IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(BRAAMFONTEIN)

CASE NO: CCT 143/15

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

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A. INTRODUCTION

1. The Economic Freedom Fighters ("the EFF") seek declaratory relief against the National Assembly for allegedly failing to fulfil constitutional obligations imposed by sections 55(2) and 181 of the Constitution.[1]

2. The EFF urges, in that regard, that:

   2.1. That failure took the form of the National Assembly failing to "*ensure that the President of the Republic of South Africa … has complied with and given effect to the findings and remedial action of the Public Protector in the report dated March 2014…*";[2] and that

   2.2. Upon receipt of the report of the Public Protector "*Parliament was obliged to take appropriate steps to hold the President to account. It failed. No explanation has been forthcoming.*"[3]

3. The EFF contends, in consequence, that:

   3.1. The National Assembly has failed in its oversight and accountability functions ("the section 55 challenge");

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[1] NOM, para 1

[2] NOM, para 1

[3] EFF HOA, para 4

3.2. The National Assembly has failed to protect the office of the Public Protector ("the section 181 challenge"); and that

3.3. Its case falls for exclusive determination by this Court in terms of section 167(4)(e) of the Constitution.

4. The National Assembly opposes this application on, *inter alia*, the following broad bases:

4.1. The EFF's reliance on sections 55(2) of the Constitution is misplaced;

4.2. The EFF's reliance on sections and 181 of the Constitution is misplaced, and so is its reliance on 182(1)(c), as it flies in the face of the doctrine of constitutional subsidiarity;

4.3. The EFF's reliance on section 167(4)(e) of the Constitution is misplaced; and that

4.4. The EFF's reliance on section 167(6)(a) of the Constitution is equally misplaced.

5. We deal with the above, in turn, below.

B. RELIANCE ON SECTIONS 55(2)

<u>The basis for the challenge</u>

6. Section 55(2) obliges the National Assembly to provide accountability and oversight mechanisms through which to exercise its accountability and oversight powers over the exercise of executive authority.

7. The section 55(2) challenge is based on the National Assembly's alleged failure to "*to provide mechanisms"* to ensure accountability and oversight of, *inter alia*, the President.[4] The EFF makes that claim despite its concession that a process has been set in motion in that regard. It states as follows:

> "*At the current conjuncture, the National Assembly has set up a sub-committee to conduct a further investigation into the matter. However the process is deeply flawed and unconstitutional.*" [5]

8. The EFF thus asserts its right to the fulfilment of the National Assembly's constitutional obligation to provide accountability and oversight mechanisms of the sort contemplated in section 55(2). The EFF seeks no relief consequential upon the declaratory relief it seeks against the National Assembly.

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[4] FA, para 15.1.1, 29, 33

[5] FA para 40.

9. Upon its proper construction however, the EFF's claim is, in substance, not about the National Assembly's failure to provide and invoke mechanisms provided for in section 55(2). It is about:

    9.1. The EFF's protestation on the manner in which those mechanisms were invoked by the National Assembly; and

    9.2. The unsubstantiated apprehension that the purpose of the invocation of the mechanisms is not to give effect to the report of the Public Protector.

10. Implicit in the EFF's challenge is the underlying assumption that the Public Protector has the constitutional power to *"prescribe"* to the National Assembly on the manner in which it should exercise its powers of oversight and accountability. It expresses this sentiment thus:

> *"… the EFF took a campaign – through the Parliamentary procedures – to ensure that the President complies with the findings and determinations of the Public Protector. That campaign included the specific requirement that the National Assembly must give effect to the* ***findings and recommendations*** *of the Public Protector."*[6] [Our emphasis]

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[6] FA, para 33 - It is significant to note the EFF's characterisation of the Public Protector's findings as recommendations. The significance of this characterisation will be made clear below.

The National Assembly 's response

11. The National Assembly, for its part, contends that it has provided such mechanisms. It asserts further that processes based on those mechanisms are currently underway with a view to exercising its powers of accountability and oversight over the President. The National Assembly thus contends that the EFF's reliance of section 55(2) is misplaced because the constitutional obligations complained of have been fulfilled.

