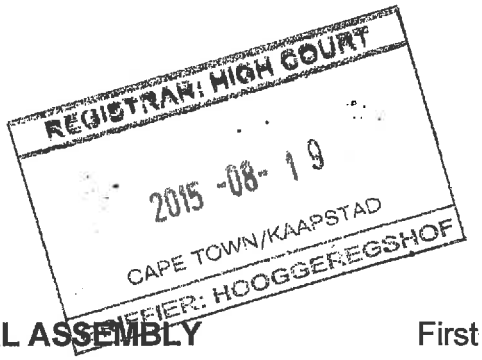
/

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15510/15

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

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the Democratic Alliance hereby institutes an application for the following relief to be heard on a date determined by the Judge-President or the Registrar of this Court:

MINDE SCHAPIRO & SMITH INC
Tel: 021 918 9012
Fax: 021 918 9090
Email: elzanne@mindes.co.za
(ref: Ms Elzanne Jonker)

1. In respect of the Second Respondent:

1.1 The Second Respondent's failure to comply with the remedial action taken by Fourth Respondent as set out at page 442, paragraph 11.1 of her report dated 19 March 2014, entitled "*Secure in comfort*" regarding an "*Investigation into Allegations of Impropriety and Unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province*" (hereafter "*the Nkandla report*") is declared to be unlawful and invalid.

1.2 The Second Respondent is directed to comply, within 14 days after the date of this order with the remedial action in the Nkandla report referred to in paragraph 1.1 above and the Second Respondent is directed to report to this Court by way of affidavit that he has done so.

1.3 In the alternative to paragraphs 1.1 and 1.2 above:

1.3.1 The Second Respondent's failure to report to the National Assembly as required by the Fourth Respondent at page 442, paragraph 11.1.4 of the Nkandla report and section 3(5)(a) of the Executive Members' Ethics Act, 82 of 1998 ("*the Ethics Act*"), is declared to be unlawful.

1.3.2 The Second Respondent is directed to report to the National Assembly in terms of section 3(5)(a) of the Ethics Act, within 14 days of the date of this order.

1.3.3 The Second Respondent's failure to engage rationally with the Fourth Respondent's findings and remedial action pertaining to him in the Nkandla report is declared to be unconstitutional, unlawful and invalid.

1.3.4 The Second Respondent is directed to comply with remedial action in the Nkandla report referred to in paragraph 1.1 above or to file with the Registrar of to this Court, within 14 days of this order, an affidavit how he intends to engage rationally with the findings and remedial action pertaining to him in the Nkandla report.

1.3.5 The Fourth Respondent shall be entitled to respond thereto within 14 days after it has been filed and the Applicant may set down the matter for hearing on whether Second Respondent has fulfilled his obligation on the same papers duly supplemented.

2. In respect of the First Respondent:

2.1 The resolution of the National Assembly of 13 November 2014 is declared unlawful and invalid.

2.2 The resolution of the National Assembly of 18 August 2015 is declared unlawful and invalid.

3. In respect of the Third Respondent:

3.1 The Report of the Third Respondent to Parliament on Security Upgrades at the Nkandla Private Residence of the President, dated 25 March 2015, is declared to be unlawful and invalid.

3.2 It is declared that the Third Respondent is not entitled to report to the National Assembly regarding the remedial action required by the Fourth Respondent at page 442, paragraph 11.1.4 of the Nkandla report and under section 3(5)(a) of the Ethics Act.

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4. The First, Second and Third Respondents shall pay the costs of the application, jointly and severally, including the costs occasioned by the employment of two counsel.

5. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the affidavit of **JAMES SELFE** will be used in support of this application.

TAKE NOTICE FURTHER THAT the Applicant has appointed the offices of Minde Schapiro & Smith Inc., care of Gerald Schnaps Attorneys, 47 on Strand, 47 Strand Street Cape Town, as the address at which it will receive all process in this matter.

TAKE FURTHER NOTICE that if Respondents intend opposing the relief sought in the Notice of Motion, Respondents are required to: -

a) within fifteen (15) days after receipt of this notice to deliver to the Applicant a notice of opposition and appoint in such notice an address at which it will accept notice and service of all processed in these proceedings in terms of Rule 6(5)(b); and

b) Within thirty (20) days after filing of such a Notice of Intention to Oppose deliver Answering Affidavits, if any.

KINDLY TAKE FURTHER NOTICE THAT if no such notice to oppose is given, the Application will be made on Thursday, 15 October 2015.

DATED AT **CAPE TOWN** this 19th day of **AUGUST 2015**.

MINDE SCHAPIRO & SMITH INC.

Per: **ELZANNE JONKER**

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Attorneys for the Applicant

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Building Number 2, Cnr Willie van Schoor and Old Oak Rds

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BELLVILLE, c/o **GERALD SCHNAPS ATTORNEYS,** 47 on Strand, 47 Strand Street, **CAPE TOWN**

TO: **THE REGISTRAR**
Western Cape High Court
CAPE TOWN

AND TO: **THE SPEAKER OF THE NATIONAL ASSEMBLY**
First Respondent
c/o **PARLIAMENT OF SOUTH AFRICA**
Parliament Street
CAPE TOWN

AND TO: **JACOB GEDLEYIHLEKISA ZUMA,THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
Second Respondent
Tuynhuys
CAPE TOWN

AND TO: **THE MINISTER OF POLICE**
Third Respondent
c/o **OFFICE OF THE STATE ATTORNEY**
4th Floor, 22 Long Street
CAPE TOWN

AND TO: **THE PUBLIC PROTECTOR**
Fourth Respondent
4th Floor, 51 Wale Street / Breë Street
CAPE TOWN

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No:

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

FOUNDING AFFIDAVIT

I, the undersigned,

JAMES SELFE

do hereby make oath and declare as follows:

1. I am an adult male and the Chairperson of the Federal Executive of the Applicant.

2. I am also a member of the National Assembly of the Parliament of South Africa, representing the Applicant. I served on the *ad hoc* Committees of the National Assembly which dealt with the subject matter of this application.

3. I am duly authorised to depose to this affidavit on behalf of the Applicant.

4. The facts contained in this affidavit are true and correct and fall within my personal knowledge, unless otherwise indicated or apparent from the context. To the extent that I rely on information provided to me by others, I verily believe such information to be correct and I ask for same to be admitted. Any legal submissions are made on the advice of the Applicant's legal representatives, which advice I believe to be correct.

THE PARTIES

5. The Applicant is the **DEMOCRATIC ALLIANCE**, a political party registered in terms of s26 of the Electoral Act 73 of 1998 with its head office situated at 2nd Floor, Theba Hosken House, cnr Breda and Mill Streets, Gardens, Cape Town. I shall refer to the Applicant as the "*DA*".

6. The First Respondent is **THE SPEAKER OF THE NATIONAL ASSEMBLY**, with her offices at Parliament, Cape Town. The First Respondent is cited as the nominal respondent as she is the presiding officer of the National Assembly, which body adopted certain resolutions which are challenged in the present matter. I shall refer to the First Respondent as "*the Speaker*" and the National Assembly as the "*NA*".

