

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO.: CCT 76/17**

In the matter between:

**THE ECONOMIC FREEDOM FIGHTERS** First Applicant

**UNITED DEMOCRATIC MOVEMENT** Second Applicant

**CONGRESS OF THE PEOPLE** Third Applicant

**THE DEMOCRATIC ALLIANCE** Intervening party

and

**THE SPEAKER OF THE NATIONAL ASSEMBLY** First Respondent

**PRESIDENT JACOB GEDLEYIHLEKISA ZUMA** Second Respondent

and

**CORRUPTION WATCH (RF) NPC** Amicus Curiae

---

**HEADS OF ARGUMENT FOR THE DEMOCRATIC ALLIANCE**

---

## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>1</b>
<b>THE NATIONAL ASSEMBLY’S CONSTITUTIONAL DUTIES TO MAINTAIN ACCOUNTABILITY.....</b>	<b>6</b>
<b>General duties.....</b>	<b>6</b>
<b>The tools of accountability.....</b>	<b>8</b>
<b>THE NATURE OF IMPEACHMENT PROCESSES AND THE NEED FOR INVESTIGATIONS AND HEARINGS .....</b>	<b>11</b>
<b>THE NATIONAL ASSEMBLY’S FAILURE TO CREATE EFFECTIVE MECHANISMS ON IMPEACHMENT.....</b>	<b>20</b>
<b>THE NATIONAL ASSEMBLY’S FAILURE TO TAKE ACTION TO HOLD THE PRESIDENT ACCOUNTABLE.....</b>	<b>26</b>
<b>REMEDY .....</b>	<b>33</b>

## INTRODUCTION

- 1 The Nkandla scandal has left a deep stain on the President and South Africa's democracy.<sup>1</sup>
- 2 In the *Secure in Comfort* report,<sup>2</sup> the Public Protector found that the President was knowingly<sup>3</sup> and unlawfully enriched at state expense when non-security upgrades were made to his private Nkandla home.<sup>4</sup> The President has never properly or fully explained why he acted in this unlawful and unconstitutional manner.
- 3 In the *Nkandla* judgment,<sup>5</sup> this Court held that the President also acted unconstitutionally by refusing to comply with the Public Protector's remedial action.<sup>6</sup> The President subsequently paid back a portion of the unlawful non-security upgrades, in compliance with this Court's order. However, this money does not change the fact of

---

<sup>1</sup> We use the term "Nkandla scandal" to refer to the events addressed in the Public Protector's report, this Court's *Nkandla* judgment, and subsequent events.

<sup>2</sup> Public Protector, *Secure in Comfort* (Report no 25 of 2013 / 14) published on 19 March 2014.

<sup>3</sup> *Ibid* at paras 9.5.1 – 9.5.4, pp 422-423

<sup>4</sup> *Ibid* at paras 10.5.3, 10.9.1.4, 10.10 at pp 427 – 441. The Public Protector found that the President's conduct was in breach of section 96 of the Constitution, the Executive Members' Ethics Act 82 of 1998 and the Executive Ethics Code.

<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] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) ("*Nkandla* judgment").

<sup>6</sup> *Ibid* at para 83 read with para 3 of this Court's order.

the President's unconstitutional and unlawful conduct, nor does it justify or explain this conduct. To date, the President has failed to adequately explain his conduct, apart from giving a terse statement on 1 April 2016.<sup>7</sup>

- 4 While the Public Protector and this Court found that the President had acted unconstitutionally and unlawfully, both stopped short of determining whether the President's conduct provides grounds for impeachment under section 89(1) of the Constitution.
- 5 That determination was rightly left to the National Assembly, which is empowered to remove the President by means of a two-thirds majority vote "*only*" on grounds of a "*serious violation of the Constitution or other law*", "*serious misconduct*", or "*inability to perform the functions of office*".
- 6 There are at least three matters that call for further investigation and hearings to determine the seriousness of the President's proven unconstitutional and unlawful conduct:
  - 6.1 First, unanswered questions remain over the President's inaction in the face of the non-security upgrades to his home:

---

<sup>7</sup> Annexure JM 10, Record pp 157 – 161.

