

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no.: CCT 143/15

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY, First respondent

REPUBLIC OF SOUTH AFRICA

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA Second respondent

THE PUBLIC PROTECTOR Third respondent

APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

- 1 In March 2014, the Public Protector published a report in which she made grave findings against the President. She found that the President isolated the Constitution by placing his interests in conflict with those of the state and unduly benefiting himself with public resources. She directed the President to comply with certain remedial steps. When so doing the Public Protector was exercising her powers under the Constitution and directing the President to comply with his own constitutional obligations.

- 2 The President has failed to comply with the remedial action taken by the Public Protector. The applicant seeks an order compelling the President to comply with the remedial action of the Public Protector. The EFF contends that the failure to comply – about which no material dispute emerges from the papers – infringes a series of obligations imposed specifically on the President by the Constitution. Anchoring these constitutional obligations is section 83, as read with sections 96 and 181 of the Constitution.

- 3 The Public Protector's report has not been challenged in any judicial forum. In the answering affidavit the President does not contend that the remedial action taken by the Public Protector is inappropriate. He does not dispute the obligations imposed on him by sections 83, 96 and 181 of the

Constitution. The President appears to contend that the remedial action is unclear because the cost of the non-security upgrades is not spelt out. He also appears to question the extent of the powers of the Public Protector.

4 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.

5 We must state then what the case is about: this case is not about whether the powers of the Public Protector are equivalent to a judicial determination. The primary focus is the constitutional obligations of Parliament and the President. The President is obliged to comply with the remedial action of the Public Protector for a reason independent of the status of the Public Protector's report: the special constitutional obligations of the President flowing from the provisions of section 83, buttressed also by the constitutional values of the rule of law and accountability.¹ Whilst the report exists and has not been upset, it should be complied with.

6 We emphasise that the applicant simply asks that the President should be directed to comply with the remedial action taken by the Public Protector. In order to decide this issue, it is not necessary for this Court to determine

¹ This Court has described accountability as a constitutional value and norm: *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) at para 121.

the cost of non-security upgrades that were made to the President's private residence in Nkandla. It is also not necessary to determine the portion of the cost to be paid by the President.² Both will be determined when the President complies with the remedial action taken by the Public Protector, which he has so far failed to do.³

EXCLUSIVE JURISDICTION: SECTION 167(4)(e)

7 The EFF's case falls for exclusive determination by this Court in terms of section 167(4)(e) of the Constitution. The EFF alleges that Parliament and the President have failed to fulfil their constitutional obligations, and only this Court has constitutional authority to decide whether that is so.

8 The question whether a dispute falls for exclusive determination by this Court is anterior to the merits of the dispute. Jurisdiction is determined on

² President's answering affidavit; p 4, para 7; p 37, para 88. As at December 2014, the cost of the Nkandla project was over R204 million: EFF's founding affidavit; annexure "FS 4", p 57, para 40 ("**the President's report**").

³ "*Secure in Comfort: report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province*" Report 25 of 2013/14 (referred to as "**the Public Protector's report**"). Due to its length, the full report is not annexed to the EFF's founding affidavit. A condensed version containing pages referred to in the EFF's founding affidavit and these heads of argument will be made available. The full version is available at:

http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf

the basis of the claim as pleaded, not its substantive merits.⁴

9 Accordingly, section 167(4)(e) is triggered when a litigant alleges that Parliament or the President have failed to fulfil a constitutional obligation.⁵

Whether a) that obligation applies to the particular facts, and b) Parliament or the President has actually failed to fulfil it are not answered at the jurisdiction level.⁶

10 When relying on section 167(4)(e), a two-stage enquiry is undertaken:⁷

10.1 First, does the constitutional provision relied upon impose an obligation?

10.2 Second, if so, is that obligation the kind contemplated in section 167(4)(e)?

11 The first enquiry is undoubtedly satisfied. The EFF's case against Parliament is moored to sections 55, 89, and 181 of the Constitution,⁸ and the case against the President to sections 83, 96, and 181.⁹ All of these

⁴ *My Vote Counts NPC v Speaker of the Parliament* [2015] ZACC 31 at paras 132-135.

⁵ *My Vote Counts* at para 135.

⁶ *Women's Legal Centre Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC) at para 4. The contrary position advanced by the President is incorrect: President's answering affidavit; p 11, para 13.

⁷ *Doctors For Life International v Speaker of the Parliament* 2006 (6) SA 416 (CC) at para 13.

⁸ EFF's founding affidavit; p 7-9, paras 9 and 14.

⁹ EFF's founding affidavit; p 8, para 14; p 11, para 26.

sections impose obligations.¹⁰

12 As to the second enquiry, all, or at least some, of those obligations are constitutional obligations for the purposes of section 167(4)(e). This is for the following reasons:

12.1 First, section 167(4)(e) is applicable when a dispute draws sufficiently on this Court's "*political legitimacy*"¹¹, such as when it raises a crucial political question, to require exclusive determination ("**the crucial political question test**"). The EFF's case against both Parliament and the President passes this test.

12.2 Second, to the extent that section 167(4)(e) is triggered when an obligation is imposed exclusively on Parliament or the President ("**the agent-specific test**"), "*in contradistinction to constitutional duties they may bear together with other agents*",¹² the EFF's case against both Parliament and the President passes this test. Sections 55(2)(a) and 89(1), and 83(c), impose exclusive obligations on Parliament and the President respectively.

12.3 Third, and if the agent-specific test is applicable but only satisfied in respect of Parliament, then the EFF's case against the President also

¹⁰ *Doctors For Life* at para 14.

¹¹ *Women's Legal Centre* at para 15.

¹² *Women's Legal Centre* at para 16.

falls for exclusive determination because it is inseparable from the case against Parliament.