12. To the extent, however, that the EFF 's claim, properly construed, amounts to a review of the process set in motion and decisions flowing therefrom because of the alleged purpose of not giving effect to the report of the Public Protector, we submit that the claim falls properly to be dismissed *inter alia* because:

    12.1. That is not the EFF's pleaded case;

    12.2. Review of an administrative action for ulterior purpose is not a proper basis for the invocation of the section 167(4)(e) procedure;

    12.3. It would not be in the interests of justice that direct access be granted to the EFF with the result that this Court would serve as both the Court of first and last instance; and that

12.4. The EFF has, in any event, failed to exhaust the internal remedies available to it by way of continued participation in the ad hoc committee set up by the National Assembly to give effect to the report of the Public Protector.

The section 55(2) challenge has not been established

13. The meaning to be ascribed to the word "*mechanisms*" as it occurs in section 55(2) is "*processes and procedures that facilitate the exercise of a power*".[7]

14. Quite what form, the EFF contends, these mechanisms should take is simply not stated in the EFF's papers. Accordingly the National Assembly, and indeed, this Court is left to speculate on the precise nature of the mechanisms relied upon which the National Assembly has allegedly failed to provide.

15. This Court has held that specificity and accuracy are the hallmarks of pleading in constitutional litigation.[8] As such, a pleading must identify accurately the impugned provisions and the sections of the Constitution it says they are inconsistent with. A failure to do so is fatal as it has the effect

[7] *Collins English Thesaurus*.

[8] *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC) at para 139.

of seeking relief so open-ended such as to be incompetent.[9] Accordingly, the EFF has simply not established its section 55(2) challenge.

16. In any event, the question whether the National Assembly has heeded the section 55 injunction of providing accountability and oversight mechanisms must undoubtedly be answered in the affirmative.

17. The National Assembly has set out, in its answering affidavit, the various mechanisms that it has provided in that regard.[10] After their adoption, its business in this connection must be disposed of in line with that agreed structure or set of guiding principles.[11]

18. The National Assembly does not only set out the precise mechanisms provided, but it also precisely sets out their extensive invocation in the exercise of its accountability and oversight powers over the President.[12]

19. This Court in *Oriani-Ambrosini*[13] held, in the context of sections 55(1) (b) and 73(2) of the Constitution, that the National Assembly may develop mechanisms to facilitate the exercise of its legislative powers.[14]

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[9] Mazibuko (supra) at para 24.

[10] Speaker's AA, para 22.1.

[11] See *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para 41.

[12] Speaker's AA, paras 68 – 83.

[13] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC).

20. The Court stated the following in that regard:

> *"… the Assembly as a collective may … vote only once to put in place a mechanism that would guide or regulate its exercise of the power … it would be unduly cumbersome for the assembly to vote on … each legislative proposal when it could instead be left to committees and individuals like the Speaker to act on its behalf."*[15]

21. The provisions of section 57 of the Constitution are material to the process regulation powers of the National Assembly. The section's heading reads: "Internal arrangements, proceedings and procedures of National Assembly." In its relevant part, the section provides:

> *"(1) The National Assembly may –*
>
> *(a) determine and control its internal arrangements, proceedings and procedures; and*
>
> *(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.*
>
> *(2) The rules and orders of the National Assembly must provide for –*

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[14] *Oriani Ambrosini* at 66.

[15] *Oriani Ambrosini* at 41.

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committee of minority parties represented in the Assembly, in a manner consistent with democracy."

22. *In casu,* the National Assembly has fulfilled its constitutional obligation imposed under section 55(2) of the Constitution. Not only did it provide mechanisms for oversight and accountability on the President, but it has also invoked those mechanisms with a view to exercising its oversight and accountability powers in that regard.

23. The EFF concedes that, at the time of instituting these proceedings, an oversight process had already been set in motion by the National Assembly from which it extricated itself based on its perception that it was actuated by the ulterior purpose of not seeking to hold the President accountable.

24. It is plain that what the EFF is seeking, essentially, is to *"prescribe"* to the National Assembly on the manner in which it should exercise its oversight and accountability powers. The EFF stated as follows in this regard:

> *"… the EFF took a campaign … That campaign included the specific requirement that the National Assembly must give effect to the findings and recommendations of the Public Protector."*[16]

25. That approach is, simply, not borne out by the express provisions of section 182(1)(c) of the Constitution read with those of the Public Protector Act 23 of 1994 (*"the PP Act"*) and of the Ethics Act 82 of 1998 (*"the Ethics Act"*). We deal fully with this aspect of the case in the next section of these submissions which focuses on the EFF's reliance on, *inter alia*, section 182(1)(c).

26. This Court cautioned against the approach of seeking to "*prescribe*" to the National Assembly how it should exercise its constitutional powers in the following terms:

> "…*It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. Crucially, lack of rationality is not an issue in these proceedings…*
>
> *Despite its protestations to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so...That attempt*

[16] FA, para 33.