7. The Second Respondent is **JACOB GEDLEYIHLEKISA ZUMA,THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**, with his offices at Tuynhuys, Cape Town. The Second Respondent was required to comply with the remedial action taken by the Fourth Respondent in her report concerning the security upgrades at his private residence at Nkandla. The Second Respondent not only failed to do so, but he failed to engage

rationally with the Fourth Respondent regarding her report. The DA contends that Second Respondent's failure to comply with the remedial action in the report, alternatively to engage rationally with her report, was unlawful, unconstitutionally and invalid. I shall refer to the Second Respondent as "*the President*". The President is cited because he has in respect to the upgrade to the Nkandla saga, demonstrated utter contempt and disdain towards the Public Protector, Parliament, including the NA, the Constitution and the law. In demonstrating such disrespect for and to the law he has failed the people of South Africa. It has unfortunately become clear that ultimately it is only the Courts which can force the President to comply with the law, when he has breached it.

8. The Third Respondent is **THE MINISTER OF POLICE**, who is cited care of the State Attorney, 4th Floor, 22 Long Street, Cape Town. The Third Respondent purported to file a report to the NA in which he attempted to deal with Fourth Respondent's Nkandla report. In law, the Third Respondent was not entitled to respond to the Nkandla report and his report is in any event fatally flawed and irrational, both procedurally and substantively. The DA seeks an order declaring the Third Respondent's report to be unconstitutional and invalid. The Third Respondent will be referred to as "*the Minister of Police*".

9. The Fourth Respondent is **THE PUBLIC PROTECTOR**, an organ of state referred to in ss181 – 183 of the Constituion of the Republic of South Africa, 1996 ("*the Constitution*") with her regional office at 4th Floor, 51 Wale Street / Breë Street, Cape Town. The Fourth Respondent compiled a report entitled "*Secure in comfort*" regarding an "*Investigation into Allegations of Impropriety and Unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province*". The report is dated 19 March 2014. A copy of the report is annexed hereto, marked **"JS1"**. I shall refer to the report to as "*the Nkandla report*" and to the Fourth Respondent as "*the Public Protector*". This application concerns the

findings made against the President in the Nkandla report and remedial action which the Public Protector took regarding the President in the Nkandla report.

NATURE OF THE APPLICATION

10. Having made certain findings against the President, the Public Protector determined, in terms of s182(1)(c) of the Constitution, that the President was to take certain steps as remedial action. The President was, *inter alia,* required to pay for a reasonable percentage of the cost of measures that did not relate to security and was specifically required to report to the National Assembly, with his comments and actions on the Nkandla report, within a prescribed period of time.[1]

11. In this application, the DA contends that:

    11.1 The President has not complied with the remedial action taken by the Public Protector. The DA contends that the President was legally obliged to do so. If that is correct, it follows that the President must be directed to comply. However, even if the President is not required to comply, then, at the very least, the President should have reported to the National Assembly and he should have rationally engaged with the findings and remedial action taken by the Public Protector. Given that he failed to report and to engage rationally, declaratory relief is sought against the President.

    11.2 To the extent that the NA regarded the responses from the President, dated 2 April 2014 and 14 August 2014; and/or a report from the Minister of Police, dated 25 March 2015, and other reports as "*a report*" which satisfies the remedial action taken by the Public Protector, and the applicable legislation, the

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

NA acted unconstitutionally and unlawfully. This is the main ground on which the NA's resolutions dated 13 November 2014 and 18 August 2015 are sought to be declared unlawful, unconstitutional and invalid.

11.3 Neither the President nor the NA was entitled to require the Minister of Police to respond to the Public Protector or the NA, on behalf of the President, or at all. The Minister of Police nevertheless submitted a report dated 25 March 2015 to the NA, which was adopted by the NA on 18 August 2015. The Police Minister's report is invalid because he had no legal authority to compile the report and the report is in any event factually flawed and irrational.

STANDING

12. The DA brings this application in its own interest, as envisaged in s38(a) of the Constitution; as well as in the interest of its members, as envisaged in s38(e) of the Constitution; and, in the public interest, as envisaged in s38(d) of the Constitution.

13. The rights and interests of the DA, its members and the public are adversely affected by the unconstitutional and unlawful conduct of the President, the NA and the Minister of Police. More particularly:

13.1 The DA, its members and the public have a right to lawful decisions, which right is enshrined in s1(c) of the Constitution (the rule of law). The DA's constitution (copy annexed, marked **"JS2"**) recognises that the rights enshrined in the Constitution must be defended and promoted in order to protect the people of South Africa from the concentration and abuse of power. The membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's

constitution and to expect the DA to do whatever is in its power, including litigating, to foster and promote the rule of law.

13.2 All political parties participating in the national Parliament must subscribe to constitutional principles. Section 48 of the Constitution provides that before members of the NA begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. All political parties participating in Parliament necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld. The political parties represent constituents that collectively make up the electorate. The parties effectively represent the public in Parliament. It is in the public interest and of direct concern to political parties participating in Parliament that the President and the Minister of Police act in accordance with constitutional and legal prescripts.

13.3 The DA is the official opposition in the NA, and as such has a particular interest in ensuring that the NA acts lawfully and that the President responds lawfully and properly to the NA.

13.4 The DA, its members and the public, have the right to ensure that the President is being held accountable through the office of the Public Protector for his actions. In this regard, the DA has a special interest in that one of its members, Ms Lindiwe Mazibuko, MP ("*Mazibuko*"), at the time the Parliamentary leader of the DA, submitted two complaints to the Public Protector's office regarding the Nkandla upgrades.

14. In the circumstances, it is submitted that the DA is entitled to bring this application in its own interest; in the interest of its members; and in the public interest.

FACTUAL BACKGROUND

15. The Public Protector's Nkandla report represents a significant effort by her office to hold the President as well as Ministers, officials and private service providers accountable for the massive overspending of public money at Nkandla. The report itself comprises some 447 pages. The investigation was extremely thorough and the report is of a high quality.

16. The origin of the Public Protector's investigation is described in the Nkandla report itself.[2] On 11 November 2011 the Mail and Guardian newspaper published an article under the heading "*Bunker, bunker time: Zuma's lavish Nkandla upgrade*", in which it was alleged that the President's private residence was being improved and upgraded at enormous state expense. A copy of this article is annexed hereto marked **"JS3".** The President's spokesperson at the time, Mr Mac Maharaj, responded as follows:

> "Presidency spokesperson Mac Maharaj said Zuma was renovating his Nkandla compound "using his own money".
>
> "Government, on the other hand, is apparently building a helipad for the military to land, medical facilities for use by military medical personnel and barracks for the SAPS protection unit. The intention is for the protectors and medical personnel to sleep in Nkandla, instead of far away in Eshowe, when on duty, or asking for accommodation from the Zuma household."
>
> Maharaj said the department of public works would be better placed to provide details of the costs.
>
> "We want to emphasise that the actual premises of the Zuma family are being built by the president at his own cost," said Maharaj."

17. On 13 December 2011, in response to this article, a member of the public lodged a complaint with the Office of the Public Protector.[3]

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[2] Nkandla report at pp. 80 – 86, para 2
[3] Nkandla report at p. 81, para 2.1

18. Subsequently, allegations of impropriety and excessive public expenditure relating to the installation and implementation of security measures at Nkandla appeared in the media on a regular basis.[4]

19. In response to one of these media articles, Mazibuko lodged a complaint with the Public Protector on 30 September 2012. She lodged a further complaint with the Public Protector in terms of the Executive Members' Ethics Act, 82 of 1998 ("*the Ethics Act*") on 12 December 2012, requesting that the Public Protector investigate allegations that members of the President's family improperly benefited from the upgrades and that this constituted a violation of the Executive Ethics Code.

