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

Case Number: 8500 / 2022

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

Coram: *Erasmus, Dolamo et Wille, JJ*
Heard: 18th and the 19th of May 2022
Delivered: Delivered by email to the legal representatives of the parties on the 10th of June of 2022

JUDGMENT

THE COURT:

ERASMUS, DOLAMO et WILLE, JJ *(unanimous)*

Introduction

[1] This matter concerns one of the core values of our constitutional framework. The Public Protector is a Chapter 9 Institution that performs a vital function to strengthen our constitutional democracy by holding the executive and legislative branches of the State to account. The Public Protector reports to the National

Assembly, which in turn has a constitutional obligation to hold the Public Protector to account, under certain circumstances and processes.[1]

[2] This is an opposed application for an interim interdict, interdicting the implementation of certain crucial and significant executive and legislative functions.[2] This application strikes at the very heart of our young democracy.

[3] This is because the applicant seeks an order impeding the parliamentary respondents from continuing with their processes of deciding whether or not to remove Adv Mkhwebane from her office.

[4] Whilst the notice of motion refers to the applicant as the Public Protector of South Africa, this matter concerns the incumbent, Adv Mkhwebane. Accordingly, we will refer to her on occasion by name. The notice of motion, as ultimately amended,[3] sought the following relief:

> *'PART A*
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> *1. Pending the finalization of Part B, granting an interim prohibitory interdict and/or mandamus for an order in the following terms:*
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> *1.1. Dispensing with the normal rules and hearing this application as one of urgency in terms of Rule 6(12) (a);*
>
> *1.2. The Speaker and/or the National Assembly is/are hereby prohibited from authorising the commencement and/or performance of any function(s) of the Committee established in terms of section 194 of the Constitution for the removal of the applicant;*
>
> *1.3. The Speaker is hereby mandated to withdraw her letter to the President dated 10 March 2022;*

[1] Sections 181 and 194 of the Constitution of the Republic of South Africa, Act 108 of 1996.
[2] Only part 'A' is before us for determination.
[3] The final amendment granted in terms of rule 28 application filed on 22nd of May 2022 and which remained unopposed.

1.4. The President is prohibited from taking any step(s) in pursuance of the suspension of the applicant in terms of section 194(3)(a) of the Constitution;

1.5. The President is mandated to withdraw his letter to the applicant dated 17 March 2022;

1.6. The first to third respondents are prohibited from taking any further steps or performing any act aimed at, commencing and/or proceeding with the process envisaged in section 194 of the Constitution;

1.7. Costs of the application only in the e\lent of opposition;

1.8. Further alternative, appropriate, just and/or equitable relief in terms of section 38 and/or 172 of the Constitution.

Alternatively to prayer 1 above

2. In terms of Rule 45A alternatively section 172(1)(b) of the Constitution, suspending the operation and execution of paragraph 118(a)(ii) of the order of this Honourable Court in case number 2107/2020, as amended by the Constitutional Court, pending the finalization of Part B, and/or the two applications filed on 11 March 2022 and 11 May 2022, respectively, in the Constitutional Court under case numbers CCT257/2021 and 259/2021.

3. Costs of the application only in the event of opposition.

4. Further alternative, appropriate, just and/or equitable relief'

'PART B

1. Declaring, in terms of section 172(1)(a) of the Constitution:

1.1. the conduct and/or decision of the Speaker to issue the letter dated 10 March 2022 to be unconstitutional and invalid;

1.2. the conduct and/or decision of the President in initiating and/or pursuing a suspension process against the applicant to be unconstitutional, irrational and invalid;

1.3. the conduct and/or decision of the Committee to commence and/or proceed with the section 194 removal proceedings while the matter is sub judice to be unconstitutional;

2. Setting aside the conduct referred to in prayers 1.1 to 1.2 above in terms of section 172(1)(b) of the Constitution;

3. Developing the common law, in line with section 34 of the Constitution, to include a rule automatically suspending the execution of an order which is the subject of a pending rescission application, unless the court rules otherwise upon the application of the successful party;

4. Granting any further, appropriate, just and equitable relief;

5. Ordering the Speaker and/or the President to pay personal costs on the attorney and client scale'

[5] One of the core issues that require our scrutiny is that of the *answerability* of the various appointed actors within our constitutional democracy to hold each other, to account. While it is indeed so that the office of the applicant performs a vital role in holding the executive branch to account, the incumbent to the former must also be held accountable and answerable. As a matter of pure logic must be so, because independence without accountability, maybe a ticket that may lead to the abuse of power.[4]

[4] *Gleniter v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at [216].

[6] The core contention advanced by Adv Mkhwebane is that this entire inquiry process falls to be 'stayed' because she has launched an application for the rescission and re-consideration of a refusal of a rescission of a judgment delivered against her in the apex court.[5]

[7] The parliamentary respondents[6], the president[7], and one of the interested political parties[8] (who opposes this relief), initially contended, *inter alia,* that the process of an application for the rescission of a judgment does not, by its very nature, suspend an order of the apex court. Most significantly, it is pointed out that this high court has no jurisdiction and should not suspend the order handed down by our apex court.

[8] Further, it was averred that even if this court is inclined to grant the interim interdict sought, this in itself, would not prevent the parliamentary respondents from continuing with their inquiry. These respondents initially argued for this position because the applicant's rescission applications[9], they say bore no prospect of success, and the applicant accordingly stood to suffer no prejudice or injustice.

[9] In addition, the incumbent seeks an order preventing the third respondent from deciding on whether or not to suspend her. She contends that this latter 'decision' is being promoted prematurely by the third respondent who is and, remains highly conflicted. This is because she is investigating certain complaints against him.

[10] As a final arrow in her bow, the Adv Mkhwebane advances that the inquiry committee that was established and that was subsequently convened has not yet commenced with their work and their inquiry.[10] For the purposes of convenience it is recorded that the fifth respondent is the Democratic Alliance and the respondents

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[5] This was the initial contention, and the subsequent developments are dealt with later in this judgment.
[6] The first and second respondents.
[7] The 3rd Respondent.
[8] The 5th Respondent - official opposition, the Democratic Alliance.
[9] The applications filed on 11 March 2022 and 11 May 2022, respectively.
[10] The 'Committee' (in terms of section 194 of the Constitution of the Republic of South Africa, 1996).

supportive of certain of the relief claimed by the applicant are the United Democratic Movement and the African Transformation Movement, respectively.[11]

[11] Constitutionally speaking, the Public Protector is answerable to Parliament. The Constitution grants the National Assembly the power to remove the Public Protector from office. This, by a two-thirds majority. The Constitution indicates that this power must be exercised diligently and without delay.[12] It must be so that the administration of justice runs the risk of being brought into disrepute in the event that this process falls to be unnecessarily delayed.

The Legislative Scheme

[12] The Constitutional Court, in *Speaker of the National Assembly v Public Protector and others* [2022] ZACC 1, discussed and set out the Constitutional scheme and framework that finds application to this case.

