THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 627/2023

In the matter between:

THE PUBLIC PROTECTOR OF SOUTH AFRICA **APPELLANT**

and

THE CHAIRPERSON OF THE 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**

Neutral citation: *The Public Protector of South Africa v The Chairperson of the Section 194(1) Committee and Others* (627/2023) [2024] ZASCA 131 (1 October 2024)

Coram: PONNAN, NICHOLLS and MOTHLE JJA and MASIPA and DIPPENAAR AJJA

Heard: 28 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website,

and release to SAFLII. The date for hand down is deemed to be 1 October 2024 at 11h00.

Summary: Uniform rule 15 – applies to change of status not change of persona – finds no application in the high court after judgment or the supreme court of appeal at all.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie, Cloete and Savage JJ, sitting as court of first instance):

The appeal is struck from the roll with costs, including those of two counsel, to be paid by Ms Busisiwe Mkhwebane.

JUDGMENT

Ponnan JA (Nicholls and Mothle JJA and Masipa and Dippenaar AJJA concurring):

[1] 'Curiouser and curiouser!', to borrow from Lewis Carroll, is how one may describe the matter.[1] The appeal to this Court was initially brought in the name of 'The Public Protector of South Africa', even though the person whose interests it seeks to advance, the previous Public Protector, Ms Busisiwe Mkhwebane, had by that stage already been removed from office. What is more, the application, the subject of the appeal, which had commenced as an urgent application, had been brought in the middle of a process that has since been finalised, and was thereafter followed by no less than three further decisions – none of which have been challenged.

[2] The litigation has a well-documented history. There are several judgments dealing with the matter.[2] It is thus unnecessary to say much by way of introduction. A brief summary will accordingly suffice: In 2016, Ms Busisiwe Mkhwebane was appointed Public Protector of the Republic of South Africa. On 21 February 2020, Ms Natasha Mazzone, the Chief Whip of the then official opposition, the Democratic

---

[1] '"Curiouser and curiouser!" Cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English).' L Carroll *Alice's Adventures in Wonderland and Through the Looking-Glass* (1998) at 16.

[2] See inter alia *Public Protector of SA v Speaker of the National Assembly and Others* [2022] ZAWCHC 117; *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1; 2022 (3) SA 1 (CC); 2022 (6) BCLR 744 (CC); and *Public Protector of South Africa v Speaker of the National Assembly and Others* [2022] ZAWCHC 180; [2022] 4 All SA 417 (WCC).

Alliance, submitted a motion to the National Assembly for an enquiry to be initiated under s 194(1) of the Constitution to investigate Ms Mkhwebane's removal from office on the grounds of misconduct and incompetence.[3] On 26 February 2020, the Speaker of the National Assembly accepted the motion and referred the matter to an independent panel for a preliminary assessment as contemplated in Rules 129T and 129U of the National Assembly (the Rules).[4]

[3] On 24 February 2021, the independent panel headed by retired Justice Nkabinde issued a report recommending that the complaints of incompetence and misconduct levelled against Ms Mkhwebane be referred to a committee in accordance with the Rules. On 16 March 2021, the National Assembly resolved to adopt the report of the independent panel and to proceed with an enquiry in terms of s 194 of the Constitution. The matter was thereafter referred to a Committee, comprising members of each of the 14 political parties represented in the National Assembly, for a formal enquiry in terms of Rules 129AA and 129AB.[5] A veritable avalanche of legal challenges, primarily at the instance of Ms Mkhwebane, followed.[6]

---

[3] Section 194(1) of the Constitution provides:
'The Public Protector, the Auditor General or a member of a Commission established by this Chapter may be removed from office only on –
(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office.'

[4] Those Rules of the National Assembly provide:
'129T. Referral of motion
When the motion is in order, the Speaker must –
(a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and
(b) inform the Assembly and the President of such referral without delay.

. . . .

129U. Establishment
The Speaker must, when required, establish an independent panel to conduct any preliminary inquiry on a motion initiated in a section 194 enquiry.'

[5] Those Rules provide:
'129AA. Establishment
There is a committee to consider motions initiated in terms of section 194 and referred to it.
129AB. Composition and appointment
(1) The committee consists of the number of Assembly members that the Speaker may determine, subject to the provisions of Rule 154(2) Notwithstanding Rule 155(2), the members of the committee must be appointed as and when necessary.'

[6] See *Public Protector of South Africa v Chairperson: Section 194(1) Committee and Others* [2023] ZAWCHC 73; [2023] 2 All SA 818 (WCC) paras 13-25.

[4] This appeal arises from an application that was launched on 7 November 2022, out of the Western Cape Division of the High Court, Cape Town. Ms Mkhwebane, who deposed to the founding affidavit in the application, stated:

'1. I am the Public Protector of South Africa duly appointed as such in terms of Section 1A(2) of the Public Protector Act 23 of 1994 ("the Public Protector Act") by the President of the Republic of South Africa.

. . .

3. I am the applicant in this matter.'

[5] The application cited:

(a) the first respondent, Mr Qubudile Richard Dyantyi, in his official capacity as the Chairperson of the s 194(1) Committee and 'in his personal capacity as the decision-maker in respect of his personal non-recusal decision;'

(b) the second respondent, Mr Kevin Mileham, as a member of the National Assembly representing the Democratic Alliance and 'in his personal capacity as an officer or member of the Committee';

(c) the Speaker of the National Assembly, in her official capacity as such; and,

(d) the fourth to seventeenth respondents, against whom no relief was sought, being the political parties represented in the National Assembly and the Committee, who were cited insofar as they may have an interest in the outcome of the application.

