IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 143/15

In the matter between:

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

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

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A. **INTRODUCTION**

1. The applicant ("*the EFF*") has approached this Court directly and seeks orders as against the second respondent declaring that the President has failed to fulfil his constitutional obligations by failing to "*implement the findings and remedial action in the Public Protector Report*" and compelling the President "*to give effect and to comply with the remedial action contained in the Public Protector Report, within 30 days of the order of this Court*".[1]

2. The remedial action recommended by the Public Protector ("PP") which is the subject of this dispute and which the EFF seeks to enforce is that the President must:-

    2.1 with the help of the National Treasury and the South African Police Services, determine the reasonable costs of the measures implemented by the Department of Public Works "*that do not relate to security, and which include the visitor's centre, the amphi-theatre, the cattle kraal and the chicken run and the swimming pool*";

    2.2 having determined those reasonable costs, pay a "*reasonable percentage of the cost of the measures*", in other words, the President is to pay a reasonable portion of the reasonable costs;

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1 Notice of Motion, paras 2 and 3.

2.3 reprimand the ministers involved; and

2.4 report on the President's comments and actions within fourteen days thereof to the National Assembly.

3. The EFF claims that the reasonable costs of the visitors centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool have not been determined; the President has not paid a reasonable percentage of these costs; and the President has not reprimanded the ministers involved.[2]

4. The President opposes this application on both procedural and substantive grounds. In essence, the President's opposition is the following:-

4.1 Procedurally, the application is jurisdictionally flawed:-

4.1.1 no litigant enjoys direct access to this Court in the absence of a properly pleaded substantive application therefor. That application has not been brought by the EFF;

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[2] Founding Affidavit, para 31.

4.1.2 the EFF is not entitled to direct access to this Court under section 167(4)(e) of the Constitution because it does not and cannot identify the constitutional obligation which it contends the President has failed to fulfil;

4.1.3 the EFF has failed to join the Minister of Police ("the *Minister*") as a party to the proceedings, notwithstanding his direct and substantial interest in the matter;

4.1.4 the application is premature and is a thinly-veiled attempt to further the EFF's political agenda, without any legal foundation.

4.2 Substantively, the EFF is incorrect in its assessment of what the PP's report requires of the National Assembly and the President and, in any event, the application is flawed in that the President has taken appropriate steps in terms of the report including directing the Minister of Police to compile a report and reporting to the National Assembly as required by the PP's report – and the application is premature inasmuch as the National Assembly has not finalised its processes in response to the PP's report.

5. We also make submissions on the effect of the PP's findings and recommendations on remedial action following her report and here we contend that:-

5.1 the President is empowered and required in implementing and giving effect to the specific terms of the PP's remedial action to consider a number of factors, including questions of what upgrades at his private home are reasonably related to security, the reasonable costs thereof and what a reasonable contribution to any such security upgrades may be. This is a process in which the President is presently engaged;

5.2 the broad terms of the PP's conclusions permit and indeed require the President to undertake a complete assessment of the remedial action required.

6. The framework of these submissions is as follows:-

6.1 under section B we set out our submissions on the proper effect of the remedial action and the President's compliance therewith;

6.2 section C advances submissions on exclusive jurisdiction;

6.3 our submissions on direct access follow in section D;

6.4 the non-joinder of the Minister of Police is dealt with under section E;

6.5 brief submissions on the debate surrounding the nature of the PP's recommendations follow in section F;

6.6 in section G it is contended that the application is premature;

6.7 section H contains submissions on the separation of powers and the President's personal liability;

6.8 the issue of political expediency is addressed in section I;

6.9 in section J it is argued that the interests of justice do not favour the granting of the relief sought; and

6.10 section contains a brief conclusion.

B. **THE REMEDIAL ACTION**

7. This application is premised on findings by the PP that:-

7.1 certain legal processes were breached for the installation and implementation of security measures and the construction of buildings at the President's private residence[3];

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[3] Paragraph 10.1 of the report.

7.2 there was improper conduct by the relevant authorities in respect of the procurement of goods relating to the project and certain prescripts were violated[4].

8. Nothing in the PP's report implicates the President in this misconduct.

9. The EFF's application is limited to the estimation of the reasonable costs of the specific items and what a reasonable proportion thereof would amount to. Those costs have yet to be determined and significantly, the EFF does not contend that they have been. Moreover, the EFF does not assert what a reasonable percentage of the costs would amount to[5].

10. The object of the EFF's application self-evidently is to hold the President personally accountable in circumstances where this is wrong in law and is politically expedient: the application is a frontal effort to circumvent the political processes which the President and the National Assembly have already put into place and to breach the

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4 Paragraph 10.2.

