

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO.: CCT 143/15

In the matter between:

ECONOMIC FREEDOM FIGHTERS

Applicant

and

THE SPEAKER OF THE NATIONAL
ASSEMBLY, REPUBLIC OF SOUTH AFRICA

First Respondent

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA

Second Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and say that:-

1.

- 1.1 I am an adult male with the details set forth in the founding affidavit. I am also the President of the Republic of South Africa.

1.2 The facts in this affidavit, save where the contrary is stated or it is apparent from the context, are within my personal knowledge and are, to the best of my knowledge and belief, true and correct.

1.3 Legal submissions are made on the advice of my legal representatives. I believe those submissions to be correct.

INTRODUCTION

2. I have read the notice of motion and the founding affidavit deposed to by Mr Shivambu for the applicant (hereinafter “the *EFF*”).

3. The application is premised on findings by the Office of the Public Prosecutor (“*the PP*”) that:-

3.1 certain legal processes were breached for the installation and implementation of security measures and the construction of buildings at my private residence¹;

3.2 there was improper conduct by the relevant authorities in respect of the procurement of goods relating to the project and certain prescripts were violated².

¹ Paragraph 10.1 of the report.

² Paragraph 10.2.

4. The remedial action recommended by the PP set out at paragraph 26.1.3 and which the EFF seeks in these proceedings to enforce are:-

4.1 I must, with the help of the National Treasury and the South African Police Services, determine the reasonable costs of the measures implemented by the Department of Public Works "*that do not relate to security, and which include the visitor's centre, the amphi-theatre, the cattle kraal and the chicken run and the swimming pool*";

4.2 having determined those reasonable costs, I must pay a "*reasonable percentage of the cost of the measures*", in other words, a reasonable portion of the reasonable costs;

4.3 I must reprimand the ministers involved; and

4.4 I must report on my comments and actions within fourteen days thereof to the National Assembly.

5. In time the contribution that I must pay has become focused entirely on the reasonable costs of and my contribution towards a reasonable percentage of the visitor's centre, the amphi-theatre, the cattle kraal, the chicken run and the swimming pool (those items are hereinafter referred to as "*the specific items*").

6. I also stress that the Public Protector herself appears to accept that I am not expected simply to rubberstamp her report and the remedial action expressed therein.

7. The EFF's application is accordingly limited to the estimation of the reasonable costs of the specific items and what a reasonable proportion thereof would amount to. The costs have yet to be determined and significantly, the EFF does not contend that they have been. Moreover, the EFF does not assert what a reasonable percentage of the costs would amount to. The object of the present application self-evidently is to hold me personally accountable in circumstances where this is wrong in law and politically expedient. There is in any event no legal basis advanced in the EFF's application which justifies its attempt to approach this court directly, and the factual and legal questions that are implicated in the EFF's direct application require careful weighing by courts of first instance rather than this Court as the final arbiter of such disputes.

8. I accordingly oppose the application and ask that it be dismissed with costs on the following broad grounds:-
 - 8.1 the application is procedurally and jurisdictionally flawed:
 - 8.1.1 the EFF does not enjoy direct access to this Court in the absence of a properly pleaded substantive application therefor. That application has not been brought;

8.1.2 the EFF is further and in any event not entitled to direct access because it does not and cannot identify the constitutional obligations which it contends the respondents have breached;

8.1.3 the EFF has failed to join the Minister of Police (“the *Minister*”) and the PP as parties to the proceedings, notwithstanding their direct and substantial interest in the matter;

8.1.4 the application is premature.

8.2 Submissions on the effect of the PP’s findings and recommendations on remedial action follow. I will contend that:

8.2.1 there is currently a debate before our courts about the nature of the PP’s findings and whether remedial action is binding or merely recommendatory;

8.2.2 in any event, I am empowered in implementing the remedial action contained in the PP’s report, and required by its terms, to consider a number of factors in giving effect to those actions, including questions of what upgrades at my private home are reasonably related to security and

what a reasonable contribution to any such security upgrades may be – a process in which I am presently engaged;

8.2.3 I am, as the law currently stands, entitled to differ with the findings and recommendations of the PP on cogent grounds.

9 It is my current advice that the PP recommended that I as an individual pay a reasonable portion of the reasonable costs of the specific Items. I have also been advised that such determination would have to consider all the relevant circumstances in determining what is a reasonable portion. The PP does not expressly state that any factor highly relevant to what is reasonable, must be disregarded in that process. I would be most surprised if the PP had expressly stated that as a governing feature of her recommendation as to how a rational exercise must be conducted.

