IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT171/15

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

JACOB GEDLEYIHLEKISA ZUMA, THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Second Respondent

THE MINISTER OF POLICE Third Respondent

THE PUBLIC PROTECTOR Fourth Respondent

WRITTEN SUBMISSIONS FOR THE DEMOCRATIC ALLIANCE

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A. INTRODUCTION

1. The Public Protector is a bastion of South Africa's constitutional democracy, established under chapter 9 of the Constitution to "*strengthen constitutional democracy in the Republic*".[1]

2. It is the Public Protector who is mandated, ultimately, to "guard the guards" and ensure governmental accountability and propriety in the conduct of state affairs.[2] The Public Protector "*provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee."*[3]

3. The independence, impartiality, dignity and effectiveness of the Public Protector has been imperilled by the unlawful conduct of President Zuma, the Speaker of the National Assembly (**"the Speaker"**) and the Minister of Police (**"the Minister"**), the very organs of state that are constitutionally obliged to "*assist and protect*" the Public Protector.[4]

[1] Section 181(1) of the Constitution
[2] *South African Broadcasting Corporation Limited and Others v Democratic Alliance* [2015] ZASCA 156 at paras 1-3.
[3] *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para 6
[4] Section 181(3) of the Constitution

4. The disregard demonstrated by these high organs of state for the remedial action taken by the Public Protector poses a threat to the rule of law and South Africa's constitutional democracy. It signals that those holding the highest office in the land consider themselves to be above the law and not accountable for the abuse of scarce public resources.

5. Specifically, this matter concerns the failure by President Zuma and the National Assembly (**"the NA"**) to comply with the remedial action taken by the Public Protector in paragraph 11.1 of the Nkandla report.[5] The Public Protector found that there was excessive and improper expenditure on non-security upgrades at President Zuma's private residence at Nkandla, and that President Zuma had breached the Executive Members' Ethics Code by failing to protect public resources.

6. The Public Protector required President Zuma –

    6.1 to determine the reasonable cost of the non-security measures at his private residence;

    6.2 to pay for a reasonable percentage of the cost of the measures that did not relate to security;

[5] The Nkandla report was published on 19 March 2014 and is entitled "*Secure in comfort*: *Report on 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".*

6.3 to reprimand the Ministers involved for the appalling manner in which the Nkandla project was handled and state funds were abused; and

6.4 to report to the National Assembly with his comments and actions on the Nkandla report within 14 days.[6]

7. None of these obligations have been met.

8. Instead, President Zuma has contended – variously and contradictorily – that the Public Protector's remedial action is merely recommendatory; that the Public Protector did not make any findings as to his liability for the non-security measures implemented at his residence; and that he has complied with the remedial action set out in the Nkandla report. Both President Zuma and the NA have relied on the findings of a parallel investigation by the Minister, which purport to second-guess and override the findings of the Public Protector. The Minister concludes that all of the improvements at President Zuma's Nkandla residence were "*security features*" and that President Zuma is not liable to pay for any of them.

9. The Democratic Alliance (**"the DA"**) launched its application to ensure respect for the Constitution, the rule of law, and the Public Protector's

[6] The remedial action taken concerning the President is set out in the Nkandla report at Record Vol. 3, p. 442, para 11.1 and in the executive summary at p. 68, para (a).

remedial action. It seeks, *inter alia*, the following relief against President Zuma, the Speaker and the Minister:

9.1 Declaring unlawful and invalid President Zuma's failure to comply with the Public Protector's remedial action, and directing him to comply therewith and report to this Court on affidavit that he has done so;

9.2 Declaring unlawful and invalid the NA's resolutions dated 13 November 2014 and 18 August 2015, which manifest the NA's failure to comply with the Public Protector's remedial action and to exercise effective oversight over the President in respect thereof; and

9.3 Declaring unlawful and invalid the Minister's "*Report to Parliament on Security Upgrades at the Nkandla Private Residence of the President*" dated 25 March 2015.

10. In these written submissions, we address: (1) jurisdiction; (2) the factual background; (3) the nature of the Public Protector's remedial power; (4) the merits of the DA's challenges to the actions of President Zuma, the Speaker and the Minister; and (5) the appropriate remedy.

B. JURISDICTION

11. The DA's application for direct access is brought under s 167(6)(a) of the Constitution and is conditional on this Court granting the EFF direct access or assuming exclusive jurisdiction over the EFF's application. In the event that this Court determines the merits of the EFF's application, the interests of justice and judicial economy favour this Court deciding the DA's application at the same time. This is because –

11.1 Substantially the same issues and relief fall to be determined in both applications, and the applications are premised on the same factual matrix. The only difference between the two applications is that whereas the EFF has pleaded the failure of President Zuma and Parliament to comply with constitutional obligations directly, the DA's application is framed as a review and legality challenge to the conduct of President Zuma, Parliament and the Minister.

11.2 It is undesirable for this Court and the High Court to be seized with the same issues – as this Court has made clear.[7]

[7] *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.

11.3 It would be a waste of judicial resources for this Court to determine the merits of the EFF's application, and yet require the DA to pursue its application on the same issues through the lower courts.

11.4 Should the Court decide the EFF's application, the DA's application in the High Court would be rendered moot. Unless this Court also hears the DA's application, the DA will be effectively denied the opportunity of making its case.

11.5 There is a strong public interest in this Court providing legal certainty on the powers of the Public Protector as the prevailing uncertainty is seriously compromising the effectiveness of the Public Protector.[8] In deciding this issue, this Court ought to have the benefit of the record and submissions in both applications, and it ought to allow all the interested and affected parties to be heard.

12. On the other hand, we submit that there is no good reason not to hear the DA's application at this stage because:

12.1 There are no disputes of fact material to the DA's application.

[8] The Public Protector explains that the functioning of her office has been *"severely compromised"*, and that there has been a trend among politicians and organs of state simply to disregard the reports and remedial action of the Public Protector, and for potential complainants to resist lodging complaints. See Record Vol. 7 at p. 876, Fourth Respondent's AA para 25.

12.2 The DA's application turns on legal questions of interpretation as regards the nature of the Public Protector's remedial power and the constitutional and statutory obligations of the President, Parliament and the Minister *vis-à-vis* the findings and remedial action taken by the Public Protector.

12.3 The only "*factual issue*", if one can call it that, is confined. The question is whether President Zuma complied with the remedial action taken by the Public Protector. This issue is not complex and it is not necessary for it to be determined first by way of High Court and SCA proceedings. It turns on the interpretation of the Public Protector's Report.

12.4 The High Court and the Supreme Court of Appeal (**"SCA"**) have already given comprehensive judgments addressing a key issue underpinning the DA's application, namely the nature and effect of the Public Protector's remedial power.

