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REPORT OF THE NATIONAL TREASURY TO THE CONSTITUTIONAL COURT IN  
COMPLIANCE WITH THE COURT ORDER DATED 31 MARCH 2016

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A. Introduction

1. In the matter of *Economic Freedom Fighters and Speaker of the National Assembly and Others* (CCT 143/15) and in the matter of *Democratic Alliance and Speaker of the National Assembly and Others* (CCT 171/15) decided on 31 March 2016 the Court made an order that required the National Treasury to give effect to the remedial action that was prescribed<sup>2</sup> in the report of the Public Protector.
2. This Report is filed in compliance with that Court order<sup>3</sup>.

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<sup>1</sup> **Economic Freedom Fighters and Speaker of the National Assembly and Others and Democratic Alliance and Speaker of the National Assembly and Others Case No CCT 143/15 and Case No CCT 171/15**

<sup>2</sup> Report of the Public Protector p. 442 para 11.1.1 – 11.1.2

<sup>3</sup> The court order reads as follows:

- “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.”

## B. Prescribed Scope

### Scope

3. The scope of the assessment undertaken by the National Treasury was prescribed in specific terms by the Court. Court order 5 made it clear that the enquiry was limited to five distinct measures implemented at the President's residence at Nkandla, namely, the visitors' centre, amphitheatre, swimming pool, cattle kraal and chicken run.
4. These are, *inter alia*, the non-security measures that were singled out in the findings made<sup>4</sup> in the report of the Public Protector, and in the judgment of this Court.<sup>5</sup>
5. Once the reasonable costs of implementing these measures are established, the National Treasury is to determine a reasonable percentage of those costs that the President is to pay personally.<sup>6</sup> The determinations of the National Treasury are then to be submitted to this Court within 60 days of the issuance of the Court's orders.<sup>7</sup>

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<sup>4</sup> Report of the Public Protector p. 431 para 10.5.3; p. 437 para 10.9.1.4 – 10.9.1.5

<sup>5</sup> Judgment: para [76] and [105] order 5.

<sup>6</sup> Judgment: para [105] order 6.

<sup>7</sup> Judgment: para [105] order 7.

C. The assignment undertaken by the quantity surveyors retained by the National Treasury

6. The National Treasury has completed the task of determining the reasonable costs of the five measures implemented by the Department of Public Works at the private residence of the President as well as the determination of a reasonable percentage of those costs that ought to be paid by the President.
7. This was done with the assistance of two firms of quantity surveyors who were independently commissioned to visit the residence of the President at Nkandla and thereafter prepare a report on the reasonable costs of the said five measures.
8. In giving context to the options that were available to the National Treasury in discharging this assignment, the following should be noted:
  - 8.1 The orders made by this Court were not prescriptive as to the process of evaluation and determination that the National Treasury was to make.
  - 8.2 This Court did not prescribe which particular experts were to be consulted.
  - 8.3 It did not set the metric that was to be applied in determining the reasonableness of the costs incurred.
  - 8.4 It did not stipulate a particular formula by which to determine the reasonable percentage that the President was to pay.

9. The Department of Public Works was requested to provide the relevant electronic and hard copies of the construction and engineering drawings, associated specifications and the site layout of the President’s residence at Nkandla in respect of the five facilities<sup>8</sup> identified by this Court. Information used for costing purposes was extracted from these drawings, as appears in Table 1 below.

**Table 1: Drawings obtained from public works which provided costing information**

Drawing No.	Description	Comment
PMB 0909/121	Visitors’ Facility – plan elevations and sections	The drawing received was for a single storey building whereas a double storey building was built Building layout incorrect No cross-sections received Elevations received are incorrect as they are not reflective of what is built
PPA-W-017-E-01-04	Swimming pool – detail and sections	Pool layout correct Screen walls, retaining walls and paving not reflective of what was built
PPA-W-017-C-01-02	Swimming pool – detail and sections	
PPA-W-015-A-01-00	Amphitheatre details	-
PPA-W-008-B-01-01	Cattle kraal Concept	Cattle kraal layout not reflective of what was built
Unnumbered	Chicken run – Sectional Elevation	
Unnumbered	Site Section AX	Landscape Architect's site plan not to scale Typical section through site provided indicative information
Unnumbered	Site Section BX	

10. The electronic and hard copies of the design, construction and engineering drawings and the associated specifications and site layout relating to the five

<sup>8</sup> “Facilities”, “Items” and “Measures” are used interchangeably in this Report.

facilities did not include the final “as built” drawings, neither did any of the information received include structural drawings, wet surfaces, civil, electrical or mechanical information or any related specifications. In addition, no bill of quantities was provided to assist in the determination of the reasonable costs incurred in building the said facilities.

