IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case No.: CCT 76/2017

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

SECOND AND THIRD APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 This matter principally deals with three fundamental constitutional issues, namely –

1.1 the value of accountability, with specific reference to executive accountability to Parliament;

1.2 the interpretation of various constitutional provisions, including section 89 of the Constitution; and

1.3 the need for judicial clarity regarding the process in terms of which section 89 of the Constitution ought to be practically applied and implemented.

2 Acting in terms of section 38 of the Constitution, the second and third applicants bring this matter –

2.1 in their own capacities, as political parties represented in Parliament;

2.2 in their representative capacities, on behalf of their members (who assert their own rights of citizenship herein); and

2.3 in the public interest.

3 The matter concerns the interpretation, protection and/or enforcement of the Constitution. The heart of this matter is contained in paragraph 62 of the founding affidavit,[1] which reads:

> "*[T]he letters from the first respondent constitute a gross misunderstanding or misrepresentation of the applicable constitutional provisions. In effect, it says that, unlike other members of the Executive, the President can never be held accountable by enquiring into his conduct to ascertain whether or not he has committed an impeachable offence, as happens in other constitutional democracies [all over] the world*".

4 This matter may, in a nutshell, be described as a sequel to two previous matters: first, the matter of ***Economic Freedom Fighters v The Speaker of the National Assembly*** ("***EFF v The Speaker***");[2] and second, the matter of ***United Democratic Movement v Speaker of the National Assembly*** ("***UDM v The Speaker***").[3] It is premised on seeking an answer to the simple question whether the conduct of the first respondent in refusing to do anything as a result of the judgment in ***EFF v The Speaker***, read in light of her constitutional obligations as explained in ***UDM v The Speaker***, can, in the circumstances, be constitutionally justifiable.

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[1] FA Paginated p 38
[2] ***Economic Freedom Fighters v The Speaker of the National Assembly*** [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618
[3] ***United Democratic Movement v Speaker of the National Assembly and Others*** [2017] ZACC 21

THE ISSUES

5 The issues for determination in this application fall into four broad categories, each with its own specific questions to be answered, namely:

5.1 **Jurisdiction** / **access**: Does the application fall within the exclusive jurisdiction of this court; alternatively, is it in the interests of justice to grant direct access?[4]

5.2 **Declaratory relief**: Have the applicants made out a case for the declaratory relief set out in prayers 2, 3 and 4 of the notice of motion pertaining to the alleged infringements of sections 42(3), 48 and/or 55(2), read with sections 1(c) and (d), of the Constitution?

5.3 **Directive relief**: Ought this Court in the circumstances to direct or order the first respondent to undertake the positive steps set out in prayers 5 and 6?

5.4 **Alternative relief**: What other alternative and appropriate relief ought to be ordered, if any?

6 Before dealing with these issues in more detail, it would be appropriate to briefly set out the material facts which are not in contention.

[4] See prayer 1 of the notice of motion

MATERIAL FACTS

7 On 31 March 2016, this Court handed down its judgment in ***EFF v The Speaker***. Amongst other findings, it held that not only had the President violated the Constitution, but so too had the National Assembly, under the leadership of the Speaker.[5] In particular, this Court declared invalid and set aside *"[t]he resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector"*.[6]

8 Yet in her public response to the judgment, given in a press conference held just three days later, the Speaker falsely stated that this Court did not find that the National Assembly had breached the Constitution.[7] In her answering affidavit filed in this application, the Speaker does not expressly deny this allegation. Moreover, the gist of her answer is that neither she nor the National Assembly has *"failed to respond appropriately to the findings of the Court in* ***EFF v The Speaker***".[8]

9 Starting with a letter dated 5 April 2016, and continuing over the months that have followed, the first applicant has repeatedly demanded of the Speaker that Parliament hold the President to account.[9] Most recently, in a letter dated 1 February 2017,[10] the Speaker's attention was drawn to the 5 April 2016 letter in which the first applicant had demanded that, as part of its constitutional

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[5] Founding affidavit, paras 22-25, pp 14-16
[6] Para 10 of this Court's order in ***EFF v The Speaker***
[7] Founding affidavit, para 49, p 33
[8] See answering affidavit, para 22
[9] Founding affidavit, paras 56-60, pp 36-38
[10] Founding affidavit, annexure **"JM15"**, pp 169-170

mandate, Parliament ought to institute a disciplinary inquiry into the President's conduct.

