CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 143/15 and CCT 171/15

In the matter of:

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

And in the matter of:

DEMOCRATIC ALLIANCE	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	Amicus Curiae

Neutral citation: *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgment:	Mogoeng CJ (unanimous)
Heard on:	9 February 2016
Decided on:	31 March 2016
Summary:	Legal Effect of Powers of Public Protector — Appropriate Remedial Action — Conduct of President — National Assembly Obligations — Separation of Powers Specific Constitutional Obligations — Exclusive Jurisdiction — Compliance with Remedial Action — Oversight and Accountability

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ORDER

Applications for the exercise of exclusive jurisdiction and direct access:

In the result the following order is made:

1. This Court has exclusive jurisdiction to hear the application by the Economic Freedom Fighters.
2. The Democratic Alliance's application for direct access is granted.
3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution is binding.
4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid.
5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the

President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.

6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.
7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.
8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.
9. The President must reprimand the Ministers involved pursuant to paragraph 11.1.3 of the Public Protector's remedial action.
10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside.
11. The President, the Minister of Police and the National Assembly must pay costs of the applications including the costs of two counsel.

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

Introduction

[1] One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy.[1] For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

> "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."[2]

And the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.

[2] In terms of her constitutional powers,[3] the Public Protector investigated allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic. She concluded that the President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources. Exercising her constitutional powers to take

[1] Section 1(c) and (d) of the Constitution.

[2] *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80, per Madala J.

[3] As conferred by section 182 of the Constitution.

appropriate remedial action she directed that the President, duly assisted by certain State functionaries, should work out and pay a portion fairly proportionate to the undue benefit that had accrued to him and his family. Added to this was that he should reprimand the Ministers involved in that project, for specified improprieties.

[3] The Public Protector's report was submitted not only to the President, but also to the National Assembly presumably to facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable.[4] For well over one year, neither the President nor the National Assembly did what they were required to do in terms of the remedial action. Hence these applications by the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA),[5] against the National Assembly and the President.

[4] What these applications are really about is that—

(a) based on the supremacy of our Constitution, the rule of law and considerations of accountability, the President should be ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence;

(b) the President must reprimand the Ministers under whose watch State resources were expended wastefully and unethically on the President's private residence;

(c) this Court must declare that the President failed to fulfil his constitutional obligations, in terms of sections 83, 96, 181 and 182;

(d) the report of the Minister of Police and the resolution of the National Assembly that sought to absolve the President of liability, must be declared inconsistent with the Constitution and invalid and that the adoption of those outcomes amount to a failure by the

[4] Section 42(3) of the Constitution and section 55(2) of the Constitution read with section 8(2)(b)(iii) of the Public Protector Act 23 of 1994.

[5] These are political parties represented in our Parliament.

National Assembly to fulfil its constitutional obligations, in terms of sections 55 and 181, to hold the President accountable to ensure the effectiveness, rather than subversion, of the Public Protector's findings and remedial action;

(e) the Public Protector's constitutional powers to take appropriate remedial action must be clarified or affirmed; and

(f) the State parties, except the Public Protector, are to pay costs to the Applicants.

Background

[5] Several South Africans, including a Member of Parliament, lodged complaints with the Public Protector concerning aspects of the security upgrades that were being effected at the President's Nkandla private residence. This triggered a fairly extensive investigation by the Public Protector into the Nkandla project.

[6] The Public Protector concluded that several improvements were non-security features.[6] Since the State was in this instance under an obligation only to provide security for the President at his private residence, any installation that has nothing to do with the President's security amounts to undue benefit or unlawful enrichment to him and his family and must therefore be paid for by him.

[7] In reasoning her way to the findings, the Public Protector said that the President acted in breach of his constitutional obligations in terms of section 96(1), (2)(b) and (c) of the Constitution which provides:

"**Conduct of Cabinet members and Deputy Ministers**

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

[6] *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No 25 of 2013/14 (Public Protector's Report) at para 11.

> (2) Members of the Cabinet and Deputy Ministers may not—
>
> . . .
>
> (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
>
> (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

In the same breath she concluded that the President violated the provisions of the Executive Members' Ethics Act[7] and the Executive Ethics Code.[8] These are the national legislation and the code of ethics contemplated in section 96(1).

[8] The Public Protector's finding on the violation of section 96 was based on the self-evident reality that the features identified as unrelated to the security of the President, checked against the list of what the South African Police Service (SAPS) security experts had themselves determined to be security features,[9] were installed because the people involved knew they were dealing with the President. When some government functionaries find themselves in that position, the inclination to want to please higher authority by doing more than is reasonably required or legally permissible or to accede to a gentle nudge by overzealous and ambitious senior officials to do a "little wrong" here and there, may be irresistible. A person in the position of the President should be alive to this reality and must guard against its eventuation. Failure to do this may constitute an infringement of this provision.

[9] There is thus a direct connection between the position of President and the reasonably foreseeable ease with which the specified non-security features, asked for or not, were installed at the private residence. This naturally extends to the undue enrichment.[10] Also, the mere fact of the President allowing non-security features,

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[7] 82 of 1998.

[8] Chapter 1 of the *Ministerial Handbook: A Handbook for Members of the Executive and Presiding officers* (7 February 2007) at pages 7-15.

[9] Public Protector's Report above n 6 at paras 7.14.2 and 7.14.4.

[10] Section 96(2)(c) of the Constitution.

about whose construction he was reportedly aware,[11] to be built at his private residence at government expense, exposed him to a "situation involving the risk of a conflict between [his] official responsibilities and private interests".[12] The potential conflict lies here. On the one hand, the President has the duty to ensure that State resources are used only for the advancement of State interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise.

[10] Having arrived at the conclusion that the President and his family were unduly enriched as a result of the non-security features, the Public Protector took remedial action against him in terms of section 182(1)(c) of the Constitution. The remedial action taken reads:

> "11.1 The President is to:
>
> 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 [Department of Public Works] at his private residence that do not relate to security, and which include [the] visitors' centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.
>
> 11.1.2 Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document.
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> 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."[13]

[11] These are the findings of the Public Protector.

[12] Section 96(2)(b) of the Constitution.

[13] Public Protector's Report above n 6 at para 11.

[11] Consistent with this directive, the President submitted his response to the National Assembly within 14 days of receiving the report.[14] It was followed by yet another response about five months later.

[12] For its part, the National Assembly set up two Ad Hoc Committees,[15] comprising its members, to examine the Public Protector's report as well as other reports including the one compiled, also at its instance, by the Minister of Police. After endorsing the report by the Minister exonerating the President from liability and a report to the same effect by its last Ad Hoc Committee, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector.

[13] Dissatisfied with this outcome, the EFF launched this application, claiming that it falls within this Court's exclusive jurisdiction. It, in effect, asked for an order affirming the legally binding effect of the Public Protector's remedial action; directing the President to comply with the Public Protector's remedial action; and declaring that both the President and the National Assembly acted in breach of their constitutional obligations. The DA launched a similar application in the Western Cape Division of the High Court, Cape Town and subsequently to this Court conditional upon the EFF's application being heard by this Court.

[14] It is fitting to mention at this early stage that eight days before this matter was heard, the President circulated a draft order to this Court and the parties. After some parties had expressed views on aspects of that draft, a revised version was circulated on the day of the hearing. The substantial differences between the two drafts are that, unlike the first, the second introduces the undertaking by the President to reprimand certain Ministers in terms of the remedial action and also stipulates the period within which the President would personally pay a reasonable percentage of the reasonable

[14] See [76] and [77] below.