[6] The following relief was sought:

'2. Declaring the 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 to 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/or equitable remedies in terms of section 8 of PAJA, section 38 and/or section 172(1)(*b*) of the Constitution.

6. Costs against any opposing respondents on the punitive scale.'

[7] The application was opposed by:

(a) the first respondent on behalf of the s 194 Committee and on his own behalf;

(b) the second respondent in respect of the relief sought against him; and,

(c) the fifth respondent, the Democratic Alliance.

On 13 May 2023, the application failed before a specially constituted court consisting of three judges (per Allie, Cloete and Savage JJ), sitting as a court of first instance (the high court).

[8] The high court concluded:

'[50] . . . 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.

. . .

[58] It is also not necessary, given our finding that the applicant has sought relief *in media 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.'

The high court accordingly dismissed the application '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 [the] Democratic Alliance as one of the fifth respondents.'

[9] On 3 May 2023, what was described as a 'Notice of Application for an Urgent Appeal' was filed with the high court. The respondents sought leave to cross-appeal the issue of costs. On 1 June 2023, the high court issued the following order:

'1. That the applicant's application for leave to appeal to the Supreme Court of Appeal is granted.

2. That the first respondent's conditional application for leave to cross-appeal to the Supreme Court of Appeal is granted.

3. That the conditional applications for leave to cross-appeal by the second and fifth respondents to the Supreme Court of Appeal are granted; and

4. That the costs shall be costs in the appeal.'

It came to be accepted in this Court that the cross appeal need not detain us, accordingly nothing further need be said about it.

[10] After the grant of leave to appeal, the Committee, having completed its task, recommended that Ms Mkhwebane be removed from office.[7] The National Assembly adopted that resolution with the support of more than two thirds of its members on 11 September 2023. The President removed Ms Mkhwebane from the position of Public Protector in terms of s 194(3)*(b)* of the Constitution on 13 September 2023. Ms Kholeka Gcaleka was thereafter appointed as her successor by the President for a non-renewable term of seven years with effect from 1 November 2023.

[11] On 8 February 2024, the attorney representing the Democratic Alliance, the fifth respondent in the appeal, Minde, Schapiro & Smith, wrote to the Office of the Public Protector:

'9. . . . we have reason to believe that the appeal is being prosecuted personally by Adv Mkhwebane, and not by the Public Protector of South Africa.

10. We wish to inquire whether you are aware of this appeal, and whether you have instructed RMT Attorneys to prosecute the appeal on behalf of the Public Protector.'

[12] That letter elicited the following response from the Senior Manager: Legal Services on 28 February 2024:

---

[7] The Committee's report is available at https://www.parliament.gov.za/committee-section-194-enquiry. [Accessed on 13 September 2024]

'3. The attorneys who represented Adv Mkhwebane in the impeachment proceedings before the Committee for the Section 194 Enquiry, were expressly advised that the PPSA was not in a position to authorise, commit funding to or mandate any litigation in respect of Adv Mkhwebane's application for the recusal of the Chairperson and one member of the Section 194 Committee.

4. Furthermore, I wish to confirm that neither Adv Kholeka Gcaleka in her capacity as the current incumbent of the office of Public Protector, nor the PPSA has authorised or instructed RMT Attorneys to prosecute the appeal in SCA Appeal Case No: 627/2023 on behalf of the Public Protector.'

[13] On 5 March 2024, Minde, Schapiro & Smith served a notice in terms of Supreme Court of Appeal Rule 5 (rule 5),[8] disputing the authority of Ramushu Mashile Twala Attorneys (the attorney) to act on behalf of the appellant and requesting that 'they lodge with the Registrar a copy of a power of attorney duly signed by or on behalf of the Public Protector of South Africa, that they are duly authorised to act on behalf of the appellant in the prosecution of this appeal'.

[14] In response, on 8 March 2024, the attorney filed a 'Notice of Application for Substitution as Appellant'. The notice described 'Busisiwe Mkhwebane' as the 'Applicant/Appellant'. It read:

'**TAKE NOTICE THAT** the abovementioned Applicant/Appellant due to her change of status, hereby applies to be substituted as the appellant for the Public Protector in the pending appeal, in terms of Rule 15 of the Uniform Rules of Court, applied *mutatis mutandis* herein.'

---

[8] SCA rule 5 headed 'Power of attorney', reads:
'When required
(1) A power of attorney need not be filed, but the authority of a legal practitioner to act on behalf of any party may, within 10 days after it has come to the notice of any other party that the legal practitioner is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed by notice, whereafter upon expiry of 10 days after service of the notice the legal practitioner shall no longer so act, unless a power of attorney is lodged with the registrar within that period.
Format
(2) Every power of attorney shall be signed by or on behalf of the party giving it, and shall otherwise be executed according to law.
Exemptions
(3) No power of attorney shall be required to be filed by –
(a) the National Prosecuting Authority;
(b) a legal practitioner acting pro deo or amicus curiae; or
(c) the State Attorney, any deputy state attorney or any professional assistant to the State Attorney, or any attorney instructed in writing or by telegram or facsimile by or on behalf of the State Attorney or a deputy state attorney in any matter in which the State Attorney or deputy state attorney is acting as such by virtue of any statute.'