20. Other members of the public also laid complaints regarding the unlawful and excessive spending of public money at the President's Nkandla residence with the Public Protector.[5]

21. The Public Protector informed the President of these complaints as long ago as January 2012.[6]

22. In response to these complaints, the Public Protector conducted an investigation in terms of ss6 and 7 of the Public Protector Act 23 of 1994 ("*the Public Protector Act*"), as well as ss3 and 4 of the Ethics Act.[7]

23. During the course of her investigation, the Public Protector encountered considerable resistance from other organs of state, including and particularly from the President. For instance:

    23.1 The President attempted to quash the investigation under the Ethics Act by contending that it "*lapsed*" because the Public Protector did not submit a report to him within 30 days after

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[4] Nkandla report at p. 81, para 2.4
[5] See, in this regard, the Nkandla report at p. 82, para 2.6: three complaints in October 2012 – November 2012; complaint by Professor Pierre de Vos of the University of Cape Town on 21 November 2012 (Nkandla report at p. 84, para 2.10).
[6] Nkandla report at p. 81, para 2.2
[7] Nkandla report at p. 88, para 3.2.1

receiving a complaint regarding the breach, as required by s3(2) of the Ethics Act. As the Public Protector records in the Nkandla report,[8] it is sad that the President attempted to avoid being held accountable on such a technical basis.[9]

23.2 Organs of state initially refused requests for documents by the Public Protector, on account of claims that their release would endanger the security arrangements at Nkandla. Court action was even taken against the Public Protector regarding this aspect.[10] The resistance was only overcome because the Mail & Guardian newspaper obtained most of the information in a court application brought in terms of the Promotion of Access to Information Act 3 of 2000 ("*PAIA*").[11]

23.3 Important for present purposes is that, after it became apparent that the Public Protector was pursuing an investigation regarding the upgrades at Nkandla, the Minister of Public Works launched a "*parallel investigation*" in an effort to sideline the Public Protector. There was even an attempt to persuade the Public Protector to drop her investigation as it was "*constitutionally impermissible*" for her to investigate while the parallel investigation was pending.[12] In that investigation an independent body was not trusted with the responsibility of determining whether the President and his family unduly benefitted from the security upgrades. This aspect was channelled to the Minister of Police, who directly reports to the President and can be dismissed by him at his pleasure.

23.4 The Public Protector's draft provisional report, which was presented to government officials, was leaked. Thereafter, in a clear attempt to intimidate and victimise the Public Protector, the

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[8] Nkandla report p. 90, para 3.2.10
[9] The facts regarding this aspect are described in the Nkandla report at pp. 88 – 92, paras 3.2.2 – 3.2.17.
[10] Nkandla report at p. 93, para 3.3.2
[11] Nkandla report at p. 93, para 3.3.2
[12] Nkandla report at pp. 96 – 103, para 3.4

National Commissioner of the South African Police Service ("*SAPS*") informed her that there was a criminal investigation in terms of s7(2) of the Public Protector Act regarding the leakage of the provisional report. The leakage of the provisional report was singled out for investigation, despite the fact that three of the Public Protector's other provisional reports were also leaked during the very same week (in November 2013).[13]

(i) The Task Team report

24. In October 2012, and approximately nine months after the Public Protector informed the President of the first complaint; and some three years after President must have been aware of allegations of overspending and maladministration at Nkandla; the Minister of Public Works ordered an investigation into the conduct and management of the security upgrades at Nkandla.

25. The Minister of Public Works has never explained why it was considered necessary to launch this "*parallel*" investigation at that time. By then, it must have been known that the Public Protector was already investigating the matter.

26. With the benefit of hindsight, it is now clear that the aim of the parallel investigation, from the outset, was to protect and exonerate the President and to shift the full blame for the Nkandla catastrophe on others.

27. The so-called "*Task Team*" convened by the Minister of Public Works finalised a report on the Nkandla upgrades in January 2013, but it was not released to the public at that time. It appears that this report was first considered and reported on by the Joint Standing Committee on Intelligence ("*JSCI*") and thereafter the Joint Cabinet Committee.

[13] See, in this regard, the Nkandla report at pp. 103 – 106, para 3.5. SAPS indicated that it will only investigate the leakage of the draft provisional Nkandla report.

28. The report of the Task Team (bar some allegedly sensitive information) was ultimately released to the public in December 2013 under cover of a foreword from the Minister of Public Works. Copies of the introduction and the Task Team report are annexed hereto, marked **"JS4"**. It will be noted that:

28.1 The findings, in essence, were that there was nothing untoward or excessive about the security upgrades themselves but a number of supply chain irregularities and a possibility of overpricing and collusion, were identified.

28.2 In response to those findings, the President and the Minister of Public Works respectively engaged the Special Investigating Unit ("*SIU*") and the Auditor-General ("*AG*") for further forensic and criminal investigation.

29. Several government ministers, with the assistance of the State Attorney and Chief State Law Advisor, attempted to convince the Public Protector to drop her investigation because of the parallel process commenced by the Minister of Public Works.[14]

30. She refused to terminate her investigation. The SIU eventually produced a report, dated 20 August 2014 (some months after the report of the Public Protector) but the AG declined to investigate the matter.[15]

(ii) <u>The Public Protector's Report</u>

31. The issues investigated by the Public Protector were categorised under twelve headings. These included, *inter alia*, whether there was:

31.1 proper legal authorisation for the security upgrades;

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[14] Nkandla report at p. 102, para 3.4.13
[15] See, on the latter aspect, the Nkandla report at p. 100, para 3.4.6

31.2 compliance with applicable supply chain management legal regime;

31.3 maladministration;

31.4 political interference; and

31.5 systemic deficiencies regarding the administration of security benefits.[16]

32. The present court application is not directly concerned with the Public Protector's findings and remedial action regarding the above aspects. The present application concerns the findings against and remedial action taken in respect of the President, which are dealt with under the following headings in the Nkandla report (my underlining):

32.1 Whether the measures taken and the buildings and items that were constructed and installed by the DPW at the President's private residence go beyond what was required for his security?

32.2 Whether the expenditure incurred by the State in this regard was excessive or amount to opulence at a grand scale, as alleged?

32.3 Whether the President's family and/or relatives improperly benefited from the measures taken and buildings and other items constructed and installed at the President's private residence?

32.4 Whether the President is liable for some of the costs incurred?

32.5 Whether there were ethical violations on the part of the President in respect of the project?[17]

[16] Nkandla report at pp. 106 – 107, para 4; Executive summary at pp. 8 – 9, para(v).
[17] These issues are identified in the Nkandla report at p. 107, paras 4.3, 4.4, 4.5, 4.9 and 4.10.