5 The EFF takes no issue with the reprimand or reporting aspects of the remedial action although it disagrees with the nature of the response

separation of powers by asking this Court to intervene where there is no legal basis to do so.

11. No legal basis is advanced in the application to justify the EFF's attempt to approach this court directly, although the EFF's written submissions belatedly attempt to provide some justification therefor, albeit without any mooring in its founding papers. We submit in any event that the factual and legal questions implicated in the EFF's direct application require careful weighing by courts of first instance rather than this Court as the final arbiter of such disputes.

12. On a proper analysis of the remedial action, the PP requires the President prior to any payment to make a <u>determination</u> of:-

    12.1 which costs relate to security and which do not;

    12.2 what the reasonable costs for non-security-related works would amount to;

    12.3 what a reasonable portion of those reasonable costs would amount to, this with the assistance of National Treasury and the Minister of Police.

13. The PP recommended that steps must be taken to determine what the reasonable costs were of all measures which do not relate to security. Her remedial action reads that the President is 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*** *the Visitors' Centre, the amphitheatre, the cattle kraal and chicken run, the swimming pool*" (those items are collectively referred to in these submissions as "*the specific items*")[6]. That part of the remedial action directed the President to investigate the security-relatedness of all Nkandla measures.

14. What the President undertook in his response and report to the National Assembly was in compliance with these steps. The PP set out findings in terms of which the President was required to achieve certain objectives and the intent of the report was to provide feedback on how those objectives would be achieved. That is precisely the exercise the President engaged in.

15. Following the President's report, the focus in the remedial action then shifted towards only the specific items being quantified for a contribution, and this is apparently the premise on which the EFF application now rests. That is a different understanding to

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6 Para 11.1.1 of the report.

the one the President had initially responded to but even that does not render his response an act of unconstitutionality because:-

15.1 a distinction between security-related and non-security related costs is clear from the PP's report and she left this to the President to determine;

15.2 the reasonable costs of the non-security related features are similarly for the President to determine; and

15.3 the reasonable portion of those reasonable costs similarly falls to be determined by the President with the South African Police Services and the National Treasury.

16. The EFF contends that the exercise the PP directed excludes any consideration of whether the specific items were security-related. This is a fundamental misinterpretation of the PP's report, on a plain reading of the report.

17. The PP's report did not say and could not mean that security considerations did not play any role in the provision of the specific items. Nor did it say or could it mean that the President must unquestioningly, as an individual, pay for the specific items. It may be that the exercise reveals that he must pay for some of them because he will

derive a benefit from these and it is in all the circumstances fair and just that he pay a reasonable contribution. That is what the PP's report in its terms indicates and what any reasonable interpretation of its terms must mean. Put differently, on a plain and common sense interpretation of the PP's remedial action, the President has complied or is in the process of complying.

18. The President received several reports on the Nkandla project and he decided that the Minister of Police must investigate these aspects, not least of all because the PP's report included as remedial action that the President should with the assistance of the South African Police Service determine the reasonable cost of the specific items. It would also not have been appropriate for the President to do so on his own, given the admonition against him "*wearing two hats*".[7] This is not constitutionally improper conduct.

19. The President's response, taking into account his constitutional responsibilities and the terms of the PP's report, is that:-

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[7] This reflects the maxim *nemo debet esse judex in propria causa* – no one should be a judge in his own cause. The rule in this maxim is a very settled and fundamental one. No one should give judgment in respect of his own affairs.

19.1 he will comply (and has complied) with the security exercise;

19.2 if unhappy with the outcome, the President would have to say so, in which case he would have to instruct the Minister of Finance to take appropriate civil action for any amounts contested. It is not possible to speculate in advance if that will occur;

19.3 personally and as President, he would validly be aggrieved at an exercise which did not consider all relevant aspects including security considerations and the reasonable contribution, and having considered all those relevant aspects, that he might be expected to make towards the specific items.

20. For these reasons, we submit that it is not appropriate for this Court to be asked to sit as a court of first and final instance in relation to these factual and legal determinations, and certainly not in circumstances where the relevant parties have not had a proper opportunity to engage with the very aspects that are contemplated in the security exercise.

21. We accordingly turn to whether this Court ought to entertain the EFF's application as one of direct or exclusive jurisdiction.

C. **EXCLUSIVE JURISDICTION**

22. The EFF approaches 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.

23. This category of exclusive jurisdiction is, on the face of it, potentially very wide. This Court has, however, emphasised that it should be given a narrow meaning.[8] It has pointed out that if section 167(4)*(e)* were to be interpreted as applying to all questions concerning the constitutional validity of the conduct of the President or Parliament, it would conflict with section 172(2)*(a)* of the Constitution, which provides that the High Court and the SCA may make an order concerning '*the constitutional validity of an Act of Parliament … or any conduct of the President*'[9].

