

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

Case No:18882/2022

In the matter between:

THE PUBLIC PROTECTOR OF SOUTH AFRICA

Applicant

and

THE CHAIRPERSON: SECTION 194(1) COMMITTEE

First Respondent

KEVIN MILEHAM

Second Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

**ALL POLITICAL PARTIES REPRESENTED IN THE
NATIONAL ASSEMBLY**

**Fourth to Seventeenth
Respondents**

Coram: Allie, Cloete and Savage JJ

Heard: 7 - 8 February 2023 and 13 March 2023

Delivered electronically: 13 April 2023

JUDGMENT

THE COURT:

Introduction

[1] In this application, the applicant, the Public Protector of South Africa, Advocate Busisiwe Mkhwebane, seeks the following relief on an urgent basis:

'...2. Declaring that first and/or second respondents' decision(s):

- 2.1 to dismiss the recusal application(s) of the applicant taken on 17 October 2022;*
- 2.2 taken on 27 October 2022, to dismiss the adjournment application and/or to continue with its proceedings as presently constituted, to be unlawful, invalid and/or unconstitutional; and/or*
- 2.3 taken, and/or confirmed on or before 17 October 2022, to refuse and/or omit to summon, subpoena and/or recall relevant witnesses to testify at the enquiry.*
- 3. Setting aside the said decision/s referred to in prayer 2 above.*
- 4. Substituting the said decision/s with the following:*
 - 4.1 that the first respondent is hereby recused and/or removed from his office as Chairperson of the section 194(1) Committee; and/or*
 - 4.2 that Mr Kevin Mileham is hereby recused and/or removed from his membership of the section 194(1) Committee; and/or*
 - 4.3 relevant witnesses be subpoenaed and/or recalled to testify; and/or*
 - 4.4 that the Committee proceedings will only take place after its composition has been duly corrected and/or confirmed by this Honourable Court.*

5. *Granting any further, appropriate, just and equitable remedies in terms of section 8 of PAJA, section 38 or section 172(1)(b) of the Constitution.*
6. *Costs against any opposing respondents on the punitive scale.'*

- [2] The first respondent, Mr Qubudile Richard Dyantyi, is cited in the application in his official capacity as the Chairperson of a section 194(1) parliamentary Committee ("the Committee") established in terms of the National Assembly Rules ("the Rules") *'and in his personal capacity as the decision-maker in respect of his personal non-recusal decision'*.
- [3] The second respondent, Mr Kevin Mileham, is cited as a member of the National Assembly representing the Democratic Alliance (DA) and *'in his personal capacity as an officer or member of the Committee'*.
- [4] The third respondent, the Speaker of the National Assembly, is cited in her official capacity, with the fourth to seventeenth respondents cited as all of the political parties represented in the National Assembly and/or the Committee. No relief is sought against the third to seventeenth respondents and they are cited insofar as they have an interest in the outcome of the application.

Applicant's case

- [5] As is apparent from the Notice of Motion, the applicant seeks the review of the decisions on 17 October 2022 to dismiss the recusal applications brought against the Chairperson and Mr Mileham; the decision on 27 October 2022 to dismiss the adjournment application and continue with the proceedings of the Committee; and the decision made on or before 17 October 2022 not to summon, subpoena and/or recall certain relevant witnesses to testify at the enquiry, including the President. During argument, the focus of counsel for the applicant was on the refusal to summon the President.