10 In particular, the letter of 1 February 2017 makes it plain that *"up to this stage, no action of any kind has been taken against Mr Zuma for violating his oath of office"*. The letter continues:

> *"Continued disregard by Parliament of this very important function of holding the executive to account poses serious risk to our democracy, and to the sacrosanct role of Parliament in sustaining and promoting democracy."*

11 At no point in the answering affidavit does the Speaker deny that since 31 March 2016, she has initiated any process to hold the President to account. Indeed, the answer makes it plain that in her view, the Constitution places no obligation on her – in her capacity as leader of the National Assembly – to act in the circumstances. Instead, she seeks to rely on a range of technical defences, as well as the actions of opposition parties, to justify her action.

12 What is of particular concern is the Speaker's failure to recognise the effect of this Court's judgment and order in ***EFF v The Speaker*** insofar as the National Assembly's conduct is concerned. Having acted unconstitutionally in *"absolving the President from compliance with the remedial action taken by the Public Protector"*, the National Assembly has been found to have failed to hold the President to account. To date, the National Assembly has failed to sanction the President in any manner or form, despite the uncontested evidence and the clear findings of this Court.

13 Before analysing the required application of the law to the abovementioned facts, we propose to set out the relevant constitutional provisions.

APPLICABLE CONSTITUTIONAL PROVISIONS

14 Sections 1(c) and (d) of the Constitution provide that:[11]

> "*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(a)* *…*
>
> *(b)* *…*
>
> *(c)* *Supremacy of the constitution and the rule of law.*
>
> *(d)* *Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*"

15 Section 42(3) provides that:[12]

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

[11] Emphasis added
[12] Emphasis added

16 Section 48 provides for the taking of the oath of office by members of Parliament, including the Speaker, which expressly includes the undertaking "*to obey, respect and uphold the Constitution*".

17 Section 55(2)(b)(ii) provides that:

> "*The National Assembly must provide for mechanisms … to maintain oversight of … the exercise of national executive authority, including the implementation of legislation*".

18 Section 83(b) provides that:[13]

> "*The President … must uphold, defend and respect the Constitution as the supreme law of the Republic.*"

19 Section 89(1) provides that:[14]

> "*The National Assembly, by a 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) a serious violation of the Constitution or the law;*
>
> *(b) serious misconduct; or*
>
> *(c) inability to perform the functions of office.*"

20 Section 165(5) provides that:[15]

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[13] Emphasis added
[14] Emphasis added
[15] Emphasis added

> "*An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*"

21 Collectively, these provisions make it clear that the National Assembly is not only required to hold the President to account, but is also provided with a range of mechanisms to do so. Where the President's conduct is particularly egregious, as we submit the uncontested facts and the decision of this Court in ***EFF v The Speaker*** show, the National Assembly would ordinarily be required to establish whether the ultimate sanction – removal from office in terms of section 89(1) – ought to be considered.

22 In ***UDM v The Speaker***, this Court made it clear that the Speaker plays a key role in discharging the National Assembly's constitutional obligations:[16]

> *"The Speaker is chosen from amongst Members of the National Assembly. That gives rise to the same responsibility to balance party interests with those of the people. It is as difficult and onerous a dual responsibility as it is for Members, perhaps even more so, given the independence and impartiality the position requires. But Parliament's efficacy in its constitutional oversight of the Executive vitally depends on the Speaker's proper exercise of this enormous responsibility. The Speaker must thus ensure that his or her decision strengthens that particular tenet of our democracy and does not undermine it."*

23 Accordingly, in circumstances where Parliament purported to exercise oversight over the executive (and to hold the President to account), but the

[16] At para 87

manner in which it did so was declared invalid and set aside,[17] it is simply not open to the Speaker to refrain from taking any action.

EXCLUSIVE JURISDICTION / DIRECT ACCESS

24 In addition to the abovementioned substantive provisions of the Constitution, provision is also made for procedural rights in terms of section 167(4)(e) of the Constitution, and Rule 18 of the Rules of this Court dealing with exclusive jurisdiction and direct access, respectively.

Exclusive jurisdiction

25 There are two separate gateways to the exclusive jurisdiction of this Court, in that this application simultaneously deals with –

25.1 the duties exclusively imposed on Parliament, specifically the National Assembly, to hold the executive, specifically the President, accountable on the one hand; and

25.2 On the other hand, this application relates to the proven violations by the President of duties specifically imposed upon him in terms of section 83 of the Constitution, read together with his oath of office as contained in Schedule 2 of the Constitution.

26 As if that is not enough, the nucleus and fulcrum of this application are the pronouncements and findings made in ***EFF v The Speaker***, which was itself heard on the basis of the exclusive jurisdiction of this Court. It would be

[17] See para 10 of the order in ***EFF v The Speaker***

strange if a matter which is for all intents and purposes a sequel thereto were to be heard by a lower court.

