IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CASE NO.: **CCT 171/15**

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

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

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A. INTRODUCTION

1. The applicant ("the *DA*") seeks a declarator that the "*failure*" of the second respondent ("the *President*") to comply with the remedial action taken by the fourth respondent ("the *PP*") in her Report "Secure in Comfort" ("the *PP Report*") is unlawful and invalid. The DA further asks this court for directory relief compelling the President to do so.

2. The DA's application before this Court is conditional on the granting of the application for direct access by the Economic Freedom Fighters ("the *EFF*") or this Court assuming exclusive jurisdiction over the EFF's application. If the EFF application for access is refused, then the DA application must suffer the same fate. In the President's Written Submissions filed in the EFF application, we have already demonstrated that the issues raised in the EFF's application do not fall within the exclusive jurisdiction of this Court; nor are they issues on which this Court should pronounce as a court of first and final instance. These issues should properly be raised before the High Court.[1]

3. We do not repeat the submissions and legal argument set out in the President's submissions in the EFF matter, and respectfully seek that those Written

[1] Indeed, the DA has launched a parallel application in the Western Cape High Court in which it seeks the same relief as the application before this Court.

Submissions are read together with this document, since the DA application not only raises many of the same issues as the EFF Application, but is also conditional on the EFF's application for direct access being granted.

4. The structure of these submissions is as follows:

4.1. under section B we set out the correct approach to the disputes of fact raised in this application and the factual matrix within which the dispute must be determined;

4.2. in section C we analyse the conditional application for direct access under section 167(6) of the Constitution and point out that neither the DA nor the EFF has made a properly pleaded substantive application for direct access, nor is this an "*exceptional*" case which justifies this court sitting as first and final arbiter of the important issues at stake in this application;

4.3. section D advances our submissions on exclusive jurisdiction in which we indicate that the DA is not entitled to direct access to this Court under section 167(4)(e) of the Constitution because a purported constitutional failure has not been properly identified. The DA's founding affidavit merely adopts select components of the PP Report on PP Report and her views

expressed in correspondence with the President and in the media in a decidedly myopic and incomplete fashion. An application of this nature ought properly to be ventilated in the High Court as the court of first instance and should proceed through the judicial system in the normal course;

4.4. our submissions on political expediency follow in section E and we argue here that this application is a political ploy in which the DA and EFF attempt to obviate the Rules of this Court for the purpose of political gain, without any legal justification for bringing this application directly to this Court;

4.5. submissions on the interests of justice are in section F in which we argue that it is not in the interests of justice for the application to be heard by this Court as a court of first and final instance. The present case made by the DA rests on a distortion of that which the remedial action of the PP required to be done;

4.6. section G sets out our submissions on the debate surrounding the nature of the PP's remedial action. Included in this are the arguments on the specific context of the PP Report on the Nkandla upgrades and the steps

implemented by the President to comply with her remedial action. To that extent, we will make submissions on the nature and scope of the PP's powers (including comparisons with other jurisdictions and other functionaries with similar powers) and we will demonstrate that the question of the binding nature of the actual terms of the remedial action require a contextual and content-based interpretation;

4.7. in section H we advance our concluding remarks and submissions on condonation and costs.

B. THE PROPER APPROACH TO THE APPLICATION

5. The remedial action which the DA purports to enforce against the President reads as follows:-

> *"The President must:-*
> *11.1.1 Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures 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 chicken run, the swimming pool.*
> *11.1.2 Pay a reasonable percentage of the cost of the measures as determined with the assistance of National Treasury, also considering the DPW apportionment document.*
> *11.1.3 Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused.*

11.1.4 Report to the National Assembly on his comments and actions on this report within 14 days."[2]

6. The declarator which the DA seeks is contingent upon a finding that the President has actually failed to implement the PP's remedial action. Of necessity, this invokes a proper analysis of the precise terms of the PP's remedial action and a factual enquiry into the measures adopted by the President to implement it. We note that the directory relief need not be considered if the President's submission on these issues are accepted.

7. The President's answering affidavit sets out in some detail the steps which have been taken by the President in compliance with the remedial action.[3] The DA denies that the remedial action has been complied with. There is accordingly a fundamental factual dispute besetting this application regarding whether or not the President has complied with the remedial action.

8. Factual disagreements in motion proceedings are to be dealt with in accordance with the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4], and

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[2] Vol 2: Annexure "JS 2", Paragraph 10.2 of the PP Report, page 269

[3] Vol 8: Answering Affidavit, para 79 and following.

[4] 1984 (3) SA 623 (A) at 634E-635C.

accepted by this Court,[5] which stipulates that, subject to certain exceptions, a court should rely only on evidence of primary facts given by the deponents for the respondents.

9. Accordingly, the factual complexities and the circumstances surrounding the construction of the Visitors' Centre, the amphitheatre, the cattle kraal, chicken run and the swimming pool ("the *specific items*") and whether any reasonable contribution is called for in the light thereof are to be determined on the version of those who oppose the granting of the relief (the President, the Speaker and the Minister of Police). In their Written Submissions the DA claims surprisingly that "*there are no disputes of fact material to the DA's application*",[6] although the DA does acknowledge that there is a "*factual issue*" regarding whether President Zuma has complied with the remedial action of the Public Protector.

The factual matrix

10. The following facts must be accepted for the purposes of the determination of the issues in this application and whether the President has complied with the remedial action:

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[5] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 53.*Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at para [8].

[6] Para 12.1.