First level: the crucial political question test

13 Our first submission is that section 167(4)(e) applies to the EFF's case because it satisfies the crucial political question test. The test has its origins in *President of the Republic of South Africa v South African Rugby Football Union*,¹³ where this Court defined the purpose of the exclusive jurisdiction provision as being “*to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State.*”¹⁴

14 In *King and Others v Attorneys Fidelity Fund Board of Control and Another*,¹⁵ the Supreme Court of Appeal, drawing upon *Sarfu*, noted that “*since the Constitutional Court bears ‘the responsibility of being the ultimate guardian of the Constitution and its values’, s 167(4) vests it with exclusive jurisdiction in ‘crucial political areas’, and it bears the duty ‘to adjudicate finally in respect of issues which would inevitably have*

¹³ 1999 (2) SA 14 (CC).

¹⁴ *Sarfu* at para 29.

¹⁵ 2006 (1) SA 474 (SCA).

*important political consequences’.*¹⁶

15 In *Doctors For Life*, Ngcobo J supported an approach to section 167(4)(e) which considers the extent to which the issue to be decided involves a judicial intrusion into the political sphere. Cases which point to material constitutional infringements by the person holding the highest political office in the land necessarily involve the greatest possible degree of political conflict. Their adjudication draws the judiciary into sensitive political matters. For this reason also, these questions are reserved by the Constitution for the exclusive determination by this Court.¹⁷

16 Subsequently, in *Von Abo*,¹⁸ Moseneke DCJ added a further point to the enquiry, namely, whether the obligation in question is specifically imposed on Parliament or the President.¹⁹ Based on this, section 167(4)(e) reserves for determination by the Constitutional Court matters relating to duties that are “*pointedly reserved for the President*”.²⁰

17 Moseneke DCJ held that, at very least, the functions listed in section 84(2)

¹⁶ *King* at para 14.

¹⁷ *Doctors For Life* at para 24.

¹⁸ *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC).

¹⁹ *Von Abo* at para 36.

²⁰ *Von Abo* at para 36.

of the Constitution are constitutional obligations of the President.²¹ Disputes regarding these functions would fall for exclusive determination by the Constitutional Court because they have “*important political consequences ... which call for a measure of comity between the judicial and executive branches of the State.*”²² They are “*decisions ... of the highest office of the Head of State and the head of the national executive.*”²³

18 Moseneke DCJ’s actor-orientated approach was further developed by Cameron J in *Women’s Legal Centre Trust*. Cameron J’s approach shares the same point of departure as *Sarfu*, *King*, *Doctors For Life* and *Von Abo*: the purpose of section 167(4)(e) is to ring-fence “*areas of intense political contention*” for exclusive determination by the Constitutional Court.²⁴ That is done because the Constitution affords particular political legitimacy to the Court.

19 According to Cameron J, a case does not fall for exclusive determination by the Constitutional Court merely because it requires a court to make a politically-sensitive decision.²⁵ The following factors inform whether an

²¹ *Von Abo* at para 37.

²² *Von Abo* at para 37.

²³ *Von Abo* at para 37.

²⁴ *Women’s Legal Centre Trust* at para 14.

²⁵ *Women’s Legal Centre Trust* at paras 15 and 24.

obligation falls within section 167(4) generally: the nature of the obligation, whether its content can be clearly ascertained, whether it is stated unambiguously in the Constitution, how its content can be determined, and whether it is capacity-defining or power-conferring.²⁶

20 Cameron J placed emphasis on section 167(4)(e) specifically referring to Parliament and the President. From this Cameron J emphasised the “*agent-specific*” focus of the section.²⁷ Matters for exclusive determination by the Constitutional Court involve obligations exclusively imposed on Parliament and the President.²⁸

21 It is noteworthy, though, that Cameron J described the agent-specific focus as a “*pointer*”, albeit a significant one.²⁹ This implies that whether an obligation is imposed on a specific agent is not the sum total of the enquiry. Rather, an agent-specific focus, like whether an obligation is ascertainable, is an indication of the types of disputes which fall for exclusive determination by the Constitutional Court.

22 The overarching justification to the exercises of the exclusive jurisdiction power of this Court laid down in *Sarfu* and endorsed in subsequent

²⁶ *Women’s Legal Centre Trust* at para 15.

²⁷ *Women’s Legal Centre Trust* at paras 16 and 20-24.

²⁸ *Women’s Legal Centre Trust* at para 16.

²⁹ *Women’s Legal Centre Trust* at para 16.

decisions remains: the greater the political question raised, the more the Constitution requires the exercise of exclusive jurisdiction by this Court. Section 167(4)(e) applies when a dispute draws upon the Court's political legitimacy, and sufficiently so in order to warrant exclusive determination. The true effect of *Doctors For Life*, *Von Abo*, and *Women's Legal Centre Trust* was not to alter the standard set in *Sarfu* but to build on it. The section's agent-specific focus is a pointer to be used in the broader test of whether the dispute draws sufficiently on the Constitutional Court's political legitimacy.

23 This application satisfies the crucial political question test. There can be no doubt that the EFF's case asks questions of the highest constitutional and political significance.³⁰

23.1 Grave findings of constitutional and ethical violations, pursuant to a thoroughgoing investigation have been made by an independent constitutional organ against the President, the Head of the National Executive.

23.2 Notwithstanding the gravity of the findings and their potential to stain our constitutional foundations, the National Assembly has been remiss in relation to its distinct and unique constitutional obligation

³⁰ *Mazibuko NO v Sisulu and others NNO* 2013 (6) SA 249 (CC) at para 36.

of holding the Head of the National Executive accountable under the Constitution and accountable specifically in relation to compliance with the remedial action taken.

23.3 Undoubtedly, this is an area of intense political contestation, which calls for a measure of comity between the Executive, Parliament and the office of the Public Protector.