[13] The applicant, further to the scheme described from paragraphs [5] to [10] of that judgment, argued that we should also have specific regard to sections 38, 96, 172, 173, 181(3), and 194 of the Constitution.

[14] We were further referred to sections 55 to 57 and to section 237 of the Constitution. In addition, we were referred to rules 42(1)(b) and 45A of the Uniform Rules of Court and rule 29 of the Constitutional Court Rules. We do not deem it necessary to quote the relevant sections or rules in full for the purposes of this judgment.

[15] The applicant and the 10th and 11th respondents further rely on rule 89 of the National Assembly which indicates as follows:

'…*No member may reflect on the merits of any matter on which a judicial decision of a court is pending…'*

[11] The 10th and 11th respondents.
[12] Section 237 of the Constitution of the Republic of South Africa, 1996.

[16] The applicant further referred us to rules 129R and 129AD(2) of the National Assembly Rules, which indicate as follows:

'129 R Initiation of Section 194 inquiry

(1) Any member of the Assembly may, by way of a notice of substantive motion in terms of Rule 124(6), initiate proceedings for a section 194(1) inquiry, provided that –

(a) The motion must be limited to a clearly formulated and substantiated charge on the groun9b0ds specified in section 194, which must prima facie show that the holder of a public office:

(i) committed misconduct;

(ii) is incapacitated and;

(iii) is incompetent.

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

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

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

(2) For purposes of proceedings in terms of section 194(1), the term 'charge' must be understood as the grounds for averring the removal from office of the holder of a public office'

'129 AD Functions and powers of the committee

(1) The committee must, when the Assembly has approved the recommendations of the independent panel in terms of Rule 129Z proceed to conduct an enquiry and establish the veracity of the charges and report to the Assembly thereon.

(2) The committee must ensure that the inquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe;

(3) The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee.

(4) For the purposes of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and these rules'

[17] During the course of the argument, counsel on behalf of the applicant, contended that the proceedings of the section 194 committee were suspended and resumed in an unlawful manner as the chair of the committee took decisions unilaterally in regard thereto. Taking into account this stance adopted by the applicant it is important to take note of the provisions of rules 161 and 164(a) of the National Assembly that indicate as follows:

'*161 Meetings*

(2) A meeting of a committee may be called in terms of Subrule (1) –

(a) by the chairperson of the committee; or (our emphasis)

(b) by resolution of the Assembly'

'164 Interruption, suspension, or adjournment

The chairperson of a committee –

(a) may interrupt or suspend the proceedings or adjourn the meeting; and

(b) may change the date of the resumption of business, provided reasonable notice is given'

[18] It is with regard to, *inter alia*, this framework that we shall consider the facts as they developed before us in these opposed motion proceedings.

The 'Relevant' Factual Background and the 'Litigation' History

[19] The last affidavit filed that was referenced when the application was first presented before this court, was an affidavit by the second respondent in terms of which it was recorded that Adv Mkhwebane would be sent a formal notice by the second respondent on or before the 22nd of April 2022. By way of this notice, Adv Mkhwebane would be invited to respond in writing, within (30) days, to the various allegations against her in the motion calling for her removal from office. This has since occurred and Adv Mkhwebane was informed that she may respond in writing to the allegations against her by the 22nd of May 2022.

[20] On the day before the matter was scheduled to be heard before this court, the lead counsel for the parliamentary respondents received a 'short message service' from a then unidentified person, which indicated as follows:

'…Hello Adv Breytenbach, Re: the Public Protector case tomorrow. I have it on very good authority that the ConCourt has declined to hear the Public Protector's rescission application. The decision will be made known sometime this coming week but not later than Friday, I thought I'd just share this with you on a strictly confidential basis. Thanks…'

[21] On the following day and, in the presence of counsel for all the parties participating in these court proceedings, the content of the abovementioned message was disclosed to this full court. Debate and discussions followed and essentially by agreement[13], this full-court postponed the hearing of the matter that was scheduled for hearing to the 18th and the 19th of May 2022. The court was advised as follows;

'…There has been an unfortunate development relating to the application in the Constitutional Court brought by the applicant for rescission of parts of the

[13] The Democratic Alliance recorded their opposition to the postponement.

Constitutional Court's judgment of 4 February 2022. The postponement is sought, inter alia to seek clarity about that and to preserve the integrity of the judicial process going forward…'

[22] It was further agreed that a letter is jointly drafted by the parties to the apex court informing it of the message received and the content thereof. The court declined to be a party to this letter but voiced no objection to same being sent to the apex court. We were given to understand that this joint letter was subsequently sent by the attorneys representing the applicant to the apex court.

[23] In essence, the letter requested the apex court to advise whether the information contained in the message was true (or not) because if it was true, it would have a material bearing on the nature of the proceedings before this full court. A response was received from the apex court to the following effect;

'…The outcome of the application for direct access and rescission will be communicated to the parties when the Court has finalized its processes and made its decision...'

[24] As a direct result of this response, the applicant's attorneys engaged with the attorneys representing the parliamentary respondents and advised them that the applicant was seeking advice on the preferring of criminal charges against the author and distributor of this message.

[25] In addition, a request was made for the second respondent to agree to temporarily suspend the impeachment proceedings, until; (a) the outcome of the rescission application before the apex court and, (b) the finalization of this investigation by the apex court. Further correspondence followed which is not germane and relevant for the purposes of this judgment.

[26] Thereafter, and on the 6th of May 2022, the apex court handed down an order dismissing the rescission application piloted by the applicant and also the application for direct access at her instance . The apex court ruled in the following terms:

'…The Constitutional Court has considered the applications for direct access and rescission. It has concluded that there is no need for directions to be issued in terms of rule 18(4) calling for written submissions and/or answering affidavits. The Court has concluded that the rescission application does not establish any rescindable errors in the judgment. There are also no exceptional circumstances that warrant the rescission of the judgment…'

'…Therefore, the Court has concluded that the application should be dismissed as no case has been made out for rescission. The Court has concluded that the application for direct access should be dismissed as no case has been made out for direct access. The Court has decided not to award costs…'

The Relevant 'Issues'

[27] The historical facts in this matter are well documented in the judgments referred to herein and we therefore only deal with those issues relevant to this application. A plethora of issues have been raised in this very unfortunate matter and the court has been literally bombarded with material (on very short notice) for its urgent consideration. Accordingly, we have decided to deal in this judgment with the most important issues that go to the core of the disputes between the parties.

[28] The fact that we do not deal with any specific point raised by the parties or any material referred to us by the parties, does not mean that we have failed to consider these issues or the material connected therewith.

[29] The following issues require our attention; (a) the striking-out application; (b) whether the applicant is entitled to an interim interdict *pendente lite*; (c) whether *res judicata* or issue estoppel is relevant and, (d) if any of the National Assembly rules support any basis for the relief contended for by the incumbent.