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33. In respect of the first of these issues, i.e. whether all the measures taken at state expense were acquired for his security, the Public Protector found that:

33.1 On 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 regional homestead, were not required for the President's security.[18]

33.2 On the state-leased land outside the private residence, 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.[19]

34. In respect of the second issue, i.e. the question of whether the expenditure was excessive, the Public Protector found that:

34.1 There was massive "*scope creep*". The total expenditure increased from an initially estimated R27 million to R215 million. This was despite the fact that the project remains incomplete even today. The current conservative estimation of the final costs stands at R246 million, excluding lifetime maintenance costs.[20]

34.2 These amounts far exceeded similar expenditure in respect of all the President's recent predecessors. The difference was acute, even if allowance was made for the rural nature of the Nkandla area and the size of President Zuma's household. For instance, in today's money, the security upgrades in respect of former

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[18] Nkandla report at p. 42, Executive summary at para (1); Nkandla report at p. 55, Executive summary at para (c)
[19] Nkandla report at p. 43, Executive summary at para (3)
[20] Nkandla report at p. 46, Executive summary at paras (7) – (8)

President Mbeki's private residence amounted to a mere R12 483 938.00.[21]

34.3 The complaint that the expenditure constitutes "*opulence at a grand scale*" was accordingly substantiated.[22]

35. In respect of the third question, i.e. whether the President's family and/or relatives improperly benefited from the upgrades, the Public Protector found that:

35.1 The allegation that the President's brothers improperly benefited from the upgrades, was not substantiated.

35.2 However, the excessive and improper manner in which the Nkandla project was implemented resulted in substantial value being unduly added to the President's private property and that he and his immediate family improperly benefited from those measures.[23]

36. In respect of the fourth question, i.e. whether the President is liable for some of the costs incurred, the Public Protector found that:

36.1 On a strict legal approach, the President had to secure the Nkandla property at his own costs as it was declared a national key point.[24]

36.2 However, the strict legal approach would not be fair as the President is entitled under the Cabinet Policy of 2003 to reasonable security upgrades at state expense, at his request or at the request of his office.

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[21] Nkandla report at p. 50, Executive summary at paras (17) and (18)
[22] Nkandla report at p. 57, para 2
[23] Nkandla report at p. 57, Executive summary at para (e)
[24] Nkandla report at p. 62, Executive summary at para (i)(1)

36.3 The President tacitly accepted the implementation of all measures at his residence and unduly benefited from the enormous capital investment from the non-security installations.

36.4 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. These included the visitors' centre, cattle kraal and culvert, chicken run, swimming pool and amphitheatre.[25]

37. In respect of the fifth question, i.e. whether there were ethical violations on the part of the President, the Public Protector found that:

37.1 The President, 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.

37.2 The President should have asked questions regarding the scale, cost and affordability of the Nkandla project, at an early stage.

37.3 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 s96 of the Constitution.[26]

38. The Public Protector then took remedial action to remedy these issues of malfeasance. She ruled that the following remedial actions were to be taken by the President:

38.1 He should take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures

[25] Nkandla report at pp. 62 – 63, Executive summary at para (i)
[26] Nkandla report at pp. 64 – 65, Executive summary at para (j)

implemented by the Department of Public Works ("*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.

38.2 He should pay a reasonable percentage of the costs of the measures as determined with the assistance of National Treasury, also considering the DPW apportionment document.

38.3 He should reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused.

38.4 He should report to the NA on his comments and actions on the Nkandla report within 14 day.[27]

39. The Public Protector released the Nkandla report on 19 March 2014.

40. This meant that the 14-day deadline for the President to report to the NA expired on 2 April 2014.

(iii) <u>The President's initial response to the Public Protector's report</u>

41. The President failed to report to the NA by the deadline. Instead, he wrote a letter, dated 2 April 2014 (copy annexed hereto, marked **"JS5"**) to the Speaker in which he:

41.1 Recorded that the Task Team conducted an investigation into the security upgrades at Nkandla and that this report had been finalised and presented to him and Parliament.

[27] Nkandla report at p. 68, Executive summary at para (a)

41.2 Contended that there were stark differences between the findings as well as the remedial action proposed in the two reports, i.e. the Task Team's report and the Public Protector's report.

41.3 Recorded that, during the course of December 2013, he caused a proclamation to be gazetted which empowered the SIU to enquire into and investigate the security upgrades at Nkandla.

41.4 Stated 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.

42. The DPW–initiated parallel investigation ("*the Task Team investigation*") was launched in an attempt to sidestep the investigation by the Public Protector.

43. The attempt to use it to convince the Public Protector to terminate her investigation failed.

44. It was then used, unlawfully, by the President as an excuse to avoid reporting to the NA, as required by the remedial action taken by the Public Protector.

45. The NA constituted an *ad hoc* committee to consider the letter of the President. This Committee commenced with its work but resolved that it could not complete it due to the 2014 national and provincial elections.

(iv) <u>The SIU report</u>

46. The SIU investigation was initiated by the President in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act 74 of 1996 on 20 December 2013 (R59, 2013 published in GG 37192, copy annexed marked **"JS6"**).

47. The SIU completed its final report to the President on 20 August 2014. The report is a bulky document comprising some 245 pages. A copy is annexed hereto, marked **"JS7"**. It will be noted from the SIU report that:

47.1 The SIU's investigation focussed on the validity of the processes used to engage the consultants and contractors who effected the security upgrades and the payments made to them.[28]

47.2 The SIU found that the official scope of the work at Nkandla changed and that the costs eventually escalated to R216 010 478.24, which was the amount that the DPW has to date paid for the upgrades.[29]

47.3 The manner and basis on which the private professional team was appointed and the almost unchecked powers given to them in regard to the spending of public funds, was a matter of grave concern.[30] The DPW had simply ceded their powers and handed over their responsibilities to outside parties and in effect abdicated their responsibilities and accountability.[31]

47.4 The changes which the President's architect, Mr Minenhle Makhanya ("*Makhanya*") introduced to the Nkandla project, which changes were not lawfully authorised, led to an increased expenditure of R155 324 516.49.[32]

47.5 The SIU found that a number of employees of the DPW were guilty of various acts of misconduct and that the DPW had suffered damages amounting to R155 324 516.49 as a result of unlawful,

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[28] SIU report at p. 2, para 5
[29] SIU report at p. 7, para 15
[30] SIU report at pp. 7 – 8, para 17
[31] SIU report at p. 9, para 19
[32] SIU report at p. 7, para 16

wrongful and/or negligent conduct of Makhanya, which the SIU was entitled to recover from him.[33]

48. It is apparent that the SIU investigation did not focus on the matters dealt with in this court application, i.e. whether the President and his family unduly benefited and whether he is liable to pay back some of the costs of the security measures. Certainly, the SIU did not investigate, nor could it be lawfully mandated to investigate, whether there were breaches of the Executive Ethics Code by the President. That a matter which falls within the exclusive jurisdiction of the Public Protector.

49. In the main, the SIU investigated the conduct of officials and, in particular, whether the procurement laws were properly applied. This aspect was also considered by the Public Protector but is not the subject of this application. The entire SIU report and court action instituted by the SIU against Makhanya and DPW are not directly relevant for purposes of the present application.[34] It is however instructive that the SIU and the Public Protector came to substantially the same conclusion regarding the fact that items were constructed that were not necessary for the President's security and/or were extravagant in nature.[35]

(v) The President's document

50. Before the SIU released its final report, the President was provided a progress report by the SIU. On 14 August 2014, the President submitted a "*report*" to the Speaker (copy annexed, marked **"JS8"**). I shall refer to this document as "*the President's August 2014 document*" or "*the President's document*" because it does not legally constitute a report as required by the Public Protector's remedial action.

51. In the President's August 2014 document he:

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[33] SIU report at p. 10, para 22
[34] The SIU instituted an action in the KZN Division of the High Court, Pietermaritzburg under case number 11107/14.
[35] SIU Report at p.129, para 6

51.1 States that he had considered the progress report of the SIU, as well as the Public Protector's Nkandla report and the report of the Task Team.[36]

51.2 Made it clear that his document was not meant to be a critique of the reports by the Task Team, the SIU or the Public Protector.

