IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No. : 62/2020
Case No. *a quo*: 5578/2019

In the matter between:

THE PUBLIC PROTECTOR	Applicant
THE ECONOMIC FREEDOM FIGHTERS	Second Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Third Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
THE NATIONAL COMMISSIONER OF POLICE	Fourth Respondent
ECONOMIC FREEDOM FIGHTERS	Fifth Respondent
FINANCIAL INTELLIGENCE CENTRE	Sixth Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Seventh Respondent
INFORMATION REGULATOR OF SOUTH AFRICA	Amicus curiae

FILING SHEET: SECOND APPLICANT'S (ECONOMIC FREEDOM FIGHTERS) HEADS OF ARGUMENT, LIST OF AUTHORITIES AND PRACTICE NOTE

BE PLEASED TO TAKE NOTICE that the Second Applicant, the Economic Freedom Fighters ("**EFF**") hereby present for service and filing:

1. Practice Note;

2. Heads of Argument;

3. List of Authorities

DATED at JOHANNESBURG on this 14th day of AUGUST 2020.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No.: 62/20
Case No.: 55578/2019

In the matter between:

THE PUBLIC PROTECTOR	First Applicant
THE ECONOMIC FREEDOM FIGHTERS	Second Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Third Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
THE NATIONAL COMMISSIONER OF POLICE	Fourth Respondent
FINANCIAL INTELLIGENCE CENTRE	Fifth Respondent

SECOND APPLICANT'S PRACTICE NOTE

A. NATURE OF PROCEEDINGS

1. This is a conditional application for direct leave to appeal against the Judgment and Order of a Full Bench of the High Court of South Africa, Gauteng Division, Pretoria.

2. Pursuant to the Chief Justice's Directions dated 24 June 2020 and 14 July 2020, this application will be heard together with the applications for direct leave to appeal by the Public Protector and amaBhungane.

B. ISSUES THAT WILL BE ARGUED

1. If leave to appeal is granted, the EFF shall address the following issues on the merits –

   1.1. Whether the President misled Parliament;

   1.2. Whether the Public Protector had the requisite jurisdiction to investigate the CR17 Campaign;

   1.3. Whether the President failed to discharge his obligation to disclose CR17 Campaign funds; and

   1.4. Whether the Public Protector owed the President a right to make representations in respect of remedial action.

C. SUMMARY OF THE SECOND APPLICANT'S ARGUMENT

1. The President misled Parliament in two inter-related ways:

   1.1. The President did not tell the truth when answering a question asked of him in the National Assembly. His duty is an objective standard and is not lessened when mistakes are made by the Questioner.

   1.2. The President deliberately placed himself in a position of ignorance by organising his campaign finances with the purpose

or effect of limiting his ability to be held to account in respect of issues for which he would ordinarily be accountable.

2. The Public Protector can investigate so-called "private" and/or "party" affairs with respect to a member of the Executive when a complaint is made under the Executive Ethics Act.

3. The President was obligated to disclose Campaign donations because they were collected for his benefit.

4. The express provisions of the Public Protector Act differentiate between findings and recommendations and/or remedial action. The obligation regarding representations attaches to the former and not the latter.

D. PORTIONS OF THE RECORD THAT SHOULD BE READ

1. The record shall be read in its entirety.

E. ESTIMATED DURATION

1. The second applicant will require 1 – 2 hours.

F. LIST OF AUTHORITIES

1. A full list is included in the second applicant's written submissions. Those marked with * have particular reference.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No.: 62/20
Case No.: 55578/2019

In the matter between:

THE PUBLIC PROTECTOR	First Applicant
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THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
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THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
THE NATIONAL COMMISSIONER OF POLICE	Fourth Respondent
FINANCIAL INTELLIGENCE CENTRE	Fifth Respondent

SECOND APPLICANT'S WRITTEN SUBMISSIONS (THE ECONOMIC FREEDOM FIGHTERS)

CONTENTS

A: INTRODUCTION

1. This Court, by direction, set down the second applicant's, the Economic Freedom Fighter's ("**EFF**"), conditional application for leave to appeal, together with that of the first and third applicants, respectively the Public Protector and amaBhungane.[1]

2. The EFF's application was conditional because by the time the Public Protector launched her application for leave in this Court, the EFF had "*filed its application for leave to appeal to the High Court timeously*".[2]

3. Faced with the possibility that its prudent conduct had been overtaken by events, the EFF then filed a conditional application for leave in this Court.