10.1. Following receipt of the PP's Report on 19 March 2014, the President reported to the National Assembly on 2 April 2014 (the fourteenth day) by way of submissions on the security upgrades.[7] The Report indicated that "*for some time government had been concerned by allegations of maladministration and excessive expenditure in relation to [the] security upgrades*". The President reported that he had instructed Ministers in the Security Cluster to launch a full investigation into the needs assessment and analysis, procurement and implementation of the security upgrades at Nkandla, and that a multi-disciplinary Task Team comprising senior government officials with the oversight of the Security Cluster Ministers had produced a report which he was considering (the "*JSCI Report*"). The President further reported that, during December 2013, he had caused a proclamation to be gazetted empowering the Special Investigations Unit ("*SIU")* to enquire into and investigate the security upgrades, and that he had been informed that the SIU Report would be ready shortly. Finally, the President noted his commitment to the Constitution and stated that he would provide a further Report to Parliament on the decisive executive interventions to be taken.

[7] The Report appears as annexure "A" to the Answering Affidavit (Vol 13) and as Annexure "JS 5" in Vol 3

10.2. On 4 June 2014, the President addressed a letter to the PP[8] stating that he had received a provisional report from the SIU and requesting a further period to provide a full and final report to Parliament.

10.3. On 14 August 2014, the President reported to the National Assembly for the second time and this Report was tabled before Parliament on the same day. In his Second Report to Parliament,[9] the President set out his responses to the JSCI Report, the PP Report and the SIU Report. The President appraised and analysed the three reports and concluded that the legislative framework governing the upgrades at Nkandla was "*either deficient in certain respects, wholly ignored or mis-applied*". The President directed that the following should occur:

10.3.1. The Minister of Police (as the implementing Minister under the National Key Points Act) must expedite a review of the legislation in question and report to Cabinet periodically in this regard;

10.3.2. The Minister of Police is to "*report to Cabinet on a determination [as] to whether the President is liable for any contribution in respect of the security upgrades*";

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[8] Vol 13: Annexure "B" to the Answering Affidavit.

[9] Vol 13: Annexure "C" to the Answering Affidavit.

10.3.3. The Minister of DPW is to report to Cabinet on the review of the protocols and procedures regarding procurement, expenditure and oversight applicable to prestige and related projects;

10.3.4. The Ministers comprising the Security Cluster and the Minister of DPW are to report to Cabinet on their clearly defined roles and responsibilities when dealing with the security which attaches to the President and Deputy President and former Presidents and Deputy Presidents; and

10.3.5. Cabinet is to conduct a review of Cabinet Policy 2003, relating to security of the President, Deputy President and former Presidents and Deputy Presidents with a view to setting parameters for expenditure and implementation.

10.4. Finally, the President reported that he had considered and was satisfied that adequate steps were being taken in terms of civil and criminal law, as well as departmental procedures in respect of disciplining those responsible for any irregularities in the project.

10.5. On 19 August 2014 the National Assembly passed a resolution establishing an *ad hoc* Committee to consider the Report, make recommendations where applicable and report to the Assembly by no later than 24 October 2014.

10.6. On 21 August 2014, the President received a letter from the PP stating that her reports "*are by law not subject to any review or second guessing by a Minister and / or Cabinet*" and that "*the findings made and the remedial action taken by the Public Protector can only be judicially reviewed and set aside by a court of law*."[10]

10.7. The President replied on 11 September 2014 and indicated that his understanding was that "*the role of the Public Protector is akin to that of an Ombud and quite distinct from that of a Judge."* As such, reports emanating from the Public Protector "*are not judgments to be followed under pain or a contempt order, but rather, useful tools in assisting democracy in a co-operative manner, sometimes rather forcefully*."[11]

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[10] Vol 13: Annexure "D" to the President's Answering Affidavit.

[11] Vol 13: Annexure "E" to the President's Answering Affidavit.

10.8. The correspondence between the Public Protector and the President was submitted to the Speaker by the President and tabled before the National Assembly on 12 September 2014.

10.9. The *ad hoc* Committee held eight (8) meetings and completed its findings and recommendations on 30 October 2014. The *ad hoc* Committee reported to the NA on 11 November 2014 and concluded that it could not make a determination on whether or not the upgrades at Nkandla were related to security and could not rely on the PP's Report in this regard since "*the Public Protector is not a security expert*".

10.10. In respect of the question whether the President or his dependents benefitted unduly as a result of the security upgrades, the Committee recommended that:

> "*the matter of what constituted security and non-security upgrades at the President's private residence be referred back to Cabinet for determination by the relevant security experts in line with the Cabinet Memorandum of 2003. Cabinet should report back to Parliament on the steps taken to give effect to this recommendation.*"

10.11. In line with this recommendation, the Minister of Police established a technical team of qualified security experts to undertake the evaluation of

the security exercise. The Minister of Police presented his report to the *ad hoc* Committee on 21 July 2015. He reported[12] that:

10.11.1. the swimming pool, new kraal, chicken run, culvert, visitors' centre and amphitheatre had been assessed by experts and were found to be security-related features; and

10.11.2. there was no evidence that the President or any of his family members had requested anything to be constructed at Nkandla.

10.12. The Minister of Police's report was tabled before the National Assembly on the same day, and a further *ad hoc* Committee was established to consider the Minister of Police's report.

10.13. The following day (22 July 2015), the *ad hoc* Committee visited the President's residence at Nkandla for an inspection *in loco*.

10.14. The *ad hoc* Committee's findings were essentially that:

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[12] Vol 5: Annexure "JS 15"

10.14.1. there was insufficient value for money in the project and there was gross exaggeration of the scope, scale and costs of the Nkandla upgrades;

10.14.2. much of the work was incomplete;

10.14.3. various department were pursuing civil, criminal and disciplinary steps against various persons responsible for the irregularities; and

10.14.4. there had been compliance with the recommendations of the previous *ad hoc* Committee's recommendations.

10.15. The findings of the second *ad hoc* Committee were tabled before the National Assembly on 18 August 2015 for adoption and they were adopted.

10.16. The President has answered questions in Parliament concerning the actions that he has taken in response to the PP Report on at least three occasions:

10.16.1. On 21 August 2014 in response to a question from Mr Malema of the EFF, the President indicated that he had "*responded to all the*

reports, as [he was] supposed to" and that the determination of what should be paid was being made by people who are "*legally authorised to make that determination*".