10 I also point out that on the face of it the PP recommended that steps must be taken to determine what the reasonable costs were of all measures which do not relate to security. Her remedial action reads that I am to: *“determine the reasonable cost of the measures implemented by the DPW at [my] private residence **that do not relate to security**, and which **include** Visitors’ Centre, the amphitheatre, the cattle kraal and chicken run, the swimming pool”* (my emphasis).³ As I had read her report, that

³ Para 11.1.1 of the report.

was a recommendation to investigate the security relatedness of all Nkandla measures. What I undertook in my response to the National Assembly, was in line therewith. The focus then shifted towards only the specific items being quantified for a contribution, and this is obviously the premise on which the EFF application now rests. That was a different understanding to the one I had initially responded to.

- 11 I furthermore understand that I am not to determine such contribution, if any, wearing two hats, one as a private citizen dealing with upgrades to his home, and another as president in relation to security aspects of those upgrades.
- 12 The EFF now contends that the exercise the PP called for, excludes any consideration of whether the specific items were security related.
- 13 I do not understand the PP's report, however, to mean that security considerations did not play any role in the provision of the specific items. Nor do I understand the PP's report to mean that I must, as individual, pay for the specific items without more. It may be that the exercise reveals that I must pay for some of them because I will derive a benefit from these that in all the circumstances it is fair and just that I pay a reasonable contribution towards. That is what the PP's report in its terms indicates, and what – so I am advised – any reasonable interpretation of its terms must mean (regardless of the current debate before the courts about the legal nature of the PP's reports and actions).

- 14 I have been advised that the specific items do indeed have a security aspect to them albeit not so as to necessarily render them security features per se. It is in that light that I responded to the PP within the 14 days ordained. I was in receipt of several reports on the Nkandla project and decided that the Minister of Police must investigate these aspects, not least of all because the PP's report included in its remedial action that I should with the assistance of the South African Police Service determine the reasonable cost of the specific items. It was also hardly appropriate for me to do so on my own, given the admonition against me wearing two hats.
- 15 I therefore prefigure the rest of my response to the EFF's application by wishing to make my position clear. I have never had a problem with such an exercise as the one described above in paragraphs 13 and 14 ("*the security exercise*"). If I am unhappy with the outcome, I would have to say so, in which case I would have to instruct the Minister of Finance to take appropriate civil action for any amounts I contest. Obviously I would not want to do so unless I feel I have been unfairly treated or the outcome is irrational. It is not possible to speculate in advance on what my reaction would be. But what I am surely allowed to say at this point is that I would be aggrieved at an exercise which did not consider all relevant aspects including security considerations and the reasonable contribution, having considered all those relevant aspects, that I might be expected to make towards the specific items.

16 For these reasons it will already be clear that I do not believe it is appropriate for this Court to be asked to sit as a court of first and final instance in relation to these factual and legal determinations, and certainly not in circumstances where the relevant parties (myself, but also the Minister of Police) have not had a proper opportunity to engage with the very aspects that are prefigured in the security exercise.

17 I accordingly turn next to whether this Court ought to entertain the EFF's application as one of direct or exclusive jurisdiction.

EXCLUSIVE JURISDICTION?

9. The EFF seeks to approach this Court directly by way of section 167(4)(e) of the Constitution which confers exclusive jurisdiction on this Court to decide whether the President or Parliament has failed to fulfil a constitutional obligation.

10. This category of exclusive jurisdiction is, on the face of it, potentially very wide. This Court has, however, emphasised that it should be given a narrow meaning.⁴ It has pointed out that if section 167(4)(e) were to be

⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 25; *Doctors for Life International v Speaker of the National Assembly and Others* para 19; *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) para 36; *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 11.

interpreted as applying to all questions concerning the constitutional validity of the conduct of the President or Parliament, it would conflict with section 172(2)(a) of the Constitution, which provides that the High Court and the SCA may make an order concerning ‘the constitutional validity of an Act of Parliament ... or any conduct of the President’.⁵

11. The most recent decision of this Court on this issue is *Women’s Legal Centre Trust v President of the Republic of South Africa and Others*.⁶ In this case, Cameron J remarked that the following considerations may indicate that a matter falls within the Court’s exclusive jurisdiction:

*“... the nature of the obligation, whether its content is clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring.”*⁷

12. Cameron J added an important prerequisite for section 167(4)(e): the constitutional obligation must be imposed “*specifically and exclusively on the President or Parliament, and on them alone*”.⁸ It does not include, for example, an instance where the President acts as part of the national executive.⁹

⁵ Ibid. See also *Doctors for Life* paras 19 and 20 and *King and Others v Attorneys’ Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA) paras 12 and 13.

⁶ 2009 (6) SA 94 (CC).

⁷ Para 15.

⁸ Para 20. See also para 23.

⁹ Ibid.

13. The right to come to this Court by way of exclusive jurisdiction under section 167(4)(e) does not depend on the mere say so of a litigant that its claim falls within the exclusive jurisdiction of this Court. It must truly in law be a claim that falls within the ambit of the exclusive jurisdiction provision. The applicant must also establish that there was a failure to fulfil the obligation in question.