[15] The type of authority contemplated by rule 5 is not in the nature of a general authority by one person to another to represent him or her in legal proceedings, but the special type of power that is given by a client to an attorney authorising such attorney to institute or defend legal proceedings on the client's behalf.[9] It is the power to take certain formal procedural steps on behalf of a litigant. It is the institution and prosecution of the proceedings (in this case the appeal) that must be authorised.[10] If the attorney is authorised to act, the proceedings are necessarily those of the client. In reference to the comparable High Court provision, Uniform rule 7, Fleming DJP said 'As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority'.[11]

[16] Rule 5 is a means of achieving production of a power of attorney in order to establish the authority of an attorney to act for the client. It may be called for simply by notice. The object of the rule is to clearly establish the mandate between the client and attorney, in order to prevent the person who is cited as a party and whose name appears on the documents lodged with the registrar of the court from denying their validity or the authority of the attorney concerned. Where an attorney's authority to act on behalf of a party is challenged, then in terms of rule 5, the attorney is required to satisfy the Court that he or she is properly authorised so to act. Until that is done, such attorney is precluded from acting further.[12] When challenged, the attorney was unable to produce a power of attorney, but sought to meet the challenge with a notice of substitution in terms of Uniform rule 15 (to which I shall presently turn). However, that was no answer to the challenge. It must accordingly be accepted that the institution of, and the steps taken by the attorney to prosecute the appeal were not duly authorised; certainly not by the Public Protector of South Africa, in whose name and on whose behalf the attorney purported to act.

---

[9] *South African Allied Workers' Union and Others v De Klerk NO and Others* 1990 (3) SA 425 (E).
[10] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19 (*Ganes*).
[11] *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705G-H, which has been referred to with approval in *Ganes* fn 10 above and *Unlawful Occupiers of the School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) paras 14–16. The relevant authorities are usefully collected in the Full Court judgment per Gorven J (Tshabalala JP and Swain J concurring) in the matter of *Umvoti Municipality v ANC Umvoti Council Caucus and Others* 2010 (3) SA 31 (KZP).
[12] *First Rand Bank Ltd v Fillis and Another* [2010] ZAECPEHC 50; 2010 (6) SA 565 (ECP) para 12.

[17] The import and purport of Uniform rule 15 has most recently been considered by this Court in *Tecmed v Nissho Iwai Corporation*, where Brand JA had this to say:

'In considering the approach of the court a quo, sight should not be lost of the import of Rule 15. The purpose of the Rule was not to afford the High Court the power to substitute a party to proceedings. The High Court already had that inherent power under the common law (see eg *Curtis-Setchell & McKie v Koeppen* 1948 (3) SA 1017 (W) at 1021; *Putzier v Union and South West Africa Insurance Co Ltd* 1976 (4) SA 392 (A) at 402E-F). The court still has that power to grant a substitution of parties on substantive application where Rule 15 does not apply (see eg *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* 1978 (1) SA 671 (A) at 678G; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369F-370B). The purpose of Rule 15 is merely to provide a simplified form of substitution, subject to the right of any affected party to apply to court for relief in terms of Rule 15(4) (see eg LTC Harms *Civil Procedure in the Supreme Court* B-1 to 5; HJ Erasmus *Superior Court Practice* B1-118).

In the absence of any substantive application for substitution the effectiveness of a Rule 15 notice will obviously depend on whether it was given in a situation covered by the rule. But where, as in this case, a substantive application for substitution had in fact been brought, any investigation into the effectiveness of a preceding Rule 15 notice is most likely to result in a futile exercise. If the substantive application is upheld, the substitution will materialise. *Caedit questio*. If, on the other hand, the application is dismissed on its merits, the situation cannot be saved by a notice under Rule 15.'[13]

[18] Prior to the introduction of Uniform rule 15, when a party died or otherwise underwent a change of status, an application to court was necessary to substitute some other person in the stead of such party. Importantly, without the substitution, the matter cannot proceed, because there is no one with standing before the court.[14] The rule regulates the procedure only where substitution becomes necessary by reason of a change of status.[15] If a substitution is necessitated by other factors that do not involve a change of status, it can be granted on application if there is no substantial procedural prejudice to the other party.[16] If no change of status is involved, the court

[13] *Tecmed (Pty) Limited and Others v Nissho Iwai Corporation and Another* [2009] ZASCA 143; [2010] 3 All SA 36 (SCA); 2011 (1) SA 35 (SCA) paras 12-13 (*Tecmed*).
[14] *Estate Huisman and Others v Visser and Others* 1967 (1) SA 470 (T).
[15] D E van Loggerenberg & E Bertelsmann *Erasmus: The Superior Courts Practice* at D1-159 (Erasmus).
[16] D Harms *Civil Procedure in the Superior Courts* Service Issue 46 at B15.1-B15.2 (Harms); *Curtis-Setchwell & McKie v Koeppen* 1948 (3) SA 1017 (W) (*Curtis-Setchwell*); *Friedman v Woolfson* 1970 (3)

will, under its common law power, grant an application for substitution involving the introduction of a new persona on being satisfied that no prejudice will be caused to the other party.[17]