10.16.2. On 11 March 2015, in response to a further question from Mr Malema, the President indicated that he has the greatest respect for the office of the PP but that he did not view the PP Report as equivalent to a money judgment.[13]

10.16.3. On 6 August 2015, the President again stated that he had complied with the remedial action by mandating the Minister of Police to make the determination and referring the matter to Parliament to determine the process moving forward.[14]

11. The DA has elected to nail its colours to the EFF's mast and proceed before this Court well aware of the risk that oral evidence to resolve factual disputes is the province of the Superior Courts. In this instance it can have no quarrel with its challenge being determined on the President's version of fact.[15] The President's

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[13] Vol 13: Answering Affidavit, Annexure "K".

[14] Vol 13: Annexure "L".

[15] See Davis J in *Ripoll-Dausa v Middleton NO* 2005 3 SA 141 (C) at 152-153, in a passage that was endorsed by the SCA in *Wightman t/a JW Construction v Headfour (Pty)* Ltd 2008 (3) SA 371 (SCA).

version is separately and independently verified by the evidence of the Speaker and the Minister of Police.

12. It is also significant to note that the outcomes of the measures adopted at the various levels of government have not been challenged by the DA or the EFF through the mechanism of judicial review as a premise to this application from the outset. In particular, the Report of the Minister of Police, pursuant to an extensive investigation initiated by the President, which established certain facts and circumstances surrounding the specific items, has not been challenged by the DA and, for the purposes of this application, the findings in the Report by the Minister of Police (including the finding that the specific items were related to security) must be accepted as valid.

13. The relief sought by the DA is declaratory and directory in nature only. To the extent that the DA belatedly (in its replying affidavit and to a certain extent in its Written Submissions) attempts to reformulate the application to conform with judicial review, this is without merit and should be rejected. In reply, the DA contends that the application constitutes "*a review challenging the lawfulness and constitutionality of the conduct of President Zuma, Parliament and the Minister. It is, in essence, an indirect challenge to their failure to comply with constitutional*

obligations. The EFF, on the other hand, has pleaded the failure by President Zuma and Parliament to comply with its constitutional obligations directly."[16]

14. This, in and of itself, must be seen as a concession of the convoluted manner in which the DA seeks to found a case for direct access where there is none and then too under the guise of a review, when such an enquiry is unprecedented in this Court. No review application has been brought under the rules of this Court or set out in the DA's Founding Papers. If a review is to be brought, it must be brought in the High Court as first instance and to the extent that the DA wishes to persist in its declaratory application before this Court, it is limited to the relief it sought in its founding papers, [17] and the application must be determined on the facts which have been pleaded by the Respondents.

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[16] Vol 12: Reply dated 13 November 2015: para 33.

[17] In *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H-636B, the Appellate Division held: "*When . . . proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas* 1924 WLD 67 *at 68 and as has been said in many other cases:'. . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'. Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit' (per Van Winsen J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 *(C) at 260)."*

In *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 114, this Court held as follows: *"Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."*

C. DIRECT ACCESS

15. The DA conditionally seeks direct access to this Court on the basis that if the EFF is granted direct access in CCT 143/15 then the DA too should enjoy that privilege. The President opposes this application for direct access on the same grounds that he opposes the EFF's application and for the reasons set out in the President's Written Submissions in the EFF application: not only is it inappropriate and not in the interests of justice for this Court to be seized with this matter directly (particularly when the same matter was launched correctly by the DA in the High Court, where it remains pending), it is also unwelcome because it constitutes an effort to manipulate the judicial system for the purposes of political expediency and violates the doctrine of separation of powers.

16. As set out above, a further fundamental problem besetting the DA's conditional application for direct access pertains to the factual complexities intrinsic to the method of implementation of the remedial action intended to determine the security nature of the upgrades, including specific items cited by the PP and whether any reasonable contribution is called for in the light thereof.

17. The Minister of Police, pursuant to an extensive investigation, has established certain facts and circumstances surrounding these items and he has reported to

Cabinet thereon in accordance with his mandate. Unless the DA accepts those facts (it did not at the outset or does not even now properly bring an application to review the Minister's decision or set aside his report or to review the President's decision to accord him this mandate), its application will provoke and engage a fundamental factual dispute on those security upgrades. Such factual disputes are to be dealt with in courts of first instance directed at the resolution of disputes of fact – if necessary, by oral evidence in the form of testimony from witnesses capable of giving primary evidence, and (where administrative action is engaged) by the production of a Rule 53 record. None of these pre-conditions have been met in this (conditional) application for direct access.

18. If this application is not dismissed for these reasons alone, then the DA must live with the consequences of its election to approach this Court directly despite its pending litigation in the Western Cape High Court. That consequence is that any disputes of fact arising in this application must be decided in the President's favour.

19. The application for direct access, conditional as it is, should in the circumstances be dismissed with costs, including the costs of two counsel.

D. EXCLUSIVE JURISDICTION

20. Like the EFF, the DA seeks, as an alternative to its conditional direct access approach, to approach this Court directly by way of section 167(4)(e) of the Constitution which confers exclusive jurisdiction on this Court to decide whether the President or Parliament has failed to fulfil a constitutional obligation. For the reasons set out in the President's Written Submissions in the EFF application, this approach too should be dismissed because neither the EFF (upon whose application the DA has latched) nor the DA has identified a "*constitutional obligation*" which the President has failed to fulfil.

21. While the relief sought by the DA is more comprehensive than that which the EFF seeks, it too is premised on perceptions and conclusions of unlawfulness and constitutional invalidity drawn from the same Report of the PP in relation to Nkandla. The DA presupposes a constitutional failure to implement the PP's remedial action (together with directory relief); alternatively, it contends for a failure by the President to report to the NA pursuant to the PP Report and to engage rationally with the PP's findings and remedial action (again, together with further directions on how the President and the PP should conduct their functions).