[15] The first Ad Hoc Committee was formed to consider the President's report along with all other reports (produced by Special Investigation Unit, Public Protector, Joint Standing Committee on Intelligence and the Task Team); the last Ad Hoc Committee was formed to consider the Minister of Police's report.

costs of the non-security upgrades after a determination by National Treasury. Also, the Auditor-General has been left out as one of the institutions that were to assist in the determination of the amount payable by the President. Otherwise, the essence of both draft orders is that those aspects of the Public Protector's remedial measures, still capable of enforcement, would be fully complied with. As for costs, the President proposed that they be reserved for future determination.

Exclusive jurisdiction

[15] The exclusive jurisdiction of this Court is governed by section 167(4)(e) of the Constitution which says:

> "(4) Only the Constitutional Court may—
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> …
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> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation."

[16] Whether this Court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. The starting point is the pleadings. But much more is required.[16] First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely examined to determine whether it is of the kind envisaged by section 167(4)(e).[17]

[16] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*) at para 24; *Women's Legal Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) (*Women's Legal Centre*) at para 16; *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) (*Von Abo*) at para 35; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at para 19; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 9; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 25.

[17] *Doctors for Life* id at para 13.

[17] Additional and allied considerations are that section 167(4)(e) must be given a narrow meaning.[18] This is so because whenever a constitutional provision is construed, that must be done with due regard to other constitutional provisions that are materially relevant to the one being interpreted. In this instance, section 172(2)(a) confers jurisdiction on the Supreme Court of Appeal, the High Court and courts of similar status to pronounce on the constitutional validity of laws or conduct of the President. This is the responsibility they share with this Court – a terrain that must undoubtedly be adequately insulated against the inadvertent and inappropriate monopoly of this Court. An interpretation of section 167(4)(e) that is cognisant of the imperative not to unduly deprive these other courts of their constitutional jurisdiction, would be loath to assume that this Court has exclusive jurisdiction even if pleadings state strongly or clearly that the President or Parliament has failed to fulfil constitutional obligations.

[18] An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation shared with other organs of State will always fail the section 167(4)(e) test.[19] Even if it is an office-bearer- or institution-specific constitutional obligation, that would not necessarily be enough. *Doctors for Life* provides useful guidance in this connection. There, Ngcobo J said "obligations that are readily ascertainable and are unlikely to give rise to disputes",[20] do not require a court to deal with "a sensitive aspect of the separation of powers"[21] and may thus be heard by the High Court.[22] This relates, as he said by way of example, to obligations expressly imposed on Parliament where the Constitution provides that a particular legislation would require a two-thirds majority to be passed. But where the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute

[18] Id at para 19.

[19] *Women's Legal Centre* above n 16 at para 20.

[20] *Doctors for Life* above n 16 at para 25.

[21] Id.

[22] Id. See also section 172(2)(a) of the Constitution.

its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this Court to exercise its exclusive jurisdiction would have been met.[23]

[19] To determine whether a dispute falls within the exclusive jurisdiction of this Court, section 167(4)(e) must be given a contextual and purposive interpretation with due regard to the special role this apex Court was established to fulfil. As the highest court in constitutional matters and "the ultimate guardian of the Constitution and its values",[24] it has "to adjudicate finally in respect of issues which would inevitably have important political consequences".[25] Also to be factored into this process is the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications. This is necessary to preserve the comity between the judicial branch and the executive and legislative branches of government.[26]

[20] That this Court enjoys the exclusive jurisdiction to decide a failure by the President to fulfil his constitutional obligations ought not to be surprising, considering the magnitude and vital importance of his responsibilities. The President is the Head of State and Head of the national Executive. His is indeed the highest calling to

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[23] *Doctors for Life* above n 16 at paras 24-6.

[24] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at para 72. Section 167 reads in relevant part:

> "(3) The Constitutional Court—
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> (a) is the highest court of the Republic; and
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and
>
> (c) makes the final decision whether a matter is within its jurisdiction."

These subsections confirm the status of the Constitutional Court as the highest court in the land and also extend its jurisdiction to arguable points of law of general public importance.

[25] *SARFU II* id at para 73.

[26] *SARFU I* above n 16 at paras 29.

the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed.[27] The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight.[28] To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation.[29] And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him.[30] Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project.

[21] He is required to promise solemnly and sincerely to always connect with the true dictates of his conscience in the execution of his duties. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities. And, but for the Deputy President, only his affirmation or oath of office requires a gathering of people, presumably that they may hear and bear witness to his irrevocable commitment to serve them well and with integrity. He is after all, the image of South Africa and the first to remember at its mention on any global platform.

[27] See section 83(b) of the Constitution.

[28] Section 83(c) read with the affirmation or oath of office in Schedule 2 of the Constitution, in context.

[29] See sections 84-5 of the Constitution.

[30] Ministers, Judges, Heads of Chapter Nine institutions and Directors General.

[22] Similarly, the National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people.[31] It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed.[32] For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made[33] to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.

[23] For the EFF to meet the requirements for this Court to exercise its exclusive jurisdiction over the President and the National Assembly, it will have to first rely on what it considers to be a breach of a constitutional obligation that rests squarely on the President as an individual and on the National Assembly as an institution. That obligation must have a demonstrable and inextricable link to the need to ensure compliance with the remedial action taken by the Public Protector. Put differently, it must be apparent from a reading of the constitutional provision the EFF relies on, that

[31] Section 77 read with section 55 of the Constitution. See also section 188 of the Constitution read with section 10 of the Public Audit Act 25 of 2004.

[32] Section 55(2)(b)(i) of the Constitution.

[33] Section 55(2)(a) of the Constitution.

it specifically imposes an obligation on the President or the National Assembly, but in a way that keeps focus sharply on or is intimately connected to the need for compliance with the remedial action. If both or one of them bears the obligation merely as one of the many organs of State, then other courts like the High Court and later the Supreme Court of Appeal would in terms of section 172(2)(a) also have jurisdiction in the matter. In the latter case direct access[34] to this Court would have to be applied for and obviously granted only if there are exceptional circumstances and it is in the interests of justice to do so.

[24] Where, as in this case, both the President and the National Assembly are said to have breached their respective constitutional obligations, which could then clothe this Court with jurisdiction, and exclusive jurisdiction is only proven in respect of the one but not the other, there might still be room to entertain the application against both provided it is in the interests of justice to do so. This would be the case, for example, where: (i) the issue(s) involved are of high political importance with potentially far-reaching implications for the governance and stability of our country; (ii) the issue(s) at the heart of the alleged breach of constitutional obligations by both the President and the National Assembly are inseparable; and (iii) the gravity and nature of the issue(s) at stake are such that they demand an expeditious disposition of the matter in the interests of the nation. This list is not exhaustive.

Exclusive jurisdiction in the application against the President

[25] Beginning with the President, the EFF argued that he breached his obligations in terms of sections 83, 96,[35] 181 and 182 of the Constitution. And it is on the

[34] Section 167(6) of the Constitution.