[19] In *Curtis-Setchell v McKie & Koeppen*, the court was concerned with an application for the substitution of the applicants as plaintiffs in a pending action instituted against the defendant by a partnership consisting of two partners.[18] After the issue of summons, the partnership was dissolved and a new partnership (being the applicant in those proceedings) was formed, which took over all book and other debts due to the old one. Roper J referred to a number of cases including several in which the court had granted applications for substitution involving the introduction of a new persona on being satisfied that no prejudice would be caused to the opposite parties. The learned judge concluded '. . . the Court is entitled to allow the substitution applied for in this case, but only on condition that no prejudice can result to the defendant'.[19]

[20] In *Kader v Frank and Warshaw*, the respondent was a firm of attorneys who had conducted a case *pro deo* for a plaintiff in a magistrate's court for damages, and on the day when judgment was given for the plaintiff, took cession from him of his rights and interest in the judgment and taxed costs. Two days later, the defendant noted an appeal and the respondent procured a cancellation of the cession. The court had granted the plaintiff leave to defend the appeal *in forma pauperis* and the defendant, after the noting of the appeal, moved for the substitution of the name of the respondent for the name of the plaintiff in the appeal proceedings. The application was refused on grounds that are not presently relevant. In the course of his judgment, Innes CJ said:

'This procedure of approaching the Court in order to obtain its assistance for the enforcement of a ceded judgment seems to have been adopted in South African practice and to have taken the form of an application to substitute the cessionary's name for that of the cedent upon the record . . . And of that practice Frank and Warshaw might have availed themselves. Or they might have obviated the execution of the judgment in ordinary form and then claimed the

SA 521 (D) (*Friedman*); *Mwandingi v Minister of Defence Namibia* 1991 (1) SA 851 at 864–86 confirmed on appeal in *Minister of Defence Namibia v Mwandingi* 1992 (2) SA 355 at 368; *Tecmed* fn 13 above.
[17] Erasmus fn 15 above D1-160.
[18] *Curtis-Setchell* fn 16 above.
[19] Ibid at 1022.

proceeds from the Sheriff. It does not follow, however, that after notice of appeal they could have claimed to be substituted upon the record for the purpose of defending the appeal; at any rate without the consent of the other party.'[20]

[21] The approach of Roper J found favour with Leon J in *Friedman v Woolfson*. There, in the course of considering the power of a court to grant an order substituting a plaintiff even where no change of status was involved but a totally new plaintiff, and after referring to the dictum of Innes CJ in *Kader's case*, supra, Leon J stated:

'In my judgment it is not correct to say that as a matter of law there cannot be a substitution without the consent of the other party. I consider the true position to be that a cessionary is entitled to bring an application for substitution even without such consent but, if in a particular case there is prejudice to the other side, then the application will be refused.'[21]

The view of Leon J was endorsed by Jansen JA in *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* in these terms: '[t]his is a matter apparently within the discretion of the court and the court will refuse the substitution if there is any prejudice to the other side (*Friedman v Woolfson*)'.[22]

[22] On the strength of *Kader's case*: Harms observes that 'it is doubtful whether the rule applies to a situation after the grant of judgment and an application to court may be necessary where it is desired to substitute a party after judgment has been given';[23] and, Erasmus states: '[i]n view of the proviso to [subrule (2)], application to court will be necessary where it is desired to substitute a party after judgment is given'.[24] Indeed, support for such a view is to be found in the judgment of Fourie AJA in *Cilliers v Ellis*: '. . . notice of the substitution of Mrs Cilliers in her personal capacity as the second appellant by the executrix of her deceased estate, was given in terms of rule 15. In so doing, the first proviso to rule 15(2) was overlooked, which states that, save with the leave of the court granted on such terms as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter. The leave of the court a quo, or the leave of this court, was not sought prior to the filing of this notice in terms of rule 15 . . . absent an application to court for the substitution of the executrix of the deceased estate of Mrs Cilliers, the purported

---

[20] *Kader v Frank and Warshaw* 1926 AD 344 at 347-348.
[21] *Friedman* fn 16 above at 525H.
[22] *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A) at 678G.
[23] Harms fn 16 above B15.1.
[24] Erasmus fn 15 above D1-160.

substitution is irregular and the executrix has no locus standi to participate in this appeal. It follows therefore that there is simply no appellant herein with the necessary locus standi to pursue the appeal.'[25]

[23] The effect of the above authorities is that Ms Mkhwebane could not by dint of a mere notice under Uniform rule 15, without more, achieve the desired substitution. This for at least two reasons: first, because the rule finds application only where a change of status has occurred and not, as here, where, what is sought to be achieved is a change of persona; and, second, as the proviso to ss 2 makes plain, no notice of substitution may be given after the commencement of the hearing of any opposed matter. If no notice of substitution may be given in terms of Uniform rule 15 after the hearing of any opposed motion in the high court, it would stand to reason that it can hardly thereafter be given in this Court. There is thus much to be said for the proposition that Uniform rule 15 does not apply at all, whether in the high court or this Court, after the grant of judgment by the former; leading to the conclusion that 'Rule 15 of the Uniform Rules of Court, [does not apply] *mutatis mutandis* herein', as appears to have been erroneously assumed in the notice of substitution filed on behalf of Ms Mkhwebane with this Court.