> *impermissibly trenches on Parliament's terrain; that is proscribed by the doctrine of separation of powers."*[17] [Our emphasis]

27. The oversight and accountability powers in respect of the Executive, like legislative power, vest solely in the National Assembly.[18] The manner of the exercise of these powers is a matter exclusively within discretion of the National Assembly.

28. Accordingly, the EFF's section 55(2) challenge must fail.

29. The EFF appears to rely, additionally, on alleged unlawfulness based on the National Assembly, in the exercise of a public power, being allegedly actuated by the ulterior purpose of not seeking to give effect to the report of the Public Protector.

30. That is the issue to which we now turn.

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17 *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015) at paras 155 – 156.

18 Compare - This Court in *My Vote Counts* at para 154 stated thus: *"The true complaint by the applicant is the manner in which Parliament – exercising a power that vests solely in it-has chosen to legislate."*

Is the claim that the National Assembly is actuated by ulterior purpose established?

31. The EFF relies additionally on unlawfulness on account of ulterior purpose for relief. It would seem that its contention, in this regard, is that the National Assembly has failed to fulfil its constitutional obligation of oversight and accountability because in invoking its mechanisms developed for this purpose, it did so for an ulterior purpose not to hold the President to account.

32. The EFF bases the above contention on the following allegations:

> *"…The applicant is cognisant of the Ad Hoc Committee established by the National Assembly to consider the matter of the security upgrades at the private residence of President Zuma… At any rate, it is apparent that the purpose of this Ad Hoc Committee is not to give effect to the report of the Public Protector."*[19]

33. We demonstrate, below, that this additional ground cannot sustain the relief sought because not only is it inaccurate, but it is also wholly unsubstantiated.

34. Section 6(2)(e)(ii) of PAJA[20] provides in that regard that: *" A court or tribunal has the power to judicially review an administrative action if … the action was taken … for an ulterior purpose or motive…"*

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19 FA, para 9 1.1.

20 Promotion of Administrative Justice Act, 3 of 2000.

35. The EFF bases its entire case, in this regard, on these conclusive allegations of ulterior purpose without alleging any primary facts from which such a conclusion has been drawn. It alleges that:

    35.1. The National Assembly has failed to ensure compliance with remedial action prescribed by the Public Protector;

    35.2. The National Assembly has set up an ad hoc Committee to consider the matter of the security upgrades at the private residence of President Zuma;

    35.3. The Committee has no powers to alter or amend remedial action decided by the Public Protector;

    35.4. It is apparent that the purpose of the ad hoc Committee is not to give effect to the report of the Public Protector; and that

    35.5. Neither the President nor the National Assembly has carried out the findings and determinations of the Public Protector.[21]

36. This Court is, sadly, faced with totally unsubstantiated allegations of ulterior purpose.

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[21] FA , para 33.

37. Without the primary facts from which the conclusions of the deponent are drawn, the EFF has simply not made out a proper case for relief based on this ground.[22]

38. Affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts.[23]

39. Secondary facts of the sort relied upon by the EFF for the "*ulterior purpose*" contention "*do not constitute evidential material capable of supporting a cause of action*".[24]

40. It follows from the above that he EFF has failed to establish, on the facts, entitlement to relief based on this ground.

41. We submit that this application, to the extent based on this ground, should similarly fail.

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[22] *Reynolds NO v Mecklenberg* (*Pty*) *Ltd* 1996 (1) SA 75 (W) at 78H–I. Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions – (See also *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C–E) and accordingly do not constitute evidential material capable of supporting a cause of action.

[23] *Willcox and others v Commissioner of Inland Revenue* 1960 (4) SA 599 (A) at 602A.

[24] *Radebe* infra.

The true nature of accountability and oversight powers

42. The powers vested in the National Assembly by section 55(2) are of a discretionary nature.

43. The principle of legality requires that the exercise of administrative discretionary power must be lawful.[25]

44. The Constitution, the PP Act and the Ethics Act[26] do not prescribe to the National Assembly the manner in which it should exercise its constitutionally ordained powers of accountability and oversight of executive action.

45. That matter is left entirely to the discretion of the National Assembly. The National Assembly is enjoined, however, to provide mechanisms within which such discretion falls to be exercised. It has provided those mechanisms.

