requiring two committees of the National Assembly . . . when the involvement of the National Assembly is to determine the existence of the grounds of removal."[80]

[148] In my view, this interpretation of section 194 accords with the text, purpose, and structure of section 194. Section 194(3)(a) of the Constitution confers a power on the President to suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person and he must in terms of section 194(3)(b) remove a person from office upon adoption by the Assembly of a resolution calling for that person's removal under section 194(2)(a). I do not see how the words "for the removal of that person" in section 194(3)(a) can be read to refer to a committee of the National Assembly other than the "committee of the National Assembly" that may by "a finding to that effect" trigger a National Assembly

[79] Part A judgment at para 120.

[80] Part B judgment above n 6 at paras 115-6.

vote to remove the Public Protector from office under section 194(2)(a) of the Constitution.

[149] The Public Protector argues that, because section 194(3)(a) refers to "a committee" and not "the committee", it must be a different committee from the one envisaged in section 194(1)(b). This reading is, however, not supported by the text and structure of these provisions, as both refer to "a committee". Further, her reliance on *Economic Freedom Fighters*,[81] is indeed ill-conceived, as that decision dealt with a different matter – the impeachment of the President under section 89(1) of the Constitution, which is completely different from section 194(3)(a) since it makes no provision for suspension or committees. The passage relied upon by the Public Protector relates to a view expressed in the context of determining whether the National Assembly required rules to give meaning to section 89. The passage merely states that the National Assembly cannot impeach unless it concludes that a section 89(1) criterion is present. The decision is clearly distinguishable.

Alleged failure to give a proper interpretation to the WhatsApp exchange

[150] In the Full Court's view, the discussions which took place on 20 May 2022 between the parties' counsel via the WhatsApp instant messaging application conveyed the following:

> "[T]he 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 [Public Protector]."[82]

[81] *Economic Freedom Fighters* above n 46.

[82] Part B judgment above n 6 at para 152.

[151] As I understand it, the Public Protector's interpretation is that there was an agreement that there would be an intermediate step – the President would give her notice even if he was not amenable to giving an undertaking so that "legal and other steps could be taken". But it seems to me that whatever meaning one ascribes to the message is six of one and half a dozen of the other and does not assist the Public Protector.

[152] One wonders what the purpose of the notice would have been when the Public Protector had already made her submissions to the President, and she had already brought an application for an interdict in respect of which judgment was pending. But, of importance is that, even on the Public Protector's interpretation, the President's failure to give her notice that he would not wait for the judgment before deciding whether to suspend her would not affect the legality of his decision to suspend, as there was no interdict to prevent him from taking a decision.

The alleged breach of section 165 of the Constitution

[153] Needless to say, since there was no order preventing the President from taking a decision when he decided to suspend the Public Protector, he could not have been in contempt of court, a fact which the Public Protector appears to concede. Nothing more need be said on this aspect. But this finding has a direct effect on the question whether the obligations in section 165 of the Constitution were violated.

[154] The Full Court held that "the applicant's failure to make out a case for contempt of court must necessarily mean that she had failed to make out a case for a breach of section 165".[83] This is correct, because there is no evidence that the President interfered with the functioning of the courts or that his conduct undermined the independence, impartiality, dignity, accessibility, or effectiveness of the courts. And, significantly, the Full Court found that the President was entitled to suspend the Public Protector. There is no merit in this ground of appeal.

[83] Part B judgment above n 6 at para 139.

Conclusion on the application for leave to cross-appeal

[155] I have not discerned merit in any of the grounds of cross-appeal. In all the circumstances it would not be in the interests of justice to grant leave in the conditional application for leave to cross-appeal. It must accordingly fail. The result is that the success of the DA and President's appeals must lead to the non-confirmation and setting aside of orders 187.5 and 187.6. The Full Court should have dismissed the Public Protector's application in its entirety.

Analysis – the section 18 application for leave to appeal

[156] I turn to deal with the section 18 application. I do so briefly, because, as already alluded to above, it is rendered moot by the success of the DA and the President's appeals and the dismissal of the Public Protector's application for leave to cross-appeal in the main case. The first objection to the application is that it is not competent and is premature and irregular. This application was filed in this Court on 18 October 2022, when the application to the High Court for leave to appeal the section 18 judgment was still to be argued. It was therefore launched in anticipation of what the High Court might decide and was an anticipatory proceeding. As counsel for the President pointed out, our court procedures make no provision for anticipatory appeals. The reason is obvious. Courts of appeal would be overwhelmed by overlapping appeals, to the prejudice of the established scheme of appeals and the procedures which apply to them.

[157] This Court frowns upon the practice of litigants approaching it for relief where there are proceedings pending in another court concerning the very issues brought to it and there has been no suggestion that there was an unreasonable delay in the other court in dealing with the proceedings. In *University of Witwatersrand Law Clinic*,[84] this Court dealt with a matter in which an application was lodged in the High Court for leave to appeal to the Supreme Court of Appeal. Two weeks later, while that application

[84] *University of Witwatersrand Clinic v Minister of Home Affairs* [2007] ZACC 8; 2008 (1) SA 447 (CC); 2007 (7) BCLR 821 (CC).

was pending in the latter court, an application for leave to appeal directly was lodged with this Court without mention of the application lodged in the High Court.