27 In ***EFF v The Speaker***, this Court considered *"whether the [constitutional] obligation allegedly breached is of the kind contemplated in s 167(4)(e)"*. The Chief Justice explained:[18]

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

28 The Chief Justice then went on to consider the National Assembly's *"actor-specific constitutional obligation imposed on it by s 182(1)(b) and (c) read with s 8(2)(b)(iii) of the Public Protector Act."* He came to the conclusion that *"[t]he presentation of [the Public Protector's] report delivered a constitutionally derived obligation to the National Assembly for action"*, with the National

[18] At para 43 (footnote omitted)

Assembly being alleged to have *"failed to fulfil these obligations in relation to the remedial action."*[19]

29 This Court held that the National Assembly had indeed failed *"to hold the President accountable, by ensuring that he complies with the remedial action taken against him"*, and that such failure *"is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President."*[20]

30 This application does not seek to compel the National Assembly to ensure that the President complies with the Public Protector's remedial action; this is no longer necessary, given the extensive order granted by this Court in ***EFF v The Speaker***. Instead, the focus of this application is on the National Assembly's subsequent failure to hold the President to account in light of the damning findings of this Court, as well as the undisputed allegations regarding the President's utterances in Parliament both before and after judgment in ***EFF v The Speaker***.

31 In the circumstances, we submit that this application falls within this Court exclusive jurisdiction.

[19] At para 44
[20] At para 104 (footnotes omitted)

Direct access

32 In the event, however, that this Court holds that its exclusive jurisdiction is not properly invoked, we submit that the matter ought nevertheless to be granted direct access.

33 In ***UDM v The Speaker***, this Court considered whether direct access should be granted in respect of the manner in which a motion of no confidence in terms of section 102 of the Constitution may be conducted. Relying in large part on its decision in ***Mazibuko v Sisulu***,[21] this Court explained:[22]

> *"Here too, we embrace and reiterate the observations relating to the importance of a motion of no confidence in our constitutional democracy, its primary objective as an effective consequence enforcement tool and the likelihood of the dispute ending up in this Court even if we were to direct that it be heard by the High Court first."*
>
> *"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. Consistent with the approach in Mazibuko in relation to an application for direct appeal, we too find it convenient to resolve the jurisdictional issue on the basis of direct access. Based on these factors, it is in the interests of justice to grant direct access."*

[21] 2013 (6) SA 249 (CC)
[22] At paras 27-28 (footnote omitted)

34 The Public Protector's report, which was published on 19 March 2014,[23] concerns upgrades to the President's Nkandla residence dating as far back as 2009.[24] The process that the National Assembly followed, purportedly to discharge its executive oversight obligations, ended on 6 August 2015 with the formal endorsement of two reports that effectively absolved the President of all liability.[25] That decision was set aside by this Court on 31 March 2016, when judgment in in ***EFF v The Speaker*** was handed down.

35 The founding affidavit in this case not only deals with this Court's findings in that case, but also includes uncontested evidence regarding the President's utterances on the Nkandla upgrades in the National Assembly on various occasions, including on 15 November 2012,[26] 20 March 2013,[27] and 11 March 2015.[28] It also includes uncontested evidence regarding the President's public response to this Court's judgment in ***EFF v The Speaker***.[29] What is clear from this evidence, which the President has not disputed, is that he misled both Parliament and the general public.[30]

36 It is with these undisputed facts in mind that this Court has been approached to consider the failure of the National Assembly, under the leadership of the Speaker, to hold the President to account in respect of his unconstitutional, unlawful and unethical conduct spanning several years. In such

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[23] Founding affidavit, para 38, p 23
[24] Construction of the upgrades began on 29 August 2009. See founding affidavit, para 28, p 17
[25] Founding affidavit, para 46, p 29
[26] Founding affidavit, paras 31-35, pp 18-21
[27] Founding affidavit, para 36, pp 21-22
[28] Founding affidavit, para 45, pp 27-28
[29] Founding affidavit, para 48, pp 32-33
[30] See founding affidavit, para 51, p 34; and para 53, p 35

circumstances, we submit that direct access ought to be granted, should this Court find that the application does not fall within its exclusive jurisdiction.

ANALYSIS OF THE MERITS OF THE APPLICATION

37 The following questions are raised in the present matter:

37.1 What duties, if any, arise from the relevant provisions of the Constitution on the part of the National Assembly out of the decision in ***EFF v The Speaker***, and the admitted relevant conduct and utterances of the President?