51.3 Stated that he, in fact, offered no comment on the methodology, interpretation of the law or regulatory framework, evaluation of evidence, analysis, findings and conclusions and recommendations and remedial action proposed in any of the three reports.[37]

51.4 Merely attempted to summarise the reports of the Task Team, the Public Protector and the SIU but did not offer comment on those reports.

51.5 Merely recorded that he was "*greatly assisted by the reports referred to above and have had an opportunity to reflect thereon*".[38]

51.6 Recorded that "*whilst a legislative framework exists [in respect of security upgrades] it was either deficient in certain respects, wholly ignored or misapplied*".[39]

51.7 *Inter alia*, 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 to whether the President is liable for any contribution in respect of the*

[36] President's August 2014 document at p. 2, para 4
[37] President's August 2014 document at pp. 3 – 4, para 7
[38] President's August 2014 document at p. 18, para 58
[39] President's August 2014 document at p. 19, para 63

security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports".[40]

52. The President's August 2014 document is the only response he has ever submitted to the NA regarding the Public Protector's Nkandla report.

(vi) Correspondence between the President, the Speaker and the Public Protector following his report

53. The Public Protector reacted to the President's August 2014 document in a letter to him dated 21 August 2014 (copy annexed, marked **"JS9"**). In her letter, the Public Protector (my underlining):

53.1 Pointed out that in the President's August 2014 document was not a response to the Public Protector's Nkandla report.[41]

53.2 Pointed out that in the President's August 2014 document, no reference was made to the findings of and the remedial action taken by the Public Protector.[42]

53.3 Recorded that it was her understanding that the President had not reported to the National Assembly with his comments on her report and the actions that he had taken or would be taking to implement the remedial action.[43]

53.4 Stated that it was difficult to understand why the Minister of Police should make a determination on whether the President was liable for any contribution in respect of the security upgrades, as there was nothing in the President's August 2014 document indicating that he disagreed with the Public Protector's findings.

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[40] President's August 2014 document at p. 19, para 63.2. Note that the President did not require the Minister of Police to report to Parliament or the NA.
[41] Public Protector's letter at p. 4, para 10
[42] Public Protector's letter at p. 4, para 11
[43] Public Protector's letter at p. 5, para 13

53.5 Contended that the Minister of Police had been given a power to "*review*" the decision of the Public Protector, which the President could not do as that power was reserved for a court of law.[44]

53.6 Reiterated that she would appreciate the President's comments to the NA on her findings and an indication on the actions taken or to be taken to implement the remedial action determined by her.[45]

53.7 Regretted having to approach the President and recorded that the alternative was that she had to advise the complainants and the NA that there had been no engagement on her report or the implementation of remedial action.[46]

54. The President responded to the Public Protector in a letter dated 11 September 2014 (copy annexed, marked **"JS10"**). In his response, the President:

54.1 Disagreed that reports of the Public Protector cannot be "*reviewed*" or second-guessed by a Minister and/or the Cabinet and disagreed that the reports can only be reviewed by a Court of law.[47]

54.2 Contended that the Public Protector's Nkandla report was not a judgment to be followed under pain of a contempt order but rather a useful tool in assisting democracy in a cooperative manner.[48]

54.3 Contended that if he were to elect either to review a decision of the Public Protector or to rubberstamp it, it would be "*failing in the discharge of [his] constitutional responsibilities, acting in an irrational manner and flout the principle of legality*".[49]

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[44] Public Protector's letter at pp. 5 – 6, paras 14 – 14.6
[45] Public Protector's letter at p. 7, para 17
[46] Public Protector's letter at p. 7, para 19
[47] President's letter at p. 1, para 3
[48] President's letter at p. 1 para 4
[49] President's letter at p. 2, para 7

54.4 Argued that he (the President) should not be a judge in his own cause as to whether he was liable for any repayments, and that he considered the Minister of Police to be the appropriate functionary to determine whether he was so liable.[50]

54.5 Stated that he was awaiting the outcome of the Parliamentary process and suggested to the Public Protector that she should do the same.[51]

55. The Public Protector responded to **"JS10"** in a letter dated 15 September 2014 (copy annexed marked **"JS11"**). In her response, the Public Protector:

55.1 Contended that a Minister was no more capable of reviewing the findings and remedial action determined by the Public Protector than reviewing a decision of another Chapter 9 institution, such as the Independent Electoral Commission or the Auditor-General.[52]

55.2 Stated that she did not believe that her powers were limited to the making of recommendations.[53]

55.3 Reiterated that all that she had asked of the President was to comment on her findings and to indicate what he (the President) had done or intended to do in pursuit thereof.[54]

55.4 Clarified that it was implied in her remedial action, that the President could question the rationality of her reasoning on any aspect or express any concerns on the process, but recorded that the President's letters expressed no such views or reservations.[55]

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[50] President's letter at p. 2, para 8
[51] President's letter at p. 2, para 9
[52] Public Protector's letter at p. 2, para 4.2.1.1
[53] Public Protector's letter at pp. 3 – 4, para 4.2.2
[54] Public Protector's letter at p. 6, para 4.2.3.3
[55] Public Protector's letter at p. 9, para 4.3.6.1

55.5 Added that some of the steps proposed by the President went against the remedial action in her report without indicating why her findings and remedial action were incorrect.[56]

55.6 Pointed out that she did not require the President to be a judge in his own cause as the Nkandla report required him to be assisted by the National Treasury and the SAPS to determine the reasonable costs of the measures implemented by DPW at his private residence that did not relate to security.[57]

55.7 Pointed out that, at the very least, the President had to engage with the Public Protector's findings and indicate where he disagreed and what the reasons for the rejection were.[58]

55.8 Stated that, if the President's response was final, she had no option but to advise the complainants and the NA that she was unable to obtain comments from the President on her report and indications of the action to be taken by him in pursuit thereof.[59]

55.9 Recorded that she would appreciate an opportunity to engage with the President in person in order to find common ground.[60]

56. The President did not take up the invitation from the Public Protector to meet with her in person.

57. In fact, the President did not substantively or constructively engage with the Public Protector.

58. The Public Protector then wrote to the Speaker. A copy of her letter to the Speaker, dated 2 October 2014, is annexed, marked **"JS12"**. In her letter,

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[56] Public Protector's letter at p. 12, para 9
[57] Public Protector's letter at p. 9, para 4.3.7.1
[58] This comment was made with reference to the practice in countries where an ombudsman can only make recommendations. See the Public Protector's letter at p. 12, para 7.
[59] Public Protector's letter at p. 12, para 8
[60] Public Protector's letter at p. 13, para 10

the Public Protector recorded her interactions with the President and indicated that it would be her pleasure to present a briefing to the NA on the contents of her report as she has historically done in respect of other reports.[61]

59. The Speaker for no discernible reason at all never gave the Public Protector an opportunity to brief the NA.

(vii) The NA's first resolution

60. On 19 August 2014, the NA resolved to establish an *ad hoc* Committee to consider the President's August 2014 document.

61. This first *ad hoc* Committee was to make recommendations and exercise the powers contained in Rule 138 of the Rules of the National Assembly and to report to the House by no later than 24 October 2014.

62. I served on this *ad hoc* Committee until the opposition parties withdrew from it.

63. A report from the *ad hoc* Committee was tabled in the NA on 11 November 2014 (copy annexed, marked **"JS13"**). It is apparent from the report that:

63.1 The opposition members differed from the majority party members regarding the methodology to be followed by the *ad hoc* Committee.