46. There is no frontal challenge against the mechanisms it has provided with the result that their constitutional validity is not in dispute. The issue is thus one of the lawfulness of the invocation of the said mechanisms.

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25 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 53 fn 73: *"Administrative lawyers now generally acknowledge the importance of discretion to a functioning legal system. The challenge for administrative law is to ensure that discretion be properly regulated."*

26 Executive Members' Ethics Act 82 of 1998.

47. Discretionary power is an indispensable necessity in the modern state.[27] In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*[28] this Court observed:

> *"Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."*

48. Simply put, discretion is a legal power to make a choice between two or more alternative courses of action in accordance with requirements laid down by law.[29]

49. Discretion involves the exercise of discernment and judgment upon which that choice is based, and in the process embraces the interpretation and/or application of rules.

> *"The scope of discretionary powers may vary. At times, they will be broad; particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. The freedom (or 'room') to decide, which must be exercised, does not*

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[27] Baxter *Administrative Law* (Juta, Cape Town, year) 82–84.

[28] 2000 (3) SA 936 (CC) par 53.

[29] See Wiechers *Administrative Law* (Publisher, City, Year) 210; *Giddey v JC Barnard & Partners* 2007 (5) SA 525 (CC) par 19: "*Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense.*" [our emphasis]

import arbitrariness; it is not absolute. The discretionary power may be 'wide' or 'narrow'."[30]

50. Wiechers [31] distinguishes between a free and a circumscribed discretion.

50.1. He states that a free discretion:

> "*is … a discretion on which the law confers a wide freedom of choice without freeing the exercise of the discretion from adherence to the rules laid down by law*"; and that

50.2. A circumscribed administrative discretion

> "*is more limited or circumscribed in two respects: first of all, the number of options is limited by the statute and, secondly, the circumstances in which the discretion is to be exercised are clearly defined in the statute*".

51. Where the decision-maker, such as the National Assembly is *in casu*, is duly authorised, lawfulness requires *inter alia* that it remains within the bounds of the power; not misconstrue it; adheres to the permissible range of considerations and/or options; and to apply its own mind to the matter in accordance with the legislative purpose of the power.

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[30] Baxter at 88.

[31] Wiechers at 221.

52. The pre-democratic grounds for review are usefully summarised by Cloete JA in *Pepcor Retirement Fund v Financial Services Board*[32] ("*Pepcor*"):

> *"Hitherto, where jurisdiction is not in issue and there is no obvious transgression of the boundaries within which the functionary has been empowered to make decisions … Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of … an ulterior or improper purpose; or where … the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter."* [Our emphasis]

53. The above passage remains relevant. This Court held in *Bato Star*[33] that as the common law informs the provisions of the Promotion of Administrative Justice Act, 2000 ("PAJA"), it remains relevant to administrative review but the extent to which it does will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.

54. It follows, from the above, that we are concerned *in casu* with the exercise of a wide discretion, also referred to as "*a discretion in the strict sense"*[34] in respect of which judicial intervention ought to *"be limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of … an ulterior or improper purpose; or where … the decision of the*

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[32] 2003 (6) SA 38 (SCA) at para 32.

[33] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 22.

[34] *Giddey v JC Barnard & Partners* 2007 5 SA 525 (CC) para19.

functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter."[35]

55. *We* accordingly submit, given the failure by the EFF to show an abuse of discretion by the National Assembly, that this Court should refuse EFF the relief sought.

56. We submit in conclusion that the EFF has not made out a proper case for declaratory relief that the National Assembly has failed to fulfil its section 55 obligations.

C. THE SUBSIDIARITY PRINCIPLE AND SECTIONS 181 AND 182(1)(c)

EFF's Reliance Directly on the Constitution Incompetent

57. The EFF seeks to give effect to the powers of the Public Protector flowing directly from section 182(1)(c) of the Constitution.

58. It locates this portion of its claim directly within section 182(1)(c) of the Constitution despite there being in place the PP Act which covers the field, completely, in that regard.

59. It contends:

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[35] *Pepkor* (supra).

59.1. At paragraph 9.1.1 that the National Assembly has failed in terms of inter alia section 182(1)(c) to ensure compliance with the remedial action prescribed by the Public Protector;

59.2. At paragraph 32 that the said findings are binding and should thus be given effect to; and

59.3. At paragraph 40.1.1 that the National Assembly cannot alter the reports of the Public Protector.

60. Section 182(1)(c) of the Constitution provides that the Public Protector has the power, as regulated by national legislation, to investigate any conduct in state affairs, to report on that conduct and to take appropriate remedial action.