- [6] It was contended for the applicant that the review is sought on the basis of '*various specified breaches of the PAJA*¹ (read with section 33 of the Constitution)', the violation of her rights in terms of section 34 of the Constitution, including the rules of procedural fairness namely *nemo index in rem sua, audi alteram partem* and/or the doctrine of legitimate expectation codified in PAJA; and/or '*procedural irrationality which is sourced in the rule of law or section 1(c) of the Constitution*'. The applicant contends that the application implicates sections 1, 7, 33 (read with PAJA), 34, 38 and/or 172 of the Constitution. Although, given the view we take of the matter, it is not strictly necessary to make a determination whether PAJA applies, we deal with this issue for the sake of completeness in our evaluation hereunder.
- [7] In her founding affidavit, the applicant indicates that the review of the recusal decisions is founded on 12 distinct grounds for recusal '*presented to the Chairperson and/or the Committee on 21 September 2022, as well as the detailed written response and reasons...as supplied by the Chairperson on 18 October 2022...[and] the legal opinion of Advocate Ismail Jamie SC...*' and those provided in respect of the recusal of Mr Mileham.
- [8] The applicant contends that the decisions of the Chairperson and Mr Mileham not to recuse themselves from the Committee are in breach of PAJA and/or the principle of legality, are unconstitutional, unlawful, irrational and invalid and should be subjected to a rationality review in being inconsistent with the rule of law and the principle of legality; and that the decisions fall to be set aside for these reasons.
- [9] The applicant stated that prayer 3 of the notice of motion '*is based on the subsequent decision of the Committee, taken on 27 October 2022, to dismiss my application for the postponement or adjournment of the enquiry proceedings pending the review application of which the Committee had been duly notified. I will refer to this as "the non-adjournment decision". This leg of the application is based on my application for postponement which was lodged on 27 October 2022*', which was dismissed the same day on the basis of '*reasons articulated on the record*' and with further reasons provided on 28 October 2022; and prayer 3

¹ Promotion of Administrative Justice Act 3 of 2000 (PAJA).

also seeks *‘to set aside the Committee and/or the Speaker’s decisions in the form of refusal and/or omissions to summon and/or subpoena at least one witness and recall three others who are relevant and required by me to testify and/or complete their evidence, as the case may be... the witness decisions’.*

- [10] The application was opposed by the Chairperson of the Committee, Mr Mileham and the DA.

Relevant background

- [11] On 21 February 2020, Ms Natasha Mazzone, the Chief Whip of the Democratic Alliance, submitted a new motion on behalf of the DA under the revised Rules of the National Assembly which sought that a section 194(1) enquiry be initiated by the National Assembly to investigate the removal of the applicant from office on grounds of misconduct and/or incompetence. She had submitted a previous motion on 6 December 2019 but it was simultaneously withdrawn.
- [12] On 26 February 2020 the Speaker accepted the new motion and on 25 November 2020 referred the matter to an independent panel for a preliminary assessment as contemplated in Rules 129T and 129U of the Rules of the National Assembly (the Rules).
- [13] In the interim, on 4 February 2020, the applicant launched an urgent application in this Court seeking to suspend the National Assembly proceedings related to the motion. On 9 October 2020, Part A of that application was dismissed by a full bench of this Court. In Part B of the same application, the applicant challenged the constitutionality of the Rules.
- [14] On 24 February 2021 the independent panel, headed by retired Justice Nkabinde, issued its report in which it recommended that complaints of incompetence and misconduct be referred to a committee as provided for in the Rules. On 16 March 2021, the National Assembly resolved to adopt the report of the independent panel and proceed with a section 194 enquiry. The matter was thereafter referred to the Committee, comprising of members from each of the 14 political parties represented in the National Assembly, for a formal enquiry in terms of Rules 129AA and 129AB of the Rules. The Committee includes the

second respondent, Mr Kevin Mileham, a member of the National Assembly representing the DA. On 20 July 2021 Mr Dyantyi was elected Chairperson of the Committee.

- [15] On 28 July 2021, a full court of this division dismissed the applicant's challenge to the Rules, save in two respects: the first, allowing a judge to serve on the independent panel; and the second, for limiting participation of the applicant's legal practitioner at the Committee's hearings. The Speaker and the Democratic Alliance brought urgent applications for direct access to the Constitutional Court to appeal the High Court's order. The applicant sought leave to cross-appeal the High Court's dismissal of the other eight grounds advanced to challenge the constitutionality of the Rules.
- [16] On 4 February 2022, the Constitutional Court in *Speaker of the National Assembly v Public Protector and Others*² set aside the finding in relation to the appointment of a judge to the independent panel. The applicant's cross-appeals in relation to the Rules were in the main dismissed, save for the attack against the Rule concerned with legal representation in respect of which certain words were severed from the Rule. The applicant thereafter sought that the proceedings of the Committee be suspended pending the finalisation of her application for rescission of the order in the Constitutional Court.
- [17] On 11 March 2022, the applicant launched an application to rescind the order of the Constitutional Court and sought that the Committee's proceedings be suspended pending the finalisation of such application. On 29 March 2022, the Committee resolved to continue with its work.
- [18] On 31 March 2022 the applicant launched a further application in this Court, seeking an urgent order interdicting the Committee from continuing with its work. On 10 June 2022, the High Court refused the interim relief sought. In Part B of the application, the applicant sought an order declaring the decision of the Committee to commence or proceed with the enquiry to be irrational, unconstitutional, and invalid; and an order declaring the President's decision to suspend her on 9 June 2022 invalid.