24 In sum, when regard is had to: -

24.1 The nature of the issue: the findings of material infringements of the Constitution made against the Head of State by an independent constitutional organ, the Public Protector, particularly the clash of interests between the personal interests of the President and his duties as Head of State;

24.2 The contention that there has been a failure by the National Assembly to secure the constitutionally mandated level of accountability by the President;

24.3 The actors involved: the President, the National Assembly and the Public Protector; and

24.4 The nature of the obligations imposed on each of these actors by the Constitution

It is clear that the dispute raises precisely the type of matter specially reserved by the Constitution for this Court's exclusive jurisdiction. In short, only this Court has the appropriate level of political legitimacy conferred by the Constitution to decide a matter such as the present.

Second level: agent-specific test

25 At the second level, if the agent-specific focus developed in *Women's Legal Centre Trust* is properly interpreted as a threshold test, the EFF's case falls within the ambit of section 167(4)(e).

26 Parliament is obliged to hold the President accountable to it in terms of section 55(2)(a).³¹ It is an obligation imposed on Parliament exclusively.³² We emphasise that the point of focus at this stage of jurisdiction is not whether that duty has been discharged, but whether the claim of the EFF is that there has been a failure to discharge an obligation exclusively imposed on Parliament by the Constitution.

27 In respect of the President, section 83(c) imposes an obligation on the President.³³

³¹ EFF's founding affidavit; p 7, para 9.

³² *My Vote Counts* at para 135.

³³ In *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 52 this Court held that section 83(c) imposes a duty on the President.

- 27.1 This is a special obligation not imposed on any other member of the National Executive.
- 27.2 It is exclusively imposed on the President.
- 27.3 It is not imposed on the President in conjunction with other members of the National Executive.
- 28 This renders the obligation unique to the office of the President. Without a doubt, this is a function of the special space occupied by the President in our constitutional landscape.
- 29 To understand the content of the duty imposed by section 83(c),³⁴ the section ought to be read in conjunction with section 83(b). In order to sensibly interpret section 83, subsections (b) and (c) must serve different purposes. They should be interpreted as a hierarchy of obligations: subsection (b) is a general obligation that applies whenever the President acts, while subsection (c) is a special, discrete constitutional obligation that only applies in particular circumstances. It is only when the special obligation in subsection (c) is applicable does a dispute fall for exclusive

³⁴ Section 83 states:

- “83. The President –
- (a) is the Head of State and head of the national executive;
 - (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
 - (c) promotes the unity of the nation and that which will advance the Republic.”

determination by this Court. This ensures that subsection (c) does not disable section 172(2)(a) by encompassing all impugned acts of the President.³⁵ Of course section 83(b) remains relevant as an aid to the interpretation of the special duty imposed by section 83(c).

30 We reiterate that it is not necessary at the jurisdiction stage to determine whether the President has breached the obligation in section 83(c). Whether a dispute falls for exclusive determination by the Constitutional Court is anterior to a determination of the merits of the dispute.³⁶

31 Accordingly, if agent-specificity is a threshold, rather than a pointer in an overall enquiry about crucial political questions, it is satisfied in respect of the EFF's case against Parliament and the President.

Third level: Parliament and the President are inseparable

32 If the agent-specific test is a threshold question, but it is only satisfied in respect of the EFF's case against Parliament, then the case against the President properly falls within the exclusive jurisdiction of this Court.

33 Whether the President has failed to fulfil his constitutional obligations is inseparable from the EFF's case against Parliament. It is not possible to

³⁵ *Doctors For Life* at para 19.

³⁶ *Women's Legal Centre Trust* at paras 3-4; *My Vote Counts* at para 131; *Mazibuko* at para 73.

determine whether Parliament has failed to fulfil its constitutional obligations without an enquiry into the failure of the President to fulfil his constitutional obligations. Any pronouncement against Parliament necessarily requires an examination of the obligations on the President and whether he has failed to fulfil those obligations.

34 The obvious overlap of issues requires the EFF's entire case to be dealt with in an "*integrated and comprehensive fashion*", thereby avoiding piecemeal litigation.³⁷

THE PUBLIC PROTECTOR'S REPORT AND THE PRESIDENT'S REACTION

35 We turn to consider the content of the Public Protector's report and the reaction of the President thereto.

36 The report is clear that the value of the President's private residence was "*substantially increased*" at taxpayers' expense.³⁸ The report found no evidence of the President ever raising concerns regarding "*extensive*" upgrades which "*had no obvious relation to his protection and the security*

³⁷ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at para 42.

³⁸ Public Protector's report; p 406, paras 9.2.17.

of the premises.”³⁹ It further found that:

36.1 upgrades to the President’s private residence deviated from the sixteen security measures that were recommended by the South African Police Service;⁴⁰

36.2 organs of state involved in the Nkandla project “*failed dismally*” in following proper constitutional and administrative procedures;⁴¹

36.3 a number of upgrades should never have been implemented because they were not contemplated by the Minimum Physical Security Standards, nor by the SAPS Security Evaluation Reports;⁴²

36.4 many of the upgrades went beyond what was reasonably required for the President’s security, and were “*unconscionable, excessive, and caused a misappropriation of public funds*”;⁴³

36.5 the upgrades resulted in “*substantial value being unduly added to the President’s private property*”;⁴⁴

36.6 the President “*tacitly accepted*” all upgrades to his private residence, including those unrelated to security, and has “*unduly benefited from*

³⁹ Public Protector’s report; p 424, para 9.5.11.

⁴⁰ Public Protector’s report; p 427, para 10.1.2.

⁴¹ Public Protector’s report; p 428, para 10.2.1.

⁴² Public Protector’s report; p 429, para 10.3.2.

⁴³ Public Protector’s report; p 430, para 10.4.1.