11. Each of the two firms of quantity surveyors comprised three qualified experts. The identity of the one firm was not disclosed to the other in order to maintain independence and objectivity. At no stage did they meet to prepare a joint report. Rather, the Moderation Panel, (“the Panel”), that assisted the National Treasury interfaced with both firms of quantity surveyors during the moderation of the reports prepared by the two firms of quantity surveyors.
12. The two firms of quantity surveyors had separate one day visits, on 10 and 11 May 2016, to the President’s residence at Nkandla, where they gathered the necessary information on which to base their cost estimates. Apart from members of the security cluster and the Presidency, the quantity surveyors were accompanied by representatives from the National Treasury.
13. The National Treasury concluded that a cost analysis, based on elemental estimates, and moderated by a professional team of built environment experts, was the most reasonable and practical course to adopt.

#### D. Cost analysis process

14. In context, each firm of quantity surveyors was taken through the same process during the site visit to ensure consistency<sup>9</sup>. They were permitted to take photographs and measurements of the indicated facilities. It is important to note, however, that no buried services<sup>10</sup>, structural elements, or retained materials were exposed and therefore capable of accurate measurement.
  
15. The two firms of quantity surveyors independently developed cost models based on an elemental cost analysis, in order to arrive at the market related values of the identified facilities as at 2009 and 2016. These models were based on:
  - 15.1 the information provided by the Department of Public Works;
  - 15.2 information gathered from the site visit;
  - 15.3 a set of assumptions that were applied in dealing with uncertainties, including the lack of information in construction and geotechnical information, what building standards were applied, what needed to be included in the ancillary works, construction operators and market conditions; and

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<sup>9</sup> The only slight difference in the quantity surveyors' access to the facilities was that the second firm of quantity surveyors did not enter the kraal as they had been sensitised to the fact that that space is traditionally only accessed by specific family members. In that instance the kraal was measured from its perimeter.

<sup>10</sup> Such as underground water of electrical conduit pipes.

- 15.4 assumed engineering solutions for similar projects.
16. It is apposite at this stage to briefly set out the methodology of an elemental cost analysis as this approach is illustrative of the reasonableness of the cost analysis exercise. It also reflects the basis from which the Moderating Panel was able to evaluate the reports of the two firms of quantity surveyors on the reasonable costs of the five facilities.
  17. An elemental cost analysis divides buildings into elements i.e. a part of a building which always performs the same function irrespective of its construction or specification e.g. foundations, an external envelope, roofs etc. Elements are in turn subdivided into components of construction, which, in turn, can be further subdivided to reflect high cost components.
  18. Unit rates are then applied to quantitative metrics associated with the element, component or sub-component such as “square metre”, “metre”, “number of” and “percentage” in order to arrive at a probable cost of the works.
  19. The accuracy of the estimate is a function of the information that is made available. An elemental estimate based on information available once a design has been developed, but not yet converted into information which enables the builder to construct the buildings, is typically within 10% of the cost of the constructed works.

20. Where the proposed works are ill defined<sup>11</sup>, the accuracy of an elemental cost estimate is dependent on assumptions that are made to deal with unknown factors. As a result, where there is a paucity of information there can be significant differences between estimates prepared by different professionals for the same construction works.
  
21. *In hoc casu*, had a full set of working drawings been provided, the two firms of quantity surveyors would have arrived at similar estimates because of the ease of quantification and measurement that a full set of drawings would have allowed.
  
22. It is also important to explain that an elemental cost estimate should not be confused with cost estimates based on a bill of quantities where construction drawings and specifications are available. A bill of quantities is a document developed for tender purposes. It is prepared in accordance with the provisions of a standard system of measurement, and comprises both a descriptive list of quantities of works and descriptions of the materials, workmanship and other matters required for a construction works.

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<sup>11</sup> In this instance the proposed works were not well defined because of the paucity of available information and, in particular, “as built” drawings.