63.2 The opposition members were outvoted and the majority party members adopted a methodology in terms of which all the reports, i.e. the Task Team report; the JSCI's consideration thereof; the Public Protector's report; and the SIU report were "*treated in an equal manner*". This was apparently done "*to avoid*

[61] Public Protector's letter at p. 2, para 5

casting aspersions on any of the government agencies or structures that dealt with the matter".[62]

63.3 Because of the difference regarding the methodology to be followed, the opposition members withdrew from the *ad hoc* Committee. The opposition members regarded the majority's methodology as unlawful.

63.4 In the absence of the opposition, the *ad hoc* Committee found that the President did not fail to act to protect state resources and did not violate paragraph 2 of the Executive Ethics Code.

63.5 The finding appears to be based on (1) the inference drawn that the President was aware of the investigation launched by the Minister of Public Works; (2) that the President initiated the SIU investigation and that (3) he "*reported*" to the National Assembly on 14 August 2014 on his efforts.[63] It appears to be suggested that these efforts were sufficient to protect state resources. The majority party members found that only the Constitutional Court could decide that Parliament or the President has failed to fulfil a constitutional obligation.[64]

63.6 In the absence of the opposition members, the *ad hoc* Committee obtained a legal opinion on "*undue enrichment*" and then "*concurred*" that it would be premature to make a finding prior to the matter having been attended by the relevant security experts consistent with the Cabinet memorandum of 2003.[65] 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

[62] *Ad hoc* Committee report at pp. 2 954 – 5
[63] *Ad hoc* Committee report at pp. 2 976 – 7
[64] *Ad hoc* Committee report at p. 2 980, para 4.30
[65] *Ad hoc* Committee report at pp. 2 977 – 8, paras 4.22 – 4.25

2003. Cabinet was required to report back to Parliament on the steps taken to give effect to this recommendation within three months.[66]

64. The report of the *ad hoc* Committee, comprising only of majority party members, was adopted by the NA on 13 November 2014. A copy of the relevant part of the minutes is annexed, marked **"JS14"**. This is the first resolution of the NA which is challenged as being unlawful in the present proceedings.

65. The first NA resolution is challenged on the following grounds:

65.1 The jurisdiction of the NA to consider the Public Protector's Nkandla report was triggered by the remedial action taken by the Public Protector in her report, which was that the President must report to the NA with his comments and actions regarding the remedial action taken by her. Given that she found a violation of the Ethics Code, the Public Protector demanded that the President report in this manner to the NA;

65.2 There was no report from the President before the NA regarding the matters raised by the Public Protector. As stated above, the responses of the President dated 2 April 2014 and 14 August 2014, do not purport to be, nor can they be described, as a "*report*" on the Public Protector's findings and remedial action;

65.3 The NA was not at liberty to consider other documents, such as the Task Team Report and the SIU report, as *ersatz* reports from the President and to adopt a resolution based on such other documents; and

[66] *Ad hoc* Committee report at p. 2 982, para 5.9

65.4 To the extent that the Task Team and SIU reports were regarded by the NA as sufficient to satisfy the remedial action taken by the Public Protector, the NA acted unconstitutionally and unlawfully. In all three respects, the NA's resolution dated 13 November 2014 is invalid and falls to be declared as such.

(viii) The Police's Minister's report

66. The NA's resolution of 13 November 2014 left the issue whether the President unduly benefitted from non-security upgrades unresolved. This issue was referred back to the Cabinet which had to report within three months with reference to the advice of security experts in line with the Cabinet Memorandum of 2003.

67. This did not happen.

68. On 29 December 2014, the Speaker wrote to the Minister of Police, unlawfully requesting him to report on the issue of whether the President benefitted from non-security updates. Several attempts by the DA to obtain a copy of this letter from the Speaker's office has been unsuccessful.

69. It is not clear why the Speaker approached the Minister of Police. In terms of the NA's (unlawful) first resolution, Cabinet was required to deal with the issue of whether the upgrades were required for the President's security. It appears that the Speaker wanted to bring the NA's resolution "*in line*" with the President's August 2014 document, in which he appointed his inferior, the Minister of Police, to determine whether he unduly benefitted and whether he was liable to pay back any monies.

70. But even this was wrong because, as pointed out above, the President in his August 2014 document required the Minister of Police to report to Cabinet (and not to Parliament or the NA) on whether he is liable for any contribution in respect of the security upgrades.

71. Be that as it may, the failure of the Speaker, properly and lawfully, to implement the NA's first resolution, renders the entire process that followed invalid. This includes the next report to be considered, which is one compiled by the Minister of Police to the NA, dated 25 March 2015 (copy annexed, marked **"JS15"**).

72. The Police Minister's report is purportedly compiled in terms of a mandate given to him by "*Parliament*" through the *ad hoc* Committee. Reference is made in the Police Minister's report to paragraph 5.9 of the Ad Hoc Committee's report, dated 11 November 2014.[67] However, in that paragraph of the *ad hoc* Committee report, Cabinet was tasked to make recommendations on what constitute security and non-security upgrades with reference to the determination by relevant security experts in line with the Cabinet Memorandum of 2003.[68] The Minister of Police was not mentioned at all by the *ad hoc* Committee.

73. The DA comments as follows on the Police Minister's report:

73.1 The purpose of the report was to inform "*Parliament*" on the outcomes of the assessment of the security features in Nkandla with specific reference to features described in the Public Protector's report as non-security.[69]

73.2 The report further "*determines whether the President is liable for any contribution in respect of security upgrades*".[70]

73.3 It bizarrely found 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

[67] Minister of Police's report at p. 5, para 1.2
[68] See **"JS10"**, *Ad hoc* Committee report at p. 2 982, para 5.9
[69] Minister of Police's report at p. 7, para 2.1
[70] Minister of Police's report at p. 7, para 2.2

"*security features*" which are in accordance with the physical security requirements and/or interest.[71]

73.4 The report concludes that "*the State (sic) President is therefore not liable to pay for any of these security features*".[72]

(ix) The NA's second resolution

74. The NA established another (second) *ad hoc* Committee to consider the Police's Minister's report.

75. The second *ad hoc* Committee was established through a resolution of the NA dated 2 June 2015. The DA maintained from the outset that the second *ad hoc* Committee was not lawfully constituted, *inter alia* on the basis that the Minister of Police could not report to the NA on behalf of the President. These objections were overruled.

76. On 22 July 2015 members of the second *ad hoc* Committee visited the Nkandla private residence for an inspection *in loco*. The observations made during that inspection were widely reported in the media.

77. The second *ad hoc* Committee also received two briefings from the Minister of Police as well as a briefing by the Minister of Public Works.

78. The briefing of the Minister of Police was based on his report.

79. The Minister of Public Works also submitted a document/letter to the Speaker, which is dated 22 June 2015. A copy of this letter is annexed, marked **"JS16"**. It is not clear why the Minister of Public Works reported to the NA. Neither the Public Protector, nor the President, nor the NA required the Minister of Public Works to do so.

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[71] Minister of Police's report at p. 46, para 9.1
[72] Minister of Police's report at p. 47, para 9.2

80. The second *ad hoc* Committee could not reach consensus on the calling of further persons to give evidence, including the Public Protector. The majority of the members voted against the proposal to call further witnesses.

81. Despite the DA's objections, the second *ad hoc* Committee proceeded to consider the Police Minister's report and brought out its findings in a report dated 7 August 2015 (copy annexed marked **"JS17"**). For present purposes, the following findings of the second *ad hoc* Committee are relevant:

81.1 The finding that the report of the Minister of Police responds to the House resolution as contained in the report of the *ad hoc* Committee adopted by the NA on 13 November 2014.

