# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No:

In the matter between:

**DEMOCRATIC ALLIANCE** Applicant

and

**THE SPEAKER OF THE NATIONAL ASSEMBLY** First Respondent

**JACOB GEDLEYIHLEKISA ZUMA, THE PRESIDENT** Second Respondent

**OF THE REPUBLIC** **OF SOUTH AFRICA**

**THE MINISTER OF POLICE** Third Respondent

**THE PUBLIC PROTECTOR** Fourth Respondent

**FOUNDING AFFIDAVIT**

I, the undersigned,

**JAMES SELFE**

do hereby make oath and declare as follows:

1. I am an adult male and the Chairperson of the Federal Executive of the Applicant.
2. I am also a member of the National Assembly of the Parliament of South Africa, representing the Applicant. I served on the *ad hoc* Committees of the National Assembly which dealt with the subject matter of this application.
3. I am duly authorised to depose to this affidavit on behalf of the Applicant.
4. The facts contained in this affidavit are true and correct and fall within my personal knowledge, unless otherwise indicated or apparent from the context. To the extent that I rely on information provided to me by others, I verily believe such information to be correct and I ask for same to be admitted. Any legal submissions are made on the advice of the Applicant’s legal representatives, which advice I believe to be correct.

**THE PARTIES**

1. The Applicant is the **DEMOCRATIC ALLIANCE** *(“the DA”)*, a political party registered in terms of s 26 of the Electoral Act 73 of 1998 with its head office situated at 2nd Floor, Theba Hosken House, cnr Breda and Mill Streets, Gardens, Cape Town. The DA brings this application in its own interest, as envisaged in s 38(a) of the Constitution, as well as in the interest of its members, as envisaged in s 38(e) of the Constitution, and in the public interest, as envisaged in s 38(d) of the Constitution.
2. The First Respondent is **THE SPEAKER OF THE NATIONAL ASSEMBLY**, with her offices at Parliament, Cape Town. The First Respondent is cited as the nominal respondent as she is the presiding officer of the National Assembly, which body adopted certain resolutions which are challenged in the present matter.
3. The Second Respondent is **JACOB GEDLEYIHLEKISA ZUMA, THE PRESIDENT OF THE REPUBLIC** **OF SOUTH AFRICA** *(“President Zuma”)*, with his offices at Tuynhuys, Cape Town. President Zuma was required to comply with the remedial action taken by the Fourth Respondent (*“the Public Protector”*) in her report concerning the security upgrades at his private residence at Nkandla. President Zuma not only failed to do so, but he failed to engage rationally with the Public Protector regarding her report. The DA contends that President Zuma’s failure to comply with the remedial action taken by the Public Protector, alternatively to engage rationally with her report, was unlawful, unconstitutional and invalid.
4. The Third Respondent is **THE MINISTER OF POLICE**, cited care of the State Attorney, 4th Floor, 22 Long Street, Cape Town. The Minister of Police purported to file a report to the National Assembly in which he attempted to respond to the Public Protector’s Nkandla report. The Minister of Police was not authorised to make such report, and his report is in any event fatally flawed and irrational, both procedurally and substantively. The DA seeks an order declaring the Minister’s report to be unlawful and constitutionally invalid.
5. The Fourth Respondent is **THE PUBLIC PROTECTOR**, an organ of state referred to in ss 181 – 183 of the Constitution of the Republic of South Africa, 1996 (“*the Constitution*”) with her regional office at 4th Floor, 51 Wale Street / Breë Street, Cape Town. The Public Protector compiled a report entitled “*Secure in comfort*” regarding an “*Investigation into Allegations of Impropriety and Unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province*”. I shall refer to the report to as “*the Nkandla report*”. No relief is sought against the Public Protector. She is cited for such interest as she may have in the application.
6. All the parties in this application are parties in an application instituted by the Applicant in the High Court, as set out below.