61. The above provision makes plain:

61.1. First, that the powers set out in subsection 1(a) - (e), namely to investigate, report and take appropriate remedial action are "*as regulated by national legislation*"; and

61.2. Second, that the powers and functions additional to those in subsection 1(a) - (e) are to be *"prescribed by national legislation".*

<u>The PP Act Regulates Section 182(1)(c) Powers</u>

62. PP Act is the national legislation that seeks:

62.1. Firstly, to regulate the powers set out in subsection 1(a)-(b) of investigating, reporting and taking appropriate remedial action; and

62.2. Secondly, to prescribe additional powers and functions of the Public Protector.

63. The above is made plain by the preamble of the PP Act which reads, in its material parts, as follows:

*"**Preamble***

WHEREAS sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) provide for the establishment of the office of Public Protector and that the Public Protector <u>has the power, as regulated by national legislation, to investigate any conduct in state affairs…</u> <u>to report on that conduct and to take appropriate remedial action</u>

… AND WHEREAS the Constitution envisages further legislation <u>to provide for certain ancillary matters</u> pertaining to the office of Public Protector;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows…" [Our emphasis]

64. It is clear from the above that the mischief of the PP Act is:

64.1. To regulate the powers provided for in section 182(1) (a) - (c); and to

64.2. Prescribe additional powers and functions of the Public Protector.

65. Section 6(4)(c) (ii) of the PP Act provides, as regards remedial action of the sort we are concerned with in this matter, that:

"(4) The Public Protector shall, be competent-

…

(c) at any time … after an investigation-

… to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority…" [Our emphasis]

66. The above section regulates the section 1 (a) – (c) powers of the Public Protector. It does so by stating that at any time, during or after an investigation, the Public Protector shall be competent to either:

66.1. Refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it;

66.2. Make an appropriate recommendation regarding the redress of the prejudice resulting therefrom; or

66.3. Make any other appropriate recommendation she deems expedient to the affected public body or authority.

67. The *"remedial action"* provided for in section 182(1)(c) is thus regulated by section 6(4)(c) (ii) of the PP Act.

Appropriate Remedial Action is not Prescriptive but Advisory

68. The PP Act provides in express language that *"appropriate remedial action"* is not prescriptive but advisory.

69. Accordingly, that "*appropriate remedial action*" is no more than *"an appropriate recommendation regarding the redress of the prejudice resulting therefrom"* or "*any other appropriate recommendation he or she deems*

expedient to the affected public body or authority…" in terms of section 6(4)(c)(ii).

70. In sum, the Public Protector, in a case such as the present where her investigation affects a public body or authority such as the National Assembly*,* can do one of three things, namely, to refer the matter to the public authority affected thereby, make recommendations on redress of the prejudice flowing therefrom or make any other recommendations.

71. What is clear from the above is that the Public Protector is not authorised by national legislation that regulates her section 182(1)(c) powers to *"prescribe"* to the repository of the power on how it should discharge its constitutional obligations.

72. Section 6(4)(c)(i) reinforces the above. It provides that where, during or after an investigation, the Public Protector is of the opinion that the facts disclose the commission of an offence, she shall be competent to bring the matter to the notice of the relevant authority charged with prosecutions. The logic behind this section is not hard to find.

72.1. Section 179[36] of the Constitution provides that prosecutorial decisions are an exclusive terrain of the National Prosecuting Authority ("the NPA").

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[36] *"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-*

72.2. Had the Public Protector been ordained with prescriptive powers of the sort contended for by the EFF and, indeed, the Public Protector, "*two parallel systems of law*"[37] would result. The absurdity of that proposition is self-evident. It is that the Public Protector, who is by all accounts a generalist, would be empowered to prescribe to a constitutionally ordained specialist body such as the NPA, on matters prosecutorial. That proposition postulates the absurd. Deference is all the more indicated in a case such as this. The proposition that the Public Protector has the competence to prescribe to a specialist body, such as the NPA, on when and whom to prosecute must, with respect be rejected. That interpretation is plainly not borne out by the textual analysis of the PP Act, read with the constitution.

72.3. The EFF's proposition that the Public Protector's section 182(1)(c) powers entitle her to prescribe to the National Assembly must apply, by parity of reasoning, to the NPA. With respect, such a proposition needs only be stated to be rejected.

73. Section 8 of the PP Act which deals with the publication of the findings of the Public Protector lends further support to the above interpretation.