22. The word "*obligation*" in section 167(4)(e) of the Constitution is given a narrow meaning so as to prevent conflict between these sections and section 172.[18] Neither section 55(2) nor section 181 of the Constitution imposes a particular obligation on the NA or on the President to perform a specified act[19] and neither section justifies a direct approach to this Court.[20]

23. Accordingly, the DA's conditional application for direct access on the alternative ground of this Court's exclusive jurisdiction is fatally flawed. It is flawed not only because it is based on the legally deficient EFF application but also because the DA's own underlying application, which is patently intended to provoke a debate over the PP's powers whilst undermining the President's implementation of the remedial action, is factually unsustainable. This leads us to our next head of argument – that these proceedings are motivated solely by political expediency.

E. POLITICAL EXPEDIENCY

24. The DA seeks drastic orders of invalidity and directions to the highest office of the land without the benefit of a proper determination on the evidence and on a

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[18] *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 36. See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

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

[20] See for example *Women's Legal Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) at paras 24-25.

contention that certain measures adopted by the NA are invalid and unconstitutional and do not conform with what the PP anticipated. Not only are those demands an unconstitutional fetter on the legislative assembly and the President, they constitute a significant violation of the separation of powers doctrine, not to mention a failure properly to challenge extant decisions taken by government.

25. Quite simply, the President has explained on numerous occasions both before the NA and this Court, that he implemented the remedial action in the PP Report and he remains committed to complying with any fair and rational processes that have as their objective the implementation of the PP's remedial action. The DA's and the EFF's failure to appreciate these nuances and to consider the content of the PP Report contextually is at their peril. It renders their applications improper.

26. Our courts have repeatedly deprecated efforts to use the courts to achieve that which parties could not achieve politically in other branches of government. This Court in *Mazibuko N.O. v Sisulu and Others N.N.O*[21] stated:

> "*Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution. A*

[21] 2013 (6) SA 249 (CC) at [83].

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

27. A further indication that this application is a political ploy is that both the DA and EFF have "jumped the gun". The DA application is premature not only because it purports to coincide with the EFF application which was launched before the parliamentary process to which the PP herself had deferred[22] was complete, it is also premature because it fails to consider that the President may only properly engage with the PP on her Report once he considers all the measures undertaken by government to give effect to the remedial action. In other words, to the extent that the PP requires the President to "*take steps*" to make a determination on "*security related*" upgrades in terms of paragraph 11.1 of the remedial action, it could only be upon completion of the steps so taken and considered in their entirety by the President that any further meaningful and rational engagement between the PP and the President may occur.

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[22] Vol 3: Annexure "JS9" to the founding affidavit.

28. In this context, the PP's contention which is adopted by the DA[23] – that the President has failed to implement the remedial action and has failed to engage with the PP on her Report – was and is wrong and premature.

29. For these reasons the President respectfully objects to the EFF's and now the DA's (conditional) efforts to enlist this Court's assistance to ventilate questions framed for first and final determination by the highest Court of the land. The EFF and the DA have done so not only prematurely but also politically, at a time when other constitutional institutions were involved in discharging their duties. In the case of the EFF, the application was launched when those institutions had yet to complete their work and in the case of the DA Parliament had completed its work on the same day the DA instituted this application. It follows as a matter of logic and rationality that the President must engage with the outcome of those processes in order to complete the remedial action. The right of recourse to court, and to this Court in particular, prior to him doing so is prematurely invoked.

30. We submit on this basis too that this Court should reject the DA application with costs.

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[23] *Inter alia* at paragraph 88 of the founding affidavit, Vol 1

F. THE INTERESTS OF JUSTICE

31. Not only should this application have remained in the High Court as the court of first instance but even then it should have been directed at judicial review in accordance with the rules of that court against:-

31.1. the Minister of Police's allegedly '*unconstitutional*' conclusion that the measures in question are not related to security, if indeed the DA truly wishes to challenge this decision; and/or

31.2. the adoption of the Minister of Police's report by the *ad hoc* committee and subsequently the NA.

32. Accordingly, we submit that it is not in the interests of justice for this matter to be accepted by this Court, or if direct access is granted, then the application should be dismissed with costs. Our arguments regarding why it is improper for this Court to be expected to act as a court of first and final instance on the questions raised by the EFF and the DA regarding compliance with the PP Report when that very issue should rightfully serve before the Western Cape High Court through the DA's application, apply equally when considering the interests of justice.

33. Importantly too, the issues raised by both applicants have been debated through avenues within the remit of the Executive and Parliament, and the EFF and DA applications are but an effort to leapfrog those actions into the judicial branch of government – and directly to the Constitutional Court no less. It cannot be in the interests of justice to entertain such an abuse of judicial and legislative process, given the refusal of our courts to be exploited in order to achieve that which is politically expedient.

34. All of the aforegoing preliminary matters weigh heavily against the DA in these proceedings. The application for direct access alternatively under exclusive jurisdiction must be dismissed with costs, including the costs of two counsel.

G. THE NATURE OF THE PP'S POWERS AND THE REMEDIAL ACTION INDICATED

35. Section 182 of the Constitution sets out the PP's powers and functions. It provides:-

> "*(1) The Public Protector has the power, as regulated by national legislation –*
> *(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*

(b) to report on that conduct; and
(c) to take appropriate remedial action.
(2) The Public Protector has the additional powers and functions prescribed by national legislation.
(3) The Public Protector may not investigate court decisions;
(4) The Public Protector must be accessible to all persons and communities,
(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

36. The nature and functions of the PP were dealt with in the *First Certification* judgment[24] where this Court confirmed that the PP "*is an office modelled on the institution of the ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice*."

37. In the *Certification* judgment, this Court acknowledged that the historical roots of the office of ombudsman are considerable. The first such office was established in 1809 in Sweden and since the Second World War, the institution has been adopted in a wide variety of democracies: in Denmark in 1953, in Norway and New Zealand in 1962 and in the United Kingdom in 1967 (where the institution is known as the Parliamentary Commissioner for Administration).[25]

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[24] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 161.