14. This enquiry requires consideration of the nature and the basis of the claim so as to determine if indeed it falls within exclusive jurisdiction.

15. The EFF has instituted a narrow claim that expressly defines the manner in which the Assembly and the President have ostensibly failed to fulfil a constitutional obligation. In the notice of motion this claim is framed in these terms:

“It is declared that the National Assembly has failed to fulfil its obligation in accordance with the provisions of sections 55(2) and 181 of the Constitution to ensure that all executive organs of state in the national spheres of government are accountable to it and to maintain oversight of the exercise of National Executive Authority in that it has failed to ensure that the [President] has complied with and given effect to the findings and remedial action of the [Public Protector]”

and

“It is declared that President Zuma in his capacity as Head of the National Executive has failed to fulfil his constitutional obligations in that he has failed to implement the findings and remedial action in the Public Protector report”.

16. For the EFF to succeed in coming to this Court under exclusive jurisdiction for relief pursuant to the apparent failure by the National Assembly to perform a constitutional obligation, it must show that sections 55(2) and/or 181 impose a particular obligation on the Assembly to perform a specified act.¹⁰ This is so – so I am advised – because the word “obligation” in section 167(4)(e) of the Constitution is given a narrow meaning so as to prevent conflict between these sections and section 172.¹¹
17. Section 55(2) of the Constitution falls under the heading of section 55 (which does not reference any obligation, but instead is headed: “Powers of National Assembly”). Section 55(2) does not detail a particular obligation. And far from referencing a specified act to be performed in pursuance of any obligation, section 55(2) speaks to the National Assembly providing “for mechanisms” – (a) to ensure that all executive organs of state in the national sphere are accountable to it; and (b) to maintain oversight of the exercise of national executive authority, and any organ of state.
18. Section 55 (2) thus does not impose a duty on the Assembly to perform a specific act or function. Instead it confers power on the Assembly to put in place mechanisms to ensure accountability and oversight. Consequently, even assuming that the Assembly allegedly failed to

¹⁰ *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC)

¹¹ *Von Abo* at para 36. See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

ensure implementation of the PP's remedial actions, does not give rise to a claim falling within the exclusive jurisdiction of this Court. Nor, as I understand the Speaker will contend, did the Assembly fail to implement those findings. It has decided to appoint an *ad hoc* committee of the National Assembly to conduct a further investigation into the matters about which the EFF complains.

19. Section 181 is no better. The Notice of Motion references section 181 generally. Generally, and by its heading, section 181 is concerned with "Establishment and governing principles". It does not define a specific obligation or specify a particular act by which that obligation is to be discharged. The EFF's founding affidavit invokes subsections 181 (3) and (4) – the former stating that "*Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality dignity and effectiveness of these institutions*"; the latter recording that "*No person or organ of state may interfere with the functioning of these institutions*".

20. Those sections similarly do not impose a duty on the Assembly to perform a specific act or function – and no particular duty is personalized for the Assembly as regards the reports of the PP (on the contrary, the duty falls on all organs of state). The founding affidavit's reference to section 182(1)(c) (which speaks to the PP having the power to take appropriate remedial action) is unhelpful for the same reasons.

21. As regards my ostensible failure to comply with a constitutional obligation, the EFF's notice of motion is silent as to which section of the Constitution imposes that obligation. The EFF thus apparently seeks this Court's exercise of its exclusive jurisdiction in relation to my conduct by reference to my obligations under "section 80(b)" of the Constitution and section 181 of the Constitution (see paragraph 9.1.2, page 7 of its founding affidavit).

22. There is no section 80(b) of the Constitution, and section 80 itself deals with "*Application by members of National Assembly to Constitutional Court*".

23. For the same reasons as above, section 181 of the Constitution is not a proper basis for exclusive jurisdiction.

24. I am accordingly advised that there is no proper basis laid by the EFF for seeking to approach this Court directly through the exercise of its exclusive jurisdiction under section 167(4)(e).

DIRECT ACCESS?

25. I am further advised that permission to approach this Court directly is granted in respect of constitutional matters which fall under the jurisdiction of other superior courts as well. In other words, the procedure

applies to cases which do not fall under the exclusive jurisdiction of this Court.

26. I am further advised that – with its genesis in section 167(6) of the Constitution – permission to grant direct access is discretionary and obtainable only if it is in the interests of justice. The section expressly gives this Court a discretion by requiring that cases of this kind be brought to it with its leave, if it is in the interests of justice to do so.