The Interlocutory applications

[30] There were a host of interlocutory applications filed. In addition to those filed prior to the hearing of the matter on the 18th and 19th of May 2022, the applicant filed

a post-hearing application to amend the relief sought in the notice of motion. The only interlocutory application that was 'contentious' in any manner, related to the application by the applicant to strike-out parts of the 'unsealing papers' of the first, second, and fifth respondents in terms of rule 6(15) of the Uniform Rules of Court. This application remained opposed.

[31] The applicant contended that the offending paragraphs and annexures should be struck out as she will suffer prejudice that cannot be mitigated by any order as to costs. This potential prejudice goes to the heart of irreparable harm on the part of the applicant in that it is averred that the paragraphs and annexures are irrelevant, vexatious, and scandalous. We are of the view that insofar as this issue relates to the first respondent's affidavit, the following; (a) the impugned passages are not in dispute, and (b) they are already in the public domain and are of significant relevance to the issues to be decided.

[32] In connection with the application aimed at the affidavit of the third respondent (the President), it related to; (a) the various pending investigations in which the applicant allegedly failed to make a full disclosure and, (b) the timing and status of the investigations which go to the question of the averred conflict of interest. We do find it rather curious that the applicant moved to strike out documents that originated from her own office.

[33] Accordingly, we hold the view that there is no merit in the application for the striking out of any of the information as contended for and, it is hard to discern why the applicant would take up the position that she did, having regard to some unfortunate emotional outbursts and intemperate language put forward in her own affidavits.

[34] Having regard to the apex court's dismissal of the rescission application, Adv Mkhwebane, nevertheless again sought to challenge and set aside the order granted on the 6th of May 2022 for the following reasons; (a) that it is no longer feasible for the proceedings of the inquiry committee to continue; (b) that there is a jurisdictional bar to the present application pending the outcome of an investigation and, (c) the

true and final status of the decision in the rescission application is ‘unknown’ pending the outcome of the investigation.

[35] In the most recent application (the new rescission application), piloted by the applicant to the apex court, she seeks the following relief, namely: (a) an order declaring the conduct of the Chief Justice authorizing the release of the order dated the 6th of May 2022 (prior to the outcome of the investigation) to be invalid; (b) an order declaring the request by the first respondent for the urgent disposal of the rescission application to be invalid and, (c) an order that the failure to further respond (to the applicant’s letter in this connection) is to be declared to be invalid and unconstitutional.

[36] In summary, the applicant seeks a further order from the apex court to rescind and reconsider their prior order dated the 6th of May 2022. In the further alternative, an order is sought to develop the common law so as to cater to the new rescission order (sought on the basis of alleged irregularity or criminality), which taints the legitimacy or legality of the order and negatively implicates the impartiality of the decision-making persons or institution involved therewith. *Simpliciter*, the applicant requests that the final order granted by the apex court be set aside yet again by way of another *rescission* process.

[37] Subsequent to the postponement of the initial hearing of the matter, the second respondent met and took the following decisions and proceeded with the following processes; (a) it decided to continue with its inquiry; (b) it approved an updated draft program; (c) it decided to invite for public participation; (d) it decided to meet to discuss the procedural management of the hearings; (e) it decided that the evidence would be processed and preparations made for the upcoming hearings; (f) it decided that it would start its hearing of evidence from witnesses and, (g) it aimed to adopt its final report towards the last quarter of this year.

The ‘Parliamentary’ Challenges

[38] The case against the parliamentary respondents is buttressed by the argument in connection with the pending new rescission application, which the

applicant says prevents the impeachment inquiry committee from progressing with its work. The inherent problem with this argument is that any application for rescission does not automatically suspend the operation of a court order. Put in another way, it legally has no effect on the execution of a court order. The authorities on this latter issue are crystal clear that the mere launching of an application for rescission does not automatically suspend the operation of the underlying order.[14] This position in law has since been confirmed in numerous judgments. If this was not the case, as a matter of logic, it would have as a result that the mere filing of an application for rescission (even a groundless one) would impede the operation and execution of court decisions and court orders.

[39] The rule of law stands to be completely eroded and undermined if this position was to be accepted. Most significantly, this court only has the power to suspend the operation of its own orders and lacks the jurisdiction to suspend an order of the apex court.

[40] Turning now for a moment to the rules to be employed by the first respondent. It is submitted that the impeachment inquiry committee is prohibited from proceeding because of the now new pending rescission application.[15] The applicant's case on this score is hard to discern in the peculiar circumstances of how the inquiry committee will (in the face of this rule), indeed reflect upon the pending court proceedings.

[41] Further, this rule does not preclude the impeachment inquiry committee from acting in any manner. Any issues in this connection that may be presented before the courts going forward are confined to legal issues. The inquiry committee must be left to deal with any and all factual findings.

[42] Besides, this latter issue was decisively dealt with by a prior decision of this full court that dismissed the applicant's previous attempt to stall the impeachment inquiry.[16] The unanimous reasoning of this prior full court cannot be faulted and it

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[14] *Erasmus Superior Court Practice* (RS16, 2021) Vol 2, D1-604.
[15] Para [11]
[16] *Public Protector v Speaker of the National Assembly and Others* [2020] 4 All SA 776 (WCC).

was to the effect that the overarching responsibility in this connection was to ensure *accountability* and this would be violated if the *sub judice* rule found application.

[43] In addition, it must be so, that the purpose of this rule must be directed at the conduct of members and, not the functioning of the impeachment inquiry committee. It is difficult to understand how Adv Mkhwebane is possessed with any right to seek refuge in this rule in an attempt to stay the process embarked upon by the inquiry committee.

[44] As alluded to earlier, this issue was fully and comprehensively dealt with in the prior judgment of this full court and brings us to reflect upon a closer look at the doctrine of issue estoppel.

Res Judicata and 'Issue' Estoppel

[45] Issue estoppel applies where an *issue* of fact or law was an essential element of a prior final judgment. The *issue* cannot be revisited in subsequent proceedings before another court, even if a different cause of action is relied upon or different relief is claimed.[17] That having been said, it is indeed so, that our courts have recognized that a strict application of issue estoppel could result in unfairness in some unusual circumstances.

[46] This is typically applied in cases where the *nature of the issue* is at least open to some doubt. The nature of the issues before us in this application is not in any doubt. By prior decision of this full-court, no difficulty arose in circumscribing the issues before them and, they correctly defined the issues that came before them in the applicant's prior attempt to interdict the impeachment inquiry. Issue estoppel precisely applies when different relief based on different causes of action is sought in the subsequent case if it involves the determination of the same *issue* of fact or law.[18]

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[17] *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para [10].
[18] *Aon SA (Pty) Ltd v Van Den Heever* 2018 (6) SA 38 (SCA) para [40].

[47] Issue estoppel developed precisely because requiring *sameness* between the two causes of action allows parties to re-litigate the same issue by garbing these up in different causes of action or subsequent applications.