4. This was motivated, *inter alia*, by the fact that:

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1 CCT Record: Vol 15, Constitutional Court Directives dated 15 July 2020, pp 1588 – 1591.

2 CCT Record: Vol 15, President's Second Answering Affidavit to the EFF ("2nd AA"), p 1580, para 2.

4.1. this Court was now seized with the matter so it would be convenient for it to do so;[3]

4.2. the EFF's application would guard against double adjudication;

4.3. piecemeal litigation would be avoided;[4] and

4.4. judicial resources – and the parties' resources – could be preserved on doubling costs.[5] [6]

5. Respectfully, these all demonstrate that it is in the interests of justice for the EFF's appeal to be given leave to be heard by this Court in

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3 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020) ("**Gordhan**") at para [1]

4 See, for example, *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) at para [9]; *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa* 2006 (6) SA 103 (CC) at paras [23]–[24] and [27].

5 CCT Record: Vol 15, EFF Founding Affidavit ("**EFF FA**"), pp 1557 – 1558, para 9 (including sub paragraphs).

6 See, for example, *MEC for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) at paras [30]–[32]

circumstances where this Court is called upon to consider the same matter.[7]

6. Hardly surprising. Hardly controversial.[8] Yet, despite this cautious approach, the first respondent, the President of the Republic of South Africa ("**the President**"), has launched a full-throated assault on the EFF.

7. Not satisfied with accusing it of "*harassing the President*",[9] "*forum shopping*",[10] and "*hedging its bets*",[11] the President has also made a curious proposition.

8. Before the High Court and this Court, the President attacks the EFF's case on appeal as:

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7 *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe And Another* 2003 (4) SA 584 (CC) at para [13], recently applied by this Court in *Diener N.O. v Minister of Justice and Correctional Services And Others* 2019 (4) SA 374 (CC).

8 See, for example, the discussion in *Prophet v National Director Of Public Prosecutions* 2007 (6) SA 169 (CC) at para [48]. Each of the EFF's reasons fall within the Court's consideration of granting leave to appeal as being in the interests of justice.

9 CCT Record: Vol 15, 2nd AA, p 1572, para 7.

10 CCT Record: Vol 15, 2nd AA, p 1570, para 5.2.

11 CCT Record: Vol 15, 2nd AA, p 1570, para 5.2.

7.1. "*[traversing] its own grounds, unrelated to the Public Protector's case, and mostly not pleaded before the High Court… [it] is not allowed to conjure up new grounds which were not part of the arguments before the High Court*";[12] and

7.2. "*Despite being a subsidiary party, with a peripheral interest in the principal dispute, the EFF has applied for leave to appeal … based on arguments which were not advanced in the main application …*"[13]

9. It seems the President is motivated to go to such lengths to exclude the EFF from the debate because the President says "*it is irrelevant that there may be other interesting defences of the Public Protector … The EFF cannot make out a case that the Public Protector has not herself made*".[14]

10. Why the President runs away from the EFF's central attack on the Court *a quo*'s judgment is clear: beyond technical points of law, the President

12 CCT Record: Vol 15, 2nd AA, p 1571, para 4.

13 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1416, para 4.

14 CCT Record: Vol 15, 2nd AA, p 1573, para 11.

does not want this Court to make a definitive ruling on the meaning and impact of section 96(2)(b)(2) of the Constitution.

11. And the reason for that is quite simple – the section creates a low bar for Executive accountability. All the President had to do was avoid the "*risk of a conflict of interest*". And he failed.

12. This has always been the EFF's legal interest in this case.

12.1. When it made its initial complaint to the Public Protector, she was specifically asked to investigate "*whether* President Ramaphosa *deliberately misled the Parliament in violation of the Executive Ethics Code*";[15]

[15] CCT Record: Vol 1, Public Protector's Report ("**PP Report**"), p 81b, para 2.

12.2. The Executive Code[16] referred to, owes its genesis to the Executive Ethics Act,[17] which in turn, stems from section 96(2)(b) of the Constitution.[18] [19]

13. The EFF squarely pleaded this.[20] Its thesis is simple:

13.1. First, the facts demonstrate the President misled Parliament.[21] His misleading Parliament arises from two sources:

13.1.1. He himself got the facts wrong. The Court *a quo* erred because it attributed the President's misleading Parliament to the errors Mr Maimane's question. But that is not the standard the Full Court

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16 The Code is promulgated pursuant to section 2 of the Executive Ethics Act.