27. But underpinning the standard of the interests of justice are various principles. First, since cases for which direct access is sought are matters in respect of which the Constitution confers jurisdiction on other courts as well, a stringent test is laid down for by-passing the other courts and denying them the opportunity to exercise a constitutionally ordained jurisdiction.¹² Consistent with this principle, an applicant for direct access is required to show compelling reasons justifying the exercise of the discretion to permit direct access.¹³ In *Bruce and Another v Fleecytex Johannesburg CC and Others* this Court affirmed the compelling reasons requirement. There the Court said:

“Under the 1996 Constitution, High Courts as well as the Supreme Court of Appeal have constitutional jurisdiction including the jurisdiction to make an order concerning the validity of the provisions of an Act of Parliament. Although an order made by such Courts declaring an Act of Parliament to be invalid has no

¹² *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC) at para 9

¹³ *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) paras 7 and 8.

force unless confirmed by this Court, the Court making the order may grant a temporary interdict or other temporary relief pending the decision of this Court. The procedure contemplated by the 1996 Constitution is that such orders of constitutional invalidity will be referred to this Court for confirmation, and that appropriate procedures in such cases will be provided for by national legislation. This Court has held that pending the enactment of such legislation it has the competence to give directions as to the procedures to be followed in respect of such referrals. Bearing in mind the jurisdiction of the High Courts and the Supreme Court of Appeal, and the matters referred to in paras [7] and [8] of this judgment, compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a Court of first instance.”¹⁴

28. Second, this Court does not ordinarily sit as a court of first and last instance. It values the views of other courts and appreciates that the process of going through more than one court reduces the risk of mistakes.

29. Third, if the Court sits as a court of first and last instance, the losing party would be denied the right of appeal. In *Fleecytex*, this Court stated:

“It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.”¹⁵

¹⁴ Bruce at para 9.

¹⁵ Bruce at para 8.

30. Therefore, as was observed in *AParty and Another v Minister of Home Affairs and Others; Moloko and Others v Minister of Home Affairs and Another*¹⁶ there must be compelling reasons which move the Court to exercise its discretion in favour of granting direct access. In that case direct access was refused in circumstances where the Court accepted that the impugned legislation implicated an important constitutional right, the right to vote. The Court refused direct access on the basis that no compelling reasons were established by the applicants despite the fact that they were granted direct access in respect of another claim for constitutional invalidity. In respect of the other claim the Court reasoned that it was not essentially sitting as a court of first and last instance because there was a judgment of the High Court in a similar matter where the same issues were raised and the two cases were heard on dates that were close to each other.
31. Moreover, the principle of separation of powers forbids the Judiciary from intervening in matters that fall within the domain of Parliament except where the intervention is mandated by the Constitution.¹⁷ This is what our constitutional order requires. Therefore in exercising their review power, the courts should always observe constitutional bounds within which they are permitted to act. For the Constitution is not only supreme but also

¹⁶ 2009 (3) SA 649 (CC)

¹⁷ *Doctors for Life supra* at para 37

binds all arms of government. Thus in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*¹⁸ this Court said:

“In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.

It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.”

32. For the reasons expressed in more detail below in the section dealing with the political expediency of the EFF’s approach directly to this Court, I submit that our Constitution contemplates a restrained approach to intervention in such matters by the courts. Such intervention is permissible if it is undertaken to uphold the Constitution because our courts are the ultimate guardians of the Constitution. But where it is a political ploy, and a competent authority (in this case a committee of the National Assembly) has already taken steps to correct conduct said to be inconsistent with the Constitution, it is not in the interests of justice for this Court to sit as a court of first and final instance in relation to such

¹⁸ 2012 (4) SA 618 (CC) at paras 92 to 93.

matters. It is noted in this regard that the EFF seeks what it describes in its notice of motion as final relief.

33. Furthermore, I am advised that in *Besserglik v Minister of Trade, Industry and Tourism*,¹⁹ this Court held that in applications for direct access one of the relevant considerations will be “*whether an applicant can show that he or she has exhausted all other remedies or procedures that may have been available.*” This consideration exists for the obvious reason that, if another remedy or procedure is readily available and capable of providing the relief sought, it cannot be in the interests of justice for that procedure to be circumvented and for the Constitutional Court to hear the matter as a court of first instance.²⁰
34. As the EFF itself concedes, another remedy or procedure is currently underway in the National Assembly, but which the EFF has chosen not to be part of. It accordingly fails on this leg too.
35. For all these reasons I submit that no compelling reasons exist for this Court to grant direct access. That is all the more so when one recalls that the very issues raised in this matter are currently pending for determination before the Western Cape High Court. I note in this regard that the Democratic Alliance (“*the DA*”) has instituted an application in the Western Cape High Court (“*the DA High Court application*”) seeking

¹⁹ *Besserglik v Minister of Trade, Industry and Tourism* 1996 (4) SA 331 (CC) para 6.

²⁰ I Currie & J de Waal (eds) *The Bill of Rights Handbook* 5 ed (2005) 134.

similar relief to that sought in this application²¹, but on the advice of the DA's legal representatives the DA has not sought to approach this Court directly but has instead correctly initiated its litigation in the High Court.