81.2 That the report of the Minister of Police be adopted.[73]

82. The second *ad hoc* Committee's report was adopted by the NA in a resolution dated 18 August 2015. I have been unable to obtain a written copy of the NA's minutes but was present and can confirm that the *ad hoc* Committee's report was adopted as submitted.

83. What happened was that some of the opposition parties, including the DA, moved an amendment to the motion to adopt the report and placed an amended report before the NA for its consideration. I annex a copy of this amended report hereto, marked **"JS18"**. The amended report was rejected by the NA.

84. The NA's second resolution suffers from the same shortcomings as the first and it is accordingly unconstitutional, unlawful and invalid. In addition, it is unlawful and invalid because it fails to implement the NA's first resolution, which required Cabinet (and not the Minister of Police) to report

[73] *Ad hoc* Committee report at p. 3 045, paras 10 and 4.

to the NA on whether the upgrades were necessary for the President's security.

85. Apart from not being legally authorised, the Police Minister's report is also factually flawed and indeed irrational. The flaws in the report were exposed by the Public Protector in correspondence with the Office of the President, dated 15 June 2015. I annex a copy of the Public Protector's letter hereto, marked **"JS19"**. The DA comments as follows on the letter:

85.1 The Public Protector reiterated the view earlier conveyed to the President, which is that it is unconstitutional to assign a Cabinet member the task of reviewing the findings of the Public Protector.[74]

85.2 The Public Protector claimed, quite correctly, that she is the only oversight authority that is legally competent to advise the President on matters of executive ethics.[75]

85.3 The Public Protector pointed out that her findings about impermissible expenditure was not limited to the swimming pool, kraal, visitors' centre and the amphitheatre, but extended to the private medical clinic which was erected at the Nkandla doorstep and the extensive paving and relocation of neighbours.[76]

85.4 The Public Protector correctly pointed out that the conversion of the fire-pool into a swimming pool, together with landscaping and the visitors' centre close to the President's dwellings, were clearly aimed at creating a recreational area there. If it was merely to create fire-fighting capability, then cheaper alternatives such as the installation of a water reservoir similar to the one that was installed for household purposes should have been considered. Such cheaper alternatives were not seriously considered,

[74] Public Protector's letter at p. 1, para 3
[75] Public Protector's letter at p. 2, para 8
[76] Public Protector's letter at pp. 3 – 5, paras 10.3 – 11.1

because the intention was to create a recreational area for the President.[77] In any event, the two security evaluation reports did not recommend the installation of a fire-pool / swimming pool.[78]

85.5 The Public Protector pointed out that the Police Minister's report does not deal with the finding that the elaborate design of the kraal and culvert resulted in considerable extra costs (some R1.2 million of public money) which could not be justified as a security measure.[79] The President himself demanded a bigger kraal than the one he had.[80]

85.6 As for the visitors' centre, the Public Protector pointed out that it is not clear why, as a security measure, a visitors' centre needed to be installed at a private home. The Police Minister did not explain why official engagements could not be restricted to official residences if they posed a security risk. Neither of the two SAPS security evaluation reports referred to the visitors' centre as a security requirement.[81] The Public Protector noted that the visitors' centre has been used for a private function which confirmed her impression that it had little, if anything, to do with the security of the President.[82]

85.7 As far as the amphitheatre is concerned, the Public Protector pointed out that this serves a dual purpose, which considerably increased the expense as paving had to be installed. Again, the cheaper alternative of using, for example, the paved area at the main entrance gate as an emergency assembly area, was not considered.

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[77] Public Protector's letter at p. 6, para 14.2
[78] Public Protector's letter at p. 8, para 16.3
[79] Public Protector's letter at p. 9, para 17.3
[80] Public Protector's letter at p. 10, para 17.4
[81] Public Protector's letter at p. 10, para 18
[82] Public Protector's letter at p. 10, para 18.3

86. In his response, dated 23 July 2015 (copy annexed marked **"JS20"**) the President claims that the involvement of the Minister of Police was foreshadowed by the recommendation from the Public Protector that he was 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 this report as not listed in the security assessments and not reasonably linked to security.

87. The President was wrong. There is no such recommendation in the Public Protector's report. This can accordingly not serve as justification for the Police Ministers' report.

88. In a public address by the Public Protector on 3 August 2015 (a copy of the written version of that address is annexed hereto, marked **"JS21"**), the Public Protector expanded on the fatal flaws in the Police Minister's report. It is apparent from the address itself that the Public Protector was driven to use the media as a platform to address the NA as the *ad hoc* Committees did not provide her with an opportunity to brief them. In her address, the Public Protector makes the following points, with which the DA agrees and which are adopted for purposes of the present application:

88.1 In terms of the Ethics Act, the President had to report to the NA within 14 days after receiving the report from the Public Protector. The President was required to submit his comments on the Public Protector's report, together with any action taken or to be taken in regard thereto to the NA.[83]

88.2 The Public Protector's key finding was that the President should have acted after the first reports emerged in November 2009 about irregularities and excessive expenditure relating to the upgrades to his private home at Nkandla. At that stage the cost estimate was at R65 million.[84] [It is accordingly irrelevant that the

[83] See the Public Protector's address at p. 12 and s3(5)(a) of the Ethics Act.
[84] Public Protector's address at p. 15

Minister of Public Works later (October 2012) initiated an investigation when the estimated cost had already ballooned to R246 million. The question that has not been addressed is what the President did after the first reports of irregularities and excessive expenditure emerged.]

88.3 Regarding the swimming pool, the Public Protector points out that the President himself requested the conversion of the fire pool into a swimming pool and the Committee flagged the item pending instructions from Makhanya on the President's willingness to pay for the conversion. While his consent does not appear to have been obtained, the apportionment document indicates an amount to be paid by the owner for the conversion. Quite obviously the President must pay for the conversion as that was not required for his security.[85]

88.4 Regarding the amphitheatre, the Public Protector points out that the amphitheatre has a dual purpose in that it provides sitting space and it serves as soil retention due to the extensive disturbance occasioned by other installations. As with the swimming pool, the President is to pay for the additional costs of the amphitheatre also providing for sitting space.[86]

88.5 In respect of the kraal and chicken run, the Public Protector points out that the President himself requested a larger kraal than the one which existed and which was "*moved*". He must accordingly pay for, at least, the increased size of the kraal. Furthermore, the kraal was not a security feature because it was not on the list of 16 minimum physical security standard items.[87]

88.6 Finally, as far as the visitors' centre is concerned, it was not listed by the authorised security experts at the time that prepared the

[85] Public Protector's address at pp. 18 – 19
[86] Public Protector's address at p. 19
[87] Public Protector's address at pp. 19 – 20

list of installations that were meant to address the security threat assessment. There was in any event an unused building that could have done the same job. The key issue was that it was not authorised by the security experts.[88]

LEGAL FRAMEWORK

(i) Public Protector's powers

89. Section 182 of the Constitution confers the following powers on the Public Protector (my underlining):

> "(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)

90. The Public Protector has the power to make remedial orders binding on organs of state whenever it is appropriate to do so. This power may be used to remedy state, and only state misconduct, and only when appropriate to do so.

91. The Constitution itself confers powers on the Public Protector in s182(1). It provides that the Public Protector's constitutional powers may be "*regulated by national legislation*". In s182(2) it is provided that the Public Protector "*has the additional powers and functions prescribed by national legislation*". Parliament may thus regulate the exercise of the Public

[88] Public Protector's address at pp. 20 – 21

Protector's constitutional powers and supplement them by national legislation.

