IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: CCT 76/2017

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS First Applicant

UNITED DEMOCRACTIC MOVEMENT Second Applicant

CONGRESS OF THE PEOPLE Third Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA Second Respondent

FILING SHEET – FIRST APPLICANT'S HEADS OF ARGUMENT

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DATED AT FAIRLAND ON THIS 30TH DAY OF JUNE 2017

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EFF & OTHERS vs SPEAKER OF THE NATIONAL ASSEMBLY & ONE OTHER: CCT 76/2017

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Good day,

Being filed herewith electronically are the electronic versions of the following:-

1. First Applicant's Heads of Argument;
2. First Applicant's Practice Note; and
3. First Applicant's Table of Authorities.

Regards,

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3 attachments

2017-06-30 EFF Heads (FINAL) tn.docx
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24K

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 76/17

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS	First Applicant
UNITED DEMOCRATIC MOVEMENT	Second Applicant
CONGRESS OF THE PEOPLE	Third Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent

FIRST APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

> "*[P]ublic 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.*"[1]

1. In March last year, this Court held in the *Nkandla Judgment* that the National Assembly (**NA**) had "*flouted*"[2] its constitutional "*obligation to scrutinise and oversee executive action and to hold the President accountable, as a member of the Executive.*"[3] The failure arose from the way in which the NA responded to the Public Protector's Report into the improvements to the President's homestead at Nkandla (**the Nkandla Report**).[4]

2. While the NA was entitled to question the correctness of the Public Protector's conclusions, it was not entitled "*effectively to nullify*" the Public Protector's

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[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) at para 1 (we refer to this judgment as ***Nkandla*** or ***the Nkandla Judgment***).

[2] Ibid at para 99.

[3] Ibid at para 95.

[4] Public Protector *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* (2014), available at http://www.pprotect.org/ library/investigation_report/2013-14/Final%20Report%2019%20March%202014%20.pdf.

findings by adopting a resolution absolving the President of any responsibility. It was for that reason that this Court set aside that resolution.

3. Accordingly, as at the date of the *Nkandla Judgment*, the NA had done nothing to hold the President to account for the serious findings in the Public Protector's Report. Following the clear guidance given by the Chief Justice, one would have expected that the NA would have taken some steps to fulfil its constitutional obligation. It has not.

4. The case of the First Applicant (**the EFF**) is that there is a *prima facie* case of misconduct and a serious breach of the Constitution by the President. This emerges from both the Public Protector's Nkandla Report and this Court's *Nkandla Judgment*. There is good reason to believe that the President knowingly benefited from public funds, violated s 96 of the Constitution, and misrepresented the extent of his involvement or knowledge to Parliament.

5. The gravity of the charges against the President could justify his impeachment. The President might or might not have a defence to the claims. Yet, until there is a fair and thorough fact finding process where he is afforded an opportunity to present his defence, and the full facts surrounding his conduct are tested, the inference is inescapable that he is guilty of a most egregious breach of his oath of office.

6. In these proceedings, the EFF seeks an order compelling the holding of that fair and thorough process. It proposes the minimum threshold requirements for a constitutionally acceptable process. It does so against the backdrop of an acknowledgment that no rules currently exist for the process envisaged by section 89 of the Constitution. But we submit that the obligations in the Constitution cannot be suspended until such time that the rules are adopted. The obligations to hold the President accountable exist independently of the presence or content of the rules.

7. This Court recently held that, where MPs face a "*conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail.*"[5] The NA is not absolved of its duty to hold the President to account by the difficulties that he is the leader of the ruling party. This Court has held unequivocally that political expedience is subservient to constitutional responsibility.

8. Where there are good reasons to believe the President unduly enriched himself at the expense of the nation, improperly benefited from public money and lied to Parliament, the NA has no choice but to take action. Its persistent inaction is unconstitutional.

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[5] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 at para 79 (***Secret Ballot*** or ***Secret Ballot Judgment***).

9. The Applicants do not ask this Court to tell the NA or the Speaker what to do. That would be inconsistent with the Constitution's careful construction of a separation of powers. They seek only a finding that the NA must establish a process through which the full facts can be laid on the table; the President presents his version of events; and the NA exercises its duty of holding him accountable. The NA must determine the correct facts including obtaining an explanation from the President. Presently the facts show *prima facie* that the President has enriched himself at the expense of the nation; has told untruths to Parliament; and the NA has simply failed to hold him accountable.

10. These written submissions are structured as follows:

10.1. **Part I** summarises the relevant factual background;

10.2. **Part II** addresses this Court's jurisdiction;

10.3. **Part III** lays out the NA's obligation to hold the executive to account;

10.4. **Part IV** explains why the NA has failed to fulfil that obligation; and

10.5. **Part V** deals with the appropriate relief.

I FACTUAL BACKGROUND

11. The facts giving rise to this matter are common cause and widely known. They are largely a repetition of the facts before this Court in the *Nkandla Judgment*. We therefore deal with them briefly under the following headings:

11.1. The lead-up to the Public Protector's Report;

11.2. The Report;

11.3. The response to the Report;

11.4. The *Nkandla Judgment*; and

11.5. Events after the judgment.

Events Preceding the Report

12. The genesis of this application lies in improvements made to President Zuma's residents beginning shortly after his election in 2009.[6] The project has been publicly controversial from the outset.[7] When the matter was first aired in public, the Presidency issued a statement claiming that the government was only working on security accommodation and a helipad outside the Zuma homestead.[8] As we now know, that was untrue. In 2011 and 2012, various people lodged complaints about the construction with the Public Protector.[9]

13. While the Public Protector was considering these complaints, the President appeared twice in the National Assembly to answer questions about the

[6] FA at para 28, p 17.

[7] FA at paras 28-29, pp 17-18.

[8] FA at para 29, p 18, quoting **JM3**, p 51.

[9] FA at para 30, p 18.

construction – on 15 November 2012[10] and 20 March 2013.[11] On both occasions, President Zuma stated that:

13.1. His family already had a plan to extend his home when he was appointed President. Government officials insisted on including security upgrades. He acquiesced.

13.2. No government funds were spent on his residence. In his words: "*There are two different things: my homes that are built by me and my family, and the security features that the government wanted to satisfy their own requirements.*"[12]

13.3. Importantly, President Zuma did not state that he was unaware how funds had been spent. He stated categorically that government money was only spent on "*fencing, bullet-proof windows ... and the bunker*".[13] He was not aware of "*[t]he nature and form of the improvements*" which were "*decided upon by the relevant officials*".[14]

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[10] The transcript appears as **JM4(a)** and **JM4(b)**, pp54.

[11] The transcript appears as **JM5**, p 65.

[12] FA at para 35, p 21.

[13] Ibid.

[14] FA at para 36, p 22.

The Public Protector's Report

14. The Public Protector released her report on 19 March 2014. The relevant conclusions she reached were:

14.1. The value of the property was "*substantially increased*" at taxpayers' expense.[15]

14.2. Several of the upgrades "*had no obvious relation to [the President's] protection and the security of the premises*".[16] They were also not contemplated by the Minimum Physical Security Standards. Government funds should never have been spent on these improvements. These included the cattle kraal, the chicken run, the swimming pool, the amphitheatre and the visitors' centre.

14.3. These upgrades were "*unconscionable, excessive, and caused a misappropriation of public funds*".[17]

15. For the purposes of this application, the most important part of the Public Protector's findings relates to what President Zuma knew or did not know, and what he did or did not do. The Public Protector concluded:

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[15] FA at para 39, p 23.

[16] Ibid.

[17] FA at para 39.4, p 24; Nkandla Report (n 4) at para 10.4.1.

15.1. He "*tacitly accepted*" all the upgrades;[18]

15.2. Unsurprisingly, President Zuma knew at all material times what was happening at his home, and was kept informed about the progress of the project;[19] and

15.3. He could and should have "*asked questions*" about the project, and taken steps to curb the excessive expenditure of public money;[20]

15.4. The President's "*failure to act in protection of state resources constitutes a violation of paragraph 2 of the Executive Ethics Code*".[21] That paragraph reads:

15.5. The President's conduct was also "*inconsistent with his office as a member of Cabinet, as contemplated by section 96 of the Constitution.*"[22]

16. These findings have never been challenged in court, and therefore stand as binding conclusions of the Public Protector.[23]

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[18] FA at para 39.6, p 24; Nkandla Report (n 4) at para 10.9.1.4.

[19] FA at para 39.7, Record p 24.

[20] FA at para 39.8, p 24; Nkandla Report (n 4) at para 10.10.1.4.

[21] Nkandla Report (n 4) at para 10.10.16.

[22] Ibid.

[23] *Nkandla Judgment* (n 1) at paras 80-82; *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) at para 53 and 56; *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others* [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC) at para 104.

17. The Public Protector was unable to make a finding about whether or not the President lied to Parliament with regard to his bond. She found that she was "*not able to establish if costs relating to his private renovations were separated from those of the state in the light of using the same contractors around the same time and the evidence of one invoice that had conflated the costs although with no proof of payment.*"[24] However, her inability to reach a conclusion points precisely to the need for further investigation.

18. She held, in addition, that with regard to his statement regarding the whether the state had paid for the buildings, that his conduct could "*be legitimately construed as misleading Parliament*" because it was clearly untrue.[25] However, she accepted that he had acted in good faith because he had been thinking about his family dwellings when he made the statement.[26]

19. To redress the President's violation of his obligations, the Public Protector ordered the President to repay a reasonable portion of the cost of the non-security upgrades. In addition, she instructed him to reprimand the relevant ministers for the abuse of state funds.[27]

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[24] Nkandla Report (n 4) at para 10.10.17.

[25] Nkandla Report (n 4) at para 10.10.1.2.

[26] Ibid.

[27] Nkandla Report (n 4) at para 11.1.3.

20. Properly, she did not comment on whether or not the President should face impeachment proceedings for his misconduct. She did, however, provide a copy of her Report to the Speaker. And she required the President to report to the National Assembly on his compliance with her remedial action.[28]

21. At that point, the evidence and findings against the President already required impeachment proceedings. What followed exacerbated both the President's misconduct, and the National Assembly's failures.

Response to the Report

22. Instead of complying with the Public Protector's Report and remedial action, the President and the National Assembly sought to avoid doing so. In short:

    22.1. The President relied on reports by a task team, the Special Investigation Unit and the Minister of Police – who all absolved him of responsibility – to justify his failure to comply with the Public Protector's remedial action.[29] When he answered questions before the National Assembly, he expressly said that he was not required to repay any money to the state.

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[28] Nkandla Report (n 4) at para 11.1.4.

[29] FA at paras 43-44: Record pp 26-7.

22.2. The National Assembly took a similar approach. It established two *ad hoc* committees to consider the President's report, and the reports of the Task Team, the SIU and the Minister.[30] Following the "investigations" by those committees, on 6 August 2015, the NA endorsed the Minister's report and passed a resolution purporting to absolve the President of any liability.[31]

23. The EFF then approached this Court to address both the President's and the NA's failure to abide by the Public Protector's remedial action, and their failure to fulfil their own constitutional obligations.

The Nkandla Judgment

24. This Court delivered its judgment on 31 March 2016. It held that the President's failure to comply with the Public Protector's remedial action constituted a violation of his obligations in terms of s 83(b) of the Constitution, read with ss 181(3) and 182(1)(c).[32]

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[30] FA at para 26: Record p 29.

[31] Ibid.

[32] *Nkandla Judgment* (n 1) order para 4.

25. In addition, this Court made the following findings concerning the President that bear on the present application:

25.1. There was "*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.*"[33]

25.2. The fact that the President allowed non-security features "*to be built at his private residence at government expense*" placed him in a position where there was a risk conflict between his "*official responsibilities and private interests*". This risk was contrary to s 96 of the Constitution, even if the actual conflict did not materialise.[34]

25.3. The remedial action of the Public Protector was binding on the President unless and until it was set aside by a court. "*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness.*"[35]

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[33] Ibid at para 9.

[34] Ibid.

[35] Ibid at para 73.

25.4. Not only the remedial action, but also the findings of the Public Protector are binding. As the Court wrote: "*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.*"[36]

25.5. The President "*failed to uphold, defend and respect the Constitution as the supreme law of the land*", although he "*might have been following wrong legal advice and therefore acting in good faith.*"[37]

26. With regard to the NA, the Court held that its failure "*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 and to maintain oversight of the exercise of executive powers by the President.*"[38] It set aside the resolution of 6 August 2015 as inconsistent with the NA's obligations under ss 42(3), 55(2)(a) and (b) and 181(3) of the Constitution.[39] It made the further relevant comments about the NA:

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[36] Ibid at para 81.

[37] Ibid at para 83.

[38] Ibid at para 104.

[39] Ibid at order para 10.

26.1. The NA was entitled, as part of its obligation to scrutinise executive action, to "*ascertain the correctness of the [Public Protector's] conclusion*".[40]

26.2. In addition, it was not for the Court "*to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish 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.*"[41]

26.3. But the Court was required "*to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations.*"[42]

26.4. However, the NA did not challenge the Nkandla Report in court as it was required to do. Instead, it purported to set it aside. It was not constitutionally permitted to do so.[43]

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[40] Ibid at para 85.

[41] Ibid at para 93.

[42] Ibid.

[43] Ibid at para 94.

26.5. The Public Protector submitted her Report to the NA because of its "*high importance, sensitivity and potentially far-reaching implications ... considering that the Head of State and the Head of the Executive is himself implicated*".[44]

26.6. Importantly, the Court did not limit itself to the requirement that the NA ensure the President repay the money he owed. It held that the NA "*was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector.*"[45] And later, it held that "*everything [was] wrong with the National Assembly ... passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector*".[46] That was why the NA had acted unconstitutionally and failed to comply with its oversight obligations.

27. Lastly, it is worth recalling that before this Court, the President accepted the remedial action was binding and volunteered to comply. More importantly, he did not question the accuracy of the Public Protector's findings. He has not disputed them in this application. And he has not taken them on review. It

[44] Ibid at para 95.

[45] Ibid at para 97.

[46] Ibid at para 98.

must therefore be accepted that the Public Protector's findings about his conduct are correct.

After the Judgment

28. Since the *Nkandla Judgment*, there has been one attempt to remove the President under s89 of the Constitution, brought as a motion in Parliament, by the Democratic Alliance. The motion was defeated on 5 April 2016.[47] As was noted in the founding affidavit, the motion was "*premature insofar as it was not preceded by a fact-finding inquiry.*"[48] The Speaker does not contend that this contention is wrong. Specifically, she does not deny that a fact-finding inquiry into the President's conduct has not been held, to establish if the grounds for removal in s89 exist or not. Nor can she do this, as she in fact rejected a pointed request from the EFF to convene a fact-finding inquiry.

29. On 5 April 2016, the EFF wrote to the Speaker to demand that Parliament institute a disciplinary inquiry into the President's conduct arising from the Nkandla Report and the *Nkandla Judgment*.[49] On 3 May 2016, the Speaker

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[47] AA at paras 8 and 44.

[48] FA at para 50: Record p 34.

[49] FA at para 56: Record p 36; **JM11**.

responded, refusing to conduct the basic fact-finding exercise necessary for the NA to perform its constitutional obligations.[50]

II JURISDICTION

30. The Applicants claim this Court's jurisdiction on two bases:

30.1. Exclusive jurisdiction in terms of s 167(4)(e) of the Constitution; and

30.2. Direct access in terms of 167(6) of the Constitution.

Exclusive Jurisdiction

31. Section 167(4)(e) provides that "*only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation*".

32. In *Nkandla*, this Court held that it had exclusive jurisdiction to determine whether the National Assembly had fulfilled its obligations with regard to the Public Protector's Report. The NA has obligations to scrutinize and oversee executive action (s 42(3)), to ensure that all executive organs of state in the national sphere of government are accountable to it (s 55(2)(a)), and to maintain oversight of the national executive authority (s 55(2)(b)(i)). The Chief Justice ruled that "*[h]olding members of the Executive accountable*" in terms of these

[50] FA at para 58: Record pp 36-37; **JM13**.

sections *"is indeed a constitutional obligation"* as contemplated in s 167(4)(e).[51] It constitutes a primary, undefined and actor-specific obligation.[52]

33. The argument in this application is an extension of the argument in *Nkandla*. The Applicants argue that, despite this Court's judgment, the NA has still failed to fulfil its constitutional obligation to hold the President to account. The underlying facts, and the legal argument are the same.

34. Indeed, there is an added level to the obligation now placed on the NA. Section 165(4) of the Constitution states that all organs of state "*must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*" This Court's judgment in *Nkandla* plainly required the NA to take some action against the President for the conduct identified by the Public Protector. On its own, s 165(4) would not found this Court's jurisdiction. But when combined with the obligations in ss 42(3) and 55(2), it supports the need for this Court, as the apex court, to determine the matter.

Direct Access

35. In the alternative, the Applicants seek direct access to this Court in terms of s 167(6) of the Constitution, read with Rule 18 of this Court's rules.

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[51] *Nkandla Judgment* (n 1) at para 43.

[52] Ibid at paras 43-44.

36. This Court has correctly held that "direct access … is certainly not available for the asking", and that an applicant must establish "*exceptional circumstances, in the form of sufficient urgency or public importance and proof of prejudice to the public interest or the ends of justice and good governance*".[53]

37. In the *Secret Ballot Judgment*, this Court granted direct access to the UDM to determine whether or not a motion of no confidence in the President should be determined by a secret ballot. The Chief Justice reasoned as follows:

> "*A motion of no confidence in the Head of State and Head of the Executive is a very important matter. Good governance and public interest could at times haemorrhage quite profusely if that motion were to be left lingering on for a considerable period of time. It deserves to be prioritised for attention within a reasonable time. The relative urgency of the guidance needed by Parliament from this Court is also an important factor to take into account.*"[54]

38. While this matter does not exclusively concern a motion of no confidence, it is directly analogous. The Applicants seek to ensure that the NA performs its duty to hold the President to account. It has been failing in that duty since March

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[53] *Secret Ballot Judgment* (n) at para 23, citing, for example, *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-9.

[54] *Secret Ballot Judgment* (n 5) at para 28. See also *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (this Court granted a direct appeal from the High Court because the matter concerned a motion of no confidence in the President).

2014 when the Nkandla Report was released. It has continued to fail in its duty since March 2016 when this Court's judgment was handed down.

39. If, as the Applicants argue, Parliament's ongoing refusal to act is unconstitutional, it will indeed haemorrhage faith in the legislative, the executive and the judicial branches of government. The legislature is ignoring its obligations to hold the executive to account, and to uphold the power of the courts. That is deserves the urgent attention of this Court.

III EXECUTIVE ACCOUNTABILITY

40. Given the power vested in the National Executive, and particularly in the President, the Constitution places special duties on the NA to hold him to account. In this Part, we describe the NA's obligation to hold the executive and the President accountable. There are five key factors to consider:

40.1. The role of the President;

40.2. The nature of the NA's obligation;

40.3. The range of tools available to the NA to meet its obligation;

40.4. The requirement that the NA acts effectively and rationally; and

40.5. The role of the courts in enforcing the obligation.

The Role of the President

41. In the *Nkandla Judgment*, this Court emphasised the central constitutional role of the President:

> "*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. ... 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.*"[55]

42. To perform that role, he wields tremendous constitutional powers. He appoints and removes members of cabinet, controls the armed forces, brings legislation into force, represents South Africa on the international stage, and bears the ultimate responsibility for implementing our laws.

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[55] *Nkandla Judgment* (n 1) at para 20 (our emphasis).

43. Importantly, that power does not belong to the President, but to the people. It cannot "*be used for the advancement of personal or sectarian interests.*"[56] The President, like all constitutional office bearers, is "*supposed to exercise the power and control these enormous resources at the beck and call of the people.*"[57]

Nature of the Obligation

44. In order to ensure that the power the people have granted to the President is not abused, the Constitution requires the NA to scrutinise, oversee and hold accountable the President and the national executive. This Court has described the NA's role as follows:

> "*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. ... In sum, Parliament is the*

[56] *Secret Ballot* (n 5) at para 7.

[57] Ibid.

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."[58]

45. Section 42(3) declares that the NA "*is elected to represent the people and to ensure government by the people under the Constitution*" (our emphasis). The NA and its members are, as Mogoeng CJ put it the people's "*messengers or servants to run our constitutional errands for the common good of us all.*"[59]

46. The NA represents the people "*by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.*"[60] In *Nkandla*, this Court held that " 'scrutinise' *means subject to scrutiny. And "scrutiny" implies a careful and thorough examination or a penetrating or searching reflection.*"[61]

47. But is it not mere investigation and reflection that the Constitution requires; it demands action to ensure accountability. In the *Secret Ballot Judgment*, this Court held that the NA "*has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and*

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[58] *Nkandla Judgment* (n 1) at para 22.

[59] *Secret Ballot* (n 5) at para 3.

[60] Constitution s 42(3) (our emphasis).

[61] *Nkandla Judgment* (n 1) at para 85.

maintain oversight of their exercise of executive authority."[62] And in *Nkandla*, it held that establishing a committee to investigate the Public Protector's findings may have been part of the duty to scrutinise, but that "*what will always be important is what the National Assembly does in consequence of those interventions.*"[63]

48. It is worth recalling that "*accountability is necessitated by the reality that constitutional office-bearers occupy their positions of authority on behalf of and for the common good of all the people.*"[64] It is because we know that without scrutiny, oversight and consequences for misconduct, even the best of us may abuse that power and fail to live up to our commitment to serve the people. The NA is the central cog in the constitutional wheel of accountability. If it fails, the democratic project is at serious risk.

49. The duty rests on the NA as an institution, not on the Speaker as an individual. The Speaker has been cited as the nominal representative of the NA as required by legislation.[65] The NA must collectively take action to hold the executive to account.

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[62] *Secret Ballot* (n 5) at para 40 (our emphasis).

[63] *Nkandla Judgment* (n 1) at para 96 (our emphasis).

[64] *Secret Ballot* (n 5) at para 33.

[65] FA at para 7: Record pp 10-11.

50. That may include passing rules that delegate some powers or duties to the Speaker, or to other committees or organs within the NA. If it has done so, those are the procedures that should be followed.

51. But where the NA has not passed rules, it does not avoid its collective, institutional responsibility to hold the President to account. It retains the power to take whatever steps are necessary to fulfil its constitutional obligation under ss 42(3) and 55(2).

The Range of Accountability Mechanisms

52. The Constitution provides the NA with a variety of tools to perform this duty to both investigate, and take action.

53. The first line of defence is the "*regular or normal*"[66] mechanisms of calling on Ministers to account to Committees and avail themselves to respond to parliamentary questions. In ordinary times, accountability is also promoted "*through the State of the Nation Address, Budget Speeches and question and answer sessions*".[67]

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[66] *Secret Ballot* (n 5) at para 41.

[67] Ibid at para 40.

54. The next line of defence is for the NA to establish special *ad hoc* committees to investigate particular incidents of executive wrongdoing and report to the House on the appropriate response. These committees – like all NA committees – have extensive powers to compel witnesses to testify and produce documents.[68] They can be extraordinarily effective mechanisms to uncover executive abuses and to identify the best course of action to uphold accountability. The recent *ad hoc* committee investigating the South African Broadcasting Corporation, which is publicly known, is a prime example.

55. If wrongdoing is discovered, either through the ordinary mechanisms, or by the NA's exercise of its special investigatory powers, it has a variety of options.

55.1. Legislation affords the NA the power to remove leaders of state owned enterprises who have failed their duties, and appoint new leaders.[69]

55.2. The majority of ministers and deputy ministers remain members of the NA[70] and are subject to the House's disciplinary powers.[71] Sanctions can

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[68] Constitution s 56.

[69] See, for example, s 13 of the Broadcasting Act 4 of 1999.

[70] Constitution s 91(3).

[71] See Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, ss 12 and 13 if the conduct constitutes contempt, and the *Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members*, for all other ethical violations.

include a reprimand, a suspension from the house, a reduction of salary or a fine.[72]

56. As the Speaker has noted, these mechanisms do not apply to the President, who is not a member of the NA. However, Parliament retains the power to issue a formal reflection on the conduct of the President.[73] It also determines the President's salary and other benefits and privileges.[74] It is entitled to reduce or suspend those in order to reflect its displeasure with his conduct.

57. But, as the Chief Justice noted, "*[t]here may come a time when these measures are not or appear not to be effective*":[75]

> "*When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms.*"[76]

When that happens, the NA can invoke the final line of defence: the dual options of a motion of no confidence in either the President or the Cabinet terms of s 102, or an impeachment in terms of s 89. These are "*serious or terminal consequences*" that should not be lightly employed. But the NA's power to

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[72] *Code of Conduct* at para 10.7.7.1.

[73] National Assembly Rules, rule 85.

[74] Remuneration of Public Office Bearers Act 20 of 1998 s 2.

[75] *Secret Ballot* (n 5) at para 41.

[76] Ibid at para 10.

invoke s 89 or s 102 is "*a sword that hangs over the head of the President to force him or her to always do the right thing.*"[77] Vitally, that threat will be "*inconsequential in the absence of an effective operationalising mechanism to give it the fatal bite, whenever necessary.*"[78]

Constitutional Allegiance and Rationality

58. While the power of the NA and its members to determine how to hold the executive to account is wide, it is limited by two basic constitutional imperatives.

59. First, MPs owe their primary allegiance to the Constitution, not to their political parties:

> "*Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people,*

[77] *Secret Ballot* (n 5) at para 43.

[78] Ibid.

but also to enable the people to govern through them, in terms of the Constitution."[79]

60. Or, as the Court put it in *Mazibuko*:

> "*Lobbying, bargaining and negotiating amongst political parties represented in the Assembly must be a vital feature of advancing the business and mandate of Parliament conferred by Chapter 4 of the Constitution. However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement. That is so, because our Constitution is supreme and demands that all law and conduct must be consistent with it.*"[80]

61. This Court will not be hesitant to intervene when the facts demonstrate that, contrary to their oath, MPs have placed their party ahead of the Constitution. For then they will not have exercised their power for the purpose for which it was given. That is why this Court recognised in the *Secret Ballot Judgment* that, in appropriate circumstances, a motion of no confidence in the President must be held by secret ballot. While the discretion rests, in the first place, with the NA (through the Speaker) to determine its own process, that discretion is constitutionally constrained:

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[79] *Secret Ballot* (n 5) at para 79 (our emphasis).

[80] *Mazibuko* (n 54) at para 58.

> "*The power to decide whether a motion of no confidence is to be resolved through an open or secret ballot cannot be used illegitimately or in a manner that has no regard for the surrounding circumstances that ought to inform its exercise. It is neither for the benefit of the Speaker nor his or her party. This power must be exercised to achieve the purpose of a motion of no confidence which is primarily about guaranteeing the effectiveness of regular mechanisms. The purpose of that motion is also to enhance the enforcement of accountability*".[81]

62. That same logic extends to the NA as an institution, and its obligations under ss 42(3) and 55(2). When it has various powers available to it, and a duty to scrutinise, oversee and hold accountable, it must use those powers to achieve that goal, and not some other goal.

63. Second, the NA must, like all state entities, act rationally.[82] That includes both substantive rationality and procedural rationality:

    63.1. The action taken must be connected in a rational way to the purpose for which the power was given, and the goal that is sought to be achieved.[83]

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[81] *Secret Ballot* (n 5) at para 85.

[82] *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 85.

[83] See, for example, *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17 at para 84;

63.2. And the process followed to determine what action to take must also "*be rationally related to the achievement of the purpose for which the power is conferred*".[84]

64. Of course, "*rationality is not a master key that opens all doors*", and courts must only find the government has acted irrationally "*where it is necessary and unavoidable to do so.*"[85] But where an organ of state has exercised a power (or failed to exercise a power) in a manner that is not rationally consistent with the reason why that organ was granted that power by the people in the first place, courts can and should intervene.

65. In short, while it remains "*the judgement call*"[86] MPs to determine when action is necessary, and what type of action to take, that judgement must be exercised in furtherance of constitutional goals and in a rational manner.

The Role of Courts

66. Precisely because of the wide array of options available to the NA, this Court has stressed that it is not the Judiciary's role to dictate which accountability-

[84] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at para 36.

[85] *Electronic Media Network* (n 83) at para 85.

[86] *Secret Ballot* (n 5) at para 11.

ensuring tool the NA should use to perform its duty. In *Nkandla*, the Court held:

> "*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.*"[87]

67. Nor is it the Court's role to determine whether or not the President is deserving of sanction, whether impeachment, removal or something else. That is for the NA to determine after a fair and thorough fact-finding process.

68. The Court's role is limited to make sure that all constitutional actors comply with the Constitution – that they take action when required, and that their decisions are rational. But that remains a significant and important duty. It includes:

    68.1. Declaring conduct or rules of the NA that are inconsistent with the Constitution invalid, as this Court did in *Nkandla* and *Mazibuko*. Indeed, this Court is obliged to declare unconstitutional conduct invalid.[88]

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[87] *Nkandla* (n 1) at para 87. See also para 93.

[88] Constitution s 172(1)(a).

68.2. Declaring the existence or nature of the NA's powers or obligations, and providing guidance for how that power must be exercised. That is the course this Court took in the *Secret Ballot Judgment*; it made it clear the NA (through the Speaker) had the power to determine whether a vote would be secret or open, and provided guidance on what the Speaker was required to consider when taking that decision.[89]

68.3. Directing the NA to comply with its constitutional obligations, and giving general guidance on what that involves. This was not necessary in the previous cases concerning Parliament's internal procedures because there was some uncertainty about what the law was. Could a motion of ballot be held by secret ballot? Were the reports of the Public Protector binding? In this matter – after the *Nkandla Judgment* and the *Secret Ballot Judgment* – there is no doubt. As we argue below, in those circumstances, an order directing the NA to comply is justified. That is, for example, what the Court did with regard to the President in *Nkandla* – it directed him to comply with the Public Protector's remedial action.

69. That is all the Applicants ask of the Court in this case: to declare that the NA's continued failure to act is unconstitutional; provide guidance on the nature of

[89] See *Secret Ballot* (n 5) at paras 70-88.

the NA's constitutional obligation; and direct the NA to meet that obligation. That is exactly the role this Court has previously identified it should perform.

IV THE NA HAS FAILED TO FULFIL ITS OBLIGATION

70. In this Part, we explain why the NA has failed to meet its constitutional obligation to scrutinise, oversee and hold to account. We then deal with the Speaker's defences, as we understand them.

The NA's Failure

71. The NA has, literally, done nothing to hold the President to account for either the unlawful and unconstitutional conduct identified by the Public Protector, his refusal to comply with the Public Protector's remedial action, or his apparent lies to the NA.

72. The NA initially took action by establishing the two committees to investigate the President's conduct. Those can fairly be described as whitewashes that sought to replace the findings of the Public Protector. That is why this Court set them aside.[90] From that date, there was absolutely zero response from the NA.[91]

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[90] *Nkandla* (n 1) at para 105.10.

73. Does that comply with the NA's sacred duty to hold the President to account? No. In short:

73.1. There are clearly *prima facie* findings that may amount to serious misconduct and violations of the Constitution, that may warrant impeachment.

73.2. But the facts necessary to make that determination remain uncertain.

73.3. The only rational and lawful way for the NA to fulfil its obligation to hold the President to account is to establish a fair and thorough process to determine the extent of the President's wrongdoing.

73.4. It has not done that, therefore, it has failed to meet its constitutional responsibility.

Prima Facie but Inconclusive Findings

74. First, the findings of the Public Protector stand unchallenged. They establish that the President knowingly and intentionally used his position for personal

[91] We deal below with the Speaker's submission that allowing questions and permitting a motion of no confidence constitutes "action" to hold the President accountable.

financial benefit. As this Court held in *DA v ANC*,[92] it did not violate a prohibition on distributing "false information"[93] for the official opposition to send its supporters the following message in the lead-up to an election: "*The Nkandla report shows how Zuma stole your money to build his R246m home.*" Van der Westhuizen J (joined by Madlanga J) held:

> "*According to the Nkandla Report, there was "misappropriation" of taxpayer money. The President benefitted from it. The misappropriation appears to have been tacitly accepted and in certain circumstances caused by the President, as set out in the Nkandla Report. The Nkandla Report seems to "show" that the President at least accepted actions which resulted in the misuse of taxpayer money which should not have been used on the project. It does not indicate that the President intended to return the appropriated money. The conduct alleged in the Nkandla Report does fall under a broadly conceived but reasonably possible meaning of the word "stole", used in the context of an election campaign.*"[94]

75. This is conduct of the most serious kind. As this Court held, when the Public Protector filed her Report with the NA, it "*triggered into operation the National*

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[92] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC)

[93] The judgment of Cameron, Froneman and Khampepe JJ (joined by Moseneke DCJ and Nkabinde J) held that it was not "false information" because it was not information, but comment. The judgment of Van der Westhuizen J (joined by Madlanga J) held that it was information, but was not false.

[94] *DA v ANC* (n 92) at para 204.

Assembly's obligation to scrutinise and oversee executive action and to hold the President accountable".[95]

76. As grave as these violations are, the version of the President is not known. Was he a mere passive but willing beneficiary of officials' attempts to please him, or did he actively encourage or arrange the financial benefits? We submit that Given the nature and scope of the non-security upgrades, it is difficult to believe the President was purely passive. But whether we are right or not is a matter that requires a proper enquiry.

77. Second, the conduct is exacerbated by how the President responded to the Report. He did not admit his mistakes and seek to repay all the money that he had "stolen" from the public purse. He attempted to avoid accountability, until days before this Court heard the EFF's first application. As the Chief Justice held, he "*might*" have acted in good faith on legal advice. But he might not have – he might have refused to comply solely to avoid repaying money he knew he was not entitled to. Even if he was advised he was not obliged to comply with the Public Protector's Report, the question remains why he chose not to, until compelled by this Court to do so.

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[95] *Nkandla* (n 1) at para 95.

78. Third, there is at least a *prima facie* case that the President misled the NA when, November 2012 and March 2013 he assured MPs that: (a) there was no overlap between the security requirements and his personal improvements; and (b) he had no knowledge of how money was being spent.

79. Neither this Court, nor the Public Protector made a clear finding on the question of what the President knew and when he knew it. The Public Protector made no finding with regard to the bond, and gave the President the benefit of the doubt that when he told Parliament no public money was spent, he was probably referring only to the residential dwellings.

80. But that claim seems inherently implausible. The claim that he knew nothing about what was being done at his home – that he knew nothing about the cattle kraal, the chicken run, the swimming pool, the visitors' centre and the amphitheatre – is simply implausible. And the claim that he did not know who was paying for those improvements is equally unbelievable. If, as he claims, his family had taken out a bond for the improvements, he must have been aware of the amount of the bond, and the cost of the non-security upgrades. He must, therefore, have known that the state was paying for those upgrades, not his family.

81. If he told a falsehood, or deliberately misled Parliament, there can be no doubt that President Zuma committed a most egregious breach of his oath of office. Parliament can only perform its task of holding the executive to account if the executive tells the truth. And the executive will only be incentivised to tell the truth if there are consequences when it does not. That is why the Powers and Privileges Act makes it an offence for any person to "*wilfully furnish[ ] a House or committee with information, or make[ ] a statement before it, which is false or misleading*".[96]

The Duty to Act

82. As we argued above, the duty under ss 42(3) and 55(2) requires effective action. Where the NA is aware of the clear evidence that the President has acted improperly and may be liable to impeachment under s 89, it must take effective steps to hold him to account. Inaction is clearly not constitutionally permissible.

83. Accountability in this context cannot mean only that the President repays the money:

[96] Powers and Privileges Act (n 71) s 17(2)(e).

83.1. First, that is an obligation that rests on the President and flows directly from the Nkandla Report. It exists independent of any steps that the NA may take. It cannot therefore fulfil the NA's obligation.

83.2. Second, paying back the money does not absolve the President. He remains liable for breaches of his oath of office. It is to be recalled that the President swears of affirms to *"be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic."*[97] If, as in this case, the evidence *prima facie* illustrates an abandonment of this duty, there must be meaningful consequences.

84. The question then is: What action should the NA take to meet its constitutional obligation?

The Fact-Finding Duty

85. In order to decide what action to take to hold the President to account, the NA must determine precisely what happened, and most importantly what the version of President Zuma is. It cannot act on the current, imperfect information. If it did, it may unduly prejudice the President. If it decided to

[97] Schedule 2 to the Constitution.

impeach him under s 89 without any prior process, it would have acted unfairly towards him. That is why the DA's initial motion on 5 April 2016 was premature.

86. At the same time, if it merely reprimanded him, it may not have taken the "*effective*" action the Constitution requires. If the President actively abused state resources, intentionally misled Parliament, and then spent public money on further investigations solely to protect his ill-gotten gains, a reprimand would be an ineffective and irrational response. It would not be consistent with the NA's constitutional duties, or the constitutional oath taken by its members.

87. In these circumstances, the only way the NA can comply with its obligation is to establish a fair process that will thoroughly examine the evidence and determine the nature and extent of any wrongdoing.

88. Only after the NA has conducted that inquiry, will it be in a position to take a vote in terms of s 89 of the Constitution on whether or not to impeach the President. That cannot be an exercise of political loyalty – this Court held in the *Secret Ballot Judgment* that is impermissible. It must be based on loyalty to the Constitution. Because s 89 sets clear, objective criteria – serious misconduct and serious violation of the Constitution – MPs must base their votes on

meaningful information directed at answering that question. That can only be answered by a mechanism created by the NA to answer it.

The Features of the Inquiry

89. As noted earlier, the NA's Rules do not establish a mechanism to deal with impeaching the President. If they had, that would be the process to follow. But in their absence, it is necessary and appropriate for:

89.1. The NA to establish an *ad hoc* process to address the findings against President Zuma; and

89.2. For this Court to set out the basic features the inquiry should have in order to fulfil its purpose.

90. The EFF submits the inquiry must have the following basic characteristics:

90.1. It must be conducted by a multi-party committee;

90.2. Its mandate must be to determine whether the President is guilty of serious misconduct or a serious violation of the Constitution;

90.3. It must be conducted in public, and allow representations by the public;

90.4. It must consider relevant documents and call relevant witnesses, including President Zuma;

90.5. It must permit limited but meaningful questioning of witnesses (including the President) by all members of the committee;

90.6. The President must, to the extent reasonable and consistent with the mandate of the committee, be permitted to lead evidence, and cross-examine witnesses;

90.7. If it finds the President committed serious misconduct or a serious violation of the Constitution, the report must serve before the NA for a vote on whether to impeach the President;

90.8. If it does not find serious misconduct or a serious violation of the Constitution, it must recommend what other action should be taken to hold the President to account; and

90.9. The Committee must conduct its work diligently, and within a defined time limit.

91. We submit these are the minimum characteristics necessary for a committee to perform its task. An inquiry that lacked these features could not credibly

determine how to hold the President to account, and would therefore still not meet the NA's constitutional mandate.

92. The NA has, to date, not established such an inquiry. Despite the clear prima facie case of serious violations of the President's oath of office , the NA has failed to comply with its constitutional obligations. By setting up the process we outline above, the NA will fulfil its obligations imposed by ss42, 55 and 89.

The NA's Defences

93. The NA essentially raises two related defences:

93.1. That the Applicants should have proceeded under rule 85 of the NA's rules, before approaching this Court; and

93.2. That the fact that the NA has considered motions of no confidence and allowed questions to be put to the President constitutes compliance with its obligation.

94. Neither defence has any merit.

Rule 85

95. Rule 85 regulates a motion calling for the censure of an MP, or a member of cabinet. It reads:

> "***85. Reflections upon members, the President and Ministers or Deputy Ministers who are not members of the Assembly***
>
> *(1) No member may impute improper motives to any other member, or cast personal reflections upon a member's integrity or dignity, or verbally abuse a member in any other way.*
>
> *(2) A member who wishes to bring any improper or unethical conduct on the part of another member to the attention of the House, may do so only by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge that in the opinion of the Speaker prima facie warrants consideration by the House.*
>
> *(3) Subrules (1) and (2) apply also to reflections upon the President and Ministers and Deputy Ministers who are not members of the House.*"

96. This rule is inapplicable to the present case. It is located in a section which deals with "Rules of Debate". This is not a case about rules of debate in the house. This is a case about the constitutional obligations of the Speaker. The Constitution cannot be interpreted through the rules. It is the other way round. The Constitution sets the obligation, and the rules are a mechanism to give

effect to the obligation. To invert that relationship is to misunderstand the structure of the Constitution.[98]

97. But in any event, even on the text of the rule, this is not an answer to the Applicants' case for two reasons.

98. First, the rule relates to bringing unethical conduct "*to the attention of the House*". That is not necessary in this case as the NA is already well aware of the improper and unethical conduct of the President. It was informed in 2014 by the Public Protector. It was informed again by this Court in 2016. A motion to bring the conduct to the House's attention is superfluous and would serve little purpose. What ss 42(3) and 55(2) require is for the NA to investigate the information already before it and take appropriate and effective action.