² 2022 (3) SA 1 (CC).

- [19] In the interim, on 6 May 2022, the Constitutional Court dismissed the applicant's first application for rescission, in response to which the applicant launched a further application for the rescission of the order.
- [20] The Committee began hearings on 11 July 2022. On 12 July 2022 the applicant indicated that she was participating in the proceedings '*under protest*', including because the Chairperson could not be impartial as he was a member of the African National Congress (ANC) which had unanimously voted for the establishment of the enquiry and he '*was not suitably qualified*'. However, she indicated that she had decided not to ask for his recusal on the basis that this would have been viewed as '*frustrating the enquiry*'.
- [21] On 15 July 2022, a Committee member informed the Committee of the contents of the National Assembly's Register of Interests, which recorded that Mr Mileham was married to Ms Mazzone. On 20 July 2022, Parliament's Chief Legal Advisor issued a legal opinion to the Secretary of the National Assembly which concluded that Mr Mileham was not automatically disqualified from serving on the Committee by virtue of his marriage to Ms Mazzone. This opinion was also provided to the Chairperson of the Committee and Mr Mileham continued to participate in the Committee hearings.
- [22] On 9 September 2022, the High Court dismissed the applicant's challenges related to the work of the Committee (Part B) but set aside the President's decision to suspend the applicant on the basis of bias. While the suspension decision is the subject of further proceedings, the applicant has appealed against the High Court's dismissal of her challenges to the work of the Committee.
- [23] On 20 September 2022, after approximately 30 days of hearing, the applicant delivered an application in which the recusal of Mr Mileham on 3 grounds and the recusal of the Chairperson on 12 distinct grounds were sought. The matter was argued before the Committee on 21 September 2022. The Committee then met to consider the applications and resolved to seek an external legal opinion on their merits. On 10 October 2022, the opinion obtained concluded that there existed no basis for recusal. The Committee met on 17 October 2022 to consider

the recusal applications, the refusal of the Chairperson and Mr Mileham to recuse themselves and the external legal opinion. On 18 October 2022 the Chairperson issued his report in which he refused to recuse himself. The majority of members of the Committee supported the decisions of the Chairperson and Mr Mileham not to recuse themselves and the recusal application in respect of both was dismissed.

[24] The same day, on 18 October 2022 the applicant lodged an application seeking that the proceedings of the Committee be adjourned pending the finalisation of the current application to review the recusal decisions taken. It was indicated that the applicant's mandate to her legal representatives was limited to arguing the adjournment application.

[25] On 27 October 2022 the adjournment application was refused, following which the applicant's legal team left the enquiry on the basis that their mandate did not extend beyond that point. Proceedings initially continued but were then adjourned until the following day. That evening, following her query, the applicant was informed that her presence was required at proceedings the following day. On Friday 28 October 2022 the applicant's request that she be granted one week until 7 November 2022 to consult her legal representatives was refused, with it being decided that proceedings would be adjourned until Tuesday 1 November 2022. On 1 November 2022 the applicant again requested that the matter be adjourned for a week to accommodate the non-availability of her counsel. The application was rejected, as was the applicant's attorney's request to be excused. A witness was then called with the applicant's counsel absent and the applicant indicated that she would not participate in the proceedings.

[26] The current application was launched on 7 November 2022.