92. Section 182(1) confers three powers on the Public Protector: (a) to investigate; (b) to report; and (c) to remedy.

93. The mischief at which all three powers are directed is state misconduct. Such conduct is, "*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*".

94. Section 182(1)(c) provides the Public Protector herself the power "*to take appropriate remedial action*". She may provide the remedy. The Public Protector determines the appropriate remedy and orders its implementation.

95. An "*appropriate*" remedy is one that is just and equitable and suitable.

96. A remedy for state misconduct must be effective to be appropriate. Without effective remedies for breaches, the values underlying and the rights entrenched in the Constitution cannot be upheld, properly or at all.

97. If the Public Protector finds the existence of state misconduct, she has the constitutional power to take appropriate remedial action. Without the power to make binding orders on the state institutions involved, she cannot do so. She can investigate and report, but she cannot remedy or combat the wrongdoing. Mere recommendation is accordingly not appropriate. On the contrary, it renders the Public Protector ineffective to fight "*against bureaucratic oppression, and against corruption and malfeasance in public office*", as the Supreme Court of Appeal has determined its function to be.[89]

[89] **Public Protector v Mail & Guardian** 2011 (4) SA 420 (SCA) para 6

98. The Public Protector is given the power to take remedial action, backed-up by the duty imposed on all other organs of state by s181(3) of the Constitution to "*assist and protect*" the Public Protector to ensure her "*independence, impartiality, dignity and effectiveness*". This duty reinforces the understanding of the Public Protector's remedial power to allow her to make orders effectively binding on all organs of state.

99. This interpretation does not suggest the conferral of judicial powers to the Public Protector. She effectively operates as the "*complaints office*" of the State. Individuals and institutions may complain to her of state misconduct. She investigates the complaint and reports on it. If she finds improper conduct, she has the power to take appropriate remedial action, that is, to remedy the wrong done by the State. She determines the remedy and orders its implementation. She does so as the state institution mandated by the Constitution to investigate, report on improper conduct and remedy the wrong.

100. The purpose of the Public Protector's powers is thus as the SCA put it to be "*what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office*".[90] The Public Protector is empowered to protect the public against malfeasance in public office by investigating complaints of state misconduct, reporting on it and providing remedies for it.

101. To achieve this purpose, the Public Protector must have the power to determine the remedy and order its implementation. She cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore remedial action taken by her. The Public Protector may take remedial action herself. She may determine the remedy and order its implementation. All organs of state must comply therewith.

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[90] **Public Protector v Mail & Guardian** 2011 (4) SA 420 (SCA) para 6

102. It is in this context that, *inter alia*, the Ethics Act is to be interpreted. The Ethics Act provides as follows:

102.1 When conducting an investigation in terms of the Ethics Act, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act. See s3(4) of the Ethics Act.

102.2 In terms of s3(1) of the Ethics Act, the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint.

102.3 In terms of s3(2), the Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the President, if the complaint is against a Cabinet member.

102.4 In terms of s3(5) (a) of the Ethics Act, the President must within a reasonable time, but not later than 14 days after receiving a report on a Cabinet member submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the NA.

103. What is intended is that the President should ensure that the remedial action taken by the Public Protector is implemented. He must report to the NA regarding his comments and actions.

104. The latter duty (to report to the NA) is a statutory one, which cannot be disregarded or delegated to others, even if the remedial action taken by the Public Protector is not binding.

105. Moreover, even if the Public Protector's remedial action is not binding, the President cannot simply ignore the findings and remedial action taken by the Public Protector. Even on the approach adopted by Schippers J in **Democratic Alliance v South African Broadcasting Corporation Ltd**

and Others 2015 (1) SA 551 (WCC), the President, if he disagreed with the findings, should have engaged rationally with the Public Protector and if a mutually acceptable outcome could not be achieved, he should have sought a judicial review of her findings and remedial actions as set out in the Nkandla report. I note that Schippers J's Judgment is the subject of an appeal before the Supreme Court of Appeal set down for hearing on 18 September 2015.

(ii) The duties of the President, the NA and the Minister of Police

106. The President, the NA and the Minister of Police had at a minimum to act lawfully and rationally when dealing with the Public Protector's report.

107. The duty to act rationally applies both procedurally and substantively. The following dictum of the Constitutional Court bears emphasis:

> "[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.[91]

GROUNDS FOR THE RELIEF SOUGHT

108. I deal separately with the grounds for the relief sought against the President, the NA and the Minister of Police.

(i) The President

109. The President is obliged to comply with remedial action taken by the Public Protector. He has failed to do so in an obstructive and defiant manner. He must accordingly be directed to comply with the remedial action.

[91] **DA v President of the RSA** 2013 (1) SA 248 (CC) para 36.

110. In the alternative, the DA contends that the President has failed to comply with the duty to report to the NA contained in s3(5)(a) of the Ethics Act. He has also has failed to engage rationally with the Public Protector regarding the findings and remedial action pertaining to him in the Nkandla report. In this regard, mere declaratory relief coupled with a direction to comply will not suffice because:

110.1 If left to their own devices at this stage, the President and the Public Protector are definitely bound to disagree with each other regarding what the engagement process should entail. This is entirely the fault of the President.

110.2 In the circumstances, it is just and equitable, as required by s172 of the Constitution, that the Court should assume its supervisory jurisdiction.

110.3 The order sought in the notice of motion only requires Court supervision if the President and the Public Protector disagree on the process to be followed. It is, in the first place, for the President to determine how he wishes to engage rationally with the Public Protector and the Court will only assume its supervisory role if there is a dispute between him and the Public Protector, which cannot be resolved by them.

(ii) <u>The NA</u>

111. In the 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 in terms of those resolutions, are sought to be declared unlawful and invalid.

112. The grounds for this relief are:

112.1 The President in fact never reported to the NA as required by the Public Protector at page 442, paragraph 11.1.4 of the Nkandla report and section 3(5)(a) of the Ethics Act.

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

112.3 The process adopted by the NA and its first and second *ad hoc* Committees was in any event procedurally flawed, to the extent of being irrational, and contrary to the rule of law, as no opportunity was given to the Public Protector to brief the NA, even though her Nkandla report was the subject matter under consideration.

112.4 The second NA resolution was unlawful and invalid as the first NA resolution did not authorise or require the Minister of Police to report to the NA on whether the President benefitted from non-security related upgrades to his Nkandla residence.

(iii) <u>The Minister of Police</u>

113. 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:

113.1 Neither the President, nor the Public Protector, nor the NA itself, authorised or required the Minister of Police to submit such a report to the NA.

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113.2 For the reasons set out above the Police Minister's report is factually flawed to the extent that it is irrational, and contrary to the rule of law.

113.3 The Police Minister's report is also procedurally flawed to the extent that it is irrational, and contrary to the rule of law, as no opportunity was given to the Public Protector to brief the Minister of Police even though her Nkandla report was the subject matter of his report.

CONCLUSION

114. For all the above reasons, it is submitted that a proper case has been made out for the relief sought in the notice of motion to which this affidavit is attached.

JAMES SELFE

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

DAVID BORGSTRÖM
ADVOCATE OF THE HIGH COURT
MEMBER OF THE CAPE BAR
6TH FLOOR, KEEROM STREET CHAMBERS
56 KEEROM STREET, C.T.

COMMISSIONER OF OATH