13. It is accordingly in the interests of justice for this Court to grant the DA direct access.

C. FACTUAL BACKGROUND

14. On 13 December 2011, a member of the public lodged a complaint with the Public Protector in response to allegations which appeared in the press of excessive spending of public money at President Zuma's private residence at Nkandla, Kwazulu-Natal.[9] Subsequently, further allegations of impropriety relating to the installation and implementation of security measures at Nkandla appeared in the media on a regular basis.[10] More complaints were lodged with the Public Protector.[11]

15. In response to these complaints, the Public Protector commenced an investigation in terms of ss 6 and 7 of the Public Protector Act 23 of 1994 (**"the Public Protector Act"**) and ss 3 and 4 of the Executive Members' Ethics Act, 82 of 1998 (**"the Ethics Act"**).[12] President Zuma was informed of the complaints in January 2012.[13]

16. Many months after it became generally known that the Public Protector was investigating the upgrades at Nkandla, the Minister of Public Works convened a "*Task Team*" to conduct an internal investigation. The Task Team produced a report in January 2013,[14] which was considered and

[9] Record Vol. 1 at p. 89, Nkandla report at p. 81, para 2.1
[10] Record Vol. 1 at p. 89, Nkandla report at p. 81, para 2.4
[11] Record Vol. 1 at p. 90, Nkandla report at p. 82, para 2.6
[12] Record Vol. 1 at p. 92, Nkandla report at p. 88, para 3.2.1
[13] Record Vol. 1 at p. 90, Nkandla report at p. 81, para 2.2
[14] Hereafter the "*Task Team Report*". A copy of the Task Team Report appears at Record Vol. 3 at pp. 315ff

reported on by the Joint Standing Committee on Intelligence (**"JSCI"**) and thereafter the Joint Cabinet Committee. The findings, in essence, were that there was nothing untoward or excessive about the security upgrades themselves but that a number of supply chain irregularities and instances of possible overpricing were identified.[15]

17. The President engaged the Special Investigating Unit (**"SIU"**) and the Auditor-General (**"AG"**) for further forensic and criminal investigation. The SIU eventually produced a report, dated 20 August 2014 (some months after the report of the Public Protector was published) and the AG declined to investigate the matter.[16]

18. The Public Protector's Nkandla report was published on 19 March 2014. As far as President Zuma is concerned:

    18.1 The Public Protector investigated whether the measures taken at Nkandla extended beyond what was required for his security. She found that, in respect of his private property, the visitors' centre, cattle kraal and culvert, chicken run, amphitheatre, marquee area and swimming pool, as well as some extensive paving, landscaping and the relocation of neighbours who used to form part of the

[15] See the findings and recommendations at Record Vol. 3 at pp.358 - 365
[16] See, on the latter aspect, Record Vol. 1 at p. 98, Nkandla report at p. 100, para 3.4.6

regional homestead, were not required for his security.[17] In respect of the state-leased land outside his private residence, she found that the health clinic, helipads and staff homes addressed a real need but should have been located at a central place so that they could benefit the entire impoverished Nkandla community.[18]

18.2 She investigated whether the expenditure was excessive or amounted to opulence at a grand scale. She found that there was massive "*scope creep*". The total expenditure increased from an initially estimated R27 million to R215 million. The project remains incomplete. The current conservative estimation of the final costs stands at R246 million, excluding lifetime maintenance costs.[19]

18.3 These amounts far exceed expenditure on the residences of all President Zuma's post-apartheid predecessors. The difference is acute, even if allowance is made for the rural nature of the Nkandla area and the size of President Zuma's household.[20]

18.4 She investigated whether the President's family and relatives improperly benefited. She found that the allegation that the

[17] Record Vol. 1 at p. 69, Nkandla report at p. 42, Executive summary at para (1); Record Vol. 1 at p. 76, Nkandla report at p. 55, Executive summary at para (c)
[18] Record Vol. 1 at p. 70, Nkandla report at p. 43, Executive summary at para (3)
[19] Record Vol. 1 at p. 71, Nkandla report at p. 46, Executive summary at paras (7) – (8)
[20] Record Vol. 1 at p. 73, Nkandla report at p. 50, Executive summary at paras (17) and (18)

President's brothers improperly benefited from the upgrades, was not substantiated, but that the excessive and improper manner in which the Nkandla project was implemented resulted in substantial value being unduly added to President Zuma's private property and that he and his immediate family improperly benefited from those measures.[21]

18.5 She investigated whether President Zuma is liable for some of the costs incurred. She found that, on a strict legal approach, he had to secure the Nkandla property at his own costs as it was declared a national key point.[22] However, the strict legal approach would not be fair as President Zuma was entitled under the Cabinet Policy of 2003 to "*reasonable security upgrades*" at state expense, at his request or at the request of his office. Although there was no specific request, President Zuma tacitly accepted the implementation of all measures at his residence. In the circumstances a reasonable part of the expenditure towards the non-security installations in the list compiled by the security experts, should be borne by him and his family.[23]

[21] Record Vol. 1 at p. 77, Nkandla report at p. 57, Executive summary at para (e)
[22] Record Vol. 1 at p. 79, Nkandla report at p. 62, Executive summary at para (i)(1)
[23] Record Vol. 1 at p. 79, Nkandla report at pp. 62 – 63, Executive summary at para (i)

18.6 She investigated whether there were ethical violations on the part of the President in respect of this project.[24] She found that President Zuma, as head of "*South Africa Incorporated*" was wearing two hats: (1) that of ultimate guardian of the resources of the people of South Africa and (2) that of being a beneficiary of public privileges. He should have asked questions regarding the scale, cost and affordability of the Nkandla project, at an early stage. He failed to act in the protection of state resources and that constituted a violation of paragraph 2 of the Executive Members' Ethics Code and amounted to conduct inconsistent with his office as Member of Cabinet, as contemplated by s 96 of the Constitution.[25]

19. The Public Protector took remedial action to remedy these issues of malfeasance: she determined the remedy and required its implementation. The following remedial measures were required to be taken by President Zuma:

19.1 President Zuma is to take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the Department of Public Works

[24] These issues are identified at Record Vol. 1 at p. 102, Nkandla report at p. 107, paras 4.3, 4.4, 4.5, 4.9 and 4.10.
[25] Record Vol. 1 at pp. 80-81, Nkandla report at pp. 64 – 65, Executive summary at para (j)

(**"DPW"**) at his private residence that did not relate to security, and which included the visitors' centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.

19.2 President Zuma is to pay a reasonable percentage of the costs of the measures as determined with the assistance of National Treasury, bearing in mind the DPW apportionment document.