[25] *Certification of the Constitution of the Republic of South Africa* supra, footnote 120.

38. As a rule, ombudsmen's recommendations are not legally binding and there are good reasons why this is so.[26] Such recommendations are always designed to remedy the particular injustice which has been referred to the ombud, but may also include wider improvements to the administrative scheme in general which may have wide-ranging implications which might be outside the knowledge and responsibility of the ombud. (The recommendations of the Public Protector are a good case in point). There will often be legitimate scope for disagreement about what, if any, steps are required as most appropriate to remedy a particular injustice and there may be a number of options, with various effects on the use of scarce resources. Since it is government which is accountable the electorate for the use of public money, government is entitled to consider the wider impact of the ombud's recommendation and to determine whether it would have an adverse effect on government as a whole. Furthermore, it is recognised that ombudsmen are not courts and their "recommendations" are not binding orders. Indeed, in Sweden, the Ombud is empowered to institute legal proceedings in order to enforce his or her findings.[27]

39. The Constitution confers "*investigatory*" powers on the PP. So too the Public Protector Act 23 of 1994 describes the PP's powers as "*investigative*", and

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[26] *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin); Q v Basildon Dist Counc [2006] EWHC 1892 (Admin); and Bradley v Work and Pensions Secretary [2008] EWCA Civ 36.

[27] 'Public Protector' by Michael Bishop and Stuart Woolman, in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 6, 2014), at 24A-2.

empowers the PP in section 6(4)(b) to "*endeavour in his or her sole discretion, to resolve any dispute or rectify any act or omission by-*

(i) "mediation, conciliation or negotiation;

(ii) advising, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances."

40. The PP may also, at a time prior to, during or after an investigation "*make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority*".[28] Moreover, the principles of cooperative government which bind the PP in her engagement with other spheres of government, including the President, also suggest that the PP's decisions may not be finally and legally binding without more.

The context-driven approach to the meaning of "remedial action"

41. Under section 182(1)(c) of the Constitution, the Public Protector is empowered to "*take remedial action*". Presently there is a debate before our courts regarding

[28] Section 6(4)(c)(ii) – our emphasis.

the nature of powers and functions of the PP, and whether those powers are anything other than investigative. Undoubtedly this issue will pertinently be before the Constitutional Court for final determination in the near future, as is evident in the matter concerning the *SABC*.[29] An appeal in that matter was submitted to this Court on 13 October 2015.

42. The President has made it clear that the current matter is not the appropriate case to determine the legal status of the PP's remedial action – certainly not as a court of first and final instance and in circumstances where there are disputed facts underpinning the application. The President has also made it clear that it is not necessary to decide this question because on a correct analysis of the facts, he has in any event complied with the remedial action, and remains committed to do so.

43. However, to the extent that this Court wishes to hear submissions on the nature of the PP's powers, the President will submit that the effect of the remedial action is context-dependent and the enforceability or otherwise of the PP's remedial action will depend to a large extent on the language used by the PP: in certain instances the remedial action might require immediate compliance, whereas in other cases (such as the present matter, and as is consistent with the investigative nature of

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[29] *The South African Broadcasting Corporation Soc Ltd and Others v The Democratic Alliance* SCA Case No. 393/2015.

the PP's office) the PP's remedial action may contemplate the referral of the issue to a further body for investigation and be incapable of immediate enforcement. Remedial action in terms of section 182(1)(c) of the Constitution could reasonably include the PP approaching a court for appropriate relief or (as in this case) referring a matter to appropriate authorities such as the police, a Minister or the National Assembly for appropriate investigative action.

44. The "*remedial action*" of the PP which forms the subject of the application is not, on its own terms, enforceable as if it were a judgment by a court of law in the terms the DA clothes it in. Having found that there were irregularities in the upgrades to Nkandla the PP had various choices: she could have consulted with a security expert in order to determine which of the upgrades were not reasonably related to security, and then with a costing expert to determine what a reasonable percentage of the reasonable cost of those measures were and come up with a final figure for payment. She did not do this. Instead, her remedial action requires the President to undertake the analysis and costing exercise, in order to come up with a "*reasonable*" percentage of the "*reasonable*" cost of the non-security items. The PP obviously recognised that the President (like herself) is neither a security expert nor a costing expert nor a Judge in his own cause. For this reason, the PP indicated that the President was to "*take steps*" to determine the appropriate

figure "*with the assistance of the National Treasury and the SAPS*" of non-security features.

45. As such, the PP Report is not the final word on the subject of what (if anything) must be paid. The wording used by the PP in her remedial action indicates that further action must be taken before any enforceable rights arise therefrom.

46. This is not to say that the findings of the PP do not have legal consequences. Our courts have recognised that "*a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays '… the necessary foundation for a possible decision… which may have grave results*."[30] Nor can the PP's remedial action be ignored. This is because of the constitutional obligation on organs of state to assist and protect the PP, and to ensure *inter alia* the effectiveness of the institution of that office.[31] Organs of state may not interfere with the functioning of the PP[32] and they have an obligation under section 41 of the Constitution to deal with the PP's findings of fact and recommended remedial action *bona fide* and seriously. The President has done so and has complied with the remedial action.

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[30] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) para 17 quoting dictum of Schreiner J in *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A) at 189A-B.

[31] Section 181(5) of the Constitution.

[32] Section 181(3) and (4) of the Constitution.

47. To the extent that the DA (and the EFF) contend that the PP's powers are of an administrative kind, then they too must accept – as this Court has confirmed – that when it come to the administrative action inquiry, a great deal depends on the particular factual context of the case.[33] This Court's reasoning in *Viking Pony* – with respect – is particularly illuminating as regards the nature of the PP's remedial action: [34]

> "*Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.*
>
> *If the City were about to pronounce on the culpability or otherwise of Viking, Hidro-Tech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City. This case has not, however, reached that stage yet*."