**THE NATURE OF THE APPLICATION**

1. This application arises from President Zuma’s and the National Assembly’s failure to comply with the remedial action taken by the Public Protector in terms of s 182(1)(c) of the Constitution.
   1. President Zuma was, *inter alia,* required to pay for a reasonable percentage of the cost of the measures that did not relate to security, and was specifically required to report to the National Assembly, with his comments and actions on the Nkandla report, within a prescribed period of time.[[1]](#footnote-1)
   2. The National Assembly was required to give effect to the remedial action taken by the Public Protector, by receiving a report of President Zuma and, to the extent that there was any dispute of the Public Protector’s remedial action, to hear the Public Protector before passing any resolutions.
2. On 19 August 2015, the DA launched an application in the High Court of South Africa, Western Cape Division (*“the High Court”)* to challenge President Zuma’s and the National Assembly’s failure to comply with the remedial action taken by the Public Protector. A copy of the notice of motion, founding affidavit and related documents is attached marked **Annexure “JS(CC)1”**. At this stage, no answering affidavits have been filed in response to the DA’s High Court application.
3. The substantive relief sought by the DA in the High Court is identical to that set out in the Notice of Motion to which this affidavit is attached.
4. The DA intended to proceed with the application in the High Court. However, the DA learnt, for the first time on Thursday, 3 September 2015, that this Court issued directions to set down for hearing an application by the Economic Freedom Fighters *(“the EFF”)* under case number CCT 143/15. That application, which is to be heard on 9 February 2016, is also directed at challenging President Zuma’s and the National Assembly’s failure to comply with the remedial action taken by the Public Protector.
5. From a consideration of the papers filed in support of the EFF’s application, it is apparent that the relief sought and the substantive issues raised overlap considerably and materially with the issues raised in the DA’s application to the High Court. In particular:
   1. The relief that the EFF seeks in respect of President Zuma is identical to that sought by the DA in the High Court (save for the time period prescribed for compliance). The primary issues raised in the EFF’s and DA’s applications are also identical – that is, the lawfulness and constitutionality of the President’s and Parliament’s failure to comply with the remedial action taken by the Public Protector.
   2. The EFF has challenged Parliament’s failure to exercise its constitutional obligations to hold the executive accountable and oversee the exercise of national executive authority, and has contended, in general terms, that this failure is manifest in Parliament’s failure to ensure that President Zuma complies with the Public Protector’s findings and remedial action. On the other hand, the DA has sought to challenge two specific resolutions, which were adopted by the National Assembly (on 13 November 2014 and 18 August 2015), and which manifest the same failure by the National Assembly.
   3. Further, both the EFF and the DA contend that the National Assembly’s reliance on the Minister of Police’s report on the Security Upgrades at Nkandla was unconstitutional and unlawful, *inter alia*, because the National Assembly thereby impermissibly sought to alter or ignore the remedial action of the Public Protector. The DA contends that the National Assembly’s reliance on further reports of other organs of state – specifically, the so-called “Task Team” convened by the Minister of Public Works in October 2012 and the Special Investigations Unit – was likewise unconstitutional and unlawful.
6. Given the overlap in the EFF’s and the DA’s applications, the DA submits that the interests of justice require that the DA’s application in this Court be heard at the same time as the EFF’s application.
7. The DA thus seeks direct access, under section 167(6)(a) of the Constitution and Rule 18 of this Court’s rules, conditional upon this Court granting the EFF direct access to this Court or assuming exclusive jurisdiction in the matter under case number CCT 143/15.
8. The DA instituted its application in the High Court on the advice and basis that the issues do not fall within the exclusive jurisdiction of this Court. However, in the event that this Court finds that the DA was incorrect in this regard – in respect of some or all of the relief that the DA seeks – the DA seeks its application to be heard, in the alternative, on the basis of the exclusive jurisdiction of this Court under s 167(4)(e) of the Constitution.