[24] Reference was made to three judgments of this Court, namely *Adendorffs Boerderye v Shabalala & others*,[26] *Mgwenya NO and Others v Kruger and Another*[27] and *Marais NO and Another v Maposa and Others*,[28] in support of the argument that Uniform rule 15 finds application in a situation such as the present. In each, the approach of the Court appeared to rest on the supposition that Uniform rule 15 applied. None undertook any considered analysis, accepting *en passant*, so it would seem, that Uniform rule 15 applied. In any event, the last two of the three judgments appear to contemplate, in each instance, a substantive application and not, as in this matter, the mere filing of a notice. I believe that it now has to be accepted that Uniform rule 15 finds no application in this Court. Such acceptance would on the present state of the law and the jurisprudence of this Court create certainty and accordingly be in the best interests of litigating parties.

---

[25] *Cilliers & others v Ellis & another* [2017] ZASCA 13 para 25.
[26] *Adendorffs Boerderye v Shabalala & others* [2017] ZASCA 37.
[27] *Mgwenya NO and Others v Kruger and Another* [2017] ZASCA 102.
[28] *Marais NO and Another v Maposa and Others* [2020] ZASCA 23; 2020 (5) SA 111 (SCA).

[25] This does not mean that Ms Mkhwebane or other similarly placed litigants would be left remediless. This Court retains the power to grant an application for substitution on being satisfied that no prejudice will be caused to the other party. All that this means is that the simplified form of substitution envisaged by Uniform rule 15 does not avail them. A substantive application would thus be necessary. In argument at the bar, it was suggested that the 'Notice of Application for Substitution as Appellant' filed on behalf of Ms Mkhwebane fell to be treated as a substantive application as contemplated in the authorities alluded to. The short response is that it is not. Although the notice does state that she 'hereby applies to be substituted as the appellant for the Public Protector in the pending appeal', it departs from the erroneous premise that Uniform rule 15 applies '*mutatis mutandis*' 'due to her change of status'. It must be said that there was simply no attempt at any stage of the argument to move an application from the bar. Rather, Counsel's entire approach was predicated on the assumption that the notice had achieved the necessary substitution and that Ms Mkhwebane was properly before us as the appellant in the matter.

[26] Moreover, the notice was not accompanied by an affidavit. We are thus in the dark as to when it first dawned on Ms Mkhwebane, given what she describes as her 'change of status', that a substitution was indeed necessary and what steps, if any, were subsequently taken. The stance adopted by the respondents throughout had always been that Ms Mkhwebane was improperly using the cloak of her office to advance her personal interests (and not those of the Office of the Public Protector) in the litigation. They went so far as to suggest that in those circumstances any order for costs as may issue should operate as against her personally and not the public purse. Indeed, the judgment of the high court on the application for leave to appeal records:

'[5] It is however necessary to deal with one of the grounds advanced by the first respondent, formulated as follows in his notice of application for leave to appeal:

"3. It was common cause that the President suspended Adv Mkhwebane as the Public Protector before she instituted these proceedings. Accordingly, the powers of the Public Protector, including the power to institute litigation in the name of the office – had already vested in the Acting Public Protector, in terms of section 2A(7) of the Public Protector Act, 1994.

4. Adv Mkhwebane does not allege that the Acting Public Protector, or a duly delegated person in the Office of the Public Protector, authorised the institution of this application on behalf of the institution of the Public Protector."

. . . .'

[27] That notwithstanding, the high court granted leave to appeal to this Court. In that, it passed over the question and seemed not to be attuned to the true import and effect of an appeal at the instance of Ms Mkhwebane, in circumstances where leave had been granted, not to her, but the Public Protector of South Africa. The high court did not pause to consider what effect, if any, Ms Mkhwebane's removal from office would have on the continued litigation in the name of the Public Protector of South Africa or for that matter whether the application for leave to appeal that served before it had been duly authorised by that office. When the point was raised on behalf of the respondents, it also ought to have focused the attention of Ms Mkhwebane's legal representatives on their continued authority to act in the matter. That did not happen.

[28] What is more, nothing was done to address the issue, until the authority of the attorney to act in the appeal was challenged by the respondents in March 2024. By then several steps had been taken in this Court with a view to the prosecution of the appeal, including: (a) the noting of the appeal – the notice of appeal having been filed on 27 June 2023; (b) the filing of the appeal record on 6 November 2023; and, the filing of Heads of Argument on 13 December 2023. All of these steps were taken in the name of 'The Public Protector of South Africa', who had been cited as the appellant in the matter. But the Public Protector did not validly authorise the taking of any of these steps. When Ms Mkhwebane and her legal representatives did eventually act it was by means of the simple expedient of a Uniform rule 15 notice, which came to be filed on 8 March 2024, some three days after the authority of the attorney had been challenged by the respondents. This occurred approximately ten months after leave had been granted, when, by that stage at the very latest, it should have been obvious that steps had to be taken to address the question of Ms Mkhwebane's standing in the appeal and her attorney's authority to act in the matter.