19.3 President Zuma is to reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused.

19.4 President Zuma is to report to the NA on his comments and actions on the Nkandla report within 14 day.[26]

20. The 14-day deadline for President Zuma to report to the NA expired on 2 April 2014.

21. In a letter of that date, President Zuma wrote to the Speaker, essentially saying that there were stark differences between the findings in the Task Team report and the Public Protector's report and that he would provide Parliament with a further final report on the executive interventions he considered to be appropriate, upon receipt of the SIU report.

[26] Record Vol. 2 at p. 269, Nkandla report at p. 442, para 11.1; Record Vol. 1 at p. 82, Nkandla report at p. 68, Executive summary at para (a)

22. The SIU submitted its report to the Presidency in August 2014. In the main, the SIU investigated the conduct of officials and, in particular, whether money could be recovered in respect of unlawful actions. On the issue of whether the measures at Nkandla were security related, the findings in the SIU report are not dissimilar to the Public Protector's report. The SIU found that many measures were not necessary for the President's security and were extravagant in nature.[27]

23. On 14 August 2014, President Zuma submitted a second response to the Speaker. In his second response, he made clear that he did not intend to comment on or criticise the reports of the Task Team, the SIU or the Public Protector. After summarising some of the findings in these reports, President Zuma stated that he deemed the following to be appropriate: "*The Minister of Police as the designated minister under the National Key Points Act [must report] to Cabinet on a determination [as] to whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports*".[28]

[27] Record Vol. 3 at p. 443, SIU Report at p. 129, para 6. See, also, Record Vol. 3 at p. 445, SIU Report at p. 134, para 13 (not identified in SAPS, SANDF or DPW assessment reports: tunnels in the safe haven; emergency exit in the safe haven; lifts for the safe haven; 20 extra SAPS and SANDF accommodation; laundry facility; visitors lounge; basement parking garage; fire pool; VIP parking garage; relocation of four households; three extra roads; changes to the scope of the fencing; air conditioning to the private houses; landscaping to beautify the inner high security area). This amount to an additional R68 506 106.00. See Record Vol 4 at p. 482, SIU Report at pp. 2017-208, para 6

[28] Record Vol. 4 at p. 520, President's August 2014 document at p. 19, para 63.2. Note that President Zuma did not require the Minister of Police to report to Parliament or the NA.

24. There followed an exchange of correspondence between the Public Protector and President Zuma, in which the Public Protector indicated that the President's responses did not constitute compliance with her remedial action.[29]

25. President Zuma expressed the view that he was not bound to comply with her remedial action in the same way as adhering to a court order and that he would await the parliamentary process.[30]

26. On 19 August 2014, the NA resolved to establish an *ad hoc* Committee to consider the President's August 2014 response.[31] The opposition parties eventually withdrew from the *ad hoc* Committee because they held the position, contrary to the majority party, that the remedial action reflected in the Public Protector's Report was binding and enforceable.[32]

27. In its report dated 11 November 2014, the *ad hoc* Committee found, *inter alia*, that:

    27.1 President Zuma did not fail to act to protect state resources and did not violate paragraph 2 of the Executive Ethics Code;[33] and

[29] Record Vol. 4 at p. 527, Public Protector's letter at para 9
[30] Record Vol. 4 at p. 531, President's letter at paras 5 and 7
[31] Record Vol. 4 at p. 548, Ad hoc Committee report at p. 2 949, para 1
[32] Record Vol. 4 at p. 553-4, Ad hoc Committee report at p. 2 954 - 5, para (c) and (e)
[33] Record Vol. 4 at pp. 575-6, Ad hoc Committee report at p. 2 976-7, paras 4.19 – 4.21

27.2 Only the Constitutional Court may decide that the President has failed to fulfil a constitutional obligation.[34]

28. The *ad hoc* Committee recommended that the matter of what constitutes security and non-security upgrades at the President's private residence be referred back to Cabinet for determination by the relevant security experts in line with the Cabinet Memorandum of 2003. Cabinet was required to report back to Parliament on the steps taken to give effect to this recommendation within three months.[35]

29. The report of the *ad hoc* Committee was adopted by the NA on 13 November 2014. This is the first of two NA resolutions challenged by the DA.

30. On 29 December 2014, the Speaker wrote to the Minister. In the letter[36] she did not refer the question of whether the Nkandla upgrades were security-related. The Speaker referred other issues to the Minister, including whether the implemented security features are secure; concerns raised in the SIU report; policy and regulatory gaps; and a review of the National Key Points Act 102 of 1980.

[34] Record Vol. 4 at p. 579, Ad hoc Committee report at p. 2 980, para 4.30
[35] Record Vol. 4 at p. 581, Ad hoc Committee report at p. 2 982, para 5.9
[36] The letter is attached to the First Respondent's AA as **"BM13"**. See Record Vol. 6 at p. 829.

31. Nevertheless, the Minister considered himself seized with the issue of whether the Nkandla upgrades were security related. The Minister proceeded to produce a report on the issue, dated 25 March 2015.[37] The Minister's Report does not address any of the issues in fact referred to him by the Speaker. Instead it finds that the animal enclosure (cattle kraal and/or goat kraal with culvert and chicken run), fire pool (swimming pool), soil retention wall (amphitheatre) and visitors' centre were "*security features*"[38] and that "*the State (sic) President is therefore not liable to pay for any of these security features*".[39]

32. On 2 June 2015, the NA established another (second) *ad hoc* Committee to consider the Minister's report.[40] This *ad hoc* Committee adopted the Minister's report,[41] which was confirmed by a resolution of the NA dated 18 August 2015. This is the second resolution challenged by the DA.

[37] The Minister's Report appears at Record Vol. 5 at pp. 589ff
[38] Record Vol. 5 at p. 633, Minister of Police's report at p. 46, para 9.1
[39] Record Vol. 5 at p. 634, Minister of Police's report at p. 47, para 9.2
[40] Record Vol. 5 at p. 644, Ad hoc Committee report at p. 3 034, para 1
[41] Record Vol. 5 at p. 655, Ad hoc Committee report at p. 3 045, para 4

D. THE PUBLIC PROTECTOR'S REMEDIAL POWER

(i) The proper interpretation of s 182(1)(c) of the Constitution

33. Section 182(1) of the Constitution confers three distinct powers on the Public Protector: to investigate, to report, and to remedy. Section 182 provides:

> *"(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."*
>
> (Emphasis added)

34. The Public Protector makes clear that she invoked her powers conferred by the Constitution.[42] It is thus unnecessary to consider the additional powers conferred on her by the Public Protector Act.