[48] The authorities that dictate for reasons not to apply issue estoppel for reasons of justice and equity, need to be evaluated with reference to the *Henderson*[19] principle. This principle provides, *inter alia*, that when a given matter becomes a subject of litigation:

'…the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case…'

[49] We also take the following from *Ekurhuleni,* where it was held as follows:

'…the submission that res judicata does not apply because of the lack of sameness in the cause of action is misconceived. Sameness is determined by the identity of the question previously set in motion…'[20]

[50] There is absolutely no doubt that this doctrine has been fully assimilated into our law. The doctrine applies equally to pure claims of *res judicata* and to claims based on issue estoppel. When the applicant went to court to challenge precisely this issue in her prior application before a full court of this division, it must be so that she was required to put forward her entire case.

[51] By doing this, the applicant euthanized her case in connection with the issue of her challenges to be held accountable by the impeachment inquiry committee and to attempt to bring a halt to this process. Additional or alternative complaints (in the form of the new pending rescission application) for the determination of the same

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[19] *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, [1843-1860] All ER Rep 378 at 381-2.
[20] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC) para [31].

issues cannot be raised in subsequent proceedings on the same *issues* in circumstances, where the applicant's first attempt failed on the same *issues*.

[52] In our view, for issue estoppel to apply, it is not necessary that the previous court *expressly* determines the issues before the latter court. We say this because it would undermine the purpose of *res judicata* and issue estoppel to hold otherwise. It would allow litigants to freely exodus from any order granted without not only a reasoned judgment, but one that expressly addresses the issues of fact or law that were nonetheless structural to the decision.

[53] The applicant places much reliance on the now new pending rescission application, together with the letter received from the third respondent regarding her possible suspension. In our view, this approach is incongruous, because issue estoppel exists to prevent litigants from approaching a later court, on new papers and armed with fresh arguments, to revisit the same *issues* that they had previously lost. This is the very purpose of issue estoppel.

[54] The *issue* for the purposes of issue estoppel is a totally discrete concept from a *cause of action* or a *remedy*. It is precisely for this reason that Adv Mkhwebane is not permitted to pioneer in later proceedings in respect of an *issue* a ground that she failed to raise in her original proceedings.

[55] To allow this would undermine the finality of judicial decision-making and cast doubt over the trustworthiness of judicial decisions[21]**.** The whole purpose of issue estoppel is to depart from the strict requirements of *res judicata* that the cause of action and the relief must be identical.

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[21] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Council for the Advancement of the South African Constitution and Democracy in Action Amicus Curiae)* 2021 JDR 2069 (CC) at para [1] which indicated as follows:

'…Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. The Constitutional Court, as the highest court in the Republic, is constitutionally enjoined to act as the final arbiter in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes…'

[56] We take the view that the only basis upon which Adv Mkhwebane may attempt to lift the shield of issue estoppel is for this court to exercise its discretion, not to invoke the doctrine of issue estoppel against her. This exercise involves both a factual and a legal inquiry.

[57] We are unable to unearth any basis for a finding in fact that there would be unfair consequences if issue estoppel were to apply against Adv Mkhwebane in these circumstances. Less important for us, is the *form* in which she sought to launch her now application proceedings together with the procedural manner in which her application unfolded. More important for us, are the *issues* that she presented for determination by the previous full-court.

[58] It seems abundantly clear to us (from the decided authorities in this connection), that the issue of the continuation of the impeachment process, together with the issue of a possible breach of the *sub judice* rule has been finally determined. Further, whether the parliamentary respondents should be precluded from continuing with the impeachment process until Adv Mkhwebane's challenge to the constitutionality of any of the rules (as set out in her initial rescission application) has also been finally determined.

[59] In our collective view, the only way that the prior full court's order may possibly be varied to the benefit of Adv Mkhwebane is if new facts (supporting her case in the subsequent variation application) have occurred (after the delivery of the prior full court's judgment) that militate to her benefit. This is so because of the court's general reluctance to allow a variation of interlocutory orders granted by them. As a matter of logic and for legal certainty, this must be so.

[60] For this to be otherwise, the facts should have changed in such a way that, had they existed at the time the interim interdict was refused, the granting of the interim interdict would have been justified.[22] The facts in the present case are exactly the opposite because the material facts and circumstances have changed adversely to Adv Mkhwebane.

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[22] *Meyer v Meyer* 1948 (1) SA 484 (T) 490-491

[61] This occurred when the apex court delivered its judgment dismissing her constitutional challenges. The single challenge which was upheld by the apex court had no bearing on the validity of the impeachment processes because no evidence has yet been tendered. This was also fortified when the apex court subsequently dismissed Adv Mkhwebane's initial rescission application.

[62] What remains for us is to deal briefly with the principle of *res judicata.* This is aimed at preventing a *multiplicity of actions* based upon the same cause of action and ensuring that there is an end to litigation. Put in another way, this is a legal principle that is aimed at avoiding an obstructive approach to litigation.

[63] The present application before us seeks to resuscitate Adv Mkhwebane's previously failed application by preventing the parliamentary respondents from continuing with the impeachment process until all her challenges have been exhausted and pursued by way of her second application for rescission. This is in our view untenable and legally unsustainable.

The 'Right' and the 'Process'

[64] It is trite that to succeed the applicant must show a *prima facie* right that is threatened. In addition, for a stay, the applicant must show prospects of success in the now new rescission application. The applicant must demonstrate that she will suffer irreparable harm if the stay is not granted and that she has no alternative remedy.

[65] Finally, the applicant must also demonstrate that the balance of convenience lends itself to the granting of the interim relief contended for by her. It is difficult to discern from the papers the precise 'identity' of the precise right that will be affected if the parliamentary respondents proceed with their work in connection with Adv Mkhwebane's impeachment process. This is because the apex court has determined that this process meets constitutional muster.

[66] It is not contended by Adv Mkhwebane that this process will not be followed chapter and verse. The argument, according to our understanding, is that if the now

new rescission application succeeds, Adv Mkhwebane would then have been subjected to an unlawful process. But that of course does not relate to the possible infringement of any current extant right which lends itself to adequate protection by way of interdictory relief.

[67] The mere fact that the law might change in the future does not grant an entitlement to approach a court in anticipation of a change in the law for interdictory relief. The argument advanced for a stay in the proceedings hinges solely on the prospects of success in the now new pending application for rescission.

[68] Where an order is not granted by default, the scope for rescission is very narrow. This must be so because it is not open for this full court to even attempt to 'second-guess' the correctness of the judgment of the apex court and their now refusal of the initial rescission application. Our rules of precedent unassailably dictate that it is not open for this full court to even consider that the judgment and the refusal of the rescission order of the apex court might be wrong.[23]

[69] Turning now to the issue of irreparable harm. Again, in our view, this is not sufficiently identified by the applicant. Adv Mkhwebane availed herself to be chosen to occupy this position and, with this high position goes the requirement to subject herself to a lawful and constitutional process. This, in our view, cannot possibly be seen as harm, let alone irreparable harm.

[70] This notwithstanding, if the now new rescission application succeeds (which is unlikely in our view), then in that event, the harm will in any event, not be irreparable. The process could then be halted if it is ongoing, or be subject to review if it has been completed. A full buffet of rights is then available to Adv Mkhwebane. This issue of irreparable harm is in turn connected with and linked to the issue of the balance of convenience.