[29] That the challenge to the attorney's authority served as the trigger for the filing of the Uniform rule 15 notice, is inescapable. The dilatoriness and inertia otherwise remain unexplained. This, in circumstances where not only is Ms Mkhwebane, in her own right, an Advocate and officer of the court, as also the former head of an important Chapter 9 Institution, but who was represented at all material times by a firm of attorneys and a team of three Advocates including Senior Counsel. On any reckoning therefore, Ms Mkhwebane is certainly not 'an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline'; there may well be a 'higher duty on [her] to respect the law' and 'to fulfil the procedural requirements'.[29]

[30] There is yet a further reason why the envisaged appeal does not get out of the starting stalls. It is this: even if the appeal succeeds on the *in media res* point, and even if this Court concludes that the Chairperson and/or Mr Mileham acted illegally, the determination of the appeal will have no practical effect within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (Superior Courts Act).[30] That section 'is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing'.[31] In that regard, it is trite that courts should and ought not to decide issues of academic interest only.[32]

[31] It is so that the lack of practical effect or mootness is not an absolute bar to the determination of issues on appeal,[33] and that this Court can consider cases that present no existing or live controversy if the interests of justice so require. That will ordinarily be so where the appeal raises a discrete legal issue of public importance

---

[29] *MEC for Health, Eastern Cape v Kirland Investments* (Pty) Ltd [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (*Kirland*).
[30] Section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 provides: '[w]hen at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'.
[31] *Legal Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA); [2014] 4 All SA 570 (SCA) para 3, quoting and applying *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA) para 7, which referred to the predecessor of s 16(2)*(a)*(i), s 21A of the Supreme Court Act 59 of 1959. See also *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA).
[32] *Clear Enterprises (Pty) Ltd v Commissioner for South African Revenue Services and Others* [2011] ZASCA 164 para 12.
[33] *Spagni v The Director of Public Prosecutions, Western Cape and Others* [2023] ZASCA 24 para 12 (*Spagni*).

that would affect matters in the future.[34] However, it remains a 'prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others'.[35]

[32] It is well settled that:

' . . . Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important' (per Innes CJ in *Geldenhuys & Neethling v Beuthin*).[36]

Some eight decades later, the Constitutional Court echoed what had been said by the learned Chief Justice in these terms:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'[37]

[33] In this matter, there is no challenge to:

(a) the recommendation of the Committee that Ms Mkhwebane be removed from office;

(b) the resolution of the National Assembly adopting that recommendation;

(c) the exercise of the Presidential power to remove Ms Mkhwebane from office; or

(d) the exercise of the Presidential power to appoint Ms Gcaleka as Ms Mkhwebane's successor.

Those decisions remain valid unless and until set aside by a court.[38] Absent a challenge to those decisions, no order of this Court could disturb their validity. As the Constitutional Court put it in *MEC for Health, Eastern Cape and Another v Kirland Investments* (Pty) Ltd, 'official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside'.[39]

---

[34] *Centre for Child Law v The Governing Body of Hoërskool Fochville & Another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 11.

[35] *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) para 22 (*Stransham-Ford*).

[36] *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441.

[37] In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 fn 8.

[38] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA).

[39] *Kirland* fn 29 above para 103.

[34] Not having challenged her removal as Public Protector (or even attempted to do so), the recommendations and resolutions culminating in her removal thus stand. Despite her challenge before the high court having long been overtaken by these events, Ms Mkhwebane seeks to persist in the appeal. She urges this Court to enquire into the legality of three interlocutory rulings, made during the enquiry by the s 194 Committee and she asks for those rulings to be set aside and substituted. But the enquiry is over, the National Assembly has impeached her, she has been removed from office and a new Public Protector has been appointed. Further, in terms of s 183 of the Constitution, Ms Mkhwebane's non-renewable seven-year term has run its course. There can hardly be a challenge to any of those decisions now, given that her fixed term of office would in any event have ended in mid-October 2023, had she not been removed. Restoration to office is thus constitutionally and factually impossible. In the circumstances, no public benefit can come from a judicial pronouncement on the regularity of the s 194 Committee's rulings.

[35] Thus, whatever this Court decides, it plainly will have no practical effect within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act. Is it nevertheless in the interests of justice to decide the appeal? Plainly not. The matter presents no discrete legal issue. The only question on which the high court decided the case was on the *in media res* point. That is not a discrete legal issue entirely divorced from the 'factual matrix'.[40] The remaining issues are intimately connected to the facts and raise no discrete legal issue. Even were we inclined to decide those issues, we would be sitting as a court of first – and possibly last – instance, which cannot be in the interests of justice.[41] In *R v Secretary of State for the Home Department, Ex Part Salem*, Lord Slynn of Hadley said:

'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed

[40] *Spagni* fn 27 above para 12; *The Kenmont School and Another v D M and Others* [2013] ZASCA 79 para 12.
[41] *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) para 8.

consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'[42]

[36] Ms Mkhwebane's counsel accepted in argument that the relief sought in paragraph 4 of the notice of motion has been rendered moot. The same, he argued, does not hold true for paragraphs 2 and 3 of the notice of motion. Why that would be so, is hard to fathom. The substitutory relief sought in paragraph 4 is inextricably linked to, and flows from, the relief sought in the preceding paragraphs. However, even standing on its own, paragraph 2 of the notice of motion conduces to confusion. The declaratory relief sought in paragraphs 2.1 and 2.3 is formless, incomplete and incoherent. Inchoate and impermissibly vague orders violate the rule of law, which is a founding principle of our Constitution.[43] Unlike paragraphs 2.1 and 2.2, it is only in paragraph 2.2 that a declaration of unlawfulness and unconstitutionality is sought. As the substitutory relief is no longer being persisted in, the relief now sought is a declaration, without more, that the decisions by the Committee to dismiss an application for an adjournment and to continue with the proceedings are unlawful and unconstitutional.