17 Executive Members' Ethics Act 82 of 1998.

18 This link was also accepted by the Court *a quo*. See CCT Record: Vol 13, Judgment, pp 1335 – 1336, para 90 – 91.

19 Section 96(2)(b) provides as follows: "Members of the Cabinet may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests".

20 CCT Record: Vol 11, EFF Answering Affidavit in the Court *a quo* ("**EFF HC AA**"), p 1136, para 26. The EFF HC AA makes this point more broadly – see CCT Record: Vol 11 EFF HC AA, pp 1123 – 1138, para 13 – 28.

21 CCT Record: Vol 14, EFF Application for Leave to Appeal ("**EFF LTA**"), pp 1390 – 1393, para 1 (including sub-paragraphs thereto).

ought to have applied. The President's duty to tell the truth is objective and operates regardless of the errors of others.

13.1.1. He placed himself in a position of willful ignorance. The design of the CR17 campaign was set up with the purpose or effect to limit the President's duty to account from a set of circumstances from which he continued to benefit. His not telling Parliament this stands as a separate ground of his misleading the House.

13.2. Second, the President's campaign design makes a mockery of section 96(2)(b)(2) and his duty to account.[22]

13.2.1. By allowing the President to get away with doing this, the Court *a quo* failed to appreciate the specific, pervasive, and heighted accountability that

[22] CCT Record: Vol 14, EFF LTA, pp 1393 – 1397, para 2 (including sub-paragraphs thereto).

the President, as a Member of the Executive had to satisfy.

13.2.2. The Court *a quo*'s distinction, then, between the private and public sphere is without substance. The Public Protector's jurisdiction is guaranteed by the President being subject to the Executive Ethics Act.

13.2.3. A constitutionally compliant interpretation of the section would hold him to a higher duty discarding the arbitrary distinctions between "private" and "public" and "party" and "State", because of the connection and relationship between the two.

13.3. Third, the President's benefit from the CR17 campaign clearly fits within the framework of benefits regulated by the Executive Code and Executive Ethics Act.[23]

[23] CCT Record: Vol 14, EFF LTA, pp 1397 – 1400, para 3 (including sub-paragraphs thereto).

13.3.1. That he benefitted from those contributions means he is liable to be accountable for them.

13.3.2. Both the Executive Code and the Executive Ethics Act are sufficiently broadly defined to apply to benefits such as these.

13.4. Fourth, the Public Protector's duties to an affected person by her conduct is prescribed by statute.[24] Her conduct in this matter wholly accords with her statutory obligations.

13.4.1. The Public Protector Act, 23 of 1994 ("**PP Act**"), stipulates that the Public Protector's duty only extends as far as her preliminary findings – before her Report's findings are finalised, but not the remedial action – which flows thereafter.

13.4.2. Absent a challenge to the PP Act, the Public Protector's alleged failure to afford the President a

[24] CCT Record: Vol 14, EFF LTA, pp 1401 – 1402, para 4 (including sub-paragraphs thereto).

hearing before the remedial action was determined is, thus, misplaced.

14. So apart from the President simply being wrong on what the EFF's interest has been, and what issues were in the record before the Court *a quo*, it is also mistaken for a further reason.

15. The Court *a quo* – and, indeed, this Court – would have been compelled to interrogate these particular issues mero motu, even if the EFF had not raised it.

16. As this Court held in *McBride v Minister of Police and Another*:[25]

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."

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[25] *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) (6 September 2016) at footnote [25].

17. This is not to suggest that the Public Protector is wrong. The Public Protector clearly had this in mind throughout her investigation. In her summary of what both complaints asked of her, the Public Protector said:

> "The complainants contend that President Ramaphosa may have breached the Executive Ethics Code by (i) exposing himself to any situation involving the risk of a conflict of interest between their official responsibilities and their private interests; (ii) acted in a way that is inconsistent with his position and (iii) use his position or any information entrusted to him, to enrich himself or improperly benefit any other person".[26]

18. Instead, what this shows is that the President's attempt to keep the EFF out of the debate cannot succeed. Similarly, the President's arguments about supposedly new arguments are also without merit.