48. And in *Corpclo*,[35] the Supreme Court of Appeal made it clear that the decision by the Registrar of Banks to investigate the appellants' business and institute proceedings against the appellants for an interdict were not administrative actions

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[33] See *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) at para 37.

[34] At para 37 (emphasis added)

[35] *Corpclo 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA) at para 26.

for the purposes of PAJA as they did not (as required by the definition of 'administrative action' in s 1 of PAJA) adversely affect the rights of the appellants or have a direct, external legal effect or have that capacity. Relying on *Viking Pony*, the SCA again confirmed that: "*A decision to investigate and the process of investigation, which exclude a determination of culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external legal effect.*"[36]

49. In determining the question of the nature and effect of decisions taken by functionaries (including the PP), context is everything. The question cannot be determined in the abstract, and regard must be had to the specific facts of the case.[37] The need for a proper analysis of the facts is another reason why we submit it is inappropriate for the DA to attempt to approach this Court directly, without the benefit of a proper factual analysis by the High Court.

50. In this matter, the DA seeks to "jump the gun". It conflates the PP's power to recommend remedial action with an order which has the force of law as a money judgment, and it presupposes that the very terms of the PP's remedial action

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[36] *Corpclo 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA) at para 26.

[37] See too *Minister of Education for the Western Cape v Beauvallon Secondary School* (2015) 2 SA 154 (SCA) at para 12 where Leach JA held: "*There is no simple litmus test to determine whether a decision by a public official is administrative or executive in nature, and in order to determine the issue a close analysis needs to be undertaken of the nature of the public power or function in question[5] in the light of the facts of each case*."

expressly exclude the exercises directed by the President. The DA's position further obfuscates any consideration of whether the security exercise directed by the PP necessarily and fairly implicates questions about the extent to which aspects of the specific items are reasonably related to security, and assuming not, what a reasonable contribution would be that the President ought personally to be held accountable for.

51. Even if it were subsequently found (in light of the SCA's decision in *SABC)* that the terms of the mandate given by the President to the Minister of Police did not strictly comply with the terms of the remedial action, that too would not assist the DA because:-

51.1. any such inconsistency would properly constitute grounds for judicial review where the proper exchange of pleadings could occur, the Rule 53 record could be filed, and evidence led, and not declaratory relief sought directly and defectively from this court;

51.2. the DA has failed to launch an application for review of the decisions taken by the President, the Minister of Police or the DPW, all of which must be taken to be lawful exercises of public power; [38]

51.3. until the SCA's decision in *SABC* that the PP's remedial action is not permissive of parallel processes (intended to subvert the remedy *per se*), the President's interpretation of what he was required to do, did not commence from a point of constitutional invalidity. The President's understanding that he was not barred from mandating the Minister through the legislative process to investigate the matter further could not have been wrong. Further, and in any event, the terms of the remedial action in fact required – as a rational response by the President – that he appoint the Minister because the PP directed that the SAPS should be involved in giving effect to her remedial action.

51.4. The response of the President was not a parallel process in the sense which the SCA disapproved of. Such a complaint may have been justified if the PP had found that the President as an individual had to pay Rand x amount to the DPW to remedy and offset any personal enrichment by the Nkandla ugprades (though that would have raised its own issues at the

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[38] *Oudekraal Estates (Pty) Ltd. v City of Cape Town and Others* 2010 (1) SA 333 (SCA) at para 26; *Member of the Executive Council for Health, Province of the Eastern Cape NO v Kirland Investments* (Pty) Ltd 2014 (3) SA 481 (CC).

individual, rather than official level). Even such a finding does not, in any event, mean that any enquiry into the same subject matter as a PP enquiry is unlawful or improper – that ignores the *"and"* to *"trump"* qualification. Indeed, even as a precursor to a review, such an enquiry may be perfectly permissible. The Public Protector Act clearly envisages similar enquiries co-existing.[39] What the President did, fitted with what the PP saw fit to direct.

52. The fact that the PP has recommended remedial action following her findings and that the President implemented measures to give effect thereto with which the DA disagrees does not mean that the President failed to give effect to the findings of the PP.[40]

53. The position adopted by the DA is therefore devised to prevent any consideration of whether the security exercise necessarily and fairly involves an investigation into the extent to which aspects of the specific items are reasonably related to security, and assuming not, what a reasonable contribution would be that the President ought personally to be held accountable for. It also ignores the clear

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[39] See section 8(2A) (C).

[40] Vol 1: Founding affidavit: page 45, para 109.

wording of the PP's remedial action, which does not support an immediately enforceable order. It is this point to which we now turn.

The remedial action in the PP Report

54. The DA's application is premised on findings by the PP that:

54.1. certain legal processes were breached in the installation and implementation of security measures and the erection of structures at the President's property;[41] and

54.2. there was improper conduct by the relevant authorities in respect of the procurement of goods relating to the project and certain prescripts were violated.[42]

55. Nothing in the PP Report implicates the President or his office in this misconduct. Since no misconduct was attributed to the President, the issue thus turns solely to the enhancement in value of his property pursuant to the surrounding improvements in which he had no involvement.

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[41] Vol 2: Paragraph 10.1 of the PP Report, page 262.

[42] Vol 2: Paragraph 10.2 pages 262 -263

56. On a plain reading, the remedial action in the PP's Report is incapable of immediate implementation and enforcement as a binding order suggestive of money being paid in respect of alleged non-security related items as suggested by the DA. In fact, the implementation of the remedial action is, at the very least, dependent on:

56.1. a determination of which upgrades, if any, at Nkandla do not relate to security;

56.2. a determination of the reasonable cost of any upgrades which do not relate to security; and

56.3. a determination of a reasonable proportion thereof.