36. For the reasons I have already given, the aspects to be ventilated and decided in the security exercise which is currently underway are best determined through the proper exchange of affidavits (and if necessary oral evidence) by the relevant parties and for determination by the High Court.

THE STATUS OF THE MINISTER OF POLICE AND THE OFFICE OF THE PUBLIC PROTECTOR IN THESE PROCEEDINGS

37. The applicant contends for an order compelling me to implement, without question, the remedial actions proposed by the PP. In so doing, the applicant ignores not only the investigative process in which the Minister engaged pursuant to a broad mandate I gave him in August 2014 to investigate my personal liability for the work undertaken at the Nkandla property. In its pursuit of an order compelling me to act, the EFF relies exclusively upon the PP's report. It contends that the nature of the PP's powers are binding on me and that I am obliged to implement the remedial action.

²¹ Under case number 15110/2015.

38. Both the Minister and the PP have a direct and substantial interest in the outcome of this matter and they ought to have been joined as parties to the application. The EFF's failure to so join these parties renders the application fatally defective.
39. In the DA High Court application the DA has joined the Minister and the PP as interested parties to that application. The *lis* in the Democratic Alliance application is similar to the present matter and is demonstrative of:-
- 39.1 the submission, correctly in my view, to the jurisdiction of the High Court as the Court of first instance;
- 39.2 the necessary joinder of the Minister and the PP as parties to the proceedings.
40. The EFF, through the present application, has ignored the aforementioned well-established legal principles.
41. But as I have indicated, even if the relevant parties were joined, the underlying difficulty remains: that the issues arising for determination regarding the security exercise (and my personal responsibility for reasonable contributions towards the specific items) are pre-eminently ill-suited for determination by this Court sitting as a court of first and final instance.

**THE CURRENT DEBATE ABOUT THE NATURE OF THE PUBLIC
PROTECTOR'S RECOMMENDATIONS**

42. Section 182 of the Constitution deals with the PP's powers and functions.

It provides as follows:-

- “(1) The Public Protector has the power, as regulated by national legislation –*
- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
 - (b) to report on that conduct; and*
 - (c) to take appropriate remedial action.*
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.*
- (3) The Public Protector may not investigate court decisions;*
- (4) The Public Protector must be accessible to all persons and communities,*
- (5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.”*

43. I submit that it is clear from the provisions of section 182 of the Constitution that the PP's powers and functions are investigative in nature. It is pursuant to the exercise of the investigative powers and the performance of those functions that the PP is given the power to report on the conduct investigated and to take appropriate remedial action.

44. I understand that presently there is a debate before our courts (which only last week was ventilated on appeal in the Supreme Court of Appeal)

about the nature of the powers and functions of the PP, and whether those powers are anything other than investigative. For example, the debate is whether those powers and functions change by reason of the remedial action taken into adjudicative powers and functions that could result in remedial action that approximates Court decisions and orders, which are by law binding and enforceable.

45. I am further advised that the leading authority on this question, unless or until disapproved by the Supreme Court of Appeal or this Court, is a decision of Schippers J in *Democratic Alliance and the South African Broadcasting Corporation Ltd and Others*²².

45.1 Schippers J determined at paragraph [51] that “... *unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action in section 182(1)(c) of the Constitution is inextricably linked to the Public Protector’s investigatory powers in section 181(1)(a).*”

45.2 However, the High Court also found at paragraph [59] that “*the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these*

²² WCHC case number 12497/2014.

findings and remedial action are mere recommendations, which an organ of state may accept or reject."

46. I accept and I am taking heed of the PP's findings and her recommendations in her report on Nkandla. I am mindful of the fact that the respondents are constitutionally bound to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.
47. I am advised that remedial action in terms of section 182(1)(c) of the Constitution which is not further described or tabulated in that section, could include approaching a Court for appropriate relief or referring a matter to appropriate authorities such as the police, a Minister, or the National Assembly or others for appropriate action.
48. The EFF's position takes no account of these nuances, however. It confuses the PP's power to recommend remedial action with an order which has force of law. What is more, it fails to recognise that the very terms of the PP's remedial action in regard to the specific items necessarily entails the security exercise that I described above. The EFF's position further blunts any consideration of whether such security exercise necessarily and fairly implicates questions about the extent to which aspects of the specific items are reasonably related to security, and assuming not, what a reasonable contribution is that I ought personally to be held accountable for.

THE APPLICATION IS PREMATURE

49. I agree that organs of state cannot ignore the findings and remedial action of the PP. This is because of the constitutional obligation on them to assist and protect the PP, and to ensure *inter alia* the effectiveness of the institution of that office.
50. Organs of state may also not interfere with the functioning of the PP²³ and they also have an obligation in terms of section 41 of the Constitution to deal with the PP's findings of fact and recommended remedial action *bona fide* and seriously.
51. The above guarantees adequately safeguard the institution of the PP and ensure that it is not undermined. The PP is entitled to seek the intervention of the National Assembly or that of the courts in appropriate cases to further safeguard the effectiveness of the institution.
52. The fact that the PP has recommended remedial action following her finding does not, however, mean that I have "failed to comply with the report", as the EFF contends.
53. In the first place, so I am advised, the rejection by a public body of the findings and remedial action of the PP may, in appropriate

²³ Section 181(3) and (4) of the Constitution.

circumstances, occur provided the rejection is rational. This is so because in our law every exercise of public power must be rational²⁴.