99. Second, this is not a situation where the NA's duty must be triggered by the Applicants. As this Court has already held, the duty was triggered the moment the Public Protector sent her Report to the Speaker. It was triggered again by this Court's *Nkandla Judgment.* The NA then had a duty to act, whatever the Applicants may or may not do. Put differently, there is a positive duty on the

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[98] *Sebola and Another v Standard Bank of South Africa Ltd and Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 62.

NA to hold the President accountable independently of what steps opposition parties may or may not take. The NA cannot avoid its obligation by shifting constitutional duties to the Applicants.

The NA's Passive Facilitation

100. The NA's primary substantive defence is that it has held the President to account because it has debated motions to remove the President in terms of ss 89 and 102(2), and has allowed MPs to put questions to the President on the Nkandla Report. The fact that those motions failed, the NA argues, is irrelevant as long as the issues were debated. If MPs do not want to sanction the President because he is the leader of the governing party, they are not obliged to do so.

101. Again, this demonstrates a serious misconception of the obligations on the NA and its members.

102. First, in these circumstances where the President may need to be impeached, the only way for the NA to comply with its constitutional obligations is to determine, in fact, the extent of the President's wrongdoing. Allowing a debate and vote on a s 89 or a s 102 motion does not achieve that goal because it is not an attempt to determine facts. No documents were produced, no witnesses

questioned, and no attempt to determine facts was present when the previous s 89 or 102 motions were debated.

103. The issue here is different from an ordinary motion of no confidence under s 102. Those do not require a specific finding that an objective standard has been met. The President can be removed under s 102 for any reason that can command a majority of votes.[99] A motion under s 89 will only be valid if the President was in fact guilty of serious misconduct or a serious violation of the Constitution. While 66% of MPs must agree that the jurisdictional fact is present, where there is doubt about exactly what occurred, s 89 requires fact-finding as a necessary precursor to a vote.

104. To be clear, not ever s 89 motion will require prior fact-finding by the NA. There will be circumstances where the facts that give rise to the motion are beyond doubt. But that is not the case here as the seriousness of the President's misconduct depends in part on his personal knowledge and state of mind, which has not yet been determined.

105. The questions posed to the President are also inadequate. They are put beforehand and the President is entitled to answer as he pleases. Only limited follow-up questions are permitted. But more importantly, the point of the

[99] *Secret Ballot* (n 5) at para

exercise is not for the NA to form a view on what in fact occurred. The questions cannot therefore serve the specific purpose at issue here.

106. Second, s 42(3) imposes multiple obligations on the NA. It is obliged to "*provid[e] a national forum for public consideration of issues*". It arguably fulfils that goal by allowing a debate on a motion of no confidence. But it cannot meet the obligation to scrutinise and hold accountable:

106.1. The obligation to scrutinise requires a "*searching examination*". That is not what occurs in a debate and vote. That occurs through careful consideration by committee.

106.2. The obligation to hold to account requires actual action once wrongdoing has been found. The Public Protector has found that the President violated his oath. This Court has confirmed that conclusion. Those findings demand action, not debate. That action must be rationally connected to the wrongdoing. It may, following further investigation, be satisfied by a reprimand, or a reduction of the President's salary, or other privileges. It may require impeachment.

107. Third, the NA must act rationally. Merely allowing debates and questions is irrational because:

107.1. It is not related to the facts. There are already findings that the President acted unethically and unconstitutionally. It is not rational to debate whether or not that requires action. It is only rational to take action. It is substantively irrational.

107.2. It is not a rational mechanism to determine whether or not the President lied, why he did not comply with the Public Protector's remedial action, and how actively he was involved in abusing state resources. That can only be achieved by a fact-finding mechanism, that reaches a conclusion of what happened.

V REMEDY

108. This court must grant a remedy that is "*just and equitable*".[100] We submit that the appropriate remedy is as set out in the notice of motion.

109. First, declaring that the NA:[101]

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[100] Constitution s 172(1)(b).

[101] In the notice of motion the declaration is directed at the "First Respondent". As the Speaker is cited in her nominal capacity, this is properly interpreted as a declaration about the NA, not the Speaker.

109.1. Failed to put in place appropriate mechanisms and processes to hold the President accountable for his conduct related to the Nkandla Report;

109.2. Failed to scrutinise the President's violation of the Constitution related to the Nkandla Report;

109.3. Violated its obligations in terms of ss 42(3), 48 and 55(2), read with ss 1(c) and 1(d) of the Constitution.

110. Second, directing the NA to:

110.1. Put the requisite processes in place to determine whether the President's conduct related to the Nkandla Report satisfy the requirements of s 89(1) of the Constitution; and

110.2. Convene a committee or other appropriate mechanism to inquire into the conduct of the President to determine if he is guilty of an offence which would warrant his impeachment under s 89.

111. Third, directing the Speaker to report to the court on what steps it has taken. Given the wide range of options available to the NA, this is necessary for the Court to be satisfied that the steps it takes are adequate to meet its obligation.

112. Lastly, the Applicants are entitled to their costs, including the costs of two counsel.

VI CONCLUSION

113. As the Chief Justice recently reminded us, "*constitutions and good governance do not self-actualise*".[102] They require structures to "*breathe life into our collective aspirations.*"[103] They also require that those structures perform their assigned functions fearlessly. We build the meaning of our constitution through our actions.

114. Our Constitutional future depends on how we react to crises in the constitutional present. If we let misconduct and abuse of power slide, we create the foundation for a weak constitution which serves the powerful not the people, and will ultimately collapse. If we resolve today's crises of accountability by setting a precedent that dissuades others to abuse their power in the future, we have built our Constitution on solid ground that will be the foundation for many, many years to come.

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[102] *Secret Ballot* (n 5) at para 2.

[103] Ibid.

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