⁴⁴ Public Protector’s report; p 431, para 10.5.2.

the enormous capital investment from the non-security installations at his private residence”;⁴⁵

36.7 at all material times, the President knew what was happening in Nkandla: he was kept informed of the progress of the project and was aware of the extent of upgrades being implemented;⁴⁶

36.8 the President should have “*asked questions regarding the scale, cost, and affordability*” of the Nkandla project, raised concerns about the “*obvious elaborate scale of the project ... and the cost thereof to the state*”, and taken reasonable steps to correct irregularities and excesses in the project;⁴⁷

36.9 the President violated the Executive Ethics Code, which amounts to conduct that is consistent with his office as a member of Cabinet and a violation of section 96 of the Constitution;⁴⁸ and

36.10 the President ought to pay a “*reasonable part of the expenditure towards the installations that were not identified as security measures in the list compiled by security experts in pursuit of the security evaluation*”.⁴⁹

⁴⁵ Public Protector’s report; p 437, para 10.9.1.4.

⁴⁶ Public Protector’s report; p 423, paras 9.5.2-9.5.4.

⁴⁷ Public Protector’s report; p 424, para 9.5.10; p 439, paras 10.10.1.4-10.10.1.5.

⁴⁸ Public Protector’s report; p 439, para 10.10.1.6.

⁴⁹ Public Protector’s report; p 437, para 10.9.1.4.

37 The report's remedial action is premised on the finding that the President is liable to pay a reasonable portion of the cost of non-security upgrades. For this reason, the remedial action does not require an investigation into whether the President is liable for non-security upgrades (and obviously not, since that was the purpose of the Public Protector's report). Rather, the effect of the remedial action is two-fold: a) determine the reasonable cost of non-security upgrades, and b) determine a reasonable portion of that cost to be paid by the President.

38 The remedial action required of the President to take the following steps:

38.1 With the assistance of National Treasury and the South African Police Service to determine "*the reasonable cost of the measure implemented by the DPW at his private residence that do not relate to security, and which include visitors centre, the amphitheatre, the cattle kraal and the chicken run and the swimming pool.*"

38.2 To pay a reasonable percentage of the cost of the measures determined with the assistance of National Treasury taking into consideration a document prepared by the Department of Public Works referred to as "*DPW apportionment document*".

38.3 To reprimand ministers involved "*for the appalling manner in which the Nkandla project was handled and State funds were abused.*"

39 The President has not sought to set aside the report in any judicial process. His stance to the findings contained in the provisional report and the final report appears to have evolved over time.

40 The President's first reaction was contained in his response to a provisional report published by the Public Protector. The President did not dispute that he was liable to pay for the installation cost of non-security measures.⁵⁰ Moreover, the President also did not dispute that non-security upgrades included, at least, the visitors centre, cattle kraal, swimming pool, and amphitheatre:⁵¹

"It is also my considered view that the amount in question should be based on the cost of installation of some or all the items that can't be conscientiously accepted as security measures. These include the Visitors' Centre, cattle kraal and chicken run, swimming pool and amphitheatre. The President and his legal advisors, did not dispute this in their response to the Provisional Report. The President did not dispute during the investigation that he told me on 11 August 2013 that he requested the building of a larger kraal, and that he was willing to reimburse the state for the cost thereof." (emphasis added)

41 The President's second reaction, though, was to question whether the President was liable for any upgrades at all. In the President's report to the Speaker, the President directed the Minister of Police to:

"...report to Cabinet on a determination to whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports."⁵² (emphasis added)

⁵⁰ Public Protector's report; p 437, paras 10.9.1.4-10.9.1.5.

⁵¹ Public Protector's report; p 437, para 10.9.1.5.

⁵² President's report; p 68 at para 63.2.

42 In other words, the President directed the Minister of Police to do what the Public Protector had already done. The purpose of the Minister's report was not compliance with the remedial action taken by the Public Protector, but a reconsideration of the Public Protector's findings.⁵³ The President put into motion a parallel process, not a process that would give effect to the remedial action taken by the Public Protector. Indeed it is apparent from the report of the Minister that he has re-entered the fray in relation to the question whether the upgrades were security related or not.

43 A third reaction is now seen in the President's answering affidavit. Its mainstay is that the Public Protector's report did not determine which upgrades at his private residence do not relate to security.⁵⁴ The President interprets the report to require an investigation into the "*security relatedness of all Nkandla measures*".⁵⁵

44 The President seems to accept that he is liable to pay a reasonable portion of the cost of non-security upgrades.⁵⁶ But he requires a determination of which upgrades are related to security, followed by a determination of a reasonable portion of the cost of those upgrades that he must pay.⁵⁷ He

⁵³ EFF's founding affidavit; annexure FS 5, p 72 at para 2 (referred to as "**the Minister's report**").

⁵⁴ President's answering affidavit; pp 6-7, para 10.

⁵⁵ President's answering affidavit; pp 6-7, para 10.

⁵⁶ President's answering affidavit; p 7, para 13; p 8, para 15.

⁵⁷ President's answering affidavit; pp 7-8, paras 13-14.

refers to this as the “*security exercise*”.⁵⁸

45 It appears that the President had previously admitted before the Public Protector that, at very least, the visitors centre, cattle kraal, swimming pool, and amphitheatre “*can’t be conscionably accepted as security measures*”.⁵⁹ Now, though, the President requires them to be subjected to his security exercise.⁶⁰ It also appears that on 11 August 2013 the President had informed the Public Protector that “*he requested the building of a larger kraal, and that he was willing to reimburse the state for the cost thereof.*” Now he appears to question liability.

46 The remedial action does not call for a determination of which upgrades are related to security. That was already dealt with in the report. During the Nkandla project, security experts evaluated the President’s private residence and compiled lists of security measures. These lists were informed by the Minimum Physical Security Standards,⁶¹ and reports prepared by the SAPS following evaluations of the President’s private residence.⁶²

⁵⁸ President’s answering affidavit; p 8, para 15.