[35] Section 96 bears no relevance to the core issues before this Court. Admittedly, it is pivotal to the Public Protector's finding that although the President was aware of the erection of non-security upgrades at his private residence, he is not known to have done anything to discourage their construction or put an end to them, considering his fiduciary duty to the State. This he arguably allowed to happen in a manner that undermines his constitutional obligations to ensure that nobody profits unduly from State resources. Needless to say that this is particularly so for those who, like him, are charged with the duty to ensure that State resources are used only, to advance the common good of all (see *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 176). But this application is not about determining whether the President and his family benefitted unlawfully from non-security installations or upgrades. That was for the Public Protector to do and that she has done already. The focus of this application is

strength of these alleged breaches that this Court is asked to exercise exclusive jurisdiction.

[26] Section 83 does impose certain obligations on the President in particular. It provides:

> "The President—
>
> (a) is the Head of State and head of the national executive;
>
> (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
>
> (c) promotes the unity of the nation and that which will advance the Republic."[36]

An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national Executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do.[37] It is, no doubt, for this reason that section 83(b) of the Constitution singles him out to uphold, defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our

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on the implementation of the remedial action taken by the Public Protector. And section 96 can in no way assist the process meant to secure the President's compliance. It cannot therefore be a justifiable basis for conferring exclusive jurisdiction on this Court.

[36] To suggest that the failure to comply with the remedial action taken by the Public Protector undermines the promotion of national unity and the advancement of the Republic, is a proposition that I find difficult to understand. The promotion of national unity and the advancement of what is in the best interests of the Republic have in essence to do with conduct or statements that could bring together or unite all our people, to heal the racial divisions of the past. And the advancement of the Republic or its well-being has a bearing on conduct or a statement that has wide-ranging implications for the Republic. The notion that the unlawful use of State resources to build a cattle kraal, chicken run, swimming pool, amphitheatre and a visitors' centre constitute a failure to promote national unity or advance the Republic, is difficult to sustain. In sum, section 83(c) bears no relationship, not even remotely, to the matter before us.

[37] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 65 states: "Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands."

constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant. This imposition of an obligation specifically on the President still raises the question: which obligation specifically imposed by the Constitution on the President has he violated? Put differently, how did he fail to uphold, defend and respect the supreme law of the Republic?

[27] Sections 181(3) and 182(1)(c) in a way impose obligations on the President. But, as one of the many. None of these provisions singles out the President for the imposition of an obligation. This notwithstanding the jurisprudential requirement that an obligation expressly imposed on the President, not Cabinet as a whole or organs of State in general, is required to establish exclusive jurisdiction.[38]

[28] For the purpose of deciding whether this Court has exclusive jurisdiction, it must still be determined whether on its own, section 83(b) imposes on the President an obligation of the kind required by section 167(4)(e). He is said to have failed to "uphold, defend and respect the Constitution as the supreme law of the Republic". This he allegedly did by not complying with the remedial action taken by the Public Protector in terms of section 182(1)(c) thus violating his section 181(3) obligation to assist and protect the Public Protector in order to guarantee her dignity and effectiveness.

[29] If the failure by the President to comply with or enforce the remedial action taken by the Public Protector against a member of the Executive and fulfil his shared obligation to assist and protect the Public Protector so as to ensure her independence, dignity and effectiveness, amounts to a failure envisaged by section 167(4)(e), then

[38] *Women's Legal Centre* above n 16 at para 16; *Von Abo* above n 16 at para 33; and *Doctors for Life* above n 16 at para 17.

the list of matters that would fall under this Court's exclusive jurisdiction would be endless. What this could then mean is that whenever the President is said to have failed to fulfil a shared obligation in any provision of the Constitution,[39] or the Bill of Rights, this Court would readily exercise its exclusive jurisdiction. This would be so because on this logic, all a litigant would have to do to trigger this Court's exclusive jurisdiction, would be to rely on the shared constitutional obligations as in the Bill of Rights, and section 83 which would then confer exclusive jurisdiction on this Court in all applications involving the President.

[30] I reiterate that, this would mean that, any failure to fulfil shared constitutional obligations by any member of the Executive, would thus be attributable to the President as his own failure. After all he appoints them and they are answerable to him. Their infringement, coupled with reliance on section 83, would thus justify the exercise of exclusive jurisdiction by this Court. Such an unbridled elastication of the scope of application of section 83 or 167(4)(e) would potentially marginalise the High Court and the Supreme Court of Appeal in all constitutional matters involving the President.

[31] Section 83 is in truth very broad and potentially extends to just about all the obligations that rest, directly or indirectly, on the shoulders of the President. The President is a constitutional being. In the Constitution the President exists, moves and has his being. Virtually all his obligations are constitutional in nature because they have their origin, in some way, in the Constitution. An overly permissive reliance on section 83 would thus be an ever-present guarantee of direct access to this Court under its exclusive jurisdiction. This does not accord with the overall scheme of the Constitution. And certainly not with the purpose behind the provisions of section 167(4)(e) read with section 172(2)(a) of the Constitution, properly construed.

[39] Like sections 41, 85, 92, 101, 165(4) and (5), 195, 198(d) and 206.

[32] Section 167(4)(e) must be given a restrictive meaning.[40] This will help arrest litigants' understandable eagerness to have every matter involving the President heard by this Court, as a court of first and last instance. Our High Court, specialist courts of equivalent status and Supreme Court of Appeal also deserve the opportunity to grapple with constitutional matters involving the President so that they too may contribute to the further development and enrichment of our constitutional jurisprudence.[41]

[33] It bears repetition, that section 83(b) does impose an obligation on the President in particular to "uphold, defend and respect the Constitution". But to meet the section 167(4)(e) requirements, conduct by the President himself that tends to show that he personally failed to fulfil a constitutional obligation expressly imposed on him, must still be invoked, to establish the essential link between the more general section 83 obligations and a particular right or definite obligation. It needs to be emphasised though that the stringency of this requirement is significantly attenuated by the applicability of section 83(b) which already imposes a President-specific obligation. The additional constitutional obligation is required only for the purpose of narrowing down or sharpening the focus of the otherwise broad section 83(b) obligation, to a specific and easily identifiable obligation. The demand for President-specificity from the additional constitutional obligation is not as strong as it is required to be where there is not already a more pointed President-specific obligation as in section 83. A constitutionally-sourced and somewhat indirectly imposed obligation complements section 83 for the purpose of meeting the requirement of section 167(4)(e). Although the additional constitutional obligation it imposes on the President would, on its own, be incapable of establishing the required specificity in relation to section 167(4)(e), it is not so in this case because of section 83(b).

[40] *Women's Legal Centre* above n 16 at para 20; *Von Abo* above n 16 at para 34; and *SARFU I* above n 16 at para 25.

[41] *SARFU I* above n 16 at paras 26-31.

[34] I must emphasise that agent-specificity is primarily established by section 83. The somewhat indirectly imposed obligation merely provides reinforcement for it. An indirectly imposed obligation is one that is not derived from section 83(b), but arises from the exercise of a constitutional power, like that conferred on the Public Protector by the Constitution. It nails the obligation down on the President. When an obligation is imposed on the President specifically as a result of the exercise of a constitutional power, for the purpose of meeting the section 167(4)(e) test, the indirectly imposed obligations cannot be dealt with as if the section 83(b) obligations do not exist. For, they impose all-encompassing obligations on the President in relation to the observance of the Constitution. In sum, section 83(b) lays the foundation which is most appropriately complemented by the imposition of an obligation through the exercise of a constitutional power.