[37] In *West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism*, Navsa JA pointed out:

'It is true that this court said more than four decades ago, in *Ex parte Nell* 1963 (1) SA 754 (A), that the absence of an existing dispute was not an absolute bar to the grant of a declaratory order. What was required was that there should be interested parties upon whom the declaratory order would be binding. In considering whether to grant a declaratory order a court exercises a discretion with due regard to the circumstances. The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. If the court is so satisfied it must consider whether or not the order should be granted. In exercising its discretion the court may decline to deal with the matter where there is no actual dispute. The court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic. Where a court of first instance has declined to make a

---

[42] *R v Secretary of State for the Home Department, Ex Parte Salem* [1999] 2 All ER 42 (HL) at 47d-f. Cited in *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7; *Rand Water Board v Rotek Industries (Pty) Limited* 2003 (4) SA 58 (SCA) para 20 and *Executive Officer: Financial Services Board v Dynamic Wealth Ltd and Others* [2011] ZASCA 193; 2012 (1) SA 453 (SCA); [2012] 1 All SA 135 (SCA) para 44.

[43] *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para 14.

declaratory order and it is held on appeal that that decision is wrong the matter will usually be remitted to the lower court.'[44]

[38] Here, remittal to the high court would be pointless. All of the decisions sought to be impugned were taken in October 2022. Thereafter, the proceedings continued to finality before the Committee. Having completed its work, the Committee made a recommendation that has since been acted upon. Two consequences flow from the fact that the Committee has ceased to exist: (a) the decisions taken in October 2022 can obviously not be reconsidered by it, so any contemplated further remittal by the high court (were it to be so inclined) to the Committee would be pointless; and (b) there is no interested party upon whom any declaratory order would be binding.

[39] A further string to counsel's bow was that we were obliged in terms of s 172(1)*(a)* of the Constitution to declare invalid the conduct complained of (which came to be described as egregious violations of Ms Mkhwebane's constitutional rights). Accordingly, so the argument went, technicalities should not be allowed to stand in the way of her vindicating her constitutional rights. Importantly, however, there is no mention of s 172(1)*(a)* of the Constitution in the notice of motion. However difficult, a litigant is required to set her course and proceed accordingly. A court and the other parties to the litigation are entitled to assume that the relief asked for is the relief wanted. In that regard, it bears emphasis that it is not the function of this Court to act in an advisory capacity.

[40] To borrow from Kriegler J in *Ferreira v Levin*:

'The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally, the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor *Sharpe* points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not

[44] *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2010] ZASCA 114; [2011] All SA 487 (SCA) para 45.

decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.'[45]

[41] There remains a question of some delicacy – the necessity to say something about the manner in which the matter was conducted. None of the points that have been held to be decisive against Ms Mkhwebane were even alluded to, much less dealt with, in the heads of argument filed with this Court, despite the fact that Ms Mkhwebane's standing to prosecute the appeal and the issue of mootness had already been raised on behalf of the respondents before the high court. One would have expected the heads to address whether the appeal was properly before us, inasmuch as: (a) the attorney, who had taken steps in the prosecution of the appeal, had not been validly authorised by the cited appellant, the Public Protector of South Africa; and, (b) there was no proper appellant, whether in the guise of the Public Protector of South Africa or in the person of Ms Mkhwebane, before the Court to prosecute the appeal. Those issues were ignored. So too, the claim by the respondents that the appeal was moot.

[42] In the circumstances, the registrar of this Court was requested on 12 June 2024 to inform the parties that counsel will be required at the hearing of the matter to address whether, after the grant of leave to appeal by the high court and after the filing of the notice of appeal in this Court, Ms Mkhwebane could, by notice under Uniform rule 15, be substituted for the Public Protector, as the appellant in the pending appeal. If so, counsel for Ms Mkhwebane would be required to address whether the decision sought by her on appeal will have any practical effect or result within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act.

[43] However, despite having been forewarned, counsel for Ms Mkhwebane, who seemed not to be sufficiently well-versed with the relevant authorities, was of little to no assistance to the Court. Long before the notice of appeal was filed with this Court, there ought to have been an objective analysis of the case with a proper focus on the legal and procedural issues that would occupy our attention at the hearing of the

[45] *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199.

matter. To understand the decision-making process, those who practice in this Court are expected to have more than just a nodding acquaintance with the relevant rules, as also the established jurisprudence of this Court. Developed skills in legal research, analysis and writing are an indispensable part of an appellate practitioner's toolkit. Conclusionally assertions that a lower court disregarded the law or turned a blind eye to egregious violations of a litigant's rights, can hardly carry the day.