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8 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) at [25]; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 19; *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) para 36; *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 11.

9 Ibid. See also *Doctors for Life* paras 19 and 20 and *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA) paras 12 and 13.

24. In *Doctors for Life*[10] the rationale behind exclusive jurisdiction was explained by this Court in the following terms:-

> *"The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is 'to preserve the comity between the judicial branch of government' and the other branches of government 'by ensuring that only the highest court in constitutional matters intrudes into the domain' of the other branches of government".*

25. In *Women's Legal Centre Trust v President of the Republic of South Africa and Others*[11], Cameron J remarked that the following considerations may indicate that a matter falls within the Court's exclusive jurisdiction:

> *"… the nature of the obligation, whether its content is clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring."*[12]

26. Cameron J added an important prerequisite for section 167(4)*(e)*: the constitutional obligation must be imposed "*specifically and exclusively on the President or*

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10 At 23.

11 2009 (6) SA 94 (CC).

12 Para 15.

Parliament, and on them alone".[13] It does not include, for example, an instance where the President acts as part of the national executive.[14]

27. The right to come to this Court by way of exclusive jurisdiction under section 167(4)(e) does not depend on the mere say so of a litigant that its claim falls within the exclusive jurisdiction of this Court. It must truly in law be a claim that falls within the ambit of the exclusive jurisdiction provision. The applicant must also establish that there was a failure to fulfil the obligation in question.

28. For the EFF to succeed in coming to this Court under exclusive jurisdiction for relief pursuant to the apparent failure by the National Assembly to perform a constitutional obligation, it must show that section 55(2) and/or section 181 impose a particular obligation on the Assembly to perform a specified act.[15] This is so because 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.[16]

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13 Para 20. See also para 23.

14 Ibid.

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

16 *Von Abo* at para 36. See also *Doctors for Life* at para 19.

29. Section 55(2) of the Constitution falls under the heading of section 55, which does not reference any obligation but instead is headed: "*Powers of National Assembly*". Section 55(2) does not detail a particular obligation. And far from referencing a specified act to be performed in pursuance of any obligation, section 55(2) speaks to the National Assembly providing "for mechanisms" – (a) to ensure that all executive organs of state in the national sphere are accountable to it; and (b) to maintain oversight of the exercise of national executive authority, and any organ of state.

30. Section 55 (2) thus does not impose a duty on the National Assembly to perform a specific act or function. It confers power on the Assembly to put in place mechanisms to ensure accountability and oversight. Consequently, even assuming that the Assembly allegedly failed to ensure implementation of the PP's remedial actions, this does not give rise to a claim falling within the exclusive jurisdiction of this Court. Nor did the Assembly fail to implement those findings. It decided to appoint an *ad hoc* committee of the National Assembly to conduct a further investigation into the matters about which the EFF complains.

31. Section 181 similarly is of no assistance. The Notice of Motion references the provision generally. However, by its content and as confirmed by its heading, section 181 is concerned with "*Establishment and Governing Principles*". It does not define a

specific obligation or specify a particular act by which that obligation is to be discharged.

32. The EFF's founding affidavit invokes subsections 181 (3) and (4) – the former stating that "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality dignity and effectiveness of these institutions"; the latter recording that "No person or organ of state may interfere with the functioning of these institutions".

33. Those sections similarly do not impose a duty on the Assembly to perform a specific act or function and nor is any particular duty personalised for the Assembly as regards the reports of the PP. On the contrary, the duty is generalised for all organs of state.

34. As regards the President's ostensible failure to comply with a constitutional obligation, the EFF's notice of motion is silent as to which section of the Constitution imposes that obligation. The EFF thus apparently seeks this Court's exercise of its exclusive

jurisdiction in relation to the President's conduct by reference to his obligations under "section 80(b)" of the Constitution and section 181 of the Constitution[17].

35. For the same reasons as above, section 181 of the Constitution is not a proper basis for exclusive jurisdiction.

36. There is no section 80(b) in the Constitution so this too is unhelpful.

37. The EFF's written submissions for the first time attempt to rely on the President's obligation under section 83(c) of the Constitution as imposing a duty on the President.[18]

38. Aside from the trite rules on pleading – accentuated when approaching this court as one of first and final instance – that an applicant should properly make out its case in its founding papers, this contention too is without foundation. Section 83(c) does not impose an obligation on the President of the category which can justify a direct access application to this Court under section 167(4)(e) of the Constitution. Section

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17 Founding affidavit: paragraph 9.1.2, page 7.

18 EFF's written submissions, paragraph 12.2.

83(c) states: "*The President … promotes the unity of the nation and that which will advance the Republic*".