**THE GRANTING OF CONDITIONAL DIRECT ACCESS IS IN THE INTERESTS OF JUSTICE**

1. The DA respectfully submits that it would be in the interests of justice for this Court to make a determination of the issues raised in its application and that of the EFF after one hearing, in which all the parties who have a direct and substantial interest in the matter are heard.
2. It should be noted that in the EFF’s application there are only two respondents, whereas in the DA’s application the Minister of Police and the Public Protector are additionally cited. The DA submits that, given the public and constitutional importance of the issues raised in the EFF’s and DA’s applications, the contentions of the Public Protector, in particular, ought to be heard. The issues raised ought to be determined once and for all, with the benefit of the EFF’s, the DA’s and the other interested parties’ submissions, including on the appropriate remedy.
3. As is detailed in the DA’s founding affidavit filed in the High Court (Annexure “JS(CC)1”), the failure by President Zuma and the National Assembly to comply with the remedial action taken by the Public Protector has caused considerable and ongoing political disruption, quite apart from being unlawful and unconstitutional. The conduct of President Zuma and (the majority of) the National Assembly in responding to the Public Protector’s Nkandla report has been deplorable, and has demonstrated a flagrant disregard of the law and their constitutional obligations. The issues raised in the DA’s and the EFF’s applications are of fundamental constitutional importance, and entail crucial political and legal questions which, the DA respectfully submits, requires the attention of this Court, as soon as possible.
4. It is also not in the interests of justice for this Court and the High Court simultaneously to be seized with deciding effectively identical issues. This has been recognised by this Court on several occasions:

*Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)* 2006 (1) SA 524 (CC) at paras 34-44;

*Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC) at paras 29-34;

*Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at paras 2-16;

*AParty v Minister for Home Affairs; Moloko v Minister for Home Affairs* 2009 (3) SA 649 (CC) at paras 14-19, 27-34;

*Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) at paras 11-12.

1. The facts and substantive contentions raised by the DA in support of the relief sought in this Court appear from the founding affidavit in the High Court application. In order to avoid unduly burdening this Court, I do not repeat the facts and legal contentions here. Instead I pray that the contents of the founding affidavit in the High Court application be read as incorporated herein and be treated as the substantive affidavit in support of the relief sought by the DA in this Court. In summary, the DA contends that:
   1. President Zuma has not complied with the remedial action taken by the Public Protector, as he was legally obliged to do so. A declaration to that effect falls to be granted, and it would be just and equitable for this Court to direct President Zuma to comply with the remedial action taken by the Public Protector.
   2. To the extent that the National Assembly regarded the responses from President Zuma (of 2 April 2014 and 14 August 2014) and/or a report from the Minister of Police (of 25 March 2015) and other reports as “*a report*” which satisfies the remedial action taken by the Public Protector, and the applicable legislation, the National Assembly acted unconstitutionally and unlawfully.
   3. Neither President Zuma nor the National Assembly was entitled to rely on a report from the Minister of Police in lieu of a report from the President to the remedial taken by the Public Protector. The Minister of Police nevertheless submitted a report to the National Assembly, which was adopted by the National Assembly on 18 August 2015. The Minister of Police’s report is invalid because he had no legal authority to compile the report and the report is in any event factually flawed and irrational.

**CONCLUSION**

1. In the circumstances, the position of the DA is:
   1. The DA seeks direct access to this Court conditional upon this Court granting the EFF direct access or assuming exclusive jurisdiction in the matter under case number CCT 143/15. The DA submits that it is in the interests of justice for the DA’s application in this Court to be heard at the same time as the EFF’s application on 9 February 2016.
   2. In the alternative, should this Court find that some or all of the relief in the DA’s application falls to be determined exclusively by this Court, the DA seeks to be admitted on this basis.
2. The DA accordingly submits that an order as contained in the Notice of Motion: Conditional Application for Direct Access is appropriate.

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**JAMES SELFE**

I certify that the above signature is the true signature of the deponent and that he has acknowledged that he knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at **CAPE TOWN** on this  day of **SEPTEMBER 2015**, in accordance with Government Notice No. R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No. R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.

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**COMMISSIONER OF OATH**

1. See, in this regard, the remedial action taken concerning the President set out in the Nkandla report at p. 224, para 11.1. The remedial action taken in respect of the President is also set out in the executive summary at p. 68, para (a). [↑](#footnote-ref-1)