[35] In this case, the requirement that the President failed to fulfil a constitutional obligation that is expressly imposed on him is best satisfied by reliance on both sections 83(b) and 182(1)(c) of the Constitution. Very much in line with the narrow or restrictive meaning to be given to section 167(4)(e) and mindful of the role that the other courts must also play in the development of our constitutional law, section 182(1)(c) does in this case, impose an actor-specific obligation. Although section 182 leaves it open to the Public Protector to investigate State functionaries in general, in this case, the essential link is established between this section and section 83 by the remedial action actually taken in terms of section 182(1)(c). In the exercise of that constitutional power, the Public Protector acted, not against the Executive or State organs in general, but against the President himself. Compliance was required only from the President. He was the subject of the investigation and is the primary beneficiary of the non-security upgrades and thus the only one required to meet the demands of the constitutionally-sourced remedial action.

[36] There is a primary obligation, that flows directly from section 182(1)(c), imposed upon only the President to take specific steps in fulfilment of the remedial

action. The President's alleged disregard for the remedial action taken against him,[42] does seem to amount to a breach of a constitutional obligation. And this provides the vital connection section 83(b) needs to meet the section 167(4)(e) requirements.

[37] Although section 181(3) is relevant, it does not impose a President-specific obligation. It is relevant but applies to a wide range of potential actors. It was not and could not have been primarily relied on by the Public Protector to impose any constitutionally-sanctioned obligation on the President which could then create the crucial link with section 83(b). A combination of only these two sections would be a far cry from what section 167(4)(e) requires to be applicable. The section 181(3) obligation is a relatively distant and less effective add-on to the potent connection between sections 83(b) and 182(1)(c), necessary to unleash the exclusive jurisdiction. These remarks on section 181(3) apply with equal force to the National Assembly.

[38] This means that it is not open to any litigant who seeks redress for what government has done or failed to do, merely to lump up section 83 with any other constitutional obligation that applies also to the President, as one of the many, so as to bypass all other superior courts and come directly to this Court. Reliance on section 83 coupled with a section that provides a shared constitutional obligation will not, without more, guarantee access to this Court in terms of section 167(4)(e) in a matter against the President. Section 83 does not have an overly liberal application that would have this Court act readily in terms of its exclusive jurisdiction whenever it is relied on.

[39] President-specific obligations like some of those set out in section 84 of the Constitution or obligations imposed on the President through the exercise of powers expressly conferred by the Constitution on those who then exercise them against the President, on their own or coupled with those in section 83 respectively, are master keys to this Court's exclusive jurisdiction in terms of section 167(4)(e). Remedial action taken against the President is one of those constitutional powers, the exercise of

[42] In terms of section 182(1)(c) of the Constitution.

which might justify the activation of this Court's exclusive jurisdiction when combined with section 83(b).

[40] I conclude that the EFF has made out a case that the President's alleged failure to comply with the remedial action coupled with the failure to uphold the Constitution, relate to constitutional obligations imposed specifically on him that are intimately connected to the issue central to this application, which is the obligation for the President to comply with the remedial action. Conditions for the exercise of this Court's exclusive jurisdiction have been met. That does not, however, dispose of the entire application for this Court to exercise its exclusive jurisdiction.

Exclusive jurisdiction in the application against the National Assembly

[41] The National Assembly is also said to have breached its constitutional obligations imposed by sections 55(2) and 181(3) of the Constitution. Section 55(2) provides:

> "The National Assembly must provide for mechanisms—
>
> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of—
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

[42] Skinned to the bone, the contention here is that the National Assembly failed to fulfil its constitutional obligation to hold the President accountable. Just to recap, what triggered the duty to hold the President accountable? The Public Protector furnished the National Assembly with her report which contained unfavourable findings and the remedial action taken against the President. The National Assembly resolved to absolve the President of compliance with the remedial action instead of facilitating its enforcement as was expected by the Public Protector. It is on this basis argued that it failed to fulfil its constitutional obligations to hold him accountable.

Whether this is correct need not be established to conclude that this Court has exclusive jurisdiction.[43]

[43] It is still necessary though, to determine whether the obligation allegedly breached is of the kind contemplated in section 167(4)(e). Holding members of the Executive accountable is indeed a constitutional obligation specifically imposed on the National Assembly. This, however, is not all it takes to meet the requirements of section 167(4)(e).[44] We still need to drill deeper into this jurisdictional question. Is holding the Executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the Executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly's constitutional power or discretion. This is a powerful indication that this Court is entitled to exercise its exclusive jurisdiction in this matter. But that is not all.

[44] As in the case of the President, the National Assembly also has an actor-specific constitutional obligation imposed on it by section 182(1)(b) and (c) read with section 8(2)(b)(iii) of the Public Protector Act. Crucially, the Public Protector's obligation "to report on that conduct" means to report primarily to the National Assembly, in terms of section 182(1)(b) of the Constitution read with section 8 of the Public Protector Act. She reported to the National Assembly for it to do something about that report. Together, these sections bring home into the Chamber of the National Assembly the constitutional obligation to take appropriate remedial action. Although remedial action was not taken against the National Assembly, the report in terms of section 182(1)(b) read with section 8(2)(b)(iii) of the Act was

[43] *My Vote Counts* above n 16 at paras 132-5.

[44] See *Doctors for Life* above n 16 at paras 25-6.

indubitably presented to it for its "urgent attention. . .or. . .intervention". That constitutionally-sourced obligation is not shared, not even with the National Council of Provinces. It is exclusive to the National Assembly. When that report was received by the National Assembly, it effectively operationalised the House's obligations in terms of sections 42(3) and 55(2) of the Constitution. The presentation of that report delivered a constitutionally-derived obligation to the National Assembly for action. And it is alleged that it failed to fulfil these obligations in relation to the remedial action.

[45] This Court, as the highest court in the land and the ultimate guardian of the Constitution and its values, has exclusive jurisdiction also in so far as it relates to the National Assembly.[45] The EFF has thus met the requirements for this Court to exercise its exclusive jurisdiction in the application against both the President and the National Assembly.

[46] Since the DA's application is conditional upon the EFF's application being heard, the striking similarity between these applications, the extreme sensitivity and high political importance of the issues involved and the fact that these applications traverse essentially the same issues impels us, on interests of justice considerations, to hear the DA application as well.

[47] Why do we have the office of the Public Protector?

The purpose of the office of the Public Protector

[48] The history of the office of the Public Protector, and the evolution of its powers over the years were dealt with in two judgments of the Supreme Court of Appeal.[46] I do not think that much benefit stands to be derived from rehashing that history here.

[45] Id.

[46] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA) (*SABC v DA*) at para 31 and *The Public Protector v Mail & Guardian Ltd and Others* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) at para 5.

It suffices to say that a collation of some useful historical data on that office may be gleaned from those judgments.

[49] Like other Chapter Nine institutions, the office of the Public Protector was created to "strengthen constitutional democracy in the Republic".[47] To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice.[48] I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector's powers or decisions were meant to be inconsequential. The constitutional safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.

[50] We learn from the sum-total of sections 181[49] and 182[50] that the institution of the Public Protector is pivotal to the facilitation of good governance in our

[47] Section 181(1) of the Constitution.

[48] Section 181(2) of the Constitution.

