

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT 76/17**

In the matter between:

<b>THE ECONOMIC FREEDOM FIGHTERS</b>	First Applicant
<b>UNITED DEMOCRATIC MOVEMENT</b>	Second Applicant
<b>CONGRESS OF THE PEOPLE</b>	Third Applicant

and

<b>SPEAKER OF THE NATIONAL ASSEMBLY</b>	First Respondent
<b>PRESIDENT JACOB GEDLEYIHLEKISA ZUMA</b>	Second Respondent

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**FIRST RESPONDENT'S WRITTEN SUBMISSIONS**

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## INTRODUCTION

1. The Economic Freedom Fighters (“EFF”), United Democratic Movement (“UDM”) and Congress of the People (“COPE”) (collectively, the “Applicants”) bring this application for direct access pursuant to section 167(4)(e) of the Constitution.
2. The Court is called upon to determine whether “*Parliament [has] fail[ed] to fulfil its unique constitutional obligations to hold the President accountable, both generally and ultimately, in terms of section 89 of the Constitution*”.<sup>1</sup>
3. The Applicants contend that:<sup>2</sup>

*“The National Assembly, under the leadership of the first respondent, has failed to take any action in response to the judgment of the Constitutional Court, despite it being her duty to hold the President accountable and to scrutinise his conduct.”*

4. It is important to emphasise at the outset that this factual allegation, the basis upon which the Applicants’ entire application is predicated, is untrue and unsustainable on the facts.
5. Quite the contrary, the correct position, as we shall demonstrate, is that the National Assembly (“NA”) did in fact take steps to hold the President to account

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<sup>1</sup> FA, p11, para 10.

<sup>2</sup> FA, p15, para 23.

in terms of the Rules of the NA (“NA Rules”).

6. As this Court has clearly stated in the recent *UDM v The Speaker* matter,<sup>3</sup> the Constitution provides for two “*terminal consequence or supreme accountability tools*”, namely, impeachment and a motion of no confidence.<sup>4</sup>
7. Pursuant upon the judgment of this Court in the *EFF v The Speaker* matter,<sup>5</sup> on 5 April 2016, the Democratic Alliance (“DA”) tabled a motion of removal of the President, in terms of section 89(1)(a) of the Constitution, which was supported by each of the Applicants and members of their parties, debated and voted upon, but defeated.<sup>6</sup>
8. The basis of the motion of removal of the President was that he had “*seriously violated the Constitution when he undermined the Public Protector’s findings by instituting parallel investigative processes and when he failed to implement the Public Protector’s remedial action.*”<sup>7</sup>
9. It is obvious that, had the motion of removal of the President been carried, this application would not have been brought.

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<sup>3</sup> *UDM v Speaker of the National Assembly & Others* Case CCT 89/17 [2017] ZACC 21 (22 June 2017).

<sup>4</sup> *Id* para [42].

<sup>5</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

<sup>6</sup> FA, p33, para 50. First Respondent’s AA para 55. See also Annexure BBM 1 to the First Respondent’s AA Item 6.

<sup>7</sup> Annexure BBM 1 to the First Respondent’s AA Item 6(2), read with Item 6(4) thereof.

10. Consequently, this application is predicated upon and arises out of the failure by the Applicants to secure the two thirds majority prescribed in section 89 of the Constitution after the NA had invoked the ‘*terminal consequence or supreme accountability tool*’ of impeachment.<sup>8</sup>
11. It thus does not lie in the mouth of the Applicants to argue that there are no or insufficient mechanisms to impeach the President in terms of section 89 of the Constitution.
12. In a sense, therefore, this application amounts to an abuse of the process of the Court. For that reason alone, the application should be dismissed with costs on a punitive scale.
13. It was not the Applicants’ pleaded case that the mechanisms that the NA adopted were not sufficient in the circumstances. The charge of the Applicants is that nothing was done. As stated above, that charge is simply not true.
14. In the Applicants’ written submissions, the argument centres around what is contended to be the correct sequential mechanisms envisaged in section 89. In particular, it is submitted by the Applicants that section 89 envisages that there should be a fact-finding mission; whilst the Applicants accept that the Court cannot prescribe to the NA how best to proceed on this score.
15. The Applicants’ line of argument is specious and self-serving. There appears to be, in our submission, an effort to discard the initial stand-point that nothing

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<sup>8</sup> In fact, they failed to obtain even a simple majority. See para 6, above.

was done and to engross the Court and the parties before court in an interpretational debate, which seems to be elevated over the Applicants' pleaded case.

16. The Court has never been called upon to pronounce on the procedural scheme of section 89 of the Constitution, in particular, what steps the Constitution envisages should precede a vote under section 89. The section itself is silent on this score, leaving it to the NA to regulate its process, as envisaged in section 57 of the Constitution.
17. The Speaker has demonstrated that there have been instances to hold the President to account. The Court has not been requested to interrogate whether or not these measures were adequate and whether something additional thereto, should be preferred.
18. The Court, in interpreting section 89 of the Constitution, cannot ignore the pleaded case. We accept, without reservation, that the Court is constitutionally mandated to interpret the Constitution.
19. On the basis of the pleaded case, the Applicants seek the following relief from this Court:<sup>9</sup>

19.1. the Court has exclusive jurisdiction to determine this application in terms of section 167(4)(e) of the Constitution, *alternatively*, that the Applicants

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<sup>9</sup> NOM, pp1-3.

should be granted direct access to this Court in terms of Rule 18 of the Rules of Court;<sup>10</sup>

19.2. the Court should declare that the Speaker has failed to put all appropriate mechanisms and processes in place to hold the President accountable for violating the Constitution in failing to implement the report of the Public Protector, dated 19 March 2014;<sup>11</sup>

19.3. the Court should declare that the Speaker has failed in her duty to apply her mind and/or scrutinise the violation of the Constitution by the President in the course of his failure to implement the report of the Public Protector, dated 19 March 2014;<sup>12</sup>

19.4. declaring that the Speaker's failures in paragraphs 19.2 and 19.3 above, infringe section 42(3), 48 and/or 55(2) read with sections 1(c) and 1(d) of the Constitution;<sup>13</sup>

19.5. directing the Speaker to put in place such requisite processes and mechanisms in place in order to hold the President to account;<sup>14</sup>

19.6. directing the Speaker to convene a committee of Parliament and/or any other appropriate independent mechanism, to conduct an investigation

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<sup>10</sup> NOM, p1, prayer 1.

<sup>11</sup> NOM, p2, prayer 2.

<sup>12</sup> NOM, p2, prayer 3.

<sup>13</sup> NOM, p2, prayer 4.

<sup>14</sup> NOM, p2, prayer 5.

into the conduct of the President;<sup>15</sup> and

19.7. directing the Speaker to report to Court, within 30 days of the order, on affidavit on the steps taken to comply with paragraphs 19.5 and 19.6, above.<sup>16</sup>

## **THE CONSTITUTION**

20. The Republic of South Africa is founded on values of, *inter alia*, supremacy of the Constitution and the rule of law [section 1(c)] and a multi-party system of democratic government, to ensure accountability, responsiveness and openness [section 1(d)].

21. The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled [section 2].

### *The functions and powers of the National Assembly*

22. The Parliament of the Republic of South Africa comprises two houses, the NA and the National Council of Provinces [section 42(1)(a) and (b)]. The NA is elected to represent the people of South Africa and to ensure government by the people under the Constitution. It does so, by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action [s42(3)]. The

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<sup>15</sup> NOM, p2, prayer 6.

<sup>16</sup> NOM, p2, prayer 6.



legislative authority in the national sphere is vested in Parliament [section 43(a)].

23. The Constitution provides that when exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution [section 44(4)].

24. Members of the NA, including the Speaker, swear or affirm their faithfulness to the Republic of South Africa and obedience to the Constitution [section 48 read with clause 4(1) of Schedule 2 thereof].

25. Section 57(1) of the Constitution provides that the NA may:

25.1. determine and control its own internal arrangements, proceedings and procedures [s57(1)(a)]; and

25.2. make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement [s57(1)(b)].

### *The removal of the President*

26. Section 89(1) of the Constitution provides that the NA, by resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of: (a) serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the

functions of office.

27. Self-evidently, there is no express requirement for the procedures that must precede the vote in section 89.

*The exclusive jurisdiction of the Constitutional Court / Direct access*

28. Section 167(4)(e) of the Constitution provides that the Constitutional Court has exclusive jurisdiction to determine that Parliament or the President has failed to fulfil a constitutional obligation.
29. Although we do not concede the issue of exclusive jurisdiction, for purposes of this application we do not oppose the Court exercising jurisdiction over this matter and thus, do not oppose direct access. However, for reasons set out above and below, we submit that this application should be dismissed.

**THE RULES OF THE NATIONAL ASSEMBLY**

30. The current Rules (9<sup>th</sup> ed) were adopted by the NA on 26 May 2016. The Rules record that the sources of authority of the NA are, *inter alia* [Rule 2(a) to (h)]:

30.1. the Constitution;

30.2. the Powers and Privileges Act and any other applicable legislation;

30.3. the Rules;

- 30.4. the orders or any other binding decision of the NA;
- 30.5. the directives and guidelines of the Rules Committee; and
- 30.6. the rulings by the Speaker and other presiding officers.
31. The Rules were adopted by the NA, pursuant to section 57 of the Constitution, and must be strictly adhered to by members of the NA [Rule 3].
32. The First Respondent's authority and responsibility is set out as follows in the Rules:

*“26. General authority and responsibility of Speaker:*

- (1) In exercising the authority of the Speaker, as provided for in the Constitution and legislation and the rules of Parliament, the Speaker must—*
- (a) ensure that the National Assembly provides a national forum for public consideration of issues, passes legislation and scrutinises and oversees executive action in accordance with Section 42(3) of the Constitution;*
- (b) ensure that parties represented in the National Assembly participate fully in the proceedings of the Assembly and its committees and forums, and facilitate public involvement in the processes of the Assembly in accordance with Sections 57 and 59 of the Constitution; and*
- (c) whenever possible, consult with relevant office-bearers and structures within Parliament to achieve the efficient and effective functioning of Parliament in a transparent and accountable manner.*
- (2) The Speaker must maintain and preserve the order of and the proper decorum in the House, and uphold the dignity and good name of the*

*House.*

- (3) *The Speaker is responsible for the strict observance of the rules of the House and must decide questions of order and practice in the House, such a ruling being final and binding as provided for in Rule 92.*
- (4) *The Speaker must act fairly and impartially and apply the rules with due regard to ensuring the participation of members of all parties in a manner consistent with democracy.”*

33. To avoid prolixity, we shall avoid restating the provisions of the NA Rules in our written submissions. The simple point is that the NA Rules provide various mechanisms to hold the President and/or the executive to account and for Parliament to exercise oversight over their conduct. More recently, the Court has stated that these mechanisms are common place and took judicial notice thereof.<sup>17</sup>

34. The exception to the norm, are steps to remove the President from office in terms of sections 102 or 89 of the Constitution – the “*terminal consequence or supreme accountability tools*”. As stated above, these occur through motions of no confidence in the President or motions to remove her or him, respectively.

## **THE SPEAKER’S CASE**

35. As asserted in the Speaker’s answering papers, there are various mechanisms to ensure accountability and oversight of executive action, *viz.*<sup>18</sup>

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<sup>17</sup> *UDM v The Speaker of the National Assembly, supra* para [40].

<sup>18</sup> AA, p33, para 33.1

- 35.1. In Chapter 5 (*Order in Public Meetings and Rules of Debate*), Rule 85 (*Reflections upon members, the President and Ministers or Deputy Ministers who are not members of the Assembly*) provides for a member who wishes to bring any improper conduct on the part of another member, **including the President**, to the attention of the NA, to do so by way of a separate motion, comprising a clearly formulated and properly substantiated charge that in the opinion of the Speaker *prima facie* warrants consideration of the House;
- 35.2. In Chapter 7 (*Motions*), Rule 124 (*Notice of motion*) and Rule 129 (*Motions of no confidence in terms of Section 102 of Constitution*) provide for a member to propose a motion of no confidence in the Cabinet or the President in terms of section 102 of the Constitution;
- 35.3. In Chapter 8 (*Discussion of Urgent Matters of National Public Importance*), Rule 130 (*Urgent matter of national public importance*) provides for the tabling of urgent matters of national public importance;
- 35.4. In Chapter 9 (*Members' Statements and Executive Statements*), Rule 132 (*Statements by members*) provides for members to make statements on any matter;

- 35.5. In Chapter 10 (*Questions*), Rule 140 (*Questions to President*) provides that members can put questions to the President on matters of national and international importance; and
- 35.6. Rule 141 (*Urgent questions*), a member may request the Speaker in writing to allow an urgent question for oral reply to be put to the President on the next applicable day.
- 35.7. In Chapter 12 (*Committee System*), provides for the establishment of NA committees, including *ad hoc* committees established in terms of Rule 253 read with Rule 167, through which to exercise its oversight and accountability functions.
36. *Ex facie* the founding papers, there is an acknowledgement that the NA has permitted two forms of mechanisms through which the President has been held to account.<sup>19</sup>
- 36.1. Questions were posed to him in terms of Chapter 10 of the NA Rules; and
- 36.2. the NA has considered, debated and voted on motions of no confidence in and/or removal of the President.

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<sup>19</sup> AA, para 37.

37. The Court restated the value of a motion of no confidence in *UDM v The Speaker*,<sup>20</sup> as follows:

*“[32]Although a motion of no confidence may be invoked in instances that are unrelated to the purpose of holding the President to account, it is a potent tool towards the achievement of that purpose. In that context, it is inextricably connected to the foundational values of accountability and responsiveness to the needs of the people. It is a mechanism at the disposal of the National Assembly to resort to, whenever necessary, for the enhancement of the effectiveness and efficiency of its constitutional obligation to hold the Executive accountable and oversee the performance of its constitutional duties.”*

38. The Applicants have attempted to characterise the DA’s motion of no confidence in the President as premature. They do this after their members all participated, voted and lost thereon.<sup>21</sup>

39. It is our submission that what appears to be at issue is the end-result of the vote, as opposed to the appropriateness of the mechanism adopted by the NA. In this regard, it is our submission that the NA has demonstrably fulfilled its constitutional obligations in holding the President to account.<sup>22</sup>

40. That the motion was brought by a member of the opposition is irrelevant. The NA participated in holding the President to account, after the Speaker

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<sup>20</sup> *United Democratic Movement v Speaker of the National Assembly and Others, supra.*

<sup>21</sup> AA, para 38.

<sup>22</sup> AA, para 39.

allowed for the tabling of the motion. The NA cannot, therefore, be said to have failed to do anything.

41. On 5 April 2016, the Applicants' representatives requested the Speaker to:<sup>23</sup>

41.1. institute an "*independent disciplinary enquiry that is impartial, free, fair, transparent and open to investigate his (the President's) misconduct and violation of the Constitution*"; and that,

41.2. such an enquiry must consist of three retired judges and an independent prosecutor.

42. The Speaker gave serious consideration to the request and responded on 3 May 2016, noting, *inter alia*:<sup>24</sup>

42.1. there was no provision in the Constitution, law or the Rules that provides for the procedure proposed;

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<sup>23</sup> AA, para 41.

<sup>24</sup> AA, para 42.



- 42.2. the NA, the only body that has the competence to remove the President from office, had already considered a motion of removal of the President tabled in terms of section 89 of the Constitution;
- 42.3. the President is not a member of the NA and cannot be subjected to the internal disciplinary processes of the NA; and
- 42.4. she cannot delegate an external process not sanctioned in the Constitution or the NA Rules.
43. It is clear, we submit, that the Speaker had reason to be satisfied that the NA had properly discharged its obligation in terms of the NA Rules in holding the President to account. It is our submission that there is no jurisdictional basis (on the pleaded case) for the Court to determine whether these mechanisms were not sufficient in the circumstances. That is not the case before Court.
44. However, if the Applicants are able to demonstrate to the Court that there is sufficient basis to examine whether these measures were adequate; and this Court were to find that the measures are inadequate (which is not conceded); in such event, the Speaker would have to reconsider how best to regulate NA process, in view of the Court's judgment. Quite evidently, a remittal would be appropriate in such circumstances

## ***Motion of no confidences***

45. It is common cause that there have been various motions of no confidence in the President. This is a demonstrable discharge of the NA's obligation to hold the President to account.<sup>25</sup>

45.1. As stated above,<sup>26</sup> on 5 April 2016, pursuant to the *EFF v The Speaker* judgment,<sup>27</sup> the Leader of the Opposition moved a motion, in terms of the NA Rules, that the NA should resolve to remove the President from office in terms of section 89(1)(a) of the Constitution on the basis, *inter alia*, that the Court in the above matter found the President's failure to comply with the remedial action taken by the Public Protector as unlawful and inconsistent with the Constitution;<sup>28</sup> and

45.2. on 10 November 2016, the Leader of the Opposition moved a motion, in terms of the NA Rules, that the NA should resolve that it has no confidence in the President in terms of in terms of section 102(2) of the Constitution.<sup>29</sup>

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<sup>25</sup> AA, para 48.

<sup>26</sup> Paras 7 and 8, *supra*.

<sup>27</sup> See footnote 5, *supra*.

<sup>28</sup> AA, para 45.

<sup>29</sup> AA, para 46.

46. These motions were debated and voted upon and subsequently defeated, on a vote of the majority. That is a political consequence and a democratic outcome.

### ***Questions to the President***

47. In an addition to motions against the President, pursuant to the *EFF v The Speaker* judgment, there have been twenty-seven (27) questions relating to the judgment and surrounding issues that were put to the executive, including to the President.<sup>30</sup>
48. Notably, in 2016, eleven (11) questions were put to the executive and responses were provided to all questions. In 2017, sixteen (16) questions were put to the executive and eight (8) responses have been provided to date.<sup>31</sup>
49. It is our submission, with respect, that on the facts, the NA has held the President to account on more than one occasion. The contention that nothing was done should be rejected outright. The choice of how best the NA should discharge its constitutional mandate, is a question best left to the NA. It is not for this Court to micro-manage or baby-sit the NA; nor is it the

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<sup>30</sup> AA, para 47.

<sup>31</sup> AA, para 48.

function of this Court to dispense advice to the NA or its members, as the Applicants would wish it to do.

## **THE QUESTION OF REMEDY**

50. The Applicants accept that the Court is constrained from prescribing specific mechanisms to the NA, being bound to respect the doctrine of the separation of powers.<sup>32</sup>
51. If the Court finds that the NA has not sufficiently complied with sections 42(3) and 55(2), read with section 89 of the Constitution (which is not conceded), the Court should remit this issue to the Speaker to consider, in light of the new interpretation (if any) to be accorded to the said sections of the Constitution.
52. In the circumstances, it is our submission that there has not been any *mala fides* on the part of the Speaker and the NA has not failed to discharge its constitutional mandate.

## **CONCLUSION**

53. In the premises, we submit that this application should be dismissed with costs, including the costs of two counsel.
54. In the alternative, that the matter be remitted to the Speaker for

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<sup>32</sup> FA, p16, para 26.

consideration, in view of the Court's interpretation of sections 42(3) and/or 55(2) of the Constitution, read with section 89 thereof, with each party paying their own costs.

**MTK MOERANE SC**  
**RT TSHETLO**

Chambers  
Durban & Sandton

14 July 2017