54. The status of the PP's remedial action and her findings are the subject of an appeal to the Supreme Court of Appeal, which was argued last Friday, the 18th of September 2015. For the EFF to approach this court until that appeal is determined is also, for the reasons advanced, premature and inappropriate.
55. Secondly, as I have been at pains to point out, I have sought to comply with the report and have given my assurance that I shall comply with any decisions that emanate from a fair and rational security exercise. The fact that the EFF sees "compliance" differently to me does not mean that I am in breach of the PP's remedial action, or that I could yet be, given that the security exercise is still underway.
56. Thirdly, the EFF contends strongly that I "side-stepped" the PP's report by "having a member of Cabinet decide whether or not the President is liable".²⁵ It says that the "premise of the Minister's report is flawed, following upon a wrong decision by the President"; it contends that the "entire report by the Minister of Police is unconstitutional since it is intended at revisiting findings and conclusions made by the Public

²⁴ *Pharmaceutical Manufacturers Association of SA and Another: in re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paragraph 90.

²⁵ Para 37.

Protector”; and it argues that neither “the President nor the Minister of Police can review a final report of the Public Protector”.²⁶

57. I deny that this is so for the reasons I gave up front in my affidavit about the nature of the security exercise currently underway. But in any event, if the EFF’s views about the flawed nature of the Minister’s decision have any merit then the remedy obviously open to the EFF was to bring a review of the Minister’s decision in the High Court raising all these arguments pertinently. Not only has the EFF failed to exhaust this available remedy before coming to this Court, it has chosen to come directly to this Court without citing the very Minister that the EFF contends acted unconstitutionally, and whose report it seeks to side-step.

SEPARATION OF POWERS AND PERSONAL RESPONSIBILITY

58. This Court has made it plain that the separation of powers doctrine is a serious doctrine under our Constitution.

59. I would be surprised if the Court did not also think that holding somebody personally responsible for repayment of potentially large sums of money did not entail considerations of fairness and rationality.

60. I submit that the present case calls for a proper regard to separation of powers in determining the nature and extent of the relief to grant to the

²⁶ Para 39.

EFF – and also as regards the appropriateness of seeking to have this Court sit as a court of first and final instance in relation to the factual and legal questions raised by the EFF’s direct resort to this Court whilst the security exercise is underway, an exercise which has the potential to hold me personally accountable (after a proper consideration of the factors mentioned) for repayment on the basis of enrichment.

61. This Court has emphasised the importance of giving proper regard to separation of powers when considering the grant of relief on matters that fall within the domain of other branches of government. In this case the EFF has made it plain that it seeks final declaratory relief and effectively a mandatory interdict stipulating the nature and extent of my conduct in giving effect to the PP’s remedial action – and thereby impugns directly the existing process that is pending before the National Assembly (without allowing it to run its course), and impugns the report of the Minister of Police (without judicially reviewing it).

62. Nothing in the PP’s remedial action suggests (or could in law suggest) that her recommendations exclusively cover the field as to what remedial steps might be taken by either the National Assembly, Cabinet, the SIU or me in response to a particular issue. This means that it is permissible for other efforts to be initiated alongside the PP’s recommendation and/or in support of her recommendation – and indeed for the reasons I have already given it is necessary to do so if the remedial action of the PP is to be rationally and fairly implemented.

63. There is also further no legislative authority for the proposition that the PP's remedial action enjoys primacy in relation to the possible efforts that might be taken. That her remedial action has to be acted upon first or finalised before other actions are taken or finalised is a proposition which undermines the President's and the National Assembly's powers to finalise those very processes.
64. On this basis too the EFF's efforts in the forms of these proceedings to enforce the PP's remedial action without more is premature.
65. Neither the National Assembly nor I have rejected the findings and remedial action of the PP.
66. My position is plain: given the very terms of the PP's remedial action, to properly take the "remedial action" indicated in her report requires a consideration of a range of factors, including what measures at my private residence do not relate to security, and considering what reasonable contribution I ought to make in respect of those measures that are ultimately determined to be reasonably related to security.
67. That is a process that is currently underway – and I have confirmed my willingness to be bound by the outcome of a fair and rational process.