Why did the President tacitly accept these upgrades? Why did he not ask questions of the relevant officials? Why did he not act to stop these upgrades as soon as he became aware of them?<sup>8</sup>

6.2 Second, did the President lie to Parliament when he claimed that the state was not paying for any non-security upgrades and that his family was paying for these upgrades with a bond?<sup>9</sup>

6.3 Third, the President's reasons for refusing to comply with the Public Protector's remedial action remain opaque. Was he simply following legal advice, as he has claimed, or was he acting in bad faith, in an attempt protect his unlawful gains?<sup>10</sup>

7 The EFF, the UDM and COPE contend that the National Assembly is in breach of its constitutional duties by failing to conduct an investigation and hearing into such matters to determine whether there are grounds for the President's impeachment under section 89(1) of the Constitution.<sup>11</sup>

---

<sup>8</sup> DA FA para 39.

<sup>9</sup> DA FA para 40.

<sup>10</sup> DA FA paras 41 – 47.

<sup>11</sup> EFF, UDM and COPE FA at paras 10, 75 – 76, pp 11, 44 – 45. EFF Heads at paras 5 – 6, 73 – 91; UDM and COPE Heads at paras 3, 39, 57.

8 The Democratic Alliance (“DA”) endorses and develops these submissions in what follows, particularly in paragraphs 49 to 58.

9 However, the DA also goes further. It contends that the National Assembly has not only breached its constitutional duties by failing to launch impeachment investigations and hearings, but it has also breached its constitutional duties by failing to create effective mechanisms to allow members of the National Assembly to initiate such impeachment investigations and hearings.<sup>12</sup>

10 In this regard, the DA submits that:

10.1 Impeachment processes under section 89 of the Constitution necessarily require an investigation and a fair hearing.

10.2 At present, the National Assembly has failed to create any legislation or rules to govern the section 89 impeachment process, including mechanisms to allow members to bring motions to initiate impeachment investigations and hearings.

10.3 Impeachment proceedings are inherently urgent and controversial matters that must be commenced and completed with all appropriate speed and in a fair manner. In the absence

---

<sup>12</sup> DA FA para 9.

of clear impeachment procedures, set out in advance of actual cases, impeachment proceedings are likely to be delayed or stymied by disagreements within the National Assembly over the proper procedure for conducting impeachment investigations and hearings. Impeachment procedures devised in the heat of the moment are also far less likely to be fair, objective or appropriate.

11 In what follows, we develop this argument by addressing the following points in turn.

11.1 First, we outline the National Assembly's constitutional duties to ensure accountability;

11.2 Second, we explain why impeachment proceedings under section 89 of the Constitution require an investigation and fair hearing;

11.3 Third, we demonstrate that the National Assembly has failed to put in place effective mechanisms to allow its members to initiate impeachment investigations and hearings;

11.4 Fourth, we show that the National Assembly has also and in any event breached its constitutional duties by failing to conduct

impeachment investigations and hearings in respect of the President's handling of the Nkandla scandal.

11.5 Finally, we address the appropriate remedy.

## **THE NATIONAL ASSEMBLY'S CONSTITUTIONAL DUTIES TO MAINTAIN ACCOUNTABILITY**

### ***General duties***

12 The National Assembly has clear constitutional duties to ensure that the President and other members of the national executive are held accountable for their actions. These duties flow from several key provisions.

13 Section 42(3) provides that the National Assembly is elected "*to represent the people and to ensure government by the people under the Constitution*". The National Assembly does this in multiple ways: "*by choosing the President, by providing a national forum for public consideration of issues, by passing legislation*" and, most significantly for present purposes, by "*scrutinizing and overseeing executive action*".

14 Section 55(2) of the Constitution further provides that the National Assembly "*must provide mechanisms*" to "*ensure that all executive*

*organs of state in the national sphere of government are accountable to it* and to “*maintain oversight*” of the exercise of national executive authority and organs of state.

15 These provisions must be read with sections 92(2) and (3) of the Constitution. The Court has explained that these provisions enjoin the President, the Deputy President, Ministers and their deputies to be “*accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions*”.<sup>13</sup>

16 In the *Secret Ballot* judgment,<sup>14</sup> this Court emphasised that the combined effect of all of these constitutional provisions is that

*"The National Assembly ... has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority."*<sup>15</sup>

17 This entails that the National Assembly must not only take action to ensure oversight and accountability, but it must also put in place effective mechanisms to facilitate proper accountability and oversight. If the National Assembly fails in either of these duties it will

---

<sup>13</sup> *United Democratic Movement v Speaker of the National Assembly and Others* (“*Secret Ballot* judgment”) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC) at para 36.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Secret Ballot* at para 40.

be in breach of the Constitution.