Recusal of Chairperson

[27] The recusal of the Chairperson was sought on twelve grounds:

27.1 The first recusal ground related to the decision to proceed with the enquiry on the basis of the motion, including in respect of allegations in respect of which the independent panel had found there to exist no prima facie

evidence, when the applicant had prepared her case on the basis that it was only the recommendations of the independent panel that would be dealt with.

- 27.2 The second recusal ground was that the directives were amended unilaterally by the Committee, without consultation, in relation to the treatment of witnesses, allowing Committee members to question witnesses before cross examination had been concluded and excusing witnesses who had not been cross examined, on the basis that an application could be brought to recall a witness.
- 27.3 The third recusal ground concerned the Chairperson's refusal to subpoena President Cyril Ramaphosa on the basis of relevance.
- 27.4 The fourth ground was that the Chairperson had unduly favoured and colluded with evidence leaders while he had adopted an impatient and oppositional stance towards the applicant and her legal representatives, which, the applicant contended, individually and cumulatively gave her the impression that the Chairperson was biased. It was contended that this was evident in the approach to objections raised by the applicant's legal representatives, the unequal time given to evidence leaders to examine witnesses, hostility directed at the applicant's team, conferring with the evidence leaders to the exclusion of the applicant and failing to censure the conduct of the evidence leaders.
- 27.5 The fifth ground was that there had been undue interference in the High Court litigation in an attempt to influence the outcome of a reserved judgment when the Chairperson delivered a Notice to the High Court advising of the dismissal by the Constitutional Court of an application brought by the applicant regarding the leaking of a previous judgment.
- 27.6 The sixth ground concerned rulings made by the Chairperson regarding cross examination and/or re-examination, in breach of the Directives, when objections related to the questioning of the applicant by Committee members before cross examination of a witness had been concluded.

Further, that on three occasions the Chairperson has permitted Committee members to question witnesses prior to the commencement or conclusion of cross examination.

- 27.7 The seventh ground concerned the relevance of evidence allowed by the Chairperson, in circumstances in which the applicant contended such evidence was irrelevant.
- 27.8 The eighth ground concerned previous utterances made by the Chairperson which the applicant contended illustrated that he has prejudged the issues.
- 27.9 The ninth ground was that the Chairperson acted in a biased and unreasonable manner when he refused to postpone the enquiry on 13 September 2022 due to the non-availability of the applicant's legal representatives.
- 27.10 The tenth ground related to the Chairperson's refusal to postpone the enquiry on 13 September 2022 due to the applicant's temporary medical unfitness, which was evident from a medical certificate provided.
- 27.11 The eleventh ground concerned the Chairperson's rejection of requests that Committee members be consulted, which led to the applicant's legal representatives being muted. This alleged '*dictatorial*' conduct led the applicant to consider that the Chairperson exhibited bias and a lack of partiality.
- 27.12 The twelfth ground concerned the allegation that the Chairperson had presented '*false facts in the public domain*' during media interviews, calling for the Legal Practice Council to investigate the applicant's legal representative.

Recusal of Mr Mileham

- [28] The applicant sought the recusal of Mr Mileham on the basis that he is married to Ms Mazzone; who is the '*complainant*' in the matter insofar as she submitted the

motion which led to the institution of the enquiry in her personal capacity as a Member of Parliament (despite the motion itself stating that she moved it on behalf of the DA); that Mr Mileham has displayed a '*distinctively hostile attitude*' and has posted tweets critical of the applicant's senior counsel.

- [29] As with the decision of the Chairperson, the applicant contends that such decision is in breach of PAJA and/or the principle of legality, is unconstitutional, unlawful irrational and invalid and should be subjected to a rationality review in being inconsistent with the rule of law and the principle of legality and the decision set aside.

Refusal to adjourn proceedings

- [30] The applicant submitted that the refusal to adjourn the proceedings of the Committee on 27 October 2022 and thereafter on 28 October 2022 and 1 November 2022 constituted unlawful conduct and was in contempt of the decision of the Constitutional Court in *Speaker of the National Assembly v Public Protector and Others*³ in which it found that she must be afforded assistance by a legal practitioner or other expert of her choice.