⁵⁹ Public Protector’s report; p 437, para 10.9.1.5.

⁶⁰ President’s answering affidavit; p 7, paras 12-13.

⁶¹ Prepared in 2009 by the Government Sector Security Council.

⁶² Public Protector’s report; p 40, para (x)(c)(3).

47 These lists are the touchstone for whether upgrades are related to security.

As noted in the report:

“The evidence gathered focused on the standard setting instruments and their provisions regarding the minimum security requirements. The lists of security measures compiled at the conclusion of security evaluations were also taken as standard setting. The President’s lawyers conceded during the meeting on 21 February 2014 that the deciding factor or what had to be implemented in the name of security were the lists prepared by security experts following the security evaluations.”⁶³

...

*Based on the items listed in the Minimum Physical Security Standards and the lists compiled in pursuit of the security, evaluations left with no basis for accepting as security measures items such as the kraal, chicken run, Visitors’ Centre, amphitheatre, swimming pool and extensive paving as these were not among the listed items.*⁶⁴

...

It is my considered view that as the President tacitly accepted the implementation of all measures at his residence and has unduly benefitted from the enormous capital investment from the non-security installations at his private residence, a reasonable part of the expenditure towards the installations that were not identified as security measures in the list compiled by security experts in pursuit of the security evaluation, should be borne by him and his family.”⁶⁵ (emphasis added)

48 The report compared the security lists against actual upgrades implemented. A table was created identifying, *inter alia*, upgrades that do not feature on the security lists.⁶⁶ These are upgrades that are unrelated to security, and fall within the ambit of the President’s liability.⁶⁷ These include, but are not limited to, the swimming pool, cattle kraal,

⁶³ Public Protector’s report; p 40, para (x)(c)(1).

⁶⁴ Public Protector’s report; p 41, para (x)(c)(4).

⁶⁵ Public Protector’s report; p 437, para 10.9.1.4.

⁶⁶ Public Protector’s report; pp 399-402.

⁶⁷ Public Protector’s report; pp 399-402. Notably, the title of the table is “Breakdown of Authorised, Unauthorised and Non-Security Related Measures Implemented in the Nkandla Project” (emphasis added).

amphitheatre, and visitors centre.

49 We pause to emphasise that the security lists were not creations of the Public Protector. They were prepared by government security experts.⁶⁸

50 In his answering affidavit, the President interprets the Public Protector's report to require a determination of which upgrades are related to security.⁶⁹ This is at odds with the findings and remedial action of the Public Protector. The exercise of determining which items are security-related has been finalised. What remains is the determination of the reasonable cost of the non-security related items and the repayment of a reasonable cost of those items. The non-security items are known.

51 Therefore, it is contrary to the report to require a further security exercise.⁷⁰ That exercise was already done by the Public Protector with reference to the security lists. It only remains to determine the reasonable cost of those upgrades, and a reasonable portion thereof that must be paid by the President.

52 Importantly, the President asserts that he will comply with *the security*

⁶⁸ Public Protector's report; p 41, para (x)(c)(5).

⁶⁹ President's answering affidavit; pp 6- 8, paras 10-14; p 24, para 48; p32, para 74.

⁷⁰ President's answering affidavit; p 8, para 15.

exercise, not the remedial action taken by the Public Protector.⁷¹ In other words, the President believes that the outcome of his parallel process trumps the Public Protector's report and remedial action. This is constitutionally impermissible on two independent bases: the special constitutional obligations imposed on the President, as well as the constitutional obligations of organs of state in response to reports of the Public Protector.⁷²

53 The President attempts to use the remedial step of determining a reasonable portion of the cost of non-security upgrades as a foothold for the security exercise.⁷³

54 But this reasoning appears circular. The report's remedial action only applies to non-security upgrades. Those have already been identified in the report, with reference to the security lists which were prepared by government experts. The remedial action now requires a costing exercise, and then a determination of a reasonable portion of that cost to be paid by the President. Security considerations play no role in that process, because the remedial action is only embarked upon in respect of *non*-security upgrades. Security considerations occupy an anterior, threshold role: they

⁷¹ President's answering affidavit; p 7, para 13; p 8, para 15; p 26, para 55; p 29, paras 66-67.

⁷² *South African Broadcasting Corporation Limited and Others v Democratic Alliance and Others* (393/2015) [2015] ZASCA 156 (8 October 2015) at para 53.

⁷³ President's answering affidavit; p 32, para 74.

inform whether an upgrade is related to security. Remedial action then applies, or it does not.

55 Incidentally, for the same reason there is no possibility of factual disputes arising in this litigation.⁷⁴ The President's obligations are a question of law. The President cannot re-enter the fray of security relatedness. The President, having elected not to challenge the report, is obliged to give effect to the remedial action taken.

56 Moreover, the President has side-stepped another significant aspect of the remedial action of the Public Protector: to reprimand the responsible Ministers for the "*appalling*" manner in which the project was handled.⁷⁵ No explanation is given in the answering affidavit with regard to whether there has been compliance with this finding and if so the grounds upon which it is contended that the President should be excused from complying.

57 It will be recalled that section 83(a) installs the President as the Head of the National Executive. Section 91(2) confers upon the President the power to appoint the Deputy President and the Ministers, including the power to dismiss them. Thus, when the Public Protector decided that the President

⁷⁴ President's answering affidavit; p 37, para 88.

⁷⁵ Public Protector's report; p 442, para 11.1.3.

should reprimand the Ministers involved in the Nkandla matter for the appalling manner in which the project was handled, special constitutional obligations imposed on the President by section 83(a), (b) and (c) and section 91(2) were triggered.