57. We have contended that inasmuch as the DA and other parties with political interests may disagree with the method of implementing the PP remedial action, that ought properly to constitute grounds for judicial review of each element of that with which those parties disagree, including possibly the content of the remedial action itself. Any such judicial review would have to engage properly (in a court of first instance) with the nature and effect of the PP's powers in the context of this matter and with due regard to the PP Report in question and then too upon

thorough examination of the role played by Parliament and the Executive at every level of the process of giving effect to the remedial action.

58. None of that has occurred in this case. Instead, this Court has been approached as the first and final arbiter of these issues. This is, as we have argued, procedurally and substantively wrong in law – and in any event all factual disputes (and there are many) ought to be resolved in favour of the Respondents.

59. On the Respondents' version, and with regard to the PP Report in issue in this application, the President has complied with and remains committed to complying with its requirements in accordance with the terms of the remedial action upon a proper consideration of the legal effect of the PP Report in the context of this case and upon careful consideration of the wording contained therein. On this basis, the "*failure*" the DA has contended for is simply wrong in fact and in law.

<u>There has in fact been compliance with the PP's remedial action</u>

60. We have set out above the actions which the President took to comply with the remedial action and repeat our submission that these actions constitute compliance with the remedial action proposed in the PP's Report. We say so for the following reasons:

61. The remedial action directed at the President is couched in broad terms, self-evidently with the intention of fashioning a reasonable and fair mechanism to determine what amount, if any, the President ought to pay for those aspects of the upgrades that resulted in an enhancement in the value of his private property.

62. Great power requires careful responsibility in the exercise thereof. If the PP has the considerable powers attributed to that office and the PP's determination has the potential to bind whichever branch of government it touches save for review, there is then a constitutional duty to frame such determinations very clearly and definitively.

63. In this instance, the PP also could not be but aware that the President himself would not concentrate and focus on the entire Report and all supporting documents, but on her determination. The PP could also not be but fully aware that the determination dealt with controversial issues which the PP proclaimed the right to fully investigate and deal with.

64. The PP also gave a 14 day deadline for compliance with her determinations and she insisted on that being observed. It could hardly be expected that given the extent and duration of her investigation and the breadth of her Report, that she demanded a review to be instituted within two weeks.

65. The common sense interpretation of her determination is that she dictated an open ended process to determine the security implications of the upgrade and depending on that outcome, a determination of what a reasonable contribution by the President as an individual, to reasonable costs of the non-security related upgrades, should be.

66. If the PP intended her determination to mean what the DA contends for, it is quite incomprehensible why she did not say that. After all, it was not difficult to clearly and precisely articulate in words that meaning. In particular, why would the PP then not indicate the specific other officials to quantify the President's liability and so exclude the Ministers and anyone else? Moreover, such task would by its nature exclude determination by the Ministers of Police and Finance as the apex decision makers in SAPS and Treasury. After all, the PP considered it appropriate to task the President himself with finally determining liability. The Ministers as the persons accountable to the National Assembly would be the natural decision makers, rather than some official in such Department of the President's unfettered choice.

67. The PP was, on the DA's and EFF's versions and constructions, at liberty to bind any State official to quantify liability if she meant that. She did not do so. In the absence thereof, her determination could not be construed to mean what it did not

say and very easily could have said if that was indeed what was meant to be conveyed.

68. The PP's requirement of the involvement of the SAPS can only be because security issues are naturally to be determined by that branch of government. Moreover, the PP's involvement of the SAPS and Treasury could hardly have been on the basis that the security and costs aspects of the Nkandla upgrades were not to be considered. Her determination required reasonable determination by the branches of government. Especially as the President could hardly act as a judge in his own affairs, a reasonable determination of the costs and proportion, if any, the President must contribute, clearly implies that the said branches of government should fully investigate and report on their input. It also requires that an investigation of the security features of the upgrades precede a costs and reasonable portion advisement.

69. Section 181 of the Constitution bestows, on the PP, the power to take <u>appropriate</u> remedial action. It would be inappropriate to determine that the President must decide solely on his own, on his liability and the extent thereof. It would equally not be fitting to demand advisement by SAPS and Treasury without any investigation as to what would be a reasonable advisement to the President.

70. The DA's constitutional *"review"* / challenge is premised on disappointment as to the outcome of the remedial action the PP enjoined. The challenge is not directed at any negation or disregard of the remedial action as such.

71. The remedial action the PP determined is entirely different from the remedial action the PP took in the *SABC* case for instance[43] in which the PP definitively prescribed certain measures in order to reverse the harm suffered. (We refer to para 51 above as well). The SCA noted in *SABC*:-

> "*Once the PP establishes State misconduct … she has the vast array of measures available to her in the Constitution and the* [Public Protector] *Act*."[44]

72. In the present case, having found no misconduct or maladministration on the part of the President in the Nkandla project other than that he ought to have raised certain questions but did not, the only matter which the PP concerned herself with in relation to him was the means by which to remedy any consequent enhancement in value of his personal estate.

73. The DA's perception of the various investigatory and enforcement measures undertaken by government as parallel processes intended to undermine the PP

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[43] *SABC supra* at para 8 sets out the detail of the remedial action.

[44] Para 42.

thus misconstrues the ambit and nature of the PP's position in relation to the legislature and the executive. As observed by Navsa and Ponnan JJA, as a Chapter 9 institution, the Office of the PP performs its functions in terms of national legislation, it is not an organ of state within the national sphere of government and accordingly, it should be, and must manifestly be seen to be, outside government.[45]

74. This dictum supports the President's contention that whilst the PP's investigations were unfolding, nothing prevented government from activating its own investigations in order to identify and penalise those responsible for the misconduct in the project – and it was indeed obliged to so act. This is exactly what government is required to do and is doing in the context of the wrongdoing by the contractors and officials involved in the Nkandla upgrade project. We refer again to para 51 above.