Evaluation

- [31] In opposing the application, the first – and seemingly the main – of the preliminary issues raised by the respondents who oppose the relief sought is that this Court is precluded from determining the application *in medias res*.
- [32] Section 194(1) of the Constitution provides that:

'(1) *The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on –*

(a) *the ground of misconduct, incapacity or incompetence;*

(b) *a finding to that effect by a committee of the National Assembly; and*

³ fn 2 above.

(c) *the adoption by the Assembly of a resolution calling for that person's removal from office.'*

[33] Rule 129AD(2) of the Rules of the Committee provides that:

'The Committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable time'.

[34] As organs of state, Chapter 9 institutions are accountable to the National Assembly.⁴ The principle of separation of powers requires that other branches of government remain *'conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government'*.⁵ The separation of powers doctrine is not to be trammelled lightly and for flimsy reasons. It exists to ensure that each arm of government concerns itself with its legislative and constitutional mandate without undue interference and without being prescriptive to others.

[35] In a different context, the Constitutional Court in *Tshwane City v Afriforum & Another*⁶ stated:

'An interim interdict should in these circumstances be granted in the rarest of cases. Intrusions into the sphere of operation reserved only for the other arms of state is an exercise not to be unreflectingly or overzealously carried out by a court of law. It calls for deeper reflection and caution. The state operates better when due deference is shown by one branch to another, obviously without approaching its obligations so timidly as to incorrectly suggest that there is an undue measure of self-restraint. That said, an attitude that is dismissive of the constitutional firewall around the powers of other arms of state is not conducive to the proper observance of separation of powers and exhibits disregard of comity among branches of government.'

⁴ Sections 55(2)(b)(ii) and 181(5) of the Constitution.

⁵ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

⁶ 2016(6) SA 279 (CC) at [70]

[36] Section 237 of the Constitution expressly requires that all constitutional obligations must be performed diligently and without delay. The National Assembly is required to hold the applicant accountable by scrutinising a motion for her removal and to do so diligently and without delay, and thereafter make a finding whether or not the applicant should be removed from office on the ground of misconduct, incapacity or incompetence. The National Assembly and its committees hold the power to determine and control their own internal arrangements, proceedings and procedures,⁷ which include those in relation to the section 194(1) Committee established. In *Doctors for Life* the Constitutional Court stated that Parliament, in relation to its legislative function, must be permitted to carry out such function without interference, warning that otherwise –

*‘the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers’.*⁸

[37] In *Glenister v President of the Republic of South Africa and Others*⁹ the Constitutional Court refused to consider a challenge to a decision to introduce a bill to Parliament on the basis that the bill was unconstitutional, finding that Parliament must first be allowed to consider such bill. The Court stated that whether a court should intervene must be *‘guided by the principle of separation of powers’* which is designed to *‘prevent the branches of government from usurping power from one another’* and *‘to ensure that each branch of government performs its constitutionally allocated function’*.¹⁰ It made clear that *‘the reasons advanced to justify intervention by the Court must, at the very least, demonstrate material and irreversible harm that could not be remedied’*.¹¹ The Court stated that whether such “exceptional circumstances” exist to justify intervention would be fact dependent.¹²

⁷ Section 57(1)(a).

⁸ *Doctors for Life* at para 36.

⁹ [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

¹⁰ *Id* at para 35.

¹¹ At para 48.

¹² At para 46.

*'Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the courts in our constitutional order: While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature. This is a formidable burden facing the applicant.'*¹³

- [38] At the same time, courts are hesitant to entertain a review of ongoing proceedings, including of recusal decisions, which are brought *in medias res* because:

'Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course'.¹⁴

- [39] In *SACCAWU v Irvin & Johnson Ltd*¹⁵ it was held by the Constitutional Court that the dismissal of a recusal application, does not, as of right, entitle an unsuccessful party to appeal the dismissal immediately while proceedings are continuing. In considering whether to permit such a challenge *in medias res*, relevant considerations include the nature of the matter, the nature of the objection to the composition of the court, the prospects of success in the recusal and the length of the record in the proceedings.