58 By avoiding the implementation of the report, the President also avoided (if not evaded) his obligations in terms of section 83 and 91 of the Constitution. He has not provided an explanation why he could not reprimand the responsible ministers as directed by the Public Protector. Nor has he contended that the remedial action taken directing the reprimand of the Ministers is inappropriate.

UNFULFILLED CONSTITUTIONAL OBLIGATIONS

59 We turn to consider what the Constitution requires from Parliament and the President. In short, it requires the President to comply with the remedial action taken by the Public Protector, and for Parliament to hold the President to account.

60 The President's concerns about the separation of powers should not cloud this debate.⁷⁶ This Court is not asked to make complex policy choices, make legislative choices or otherwise exceed its constitutional purchase.

⁷⁶ President's answering affidavit; pp 27-29, paras 58-67.

The EFF's case is about the constitutional obligations of Parliament and the President. It falls squarely within this Court's role as "*the final arbiter on adherence to the Constitution and its values.*"⁷⁷ As recently recognised by the Supreme Court of Appeal, deciding whether organs of state have to give effect to remedial action by the Public Protector is "*one eminently for a court to decide.*"⁷⁸ The principle does not change in respect of the constitutional claim against Parliament: this Court is being asked to interpret section 55 of the Constitution, in light of the provisions of section 181 of the Constitution. Whether or not Parliament has failed to discharge a constitutional obligation can only be answered by a Court. Thus, no genuine question about separation of powers arises. Only matters of constitutional interpretation are at stake.

The President: The Supreme Upholder and Protector of The Constitution

61 South Africa is founded on the rule of law, democracy, and accountability.

The President and the National Executive occupy a special role in achieving and protecting the founding values of the Constitution.

62 The President is no ordinary political appointee. He is the Head of State and vested with the executive authority of the Republic. Moreover, he

⁷⁷ *My Vote Counts* at para 152.

⁷⁸ *SABC* at paras 59-60.

occupies a position of trust. The Constitution does not confer power on the President, but entrusts it.⁷⁹ As Kriegler J held:

*“Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands.”*⁸⁰

63 The President is subject to a raft of constitutional obligations. Some are imposed on him alone,⁸¹ others as part of the National Executive and the public administration.⁸²

64 The President’s constitutional obligations – sourced in section 83 and elsewhere in the Constitution – ought to be viewed as a series of concentric circles. At the very centre is the President’s special obligation in section 83(c): the President must promote the unity of the nation and that which will advance the Republic.

65 When the section 83(c) obligation is triggered may require a case by case determination. Formulating a general rule could also prove conceptually taxing. But it is not essential to lay down the general test. Whatever approach is taken, the Public Protector’s finding that the President had knowingly enriched himself, to a material degree, at the expense of the

⁷⁹ Section 84(1) of the Constitution.

⁸⁰ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 65.

⁸¹ Including sections 83 and 84 of the Constitution.

⁸² Including sections 92, 96, and 195 of the Constitution.

taxpayers clearly engaged the duty entrenched by section 83(c).

66 The constitutional position occupied by the President means that he – more than any other organ of state – must pay attention to the findings of Chapter 9 institutions. The President must pay particular attention to the findings of the Public Protector, given its “venerable” and “unique” position that it occupies in our constitutional order.⁸³ Section 83(c) will always require the President to act when the Public Protector makes findings against him of, *inter alia*, acting in self-interest,⁸⁴ misappropriating public funds,⁸⁵ and unduly benefitting himself at taxpayers’ expense.⁸⁶

67 It does not matter whether those findings were made against the President alone. It is enough that the President knew about the “toxic concoction of a lack of leadership, a lack of control and focused self-interest” that characterised the Nkandla project.⁸⁷

68 Inaction in the face of that knowledge, and the other findings made in the Public Protector’s report are the antithesis of democratic trust placed in the

⁸³ SABC at paras 45 and 53.

⁸⁴ Public Protector’s report; p 422, para 9.4.66

⁸⁵ Public Protector’s report; p 430, para 10.4.1.

⁸⁶ Public Protector’s report; p 437, para 10.9.1.4.

⁸⁷ Public Protector’s report; p 422, para 9.4.66.

President. If the findings are accepted – as they should in the absence of a challenge – then a President who knows of, and endorses, self-interest, enrichment, misappropriation, and maladministration divides the nation and undermines the Constitution.

69 Section 83(c) necessarily requires the President to comply with his other constitutional obligations. This is because the content of section 83(c) includes the broader obligations that the Constitution imposes on the President (because section 83(c) is the most defined circle in the schema of presidential obligations). In other words, section 83(c) ought to be interpreted with reference to other obligations that are imposed on the President. Section 83(c) may require more, but its minimum content must be what the Constitution otherwise requires from the President. This requires a consideration of sections 96 and 181.

70 The Public Protector found that the President violated the Executive Ethics Code and section 96 of the Constitution.⁸⁸ Section 96(2)(b) prohibits the President, as a member of Cabinet, from exposing himself to any situation involving the risk of a conflict between his official responsibilities and his private interests. An actual conflict is not required; the Constitution is

⁸⁸ Public Protector's report; p 439, para 10.10.1.6.

breached by the mere risk of a conflict.⁸⁹ The section thus, imposes a strict ethic.

71 The President cannot deny that he exposed himself to a risk of conflict, on two levels.

71.1 First, the fact of the President's knowledge of publicly funded upgrades to his private residence is enough. The President was aware of what was happening in Nkandla.⁹⁰ The President's failure to interrogate the extent, cost, and necessity of the upgrades despite his knowledge undeniably exposed him to a risk of conflict (if not an actual conflict).

71.2 Second, the mere fact that the President now calls for the security exercise and appears committed to reimbursing the state in the event of an adverse outcome from the security determination demonstrates that a risk of conflict must have arisen. The mere potential for there to have been enrichment in the form of non-security upgrades constitutes a conflict of interest. It is irrelevant whether the President subsequently reimburses the state.⁹¹ The fact is that any re-assessment of the security upgrades, at this stage, would inevitably

⁸⁹ EFF's founding affidavit; p 11, para 22.