39. This section states the goals the President should aspire to when conducting the affairs of his Office. Its terms, while hortatory and general, do not impose any specific obligations on the President to perform a specific act or function. Certainly no particular duty is personalised for the President as regards the reports of the PP, and the section does not result in any "obligation" of the sort envisaged by section 167(4).

40. Accordingly, no proper basis has been established for the direct approach to this Court through the exercise of its exclusive jurisdiction under section 167(4)(e).

D. **DIRECT ACCESS**

41. Where applications fall outside the provisions of section 167(4), permission to approach this Court directly is granted in respect of constitutional matters which fall under the jurisdiction of other superior courts as well. In other words, the procedure applies to cases which do not fall under the exclusive jurisdiction of this Court.

42. With its genesis in section 167(6) of the Constitution permission to grant direct access is discretionary and obtainable only if it is in the interests of justice. The section

expressly gives this Court a discretion by requiring that cases of this kind be brought to it with its leave, if it is in the interests of justice to do so.

43. This Court has held on numerous occasions that it will only sit as a court of first instance in exceptional circumstances. In particular, in *Mkontwana v Nelson Mandela Metropolitan Municipality*[19], this Court held:

> *"A useful point at which to start in considering an application for direct access is to recognise the importance of the principle that it is ordinarily not in the interests of justice for this Court to be a Court of first and last instance. The Constitution and the Rules of this Court do, however, provide for this Court to be the Court of first and final instance, but only in exceptional circumstances. The saving of time and costs, the importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court being a Court of first and last instance. Indeed the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another Court."*[20] *(emphasis added)*

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19 *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para 11.

20 See also: *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC) in para 19.

44. A number of principles have been developed regarding the granting of direct access in appropriate cases which have been overlooked by the EFF:

44.1 firstly, since cases for which direct access is sought are matters in respect of which the Constitution confers jurisdiction on other courts as well, a stringent test is laid down for circumventing other courts and denying them the opportunity to exercise a constitutionally ordained jurisdiction.[21] Consistent with this principle, an applicant for direct access is required to show compelling reasons justifying the exercise of the discretion to permit direct access.[22] *Bruce and Another v Fleecytex Johannesburg CC and Others* affirmed the compelling reasons requirement. There this Court said:

> *"Under the 1996 Constitution, High Courts as well as the Supreme Court of Appeal have constitutional jurisdiction including the jurisdiction to make an order concerning the validity of the provisions of an Act of Parliament. Although an order made by such Courts declaring an Act of Parliament to be invalid has no force unless confirmed by this Court, the Court making the order may grant a temporary interdict or other temporary relief pending the decision of this Court. The procedure contemplated by the 1996 Constitution is that such orders of constitutional invalidity will be referred to this Court for confirmation, and that appropriate procedures in such cases will be provided for by national legislation. This Court has held that pending*

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21 *Christian Education South Africa v Minister of Education*1999 (2) SA 83(CC) at para 9

22 *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) paras 7 and 8

the enactment of such legislation it has the competence to give directions as to the procedures to be followed in respect of such referrals. Bearing in mind the jurisdiction of the High Courts and the Supreme Court of Appeal, and the matters referred to in paras [7] and [8] of this judgment, compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a Court of first instance."[23]*;*

44.2 secondly, this Court does not ordinarily sit as a court of first and last instance. It values the views of other courts and appreciates that the process of going through more than one court reduces the risk of mistakes. In *Minister of Police and Others v Premier of the Western Cape and Others*[24] Moseneke DCJ stated this principle as follows:-

"The language of section 167(4)(a) is broad and its ambit is seemingly wide. However, this court has often warned that the category of cases falling under section 167(4) should be narrowly construed. This is because exclusive jurisdiction ousts the jurisdiction of other competent courts – a result that would deviate from the general rule that judicial authority is vested in the courts. Ordinarily, it is preferable for this court to have the benefit of the opinion of other courts before deciding a matter definitively. In this way other competent courts, which are ordinarily more accessible than this Court, would help safeguard constitutional promises and join in shaping our 'budding constitutional' jurisprudence."

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23 *Fleecytex* at para 9

24 2014 (1) SA 1 (CC) at [20].

44.3 thirdly, if the Court sits as a court of first and last instance, the losing party would be denied the right of appeal. In *Fleecytex*, this Court stated:

> *"It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."*[25]

44.4 And in *Women's Legal Centre Trust*[26] Cameron J noted:-

> *"However, the power to grant litigants direct access outside the court's exclusive competence is one which this Court rarely exercises, and with good reason. It is loath to be a court of first and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other court's insights."*

45. Crucially too, the principle of separation of powers forbids the Judiciary from intervening in matters that fall within the domain of Parliament except where the intervention is mandated by the Constitution.[27] This is what our constitutional order requires. Therefore, in exercising their review power the courts should always observe the constitutional bounds within which they are permitted to act. For the

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25 *Fleecytex* at para 8.