- [40] It is only *'in rare cases where grave injustice might otherwise result or where justice might not by other means be attained'*¹⁶ that a court will entertain a review before the conclusion of proceedings. Such judicial intervention *in medias res*

¹³ At para 43.

¹⁴ *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) at para [25], cited with approval in *Maswanganyi v Road Accident Fund (Maswanganyi)* 2019 (5) SA 407 (SCA) at para [21].

¹⁵ *SACCAWU v Irvin & Johnson Ltd* 2000(3) SA 705(CC) at para [4].

¹⁶ *Wahlhaus v Additional Magistrate, Johannesburg (Wahlhaus)* 1959 (3) SA 113 (A) at 120B.

has been said to be warranted only where there is a gross irregularity¹⁷ in the proceedings and in a rare case¹⁸ because the perpetrators perpetuating the irregularities are those that have been entrusted with safeguarding constitutional rights.

[41] Courts will *'hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available'*.¹⁹ This is so because in the absence of exceptional circumstances reviews should ordinarily be brought at the end of proceedings in order not to threaten the effectiveness of all tribunals and courts by opening *'sluice-gates that could render the functioning of the courts and the innumerable administrative tribunals throughout the land untenable'*.²⁰ To find differently not only risks wasting judicial resources and increasing legal costs but *'would result in the piecemeal review'* of proceedings²¹ and a fragmentation and delay in proceedings which may not have arisen had the process been left to run to completion.²²

[42] As was made clear in *Take & Save Trading CC and Others v The Standard Bank of SA Ltd*.²³

*'...an appeal in medias res in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience'²⁴ more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed.*²⁵

¹⁷ Relied on *Wahlhaus* 1959(3) SA 113 (A).

¹⁸ *Maswanganyi (supra)* at para [21].

¹⁹ *Ibid.*

²⁰ *Hlophe v Judicial Service Commission and Others* [2009] ZAGPJHC 19; [2009] 4 All SA 67 (GSJ) at para [12].

²¹ *Phahlane v National Commissioner of the South African Police Services and Others* [2020] ZAGPPHC 159 at para [35].

²² *S v Western Areas Ltd & Others* 2005(50) SA214 (SCA) at para 26, cited with approval in *Maswanganyi* *infra*.

²³ [2004] ZASCA 1; 2004 (4) SA 1 (SCA); [2004] 1 All SA 597 (SCA) at para [4].

²⁴ With reference to *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para [16].

²⁵ *R v Silber* 1952 (2) SA 475 (A) 481E; *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC) paras [4]-[5].

- [43] Counsel for the applicant sought to advance her case by placing reliance on *Bhugwan v JSE Limited*²⁶ in which it was noted:

‘...that the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not. Once unlawfulness is manifest in a form which cannot be corrected no matter how the public authority continues to act, there is no point in insisting that the complainant should continue to go through the motions before bringing the matter to court.’

- [44] Reliance was also placed by counsel for the applicant on the decision in *Bernert v ABSA Bank*²⁷ in which it was held that it is not in the interests of justice for a litigant to wait until an adverse judgment before seeking recusal when the facts relied on were known to the applicant during the proceedings. However not only is that matter distinguishable from the present in that the litigant in *Bernert* failed to apply for the recusal of judges when the facts that he raised later on appeal, after the finalisation of the case, were known to him during the proceedings, but the test is rather whether the applicant suffered resultant material and irreversible harm *at the stage complained of during the proceedings*. It is in this crucial respect that she bears a formidable burden. Put differently, the applicant must show that it is not the nature of the irregularities complained of *per se* that entitles her to relief in this application, but rather that the proceedings themselves have been irremediably tainted thereby, resulting in grave injustice which cannot be corrected by a court in due course.

- [45] The applicant also placed reliance on *Dyantyi v Rhodes University and Others*,²⁸ in which a decision was made on the merits of the matter after the tribunal had proceeded with its work in the absence of the appellant’s legal representatives. However, *Dyantyi* is distinguishable from the current matter in that the review application was not brought *in medias res*, but after a finding on the merits.