⁹⁰ President's report; pp 56-57, paras 32-33. Public Protector's report; p 423, paras 9.5.2-9.5.5.

⁹¹ As is the case for fiduciary duties generally: *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at para 31.

concern the separation of the personal items from those items which were publicly funded. But this should have been done – and in fact on the findings of the Public Protector was done – before the expenses were actually incurred.

72 The factual underpinnings of the conflict of interests are not disputed by the President. The conflict relies on the President’s knowledge and his failure to act.⁹²

73 Of course, the Public Protector’s findings go much further. In particular, the Public Protector positively concluded that the President breached section 96. He did so in three respects.⁹³

73.1 First, the President breached the Executive Ethics Code which, in turn, constitutes a breach of section 96(1). *“His failure to act in protection of State resources, constitute a violation of paragraph 2 of the Executive Ethics Code and accordingly amounts to conduct that is inconsistent with his office as a member of Cabinet, as contemplated by section 96 of the Constitution.”*⁹⁴

73.2 Second, the President breached section 96(2)(b) by placing himself

⁹² Public Protector’s report p 439, para 10.10.1.4.

⁹³ EFF’s founding affidavit; pp 10-12, paras 20-23.

⁹⁴ Public Protector’s report; p 439, para 10.10.1.6.

in a position of conflict. He wore two hats: *“that of the ultimate guardian of the resources of the people of South Africa and that of being a beneficiary of public privileges of some of the guardians of public power and state resources”*.⁹⁵

73.3 Third, the President breached section 96(2)(c) because he *“unduly benefited from the enormous capital investment from the non-security installations at his private residence.”*⁹⁶

74 In the finding of the Public Protector, it is unmistakable that the President knew of the upgrades to his private residence and knew of the fact that the state was paying for the upgrades. *“It is also not unreasonable that once the news broke in December 2009 of alleged exorbitant amounts, at the time R65 million on requested security installations at his private residence, that dictates of sections 96 and 237 of the Constitution and the executive ethics code required of President Zuma to take reasonable steps to order an immediate enquiry into the situation and immediate correction of any irregularities and excesses.”*⁹⁷

75 The President’s reaction to the Public Protector’s report is also an affront to section 181(3) of the Constitution. The President has not given effect to

⁹⁵ Public Protector’s report; p 439, para 10.10.1.4.

⁹⁶ Public Protector’s report; p 437, para 10.9.1.4.

⁹⁷ Public Protector’s report; p 439, para 10.10.1.5.

the report.

76 The liability of the President was already determined by the Public Protector's report. Initiating a fresh, liability-determining process defeats the report and undermines the constitutional powers of the Public Protector. Plainly, the President has sought to initiate a parallel process, which will not give effect to the remedial action. Organs of state are not permitted to do that.⁹⁸ *A fortiori*, neither is the President.

77 The President's assurance that he will ultimately pay a portion of the cost of non-security upgrades, if that is the outcome of the new security determination exercise,⁹⁹ is a caricature of what the Constitution requires. It is born of a category mistake. The security exercise is fundamentally different to the remedial action taken by the Public Protector. Like the President's liability, security relatedness was already determined in the report. The remedial action only applies to non-security upgrades, as determined in the report with reference to the security lists prepared by government security experts. By requiring a re-determination of security relatedness, the President's reaction goes beyond the discrete purpose of the remedial action. It is precisely the type of parallel process that the

⁹⁸ *SABC* at para 53.

⁹⁹ President's answering affidavit; p 26, para 55.

Constitution does not countenance.¹⁰⁰

78 The President's apparent commitment – in these proceedings – to pay an amount determined in a new security determining exercise is also irreconcilable with his express conduct. The President asked the Minister of Police to conduct a fresh exercise to determine his liability. The outcome of that exercise is known. The Minister concluded that the President is not liable, at all because all the disputed items were security related.¹⁰¹ In other words, the President through the Minister has sought to second-guess the Public Protector's findings and ignore her remedial action. This too is not countenanced by the Constitution.¹⁰²

79 The findings made by the Public Protector are sufficiently grave to undermine democracy and divide the nation. In order to vindicate the unique and heightened role entrusted to him by the Constitution, the President must comply with the remedial action taken by the Public Protector.

80 The President is obliged to comply not because a report of the Public Protector is necessarily equivalent to a judgment of a court of law. That

¹⁰⁰ *SABC* at para 53.

¹⁰¹ The Minister's report; pp 97-99, para 8.

¹⁰² *SABC* at paras 52-53.

debate is not central to this case. The source of the President's obligation is different. It is found in the unique, heightened obligations imposed on the President by the Constitution.

81 Furthermore, the report and remedial action of the Public Protector exists in fact. The rule of law requires that it should be given effect. If the President believed that the Public Protector had failed to comply with the law, in coming to her conclusions, it is clear what the President was required to do. In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*¹⁰³ the imperative of the rule of law in giving effect to factually extant decisions of statutory or constitutional organs is explained:

“[The essential basis of Oudekraal was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process. The Court expressed it thus:¹⁰⁴

‘For those reasons it is clear, in our view, that the Administrator’s permission was unlawful and invalid at the outset....But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always

¹⁰³ 2014 (3) SA 481 (CC).

¹⁰⁴ *Kirland* at para 101.

recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’’

82 It is irrelevant whether a report of the Public Protector is administrative action for the *Oudekraal* rule to apply:¹⁰⁵

“...it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked...It suffices for present purposes to state that if such a principle finds application to the decisions of an administrative functionary then, given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution. After all, the rationale for the principle in the administrative law context (namely, that the proper functioning of a modern State would be considerably compromised if an administrative act could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question...), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports.”