POLITICAL EXPEDIENCY

68. From what I have said thus far it will be clear, with respect, that what the EFF seeks to achieve in these proceedings is politics by judicial means. The EFF seeks for the National Assembly to make such decisions as they wish it to make in respect of the Nkandla issue. Having refused to participate in the National Assembly's processes, and despite refusing to review the Minister of Police's report (which stands until set aside), the EFF comes directly to this Court for an audience. For the reasons already given that is premature, but also politically expedient.
69. This application effectively seeks to predetermine, by Court order, what resolutions must serve before the National Assembly and how each member must vote on it. It further seeks an effective finding, without citing the Minister concerned, and without the benefit of a proper determination on the evidence, that the Minister of Police's report is invalid and unconstitutional. Those demands are both an unconstitutional fetter on the legislative assembly and a significant violation of the separation of powers doctrine, not to mention a failure properly to challenge an extant decision by the Minister of Police.
70. The EFF in effect interprets the remedial action to mean that the PP has ordered me to:-

- 70.1 pay a reasonable portion of the reasonable costs of the Nkandla upgrade in respect of the visitor's centre, the amphi-theatre, the cattle kraal, the chicken run and the swimming pool and also of such other upgrades which did not relate to security;
- 70.2 to reprimand the Ministers involved in the appalling mismanagement of the Nkandla project;
- 70.3 to report to the National Assembly on the Second Respondent's comments and actions on the PP's report, within 14 days of 19 March 2014.
71. This interpretation is wrong for the reasons I have already given.
72. For context I should stress that I reported to the National Assembly by 2 April 2014. The fact that I raised queries about some of the findings in the PP's report and that the Second Respondent undertook to further report on those aspects were obviously features of my response which did not please the EFF which sought to maximise the political capital to be made of aspects of the PP's report critical of my conduct.
73. I respectfully contend that it was up to the National Assembly to determine further reporting to it. Legal argument will be adduced in support hereof but it is only rational that the body to which I had to report was to deal with the further conduct thereof.

74. As to the rest of the above "Order", it is respectfully disputed that I had to accept the PP's report as if a money judgment against me. As mentioned, I understand that the PP's report states that the PP's conclusion is that the reasonable costs of non-security upgrades must be determined, and that I must repay a reasonable portion thereof. I also understand that the PP's conclusion is that the specific items were non-security upgrades. I did not understand these conclusions to exclude a determination as to what constitutes non-security upgrades. If such an exercise indicated that any or all of the specific items were indeed security upgrades, I would not have to reimburse a reasonable portion of such specific items. Indeed, it is my contention that there could then not be a "reasonable portion" which I had to repay. It is, with respect, somewhat artificial to isolate the enquiry of a reasonable portion of the specific items, from the question of a reasonable portion of the reasonable costs of non-security upgrades.
75. The PP's report simply does not say what the EFF wishes it to say and nor are my reactions discordant with its meaning. Likewise the accusation of unconstitutional conduct by the National Assembly finds its basis in the EFF's political agenda and not in fact or in law.
76. As I understand the PP's report, the PP's conclusion is that I, as an individual, must pay a reasonable portion of the non-security upgrades. The contention that an individual must comply with such conclusion as if

a judgment of a court of law, unless he or she specifically reviews it, is quite extraordinary. With respect, I do not consider that such a conclusion was ever intended in Chapter 9 of the Constitution.

77. It is for that reason that I have indicated my willingness to indeed make a reasonable contribution if the upgrades are not security related and it will benefit my estate unduly. Precisely because it will impact on me personally, it is not for me to engage in the costs estimation. That is what I understand the PP report to conclude for the same reasons.
78. The conclusions reached by the Minister of Police are clearly not to the EFF's liking, hence the attack on those and the EFF's contentions of a clash between personal interest and my role as President.
79. As the President, I contend that I am duty bound to consider all reports and conclusions of the PP carefully and to heed these. I do not understand these as binding in the way a statutory provision or a Court's judgment would bind me. The very findings which the EFF seeks to enforce herein, come to mind, as do a plain reading of the remedial action contained in the PP's report.
80. As indicated already, I have implemented the remedial action and remain committed to complying with the outcome of any fair and rational security exercise.

81. I further undertake to reprimand the Ministers involved but will not do so, with respect, in the absence of a proper investigation and without a fair hearing.

82. In this instance, the EFF seeks an order that I reprimand the Ministers (I assume publicly) without hearing them. This approach is presumably why the EFF has not mentioned or joined these Ministers (or for that matter, the Minister of Police, the author of the “unconstitutional report”). Aside from the fact that the EFF has simply ignored the rules of joinder, it has also overlooked the fact that fairness means that I cannot treat the remedial action as a blunt stick to be wielded publicly and finally against recalcitrant Ministers without an opportunity for them to present their side of the story.

83. I have already made the point that the PP’s remedial action does not enjoy exclusivity or primacy and therefore the application is premature. It is premature not only because the existing and supplemental actions are not yet finalised but also because the question of the nature of the PP’s orders is currently on appeal to the SCA which has not yet had a chance to give its views on the matter and this court would undoubtedly benefit from those views as would the parties, not least of all because this court has repeatedly indicated that it prefers to receive the views of other courts before deciding difficult legal questions.