[42] Record Vol. 7 at p. 874, Fourth Respondent's AA at para 16

35. The remedial power afforded the Public Protector under s 182(1)(c) is unique: no other chapter 9 institution has an equivalent power under the Constitution. By comparison –

35.1 The South African Human Rights Commission is empowered under s 184(2)(b) of the Constitution "*to take steps to secure appropriate redress where human rights have been violated".* Whereas the Human Rights Commission may "*take steps to secure appropriate redress"*, the Public Protector has the power to "*take remedial action"* – that is, the power to determine the remedy and order its implementation.

35.2 The Auditor-General is empowered under s 188 of the Constitution to *"audit and report on"* the accounts, financial statements and financial management of public institutions. The Auditor-General must submit its audit reports to the relevant legislature and make them public. The Auditor-General has no remedial power.

36. The nature and effect of the Public Protector's remedial power under s 182(1)(c) lies at the core of the present dispute. Two comprehensive, but conflicting, judgments have addressed this issue.

37. The first is that of Schippers J in ***Democratic Alliance v South African Broadcasting Corporation Ltd and Others*** **2015 (1) SA 551 (WCC)**.

Schippers J found that the remedial action taken by the Public Protector is not binding, and that organs of state may dispute her findings on rational grounds and provided that they engage with the Public Protector in good faith in the event of such dispute. Schippers J also held that if a mutually acceptable outcome cannot be achieved, the organ of state should seek a judicial review of the Public Protector's findings and remedial action.[43]

38. The second judgment is that of the SCA in ***South African Broadcasting Corporation Limited and Others v Democratic Alliance*** **[2015] ZASCA 156 ("*SABC v DA*")**. The SCA dismissed the appeal against Schippers J's judgment and orders, but differed with it on the nature of the remedial power of the Public Protector. The SCA held that the remedial action taken by the Public Protector under s 182(1)(c) is not merely recommendatory; it cannot simply be ignored or disregarded by public officials. It must be complied with unless and until set aside on review.[44]

39. The SCA's judgment was informed by a contextual and purposive reading of s 182(1)(c). It reasoned that:

39.1 The 1996 Constitution considerably strengthened the powers of the Public Protector granted under the interim Constitution through "*a significant shift in language"*. Thus, "*Instead of empowering the*

[43] Record Vol. 1 at para 72
[44] Record Vol. 1 at paras 45, 47 and 53

Public Protector to 'endeavour' to resolve a dispute, or 'rectify any act or omission' by simply 'advising' a complainant of an appropriate remedy as under the Interim Constitution, the Final Constitution empowers the Public Protector to 'take appropriate remedial action'".[45]

39.2 The nature of the Public Protector's office – which entails policing State officials to guard against corruption and malfeasance in public office – is such that the Public Protector *"cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations."*[46]

39.3 *"It would be naïve to assume that organs of State and public officials guilty of corruption and malfeasance in public office will meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond".*[47]

39.4 *"[A] mere power of recommendation…is neither fitttting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose".*[48]

[45] Record Vol. 1 at para 42
[46] Record Vol. 1 at para 52
[47] Record Vol. 1 at para 44
[48] Record Vol. 1 at para 53

40. It is submitted that the SCA's approach in ***SABC v DA*** is the correct one. It accords with the language of s 182(1) of the Constitution and best promotes the Constitution, the rule of law and the mandate and objects of the Public Protector's office. It also accords with the positive obligation imposed on all organs of state under s 181(3) of the Constitution to take measures *"to assist and protect"* the office of the Public Protector, to ensure its independence, impartiality, dignity and effectiveness.

41. As an institution dedicated to combatting corruption and abuse of public power and resources, the importance of the Public Protector's office in South Africa's constitutional democracy cannot be underestimated. This Court recognised in ***Glenister II***[49] that corruption is detrimental to the protection and promotion of rights in the Bill of Rights and the foundational principles of South Africa's constitutional democracy. The same, we submit, applies to other abuses of power that result in the wastage and misuse of scarce public resources.

42. This Court also found in *Glenister II* that it is implicit in the duty of the State under s 7(2) of the Constitution (to "*respect, protect, promote and fulfil*" the rights in the Bill of Rights) that anti-corruption bodies must be independent, efficient and effective. The office of the Public Protector is indeed such a body, albeit that its mandate extends to other abuses of

[49] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at paras 175-177

public power. The Public Protector's remedial power must be interpreted to ensure the effectiveness of the office, so as to give effect to the State's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.

43. The DA aligns itself with the SCA's judgment in *SABC v DA*.

44. In sum, the DA submits that:

44.1 The Public Protector's remedial action under s 182(1)(c) has legal effect and must be complied with unless and until set aside on review.

44.2 It is incumbent on the person aggrieved by the Public Protector's remedial action to challenge such remedial action on judicial review.

44.3 The only possible exceptions to requiring judicial review to challenge the Public Protector's remedial action are the limited common law exceptions to the *functus officio* doctrine.[50]

[50] The exceptions to the *functus officio* doctrine in the administrative law context are discussed in Hoexter (2012) *Administrative Law in South Africa* 2ed at 276-281; Baxter (1984) *Administrative Law* at 372ff; and D M Pretorius 'The origins of the *functus officio* doctrine, with specific reference to its application in administrative law' (2005) 122 *SALJ* 832.
The common law exceptions to the *functus officio* doctrine also apply to courts, and are reflected in court rules that define the court's power to vary or rectify judgments – see, rule 42 of the Uniform Rules of Court and rule 29 of the Constitutional Court's rules. This Court exercised its power to rectify a patent error in its judgment in *University of Witwatersrand Law Clinic v Minister of Home Affairs and*

44.4 In these limited and exceptional circumstances, and in the interests of efficiency, it would be open to the Public Protector (on application to her or at her own instance and after giving affected persons an opportunity to be heard) to rectify, supplement or vary her findings and remedial action, without recourse to judicial review.

(ii) The President and the Speakers' countervailing arguments

45. President Zuma accepts in his answering affidavit that –

> *"There may be circumstances where the findings and remedial action proposed by the Public Protector are, of their very nature and terms, final and binding decisions which require compliance within a certain specified time frame (and which, absent a review, must be given effect to)."*[51]

46. President Zuma contends, however, that *"In other circumstances, the Public Protector's findings will require further investigative steps to be*

Another 2008 (1) 447 (CC). As is recorded in footnote 1 to the judgment, this Court revised the judgment by deleting paragraph 8, which erroneously recorded that the applicant had made a submission which it had not. Satisfied that the paragraph could be deleted without affecting the sense or substance of the judgment, the Court gave notice to the parties that it intended to delete the paragraph from its judgment, and having received no objection, duly issued a revised judgment.

