**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 1 October 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*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)

---

Today the Supreme Court of Appeal (SCA) struck the appeal of the former Public Protector of South Africa, Ms Busisiwe Mkhwebane, from the roll and ordered her to pay the costs, including those of two counsel. The appeal arises from an application that was launched on 7 November 2022, out of the Western Cape Division of the High Court, Cape Town (the high court). The application was brought in the name of the 'The Public Protector of South Africa', even though Ms Mkhwebane sought to advance her personal interests in the litigation.

In 2016, Ms 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 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. 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.

On 24 February 2021, the independent panel recommended that the complaints of incompetence and misconduct levelled against Ms Mkhwebane be referred to a committee in accordance with the Rules of Parliament. The matter was thereafter referred to a Committee for a formal enquiry. The Committee recommended that Ms Mkhwebane be removed from office. 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 pursuant to 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.

On 8 February 2024, the attorney representing the Democratic Alliance (Minde, Schapiro & Smith) wrote to the Office of the Public Protector inquiring whether she is aware of the appeal that was before the SCA and whether she had instructed Ramushu Mashile Twala Attorneys (the attorney) to prosecute the appeal on behalf of the Public Protector. The Office of the Public Protector confirmed that the appeal had not been authorised by it.

On 5 March 2024, Minde, Schapiro & Smith served a notice in terms of SCA Rule 5 (rule 5), disputing the authority of the attorney 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'. In response, on 8 March 2024, the attorney filed a 'Notice of Application for Substitution as Appellant' in terms of Rule 15of the Uniform Rules of the High Court (Uniform rule 5). The notice described 'Busisiwe Mkhwebane' as the 'Applicant/Appellant'.

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. 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. The SCA took the view that was no answer to the challenge. Uniform rule 15 regulates the procedure only where substitution becomes necessary by reason of a change of status and not a change of persona. If no change of status is involved, a substitution can be granted on a substantive application if there is no substantial procedural prejudice to the other party. The SCA concluded that, in any event, Uniform rule 15 finds no application in the high court after judgment or in the SCA at all.

Moreover, not having challenged her removal as Public Protector (or even attempted to do so), the recommendations and resolutions culminating in her removal stood. Despite her challenge before the high court having long been overtaken by these events, Ms Mkhwebane persisted in the appeal. She nonetheless urged the SCA to enquire into the legality of three interlocutory rulings, made during the enquiry by the s 194 Committee and asked for those rulings to be set aside and substituted. But, said the SCA, 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. The SCA held that 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. Thus, any appeal as may avail Ms Mkhwebane will have no practical effect.

The SCA accordingly concluded that inasmuch as there is neither an appeal properly before it, nor an appellant to prosecute it, the matter fell to be struck from the roll. The SCA was critical of the manner in which the matter was conducted, stating that none of the points that were held to be decisive against Ms Mkhwebane were even alluded to, much less dealt with, in the heads of argument filed with the 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. The SCA pointed out the Counsel for Ms Mkhwebane seemed not to be sufficiently well-versed with the relevant authorities and was of little to no assistance to the Court. The SCA added that appellate work is not the recycling of trial level points and that had the matter been approached from a detached perspective Ms Mkhwebane would have been advised not to pursue the appeal, which self-evidently was dead on arrival.

--------oOo--------