26 At para 27.

27 *Doctors for Life* supra at para 37

Constitution is not only supreme but also binds all arms of government. Thus in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[28] this Court said:

> *"In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.*
>
> *It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power."*

46. For the reasons expressed in further detail in the section dealing with the political expediency of the EFF's direct approach to this Court, we respectfully submit that our Constitution contemplates a restrained approach to intervention in such matters by the courts. Such intervention is permissible if it is undertaken to uphold the Constitution because our courts are the ultimate guardians of the Constitution. However, where it is a political ploy and a competent authority (in this case a

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[28] 2012 (4) SA 618 (CC) at paras 92 to 93.

committee of the National Assembly) has already taken steps to correct conduct said to be inconsistent with the Constitution, it is not in the interests of justice for this Court to sit as a court of first and final instance. It is noted in this regard that the EFF seeks what it describes in its notice of motion as final relief.

47. In *Besserglik v Minister of Trade, Industry and Tourism*,[29] this Court held that in applications for direct access one of the relevant considerations will be "*whether an applicant can show that he or she has exhausted all other remedies or procedures that may have been available*." This consideration exists for the obvious reason that if another remedy or procedure is readily available and capable of providing the relief sought, it cannot be in the interests of justice for that procedure to be circumvented and for the Constitutional Court to hear the matter as a court of first instance.[30]

48. Crucial to this matter is that the EFF:-

    48.1 concedes that a parallel process or remedy is currently underway in the National Assembly but which it has chosen not to be part of[31]; and

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29 *Besserglik v Minister of Trade, Industry and Tourism* 1996 (4) SA 331 (CC) para 6.

30 I Currie & J de Waal (eds) *The Bill of Rights Handbook* 5 ed (2005) 134.

31 Founding affidavit: page 20, paragraph 40.1.3.

48.2 challenges the conclusions of the Minister of Police but it has elected not to exhaust the alternate remedy of judicial review of the Minister's report.

49. For the EFF to approach this Court directly in these circumstances is impermissible.

50. For all these reasons we submit that no compelling reasons exist for this Court to grant direct access.

51. In any event, the aspects to be ventilated and decided in the security exercise which is currently underway are best determined through the proper exchange of affidavits (and if necessary oral evidence) by the relevant parties and for determination by the High Court, a point to which we return later in the section addressing the interests of justice.

E. THE ABSENCE OF THE MINISTER OF POLICE

52. The EFF contends for an order compelling the President to implement, without question, the remedial actions proposed by the PP. In so doing, the EFF:-

52.1 ignores the investigative process in which the Minister of Police engaged pursuant to a broad presidential mandate to investigate the President's personal liability for the work undertaken at the Nkandla property; and

52.2 in its pursuit of an order compelling the President to act the EFF relies exclusively upon the PP's report when that document itself contemplates a further investigative process, one in which the Minister of Police engaged.

53. The Minister of Police accordingly retains a direct and substantial interest in the outcome of this matter and he ought to have been joined as a party to the application. That is clear from the fact that the EFF seeks to impugn the Minister's report directly before this Court. The EFF's affidavit makes bold to say:[32]

53.1 "The premise of the Minister's report is flawed";

53.2 "The point in this application relates to the power of the President **and the Minister of Police** to effectively overrule the Public Protector";

53.3 "It is submitted that the entire report by the Minister of Police is unconstitutional…".

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32 At para 39.

54. If allegations of unconstitutionality are to be directed at a Minister, then the Minister concerned ought to be joined. That duty is not lessened by the self-serving statement by the EFF that the "merits or the demerits of this decision by the Minister are not pertinent"[33] (which statement is plainly belied by the averments quoted above).

55. The EFF's failure to join the Minister of Police as a co-respondent renders the application fatally defective. That is all the more so since the EFF effectively seeks to impugn the Minister of Police's findings before this Court but without doing so through the appropriate legal avenue of judicial review. The non-joinder is thus not only fatal; it also serves to confirm the inappropriateness of the EFF's direct approach to this Court.

56. The PP, upon whose report the EFF places exclusive reliance but whom it nonetheless also failed to join in this application, has subsequently intervened as the third respondent.

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[33] Para 39.

F. THE NATURE OF THE PUBLIC PROTECTOR'S RECOMMENDATIONS

57. Section 182 of the Constitution deals with the PP's powers and functions. It provides as follows:

> *"(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."*

58. Presently there is a debate before our courts (as evident in an appeal concerning the head of the *SABC*[34] decided by the Supreme Court of Appeal on 8 October 2015) about the nature of the powers and functions of the PP, and whether those powers are anything other than investigative. Undoubtedly this issue will pertinently be before this Court for final determination at some future date.