[51] Record Vol 8 at p. 897, Second Respondent's AA para 18.3

taken and the action proposed may not lend itself to compliance and enforcement as a final and definitive decision".[52]

47. President Zuma suggests that the remedial action in paragraph 11.1 of the Nkandla report was of the latter kind – i.e., it "*did not lend itself to compliance and enforcement as a final and definitive decision"* – because "*it required further action to be taken to determine [his] liability (if any)".*[53]

48. It is conceivable that the Public Protector may choose to make only non-binding recommendations in the exercise her remedial power under s 182(1)(c). However, there is no indication that the remedial action set out in paragraph 11.1 of the Nkandla report is merely recommendatory and open to dispute or disregard by the President or any other person. Indeed, the Public Protector does not suggest that it is not a finding and merely recommendatory.[54]

49. The Public Protector's remedial action in paragraph 11.1 directed the President to take a series of steps to give effect to the ultimate injunction that the President pay a reasonable percentage of the costs of the non-security upgrades at his Nkandla residence.

[52] Record Vol 8 at p. 897 Second Respondent's AA para 18.4
[53] Record Vol 8 at p. 897, Second Respondent's AA para 19
[54] Record Vol 7 at p. 885, Fourth Respondent's AA para 46

50. President Zuma was directed first to determine the reasonable cost of the non-security measures implemented at Nkandla, with the assistance of National Treasure and the SAPS (paragraph 11.1.1). Following such determination, President Zuma is then obliged to pay a reasonable percentage of that cost (paragraph 11.1.2). The mere fact that certain steps must be taken that are preliminary to others, does not render the Public Protector's remedial action any less binding and obligatory.

51. Contrary to President Zuma's contentions, the steps that he is required to take do not entail any further investigation into the question of his liability.

52. The Public Protector unequivocally found that President Zuma was liable for a reasonable percentage of the costs incurred in the implementation of non-security measures at Nkandla.

53. The steps that President Zuma is required to take are not concerned at all with investigating whether he is liable to pay for the non-security improvements to his private residence; they entail only costing his liability to the State.

54. President Zuma contends further that, by interpreting the Public Protector's remedial action as binding and enforceable, her remedial action is given the force of a "*money judgment*".[55] This is incorrect.

54.1 The Public Protector's remedial action is not self-executing like a money judgment. Any execution and recovery of assets pursuant to the Public Protector's findings and remedial action would require a court order.

54.2 The Public Protector's remedial action does not to confer judicial power on the Public Protector. Unlike a court order, the Public Protector's remedial action remains subject to judicial review.

54.3 While the language of "*binding and enforceable*" may be *"terminologically inapt"* (as the SCA suggested in *SABC v DA*),[56] what is critical is that the remedial action taken by the PP has legal effect and must be complied with absent review. It is anomalous to allow non-compliance with remedial action taken that remains valid. It would amount to a backdoor review of the Public

[55] Record Vol 8 at p. 890, Second Respondent's AA para 9
[56] *SABC v DA* para 45

Protector's remedial action and would allow government simply to ignore it.[57]

55. Both the President and the Speaker suggest that regarding the Public Protector's remedial action as binding and enforceable has the effect of tying the hands of other organs of state from exercising their own powers and functions, and infringes the separation of powers.[58] This too is incorrect.

55.1 Regarding the Public Protector's remedial action as binding and enforceable does not suggest that the Public Protector's remedial action "*exclusively covers the field*" as to what actions might be taken in respect of State misconduct, corruption and maladministration.[59] It remains incumbent on other organs of state to expose and curb corruption and the abuse of public funds and public power, in accordance with sections 7(2) and 195 of the Constitution, and their own mandates.

[57] This is impermissible on the authority of *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at paras 65 – 66 and 100 – 103.
[58] Record Vol 6 at p. 726, First Respondent's AA para 13.1; Record Vol 8 at pp. 911 – 912, Second Respondent's AA paras 53-57
[59] Record Vol 8 at p. 932, Second Respondent's AA para 110

55.2 What is not permissible, however, is the usurpation of the Public Protector's powers and mandate by other organs of state, under the guise of a parallel investigative process.[60]

55.3 While further investigations into state misconduct and impropriety are generally to be welcomed, such investigations cannot displace or override the findings and remedial action of the Public Protector. This means that organs of state cannot invoke and rely on parallel investigations as a basis for disregarding the Public Protector's findings and remedial action.

55.4 Relying on a parallel investigation to second-guess and override the Public Protector's findings and remedial action not only infringes basic principles of administrative law (as it allows another body to usurp the authority of the Public Protector), it also violates s 181(3) of the Constitution, which specifically obliges all organs of state to protect, *inter alia*, the dignity and effectiveness of the office of the Public Protector.

E. MERITS

56. The merits of challenges against the President Zuma, the NA and the Minister are dealt with separately.

[60] *SABC v DA* paras 47 and 53

(i) President Zuma

57. President Zuma has shifted his stance in respect of the remedial action taken by the Public Protector in her Nkandla report. In the answering papers, he contends that he in fact complied with the Public Protector's remedial action.[61] This is inconsistent with his earlier responses to the Public Protector's report:

57.1 In his initial response to the NA, dated 2 April 2014,[62] President Zuma refers to the Task Team Report and the Public Protector's Report and the "*recommended" "remedial action*" proposed in both of those reports.[63] He then states that, in light of these reports he had to apply his mind as to "*the appropriate action to be taken, remedial and otherwise*".[64] He says that, given the "*stark differences both in respect of the findings as well as the remedial action proposed in the two reports*",[65] he would give full and proper consideration to the matter upon receipt of the SIU Report. This is not the response of someone who believes that he is bound to comply with the Public Protector's remedial action. If President Zuma thought he was bound, why wait for the SIU Report?

[61] Record Vol 8 at p. 892, Second Respondent's AA para 13
[62] Record Vol 3 at pp. 366–368
[63] Record Vol 3 at p. 367, President's letter at unnumbered paras 1 and 3
[64] Record Vol 3 at p. 367, President's letter at unnumbered para 7
[65] Record Vol 3 at p. 368, President's letter at unnumbered para 6

57.2 In President Zuma's second response to the National Assembly, dated 14 August 2014,[66] he categorically states that his report does not comment on or critique the Public Protector's report (nor the JSCI Report or the SIU Report) and that "*the fact that I restate or offer no comment on the recommendations and remedial action proposed*" by the Public Protector "*is not reflective of the fact that I am accepting if the same*".[67] It is apparent from the second response that President Zuma had regard to all three reports (possibly also the Task Team Report) and that, in light of all three, he decided on the appropriate steps that he would take. There is no indication however that President Zuma intended to comply with the Public Protector's Report or that his actions were aimed at achieving compliance.