23. Accordingly, an estimate based on a bill of quantities immediately prior to construction or on precise “as built” information will have an accuracy typically within 5% of the cost of the constructed works<sup>12</sup>.
24. In the breakdown of the components in an elemental cost estimate, what is included and excluded in each element or component and what metrics are used in the assessment of cost, varies significantly between professionals. This is because the focus is on the prediction of the total cost for the construction works under consideration, as opposed to a singling out of each individual item under scrutiny and costing that item in isolation to the total works completed.
25. The breakdown of construction works into elements and components, that has as its main objective the provision of shelter for its occupants or contents, can be standardised. Such breakdown for other types of construction works cannot be standardised. Furthermore the rates applied and the basis of measurement (e.g. gross area or net area) to each item take into account uncertainties in the measurements and anticipated construction requirements.

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<sup>12</sup> National Treasury is advised by the moderators that the room for error of 10% where information is limited as opposed to the room for error of 5% where all information is available is not a significant difference from an industry perspective. As a consequence, in their view, the paucity of information did not make a material difference to the outcome of the cost analysis exercise undertaken by National Treasury.

26. As a result, it is not usually possible to directly compare the build-up of costs between different elemental cost estimates for the same construction works prepared by different professionals as is the case with a bill of quantities.
27. In this case, there are understandable differences between these two estimates due to the quality of the information provided to the two firms of quantity surveyors and the assumptions made in preparing the estimates, particularly where there is a lack of information.
28. The elemental cost estimates prepared by the two firms of quantity surveyors and the variances between the two reports were identified and interrogated by the moderators. It is to the report of the moderators that attention is now focussed as it is from this report that the National Treasury has sought guidance.

**E. The moderation of the reports of the two firms of quantity surveyors by the Panel<sup>13</sup>**

29. The South African Institution of Civil Engineering (“SAICE”) and the Association of South African Quantity Surveyors (“ASAQS”) are non-profit institutions which collectively represent approximately 23 000 individuals.

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<sup>13</sup> In context, and in clarifying the role of the Moderation Panel, though the National Treasury had its own in-house procurement specialists on whom it relied, it was envisaged that when the two firms of quantity surveyors were appointed, their estimates would be moderated by a panel of built environment professionals whose experience and professional expertise represented industry norms and standards.

Membership of these organisations is voluntary. Both institutions focus on learned society and technical leadership activities for the built environment.

30. These two organisations volunteered their services on 12 April 2016, without charge, to assist the National Treasury in fulfilling the tasks assigned by this Court. The National Treasury accepted their offer of assistance, as it was thought prudent to bring on board the breadth of expertise that resides in these two institutions<sup>14</sup>.
31. The additional rationale for accepting the offer of the two institutions and for applying the moderation panel approach was to ensure objectivity and to maintain independence, as well as to make use of collective and specialised skills.
32. SAICE and ASAQS assembled a six member Panel comprising the chief executive officers of both organisations, two professional engineers and two professional quantity surveyors, each of whom had at least 30 years of experience.
33. This Panel was required to moderate the reports, fill the gaps where necessary, prepare a report of the costs of the measures implemented, and make a determination as to what the actual costs for professional services,

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<sup>14</sup> The National Treasury acknowledges that the professional input of these two institutions has been of great assistance.

construction costs and materials should have been in June 2009 (when the construction effectively started).

34. The Panel was further requested to apply their professional expertise and provide a recommendation on the reasonable percentage of the costs of each of the five items which the Court indicated ought to be paid personally by the President.

35. The approach adopted was intended to ensure that any cost estimates used by the National Treasury in terms of the Court orders would be within the limits of acceptable professional practice standards, as assessed by practitioners in the impacted industry.

36. The moderation process of the Panel involved:

36.1 examining the available information including the material furnished by the Department of Public Works, and information contained in relevant portions of the report of the Public Protector;

36.2 interrogating the two quantity surveyor firms' cost models and reports with reference to the drawings furnished by the Department of Public Works and the photographic material provided by the two firms;

36.3 conducting separate telephonic interviews with the two firms of quantity surveyors, in particular, with the team leaders, to clarify

relevant aspects of their reports, including the assumptions made by them and the consequent impact on costs;

36.4 requesting further information from the two firms of quantity surveyors to address identified gaps and inconsistencies between the two reports;

36.5 conducting a face-to-face discussion with each team leader after which a common understanding was reached regarding the scope and the methodology relied on in compiling the moderated estimates;

36.6 using their expertise and further information obtained local to the project, to calibrate the base rates in the two reports;

36.7 determining the work scope that had actually been performed at the President's residence; and

36.8 using its own judgment in determining the reasonable costs of the measures implemented and developing a report in which they set out their findings and recommendations.<sup>15</sup>

37. The reports of the firms of quantity surveyors that were moderated by the Panel are annexed hereto, marked "**NT 1**" and "**NT 2**". The Court will immediately notice that there are variances in their measurements. These are dealt with in the Moderation Panel Report which is annexed hereto marked "**NT 3**".