37.2 Insofar as section 89 is relevant to the answer to the above question, and upon a proper and effective interpretation thereof, what is the correct sequential process towards the proper invocation of section 89(1) of the Constitution?

37.3 What remedies are available to the applicants? In a nutshell, does the Speaker's omission or failure to act constitute "*conduct that is inconsistent with the Constitution*" within the meaning of that phrase in section 172(1)(a) of the Constitution? To what extent does the doctrine of separation of powers affect and/or restrict the nature of the relief which this Court can grant?

DUTY TO ACT

38 It is trite that where conduct complained of constitutes a failure or omission, there must exist a duty to act. In the present matter, the duty to act relied upon

is derived from the applicable sections of the Constitution and the following extracts from the judgment in ***EFF v The Speaker***, *mutatis mutandis*, and directly so:

38.1 "*When that [judgment] was received by the National Assembly, it effectively operationalised the House's obligations in terms of sections 42(3) and 55(2) of the Constitution. The presentation of that [judgment] delivered a constitutionally-derived obligation to the National Assembly for action. And it is alleged that it failed to fulfil these obligations*".[31]

38.2 "'*[S]crutiny' implies a careful and thorough examination or a penetrating or searching reflection.*"[32]

38.3 "*The mechanics of <u>how to go about fulfilling</u> these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon.*"[33]

39 Insofar as the National Assembly is concerned, the effect of this Court's order in ***EFF v The Speaker*** is that the President has yet to be held to account by the very body tasked by the Constitution with that responsibility. The duty to

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[31] Para 44
[32] Para 85
[33] Para 93 (emphasis added)

act on the part of the Speaker, in her official capacity as leader of the National Assembly, was additionally and more specifically triggered by the numerous requests for her to initiate disciplinary and/or section 89 proceedings, all of which she unreasonably rejected.[34]

40 Her reasons for such rejection were not legally sustainable, as will be shown hereunder, when dealing with the defences raised by the first respondent in this application.

41 In any event, and upon a contextual and holistic reading and interpretation of the judgment in ***EFF v The Speaker***, read with section 165(5) of the Constitution, an independent duty to act arises from its binding effect upon "*organs of state to which it applies*" which in this instance include the Speaker and the National Assembly.

42 The impugned conduct of the Speaker in doing nothing (or omitting/failing to do anything) is in the circumstances liable to be declared unlawful and unconstitutional.

PROCESS ENVISAGED BY A PROPER INTERPRETATION OF SECTION 89

43 This matter lies at the heart of this application.

44 It is respectfully submitted that this Court has not had any prior opportunity to consider whether section 89 must be applied in the manner in which it has hitherto been applied, i.e. akin to section 102(2), and by the mere introduction

[34] See founding affidavit, paras 55-60, pp 36-38

of a motion in the National Assembly followed by a vote, or in the manner herein proposed by the applicants, namely:

44.1 The establishment (by investigation or otherwise) of a *prima facie* case of an impeachable offence or cause (Step One);

44.2 The conducting of a fair process to determine the guilt or otherwise of the President in respect of the accusations levelled against him or her, which process may also make a recommendation as to sanction (Step Two); and

44.3 Only thereafter, putting the matter to a vote in the House to determine whether or not to remove the President (Step Three).

45 It is respectfully submitted that no proper holistic and purposive interpretation of section 89 may lead to a materially and substantially different sequential process than that outlined above.

46 A similar conclusion is reached when one focuses on the text of section 89(1), which allows for the removal of the President for *"a <u>serious</u> violation of the Constitution or the law"*, *"<u>serious</u> misconduct"*, or the President's *"inability to perform the functions of office"*.[35] Implicit in each of the first two grounds is that the President's conduct, whilst deserving of Parliament's attention, may not necessarily rise to the level of seriousness required to remove him or her

[35] Emphasis added

from office. In respect of the third ground, the President is either able or unable to perform his or her functions; there are no degrees of inability.

47 A consideration of section 89(2) reaffirms the need for a fair process to determine whether the nature of the President's conduct is deserving of the sanction that accompanies removal from office. That section states that *"[a]nyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."* The same sanction does not apply to a person removed from office in terms of section 89(1)(c), presumably because this ground of removal is ordinarily beyond someone's control.

48 In practical terms, a removal from office on the basis of the President's *"inability to perform the functions of office"* results in a similar sanction to a successful motion of no confidence in terms of section 102: the effective loss of office. But a removal on the basis of sections 89(1)(a) or 89(1)(b) results in more than just the loss of office; it also strips that person of his or her benefits, and bars him or her from future public office. Such a sanction can be viewed as punishment for egregious conduct on the part of the President, and protection of the public interest by preventing the President from ever holding public office again.