[49] Section 181 of the Constitution provides:

> "(1) The following state institutions strengthen constitutional democracy in the Republic:
>
> (a) The Public Protector.
>
> (b) The South African Human Rights Commission.
>
> (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
>
> (d) The Commission for Gender Equality.
>
> (e) The Auditor-General.
>
> (f) The Electoral Commission.

constitutional dispensation.[51] In appreciation of the high sensitivity and importance of its role, regard being had to the kind of complaints, institutions and personalities likely to be investigated, as with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of State. And the Public Protector is one of those deserving of this constitutionally-imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood.

[51] The office of the Public Protector is a new institution – different from its predecessors like the "Advocate General", or the "Ombudsman" and only when we became a constitutional democracy did it become the "Public Protector". That carefully selected nomenclature alone, speaks volumes of the role meant to be fulfilled by the Public Protector. It is supposed to protect the public from any conduct in State affairs or in any sphere of government that could result in any impropriety or

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(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) 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.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

[50] Section 182 in relevant part 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."

[51] See also *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 161 (*Certification* case).

prejudice. And of course, the amendments[52] to the Public Protector Act have since added unlawful enrichment and corruption[53] to the list. Among those to be investigated by the Public Protector for alleged ethical breaches, are the President and Members of the Executive at national and provincial levels.[54]

[52] The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen.[55] For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.

[53] Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental "embarrassment" and censure. This is a necessary service because State resources belong to the public, as does State power. The repositories of these resources and power are to use them, on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this Court said in the *Certification* case:

[52] See Public Protector Amendment Act 113 of 1998.

[53] See section 6(4)(a)(iii) and (iv) of the Public Protector Act.

[54] See sections 1, 3 and 4 of the Executive Members' Ethics Act read with section 96(1) of the Constitution.

[55] See section 34 of the Constitution.

> "[M]embers of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action."[56]

[54] In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real. Within the context of breathing life into the remedial powers of the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy.

[55] Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office-bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated.

[56] If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy. The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State

[56] *Certification* case above n 51 at para 161.

affairs, all spheres of government and State-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.

The nature and meaning of "as regulated by" and "additional powers and functions"

[57] Our Constitution is the supreme law of the Republic. It is not subject to any law including national legislation unless otherwise provided by the Constitution itself.[57] The proposition that the force or significance of the investigative, reporting or remedial powers of the Public Protector has somehow been watered down by the provisions of the Public Protector Act, is irreconcilable with the supremacy of the Constitution, which is the primary source of those powers. To put this argument[58] to rest, once and for all, its very bases must be dealt with. The first basis is grounded on section 182(1) in so far as it provides that "the Public Protector has the power, as regulated by national legislation". The second is section 182(2) which says that "the Public Protector has the additional powers and functions prescribed by national legislation".

[58] The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take appropriate remedial action. Section 182(1) and (2) recognises the pre-existing national legislation which does regulate these powers and confer additional powers and functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution. In any event section 182(1) alludes to national legislation that "regulates" the Public Protector's three-dimensional powers.

[57] See for example section 179(3) and (4) of the Constitution.

[58] This is what the National Assembly argued.

[59] That most of the powers provided for by the Public Protector Act were already in place when the Constitution came into operation does not affect the constitutionally prescribed regulatory and supplementary role of the Act. The drafters of the Constitution must have been aware of the provisions of the Act. This is apparent from the words "as regulated" in section 182(1). If the legislation that was to regulate were not yet in place, words like "to be regulated" or similar expressions that point to the future, would in all likelihood have been employed. Notably, the Public Protector Act was amended no fewer than five times[59] since the coming into operation of the Constitution. Furthermore, its long title, substituted in 1998, reads: "To provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith". This buries the proposition that Parliament has not yet enacted legislation that would regulate the constitutional powers of the Public Protector and provide for additional powers and functions. If it were to be amended again that would, as with all other legislation, simply be for the purpose of improving on what the Public Protector Act has already done.

[60] "Regulate power" in this context and in terms of its ordinary grammatical meaning connotes an enablement of the correct exercise of the constitutional power. The Constitution points to a functional aid that would simplify and provide details with respect to how the power in its different facets is to be exercised. For example, the Public Protector Act provides somewhat elaborate guidelines on how the power to investigate, report and take remedial action is to be exercised.[60]

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[59] Amended through Act 47 of 1997, Act 113 of 1998, Act 2 of 2000, Act 22 of 2003 and Act 12 of 2004.

[60] Some of the incidences of regulation are located in section 6(4). It regulates the powers of the Public Protector, including how: she is to initiate an investigation; remedial action is to be taken or what form it may take; and information is to be shared with other law enforcement authorities to the extent that it may be necessary to do so. Section 6(9) regulates the time-frame within which a complaint may be validly referred to the Public Protector. Other elements of regulation are to be found in section 7. They relate to: the initiation of investigations; the procedure to be followed; the exclusion of some people from the Public Protector's investigative proceedings; the right to be heard and to challenge evidence; the form in which evidence may be lodged; and the oath or affirmation and subpoenas. Section 7A regulates the entering of premises by the Public Protector for the purpose of investigations. And section 8 regulates the power to submit the reports and when to keep them confidential.

[61] Section 182(2) envisages "additional" but certainly not "substitutionary" powers. It contemplates "additional powers and functions". Giving the word "additional" its ordinary grammatical meaning, it means "extra" or "more" or "over and above". Nothing about "additional" in this context could ever be reasonably understood to suggest the removal or limitation of the constitutional powers. A reading of section 6 of the Public Protector Act bears this out. The Public Protector Act did not purport to nor could it validly denude the Public Protector of her constitutional powers. On the contrary and by way of example, section 6(4)(a)(iii) and (iv) adds expressly, unlawful enrichment or corruption to the powers and functions she already had. The power to investigate institutions in which the State is the majority or controlling shareholder, undue delay, unfair and discourteous conduct have also been added to the investigative powers of the Public Protector.[61]

[62] A useful regulatory framework for the fruitful exercise of the Public Protector's powers does, as promised, exist. And by reference in the Constitution and subsequent statutory amendments, more powers and functions were indeed added to those already listed in section 182(1) of the Constitution. The remedial action that could be resorted to under different circumstances, is also detailed in the Public Protector Act, for greater clarity and effectiveness. Likewise, the circumstances and manner in which reports on the investigations are to be presented, and to whom, all reinforce the harmonious correlation between the relevant provisions of the supreme law and the Public Protector Act.

[61] All the powers set out in section 6 accord and are harmoniously coexistent with section 182. Powers or functions have thus either been added or regulated. Mediation, conciliation, negotiation and giving advice to a complainant regarding how best to secure an appropriate remedy; bringing what appears to be an offence to the attention of the prosecuting authority; referring a matter to an appropriate body or authority or making suitable recommendations to remedy the complaint; and resolving any complaint by "any other means that may be expedient in the circumstances", are all regulatory and additional powers. And they are consistent with and flow from the constitutional power "to take appropriate remedial action" and provision for "additional powers and functions".

Legal effect of remedial action

[63] Section 182(1)(c) of the Constitution provides that the "Public Protector has the power, as regulated by national legislation. . .to take appropriate remedial action". This remedial action is also provided for in somewhat elaborate terms in section 6 of the Public Protector Act.[62] What then is the legal status or effect of the totality of the remedial powers vested in the Public Protector?

[64] The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution. Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity. The contention that regard must only be had to the remedial powers of the Public Protector in the Act and that her powers in the Constitution have somehow been mortified or are subsumed under the Public Protector Act, lacks merit. To uphold it would have the same effect as "the tail wagging the dog".[63]

[65] Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the "efficient, economic and effective use of resources [is] promoted",[64] that accountability finds expression, but also that high standards of professional ethics are promoted and maintained.[65] To achieve this requires a difference-making and responsive remedial action. Besides, one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.