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34 *The South African Broadcasting Corporation Soc Limited and Others v The Democratic Alliance* SCA Case No. 393/2015.

59. We contend that this is a debate which this court need not concern itself with in the present dispute because the President has accepted the PP's findings and her recommendations in her report on Nkandla. The President is mindful of the fact that the respondents are constitutionally bound to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness[35] and, as set out in the affidavits, he is giving effect to the remedial action.

60. Even if it were subsequently found (in light of the SCA's very recent decision in *SABC and Others v The Democratic Alliance*) that the terms of the Minister of Police's mandate were not consistent with the terms of the remedial action; that would not assist the EFF in this application:-

60.1 that 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, including by the Minister of Police properly cited) and not declaratory relief sought directly and defectively from this Court; and

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35 Paragraph 46 of the answering affidavit.
Section 181(5) of the Constitution.

60.2 until the SCA's decision in *SABC* that the PP's remedial action does not permit of parallel processes the President's interpretation of what he was required to do did not commence from a point of unconstitutional invalidity in that he believed that he was not barred from mandating the Minister to investigate the matter further (indeed, as indicated earlier, he believed that he was obliged to do so in light of the PP's findings that the SAPS were to be involved as per the terms of the PP's remedial action).

61. Remedial action in terms of section 182(1)(c) of the Constitution could reasonably include approaching a Court for appropriate relief or referring a matter to appropriate authorities such as the police, a Minister, or the National Assembly or others for appropriate action and the broad terms of the remedial action in this matter self-evidently contemplates a referral to the appropriate Minister, in this case the Minister of Police. That is what the President has sought to give effect to.

62. The EFF confuses 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 in regard to the specific items expressly excludes the security exercise directed by the President. The EFF's position further obfuscates any consideration of whether such security exercise 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.

63. Whatever the ultimate outcome in the debate around the PP's powers, the President's position remains that organs of state cannot ignore the findings and remedial action of the PP. This is because of the constitutional obligation on them to assist and protect the PP, and to ensure *inter alia* the effectiveness of the institution of that office.

64. Organs of state may also not interfere with the functioning of the PP[36] and they also 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.

65. These guarantees adequately protect the institution of the PP and ensure that it is not undermined. The PP is entitled to seek the intervention of the National Assembly or that of the courts in appropriate cases to further safeguard the effectiveness of the institution.

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

66. The fact that the PP has recommended remedial action following her finding does not, however, mean that the President "*failed to give effect to the findings of the PP*" as the EFF contends[37].

G. **THE APPLICATION IS PREMATURE**

67. The status of the PP's remedial action and her findings were the subject of the *SABC* appeal to the Supreme Court of Appeal decided on 8 October 2015. It seems probable that the SCA decision will be subjected to an appeal to this Court. For the EFF to approach this court prior to those proceedings being finalised is also for the reasons we advance premature and inappropriate.

68. The EFF contends strongly that the President 'side-stepped' the PP's report by "having a member of Cabinet decide whether or not the President is liable".[38] It says that the "premise of the Minister's report is flawed, following upon a wrong decision by the President"; it contends that the "entire report by the Minister of Police is unconstitutional since it is intended at revisiting findings and conclusions made by the

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37 Founding affidavit: page 14, paragraph 28.

38 Para 37.

Public Protector"; and it argues that neither "the President nor the Minister of Police can review a final report of the Public Protector".[39]

69. This is factually incorrect because of the nature of the security exercise currently in progress and in any event, if the EFF's views about the flawed nature of the Minister's decision do have merit then the remedy obviously would have been for the EFF to seek a review of the Minister's decision in the High Court raising all these arguments pertinently. Not only has the EFF failed to exhaust this available remedy before approaching this Court directly, it has chosen to approach this Court directly without citing the very Minister that the EFF contends acted unconstitutionally, and whose report it seeks to circumvent.

70. The application is wrong on this basis too.

H. THE SEPARATION OF POWERS AND PERSONAL RESPONSIBILITY

71. The present case demands a proper regard to separation of powers in determining the nature and extent of the relief to grant to the EFF. It also demands careful consideration of the appropriateness of seeking to have this Court sit as a court of

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[39] Para 39.

first and final instance in relation to the factual and legal questions raised by the EFF's direct resort to this Court whilst the security exercise is occurring, an exercise which has the potential to hold the President personally accountable (after a proper consideration of the factors mentioned) for repayment on the basis of enrichment.

72. This Court has emphasised the importance of the separation of powers when considering the granting of relief on matters that fall within the domain of other branches of government. In this case the EFF has made it plain that it seeks final declaratory relief and effectively a mandatory interdict stipulating the nature and extent of the President's conduct in giving effect to the PP's remedial action, and under stricture of a 30-day timeline. It thereby impugns directly the existing process that is pending before the National Assembly without allowing it to run its course, and it impugns the report of the Minister of Police without judicially reviewing it and joining him as a party to these proceedings.