[71] As a matter of logic, the prospects of success are a relevant factor in weighing the balance of convenience. The better the prospects of success, the less the

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[23] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para [28].

balance needs to favour the applicant.[24] It is further trite law that there exists an inversely proportionate relationship between the prospects of success and the balance of convenience.

[72] Put in another way, the stronger the prospects of success, the less the need for the balance of convenience to favour the applicant and *vice versa*.[25] It is advanced that the prospects of success in the now new pending rescission application vary from non-existent to slim. On this, we agree.

[73] It must also be so that the granting of the interdict will cause harm to the doctrine of the separation of powers. This is so because we are in essence requested to prohibit the government's respondents from performing their constitutionally assigned role of accountability. A very strong and clear-cut case needs to be made out. On this score, the balance of convenience is not with the applicant.

[74] Again, we hold the view that the principle that the interdict-incumbent must positively demonstrate that the granting of the interim interdict will not unreasonably undermine our constitutional values, finds application in this case.

[75] In the present application, Adv Mkhwebane seeks to interdict the parliamentary respondents from continuing with an impeachment process, pending the outcome of litigation for final relief. No doubt the previous full-court applied the abovementioned principle correctly. The interim interdictory relief sought in the previous proceedings is indistinguishable from the interim interdictory relief sought in the present case. The only possible way we can differ from this finding is to hold the view that the previous full court was wrong. Not only was the previous full-court not wrong, but it was also unequivocally correct.

[76] Adv Mkhwebane relies upon, so it seems, a violation of certain of her fundamental rights as set out in various sections of the Constitution. Put in another way, Adv Mkhwebane takes the position that a continuation of the impeachment

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[24] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D).
[25] *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T).

process will infringe upon her constitutional rights. This is very difficult to discern because Adv Mkhwebane's reputation simply cannot be infringed by the impeachment process. We say this, *inter alia*, because Adv Mkhwebane herself is not squarely before this court.

[77] The applicant on the papers is the Office of the Public Protector. Adv Mkhwebane is different from the Office of the Public Protector. This may seem somewhat technical but, is nevertheless vitally important. Adv Mkhwebane's reputation has been sullied by numerous criticisms in the various judgments concerning her which underlie most of the charges in the motion calling for her removal. On the contrary, the parliamentary impeachment process presents Adv Mkhwebane with the ideal opportunity to remove these alleged blemishes on her reputation.

[78] Adv Mkhwebane clearly does not enjoy the status of an employee. Rather, she is a constitutional office-bearer and, Adv Mkhwebane's right to institute the now new rescission application is in no possible way compromised by the continuation of the parliamentary impeachment process.

[79] Put in another way, the continuation of the impeachment process will not in any way stultify the new rescission application by rendering it moot.

[80] In addition, Adv Mkhwebane alleges that the impeachment process cannot be allowed to proceed before the finalization of the Chief Justice's investigation into the unsolicited short message service referenced earlier in this judgment. We stress that it is not for this full court to make any findings of any nature in connection with the content of this 'short message service' and this issue is also not in any manner connected to and with the impeachment process.

[81] In addition, in so far as it may be relevant, we agree with the submissions on behalf of counsel for the parliamentary respondents to the effect that the objective facts (before us at this stage) point to there being very little prospect of any investigation revealing that one or more of the members of the apex court (who participated in the decision to dismiss her first rescission application) were in any

manner responsible for any ‘leak’ in connection with the content of this short message service.

[82] We are further of the view that on any legal test, properly applied, Adv Mkhwebane’s application falls overwhelmingly short of the requirements for any ordinary interdictory relief. We say this because Adv Mkhwebane has, in our view, not demonstrated even a *prima facie* right for an interdict preventing the parliamentary respondents from continuing with the impeachment process pending her now new second rescission application.

[83] That having been said, what obviously remains of utmost importance is the fact that the public interest will not be served by the granting of any interdictory relief in these peculiar circumstances. Further, an interim interdict will prevent the parliamentary respondents from performing their role of determining whether Adv Mkhwebane should be impeached or not.

[84] Even if we are wrong on the issue of a *prima facie* right, if the third respondent indeed elects to place Adv Mkhwebane under a precautionary suspension, Adv Mkhwebane will be entitled to seek judicial review of the decision to suspend her from her office. Adv Mkhwebane will be granted the luxury of having a more than reasonable and fair opportunity to exonerate herself.

[85] In the highly unlikely event that the apex court, rescinds its first rescission order (and, replaces it with an order declaring that the rules are unconstitutional and invalid to the extent that they permit the appointment of a judge to an independent panel), that a new independent panel would need to be constituted and the process restarted *de novo* from that point.

[86] No irreparable harm will ensue because there will be nothing preventing the process from running its course in accordance with any new rules from that point onwards. Moreover, the granting of the interim interdict would result in a material restriction of a critical feature of the oversight powers in respect of the applicant and it would arrest the exercise of that power mid-stream.

[87] We must emphasize that there exists a strong public interest in the continuation of the impeachment process. As a matter of logic, there is serious prejudice against the separation of powers and the public interest, in the event that the impeachment process is not concluded timeously and without inordinate delay. This will happen if the interdict is granted and this overwhelmingly outweighs any harm that Adv Mkhwebane will suffer if the interim interdict is refused and she is ultimately successful with her second rescission application.

[88] The relief contended for by Adv Mkhwebane is also not practical. This is so because if this court was to issue an order suspending the orders granted by the apex court in connection with the rules, the effect would be to revive the *status quo ante* the making of the previous order of the apex court. The reason is that in accordance with section 18(1) of the Superior Courts Act, the first respondent's and the fifth respondent's applications for leave to appeal to the apex court (against the prior full court's order), *ipso facto* suspended the operation of this latter court's order.

[89] This, in turn, goes to the core of Adv Mkhwebane's argument insofar as it is connected to the alternative cause of action based on Uniform Rule 45A. Rule 45A finds no application in this case as it is confined to judgments *in personam* and it does not apply to judgments *in rem*. As a matter of common sense, it would find no application in connection with a judgment concerning the *constitutionality* of a rule.

The 'Presidential' Challenges

[90] Adv Mkhwebane seeks to prevent the third respondent from deciding whether to suspend her or not. For this relief, she advances that; (a) the impeachment inquiry committee has not yet commenced with its proceedings; (b) accordingly, the third respondent has no power to proceed with the process to suspend her; (c) the third respondent is conflicted because the applicant is considering complaints against him and, (d) therefore somebody else must decide whether to suspend Adv Mkhwebane. We will deal firstly with the challenge of dealing with the issue of the conflict of the third respondent.

[91] The applicant's case is that as soon as she embarks upon an investigation of the third respondent, as a matter of law, he renders himself automatically disqualified from deciding whether she should be suspended or not. This is irrespective of the nature of the investigation or the merits of any complaint. It must be so that the third respondent may be prevented from exercising this power if there is an objectively reasonable apprehension of bias.