[62] See the summarised version of section 6 in n 60 and 61 of this judgment.

[63] *SABC v DA* above n 46 at para 43.

[64] Section 195(1)(b) of the Constitution.

[65] Section 195(1)(a) of the Constitution.

[66] The language, context and purpose of sections 181 and 182 of the Constitution give reliable pointers to the legal status or effect of the Public Protector's power to take remedial action. That the Public Protector is required to be independent and subject only to the Constitution and the law, to be impartial and exercise her powers and perform her functions without fear, favour or prejudice,[66] is quite telling. And the fact that her investigative and remedial powers target even those in the throne-room of executive raw power, is just as revealing. That the Constitution requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness,[67] shows just how potentially intrusive her investigative powers are and how deep the remedial powers are expected to cut.

[67] The obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness is relevant to the enforcement of her remedial action.[68] The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is free to ignore or second-guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy. The words "take appropriate remedial action" do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take. "Take appropriate remedial action" and "effectiveness", are operative words essential for the fulfilment of the Public Protector's constitutional mandate. Admittedly in a different context, this Court said in *Fose*:

> "An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where

[66] Section 181(2) of the Constitution.

[67] Section 181(3) of the Constitution.

[68] Id.

> so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."[69]

[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution.[70] It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate.[71] However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint. Remedial action must therefore be suitable and effective.[72] For it to be effective in addressing the investigated complaint, it often has to be binding. In *SABC v DA* the Supreme Court of Appeal correctly observed:

> "The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct the implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation."[73]

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[69] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[70] Section 112(1)(b) of the interim Constitution Act 200 of 1993 (interim Constitution) provided that it was competent for the Public Protector after investigation:

> "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."

[71] *Fose* above n 69 at para 69.

[72] Id.

[73] See *SABC v DA* note 46 above at para 52.

[69] But, what legal effect the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. As common sense and section 6 of the Public Protector Act suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. And so might recommending litigation or a referral of the matter to the relevant public authority or any other suitable recommendation, as the case might be. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.

[70] It is however inconsistent with the language, context and purpose of sections 181 and 182 of the Constitution to conclude that the Public Protector enjoys the power to make only recommendations that may be disregarded provided there is a rational basis for doing so.[74] Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It needs to be restated that, it is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to.[75]

[71] In sum, the Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. Moreover, the remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following:

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[74] *Democratic Alliance v South African Broadcasting Corporation Limited and Others* [2014] ZAWCHC 161; 2015 (1) SA 551 (WCC) (*DA v SABC*) at paras 72-4.

[75] A referral of the possible offence to the National Prosecuting Authority for possible investigation in terms of section 6(4)(c)(i) of the Public Protector Act might for example not be acted upon because it was investigated already.

(a) The primary source of the power to take appropriate remedial action is the supreme law itself, whereas the Public Protector Act is but a secondary source;

(b) It is exercisable only against those that she is constitutionally and statutorily empowered to investigate;

(c) Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;

(d) She has the power to determine the appropriate remedy and prescribe the manner of its implementation;[76]

(e) "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case;

(f) Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;

(g) Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken; and

(h) Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is binding or not or what its legal effect is, would be a matter of interpretation aided by context, nature and language.

[76] *SABC v DA* above n 46 at para 52.

May remedial action be ignored?

[72] It has been suggested, initially by both the President and the National Assembly, that since the Public Protector does not enjoy the same status as a Judicial Officer, the remedial action she takes cannot have a binding effect. The President has since changed his position but it appears, only in relation to this case, not necessarily as a general proposition. By implication, whomsoever she takes remedial action against, may justifiably and in law, disregard that remedy, either out of hand or after own investigation. This very much accords with the High Court decision in *DA v SABC* to the effect that:

> "For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational."[77]

It is, of course, not clear from this conclusion who is supposed to make a judgement call whether the decision to reject the findings or remedial action is itself irrational. A closer reading of this statement seems to suggest that it is the person against whom the remedial action was made who may reject it by reason of its perceived irrationality. And that conclusion is not only worrisome but also at odds with the rule of law.[78]

[73] The judgment of the Supreme Court of Appeal is correct in recognising that the Public Protector's remedial action might at times have a binding effect.[79] When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

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[77] *DA v SABC* above n 74 at para 74.

[78] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[79] *SABC v DA* above n 46 at para 53.

[74] This is so, because our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help".[80] Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained. This was aptly summed up by Cameron J in *Kirland* as follows:

> "The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom*. . .'(t)he rule of law obliges an organ of state to use the correct legal process.' For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality."[81] (Footnotes omitted.)

[75] The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.

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[80] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 89.

[81] Id at para 103.

Remedial action taken against the President

[76] The remedial action that was taken against the President has a binding effect. This flows from the fact that the cattle kraal, chicken run, swimming pool, visitors' centre and the amphitheatre were identified by the Public Protector as non-security features for which the President had to reimburse the State. He was directed to first determine, with the assistance of the SAPS and National Treasury, the reasonable costs expended on those installations and then determine a reasonable percentage of the costs so determined, that he is to pay. The President was required to provide the National Assembly with his comments and the actions he was to take on the Public Protector's report within 14 days of receipt of that report and to reprimand the Ministers involved, for the misappropriation of State resources under their watch.

[77] Concrete and specific steps were therefore to be taken by the President. Barring the need to ascertain and challenge the correctness of the report, it was not really necessary to investigate whether the specified non-security features were in fact non-security features. Features bearing no relationship to the President's security had already been identified. The President was enjoined to take definite steps to determine how much he was supposed to pay for the listed non-security features. If any investigation were to be embarked upon, to determine whether some installations were non-security in nature, it was to be in relation to those additional to the list of five for which some payment was certainly required. The reporting to the National Assembly and the reprimand of the affected Ministers also required no further investigation.

[78] This does not mean that there is an absolute bar to what some see as a "parallel" investigative process regardless of its intended end-use. For it cannot be correct that upon receipt of the Public Protector's report with its unfavourable findings and remedial measures, all the President was in law entitled to do was comply even if he had reason to doubt its correctness. That mechanical response is irreconcilable with logic and the rights exercisable by anybody adversely affected by any unpleasant determination. The President was, like all of us and for the reasons set out in some

detail earlier,[82] entitled to inquire into the correctness of those aspects of the report he disagreed with. That inquiry could well lead to a conclusion different from that of the Public Protector. And such a contrary outcome is legally permissible. The question would then be how the President responds to the Public Protector's report and the remedial action taken, in the light of other reports sanctioned or commissioned by him.

[79] Incidentally, the President mandated the Minister of Police to investigate and report on—

> "whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports."

[80] The National Assembly also commissioned the Minister's report. The upshot was a finding that elements of the upgrades identified by the Public Protector as non-security features, were in fact security features for which the President was not to pay. Consequently the Minister of Police "exonerated" the President from the already determined liability. Although the remedial action authorised the President's involvement of the SAPS and arguably the Minister, it was not for the purpose of verifying the correctness of the remedial action taken against him by the Public Protector. It was primarily to help him determine what other non-security features could be added to the list of five, and then to assist in the determination of the reasonable monetary value of those upgrades in collaboration with National Treasury.[83] But again, the President was at large to commission any suitably qualified Minister to conduct that investigation into the correctness of the Public Protector's findings.

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[82] See [74] to [77] above.

[83] Again, this must be understood within the context of the President's entitlement to challenge the Public Protector's report in a court of law, obviously even after some investigation into the correctness of the outcome, which could be foundational to the challenge. But we know that a court challenge was never launched and this is the basis on which the purported reliance on the outcome of the Minister's investigation is approached.

[81] The end-results of the two streams of investigative processes were mutually destructive. The President should then have decided whether to comply with the Public Protector's remedial action or not. If not, then much more than his mere contentment with the correctness of his own report was called for. A branch of government vested with the authority to resolve disputes by the application of the law[84] should have been approached. And that is the Judiciary.[85] Only after a court of law had set aside the findings and remedial action taken by the Public Protector would it have been open to the President to disregard the Public Protector's report. His difficulty here is that, on the papers before us, he did not challenge the report through a judicial process. He appears to have been content with the apparent vindication of his position by the Minister's favourable recommendations and considered himself to have been lawfully absolved of liability.

[82] Emboldened by the Minister's conclusion, and a subsequent resolution by the National Assembly to the same effect, the President neither paid for the non-security installations nor reprimanded the Ministers involved in the Nkandla project. This non-compliance persisted until these applications were launched and the matter was set down for hearing. And this is where and how the Public Protector's remedial action was second-guessed in a manner that is not sanctioned by the rule of law. Absent a court challenge to the Public Protector's report, all the President was required to do was to comply. Arguably, he did, but only with the directive to report to the National Assembly.

[83] The President thus failed to uphold, defend and respect the Constitution as the supreme law of the land. This failure is manifest from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers. The second respect in which he failed relates to his shared section 181(3) obligations. He was duty-bound to, but did not, assist and protect the

[84] See section 34 of the Constitution.

[85] See section 165 of the Constitution.

Public Protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action. He might have been following wrong legal advice and therefore acting in good faith.[86] But that does not detract from the illegality of his conduct regard being had to its inconsistency with his constitutional obligations in terms of sections 182(1)(c) and 181(3) read with 83(b).

National Assembly's obligation to hold the Executive accountable

[84] The Public Protector submitted her report, including findings and the remedial action taken against the President, to the National Assembly. For the purpose of this case it matters not whether it was submitted directly or indirectly through the President. The reality is that it was at her behest that it reached the National Assembly for a purpose. That purpose was to ensure that the President is held accountable and his compliance with the remedial action taken, is enabled.

[85] The National Assembly's attitude is that it was not required to act on or facilitate compliance with the report since the Public Protector cannot prescribe to it what to do or what not to do. For this reason, so it says, it took steps in terms of section 42(3)[87] of the Constitution after receipt of the report. Those steps were intended to ascertain the correctness of the conclusion reached and the remedial action taken by the Public Protector, since more was required of the National Assembly than merely rubber-stamp her report. Broadly speaking, this is correct because "scrutinise" means subject to scrutiny. And "scrutiny" implies a careful and thorough examination or a penetrating or searching reflection. The Public Protector's report relates to executive action or conduct that had to be subjected to scrutiny, so understood.

[86] See for example the High Court decision in *DA v SABC* above n 74 at paras 73-4 that held that remedial action is not binding and may be disregarded on rational grounds.

[87] Section 42(3) of the Constitution reads:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action."

[86] Besides, even findings by and an order of a court of law may themselves be subjected to further interrogation or research, at the instance of the affected party, that may culminate in the conclusion that the court was wrong. But when the conclusion is reached, the question is: how then is it acted upon? This would explain the reviews of tribunal or Magistrates' Court decisions and appeals from all our courts all the way up to the apex Court. In principle there is nothing wrong with wondering whether any unpleasant finding or outcome is correct and deploying all the resources at one's command to test its correctness.

[87] The National Assembly was indeed entitled to seek to satisfy itself about the correctness of the Public Protector's findings and remedial action before it could hold the President accountable in terms of its sections 42(3) and 55(2) obligations. These sections impose responsibilities so important that the National Assembly would be failing in its duty if it were to blindly or unquestioningly implement every important report that comes its way from any institution. Both sections 42(3) and 55(2) do not define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given the leeway to determine how best to carry out its constitutional mandate. Additionally, section 182(1)(b) read with section 8(2)(b)(iii) does not state how exactly the National Assembly is to "attend urgently" to or "intervene" in relation to the Public Protector's report. How to go about this is all left to the discretion of the National Assembly but obviously in a way that does not undermine or trump the mandate of the Public Protector.

[88] People and bodies with a material interest in a matter have been routinely allowed by our courts to challenge the constitutional validity of a law or conduct of the President, constitutional institutions or Parliament. The appointment of the National Director of Public Prosecutions[88] is one such example, as is the extension of

[88] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

the term of office of the Chief Justice,[89] the constitutional validity of the proceedings of the Judicial Service Commission[90] and of rules and processes of Parliament.[91] The National Assembly and the President were in like manner entitled to challenge the findings and remedial action of the Public Protector. It would be incorrect to suggest that a mere investigation by the National Assembly into the findings of the Public Protector is impermissible on the basis that it trumps the findings of the Public Protector. Rhetorically, on what would they then base their decision to challenge the report? Certainly not an ill-considered viewpoint or a knee-jerk reaction.

[89] There is a need to touch on separation of powers.

[90] The Executive led by the President and Parliament bear very important responsibilities and each play a crucial role in the affairs of our country. They deserve the space to discharge their constitutional obligations unimpeded by the Judiciary, save where the Constitution otherwise permits. This accords with the dictates of Constitutional Principle VI, which is one of the principles that guided our Constitution drafting process in these terms:

> "There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."[92]

[91] And this was elaborated on in the *Certification* case as follows:

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[89] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

[90] *Helen Suzman Foundation v Judicial Service Commission and Others* [2014] ZAWCHC 136; 2015 (2) SA 498 (WCC); [2014] 4 All SA 395 (WCC).

[91] *Mazibuko v Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) and *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).

[92] See Schedule 4 to the interim Constitution above n 70 and the *Certification* case above n 51 in Annexure 2.

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."[93]

[92] The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government. It was with this in mind that this Court noted:

> "Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.
>
> But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament.. . .Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations.. . .It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."[94] (Footnotes omitted.)

[93] It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish

[93] *Certification* case above n 51 at para 109.

[94] *Doctors for Life* above n 16 at paras 37 and 38 in relevant part.

and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the "vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government".[95] Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution.[96] It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.

[94] That said, the National Assembly chose not to challenge the Public Protector's report on the basis of the findings made by the Minister of Police and its last Ad Hoc Committee. Instead it purported to effectively set aside her findings and remedial action, thus usurping the authority vested only in the Judiciary. Having chosen the President to ensure government by the people under the Constitution, and the Public Protector Act which, read with the Constitution, provides for the submission of the Public Protector's report to the National Assembly,[97] it had another equally profound obligation to fulfil. And that was to scrutinise the President's conduct as demanded by section 42(3) and reported to it by the Public Protector in

[95] Id at para 37.

[96] Id.

[97] See sections 42(3) and 55(2) of the Constitution and section 182(1)(b) of the Constitution read with section 8 of the Public Protector Act.

terms of section 182(1)(b) of the Constitution read with section 8(2)(b)(i), (ii) and (iii) of the Public Protector Act. Section 8(2) provides in relevant part:

> "(b) The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if—
>
> (i) he or she deems it necessary;
>
> (ii) he or she deems it in the public interest;
>
> (iii) it requires the urgent attention of, or an intervention by, the National Assembly;
>
> (iv) he or she is requested to do so by the Speaker of the National Assembly; or
>
> (v) he or she is requested to do so by the Chairperson of the National Council of Provinces."

[95] The Public Protector could not have submitted her report to the National Assembly merely because she deemed it necessary or in the public interest to do so. In all likelihood she also did not submit it just because either the Speaker of the National Assembly or Chairperson of the National Council of Provinces asked her to do so. The high importance, sensitivity and potentially far-reaching implications of the report, considering that the Head of State and the Head of the Executive is himself implicated, point but only to one conclusion. That report was a high priority matter that required the urgent attention of or an intervention by the National Assembly.[98] It ought therefore to have triggered into operation the National Assembly's obligation to scrutinise[99] and oversee executive action and to hold the President accountable, as a member of the Executive.[100] Also implicated was its obligation to give urgent attention to the report, its findings and remedial action taken and intervene appropriately in that matter.[101]

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[98] Section 8(2)(b)(iii) of the Public Protector Act.

[99] Section 42(3) of the Constitution.

[100] Section 55(2) of the Constitution.

[101] See section 182(1)(b) and (c) of the Constitution read with section 8(2)(b)(iii) of the Public Protector Act.

[96] Mechanisms that were established by the National Assembly,[102] flowing from the Minister's report, may have accorded with its power to scrutinise before it could hold accountable. As will appear later, what will always be important is what the National Assembly does in consequence of those interventions. The Public Protector, acting in terms of section 182 of the Constitution read with sections 1, 3 and 4 of the Executive Members' Ethics Act, had already investigated the alleged impropriety or relevant executive action and concluded, as she was empowered to do, that the President be held liable for specific elements of the security upgrades.

[97] On a proper construction of its constitutional obligations, the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The exception would be where the findings and remedial action are challenged and set aside by a court, which was of course not done in this case. Like the President, the National Assembly may, relying for example on the High Court decision in *DA v SABC*,[103] have been genuinely led to believe that it was entitled to second-guess the remedial action through its resolution absolving the President of liability. But, that still does not affect the unlawfulness of its preferred course of action.

[98] Second-guessing the findings and remedial action does not lie in the mere fact of the exculpatory reports of the Minister of Police and the last Ad Hoc Committee.[104] In principle, there may have been nothing wrong with those "parallel" processes. But, there was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and "remedial action". This, the rule of law is dead against. It is another way of taking the law into one's hands and thus constitutes self-help.

[102] In terms of section 55(2) read with section 42(3) of the Constitution.

[103] *DA v SABC* above n 74.

[104] This is the last Ad Hoc Committee that was set up to examine the report of the Minister of Police and make recommendations on it.

[99] By passing that resolution the National Assembly effectively flouted its obligations.[105] Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect or has been set aside through a proper judicial process. The ineluctable conclusion is therefore, that the National Assembly's resolution based on the Minister's findings exonerating the President from liability is inconsistent with the Constitution and unlawful.

Remedy

[100] All parties, barring the National Assembly and the Minister of Police, appear to be essentially in agreement on the order that would ensure compliance with the Public Protector's remedial action. The President's ultimate draft order, following on the one circulated eight days before the hearing,[106] is virtually on all fours with the remedial action taken by the Public Protector. The effect of this draft and the oral submissions by his counsel is that he accepts that the remedial action taken against him is binding and that National Treasury is to determine the reasonable costs, of the non-security upgrades, on the basis of which to determine a reasonable percentage of those costs that he must pay. The President is also willing to reprimand the Ministers in line with the remedial action. In response to that draft's predecessor, the Public Protector only expressed the desire to have the nature and ambit of her powers and the legal effect of her remedial action addressed if, as it turned out, no agreement was secured on the basis of the President's draft order and oral submissions were made.

[101] The only real disagreement amongst the parties about the draft order relates to the unqualified binding effect of the Public Protector's remedial action and whether a

[105] In terms of sections 42(3), 181(3), 182(1)(c) and 55(2) of the Constitution read with section 3(5) of the Executive Members' Ethics Act and section 182(1)(b) of the Constitution and section (8)(2)(b)(iii) of the Public Protector Act.

[106] The President filed a draft order with the Constitutional Court on 02 February 2016.

declaratory order should be granted to the effect that the President failed to fulfil his constitutional obligations in terms of sections 83, 96 and 181(3) of the Constitution and violated his oath of office.[107] Also that the National Assembly breached its constitutional obligations in terms of sections 55(2) and 182(1)(c) of the Constitution. These are the orders cumulatively prayed for by both the EFF and the DA.

[102] This Court's power to decide and make orders in constitutional matters is set out in section 172 of the Constitution. Section 172(1):

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[103] Declaring law or conduct inconsistent with the Constitution and invalid is plainly an obligatory power vested in this Court as borne out by the word "must". Unlike the discretionary power to make a declaratory order in terms of section 38 of the Constitution, this Court has no choice but to make a declaratory order where section 172(1)(a) applies.[108] Section 172(1)(a) impels this Court, to pronounce on the inconsistency and invalidity of, in this case, the President's conduct and that of the National Assembly. This we do routinely whenever any law or conduct is held to be inconsistent with the Constitution. It is not reserved for special cases of constitutional invalidity. Consistent with this constitutional injunction, an order will thus be made that the President's failure to comply with the remedial action taken against him by the Public Protector is inconsistent with his obligations to uphold, defend and respect

[107] This was mentioned for the first time by the EFF in its response to the President's draft order.

[108] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 106-8.

the Constitution as the supreme law of the Republic;[109] to comply with the remedial action taken by the Public Protector;[110] and the duty to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.[111]

[104] Similarly, the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action[112] and to maintain oversight of the exercise of executive powers by the President.[113] And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action.[114]

Order

[105] In the result the following order is made:

1. This Court has exclusive jurisdiction to hear the application by the Economic Freedom Fighters.
2. The Democratic Alliance's application for direct access is granted.
3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution is binding.
4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid.

[109] Section 83(b) of the Constitution.

[110] Section 182(1)(c) of the Constitution.

[111] Section 181(3) of the Constitution.

[112] Section 42(3) of the Constitution.

[113] Section 55(2)(a) and (b) of the Constitution.

[114] Section 8(2) of the Public Protector Act.

5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.
6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.
7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.
8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.
9. The President must reprimand the Ministers involved pursuant to paragraph 11.1.3 of the Public Protector's remedial action.
10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside.
11. The President, the Minister of Police and the National Assembly must pay costs of the applications including the costs of two counsel.

For the Economic Freedom Fighters:	W Trengove SC D Mpofu SC T Ngcukaitobi J Mitchell N Muvangua Instructed by Godla and Partners Attorneys
For the Democratic Alliance:	A Katz SC J De Waal J Bleazard T Mayosi Instructed by Minde Schapiro & Smith Inc
For the Speaker of the National Assembly:	L G Nkosi-Thomas SC G D Ngcangisa M Musandiwa Instructed by the State Attorney
For the President:	J J Gauntlett SC K J Kemp SC M du Plessis S Mahabeer S Pudifin-Jones Instructed by the State Attorney
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