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<sup>15</sup> The detail of the process of moderation is recorded at para 2.2 p. 10 – 12 of the Moderation Report

38. On the advice of the Panel, the variances in the reports of the quantity surveyors are not material to the outcome of the evaluation and assessment exercise that culminated in the determination of the reasonable costs of the measures implemented by the Department of Public Works.
39. Section 2 of the Moderation Panel Report addresses the methodology adopted. The approach taken and the adjustments made are explained fully therein. The National Treasury is satisfied that the extensive work undertaken by the moderators was executed impartially, professionally and in a balanced and fair manner.
40. Section 3 of the Moderation Panel Report deals with the estimation of costs. A detailed note of the cost estimates developed by the moderators is set out in this section of the report.
41. In the view of the Panel, the fact that they did not physically visit the site does not detract from the validity of their conclusions and recommendations. Their observation is that a different process may have yielded a better process, but not a significantly better result.
42. The National Treasury is satisfied that, although the Panel did not visit the site, their interrogation of the available material and information was rigorous and professional.

*The cost estimates*

43. The National Treasury has accepted the cost estimates made by the Panel and noted the recommendation that follows thereon.
  
44. As requested in the terms of reference given to the Panel, the reasonable percentage of the costs to be paid by the President personally has also been calculated by that Panel and a recommendation made. The National Treasury notes the recommendation, and has applied its mind to the matter, as explained below.

F. **Discussions with the Panel**

45. The inclusion of the broad record of discussions in this Report is intended to illustrate to this Court the intensity of the National Treasury's interrogation of the material that was placed before it by the experts that assisted it. The reason for the close examination of the Panel report in particular was to enable the National Treasury to:
  - 45.1 be in a position to make an informed and well considered determination of what constituted the reasonable costs of the five facilities built at the private residence of the President; and
  - 45.2 establish what would constitute a reasonable percentage of those costs that the President should pay personally.

46. In order to satisfy itself on the findings and recommendations of the Panel, a number of engagements were held with the Panel. These consultations illustrated:

46.1 the detail of the enquiry made during the moderation exercise;

46.2 how the gaps in information were filled;

46.3 what assumptions were made;

46.4 how the Panel arrived at the findings made; and

46.5 the basis on which the recommendations made were justifiable according to the professional standards that obtain in the built environment industry.

47. Included in the moderation conducted by this team of experienced professionals were the undermentioned elements. They explained that their primary objective was to ensure that the values captured during their moderation exercise were justifiable according to industry standards. It was for this reason, *inter alia*, that the approach taken was to make assumptions that were consonant with industry standards.

48. The Panel assured the National Treasury, however, that the assumptions made by the two firms of quantity surveyors, though at variance in places, were based on acceptable industry standards.



49. The detailed interrogation of the cost estimates of the two firms of quantity surveyors was a task allocated to the two members of the said Panel who themselves were quantity surveyors. Their findings were then interrogated by the remainder of the Panel, which included civil engineers.
50. Following on their moderation process, the Panel established that the cost estimates of the five measures indicated by this Court *“are accurate within 10% of prices that would be obtained currently on an open tender for the scope of work entailed”*.<sup>16</sup>
51. The said Panel assured the National Treasury that, in conducting the moderation, they did not average the costs of the two firms of quantity surveyors, but instead applied their minds to the approximately 300 items that were integral to the costing exercise.
52. They also assured the National Treasury that the two firms of quantity surveyors had approached their task in a professional manner and that though some of their assumptions yielded different results, from an industry standard, those assumptions were correct.
53. In illustrating this point, the Panel pointed to variances arising from the absence of “as built” drawings, related information on the specifications that were agreed to, or even the market conditions that prevailed at the time.

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<sup>16</sup> Moderation Panel Report Part A Executive Summary p. 3

54. Their task as a moderating panel was thus to use their professional judgment to find an acceptable value as per the prevailing industry standards and apply those to the moderation exercise.
55. They deferred to industry standards in, for example, calculating fees for preliminaries and for professional fees.
56. The Panel concluded that the reasonable costs of the five items amounts to R8 884 364 (including VAT) as at June 2009 and R11 753 758 (including VAT) as at May 2016 as indicated in Table 2, with an accuracy of  $\pm 10\%$ .