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

…."

[37] *My Vote Counts*, para 160, NAPTOSA at n100 at para 123 B-C.

74. It provides:

74.1. At subsection 8(1), that the Public Protector may "*make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her*"; and

74.2. At subsection 2(b)(iii), that the Public Protector *"shall"*[38] submit a report to the National Assembly on the finding of a particular investigation if it requires the urgent attention of, or an intervention by, the National Assembly.

75. The word *"finding"* has been defined to mean outcome, *"conclusion reached by an inquiry".*[39]

75.1. Whatever meaning one chooses to ascribe to the word *"finding"* as it occurs in the PP Act, what remains clear is that where the National Assembly's attention and/or intervention is required, the Public Protector is enjoined, by peremptory language, to submit her report to the National Assembly for intervention and attention pursuant to the provisions of section 8(2)(b)(iii).

75.2. *"Intervention"*[40] denotes active involvement of some form or another. It contemplates positive action required from the National Assembly

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38 Subsection employs peremptory language, i.e *"shall"*

39 The Concise Oxford Dictionary, 9th Edition

in order to perfect the *"finding"* of the Public Protector. It can hardly be seriously contended that the attention and intervention referred to in this subsection is a mere rubber-stamping of the Public Protector's report.

76. The scenario contemplated in section 8(2)(b)(iii is akin that often encountered by this Court upon making a finding of legislative unconstitutionality. This Court does not, in such a case, legislate remedial legislation on behalf of Parliament. What it does do, however, is to reach its *"conclusion"* and, thereafter, defer to Parliament to perfect its *"conclusion"*, by for example enacting remedial legislation as it may deem appropriate in the exercise of its legislative powers vesting, as they do, exclusively in Parliament.

77. We submit that the Public Protector's *"findings"* are subject to a similar scheme. She has no constitutional powers of prescription to the National Assembly.

78. Lastly in this regard, the submissions that we make above find support in the provisions of the Ethics Act.

78.1. The Ethics Act provides for a code of ethics governing the conduct of, inter alia, members of Cabinet;

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[40] The word *"intervene"* is defined to mean *"come between so as to prevent or modify the result or course of events"*; and *"intervention"* means *"an act of intervening"*; The Concise Oxford Dictionary, 9th Edition

78.2. Section 3(1) provides that the Public Protector must investigate any alleged breach of the code of ethics complaint against a Cabinet member or a Deputy Minister;

78.3. Upon completion of the investigation, the Public Protector must submit a report in that regard to the President;

78.4. The President must within a reasonable time after receiving the report submit a copy of the report; any comments thereon and report on any action taken or to be taken in that regard to the National Assembly;

78.5. The reason for the submission of the report together with comments thereon and action taken or to be taken is not hard to find. It is so as to enable the National Assembly, as the repository of the oversight and accountability powers, to properly apply its mind on the totality of relevant information submitted and to take a decision in the exercise of its discretion;

78.6. Had the Public Protector's powers been of a prescriptive nature, the requirement to submit comments and further information to the National Assembly would simply not exist. Indeed, submitting the report to the National Assembly would not be necessary as the report would be self-contained and prescribe so as to require strict compliance therewith, without more;

78.7. *In casu,* the Public Protector directed that the President should submit his comments and action taken to the National Assembly so as to enable the National Assembly to apply its mind thereto;

78.8. The President proceeded to do so;

78.9. Based thereupon the parliamentary process unfolded and it is still ongoing.

79. The EFF ‘s objection to the process is, thus, difficult to fathom.

80. The role of the Public Protector is to support the National Assembly in the exercise of its powers. The PP Act regulates her section 182(1)(c) powers. It provides that in instances such as these she should either refer the matter to the National Assembly or make recommendations thereto. There is no mention of the power to *“prescribe*” to the National Assembly of the sort contended for by the EFF. Hers is to support the National Assembly and not to usurp its powers.

<u>The subsidiarity Principle</u>

81. The above construction is, in our respectful submission, consistent with the doctrine of constitutional subsidiarity.

82. According to Ngcobo J:

> *"Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides."*[41]

83. Further, this Court recently articulated the principle thus:

> *"Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role*
>
> *…*
>
> *Over the past 10 years, this Court has often affirmed this. It has done so in a range of cases…"*[42]

84. Based on the above, we respectfully submit that EFF's reliance on section 182(1)(c) is misconceived.

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[41] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 437

[42] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at 53 and 54, and the authorities collected at footnote 100. Judgment not yet reported.