84. For these reasons I respectfully object to the EFF's efforts to enlist this Court's assistance in hearing the questions it has framed for first and final determination by the highest judicial officers in this land. The EFF has done so not only prematurely, but also politically at a time when other constitutional institutions are presently dealing with the subject matter and a Minister's decision on the topic has not been challenged in the High Court but side-stepped by an approach directly to this Court. Our Courts have increasingly deprecated efforts such as those by the EFF in this matter to use the courts to achieve that which they could not achieve politically in other branches of government. This Court in *Mazibuko N.O. v Sisulu and Others N.N.O.* 2013 (6) SA 249 (CC) at [83] stated:-

“Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution. A timely warning was issued in this case by Davis J in a judgment delivered by the High Court. He cautioned: “There is a danger in South Africa, however of the politicisation of the judiciary, drawing the judiciary into every and/or political disputes as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of this dispute, judges cannot be expected to dictate to Parliament when and how it should arrange its precise order of business matters. What Courts can do, however, is to say to Parliament: ‘you must operate within a constitutionally compatible framework; you must give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence. However, how you allow that right to be vindicated is for you to do, not for the Courts to so determine.’”

**THE INTERESTS OF JUSTICE DO NOT FAVOUR THE GRANTING OF
THE RELIEF SOUGHT**

85. Not only should this application have been brought in a court of first instance, but it should, if anything, also have been directed at reviewing the Minister's "unconstitutional" decision on an irrationality basis. Such challenge would likely have failed because the Minister's determination is not irrational. Hence, the present convoluted challenge to my conduct and that of the National Assembly.
86. I have been advised that the PP's remedial action in ordering or instructing me to decide on a reasonable portion of the reasonable costs of the specific items for me to pay back to the State, was not meant as an order nor should I myself determine what, if any, to pay – lest I be accused of being judge and president in my own cause. Whatever portion I decide on will be viciously attacked as a biased determination. Whatever I decide on the reasonable costs will likewise be attacked. It is prudent therefore for me to be removed as the actual decision maker from that process. That is what I have endeavoured to do by tasking the Minister to investigate the costs issue. And I remain by design removed from the National Assembly process, again as decision maker.
87. I have never indicated my unwillingness to pay once a reasonable portion of the reasonable costs of the specific items has been determined. I was also always of the view that the facts regarding the specific items would

be considered and that the decision maker may determine that there is something or nothing to be paid in respect of some or all of the specific items. The outcome of that process remains to be seen.

88. Another fundamental problem besetting the direct approach embraced by the EFF is that I have a different case as to the factual basis underpinning the specific items as payment items. I have explained some of the complexities of the facts and circumstances surrounding the specific items and whether any reasonable contribution is called for in the light thereof. The Minister, after an exhaustive investigation, established the facts and circumstances surrounding the specific items. Unless the EFF accepts those facts, its application will provoke and engage a fundamental factual dispute. Despite obviously being aware of this, political expediency is elevated by the EFF above trite legal principles. Such factual disputes are to be dealt with in courts of the first instance geared to the resolution (if necessary by oral evidence) of testimony of witnesses capable of giving primary evidence. By seeking to come directly to this Court, the EFF has now engaged this Court in precisely the type of exercise which is ill-suited to a court of final instance.

89. The PP's appropriate remedial actions clearly allows any affected party against whom she seeks to enforce such remedial actions, to challenge the legality or validity of her conclusions and actions. A third party seeking to enforce the Public Protector's findings or recommendations can hardly have more rights and powers than the Public Protector – and

a party subject to such an attempt at enforcement can hardly have fewer rights than would ordinarily be accorded under the principles that our law has laid down regarding fairness and rationality.

90. I submit that it is not in the interests of justice for this matter to be accepted by this Court, or if it is so accepted then it should be dismissed. I have also advanced the reasons why it is improper for this Court to be expected to act as a Court of first and final instance on the questions raised by the EFF regarding compliance with the PP's report on the security issues when that very issue is currently serving before the Cape High Court through the DA's application. Furthermore, the Supreme Court of Appeal has not yet ruled on the broader jurisprudential question regarding the nature of the PP's findings and remedial action. Further and in any event, the issues raised by the EFF are being debated through avenues within the remit of the executive and Parliament and the application is but an effort to leapfrog those actions into the judicial branch of government and directly to the Constitutional Court no less.
91. In the circumstances, I respectfully submit that it is not in the interests of justice for the application to be granted. It should be dismissed with costs. .

DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit duly signed and sworn to before me at _____ on this _____ day of _____, the regulations contained in Government Gazette No. R1258 dated 21 July 1972, as amended, having been complied with.

COMMISSIONER OF OATHS

Full name:

Address:

Designation:

Area: