

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT89/17

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS

First Applicant

UNITED DEMOCRATIC MOVEMENT

Second Applicant

CONGRESS OF THE PEOPLE

Third Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

PRESIDENT JACOB GELDEYIHLEKISA ZUMA

Second Respondent

WRITTEN SUBMISSIONS

ON BEHALF OF CORRUPTION WATCH

Table of Contents

Introduction.....	2
Interpretation of section 42(3)	3
The language used in s42(3).....	3
The context.....	4
A purposive approach	4
Foundational values	6
The import of section 7(2).....	8
What does effective oversight entail?.....	10
Were the oversight tools utilised by the NA rational?	12
Comparative Law	17
Brazil	17
The United States of America	19
Appropriate relief	20

Introduction

1. This application raises for determination the nature and ambit of the obligations imposed by the Constitution on the National Assembly (“the NA”) to ‘scrutinise’ and ‘oversee’ executive action. The applicants contend that the NA has failed in its obligation to hold the President accountable for his conduct in violating the Constitution¹. The Speaker contends that the NA has complied with its obligations in that it posed questions to the President and the executive on the issues arising from the judgment of *EFF v The Speaker*; it has debated and voted on a motion to remove the President from office;² and it has debated and voted on a motion of no confidence in the President.³
2. The sharp point of the debate between the parties is whether or not the NA has taken adequate action to hold the President accountable for his conduct. The answer to this question lies in the proper interpretation of section 42(3) of the Constitution which provides:

“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

¹ This was the finding of this court found in the matter of *EFF v Speaker*, NA 2016 (3) SA 580 (CC) (“*EFF v The Speaker*”)

² On 5 April 2016 (see *Speaker AA* para 48)

³ On 10 November 2016 (see *Speaker AA* para 46)

*consideration of issues, by passing legislation **and by scrutinizing and overseeing executive action.***” (emphasis added)

The proper interpretation of section 42(3)

3. This Court has held that the correct approach to the interpretation of the Constitution is to have regard to the language and the context of the provision concerned. In addition, a generous and purposive interpretation should be adopted which gives expression to the underlying values of the Constitution.”⁴
4. We deal with the factors which are relevant to the proper interpretation of section 42(3) below.

The language used in s42(3)

5. In *EFF v The Speaker* this Court held that the term ‘scrutinise’ means *subject to scrutiny*. And ‘scrutiny’ implies “a careful and thorough examination or a penetrating or searching reflection”.⁵

⁴ See *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC) at para 16

⁵ Para 85

The context

6. Section 42(3) must be interpreted in the context of other relevant constitutional provisions. In this regard section 55 of the Constitution provides for the powers of the NA. Section 55(2)(a) provides that the NA must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. Section 55(2)(b) provides that the NA must provide for mechanisms to maintain oversight of the exercise of national executive authority.

A purposive approach

7. In *EFF v Speaker* this Court held that the NA is the voice of all South Africans and the watchdog of State resources:

“It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. 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. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made 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.... No doubt, it is an irreplaceable feature of good governance in South Africa.”⁶

8. To achieve the constitutional purpose, oversight over executive action must be real and effective, and not illusory or rendered nugatory.⁷ This is vital because the NA, and by extension Parliament, is a “*watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people*”.⁸
9. Furthermore, a constitutional watchdog may not be toothless; nor its teeth blunt. Otherwise, those over which it watches have no reason to be on their toes and fulfil their constitutional duties. This approach to the Constitution accords with this Court’s approach to the watchdog functions of the Public Protector and remedial action that can be taken – it must be effective.⁹

⁶ Para 22

⁷ *Democratic Alliance v Speaker, National Assembly and Others* 2016 (3) SA 487 (CC) at para 17

⁸ *Supra*

⁹ *Economic Freedom Fighters* paras 56 and 71; *South African Broadcasting Corporation Soc Ltd and others v Democratic Alliance and others (Corruption Watch as amicus curiae)* [2015] 4 All SA 719 (SCA) para 53.

Foundational values

10. The obligation on the NA to “scrutinize” and “oversee” must be viewed in light of the foundational values underpinning the Constitution. In *EFF v The Speaker*, this Court identified the values of constitutionalism, accountability and the rule of law as foundational to the Constitution.
11. This court has described the profound importance of ensuring that members of the three branches of the state remain accountable. It held in *Secret Ballot*:

“Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina (power belongs to us) and mayibuye iAfrika (restore Africa and its wealth) are much more than mere excitement generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to “we the people”, united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and

resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.”¹⁰

12. The NA’s oversight function has been recognized as a form of protection against potential tyrannical rule at the hands of the executive. Because of the ever-present temptation of the improper use of state organs to further the interests of some within the executive, it is important that the NA carry out its oversight function diligently and effectively. It has to do so with a view to:

12.1. Ensuring accountability, transparency and good governance:

The Constitution requires that government must be accountable, responsive and open. It also requires that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency.

12.2. Reducing the opportunity for corruption: The Constitution sets high standards for the exercise of public power by state institutions and officials. The objective of monitoring state officials in order to guard against corruption and malfeasance in

¹⁰ Para 7

public office forms part of the constitutional imperative to combat corruption. Irrespective of whether the Nkandla debacle involves corruption or not, it is important that Parliament performs its oversight function in such a way that it reduces the opportunity for corruption and malfeasance. This arises not only from an interpretation of section 43(2) but also from a consideration of section 7(2) of the Constitution given that corruption undermines the rights in the Bill of Rights, and imperils democracy.

12.3. *Fostering a culture of integrity in government:* The NA has a duty to create and foster a culture of integrity. It does so by holding the executive to high standards of ethical conduct and robustly engaging with members of the executive where conduct exists which falls short of acceptable ethical conduct.

The import of section 7(2)

13. Section 7(2) of the Constitution provides, in peremptory terms, that organs of state have a constitutional obligation to respect, protect promote and fulfil the rights entrenched in the bill of rights. In so doing, section 7(2) imposes a positive obligation on organs of state to prevent

and combat corruption and maladministration.¹¹ This in the face of the deleterious effects of corruption on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms.

14. In *Heath*¹², this Court held that:

“Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. . . .”

15. The import of section 7(2) is that the NA is constitutionally obliged to be vigilant in order to combat corrupt activity and maladministration. It must act scrupulously and conscientiously in order to guard against malfeasance. As this Court held in *Nyathi*¹³:

¹¹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

¹² *South African Association of Personal Injury Lawyers v Heath and Others* [2001 \(1\) SA 883 \(CC\)](#)

¹³ *Nyathi v MEC Council for Department of Health, Gauteng and Another* [2008 \(5\) SA 94 \(CC\)](#) at para 80

“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”

What does effective oversight entail?

16. This Court in *United Democratic Movement v Speaker of the National Assembly* (“*Secret Ballot*”)¹⁴ judgment, identified the oversight processes created by the Rules of Parliament. These include regular or normal oversight mechanisms and so-called *supreme accountability tools*¹⁵.

17. Normal oversight mechanisms include:

17.1. Calling on Ministers to regularly account to Portfolio Committees and ad hoc Committees;

¹⁴ Neutral Citation [2017] ZACC 21 at paras 40 – 41

¹⁵Id at para 42

- 17.2. Ministers availing themselves to respond to parliamentary questions as well as other question and answer sessions during a National Assembly sitting.
 - 17.3. The State of the Nation Address;
 - 17.4. Budget Speeches; and
 - 17.5. Question and answer sessions that the President and the rest of the Executive are held to account.
18. The supreme accountability tools include mechanisms to remove the President from office. In this regard, the Constitution provides for two processes in terms of which the President may be removed from office:
- 18.1. Impeachment under section 89 of the Constitution, which applies where there is a serious violation of the Constitution or the law, serious misconduct or an inability to perform the functions of the office; or
 - 18.2. A motion of no confidence under section 102.
19. Corruption Watch submits that the NA's choice of oversight tool will depend on the facts of an issue. However, as with all exercises of public power, this choice must be rational having regard to the

constitutional and statutory paradigm within which the choice is exercised.

20. While the doctrine of separation of powers does not permit this Court to prescribe to NA which oversight tool it should employ in the exercise of its obligation to scrutinize and oversee the executive, this Court can and should enquire into whether or not the choice exercised is rational.

Were the oversight tools utilised by the NA rational?

21. In order to assess the adequacy of the oversight tools which the Speaker alleges were used by the NA to hold the President to account, it is necessary to identify features of the President's handling of the Public Protector's report which necessitated action by the NA. These include:

- 22.1 The President's conduct which was found by the Public Protector to violate the Executive Ethics Code and to be inconsistent with his office as a member of Cabinet as contemplated in section 96 of the Constitution¹⁶;

- 22.2 The finding by the Public Protector that the President failed to act in line with certain of his constitutional and ethical

¹⁶ Nkandla Report para 10.10.1.4

obligations by knowingly deriving undue benefit from the irregular deployment of state resources;

22.3 The fact that the upgrades to President Zuma's residence were "unconscionable, excessive and caused a misappropriation of public funds"¹⁷;

22.4 The Public Protector's finding that the President and his family were unduly enriched as a result of the non-security features;

22.5 Whether the President had misled the NA when he made statements in the Assembly about the Nkandla upgrades. In this regard, the Public Protector indicated that she was unable to make a finding about whether or not the President had lied to the NA although she accepted that his conduct could "be legitimately construed as misleading Parliament";¹⁸

22.6 The President's disregard for the remedial action taken against him by the Public Protector. This failure was described by this Court as a failure to "uphold, defend and respect the Constitution as the supreme law of the land."¹⁹

¹⁷ FA at para 39.4

¹⁸ Nkandla Report para 10.10.1.4

¹⁹ EFF v The Speaker at para 83

22. The cumulative effect of these factors is that the NA was obliged to properly investigate the matter in order to decide what the appropriate oversight tool was.
23. The Speaker's case is that Parliament did indeed exercise oversight over the findings by this Court that the President breached the Constitution when he failed to implement the remedial action in the report of the Public Protector. On her version, the National Assembly has done at least three things, firstly it allowed questions to the President as contemplated in the Rules. Secondly, it entertained, debated and voted on a motion to remove the President and a motion of no confidence.²⁰
24. On their own, these processes, are wholly inadequate and cannot form the basis on which the NA determines whether to impose the ultimate sanction on the President. Corruption Watch submits that the NA would only have been in a position to decide whether to exercise its impeachment powers after investigating and reaching a finding through its ad hoc committee system on whether it was misled by the President.

²⁰ Page 17 para 37 of the Speaker's answering affidavit

25. The NA is empowered by the Constitution and its rules to implement such an investigative process.

25.1. Section 57(1) of the Constitution empowers the National Assembly to determine and control its internal arrangements, proceedings and procedures; and to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

25.2. In terms of section 56 the “*National Assembly or any of its committees may summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.*”

25.3. Part 15 of the Rules of the National Assembly allow for the establishment of an ad-hoc committee by the Speaker for the performance of a specific task.

26. In his report on the South African experience on enhancing parliamentary oversight, to the Inter-Parliamentary Union's Association of Secretaries, the erstwhile Secretary General of the

National Assembly, Mr NK Mansura, said of the ad-hoc committee system that²¹:

“The model also recommends that the current system in Parliament of appointing ad hoc committees to investigate a matter of public interest is effective. However, there is a need to ensure that issues of public interest, as they arise and are made known to Parliament, are investigated through the appointment of ad hoc committees. This will enhance Parliament’s role on oversight and ensure compliance with the Constitution where we are becoming responsive to the needs of the people as outlined in the vision and mission statement of Parliament. In addition, Parliament ought, when it deems it necessary, to be proactive in appointing ad hoc committees to address issues of public interest.”

27. Mansura goes on to say that in order to effectively conduct its oversight functions, committees have the following powers:

- to summon any person to appear before it to give evidence on oath or affirmation or to produce documents;
- to receive petitions, representations or submissions from interested persons or institutions;
- to determine its own procedure; and

²¹ Enhancing Parliamentary Oversight: The South African Experience by NK Mansura Page 14 para 6.3

- to conduct public hearings, and hearings in public.²²

28. It is evident from this that the NA envisages the use of the *ad hoc* committee system to investigate matters of public interest, and that the purpose of convening an investigative ad hoc committee is for the NA to enhance its oversight role and to ensure compliance with the Constitution.
29. In the circumstances of the present matter, Corruption Watch submits that the absence of a detailed factual report by the NA rendered the supreme accountability tools ultimately initiated by the opposition, meaningless.

Comparative Law

30. Moreover, comparative law demonstrates that presidential impeachments are often preceded by fact finding investigative inquiries.

Brazil

31. In terms of Section 3 Article 1 of the Brazilian Constitution provides that after the President is found guilty in an **impeachment trial** she or

²² Id Page 5 para 4(i)

he will face removal from office and be disqualified from holding any office of honour, trust or profit.

32. The pillars of the Brazilian impeachment process are the Constitution and the Impeachment Act (Law 1.079/1950). The first requirement for the commencement of the impeachment proceeding is the existence and authorship of an impeachable offense, as contemplated in Articles 85 and 86 of the Constitution.²³
33. The second requirement is that the President must have acted with *specific intent*. Article 86, must be read with the procedure in articles 51 and 52 of the Constitution, which mandate that before the impeachment process can commence, two-thirds of the Chamber of Deputies²⁴ must accept an accusation formulated against the President, which will then be submitted to the Federal Senate (in the event of a civil impeachable offense). The Federal Senate is obligated to initiate proceedings to investigate whether the President is guilty of an impeachable offence.

²³ According to Article 85 of the Constitution, impeachable offenses are those that are in direct contradiction and violation of the Constitution, and, specifically, against: (i) the existence of the Brazilian Federal Union; (ii) the free exercise of the power held by the legislature and the judiciary as well as any sphere of the Prosecutor's Office (at the federal, state and municipal levels); (iii) the free exercise of the citizen's political, individual and social rights; (iv) the internal security of the country; (v) administrative probity; (vi) the annual budget law; and (vii) the enactment and fulfilment of the law and judicial rulings.

²⁴ Equivalent to the American House of Representatives or the lower House of Parliament

34. In this proceeding, the President is granted the right to a fair hearing. Furthermore, in accordance with the Impeachment Act, a commission will be elected to rule on the proceedings, made up by one-fourth of the Senate's 81 members. This commission will be tasked with producing yet another accusation against the President, which will then be submitted to an open vote in the Senate. If 54 of the 81 Senators vote that the President be convicted for the impeachable offences, the President is impeached.

The United States of America

35. In the United States of America, the Constitution says little about the process of impeachment, leaving it to the House and Senate to determine their own rules, somewhat similar to section 89. Laurence Tribe²⁵ says of the US impeachment process that it is regulated by practice, with the House Judiciary Committee playing a pivotal role in the modern impeachment process. He writes²⁶ that the House Judiciary Committee:

“....conducts an investigation, often calling witnesses and subpoenaing documents and drafts articles of impeachment for high crimes and

²⁵ *American Constitutional Law 3rd Edition Volume 1* by Laurence H Tribe, New York Foundation Press 2000 Chapter 2 Model I – The Model of Separated and Divided Powers Pg 118 at pgs 160 – 162

²⁶ *Id*

misdemeanors that it deems to be established by clear and convincing evidence. If the Committee votes to report the articles of impeachment favorably to the full House, the House may after floor debate vote to impeach by simple majority”...

In the Senate, the Vice President presides over the trial, except in cases of presidential impeachment, when the Chief Justice of the United States presides – under a set off rules written for the impeachment trial of Andrew Johnson in 1868 and modified only slightly once. Members of the House, typically including the Chairman of the House Judiciary Committee, serve as the House Managers responsible for prosecuting the case. The Chief Justice’s rulings as presiding judge may be overridden by a majority vote of the senators. The senators sit in silence as triers of fact and law, functioning upon Oath or Affirmation.”

Appropriate relief

36. Corruption Watch supports the declaratory relief sought by the applicants. It submits that an appropriate ancillary order is one directing the NA to put in place appropriate mechanisms to enquire into the conduct of the President:

- 36.1. The conduct found by the Public Protector to be inconsistent with the Constitution and an abuse of his office;

36.2. The President's disregard for the Public Protector's report which constituted a violation of the Constitution; and

36.3. Whether he misled the NA when he addressed the issue of the upgrades to his residence.

**KAMESHNI PILLAY SC
REGHANA TULK
KUTLWANO MOTLA**

**DUMA NOKWE AND MAISELS CHAMBERS, SANDTON
25 AUGUST 2017**