57.3 In his letter to the Public Protector dated 11 September 2014,[68] President Zuma explicitly disagreed with her assertion that reports of the Public Protector are by law not subject to any review or second-guessing by a Minister and Cabinet.[69] He also disagreed that the Public Protector's findings and remedial action can only be set aside by a court of law.[70] He described the PP's reports as

[66] Record Vol 4 at pp. 502 – 521
[67] Record Vol 4 at pp. 504 – 505, President's letter para 7
[68] Record Vol 4 at pp. 531 – 532
[69] Record Vol 4 at p. 531, President's letter para 3
[70] Record Vol 4 at p. 531, President's letter para 3

"*useful tools in assisting democracy in a cooperative manner, sometimes rather forcefully*".[71] He claimed that because the Public Protector's reports are "*impregnable from [judicial] review*", this was a significant factor to "*caution me against a blanket acceptance*".[72]

57.4 This clearly indicates that President Zuma did not believe that he was bound to comply with the Public Protector's remedial action, and did not intend doing so.

58. The Public Protector has herself, on a number of occasions prior to the present litigation, denied that President Zuma complied with her remedial action. President Zuma has never contested the Public Protector's claims that he did not comply. The Public Protector made these claims in the following correspondence and statements:

58.1 In a letter dated 21 August 2014, the Public Protector stated that the public perception as reflected in media reports that President Zuma's response dated 14 August 2014 represented "*an implementation to the remedial action taken in my Report, is clearly unfounded*".[73]

[71] Record Vol 4 at p. 531, President's letter para 5
[72] Record Vol 4 at p. 532, President's letter para 7
[73] Record Vol 4 at p. 527, Public Protector's letter at para 9

58.2 In another letter to President Zuma dated 15 September 2014, the Public Protector stated that if the response of President Zuma (of 14 August 2014) was final, she would have no option but to advise the complainants and the National Assembly that she was "*unable to get President Zuma to present his comments on her Report to Parliament and to indicate action to be taken in pursuit thereof*".[74]

58.3 In a letter dated 15 June 2015 to President Zuma, the Public Protector concluded that President Zuma and the National Assembly were not properly advised by the Minister's Report on his liability to contribute to the upgrading of his private residence at state expense;[75] and that the Minister's Report did not give effect to the remedial action taken in paragraph 11.1.1 and 11.1.2 of her Nkandla report.[76]

58.4 In a public address, dated 3 August 2015, the Public Protector stated that she never asked the Minister make any determination regarding President Zuma's payment of a reasonable portion of the cost of non-security upgrades at his private homestead.[77]

[74] Record Vol 4 at p. 544, Public Protector's letter para 8
[75] Record Vol 5 at p. 681, Public Protector's letter para 23.1
[76] Record Vol 5 at p. 682, Public Protector's letter para 23.3
[77] Record Vol 5 at p. 687, Public Address unnumbered paragraph 1

59. Whatever his intentions and the views of the Public Protector, the fact remains that President Zuma in fact never complied with the remedial action.

60. It is not a difficult task to determine whether President Zuma has complied. We deal with the four prongs of the remedial action taken by the Public Protector separately below.

(aa) Determining the reasonable cost of the non-security measures

61. On a plain reading of paragraph 11.1.1 of the Public Protector's Report, she ruled that the DPW measures at President Zuma's private residence that do not relate to security include the Visitors' Centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.

62. Paragraph 11.1.1 cannot be read to allow for a "*re-determination*" of whether the measures relate to security or not, because the Public Protector made a final determination thereof. This is clear from the following:

62.1 In terms of the remedial action, President Zuma is required, with the assistance of the NT and the SAPS to determine the reasonable cost of the measures listed in paragraph 11.1.1. This implies that

the Public Protector has finally determined the prior question – i.e., whether the measures listed are security related or not.

62.2 Likewise, the Public Protector's finding that President Zuma's is liable for a percentage of the costs of DPW's non-security measures,[78] and her finding that the President's failure to act in protection of state resources constitutes a violation of paragraph 2 of the Executive Ethics Code,[79] could not be made if she had not make a final determination that certain of the DPW measures were not security related.

62.3 The body of the Public Protector's Report records the Public Protector's findings that the Visitors' Centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool do not relate to security.[80] If she ordered a re-determination of the issue, her

[78] Record Vol 2 at p. 266, Nkandla report para 10.9
[79] Record Vol 2 at p. 268, Nkandla report para 10.10.1.6
[80] **Visitors' Centre and amphitheatre:** Record Vol 2 at p. 160, para 6.64.9 ("*Visitors' Centre includes an amphitheatre which can accommodate 100 people and the lawn area that was flattened to accommodate a marquees tent creating an impression of an enormous entertainment area that has very little connection with issues of security*"); Record Vol 2 at p. 212, para 7.20 ("*It was decided to create a recreational area close to the President's dwellings and the Visitors' Centre was added to complete the picture*" "*The Visitors' Centre had been used for a private function, which confirmed the impression that it has little, if anything to do with the security of the President*")
Cattle kraal and chicken run: Record Vol 2 at p. 158, para 6.63.3 ("*Elaborate design*" and "*linked to the outside by means of an access tunnel (culvert) with a gate that is remotely controlled*"); Record Vol 2 at p. 159, para 6.63.5 ("*Kraal not mentioned in SAPS security evaluation report*"); Record Vol 2 at p. 212, para 7.19 ("*President Zuma himself indicated that the kraal should be relocated and be larger to accommodate his increased livestock and that he would be amenable to refund the State for the costs incurred*")
Swimming pool: Record Vol 2 at p. 159, para 6.64.1 ("*Swimming pool was constructed in addition to the water reservoir and not mentioned in the SAPS security evaluation report*")

remedial action would conflict with the findings recorded in the body of her report.

63. There are two additional reasons why President Zuma as a matter of fact did not comply with paragraph 11.1.1 of the Public Protector's remedial action:

63.1 First, President Zuma was under the impression that he had to engage the Minister of Police with the view to "*determining a fair amount to be paid by him in respect of the items identified in the PP's Report not listed in the security list and not reasonably linked to security*".[81] However, as the Public Protector pointed out in her public address, the remedial action which she took did not involve the Minister at all.[82] She required President Zuma to determine the reasonable costs of the measures with the assistance of SAPS[83] and the NT.

63.2 President Zuma did not involve the NT at all in his alleged attempt to comply with paragraph 11.1.1 of the PP's remedial action. On this basis alone there could not have been compliance with this paragraph.