**Table 2: Revised cost estimates following the moderation process**

Identified measures	SAICE – ASAQS Panel estimates (2016 cost)		SAICE – ASAQS Panel estimates (2009 cost)	
	Total	Security component	Total	Security component
Visitor's centre	R 3 876 847		R 2 930 409	
• Ground floor	R 1 241 979	R 1 241 979	R 938 780	R 938 780
• First floor	R 1 536 240		R 1 161 204	
• External works	R 549 547		R 415 388	
• Professional fees	R 549 081		R 415 036	
Swimming pool	R 3 071 576		R 2 321 725	
• Pool area	R 1 229 551		R 929 386	
• Garages	R 1 406 995		R 1 063 511	
• Professional fees	R 435 030		R 328 828	
Amphitheatre*	R 1 325 783		R 1 002 125	
Cattle kraal*	R 1 702 725		R 1 287 046	
• Culvert	R 346 244		R 261 717	
• Kraal	R 1 356 481		R 1 025 329	
Chicken run*	R 333 383		R 251 996	
<b>Subtotal</b>	<b>R 10 310 314</b>	<b>R 1 241 979</b>	<b>R 7 793 302</b>	<b>R 938 780</b>
<b>Vat</b>	R 1 443 444	R 173 877	R 1 091 062	R 131 429
<b>Total (Including VAT)</b>	<b>A R 11 753 758</b>	<b>B R 1 415 856</b>	<b>A R 8 884 364</b>	<b>B R 1 070 209</b>
<b>Total (Excluding security component)</b>	<b>A-B R 10 337 902</b>		<b>A-B R 7 814 155</b>	

\* Inclusive of professional fees

57. The Panel, however, was of the view that the only element of the five components in question that could be considered to be of a security nature is the control centre at the ground floor of the visitor's centre.
58. The Panel accordingly concluded that the reasonable costs for the five items (excluding the lower level of the visitor's centre which was used by the South African Police Services), including VAT, amounts to R 10 337 902 at 2016 values, and R7 343 012 if de-escalated to June 2009 values using the Bureau for Economic Research indices<sup>17</sup>.
59. The Panel advised that in their opinion and given the scope of work entailed, those estimates were accurate within 10% of prices that currently could be obtained on an open tender.
60. Finally, in the view of the National Treasury, the Panel satisfactorily addressed the issues raised by it in the exchanges held between the parties.

#### **G. Determinations of the National Treasury**

##### *Court order 5*

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<sup>17</sup> Moderation Panel Report Section 4 Conclusions and Recommendations p.24

61. With specific reference to the reasonable costs of the five measures indicated in Court order 5, the National Treasury has understood that the Panel applied the “but for” principle in establishing the extent of the work to be included in its cost estimates<sup>18</sup>. It has considered the rationality and purpose of the use of this principle and adopted it as its own modality on the basis that it is a logical and justifiable approach.
62. In the result the National Treasury notes the cost analysis and estimates of the Moderation Panel as outlined above, and determines that as at June 2009 the reasonable costs of the visitors’ centre, amphitheatre, cattle kraal, chicken run and the swimming pool would be R8 884 364<sup>19</sup> (Including VAT ).

*Court order 6*

63. An important aspect to which the National Treasury has applied its mind relates to whether the visitors’ centre ought to be assessed as a composite measure that comprises two levels, or whether the cost of the ground floor of the visitors’ centre which is currently used by the South African Police Services ought to be separated from the total cost of the composite visitors’ centre.

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<sup>18</sup> Moderation Panel Report Section 2.3 Extent of Five Measures p.12

<sup>19</sup> This computation includes the cost estimate for the composite visitors’ centre.

64. The cost of the first floor is R1 161 204 as at June 2009. The cost of the ground floor that is used by the South African Police Services is R938 780 as at June 2009.
65. After excluding the ground floor of the visitors' centre, the Panel de-escalated the 2016 value of R 10 337 902 to June 2009 rand values (de-escalation percentage of 28.97%) which amounted to R 7 343 012 using the Bureau for Economic Research indices<sup>20</sup>.
66. In the premises, the National Treasury has taken into account the current use of the lower level of the visitors' centre by the South African Police Services. As a consequence the reasonable percentage of the estimated costs of the five measures that the President would have to pay personally would be 87,94%. This percentage corresponds to R7 814 155 as at June 2009.

Dated at PRETORIA this 27<sup>th</sup> day of June 2016

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On behalf of the National Treasury

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<sup>20</sup> Moderation Panel Report Appendix A: SAICE and ASAQS Moderation Table p.25