### ***The tools of accountability***

18 There are a number of ways of ensuring accountability. In the *Secret Ballot* judgment, this Court distinguished between the "*regular or normal*" accountability tools and the "*supreme*" accountability tools of impeachment and a vote of no confidence under section 89 and 102 of the Constitution.<sup>16</sup>

19 This Court has established several important principles on the nature and exercise of these "*supreme*" accountability tools under the Constitution.

20 First, this Court has indicated that these are not merely constitutional tools for ensuring accountability, but they are also rights vested in each member of the National Assembly.

20.1 In *Mazibuko*,<sup>17</sup> this Court acknowledged that each member has "*the right to initiate a motion of no confidence is accorded to every member of the assembly*" and that this "*right that flows*

---

<sup>16</sup> *Secret Ballot* at para 41 – 42.

<sup>17</sup> *Mazibuko v Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) ("*Mazibuko*").

*from section 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution.”<sup>18</sup>*

20.2 The power to bring motions to initiate section 89 impeachment proceedings must equally be viewed as a right available to each member of the National Assembly.

21 Second, this Court has stressed that the Constitution requires appropriate mechanisms to be in place to allow members of the National Assembly to exercise these rights effectively.

21.1 In *Mazibuko*, this Court held that:

*“The Constitution requires that the assembly must have a procedure or process which would permit its members to deliberate and vote on a motion of no confidence in the President. In order for members of the assembly to vote on a motion, the rules of the assembly must permit a motion of no confidence in the President to be formulated, brought to the notice of members of the assembly, tabled for discussion and voted for in the assembly.”<sup>19</sup>*

21.2 In the *Secret Ballot* judgment, this Court further stressed that the *“threat [of a motion of no confidence] will remain virtually inconsequential in the absence of an effective operationalising mechanism to give it the fatal bite, whenever necessary.”<sup>20</sup>*

---

<sup>18</sup> Ibid at paras 44 – 45.

<sup>19</sup> *Mazibuko* at para 41.

<sup>20</sup> *Secret Ballot* at para 43.

21.3 By this same reasoning, section 89 of the Constitution also requires an “*effective operationalising mechanism*” to allow for the proper exercise of this right.

22 Finally, this Court has further emphasised that the National Assembly may not “*deny, frustrate, unreasonably delay or postpone the exercise of that right*”.<sup>21</sup> Instead, the National Assembly is obliged to take steps to “*protect and advance*”<sup>22</sup> and “*recognise and facilitate*” these rights.<sup>23</sup> This too applies with equal force to impeachment motions.

23 The National Assembly therefore has clear constitutional obligations to ensure that there are effective operationalising mechanisms in place to allow members of the National Assembly to exercise their right to launch impeachment proceedings.

24 As we will now explain, these mechanisms must, of necessity, make provision for some form of investigation or hearing into the grounds for impeachment, prior to a debate and vote.

---

<sup>21</sup> *Mazibuko* at para 47. See also para 60. See also *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (“*Oriani-Ambrosini*”) at paras 66 – 67.

<sup>22</sup> *Mazibuko* *ibid* at para 61.

<sup>23</sup> *Oriani-Ambrosini* at para 66.

## THE NATURE OF IMPEACHMENT PROCESSES AND THE NEED FOR INVESTIGATIONS AND HEARINGS

25 Section 89 of the Constitution grants the National Assembly the power to impeach the President in the following terms:

*“89. Removal of President*

*(1) 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.*

*(2) Anyone 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.”*

26 This impeachment process can be contrasted with motions of no confidence in the President under section 102(2) of the Constitution.

26.1 Unlike motions of no confidence, the impeachment process applies only to the President. It is one of only two mechanisms provided for in the Constitution for the removal the President whose term of office, unlike members of Cabinet, is protected and defined in the Constitution.<sup>24</sup>

---

<sup>24</sup> Section 88 of the Constitution.

26.2 This Court has already noted that motions of no confidence can succeed with a simple majority whereas an impeachment requires a two-thirds majority.<sup>25</sup>

26.3 Motions of no confidence can be invoked for any reason, in circumstances which may be entirely unrelated to the President's misconduct or incapacity.<sup>26</sup> By contrast, impeachment proceedings exist solely for holding the President to account for alleged wrongdoing or inability to perform the functions of office. In their comparative assessment of impeachment processes, San Juan and Tiojanco, note that:

*“The essence of an impeachable offence. . . is that it is such a grave violation of the public trust that the offender becomes unfit to continue enjoying the trust reposed on him by the people.”<sup>27</sup>*

26.4 In the same vein, a United States House of Representatives report titled “Constitutional Grounds for Impeachment” notes that:

*“Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement-substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated*

---

<sup>25</sup> Secret Ballot at para 45.

<sup>26</sup> Secret Ballot at para 32.

<sup>27</sup> San Juan and Tiojanco, “Impeachment” in *Max Planck Encyclopaedia of Comparative Constitutional Law* at DA FA Annexure JS 2.

*events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.”<sup>28</sup>*

27 While section 89(1) sets out the grounds for impeachment and the requirement of a two-thirds majority, it is silent on the procedure leading up to the vote.

28 Nonetheless, on a proper interpretation of section 89, it is clear that some form of investigation and a fair hearing must, of necessity, precede a vote. Three considerations are relevant here.

29 First, impeachment under section 89 can only take place on the grounds specified in section 89(1)(a)-(c): a “*serious violation of the Constitution or the law*”, “*serious misconduct*”, or “*an inability to perform the functions of the office*”.

29.1 This implies that some form of investigation and hearing must precede a debate and vote on impeachment, as the members of the National Assembly can only meaningfully debate the issues and cast a vote if they have the facts at hand to

---

<sup>28</sup> Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary House of Representatives “Constitutional Grounds for Impeachment” available at [https://lofgren.house.gov/uploadedfiles/constitutional\\_grounds\\_for\\_presidential\\_impeachment\\_-\\_house\\_judiciary\\_comm\\_staff\\_report\\_february\\_1974.pdf](https://lofgren.house.gov/uploadedfiles/constitutional_grounds_for_presidential_impeachment_-_house_judiciary_comm_staff_report_february_1974.pdf).

determine whether these grounds for impeachment exist.

29.2 Even if another body, such as this Court or the Public Protector, has already established that the President acted unconstitutionally or unlawfully, investigations are still required to determine whether these acts are sufficiently culpable to meet the section 89(1)(a)-(b) test of “*seriousness*”.

29.3 Determining whether these acts are “*serious*” is a judgment-call, but one which can only be properly formed on the basis of all relevant facts. These facts would include, for example, the President’s motives in breaching the Constitution or committing misconduct, his knowledge of unlawfulness, whether he derived undue benefits from his actions, and so on.

29.4 Similarly, the ground dealing with “*an inability to perform the functions of the office*” requires at the very least an investigation into the alleged inability, the extent to which the alleged inability impedes the proper performance of the function of the office and a determination whether such inability is temporary or permanent.<sup>29</sup>

---

<sup>29</sup> In *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810, this Court considered regulations that provided for the removal of a magistrate for alleged incapacity or ill-health that prevented the magistrate concerned from carrying out his or her duties efficiently. The Court noted that in such circumstances

30 Second, impeachment on the grounds of a serious violation of the Constitution or serious misconduct carries severe punitive consequences. In terms of section 89(2) of the Constitution, the President is not only removed from office but also forfeits all benefits of that office and is barred from holding any public office in future. The Constitution does not provide for similar punitive consequences if a motion of no confidence succeeds.

30.1 Given the severity of these consequences, and the shame and ignominy this entails, this would require that the President be afforded some opportunity to respond to the charges and to challenge evidence.

30.2 In *Van Rooyen*,<sup>30</sup> this Court dealt with the analogous case of the removal of magistrates from office. This Court accepted that the investigations preceding removal “*would ... have to be conducted in a manner consistent with natural justice.*”<sup>31</sup> These requirements of natural justice ought to be equally applicable to impeachment proceedings involving the President.

---

the appropriate person to investigate may be “*a medical practitioner or persons skilled in a field of the particular incapacity alleged to impair the magistrate’s ability....*”

<sup>30</sup> Ibid.

<sup>31</sup> Ibid at para 204 – 205.

31 Third, impeachment investigations and hearings are not only necessary to ensure that the vote on impeachment is informed and fair. These processes are also vital for ensuring accountability and transparency, in accordance with the section 1(d) founding values of the Constitution.

31.1 If impeachment is merely put to a vote, without any prior public fact-finding process, questions will always linger over the President's conduct and correctness of the National Assembly's decision.

31.2 As the disgraced former US President Richard Nixon famously declared: "*the people have got to know whether or not their President is a crook*".<sup>32</sup> That necessarily calls for investigations and hearings before a vote on impeachment.

31.3 Only this can ensure that the President's alleged conduct is fully ventilated and that the ultimate decision on impeachment is reached in a manner that is transparent, credible, and is capable of inspiring public confidence.

32 The impeachment procedures adopted in other countries reinforce

---

<sup>32</sup> President Nixon's remarks at a news conference held on 17 November 1973, at the height of the Watergate scandal. The transcript of these remarks is available at <http://www.npr.org/templates/story/story.php?storyId=245830047>.

the need for a formal investigation and a hearing as part of the section 89 impeachment process.

33 In their survey of impeachment processes in more than 90 countries, San Juan and Tiojanco conclude that impeachment processes across the world involve some form of investigation and hearing.<sup>33</sup>

34 Examples from other African countries support these findings. For instance:

34.1 In Malawi, the Standing Orders of the Malawian Parliament give the National Assembly the power to indict the President. If the President is indicted, the Chief Justice must then appoint a tribunal to investigate charges and to report back to the National Assembly. The President is entitled to appear before the tribunal and to be legally represented during these proceedings. If the tribunal concludes that there is a *prima facie* case for impeachment, the matter is referred back to the National Assembly for a vote. The President is removed from office if two-thirds of the National Assembly vote in favour of removal.<sup>34</sup>

---

<sup>33</sup> See DA FA, Annexure JS 2 at paras 26 – 29.

<sup>34</sup> Section 89 of the Constitution of Malawi, 1994 and Standing Orders of Parliament, adopted on 5 November 2013, sections 208 - 209. DA FA at para 55.1 and Annexure JS3 at para 1-5.

34.2 In Kenya, section 145 of the 2010 Kenyan Constitution allows the Kenyan Senate to appoint a special committee to investigate charges of impeachment against the President. The President is afforded the opportunity to appear before this special committee to respond to the charges. If the special committee finds that there are grounds for removal then the matter is put to a vote and the President is removed from office if two-thirds of the Senate vote in favour.<sup>35</sup>

34.3 In the Seychelles, the National Assembly is empowered to pass a motion proposing that the Constitutional Court investigate specific allegations that the President has committed a violation of the Constitution. The Constitutional Court investigates the allegations and allows the President to respond. If the Constitutional Court finds that there is a *prima facie* case, it provides a report to the Speaker which is then put to a vote by the members of the National Assembly. If the findings of the Constitutional Court's report are adopted, the president will cease to hold office.<sup>36</sup>

---

<sup>35</sup> Section 145 of the Constitution of the Republic of Kenya, 2010. DA FA para 55.2 and annexure JS3 at para 6 – 11.

<sup>36</sup>Section 54.1 of the Seychelles Constitution, 1993. DA FA para 55.3 and annexure JS3 at para 12 - 16.

34.4 In Egypt, the members of the House of Representatives pass a motion to impeach the President following an investigation. The Constitution then makes provision for a special court to be convened to conduct a trial. If convicted, the President is then removed from office.<sup>37</sup>

34.5 In Zimbabwe, the Senate and National Assembly pass a motion on whether the President has violated any of the provisions in section 97 of the Constitution of Zimbabwe, 2013. If the motion is passed, a joint committee of the Senate and National Assembly is established to investigate the allegations. If the joint committee recommends removal and two thirds of the members of the National Assembly and Senate vote in favour, then the president will be removed from office.<sup>38</sup>

35 These examples display substantial variation in the way that investigations and hearings are conducted in each country. However, all of these other countries recognise the need for investigations and hearings, in whatever form.

---

<sup>37</sup> Article 159 of Egypt's Constitution, 2014. DA FA para 55.4 and annexure JS3 at para 17 – 20.

<sup>38</sup> Section 97 of the Constitution of Zimbabwe, 2013. DA FA para 55.5 and annexure JS3 at para 21 – 23.

36 The DA does not ask this Court to dictate to the National Assembly precisely how it should structure the relevant legislation or rules governing impeachment investigations and hearings. However, the absence of any legislation or rules governing these procedures is constitutionally impermissible, for reasons we will now go on to explain.

### **THE NATIONAL ASSEMBLY'S FAILURE TO CREATE EFFECTIVE MECHANISMS ON IMPEACHMENT**

37 As set out in detail above, the National Assembly is not only constitutionally obliged to take action to ensure oversight and accountability, but it must also put in place effective mechanisms to facilitate proper accountability.

38 The section 89 impeachment process is one of the means by which the National Assembly can ensure accountability. It not only confers a power on the National Assembly but it is also a right, vested in each member, to initiate motions on impeachment. This must necessarily include the right to bring motions to initiate impeachment investigations and hearings.

39 This power and right to launch impeachment investigations and hearings under section 89 is "*inconsequential in the absence of an*

*effective operationalising mechanism to give it the fatal bite, whenever necessary.*<sup>39</sup> Moreover, the National Assembly may not do anything to “*deny, frustrate, unreasonably delay or postpone the exercise of that right*”.<sup>40</sup>

40 The National Assembly is in breach of these duties as its failure to put in place legislation or rules governing impeachment investigations prevents section 89 from being an effective accountability mechanism. This also frustrates members’ rights to bring motions to initiate these impeachment procedures.

41 The DA’s efforts to bring a motion to impeach the President on 5 April 2016 illustrates the deficiencies in the existing mechanisms and the need for such rules or legislation, in advance of actual cases.

42 In the DA’s founding affidavit, the Chairperson of its Federal Executive, James Selfe, acknowledges that the impeachment motion was debated and voted upon without a prior investigation or hearing. However he explains that had the National Assembly put in place

---

<sup>39</sup> *Secret Ballot* at para 43.

<sup>40</sup> *Mazibuko* at paras 47, 60.

proper mechanisms for impeachment investigations and hearings, the DA would have made use of those mechanisms.<sup>41</sup>

43 The DA's decisions to proceed with the motion, without seeking a prior investigation, was necessitated by the absence of such rules and procedures and the urgency of the matter. As Mr Selfe explains, the impeachment motion was inherently urgent as it came in the wake of this Court's *Nkandla* judgment. This meant that "*there was no time to become embroiled in debates in the National Assembly about how to initiate a pre-impeachment investigation and hearing, the composition and structure of this investigation, and other technical matters.*"<sup>42</sup>

44 Impeachment procedures, like motions of no confidence, are inherently urgent matters.

44.1 The fate of a President who has committed serious breaches of the Constitution must be decided with all appropriate haste. This is necessary to contain and prevent any further damage to the country in having a compromised President in power.

---

<sup>41</sup> DA FA at para 26.

<sup>42</sup> DA FA at para 29.

44.2 Impeachment proceedings are also inherently disruptive, as they create uncertainty as they unfold and also disrupt the day-to-day business of government. This Court's observations in the *Secret Ballot* judgment apply with equal force here:

*“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.”*<sup>43</sup>

44.3 In this light, it is necessary to commence and conclude these impeachment proceedings, including investigations and a fair hearing, as swiftly as circumstances allow.

45 Given the inherent urgency of these matters, it is essential that the procedure for initiating, conducting and concluding impeachment investigations and related procedures be determined in advance, as far as possible, in legislation or rules. These procedural matters would include, *inter alia*:

45.1 The number of votes required to launch impeachment investigations and hearings.

45.2 The type of body that will conduct the impeachment investigations, such as a committee of the National Assembly,

---

<sup>43</sup> *Secret Ballot* judgment at para 28.

a specially appointed prosecutor, or some other external body;

45.3 The composition of the body that will hear evidence and afford the President a hearing, which would need to allow for fair representation of opposition parties;

45.4 The timelines for investigations and hearings;

45.5 The rights afforded to the President to present and contest evidence; and

45.6 The manner in which findings will be presented to the National Assembly before a vote.

46 *Ad hoc* decisions on these complex impeachment procedures, during times of crisis, will generally stand in the way of swift and effective action by the National Assembly. Squabbling over procedural technicalities may delay the impeachment process indefinitely. There is also the danger that some members may intentionally use these procedural debates as an opportunity to stymie and delay an investigation and final vote on impeachment. As Mr Selfe notes: “[s]uch procedural debates would not only have created delays [in bringing the impeachment motion], but would also have given the majority party ample opportunity to shield the President by drawing

*out these procedural debates indefinitely.”<sup>44</sup>*

47 Impeachment procedures created in times of crisis are also less likely to be fair and balanced. Crises do not lend themselves to clear and balanced decision-making on proper procedures. Factions vying for or against the President’s removal may also seek to shape the impeachment procedures in a way that will produce their favoured outcome. Therefore, these procedures need to be determined in advance of actual cases, as far as is reasonably possible, to ensure fairness and objectivity.