[92] Again, a full-court has already considered the issue of the applicant's remedial action requiring the third respondent to establish a commission of inquiry into allegations of 'State Capture'.[26] This full court relied on the principles of recusal that apply to judges, namely, that without other evidence, judicial officers are assumed to be impartial. This flows from the nature of their office, and the oath that they take. The third respondent adopts a similar approach.

[93] This in effect means, that without some special showing of bias, a mere complaint (even a reasonable one) about the third respondent's alleged conduct is not enough to prevent him from acting accordingly. One of the constitutional roles allocated to the applicant is to investigate the executive branch.

[94] It must accordingly be so that there is nothing wrong with affording a member of the executive with the power to suspend someone who might investigate them (or their associates), as long as the suspension has adequate safeguards. However, it must not be without pay, and it must not be for an indefinite duration.[27]

[95] This also means that whilst the third respondent has the sole power to suspend the applicant, he cannot exercise that power on a whim or for flimsy reasons. He only has the power to suspend after the first respondent commences proceedings to remove the applicant. At this stage, there will already, as a matter of necessity, have been levied credible allegations of misconduct, incapacity, or incompetence against Adv Mkhwebane. Regrettably, this is precisely what we are dealing with in this matter.

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[26] *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP).
[27] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC) paras [45] to [48].

[96] It follows, that if the third respondent suspends Adv Mkhwebane, it does not end or even delay any investigation, as the office of the applicant may proceed with any investigation against the third respondent. Further, the third respondent has no control over how long the suspension will last as the impeachment inquiry committee may decide against impeachment proceedings and the applicant will be able to proceed with all the complaints, including those against the third respondent. Thus it must be so, that a *reasonable observer* will know that a precautionary suspension of Adv Mkhwebane may achieve nothing at all to the benefit of the third respondent.

[97] Significantly, a precautionary suspension is by no means punitive as Adv Mkhwebane will not be denied her salary during the period of her suspension. As a matter of logic, for a complaint to give rise to a conflict of interest, it must be because of the specific content or nature of the complaint. These details about these alleged complaints are absent in these papers in the sense that we are left in the dark as to precisely how these complaints will give rise to a conflict of interest.

[98] A precautionary suspension under these circumstances merely prevents the incumbent from acting, without any ability to determine who will take over the office of the applicant. For these reasons, there is no reasonable basis to perceive that the third respondent is biased in any form or manner whatsoever.

[99] Adv Mkhwebane does not allege actual bias. Instead, her case hinges on the apprehension of bias in respect of which she squarely bears the onus.

[100] The test has a two-fold objective element: (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.

[101] As at the date of the hearing of this application, there is not an iota of evidence of an apprehension of bias, let alone a reasonable apprehension of bias. The alleged grounds of Adv Mkhwebane's application relate almost primarily and exclusively to historical facts. Much water has passed under the bridge since these

'facts' alleged by Adv Mkhwebane. For the most part, Adv Mkhwebane's case consists of arguments and repetitious assertions about what Adv Mkhwebane apprehends.

[102] It must be so that on the '*true facts'* there can be no objectively-perceived apprehension, let alone one that is reasonable, that the third respondent has not, or will not, bring an impartial mind to bear on the issue of Adv Mkhwebane's possible suspension and that it is also a mind that is open to persuasion by the evidence and information received by him.

[103] The applicable legal principles on this issue emerge from the common law. They have since been re-articulated in the light of the right to a fair public hearing under section 34 of the Bill of Rights in a sequence of Appellate Division judgments.[28] Consequently, contrary to what is contended for by the incumbent, she is not possessed of a free-standing claim for the recusal of the third respondent, independent of the common law principles as set out in our jurisprudence.

[104] A consequence of the so-called double reasonableness requirement as alluded to earlier is that both; (a) the party who apprehends bias and, (b) the apprehension itself must be reasonable.[29] The onus of satisfying both these requirements lies with Adv Mkhwebane. It is a formidable onus that can only be discharged with cogent evidence.[30] This threshold is high and for logical reasons must be so.

[105] Simply put, Adv Mkhwebane has failed to put up any 'convincing' or 'cogent' evidence to rebut the presumption that the third respondent is impartial and has failed to discharge the onus of satisfying the double reasonable test.

[106] Turning now to the 'proceedings' argument. This is an interesting and yet curious claim by Adv Mkhwebane. A motion was tabled for the removal of the incumbent more than two years ago. An independent panel investigated this issue and completed its work more than a year ago. As a direct result of this investigation,

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[28] *S v Basson* 2005 (1) SA 171 (CC) and *Bernert v Absa Bank Ltd* 2011(3) SA 92 (CC)
[29] *Bernert v Absa Bank Ltd* 2011(3) SA 92 (CC) para [34]
[30] *Bernert v Absa Bank Ltd* 2011(3) SA 92 (CC) para [33]

the impeachment inquiry committee formulated a plan of action and appointed evidence leaders.

[107] To properly consider when proceedings 'commence' a purposive approach needs to be adopted. This argument to a large extent has in any event been taken over by the subsequent developments in this case. The reason why the purposive approach falls to be adopted is to protect the integrity and capacity of the institution in order to maintain public trust in the institution.

[108] If Adv Mkhwebane is reliably suspected of misconduct or incapacity and, is allowed to remain in office, public faith in the institution is eroded. This, in turn, denudes the value of accountability. The issue that needs to be considered is at what *moment critique* will the public reasonably be concerned that allowing Adv Mkhwebane to remain in office, this could and would be inconsistent with the integrity of the office. As soon as that point is reached, the need for a possible precautionary suspension arises.

[109] At the time when the matter is referred to the impeachment inquiry committee, a line falls to be drawn in the sand, as there can then be no doubt that the complaints against Adv Mkhwebane are serious and could result in her removal. This is precisely when the power to suspend is triggered.

[110] On the contrary, delaying the power to suspend until evidence is heard would be inconsistent with the constitutional purpose for which the power is designed. Put in another way, the very purpose for suspension exists with equal strength at the *moment of critique* of referral, as it does when the first witness is called to testify.[31]

[111] In our view, the provisions of the relevant section do not exist for a *private purpose* but are manifestly concerned with the integrity of the office of the applicant. It is not a 'right-giving' provision.

[112] Further, it must be so that there is no need to afford a person any form of 'hearing' before a precautionary suspension. This is because a 'precautionary'

[31] This is the very purpose of s 194(3)(a).

suspension with remuneration does not result in material prejudice against the person so suspended.[32]

[113] In our view, the apex court, in this case, was not vested with or concerned with the narrow issue of the 'commencement' of the proceedings.

[114] Rather, the focus was on whether proceedings had reached the stage where the applicant would be able to exercise her right to legal representation. Put in another way, the rule denying the applicant legal representation would only arise when evidence was presented. This is a totally discrete issue from the authority of the third respondent to commence the suspension process against the incumbent of the applicant.