²⁶ *Bhugwan v JSE Limited* 2010 (3) SA 335 (GSJ) at para [11].

²⁷ *Bernert v ABSA Bank* 2011 (3) SA 92 (CC) at para [75].

²⁸ [2022] ZASCA 32; 2023 (1) SA 32 (SCA).

- [46] In undertaking its constitutionally mandated task, the Committee is required to reach a finding, in accordance with the applicable Rules, in a '*reasonable and procedurally fair manner, within a reasonable time*', and to do so within the parameters conferred upon it by Parliament. The foundational basis for the establishment of the enquiry and the role of the s194 Committee is thus, in our view , the prism through which the *in medias res* issue should be considered. Upon careful consideration it seems to us that the applicant has approached the issue of *in medias res* as if it is akin to a review. The result is that, on this specific issue and as her papers show, she has failed to properly engage with what is required to pass the test. Instead she has made broad and sweeping averments and also seemingly hedged her bets.
- [47] The applicant contends that '*gross irregularities*' have occurred in the course of the Committee's work that are of such a nature that it is '*indisputable that grave injustice would result*' were the relief sought not be granted. Yet she has pertinently not engaged with how her temporary lack of legal representation placed her at an irremediable disadvantage in circumstances where an adjournment in fact eventuated after her medical certificate was considered; or how alleged misrepresentations made by the Chairperson and Mr Mileham in the public domain grossly impeded her ability to continue presenting her case before the Committee. In addition considerations of time wasted and expense incurred do not warrant a different conclusion, including that we were informed by her counsel on the last day of argument that the transcript of the Committee proceedings exceeded 60 000 pages at that stage alone.
- [48] The applicant's contention that she is aware of many more irregularities that occurred during the proceedings but has elected to raise only some of them in this application, reserving her right to raise others later, underscores that this may not be the last application brought before finalisation of the enquiry and that the real risk exists that the applicant intends to engage in piecemeal litigation which would only serve to delay the finalisation of the matter.
- [49] The applicant retains effective remedies which remain available to her once the Committee has completed its work. She has not shown the existence of grave

injustice or that any harm which may have been suffered by her will be material and irreversible if the Committee is permitted to proceed with its task.

- [50] We thus find, on the basis of *in medias res*, that it would not be appropriate for this Court to permit a piecemeal review of proceedings. With no exceptional circumstances demonstrated, the balance of convenience favours a decision to dismiss the application brought by the applicant.
- [51] However as previously indicated we nonetheless deal with the applicability of PAJA for sake of completeness, given that we are a court of first instance. The applicant submitted that the relief sought is governed by PAJA, and only in the alternative, the principle of legality. This is so, the applicant contends, since the Committee is an organ of state exercising a power in terms of the Constitution, and thus falls squarely into the definition of ‘*administrative action*’ in s 1(a)(i) of PAJA.
- [52] The second basis relied upon to support the applicant’s contention that PAJA would apply is that to the extent that the Chairperson and Mr Mileham may be viewed as “natural persons”, the same applies to them given that they are functionaries of the Committee. A related reason appears to be that PAJA applies since the primary bases for the application are bias and procedural unfairness which are specific grounds in s 6 of PAJA, but to us this seems to be a circular argument which takes the matter no further. It is an argument in which the grounds for review are meant to create jurisdictional facts, but as we see it, PAJA cannot apply to non-administrative action and to a parliamentary committee exercising a Constitutionally ordained legislative function.
- [53] The applicant relies on *Calibre Clinical Consultants*²⁹ where the Supreme Court of Appeal comprehensively considered the question of what constitutes a power or function of a public nature as opposed to a domestic one. It held that characteristics of a public function include those ‘*woven into a system of governmental control*’ or ‘*integrated into a system of statutory regulation*’.³⁰ It is about ‘*accountability to those with whom the functionary or body has no special*

²⁹ *Calibre Clinical Consultants v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) at paras [33], [35] and [38].

³⁰ At para [42].

*relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship’.*³¹

- [54] In our view the applicant’s reliance on *Calibre Consultants* is misguided since it rather serves to assist the respondents who maintain that PAJA does not apply. We say this for the primary reason that the Committee is accountable only to Parliament, not the public at large. The Committee was constituted in terms of the Rules of Parliament and must, upon conclusion of the enquiry, report to Parliament and no more. In this sense, properly construed, the Committee (as well as the Chairperson and Mr Mileham as “natural persons”) perform a “domestic” and not a public function in terms of the Constitution. Neither the Committee nor the individuals concerned are “organs of state”.
- [55] As submitted by the Chairperson, Parliament, in appointing the Committee, exercises the legislative power conferred by s 55(2)(b)(ii) of the Constitution.³² In terms of paragraph (dd) of the definition of ‘*administrative action*’ in s 1 of PAJA the legislative functions of Parliament are excluded from that statute’s purview. The Chairperson, in chairing the enquiry, implements NA Rule 129AD which spells out the powers of the Committee. The Chairperson’s rulings during the enquiry are, consequently, excluded from the definition of ‘*administrative action*’ in PAJA.
- [56] Moreover, as pointed out by the DA, the applicant appears to overlook the requirement that an administrative decision must be of an “administrative nature”. The decision of the Committee whether to recommend removal of the applicant in due course will be taken in its capacity as a committee of Parliament, and it is the latter which is duty bound in the performance of its constitutional obligation to maintain oversight over organs of state. As described in *Speaker of the National Assembly v Public Protector and Others*:³³

[9] The National Assembly is obliged by s 55(2)(b)(ii) of the Constitution to provide mechanisms to maintain oversight over organs of state. The

³¹ At para [40].

³² *Speaker of the National Assembly v Public Protector and Others* 2022 (3) SA 1 (CC) at para [9].

³³ See footnote 6 above.

Public Protector, the Auditor-General and other Chapter 9 institutions are organs of state. With this in mind, the National Assembly adopted the Rules to govern the process for the removal from office of these office-bearers.'

[57] We thus would have found, had the application not been determined on the basis that relief has been sought *in medias res* and accordingly that any review of the matter is premature, that any such review would be undertaken against the principle of legality and not under PAJA.

[58] It is also not necessary, given our finding that the applicant has sought relief *in medias res*, to determine the test for bias in proceedings before the Committee established under section 194(1) or whether a case for bias has been made out against either the Chairperson or Mr Mileham; or whether the issues complained of by the applicant concerning *inter alia* the widening of the scope of the enquiry and the violation of her right to *audi alteram partem* have merit.

Costs

[59] The respondents who oppose seek costs against the applicant in her personal capacity (whether in full or in part). Personal costs orders against state functionaries are used to prevent the abuse of court processes, such as where there has been '*a flagrant disregard of constitutional norms*' and evidence of factors such as bad faith and gross negligence.³⁴ Given the findings of this court, there is no reason why costs should not follow the result, but in our view the punitive costs award sought is not warranted, since we cannot find that the applicant deliberately embarked on vexatious litigation, particularly given the decision of the Constitutional Court that she was entitled to legal representation. It may well be that in due course, if there is a review once proceedings have concluded, another court may come to a different conclusion on the costs of the review, but we emphasise that, for all of the reasons given, we decline to deal with the merits of the review at this stage.

Order

[60] The following order is made:

³⁴ *Black Sash Trust v Minister of Social Development* 2017 (9) BCLR 1089 (CC).

The application is dismissed with costs, including the costs of three counsel for the first respondent where so employed, as well as the costs of counsel for the second respondent and Democratic Alliance as one of the fifth respondents.

**R ALLIE
JUDGE OF THE HIGH COURT**

**J I CLOETE
JUDGE OF THE HIGH COURT**

**K M SAVAGE
JUDGE OF THE HIGH COURT**

APPEARANCES

Applicant: D Mpofu SC with H Matlhape and B Shabalala
Instructed by Seanego Attorneys

First Respondent: I Jamie SC with A Nacerodien and U Naidoo
Instructed by the State Attorney

Second and Fifth Respondents: S Budlender SC with M Bishop
Instructed by Minde Schapiro & Smith Inc.