[81] Record Vol 6 at p. 684, President's letter unnumbered paragraph 3
[82] Record Vol 6 at p. 708, Public Protector's Address unnumbered paragraph 4
[83] The National Police Commissioner is the head of SAPS, not the Minister. See s 207(1) of the Constitution.

(bb) Paying a reasonable percentage of the cost

64. President Zuma appears to claim that paragraph 11.1.2 of the Public Protector's remedial action fell away as the Minister of Police determined that all the DPW measures were security related.[84] In other words, he claims that because there was "*compliance*" with paragraph 11.1.1 (in the sense that the Minister determined that all the measures were security related) the remedial action in 11.1.2 fell away.

65. The converse is true.

66. Because President Zuma did not comply with paragraph 11.1.1, the remedial action in paragraph 11.1.2 was also not complied with.

67. For the avoidance of any doubt, President Zuma is required to pay a "*reasonable percentage*" of the cost of the non-security measures listed in paragraph 11.1.1, which percentage is to be determined with the assistance of the NT "*taking into consideration the DPW apportionment document*".

68. The DPW apportionment document forms part of the Public Protector's Report.[85] This apportionment is very lenient on President Zuma. It

[84] Record Vol 8 at pp. 895-6, Second Respondent's AA para 17.4 ("*Having received the Minister of Police's determination that there were not upgrades which were unrelated to security, there was simply put, nothing for me to refer to Treasury for determination*").
[85] Record Vol 2 at pp. 172 – 173, Nkandla report at p. 248

requires him to pay a mere R10 651 580.64. The State, i.e. the taxpayer, is to foot the bill for the remainder, amounting to some R203 079 677.18.[86] The DPW apportionment is only to be considered and used as a starting point determining a reasonable percentage of the costs that President Zuma is to pay back.

(cc) Reprimanding the Ministers

69. In his answering affidavit, President Zuma makes no attempt to describe how he reprimanded the responsible Ministers. President Zuma merely describes certain disciplinary steps to be taken against DPW officials;[87] actions for civil damages instituted by the SIU against the architect, which actions are currently pending;[88] criminal dockets which have been prepared and which are "*under consideration*";[89] and intentions to reform certain supply chain management ("*SCM*") processes.[90]

70. What President Zuma describes in his affidavit have nothing to do with the the reprimand of the Ministers required in the Public Protector's Report:

[86] Record Vol 2 at p. 174, Nkandla report at p.251, para 6.72.8
[87] Record Vol 8 at p. 936, Second Respondent's AA para 119
[88] Record Vol 8 at p. 937, Second Respondent's AA para 121
[89] Record Vol 8 at p. 938, Second Respondent's AA para 123
[90] Record Vol 8 at p. 939, Second Respondent's AA para 125

70.1 The Public Protector's findings in respect of the Ministers were, *inter alia*, the provision of incorrect information on the legal authority for and the extent of the works at the Nkandla residence;[91] the failure to apply the mind to the signing of the declaration of the Nkandla residence as a national key point;[92] and insufficient executive leadership, especially with regard to speedily accessing the extent and the cost of the Nkandla Project.[93]

70.2 These findings formed the basis of the remedial action to be taken by President Zuma against the Ministers, which was to be in the form of a very specific reprimand. President Zuma was required to reprimand the responsible Ministers for the unlawful manner in which the Nkandla Project was handled and state funds abused. There is nothing unclear about the nature of the reprimand.

70.3 The Public Protector's findings in respect of officials of the DPW, the Department of Defence and contractors were set out in a separate part of the PP's report.[94]

70.4 The remedial actions to be taken by the Director-General of the DPW and the Secretary for Defence in respect of these officials are

[91] Record Vol 2 at p. 264, Nkandla report p. 432, para 10.6.1.1
[92] Record Vol 2 at p. 264, Nkandla report p. 432, para 10.6.1.2
[93] Record Vol 2 at p. 264, Nkandla report p. 432, para 10.6.1.3
[94] Record Vol 2 at pp. 265 – 266

also set out in a separate part of the Public Protector's remedial action.[95]

70.5 It cannot be contended that compliance with the remedial action in respect of DPW and DOD officials constitute compliance in respect of the remedial action that the President was required to take against the Ministers.

(dd) Reporting to the National Assembly

71. In the fourth subparagraph of her remedial action, the Public Protector required President Zuma to report to the National Assembly on his comments and actions on the Report within 14 days.

72. Despite President Zuma's protestations to the contrary in his answering affidavit,[96] he clearly did not "*report*" to the National Assembly. His first response, dated 2 April 2014 is, at best for him, an explanation that he was awaiting the SIU Report and a recordal that he would report to the NA once in receipt of the SIU report. His second response, dated 14 August 2014, explicitly states that he does not comment on or critique any of the reports, including the PP's Report.[97]

[95] Record Vol 2 at pp. 270 – 271
[96] Record Vol / at p. 896, Second Respondent's AA para 17.6; Record Vol 8 at pp. 922ff, Second Respondent's AA paras 82ff
[97] Record Vol 4 at p. 504, President's letter para 7

73. President Zuma has to date not reported to the National Assembly. He was not permitted or required to delegate the task of reporting to the Minister.[98]

(ee) Conclusion

74. President Zuma was obliged to comply with the remedial action taken by the Public Protector. He has failed to do so.

75. In the alternative, and in any event on the premises that this Court finds that the remedial action taken by the Public Protector is not binding, the DA contends, for the reasons set out above that:

75.1 President Zuma has failed to comply with the duty to report to the NA contained in s3(5)(a) of the Ethics Act;

75.2 President Zuma has also failed to engage rationally, or at all, with the Public Protector regarding her findings and remedial action pertaining to him in the Nkandla report.

[98] At various places in President Zuma's answering affidavit the complaint is made that the Minister's report has not been challenged by way of review proceedings but merely by way of an application to have his report declared invalid. See for example, Record Vol 8 at p. 917, Zuma AA at para 68.1; Record Vol 8 at p. 961, Zuma AA at para 19. The point is misdirected. The challenge to the Minister's report is a rule of law challenge, and not one in terms of the Promotion of Administrative Justice Act 3 of 2000. The DA seeks a declaratory order to the effect that the Minister's report is unlawful and irrational. This is the standard way of formulating relief sought in a rule of law challenge to state action.

76. On both the main and the alternative relief, mere declaratory relief coupled with a direction to comply will not suffice because:

76.1 The Nkandla saga has carried on too long and it is unlikely to be resolved expeditiously if the parties are left to their own devices at this stage.[99] This is particularly the case because positive action on the part of President Zuma is required which will involve him having to pay for some of the DPW measures at his Nkandla home out of his own pocket. Given the enormous public interest in the matter, and the need to put the matter finally to rest, it is imperative that this Court assess and give final sanction to implementation of the remedial action taken and the President's compliance with the Public Protector's remedial action. He himself has expressed the desire not to be judge in his own cause,[100] and there can, with respect be no better judge of whether he complied and what is the appropriate remedy than this Court.