[158] In its judgment dismissing the application, this Court held:

> "[T]he application, contrary to the Constitutional Court rule 19(3)(d), does not indicate that an application is pending in the High Court and the status of that application. The purpose of this rule is to avoid the duplication of proceedings and more importantly to enable this Court to determine whether it is in the interests of justice to consider the matter while an application for appeal is pending in another court. It is not in the interests of justice to have two courts consider applications for leave to appeal at the same time without each knowing that another court is considering an application for leave to appeal in the same matter.
>
> We accept that the matter is one which evokes public interest. This in itself, does, however, not justify a departure from the rules relating to applications for leave to appeal. An application for leave to appeal is presently pending in the Pretoria High Court. There is no suggestion that there has been an unreasonable delay in dealing with the application for leave to appeal. In all the circumstances it is not in the interests of justice to grant the application for leave to appeal at this stage."[85]

[159] It is not insignificant that this application was heard simultaneously with the main appeals, which would determine whether the Public Protector's suspension was lawful. That decision would render the correctness or otherwise of the section 18 judgment irrelevant. This application was, therefore, unnecessary. Furthermore, the risk that granting it would open the floodgates for similar applications is not far-fetched. Thus, it is not in the interests of justice to hear it and it must fail. This finding dispenses with the need to deal with the merits of the application.

Costs

[160] In the main appeals and application for leave to cross-appeal, the DA and the President seek costs orders against the Public Protector in her personal capacity if their

[85] Id at paras 7-9.

appeals are upheld. The DA acknowledges that it was reasonable for her to defend the order of the High Court but the only concession it is prepared to make is not to seek punitive costs. The Public Protector has not conducted herself in a manner that would justify mulcting her with costs. In my view, the nature of these proceedings warrant the application of the *Biowatch*[86] principle and I would thus make no order as to costs.

[161] As to the costs of the section 18 application for leave to appeal, the DA and the President sought costs orders against the Public Protector personally in these proceedings as well. It is highly regrettable that this Court and the other parties were burdened with an entirely unnecessary application. There is no indication that it was authorised by the Office of the Public Protector, which had undertaken to settle her legal costs in the appeal proceedings, even after the President's invitation in his answering affidavit to the Public Protector to produce proof of such authorisation. In that case, there is no basis to hold the Office of the Public Protector liable for the costs. She must, therefore, pay the costs of this application in her personal capacity.

Order

[162] The following order is made:

1. The appeals by the Democratic Alliance (DA) and the President of the Republic of South Africa in CCT 251/22 and CCT 252/22 against the orders in paragraphs 187.5 and 187.6 of the Full Court's judgment delivered on 9 September 2022 (Part B judgment) are upheld.
2. The conditional application for confirmation of the said orders of invalidity is dismissed.
3. The orders of the Full Court in paragraphs 187.5 and 187.6 of the Part B judgment are set aside and replaced with the following order:

   "The prayers in paragraphs 3.2, 3.3 and 4 of the amended Notice of Motion to declare the decision to suspend the applicant issued on 9 June 2022 and the decision of the

[86] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Section 194 Committee to commence the section 194 removal process to be irrational, unconstitutional and invalid and set aside in terms of section 172(1)(f) of the Constitution are dismissed."

4. The appeals by the DA and the President in CCT 251/22 and CCT 252/22 against the costs order in paragraph 187.7 of the Part B judgment are dismissed.
5. The Public Protector's conditional cross-appeals in CCT 251/22 and CCT 252/22 are dismissed.
6. The Public Protector's application for leave to appeal in CCT 299/22 is dismissed.
7. In CCT 251/22 and CCT 252/22 there is no order as to costs.
8. In CCT 299/22 the Public Protector shall pay the costs in her personal capacity, such costs to include the costs of two counsel.

For the Applicant in CCT 251/22 and Fifth Respondent in CCT 299/22:	S Budlender SC, M Bishop and M Seti-Baza instructed by Minde Shapiro & Smith Attorneys
For the Applicant in CCT 252/22 and Third Respondent in CCT 299/22:	G Budlender SC, K Pillay SC, M Adhikari and N Luthuli instructed by State Attorney, Cape Town
For the First Respondent in CCT 251/22 and CCT 252/22 and Applicant in CCT 299/22:	D Mpofu SC, B Shabalala and B Matlhape instructed by Seanego Attorneys Incorporated
For the Tenth, Eleventh and Sixteenth Respondents in CCT 251/22 and CCT 252/22:	V Ngalwana SC, T Masuku SC and M Simelane instructed by Mabuza Attorneys
For the First and Second Respondents in CCT 299/22:	A M Breitenbach SC, U K Naidoo and A Toefy instructed by State Attorney, Cape Town