[44] Where, as here, counsel has been involved in many matters involving the same client, they can easily become convinced of the merits of their client's cause, oftentimes to the detriment of the client. Unless the matter is approached from a detached perspective, a legal representative may well develop tunnel vision, thereby losing all objectivity. Had counsel stepped back apace or had Ms Mkwebane taken advice from a disinterested member of the bar, schooled in appellate practice, she would have been advised not to pursue this appeal, which self-evidently was dead on arrival. We cannot conceive that any reasonable legal practitioner could disagree with this appraisal.

[45] As the Court of Appeal of California (Fourth District, Division Three) pointed out:

'Appellate work is most assuredly not the recycling of trial level points and authorities . . . the orientation of trial work and appellate work is obviously different . . . but that is only the beginning of the differences that come immediately to mind.

For better or worse, appellate briefs receive greater scrutiny than trial level points . . . The judges . . . will . . . be able to study the attorney's "work product" more closely . . . to . . . identify errors in counsel's reasoning, misstatements of law and miscitations of authority, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention.

. . . [A]ppellate practice entails rigorous original work in its own right. The [lawyer] who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them into an appellate brief, is producing a substandard product.'[46]

[46] *In re Marriage of Shaban* (2001) 88 Cal. App. 4th 398.

[46] In his address, on 6 June 2000, to the Advocates' Society Spring Symposium entitled the 'Role of the Courts and Counsel In Justice', the then Chief Justice of Ontario, The Honourable R Roy McMurty had this to say:

'Lawyers are not solely professional advocates or "hired guns". And while they do not surrender their free speech rights upon admission to the Bar, they are also officers of the court with fundamental obligations to uphold the integrity of the judicial process, both inside and outside the courtroom. It is the duty of counsel to be faithful both to their client and to the administration of justice.'[47]

[47] The former Chief Justice of the Supreme Court of Victoria, the Honourable Marilyn Warren put it thus:

'The lawyer's duty to the court is an incident of the lawyer's duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner's role is not merely to push his or her client's interests in the adversarial process, rather the practitioner has a duty to "assist the court in the doing of justice according to law."

The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short, lawyers "must do what they can to ensure that the law is applied correctly to the case."

The lawyer's duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind their role in the legal process and how the role might further the ultimate public interest in that process, that is, the proper administration of justice. As Brennan J states, "[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society."

When lawyers fail to ensure their duty to the court is at the forefront of their minds, they do a disservice to their client, the profession and the public as a whole.'[48]

---

[47] R McMurtry. (2000) *Role of the Courts and Counsel* In JusticeThe Advocates' Society Spring Symposium 2000 Advocacy in the 21st Century, Ontario. 6 June 2000. Available at https://www.ontariocourts.ca/coa/about-the-court/archives/role-of-the-courts-and-counsel-in-justice/ [Accessed on 14 September 2024.]

[48] M, Warren. (2009) *The Duty Owed to the Court – Sometimes Forgotten* The Judicial Conference of Australia Colloquium, Melbourne. 9 October 2009. Available at https://www.ajoa.asn.au/wp-content/uploads/2022/05/Warren-2009-paper.pdf [Accessed on 14 September 2024.] See also *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenthout v Pretoria Society of Advocates* [2012] ZASCA 175; [2013] 1 All SA 393 (SCA); 2013 (2) SA 52 (SCA) para 87.

[48] Brevity is the hallmark of good advocacy. Clarity of thought, logical coherence and conciseness of presentation are the product of painful preparation. Said Winston Churchill: 'If you want me to speak for two minutes, it will take me three weeks of preparation. If you want me to speak for thirty minutes, it will take me a week to prepare. If you want me to speak for an hour, I am ready now.' Exasperated sighs, soapbox oratory, empty rhetoric, political posturing, theatrical gestures and long-winded dismissive non-sequiturs have no place in a courtroom, particularly in response to searching questions from the bench. The taking of 'miserable, pettifogging point[s]', as Innes CJ described them over a century ago, are bound to fail. The learned Chief Justice added: 'But points of that kind do commend themselves to a certain class of practitioner, and do undoubtedly possess an attraction for a certain stamp of mind . . .'[49]

[49] It must follow that, inasmuch as there is neither an appeal properly before this Court, nor an appellant to prosecute it, the matter falls to be struck from the roll. The regret is that unmeritorious appeals, such as this, impact not just the immediate parties and the Court (that has to increasingly deal with congested court rolls), but also other litigants whose matters are truly deserving of the attention of this Court. Those litigants have to wait in line whilst we process frivolous appeals such as this.

[50] In the result, the appeal is struck from the roll with costs, including those of two counsel, to be paid by Ms Busisiwe Mkhwebane.

_____

V M PONNAN

JUDGE OF APPEAL

[49] *Incorporated Law Society v Bevan* 1908 TS 724 at 730.

Appearances

For the appellant:	DC Mpofu SC, B Shabalala with N Khooe
Instructed by:	Ramushu Mashile Twala Inc., Johannesburg
	Claude Reid Attorneys, Bloemfontein
For the first respondent:	I Jamie SC, A Nacerodien with UK Naidoo
Instructed by:	The State Attorney, Cape Town
	The State Attorney, Bloemfontein
For the second & fifth respondents:	P Maharaj-Pillay
Instructed by:	Minde, Schapiro & Smith Attorneys, Cape Town
	Symington & De Kok Attorneys, Bloemfontein