73. Nothing in the PP's remedial action suggests (or could in law suggest) that her recommendations exclusively cover the field as to what remedial steps might be taken by either the National Assembly, Cabinet, the Special Investigations Unit or the President in response to a particular issue. On the contrary, the terms of her remedial action rightly require the involvement of other third parties besides the

President (precisely because of the “two-hats” difficulty mentioned earlier). This means that it is permissible for other efforts to be initiated and operate in support of the PP’s recommendation – and indeed for the reasons we have already given it is necessary to do so if the remedial action of the PP is to be rationally and fairly implemented. This is more so because the remedial action contemplates that the President, in his individual capacity, is liable for certain costs.

74. The President’s position in this matter must therefore be correct: to properly comply with the precise terms of the PP’s remedial action requires a consideration of a range of factors, including what measures at the private residence do not relate to security, and what reasonable contribution ought to be made in respect of those measures that are ultimately determined to be reasonably related to security.

75. That is a process that is currently underway and the President has repeatedly in his affidavit confirmed his willingness to be bound by the outcome of this fair and rational process. It would be wholly inappropriate and administratively incorrect for him to be denied that, both as president of the Republic and as an individual.

I. **POLITICAL EXPEDIENCY**

76. Implicit in the relief is that the EFF seeks for the National Assembly to make such decisions as they (the EFF) wish it to make in respect of the Nkandla issue. Having refused to participate in the National Assembly's processes and to review the Minister of Police's report (which stands until set aside), the EFF comes directly to this Court for an audience. For the reasons already submitted, that is not just premature but also politically expedient.

77. The application effectively seeks to predetermine, by court order, what resolutions must serve before the National Assembly and how each member must vote on it. The EFF further seeks an effective finding, without citing the Minister concerned, and without the benefit of a proper determination on the evidence, that the Minister of Police's report is invalid and unconstitutional. Those demands are both an unconstitutional fetter on the legislative assembly and a significant violation of the separation of powers doctrine, not to mention a failure properly to challenge an extant decision by a Minister.

78. The EFF incorrectly interprets the remedial action to mean that the PP has ordered the President to:-

78.1 pay a reasonable portion of the reasonable costs of the Nkandla upgrade in respect of the specific items and of such other upgrades which did not relate to security, when no amount has yet been determined, and when the President has initiated processes to determine those amounts – which processes have yet to be completed;

78.2 to reprimand the ministers involved in the appalling mismanagement of the Nkandla project;

78.3 to report to the National Assembly on the Speaker's comments and actions on the PP's report, within 14 days of 19 March 2014.

79. This interpretation is wrong on the plain reading of the PP's report and incompetent in law.

80. The President reported to the National Assembly by 2 April 2014. The fact that he queried some of the findings in the PP's report and that the Speaker undertook to further report on those aspects were self-evidently features of the response which did not suit the EFF, but are in no way inconsistent with the President's obligations arising from the PP's remedial action.

81. Furthermore, nothing in law or on proper interpretation of the remedial action obliges the President to accept the PP's report as if it constitutes a money judgment – and with no appeal mechanism against such judgment. We reiterate that the PP's report states that her conclusion is that the reasonable costs of non-security upgrades must be determined, and that the President as individual must pay to the State a reasonable percentage thereafter.

82. The PP's report simply does not say what the EFF wishes it to say and nor are the President's reactions discordant with its meaning. Likewise the accusation of unconstitutional conduct by the National Assembly finds its basis in the EFF's political agenda and not in fact or in law.

83. The PP's conclusion is that the President, as an individual, must pay a reasonable portion of the non-security upgrades. The contention that an individual must comply with such conclusion as if it comprises a judgment of a court of law, unless he or she specifically reviews it, is quite extraordinary and we submit, with respect, that such a conclusion could not have been intended in Chapter 9 of the Constitution.

84. In the circumstances, the President has, quite correctly, indicated his willingness to make a reasonable contribution to any upgrades which are found not to be security-

related and which will benefit his estate unduly. This, and nothing more, is precisely what the report requires.

85. The President's undertaking to reprimand the Ministers involved upon a proper investigation and with a fair hearing is further not only proper but administratively correct[40].

86. For all these reasons the EFF's effort to enlist this Court's assistance in hearing the questions it has framed for first and final determination by the highest judicial officers in this land is wrong. The EFF has done so not only prematurely, but also politically at a time when other constitutional institutions are presently dealing with the subject matter and the Minister of Police's decision on the topic has been blatantly side-stepped by an approach directly to this Court.

87. Our courts have increasingly deprecated efforts such as those by the EFF in this matter to use the judiciary to achieve that which they could not achieve politically in other branches of government. This Court in *Mazibuko N.O. v Sisulu and Others* stated:-

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[40] Answering affidavit: page 34, paragraph 82.

> *"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 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 and/or political disputes 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'."*[41]

88. The application should not be entertained on the ground of political expediency to avoid this Court being drawn into what is blatantly a dispute which should be resolved with proper respect for the separation of powers (inasmuch as other bodies within the government are already engaged) and the discipline of judicial review (inasmuch as the EFF suggests that the decisions of those bodies are unconstitutional).

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41 At paragraph 83.

J. THE INTERESTS OF JUSTICE DO NOT FAVOUR THE GRANTING OF THE RELIEF SOUGHT

89. We have already submitted that not only should this application not have been brought in this Court as the court of first instance, but it should, if anything, also have been preceded by a judicial review of the Minister of Police's purportedly 'unconstitutional' decision.

90. The PP's remedial action in ordering or instructing the President to decide on a reasonable portion of the reasonable costs of the specific items for him to pay back to the State was not meant as an order by the PP, nor should the President personally determine what, if any, to pay, lest he be accused of being 'judge and jury' in his own cause. It is prudent therefore for the President to be removed as the actual decision-maker from that process of determining any amount payable. That is what he endeavoured to do by tasking the Minister of Police to investigate the costs issue. And he remains by design removed from the National Assembly process, again as decision-maker.

91. At no stage did the President indicate an unwillingness to pay once a reasonable portion of the reasonable costs of the specific items has been determined. He is of the view that the facts regarding the specific items would be considered and that the

decision-maker may determine that there is something or nothing to be paid in respect of some or all of the specific items. Our contention is that it is proper and fair to allow that process to conclude before subjecting the President's actions to judicial scrutiny.

92. There is another fundamental problem besetting the direct approach embraced by the EFF. This pertains to certain factual complexities and the circumstances surrounding the specific items and whether any reasonable contribution is called for in the light thereof. The Minister of Police, pursuant to an extensive investigation, has established the facts and circumstances surrounding the specific items. Unless the EFF accepts those facts, its application will provoke and engage a fundamental factual dispute. Such factual disputes are to be dealt with in courts of the first instance geared to the resolution of such disputes (if necessary by oral evidence) through the testimony of witnesses capable of giving primary evidence, and by production of the rule 53 record.

93. Thus in *Fleecytex*[42], this Court explained:

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42 At para 7.

> *"This Court is the highest court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. These factors have been referred to in documents given by this Court on applications for direct access under the interim Constitution, and are clearly relevant to the granting of direct access under the 1996 Constitution."*

94. By seeking to approach this Court directly, the EFF has now sought to engage this Court in precisely the type of exercise which is ill-suited to it sitting as a court of final instance.

95. The PP's appropriate remedial actions clearly allow any affected party against whom she seeks to enforce such remedial actions to challenge the legality or validity of her conclusions and actions. A third party seeking to enforce the PP's findings or recommendations can hardly have more rights and powers than the PP and a party subject to such an attempt at enforcement can hardly have fewer rights than would ordinarily be accorded under the principles that our law has laid down regarding fairness and rationality.

96. We submit that it is not in the interests of justice for this matter to be accepted directly by this Court, or if it is so accepted then it should be dismissed. We have advanced

the reasons 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 regarding compliance with the PP's report when that very issue is currently serving before the courts in the *SABC* matter. The Supreme Court of Appeal has only very recently ruled on the broader jurisprudential question regarding the nature of the PP's findings and remedial action, and this Court may well be approached on appeal. Further and in any event, the issues raised by the EFF are being debated through avenues within the remit of the executive and Parliament. This application is but an effort to leapfrog those actions into the judicial branch of government and directly to the Constitutional Court no less.

97. In the circumstances, it is not in the interests of justice for the application to be granted. It should be dismissed with costs, including the costs of two counsel.

K. **CONCLUSION**

98. We submit that viewed in its proper context and upon a plain and common-sense interpretation of the PP's remedial action, the application is ill-conceived. The EFF is not entitled to manipulate the judicial system in a matter of enormous national interest when extraneous factors comprising investigative processes contemplated in that remedial action are yet to be finalised, merely because it is politically expedient.

99. Even if merit were to be found in the EFF's complaints, the issues would most appropriately be ventilated in the High Court and not in this Court directly and finally.

100. The PP's remedial action is in the process of being implemented, and will continue to be implemented with the benefit of the further clarity provided by the SCA most recently in the SABC matter.

101. In the circumstances, an order should be granted dismissing the application with costs, including the costs of two counsel.

Kemp J. Kemp SC

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19 October 2015.