83 Thus, the status of the Public Protector’s report aside, the rule of law imposes a distinct obligation on the part of the President to comply with the findings of the Public Protector. He could not, by the vice of assigning the re-determination of the report to the Minister of Police, effectively avoid compliance. Doing so is an affront to the rule of law and the principle of accountability.

Parliament: Duty to Hold the National Executive Accountable

84 Section 55(2)(a) of the Constitution requires Parliament to provide mechanisms to ensure that organs of state are held accountable to it.

¹⁰⁵ SABC at para 45.

Parliament has failed to fulfil that obligation on two levels.

85 The first is that Parliament failed to provide an effective mechanism to hold the President to explain himself in relation to the facts underpinning the report.

86 Parliament is under a constitutional duty to oversee the executive and hold it to account.¹⁰⁶ Despite the executive being answerable to Parliament,¹⁰⁷ it has yet to require compliance from the President. Parliament ought to have required the President to comply with to the report's findings, particularly in light of the special Constitutional status of the Public Protector.

87 The *ad hoc* committee is not a “*mechanism*” envisaged in section 55(2)(a). The committee was tasked with considering the President's report, not the findings of the Public Protector and its remedial action.

88 Further, facts which the President is unable to deny establish a violation of section 96(2) of the Constitution. It is not necessary to consider, let alone accept, the findings of the Public Protector for that purpose. Section 55(2)(a) nevertheless obliged Parliament to consider those findings. They demonstrate that the President violated the Constitution to a material

¹⁰⁶ *Mazibuko* at para 43.

¹⁰⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 111.

degree. The *prima facie* evidence, springing from the explicit findings of the Public Protector, is that the President acted in violation with section 89. He committed a material violation of the Constitution. It is wholly illegal that Parliament has failed to act pursuant to such serious findings.

89 On a second level, Parliament has failed to hold the President to account for his failure to respond to the Public Protector's report and its remedial action. The President's reaction has been to ignore the report and set in motion his own parallel process. Organs of state are not permitted to react to a report of the Public Protector in that manner.¹⁰⁸ The President has failed his constitutional responsibilities in doing so, and Parliament has been party to those failures.

FURTHER, PROCEDURAL ARGUMENTS OF THE PRESIDENT

90 Finally, we dispense with two procedural arguments that are advanced by the President: non-joinder and prematurity.

Non-joinder

91 The President contends that the Public Protector and the Minister of Police ought to have been joined as parties to this application, and that the EFF's

¹⁰⁸ SABC at para 53.

failure to joint them renders the application “*fatally defective*”.¹⁰⁹

92 The EFF’s case is about the obligations of the President. Nevertheless, the Public Protector’s interest in this litigation is now catered for by the decision of this court permitting her to intervene as a respondent.

93 The Minister of Police has no legitimate interest in this litigation. No relief is sought against him, nor his report. The Minister’s role is, at best, incidental since his report was the product of terms of reference set by the President albeit in conflict with the Constitution.

Prematurity

94 The President contends that this application is premature for three reasons: litigation between the Democratic Alliance and the SABC is still pending before the Supreme Court of Appeal, the President has undertaken to comply with the so-called security exercise that he has put into motion, and the EFF ought to have reviewed the report of the Minister of Police.

95 First, the litigation between the Democratic Alliance and the SABC is no longer pending. The Supreme Court of Appeal delivered judgment on 8 October 2015. The Court found that organs of state must comply with

¹⁰⁹ President’s answering affidavit; p 21, para 38.

remedial action taken by the Public Protector, unless the Public Protector's findings are set aside in proceedings for judicial review. The Court expressly found that the type of parallel process that has been undertaken by the President is impermissible. In any event, the EFF's case is based on the constitutional obligations of Parliament and the President.

96 Second, and as already explained, the President has not complied with the remedial action taken by the Public Protector. The security exercise that is underway is a different process. No purpose is served awaiting its outcome.

97 Third, the focus of this litigation is the conduct of the President, not the Minister of Police. A review of the Minister's report would miss the true issue: the President's obligation to comply with the remedial action taken by the Public Protector. At any rate, the President has been directed to reprimand his Ministers, which he has failed to do.

CONCLUSION

98 The Public Protector's report is a significant, if inauspicious milestone in our democracy. The very institution tasked to guard against public maladministration has made serious findings against the Head of State. The Head of State has failed to comply, but has not challenged the findings.

99 The appropriate relief is for this Court to declare that Parliament and the President have failed to comply with their constitutional obligations. Declaratory relief has particular value in this case given its constitutional contours. It will bring clarity to the failed constitutional obligations of Parliament and the President, vindicating the protection and enforcement of the Constitution.¹¹⁰

100 It is just and equitable that the President be directed to comply with the remedial action taken by the Public Protector. That is, the President ought to be directed to:

100.1 take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of non-security upgrades (as determined in the Public Protector's report with reference to the security lists, and including the visitors' centre, amphitheatre, cattle kraal, chicken run, and swimming pool);

100.2 pay a reasonable percentage of the cost of non-security measures, as determined with the assistance of the National Treasury; and

100.3 reprimand the ministers involved in the Nkandla project.

101 The President seeks a costs order against the EFF if this application is

¹¹⁰ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras 107-108.

unsuccessful.¹¹¹ That would be inappropriate, and contrary to the rule that unsuccessful litigants in constitutional litigation should not ordinarily be burdened with costs.¹¹² A political motivation for litigation, even if it exists in this case, is irrelevant.¹¹³

102 We accordingly pray for an order in terms of the notice of motion.

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13 October 2015

¹¹¹ President's answering affidavit; p 4, para 8; p 38, para 91.

¹¹² *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para 23.

¹¹³ *Biowatch* at para 24; *Democratic Alliance v President of South Africa* 2014 (4) SA 402 (WCC) at para 108.

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