76.2 In the circumstances, it is just and equitable that the Court should assume its supervisory jurisdiction and require President Zuma to report to this Court on the manner in which he complied with either the main or the alternative relief. It is suggested that he be afforded

[99] *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) SA 315 (CC) at paras 60 – 62
[100] Record Vol 8 at p. 942, Second Respondent's AA para 134

a period of one month for the affidavit to be filed regarding his compliance with the Public Protector's remedial action.

(ii) The National Assembly

77. In the DA's notice of motion, the resolutions of the NA of 13 November 2014 and 18 August 2015; and the *ad hoc* Committee reports of 11 November 2014 and 7 August 2015, which were adopted by those resolutions, are sought to be declared unlawful and invalid. The reports and the resolutions are not dealt with separately. The grounds on which they are challenged are effectively the same.

77.1 For the reasons set out above, President Zuma himself in fact never "*reported*" to the NA as required by the Public Protector. There was accordingly no report for the NA to accept or approve.

77.2 It was impermissible and unlawful of the NA and its first and second *ad hoc* Committees to have regard to the contents of reports compiled by other organs of state, such as those of the Task Team, the SIU and the Minister , when, in law, the President Zuma was required to report to the NA.

77.3 The second NA resolution (18 August 2015) was unlawful and invalid as the first NA resolution did not authorise or require the

Minister report to the NA on whether the President benefitted from non-security related upgrades to his Nkandla residence.

78. The Speaker's defence is that the Nkandla report was not to be rubberstamped but had to be processed in terms of the NA's accountability and oversight powers; that all relevant materials had to be considered in this process; and that the DA participated in the process and now fails to accept the outcome thereof.

79. The DA's position on this defence was set out in the amended report of the opposition parties, which was submitted to the second *ad hoc* Committee for consideration but defeated by the majority party's members.[101] The DA has never accepted that President Zuma "*reported*" to the NA as required by the Public Protector.

80. In any event, for present purposes, the position adopted by the DA in the NA and in its *ad hoc* Committees, is not relevant. It cannot turn unlawful conduct into lawful conduct.

81. President Zuma was required to report to the NA on <u>how</u> he implemented the remedial action taken by the Public Protector. As this was <u>not</u> done, the NA had nothing before it to consider, whether by way of exercising its accountability and oversight powers, or otherwise. The NA was and

[101] The amended report appears at Record Vol 5 at pp. 656 – 667

remains bound by the Public Protector's remedial action. What it was required to do was to consider a report on how the remedial action was implemented by President Zuma as well as any comments that the President had on the Public Protector's Nkandla report. This, the NA failed to do.

(iii) The Minister of Police

82. The Police Minister's report to "*Parliament*" regarding the liability of the "*State President*" in respect of the so-called security upgrades at Nkandla was unlawful and invalid because neither President Zuma, nor the Public Protector, nor the NA itself or the Speaker, authorised or required the Minister of Police to submit such a report to the NA.

83. The Minister attempts to extract his authority for doing so from bits and pieces of the Public Protector's remedial action (19 March 2014), President Zuma's document (14 August 2014) and the NA's resolution (13 November 2014), and the Speaker's letter of 29 December 2014. But none of these require the Minister to report to the NA on whether the upgrades at Nkandla were security related.

84. In any event, the Minister's investigation and his report clearly constitutes the kind of parallel process aimed at second-guessing the Public Protector, which the SCA ruled to be impermissible in the *SABC v*

DA matter. An organ of state affected by any finding or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector.[102] That parallel process undertaken by the Minister is in itself unlawful.

F. REMEDY, CONDONATION AND COSTS

85. Should this Court find that any of the impugned conduct of the President, the Speaker and the Minister is unlawful, it must declare such conduct to be inconsistent with the Constitution and invalid. This Court has no discretion in that regard.[103]

86. The Court may also make any order that is just and equitable, in terms of s 172(1)(b) of the Constitution. The DA submits that, in this instance, a just and equitable order requires this Court to direct compliance by President Zuma with the remedial action of the Public Protector, and to retain supervisory jurisdiction to ensure compliance by the President.

87. These structural orders are necessary to ensure that the Court's remedy is

[102] *SABC v DA* at para 53
[103] Section 172(1)(a) of the Constitution. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 59; *Mazibuko N.O. v Sisulu N.O.* 2013 (6) SA 249 (CC) at para 70

effective in light of the extraordinary facts of this matter[104] – particularly President Zuma's determined endeavours to avoid implementing the Public Protector's remedial measures; the inconsistent and disingenuous postures that he has adopted in doing so; the fact that the Public Protector's remedial measures require President Zuma personally to pay back monies to the State; and the serious and ongoing harm that the President's conduct has caused to the Public Protector's office, constitutionalism, the rule of law and ultimately poverty alleviation in South Africa. The structural orders are especially necessary to restore the dignity and effectiveness of the Public Protector's office, which has been compromised by the President's failure to heed her remedial action and which will continue to be so compromised until the President has complied.

88. It remains to address President Zuma's condonation application for the late filing of his answering affidavit and costs.[105] Given the public importance of this matter, the DA recognises that this Court may be inclined to grant condonation and admit President Zuma's answering affidavit, despite it being filed with disregard to the directions of the Chief Justice. Should it be so inclined, we submit that this Court ought to

[104] This Court has granted supervisory orders where it is necessary to secure compliance and ensure an effective remedy, including *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 53; *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) paras 91-92; *Sibiya and Others v Director of Public Prosecutions, Johannesburg and Others* 2005 (5) SA 315 (CC) para 64.

[105] The condonation application appears at Record Vol 11 at pp. 1123 - 1135, and the DA's AA to the condonation application appears at Record Vol 12 at pp. 1219 - 1226.

express its displeasure at the lack of respect demonstrated by President Zuma for the Court's process and the directions of the Chief Justice by directing President Zuma to pay the costs of the condonation application *de bonis propriis* on the scale as between attorney and client.

89. In the event that the DA is successful in this application, it seeks costs against the first, second and third respondent, including the costs of three counsel. Should the DA be unsuccessful, we submit that no order as to costs is appropriate as this is constitutional litigation of the kind contemplated by this Court in *Biowatch*.[106]

ANTON KATZ SC

JOHAN DE WAAL

JANICE BLEAZARD

TEMBELANI MAYOSI

Chambers, Cape Town and Johannesburg

30 November 2015

[106] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 43