49 That being so, and in view of the fact that a *prima facie* case has been made out with reference to the Public Protector's report (which has not been taken on review), the judgment in ***EFF v The Speaker***, and the allegations made in

the founding affidavit (which have not been denied),[36] the next logical step in the sequence must be Step Two above.

50 At the end of such a process, Parliament may decide that whilst the President's is indeed deserving of sanction, his conduct did not rise to the level of seriousness required for removal from office in terms of either section 89(1)(a) or 89(1)(b). Or it might decide, despite the seriousness of the violation of the Constitution or the law, or the misconduct in question, that the particular circumstances do not warrant removal from office. Either way, a decision in terms of section 89(1) cannot be made rationally if the type of process contemplated in Step Two has not taken place.

51 The interpretation contended for herein arises from a holistic interpretation of the Constitution as a whole, with specific reference to the applicable constitutional provisions listed hereinabove.

DEFENCES / JUSTIFICATION

52 It is common cause that, despite demand, the Speaker has consistently failed and/or refused to act in such a manner so as to afford the President the opportunity to face his parliamentary accusers and those who wish to see him removed for the alleged breaches of section 89. In so refusing, the Speaker

[36] As previously indicated, these allegations relate to the President's misleading of the National Assembly before this Court handed down its decision in ***EFF v The Speaker***, and his misleading of the South African public in his response to the judgment. Significantly, the President – despite being cited as the second respondent – has chosen not to file an affidavit in answer to these allegations.

has raised five main defences in the correspondence and/or in her answering affidavit, namely:

52.1 The applicants have failed to establish the grounds either for exclusive jurisdiction or direct access.

52.2 Neither the sections invoked by the applicants, nor the judgment in ***EFF v The Speaker***, place any constitutional obligations on the Speaker and/or on the National Assembly.

52.3 The applicants failed to exhaust internal remedies, with specific reference to Rules 85(2) and (3) of the Rules of the National Assembly.

52.4 On 5 April 2016, the Leader of the Opposition, supported by the leaders of the three applicants, moved a motion in terms of section 89(1)(a) on the same grounds advanced in this matter, which motion failed. (This defence is a version of "*res judicata*" or double jeopardy.)

52.5 The application implicates the doctrine of separation of powers.

53 The preliminary issues of exclusive jurisdiction and direct access have already been dealt with above. We now turn to dealing with the remaining four defences mentioned above, and demonstrate why they all do not hold any water.

No obligations arising

54 This Court's decision in ***EFF v The Speaker*** made the express finding that the National Assembly had failed to discharge its constitutional obligations.[37]

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

55 Pursuant to this finding, this Court made the following order in respect of the conduct of the National Assembly:[38]

> *"The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of s 182(1)(c) of the Constitution is inconsistent with ss 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside."*

56 This means that after all these years, the National Assembly – under the leadership of the Speaker – has failed to hold the President to account in respect of his objectionable conduct, including his misleading of the National Assembly and the South African public. Yet central to the National Assembly's

[37] At para 99 (footnote omitted)
[38] Para 10 of the order

mandate, which flows directly from the various constitutional provisions on which we rely, is an obligation to hold the President to account.

57 Where the President's conduct is particularly egregious, the Constitution provides a mechanism to determine whether he or she should be removed from office. Under the leadership of the Speaker, the National Assembly is duty-bound to determine whether this sanction ought to be considered. Should the National Assembly ultimately decide not to remove the President from office, it would still be obliged to consider what would constitute an appropriate sanction in the circumstances.

Non-exhaustion of internal remedies: Rules 85(2) and (3)

58 Rules 85(2) and (3) of the Rules of the National Assembly are to be found under the heading *"Reflections upon members, the President and Ministers or Deputy Ministers who are not members of the Assembly"*, which is located in Chapter 5 entitled *"Order in Public Meetings and Rules of Debate"*. That chapter is broken into two parts: Part 1: Order in meetings; and Part 2: Rules of debate. Rule 85, which is in Part 2, provides as follows:

> *"(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."

59 We submit that the Speaker's reliance on Rules 85(2) and (3) is misplaced, because these provisions simply seek to provide a formal mechanism for a member to raise allegations of improper or unethical conduct for purposes of debate. What they seek to avoid is the raising of such allegations, by ambush, during the ordinary course of debate. They do not provide a substantive mechanism for holding to account another member, or members of the executive who are not members of the National Assembly.

60 Accordingly, these rules are not relevant to the facts of this case. The National Assembly is already well-aware of the President's conduct, including as documented in the Public Protector's report, as well as the findings of this Court in relation to the manner in which he responded to that report. In addition, the applicants are not seeking to have the issue debated in the National Assembly, but instead are looking to the Speaker to provide guidance on the appropriate mechanism for holding the President to account in respect of the uncontested evidence and findings of fact.

Section 89 proceedings held on 5 April 2016

61 The Minutes of Proceedings of the National Assembly dated 5 April 2016 indicate that the motion in question –

61.1 was only introduced by the Leader of the Opposition at 16h07;

61.2 not only dealt with the implications of the decision of this Court in ***EFF v The Speaker***, but also considered two further decisions of this Court and a decision of the Supreme Court of Appeal in which adverse findings were made in respect of the President's conduct;

61.3 was only brought in terms of section 89(1)(a) of the Constitution, and did not invoke section 89(1)(b) dealing with serious misconduct; and

61.4 was already debated and voted upon by 18h19.[39]

62 We submit that the motion ought not to have been put to a vote in the absence of the Step Two process to which we have already referred. Given the manner in which the motion was considered, in particular without being *"preceded by any fact-finding enquiry"*,[40] the National Assembly was not afforded the opportunity properly to consider whether the President's violation of the Constitution and the law was sufficiently serious to warrant removal in terms of section 89(1)(a).

63 In addition, the President was not given the opportunity to defend himself. Moreover, the motion did not consider whether the President's misconduct was sufficiently serious to warrant removal in terms of section 89(1)(b) of the Constitution. Further, the motion was not tabled by the Speaker, in her capacity as the leader of the National Assembly, in contrast to the role that

[39] A copy of the minutes is attached to the answering affidavit as annexure **"BMM1"**.
[40] Founding affidavit, para 50, p 34

she played in establishing the two *ad hoc* committees that purported to deal with the Public Protector's report.[41]

64 Accordingly, the Speaker's reliance on the section 89 proceedings held on 5 April 2016 is misplaced.

Remedy and separation of powers

65 In *Glenister I*, Langa CJ explained why the Constitution recognises the principle of separation of powers:[42]

> *"The principle of checks and balances focuses on the desirability that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. The system of checks and balances operates as a safeguard to ensure that each branch of government performs its constitutionally allocated function and that it does so consistently with the Constitution."*

66 In *Doctors for Life*, Ngcobo J explained the basis upon which this Court is empowered to order Parliament to discharge its constitutional obligations:[43]

> *"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the*

[41] Founding affidavit, para 50, p 34
[42] *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) at para 35
[43] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 37-38 (footnotes omitted)

institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

"But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

67 Given the structure of the relief prayed for in the notice of application, the doctrine of separation of powers is therefore not relevant to the declaratory relief, and only features in respect of the directive or mandatory relief to compel the Speaker to take the necessary steps.

68 In recognition of the separation of powers, the applicants have deliberately refrained from prescribing exactly how the obligations in question ought to be fulfilled. Instead, they depart from the fact that to do nothing in the circumstances is out of the question.

69 Departing from that premise, it should then be open to the court to grant the minimalist relief sought in prayers 5 and 6.

69.1 Relying on the declarator to which the relief in prayer 3 refers, prayer 5 contemplates relief that compels the Speaker to do no more than what is necessary to discharge her constitutional obligations. In particular, it does not specify which processes and mechanisms she ought to put in place; on the contrary, it leaves the decision to the Speaker herself. To the extent that it refers to processes and mechanisms necessary to determine whether the requirements of section 89(1) of the Constitution have been met, it does no more than work within the accountability framework chosen by the Constitution itself.

69.2 The relief sought in prayer 6 is similar in nature. It builds on the relief sought in prayer 5, seeking no more than what is necessary to ensure that the President is held to account in accordance with a fair process that is compatible with the Constitution's chosen accountability mechanism. Importantly, it does not prescribe to the Speaker what mechanism she ought to choose, but simply insists that she choose a mechanism that she deems appropriate in the circumstances. Reference is made to a committee of Parliament as an example of what may be done, mindful of the fact that such a mechanism was previously chosen by the Speaker to consider the Public Protector's report.

FOREIGN COMPARATIVE LAW

70 In what follows below, we consider the process followed to remove a sitting President in three jurisdictions: the United States of America ("the US"), Brazil, and the Republic of Korea ("South Korea"). Recently, Dilma Rousseff of Brazil and Park Geun-hye of South Korea were both removed from the office of president by way of impeachment proceedings. While President Bill Clinton was impeached by the House of Representatives, he survived his trial in the Senate.

71 While the process for removal from public office differs from country to country, three features are common to all three jurisdictions:

71.1 First, a legislative mechanism that triggers impeachment proceedings;

71.2 Second, a public process – whether in the legislature (in the case of the US and Brazil) or the Constitutional Court (in the case of South Korea) – which provides the person facing removal from office with the opportunity to defend himself or herself; and

71.3 Third, protection from removal in the absence of a deliberative process that considers whether removal is justified.

The US

72 The US Constitution makes provision for the President, Vice President and *"all Civil Officers of the United States"* (such as judges) to *"be removed from office*

on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[44]

73 Vesting legislative power in a bicameral Congress,[45] the US Constitution empowers both the House of Representatives ("the House") and the Senate to play a role in impeachment proceedings. While the House has the *"sole Power of Impeachment"*,[46] the Senate has the *"sole Power to try all Impeachments"*.[47] Or in the words of the Supreme Court:

> *"[T]he whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge."*[48]

74 Thus unless and until convicted by the Senate, a public official who has been impeached by the House remains in office. Put differently, the House process merely triggers the Senate trial, by the adoption of the *"articles of impeachment"* by way of a simple majority vote.[49]

75 When the Senate tries the President, the Chief Justice is required to preside. At the conclusion of a Senate trial, the impeached person may only be convicted by a vote taken by at least third-thirds of all senators. Once convicted, the person is removed from office.

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[44] Art. 2, § 4
[45] Art. 1
[46] Art. 1, § 2, cl. 5
[47] Art. 1, § 3, cl. 6
[48] *Nixon v United States* 506 U. S. 224 (1993) at 236
[49] *Nixon* at 226

76 Trials in the Senate are regulated by the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials ("the Impeachment Rules")[50] While the full Senate is entitled to conduct a trial, Impeachment Rule XI makes provision for a committee of senators *"to hear evidence against an individual who has been impeached and to report that evidence to the full Senate"*.[51] Unless the Senate orders otherwise, such a committee is subject to the same rules of procedure as would ordinarily govern a full Senate trial.

77 An instructive example of how this operates in practice is set out in the Supreme Court's majority decision in *Nixon v. United States*,[52] in which a district court judge who had been removed from office unsuccessfully challenged the constitutionality of Impeachment Rule XI. Following impeachment by the House, the Senate voted to invoke the rule. Thereafter, the trial proceeded as follows:[53]

77.1 The Senate committee held four days of hearings, in which testimony was heard from ten witnesses, including Nixon.

77.2 Once the hearings were over, the Senate committee presented the full Senate with –

77.2.1 a full transcript of the hearings; and

77.2.2 a report *"stating the uncontested facts and summarizing the evidence on the contested facts"*.

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[50] The rules are available at https://www.law.cornell.edu/background/impeach/senaterules.pdf
[51] *Nixon* at 226
[52] 506 U. S. 224 (1993)
[53] Ibid at 227-228

77.3 Nixon and the *"House impeachment managers"*[54] then made both written and oral submissions to the full Senate, with senators having the opportunity to pose questions to both parties during the three-hour long hearing.

77.4 Finally, the matter was put to a vote, which resulted in Nixon being convicted on two articles of impeachment. He was thereafter removed from office as a district judge.

78 The Impeachment Rules contemplate a fair trial process. For example, Impeachment Rule XVII states that *"[w]itnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side."* But unlike a trial by jury, a conviction by the Senate is neither appealable nor reviewable.[55]

Brazil

79 The Constitution of the Federative Republic of Brazil ("the Brazilian Constitution") makes provision for the impeachment of the President and other public officials by way of a two-stage process that involves both houses of the National Congress:[56] the lower house, known as the Chamber of Deputies; and the upper house, known as the Federal Senate.

[54] These are members of the House who act as prosecutors in impeachment trials.
[55] This is key finding of the majority of the Supreme Court in *Nixon*.
[56] According to Article 44, the National Congress exercises legislative power.

80 In terms of Article 51,[57] the lower house has the exclusive competence *"to authorize, by two-thirds of its members, legal proceeding to be initiated against the President … of the Republic"*. This authorisation of legal proceedings may be for *"common criminal offences"*, or *"crimes of malversation"*.

80.1 The Oxford Living Dictionaries define malversation as "[c]*orrupt behaviour in a position of trust, especially in public office"*. Similarly, the Merriam-Webster Dictionary defines the word to mean *"misbehavior and especially corruption in an office, trust, or commission"*.

80.2 Article 85 broadly sets out what are considered to be crimes of malversation insofar as the President is concerned. In addition, it provides that *"[t]hese crimes shall be defined in a special law, which shall establish the rules of procedure and trial."*[58]

81 In terms of Article 52,[59] the upper house has the exclusive competence *"to effect the legal proceeding and trial of the President … of the Republic for [the] crime of malversation"*.[60]

81.1 According to Article 52,[61] the Chief Justice of the Supreme Federal Court presides over the trial in the upper house. Once the proceedings have been instituted by the upper house, and pending the outcome of the trial,

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[57] Item II
[58] Article 85, Sole paragraph
[59] Item II
[60] Where the lower house accepts charges against the President in respect of common criminal offences, the trial takes place in the Supreme Federal Court.
[61] Sole paragraph

the President is suspended from performing his or her functions.[62] If the trial is not completed within 180 days, the suspension is lifted.[63]

81.2 The upper house is not obliged to conduct a trial. In a 2016 decision relating to the lower house's vote to initiate charges of impeachment against former President Rousseff, a majority of the Supreme Federal Court held that upper house may dismiss such charges by a simple majority.[64]

81.3 The President may only be impeached by a vote taken by at least two-thirds of all members of the upper house. Significantly, *"the sentence … shall be limited to the loss of office with disqualification to hold any public office for a period of eight years, without prejudice to other applicable judicial sanctions."*[65]

82 Finally, in contrast to the US position, impeachment proceedings in Brazil are reviewable by the Supreme Federal Court.[66]

South Korea

83 In contrast to the US and Brazil, South Korea follows an impeachment process that involves both the National Assembly[67] and the Constitutional Court.

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[62] Article 86, Paragraph 1
[63] Article 86, Paragraph 2
[64] De Lazari et al, "Two Courts, Two Interpretations", *Verdict: Legal Analysis and Commentary from Justia* (27 April 2016), available at https://verdict.justia.com/2016/04/27/17143
[65] Article 52, Sole paragraph
[66] See De Lazari et al, above n 64
[67] Article 40 of the South Korean Constitution states that *"legislative power shall be vested in the National Assembly."*

83.1 Article 65 of the South Korean Constitution empowers the National Assembly to pass motions for the impeachment of the President and other public officials who *"have violated the Constitution or other Acts in the performance of official duties"*;[68] and

83.2 Article 111(1) of the South Korean Constitution provides that the Constitutional Court has jurisdiction over impeachment.

84 A simple majority of all members of the National Assembly is required to propose a motion for the impeachment of the President, with a third-thirds majority of all members being required to approve the motion.[69] The passage of a motion for impeachment results in the suspension from public office *"until the impeachment has been adjudicated."*[70] Should the Court uphold the decision, the impeached person is removed from public office, and can be sued both civilly and criminally.[71]

85 While much detail on the impeachment process is provided in the National Assembly Act, the Constitutional Court has recently indicated that Article 130(1) of that Act makes it clear that the National Assembly has the discretion to decide "*whether or not to investigate the grounds of a proposed impeachment bill"*. Article 130(1) provides:[72]

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[68] Article 65 applies to the *"the President, the Prime Minister, members of the State Council, heads of Executive Ministries, justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act"*.
[69] Article 65(2)
[70] Article 65(3)
[71] Article 65(4)
[72] Emphasis added

> *"When a proposition of impeachment prosecution is made, the Speaker shall report it to the plenary session first opened after the proposition, which may refer it to the Legislation and Judiciary Committee for an investigation, by its resolution."*

86 In its recent decision dealing with the impeachment of then President Park Geun-hye,[73] the Court upheld the National Assembly's decision. This was despite the failure of the National Assembly to perform an investigation into the grounds for impeachment, and the fact that the vote was held without waiting for the outcome of an investigation into the allegations underpinning the impeachment, and without any debate. Invoking the doctrine of separation of powers, the Court held that the *"self-regulating authority of the deliberative process of the National Assembly should be respected"*.[74]

87 However, the Court did consider whether the substantive requirements for impeachment had been met. As the official English summary of the decision makes clear, each separate ground of impeachment was considered, with many of them being dismissed. That said, the Court held that the then President had indeed violated the Constitution and the law in a manner that justified her removal from office.

CONCLUSION

88 This Court is being asked to compel the Speaker, in her capacity as leader of the National Assembly, to ensure that the President is held to account by way

[73] Case no. 2016Hun-Na1 (10 March 2017), a summary of which is available at http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do
[74] Ibid

of a fair process that provides him with the opportunity to defend himself. There is no dispute that the President has violated the Constitution and the law. Indeed, such a finding has already been made by this Court. Moreover, the uncontested evidence makes out – at the very least – a *prima facie* case of misconduct. Accordingly, we pray for the order as set out in the notice of motion.

DC MPOFU SC

JM BERGER

Chambers, Sandton

30 June 2017