[115] Our view is fortified by the wording and the context of the findings in the apex court to the effect that the process had not reached the stage of the inquiry**.** Further, some technical arguments are advanced that the power to suspend Adv Mkhwebane only commences when the 'hearing' starts and the 'charges' are formally preferred. However, these arguments are in direct conflict with the purposive approach alluded to above and are now mostly historical.

[116] The applicant and 10th and 11th respondents urged us to interpret paragraph [110] of *Speaker of National Assembly v Public Protector* referred to above (delivered on the 4th of February 2022) to mean that the proceedings as referred to in section 194(3)(a) had not started or convened and therefore some of the relief sought against the first and third respondent should be granted. Paragraph [110] of the judgment indicates as follows:

'…This brings me to the final issue, the retrospectivity of the order in relation to the right to legal representation. The office-bearer is entitled to full legal representation at the stage of the section 194 enquiry, that is, during the enquiry before the committee established in terms of rule 129AA. The current processes before the National Assembly to remove the Public Protector from office have been suspended

[32] *Long v South African Breweries (Pty) Ltd and Others; Long v South African Breweries (Pty) Ltd and Others* [2019] BLLR 515 (CC) paras [24] to [25].

pending the outcome of litigation, and the process has not yet reached the stage of the section 194 enquiry before the rule 129AA committee. As a result, the retrospectivity of the order of the constitutional validity will have no bearing on the lawfulness of the current process and will not disrupt the steps already undertaken. When the section 194 enquiry formally proceeds, the Public Protector will be entitled to full legal representation in the committee proceedings…'

[117] The Constitutional Court held that the purpose of the preliminary inquiry was to determine whether the motion for removal had any merit. If on the advice of the panel, the National Assembly decided not to proceed with the section 194 inquiry, the office-bearer falls to be automatically protected against any unmeritorious removal process.

[118] The applicant contended that the appointment of the independent panel offended the principle of legality. On the contrary, the Constitutional Court held unequivocally that the procedure adopted by the National Assembly was only in the nature of a preliminary inquiry and did not constitute 'proceedings'.

[119] In terms of section 194(3)(a) of the Constitution, 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). Any doubt as to when the proceedings before the committee of the National Assembly had commenced, was removed by the definitive findings of the Constitutional Court in the *Speaker of National Assembly v Public Protector* as referenced above.

[120] Even if a liberal interpretation was given to the concept of the proceedings of the committee, undoubtedly the proceedings started when the committee met on the 22nd of April 2022. This occurred when by way of notice, Adv Mkhwebane was invited in writing (within (30) days), to respond to the various allegations calling for her removal from office.

[121] Having regard to the factual matrix that served before the Constitutional Court, more particularly, taking into account the stages of the processes, this submission on behalf of the applicant is without merit. The issue of legal

representation must be read in conjunction with the facts and issues identified by the Constitutional Court. In this regard the court stated in paragraphs [26] and [29] as follows:

'*…The Rules provide that a holder of public office has a right to legal representation provided that the legal practitioner may not participate in the committee. The Speaker confirmer in her answering papers that this proviso was intended to mean that the holder of public office may be assisted by a legal practitioner – for example, the holder of public office could seek adjournments to consult with his or her legal representative, but the legal practitioner may not participate in the committee proceedings in order to lead or cross-examine witnesses or make submissions. The case was argued on the basis that this was the import of the proviso…'*

[122] Curiously, the argument is made that the applicant's case is analogous to that of criminal proceedings and that criminal proceedings begin when the charges are put to the accused. This is in direct conflict with the recent findings in *Kouwenhoven*[33] confirming that criminal proceedings, *inter alia*, include; (a) preparatory examinations; (b) an inquiry into the non-appearance of an accused in response to a summons; (c) a bail application and, (d) an inquiry into the failure of an accused on bail to appear at the trial or to return after an adjournment.

[123] Significantly, these processes occur before any evidence is tendered or any charges are formally presented to an accused person. As a matter of law, it must be so that the third respondent is vested with the requisite power to initiate the suspension proceedings against Adv Mkhwebane when the section 194 Committee commences with its work.

[124] This referral is in turn inextricably linked to the issue of the alleged conflict of interest of the third respondent. Once the committee's proceedings have commenced (*sans* any conflict), there is no basis for any interdictory relief as currently formulated. In these circumstances, the applicant must satisfy the court that

[33] *Kouwenhoven v DPP (Western Cape) and Others* 2022 (1) SACR 115 (SCA) paras [14] to [15].

she is possessed of a *prima facie* right that is threatened by an impending or imminent irreparable harm. Without this, there is nothing to preserve *pendente lite*.[34]

[125] After careful analysis, it seems clear to us that Adv Mkhwebane essentially seeks a right not to participate in a lawful process. This right, however, is not the *species* of right that lends itself to be enforced by the mechanism of an interim interdict. It is an out-and-out review right. In order to bolster this argument about a *prima facie* right, a general reference is made to Adv Mkhwebane's constitutional rights to dignity, administrative justice, and other similar rights. There is however not before us an iota of material that underpins or supports a violation of these rights if the third respondent was to render a decision about her precautionary suspension.

[126] If Adv Mkhwebane was to be suspended she will receive all her current remuneration and will still be able to assert her administrative rights through a review. Further, she will return to work if she is not impeached. We are of the view that none of the applicant's complaints are legally connected to a *prima facie* right that would or could ground relief for an interim interdict.

[127] Moreover, Adv Mkhwebane takes the position that she will suffer 'constitutional harm' because the process that will unfold against her will primarily be based on the report of the independent panel which she advances is unconstitutional. The apex court has dealt comprehensively with this issue and it cannot be resuscitated in this hearing. Again, this is by its very nature a right of review because the remedies for unlawful State conduct are to review and set it aside after it has been taken.

[128] Further, the purported harm to be suffered by Adv Mkhwebane is not permanent, but only in the form of a temporary precautionary suspension, should the President decide to suspend her. Finally, on this issue, we hold the view that there are a number of alternative remedies available to Adv Mkhwebane other than to prevent the third respondent from rendering a decision in connection with her possible suspension.

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[34] Significantly, no right has been specifically identified by the incumbent.

[129] These, *inter alia,* are; (a) she can seek an order interdicting the suspension from being implemented and, (b) she could review the decision if the third respondent decides to suspend her.

[130] The balance of convenience also does not lend itself to the position adopted by the incumbent. This is so because the longer Adv Mkhwebane occupies the office of the applicant while facing serious charges, the more public faith in this office is eroded. This position is also fortified by the fact that accountability is core to our democracy which could be circumvented should the relief be granted.

[131] On the contrary, Adv Mkhwebane will suffer no harm and the integrity of the office will be secured in the event that the relief is refused. The 'office' will continue to function while the inquiry process would run its course in accordance with the law. We must emphasize that it is difficult for us to discern how any harm to Adv Mkhwebane bears any relevance to this application as she is not litigating in her personal capacity.