48 For these reasons, the National Assembly’s failure to put in place legislation or rules to govern impeachment proceedings, including investigations and hearings, is in breach of its constitutional duties to ensure effective accountability mechanisms in terms of section 42(3) read with section 55(2) of the Constitution. This also frustrates and unreasonably delays the exercise of the right to bring motions to commence impeachment proceedings under section 89 of the Constitution.

---

<sup>44</sup> DA FA at para 29.

## THE NATIONAL ASSEMBLY'S FAILURE TO TAKE ACTION TO HOLD THE PRESIDENT ACCOUNTABLE

- 49 The National Assembly has not only breached the Constitution by failing to put in place legislation or rules governing impeachment investigations and hearings.
- 50 Irrespective of whether these operationalising mechanisms exist, the National Assembly has a further, self-standing obligation to take action to ensure that the President is held accountable for his role in the Nkandla scandal. This flows from the requirements of sections 42(3) and 55(2) of the Constitution, summarised above.
- 51 As this Court indicated in the *Secret Ballot* judgment, there will be circumstances where the National Assembly's duty to ensure accountability will "*demand*" impeachment proceedings under section 89 of the Constitution:

*"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. Those measures range from being voted out of office by the electorate to removal by Parliament through a motion of no confidence or impeachment. These are crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them,*

*for a perceived or actual mismanagement of the people's best interests.*"<sup>45</sup> (Emphasis added)

52 This is such a case where accountability demands a full investigation and hearing to establish whether there are grounds for the President's impeachment under section 89(1) of the Constitution.

53 The Public Protector's report and this Court's judgment triggered this obligation. The President was not only found to have violated important constitutional duties. The President had also been knowingly and unlawfully enriched at state expense as a result of these constitutional breaches.

54 Until the Nkandla scandal, no post-1994 President has ever been found to have committed unlawful and unconstitutional conduct of this gravity and scale, and with such direct personal benefit. At the very least, this conduct established a *prima facie* case for impeachment under section 89(1).

55 The Public Protector and this Court refrained from expressing any views on whether the President's proven unconstitutional and

---

<sup>45</sup> *Secret Ballot* judgment at para 10.

unlawful conduct was sufficiently “*serious*” to merit impeachment under section 89 of the Constitution. That enquiry was rightly left to the National Assembly.

56 But this in turn placed a duty on the National Assembly to conduct further investigations into at least three matters to determine whether the President’s proven unconstitutional and unlawful conduct reaches the threshold of “*seriousness*” under section 89(1) of the Constitution:

56.1 First, the Public Protector found that the President acted unconstitutionally and unlawfully. However, there are still further questions that remain unanswered, which are necessary to assess the seriousness of the President’s conduct.<sup>46</sup>

56.2 These questions include:

56.2.1 Why did the President fail to act when he became aware that state money was being spent on these non-security upgrades?

56.2.2 Why did he not question the vast amounts of state money being spent on these upgrades?

---

<sup>46</sup> DA FA para 35.

56.2.3 And why did he not immediately put a halt to these upgrades and offer to repay the money?<sup>47</sup>

56.3 These questions could only be answered by conducting further investigations and by summoning the President to give evidence under oath, in terms of the National Assembly's powers under section 56(a) of the Constitution.<sup>48</sup>

56.4 Second, further investigation is also required to determine whether the President lied to Parliament about the upgrades to his home.<sup>49</sup>

56.4.1 The Public Protector's report concluded that she was "*unable to make a finding*" on whether the President lied to Parliament by denying that state money was being spent on the non-security upgrades to his home<sup>50</sup> and in

---

<sup>47</sup> DA FA para 39.2.

<sup>48</sup> DA FA para 39.3.

<sup>49</sup> DA FA para 40.