75. The fact that the Security Cluster Task Team, the SIU and the JSCI were engaged in separate investigations and disciplinary proceedings which culminated in reports which the President took into consideration alongside the Report of the PP does not therefore, we submit, translate to irrational or unconstitutional conduct. It is a function of the separation of powers between the executive and the PP that

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[45] *SABC*, para 25.

such processes must be initiated and once done, for government to complete their work in order to complement that of the PP. It is equally vital for the Head of State to take heed of all relevant information contained in all the relevant reports so provided to arrive at a proper and informed decision.

76. The aforegoing is also important in demonstrating that the Report of the PP was not ignored. This conforms with the reasoning of the SCA in the *SABC* matter that a person is not entitled simply to ignore the findings, decision or remedial action taken by the PP. In this regard, the SCA stated:-

> "*an individual or body affected by any finding, decision or remedial action taken by the PP is not entitled to embark on a parallel investigation process to that of the PP, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the PP*."[46]

77. As we have demonstrated, no deliberate and opportunistic manipulation by government at its highest levels occurred in this matter as made out by the DA.

78. To the extent that the DA persists with its insinuation that the President manipulated the parliamentary process to arrive at an exculpatory finding in the Minister's report and elsewhere, it is crucial to note that:

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[46] *SABC*, para 53.

78.1. the DA itself engaged in the parliamentary process which it now criticises by participating in *ad hoc* committees established by the NA as a means to implement the remedial action of the PP;

78.2. the DA rejected the parliamentary process only when it failed in its efforts to limit the methodology of addressing the President's report, and when neither the content of the report nor the constitutionality of the parliamentary process was in dispute and in fact the latter was defended by the DA;[47] and

78.3. the DA failed to subject the Minister of Police's report to judicial review, and its belated attempt to characterise the present application as such a review cannot be sustained; and

78.4. the complaints of unconstitutionality levelled at the President, the Speaker and the Minister of Police are unsupported on the facts.

79. In fact, the timing of this application, having been instituted in the High Court on the same day that the *ad hoc* committee completed its work by adopting the

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[47] Vol 6: The Speaker's answering affidavit: paras 45 – 47.

Minister of Police's report, on 18 August 2015, confirms the political expediency with which these proceedings are tainted.

80. In respect of the declaratory relief directed at the President's engagement with the PP, we submit that this too is misguided at a factual level. It is self-evident from the PP Report and in the exchange of correspondence that the President and the PP engaged with each other during the course of her investigations and thereafter. The DA, in its haste to approach, first, the High Court and then this Court by direct access, also fails to grasp that there exists a distinct probability that the President may yet engage with the PP following the conclusion of the work undertaken by Parliament and the adoption of the Minister's report.

81. The President is also at liberty to engage with the PP in light of the compromise which he suggests. That proposal is that should this Court concur with the DA's challenge to the legislative processes undertaken and the outcome of the Minister's report (notwithstanding that these are not review proceedings and that to do so would be unwarranted in light of our submissions), then the determination of the reasonable costs of the security and non-security related features should be undertaken by the Auditor-General and an apex official from the National Treasury. It is submitted that this would be a reasonable and sensible outcome in the event that the DA's challenge is upheld.

82. The engagement portion of the relief sought must accordingly also fail.

H. CONDONATION AND CONCLUSION

Condonation

83. The President was directed to deliver his answering affidavit on or before Friday, 6 November 2015.[48] Unfortunately, due to the complex factual matrix, the important matters of law and the President's international and domestic commitments as head of state, he was unable to comply with that direction and his affidavit was filed on 16 November 2015 together with an application for condonation.[49]

84. The President has expressed his regret at the unavoidable delay and undertook not to raise any technical objections to any delay in the filing of the DA's replying affidavit. The DA has opposed the application for condonation and has sought costs personally from the President.

85. The President takes the legal challenges raised in these papers seriously. He wanted to personally be taken through the papers. There is no real prejudice which the DA can point to. Its reply and argument display little heed for the President's version.

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[48] See the directions dated 22 October 2015.

[49] Vol 11.

86. The President accordingly seeks condonation for the late lodgement of his answering affidavit with no order as to costs. Indeed, such costs cannot be considered in isolation of the spurious challenge the DA raises. If its case was indeed the different review it seeks to assert in reply, there is no reason to even join into the EFF's different challenge.

Conclusion

87. Upon careful analysis of the content of the remedial action that is the subject of this dispute, no act of unconstitutionality or invalidity by the President is shown, which means that the application is ill-conceived. It is further apparent that the DA's and the EFF's interpretation of the remedial action taken in respect of the President is misguided. Both applications are directed solely at political expediency and it is not in the interests of justice for this Court to entertain either application.

88. Apart from their fatal jurisdictional and the procedural flaws both the applications fall woefully short of the substance necessary to implicate the President, the Speaker and the Minister as co-conspirators seeking to undermine the PP. Indeed, as set out above and on the version advanced by the President and which is corroborated separately and independently by the Speaker and the Minister of Police, the President has complied with the remedial action and remains

committed to supporting and protecting the Office of the Public Protector, as he is constitutionally mandated to do.

89. And finally, to the extent that the DA persists in seeking directory relief, this too is vague and in violation of the doctrine of separation of powers.[50] Furthermore, on its own terms the proposed remedy does not achieve the closure contended for in the DA's Written Submissions – if the President is found to have acted unlawfully, how precisely was he to have discharged his executive obligations in terms of the remedial action? The directory relief is accordingly improper and unsustainable.

90. In the circumstances, the application ought to be dismissed with costs, including the costs of two counsel.

Kemp J. Kemp SC
Max du Plessis
Sandhya Mahabeer
Sarah Pudifin-Jones

Chambers, Durban
4 December 2015.

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[50] For instance, does the DA require the President to respond to each and every finding of the PP?; is it anticipated that the President will disregard the reports tabled by different government departments and agencies in this further report to the NA?; in what form should the President be compelled to report bearing in mind the overlapping legislative and parliamentary processes?