[132] Rather, Adv Mkhwebane is litigating in the name of the office of the applicant. She personally will also suffer no real harm as she will still receive her salary and will have the added opportunity of focusing her efforts on opposing the process that will eventually unfold against her.

[133] In addition, the third respondent has not taken any decision and only the process of making this decision has been initiated. It is not for this court to attempt to interfere with a decision that has yet to be taken. The balance of convenience is overwhelmingly loaded towards a dismissal of this application.

[134] The third respondent is obliged to pursue his constitutional duties and the public interest also needs to be served and preserved. Any interference with the third respondent's powers in this connection will also violate the doctrine of the separation of powers.

[135] Further, there is simply no material difference to the benefit of the incumbent's position and circumstances otherwise than those that prevailed when the prior full-court of this division delivered its judgment, compared to the present circumstances.

[136] No doubt serious prejudice against the doctrine of separation of powers and the public interest will endure in the event that the inquiry committee is prevented from continuing with its work in view of the trenchant judicial criticisms against Adv Mkhwebane.

Conclusion

[137] All the complaints against the impeachment inquiry rules have now been finally euthanized by the judgment of the apex court. In an attempt to resuscitate these objections and complaints, the applicant chartered an 'appeal' against this decision, formulated as an application for rescission.

[138] This process in itself may very well undermine the legitimacy of the apex court. In our view, a strong signal needs to be sent that the judgments handed down by the apex court are final, need to be obeyed, respected, and cannot be circumvented through the device of a rescission application.

[139] In the interim period (after the judgment delivered by the apex court), the parliamentary respondents were unfazed and continued with their work of the impeachment inquiry. No doubt this triggered the correspondence to the applicant from the third respondent to the effect that he was considering suspending Adv Mkhwebane together with the request to her to make representations why this should not occur.

[140] In response to this, Adv Mkhwebane claims that the third respondent is conflicted because of the investigation of certain pending complaints her office is addressing against him. Moreover, it is contended that even though the impeachment inquiry committee was actively preparing for the now scheduled hearings, it had not commenced with its proceedings.

[141] Again, as an accommodation, the third respondent agreed to delay his decision on whether to suspend Adv Mkhwebane so that she would be presented with an opportunity to challenge his right to do so, and also the right to proceed with the impeachment inquiry.

[142] In the result, this court was enjoined to consider an application that, in the main, seeks to prevent organs of state from exercising powers, specifically assigned to them by the Constitution. Preventing the exercise of legislative or executive power treads deep into the heartland of these branches of authority and accordingly, it is trite law that we can only do this in very clear cases.[35] This case is and was by no means a clear case to the benefit of the incumbent of the applicant.

Costs and Order

[143] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[36] The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[37]

[144] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[38] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.

[145] No hard and fast rules have been set for compliance and conformity by the courts unless there are special circumstances.[39] Costs follow the event in that the

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[35] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)
[36] *Union Government v Gass* 1959 4 SA 401 (A) 413.
[37] *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) para [16].
[38] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F- G
[39] *Fripp v Gibbon & Co* 1913 AD 354 at 364.

successful party should be awarded costs.[40] This rule should be departed from only where good grounds for doing so exist.[41] In *Potgieter*[42], a general rule was formulated that a personal order for costs against a litigant occupying a fiduciary capacity is justified where the conduct in connection with the litigation in question has been *mala fide*, negligent or unreasonable.

[146] The conduct of the fiduciary must evidence improper conduct which deviates from the standards of conduct to be expected of the fiduciary.[43] In our view, the position of Adv Mkhwebane is somewhat analogous to what is expected of a person in a fiduciary position.

[147] The fifth respondent not only seeks a special punitive costs order but also seeks this order against Adv Mkhwebane, personally. In support of this request, the following issues were emphasized; (a) that Adv Mkhwebane had no basis in fact or law to launch the initial application and, (b) that the applicant simply had no basis in law at all to pursue this application after the order from the apex court refusing the application for rescission on the 6th of May 2022.

[148] It is so that the papers presented by Adv Mkhwebane are replete with some ruinous allegations against the parliamentary respondents and against the presidential respondent. From an evaluation of the evidence presented in the papers, regretfully it seems apparent that she has been less than candid on many occasions during this unfortunate litigation between the parties.

[149] In all the circumstances of the matter, we hold the view that a personal costs order in this matter is warranted for some of the reasons set out in this judgment. We are however not persuaded that any costs order should be granted on a punitive scale.

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[40] *Union Government v Gass* 1959 4 SA 401 (A) 413.
[41] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 3 SA 692 (C)
[42] *In re Potgieter's Estate* 908 TS 982
[43] *Vermaak's Estate v Vermaak's Heirs* 1909 TS 679 at 691

[150] Whilst we do have some deep suspicions about the alleged conduct of Adv Mkhwebane during the course of this litigation, we simply cannot visit this conduct, absent further evidence, to the threshold adequate for a punitive costs order.

[151] That having been said, it must have dawned on her shortly after the refusal of the rescission application handed down by the apex court, that the shields that she had raised to the inquiry process and the alleged bias of the third respondent, were doomed to failure.

[152] It is for these reasons that a portion of the costs awarded in this matter will be awarded against Adv Mkhwebane in her personal capacity.

[153] Finally, despite anxious consideration (including some serious debate amongst the members of this court in this connection), we have agreed to follow the *Biowatch*[44] standard in connection with all the remaining issues relating to costs, and accordingly, each party should be responsible for their own respective costs (otherwise than in the order as to costs as set out below), except for the fifth respondent who was substantially successful and therefore costs of the fifth respondent are to be paid by the applicant.

[154] In the result, the following order is granted;

1. That the application to strike out is dismissed.

2. That the main application is dismissed.

3. That each party shall be liable for their own costs, except that the *Public Protector* shall be liable for the costs of the fifth respondent, (including costs of two counsel where so employed), up to and including the proceedings until the 6th of May 2022.

4. That Adv Mkhwebane *(in her personal capacity)* shall be liable for the costs of and incidental to this application, on a party and party scale

[44] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)

(including costs of two counsel where so employed), as taxed or agreed, from the 7th day of May 2022 and thereafter.

N C ERASMUS
Judge of the High Court

I agree.

M J DOLAMO
Judge of the High Court

I agree.

E D WILLE
Judge of the High Court

IT IS ACCORDINGLY SO ORDERED.

APPEARANCES

1. Counsel for Applicant

Adv. D Mpofu SC
Adv. B Shabalala
Adv. B Matlhape
Instructed by Seanego Attorneys

2. Counsel for First and Second Respondents

Adv. A Breitenbach SC
Adv. U Naidoo
Adv. A Toefy
Instructed by The State Attorney

3. Counsel for Third Respondent

Adv. K Pillay SC
Adv. N Luthuli
Instructed by The State Attorney

4. Counsel for Fifth Respondent

Adv. S Budlender SC
Adv. M Bishop
Instructed by Minde Schapiro & Smith

5. Counsel for Tenth & Eleventh Respondents

Adv. T Masuku SC
Adv. M Simelane
Instructed by Mabuza Attorneys