<sup>50</sup> DA FA para 40.1. Public Protector's Report, para 10.10.1.2, p 438: "I have accepted the evidence that he addressed Parliament in good faith and was not thinking about the Visitors' Centre, but his family dwellings when he made the statement. While his conduct could accordingly be legitimately construed as misleading Parliament, it appears to have been a bona fide mistake and I am accordingly unable to find that his conduct was in violation of paragraph 2 of the Executive Ethics Code."

claiming that these upgrades were being paid for by the family, using a bond.<sup>51</sup>

56.4.2 The Public Protector did not exonerate the President in this regard. Instead, her report was an acknowledgement that she could not make findings on whether the President lied and a clear invitation to the National Assembly to conduct further investigations and ask the further, pertinent question.<sup>52</sup>

56.5 Third, further investigation is needed to determine whether the President's unconstitutional refusal to comply with the Public Protector's remedial action constitutes a serious violation of the Constitution, in terms of section 89(1)(a) of the Constitution.<sup>53</sup>

56.5.1 The "*seriousness*" of the President's conduct turns, in large part, on whether the President was acting in bad

---

<sup>51</sup> DA FA para 40.1. Public Protector's Report, para 10.10.1.7, pp 439 – 440: Regarding the allegation that the President may have misled Parliament and accordingly violated the Executive Ethics Code when he announced that the renovations at his private residence were financed through a bank mortgage bond, I am unable to make a finding. Although having established through the Register of Financial Interests that the President has declared a mortgage bond in respect of his private residence at Nkandla since 2009, I am 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."

<sup>52</sup> DA FA para 40.2.

<sup>53</sup> DA FA para 41.

faith, in order to avoid repaying the state for the undue enrichment that he and his family received.

56.5.2 This Court reached no conclusion on whether the President had acted in bad faith, as this Court noted that the President “*might*” have been acting on incorrect legal advice.<sup>54</sup>

56.5.3 In his 1 April 2016 statement to the nation,<sup>55</sup> the President claimed that he was indeed acting on legal advice and in reliance on the Western Cape High Court’s October 2014 judgment in *DA v SABC*.<sup>56</sup>

56.5.4 However, this statement raises a host of questions which have not been satisfactorily answered, including: Did the President in fact receive legal advice? Who provided that legal advice? What was the content of that advice? Most significantly, when did the President receive that advice?<sup>57</sup>

---

<sup>54</sup> *Nkandla* judgment at para 83.

<sup>55</sup> Annexure JM 10 to the applicants’ founding papers, Record pp 157 – 161.

<sup>56</sup> 2015 (1) SA 551 (WCC).

<sup>57</sup> DA FA para 45.

56.5.5 The President's reliance on the Western Cape High Court's judgment also provides a strong basis to question the President's motives. This judgment was handed down some six months after the Public Protector's report, which leaves the President's inaction in that six-month period unexplained. Moreover, that judgment was also overturned by the Supreme Court of Appeal in its judgment in *SABC v DA*,<sup>58</sup> which was handed down on 8 October 2015. The President's inaction from 8 October 2015 until the *Nkandla* hearing in this Court in February 2016 is also unexplained.

56.5.6 This again points to the need for further investigation, which would necessarily involve summoning the President to testify under oath on these matters, as part of a broader impeachment investigation.<sup>59</sup>

57 This demonstrates the urgent need for the National Assembly to launch an investigation and hearing into potential grounds for the President's impeachment under section 89(1) of the Constitution.

---

<sup>58</sup> [2015] ZASCA 156; 2016 (2) SA 522 (SCA).

<sup>59</sup> DA FA para 47.

58 Given this need, the National Assembly's failure to take any action to investigate these matters is in breach of its constitutional duties.

## **REMEDY**

59 The declaratory orders and the accompanying declaration of invalidity sought in prayers 2 to 4 of the notice of motion prepared by the EFF, UDM and COPE are just and equitable remedies in the circumstances.

60 These orders cover both the National Assembly's failure to initiate impeachment investigations and hearings and its failure to put in place effective accountability mechanisms to give effect to section 89 of the Constitution.

61 We further submit that it would be just and equitable for this Court to give guidance (as it did in the *Secret Ballot* judgment) on the issues that the National Assembly should consider in formulating legislation or rules pertaining to impeachment investigations and hearings. This may include the considerations listed in paragraph 45 above. This will ensure that there are proper mechanisms to give effect to section 89 of the Constitution.

62 Finally, we submit that the DA is entitled to its costs from the Speaker, including the costs of two counsel.<sup>60</sup>

**STEVEN BUDLENDER**

**CHRIS MCCONNACHIE**

**LERATO ZIKALALA**

**Chambers, Johannesburg**

**25 August 2017**

---

<sup>60</sup> *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).