Legislative History of the PP Act

85. The legislative history of the PP Act supports the proposition set out above.

86. Although the PP Act was passed before the coming into effect of the Final Constitution, it has been amended on numerous occasions so as to bring it in line with the provisions of the Final Constitution.

87. The Interim Constitution provided for the powers and functions of the Public Protector under section 112 thereof. That section had six subsections. It resembled, to a large extent, the current section 6 of the PP Act.

88. After the coming into effect of the Final Constitution, the PP Act was amended by:

88.1. Public Protector Amendment Act 113 of 1998 ("the 1998 Amendment Act"); and

88.2. Public Protector Amendment Act 22 of 2003 ("the 2003 Amendment Act").

89. Only the 1998 Amendment Act is relevant to the submission that we make. It amends the PP Act inter alia:

89.1. By section 2 substituting the Preamble to provide that:

89.1.1. The PP Act is passed pursuant to sections 181-183 of the Final Constitution as opposed to sections 110 - 114 of the Interim Constitution;

89.1.2. PP Act seeks to give effect the provisions of section 182(1)(c) of the Final Constitution that the Public Protector's power to investigate, report and take appropriate remedial action are regulated by national legislation; and that the

89.1.3. PP Act seeks to give effect to the provisions of section 182 of the Final Constitution that ancillary matters (additional powers) pertaining to the office be provided for in national legislation.

89.2. By section 8 which amended section 6 of the PP Act by inter alia substituting subsections (4), (5), (6), (7), (8) and (9) for subsections (4) and (5).

89.2.1. The result of this amendment is to provide elaborately for the powers of the Public Protector in national legislation as opposed to doing so in the constitutional text.

89.2.2. Essentially, this amendment regulates section 181(2)(c) powers and prescribes additional ones in accordance

with section 182 of the Final Constitution. Powers hitherto provided for in the Interim Constitution are now in the PP Act together with additional ones. By way of example:

89.2.2.1. Section 112 (1) of the Interim Constitution is now section 6(4) of the PP Act;

89.2.2.2. Section 112(2) of the Interim Constitution is now section 6(7);

89.2.2.3. Section 112(4) of the Interim Constitution is now section 6(8);

89.2.2.4. Additional powers envisaged in section 182 of the Final Constitution are provided for in section 6(5) of the PP Act.

90. The Explanatory Memorandum on the objects of the Public Protector Amendment Bill states as follows:

> " *The Bill aims to bring the provisions of the Public Protector Act, 1994 …in line with the Constitution… the principal Act was originally drafted to give effect to the provisions of sections 110 – 114 of the …Interim Constitution. As a result of the repeal of the Interim Constitution, various amendments to the*

principal Act are required so as to harmonise it with the provisions of section 181 and 182 of the Constitution and to re-enact certain of the afore-mentioned provisions of the Interim Constitution in the principal Act."

91. The result is that the Final Constitution provides only for the general powers of the Public Protector which are to be regulated in national legislation. Similarly, the final Constitution provides for additional powers of the Public Protector which are to be prescribed by national legislation.

92. The 1998 Amendment Act gives effect to the constitutional injunction of regulating the section 182(1)(c) powers and of prescribing additional powers as envisaged in section 182 (2).

93. We submit that the above reinforces our submission that the EFF's direct reliance on the Constitution is misplaced. The PP Act is national legislation seeking to give expression to the rights and obligations set out in section 182 of the Constitution. It covers the entire field in that regard. There is no basis, therefore, for relying directly on the rights and duties provided for in the Constitution.

94. Any construction of the powers of the Public Protector without having regard to the provisions of the PP Act unhelpful.

95. Accordingly, the powers set out in section 182(1) (c) are to be construed through the prism of the PP Act.

96. That construction leads, inevitably, to the conclusion that where a public authority such as the National Assembly is impacted by the investigation conducted by the Public Protector, she can either refer the matter to such an authority or make recommendations on redress of prejudice or on any other matter indicated by the investigation.

97. Absent a frontal challenge to the constitutionality of the PP Act, this Court must, with respect, locate the relief sought by the EFF in the PP Act as opposed to the Constitution.

98. The result of that approach is that the PP Act provides that she can do no more than recommend in the circumstances of this case.

99. Based on the aforegoing, we submit that the application for a declarator should be dismissed with costs.

D. RELIANCE ON SECTION 167(4)(e) OF THE CONSTITUTION IS MISPLACED

100. Section 167(4)(e) of the Constitution confers exclusive jurisdiction on this Court to decide whether Parliament has failed to fulfil a constitutional obligation.

101. The EFF seeks an order in terms of section 167(4)(e) of the Constitution that "*Parliament has failed to fulfil its constitutional obligations under sections 55(2) and 181 of the Constitution*".

102. That section provides that only this Court may *“decide that Parliament or the President has failed to fulfil a constitutional obligation*”.

103. This relief is incompetent because section 42(1) of the Constitution provides that Parliament consists of:

103.1. The National Assembly; and

103.2. The National Council of Provinces (NCOP).

104. Since section 55(2) of the Constitution enjoins the National Assembly, and not Parliament, to provide mechanisms to maintain oversight of the exercise of the national executive authority, the relief to declare, in terms of section 167(4)(e), that Parliament has failed to fulfil its constitutional obligations under section 55(2) is incompetent. Such an order would equally affect the NCOP in circumstances where the NCOP has no such constitutional obligation.

105. The EFF’s reliance on section 181(3) of the Constitution to invoke the provisions of section 167(4)(e) of the Constitution is equally misplaced. In order for it to succeed, it must show that section 181(3) of the Constitution imposes a specific obligation on the National Assembly to perform a specified act.[43] Section 181(3) does not impose a specific obligation

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[43] *Mazibuko NO v Sisulu and Others NNO* 2013 (6) SA 249 (CC) at para 124.

exclusively on the National Assembly to assist and protect the Chapter 9 institutions. That obligation is imposed on all "*other organs of state".*

106. This Court in *Chirwa v Transnet*[44] said, as regards its exclusive jurisdiction, that:

> *"[169] … a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this court has rejected. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable."*

107. This court confirmed in *Gcaba v Minister for Safety and Security*[45] that jurisdiction is determined on the pleadings:

> *"[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr. Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion*

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[44] 2008 (4) SA 367 (CC).

[45] 2010 (1) SA 238 CC.

proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."

108. The nature of the applicant's claim is apparent from its notice of motion. It claims that Parliament has failed to fulfil an obligation imposed upon it by section 55(2) of the Constitution, to hold the President to account.

109. We submit that this is not such a case where this court should permit the invocation of section 167(4)(e) based on the pleaded case.

110. This court held in *My Vote Counts*[46] that in certain instances, claims of exclusive jurisdiction may be so palpably contrived such that a claim for exclusive jurisdiction will not succeed. We submit that this is such a case.

111. We accordingly submit that the claim for exclusive jurisdiction is misplaced.

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[46] My Vote Counts at para 134

E. RELIANCE ON SECTION 67(6)(a) OF THE CONSTITUTION IS MISPLACED

112. In order to succeed in this regard the EFF must show that it is in the interests of justice that it be granted direct access to this Court.

113. The EFF has simply not made out a case for direct access. No factual basis whatever has been laid for the invocation of this procedure. There is no reason for depriving this Court of the benefit of High Court's input in this matter. Indeed, no reason has been proffered for depriving the respondents to their right of appeal in the event they are ultimately unsuccessful. Permitting this Court to sit as both the Court of first and last instance would be prejudicial to the National Assembly.

114. In the circumstances, we submit that this application falls to be dismissed on this further ground.

F. CONCLUSION

115. We submit, in conclusion, that the EFF that the EFF has failed to make out a proper case for the relief sought.

116. This application must, thus, be dismissed with costs inclusive of those consequent upon the employment of two counsel.

L G NKOSI-THOMAS SC

G NGCANGISA

Chambers, Sandton

2 November 2015

LIST OF AUTHORITIES

Legislation

1. Public Protector Act 23 of 1994.

2. Executive Members' Ethics Act 82 of 1998.

3. Promotion of Administrative Justice Act 3 of 2000.

Case Law

1. *Oriani-Ambrosini v Sisulu, The Speaker of the National Assembly* 2012(6) SA 588 (CC);

2. *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I;

3. *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C–E;

4. *Willcox and others v Commissioner of Inland Revenue* 1960 (4) SA 599 (A) at 602A;

5. *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);

6. *Giddey No v JC Barnard & Partners* 2007 5 SA 525 (CC);

7. *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA);

8. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at [22];

9. *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC); and

10. *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at [53] and [54].

Textbooks

1. Baxter Administrative Law;

2. Wiechers Administrative Law 210; and

3. The Concise Oxford Dictionary, 9th Edition.