19. These arguments were raised by the EFF in the Court *a quo*. More importantly, even if they were not, this Court could nonetheless entertain them.

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[26] CCT Record: Vol 1, PP Report, p 92, para 2.3.5.

20. This Court, relying on authority from Innes CJ some 110 years ago,[27] has repeatedly found it acceptable that new points of law can be raised on appeal.

21. In helpful words to the dispute in this matter, Justices Cameron and Froneman said for the majority of this Court in *Tshwane City v Link Africa and Others*:

> "The core issue all along has been whether the provisions are capable of an interpretation that renders them constitutionally compliant. That this court undertakes its constitutional mandate to find a reasonable interpretative

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[27] *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-3: "*[I]t has been suggested that the appellant should not be allowed to take advantage of the point on appeal. But there seems no reason, either on principle or on authority, to prevent him. The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.*" This was approved of and subsequently adopted in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-24C, and the cases that followed.

> path … by using additional interpretative considerations …cannot raise an audi point."[28]

22. So, with respect, once this Court looks through the President's smokescreen, the EFF ought, with respect, not only to be granted leave to appeal, it should succeed on the merits, too.

B: LEAVE TO APPEAL

23. In a recent matter also involving the Public Protector's powers,[29] this Court established that its jurisdiction was engaged when:

23.1. The EFF raised a constitutional matter because the High Court, in granting an interim interdict against the Public Protector, impermissibly interfered with the Public Protector's powers;[30] and

23.2. The EFF raised an arguable point of law because it contended that the established jurisprudence on the grant of interim interdicts

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28 *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) at para [119]. For the sake of completeness, the Court's distinguishing of *Paddock* found in *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) does not apply in these proceedings.

29 *Gordhan* above.

30 *Gordhan* at para [32].

required development when specifically applied to the Public Protector.[31]

24. Respectfully, the EFF engages this Court's jurisdiction on a similar basis once again:

24.1. The EFF raises a constitutional matter because it contends that the Court *a quo*, in narrowly construing the legislation applicable to Public Protector, has unduly constrained the Public Protector's jurisdiction.[32] This is both a matter of form (the Court *a quo* simply misdirected itself as to what the complaints required of the Public Protector), and substance (the Court *a quo* failed to properly interpret and apply section 96(2)(b) of the Constitution and how that regulates the President's conduct);[33] and

24.2. The EFF raised an arguable point of law because it contends that the Court *a quo*'s ruling creates a dangerous precedent insofar as

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31 *Gordhan* at para [33].

32 CCT Record: Vol 14, EFF LTA, pp 1397 – 1400, para 3 (including sub-paragraphs thereto).

33 CCT Record: Vol 14, EFF LTA, pp 1393 – 1397, para 2 (including sub-paragraphs thereto).

how politicians can escape being held accountable for their receipt of private money.[34]

25. Respectfully, and as is plain from the papers, this Court's characterisation of its test for leave to appeal in the *Gordhan* matter is of direct application in these proceedings.

> "This Court has cautioned that it will not grant leave to appeal merely because an applicant is aggrieved by a lower court's application of the law. In *Mankayi*, it was observed that "this Court has refused to entertain appeals that seek to challenge only factual findings or the incorrect application of the law by the lower courts". Thus, for this Court to adjudicate on the merits of a matter, that matter must "not merely involve the application of an uncontroversial legal test to the facts". Similarly, in *Jiba*, this Court held that the application of an established legal test does not raise an arguable point of law which would ground our jurisdiction."[35] (footnotes omitted)

26. While the EFF is undoubtedly "*aggrieved*" by the Court *a quo*'s findings, it is not simply attacking the conclusions it reached. Instead, the EFF contends that the Court *a quo* has made fundamental mistake of law

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34 CCT Record: Vol 14, EFF LTA, pp 1402 – 1403, para 1 – 2.

35 *Gordhan* at para [39].

regarding its understanding and application of, *inter alia*, section 96(2)(b) of the Constitution.

27. And by the President's own attempts to exclude the EFF from the debate in this Court (above), demonstrates why the EFF's case does not involve an "*uncontroversial test*" or an "*established legal principle*".

28. Far from it. Instead, what the EFF asks this Court to do, flowing from the Court *a quo*'s failings, is to extend its principle findings in *My Vote Counts*.[36]

29. In this regard, the majority judgment penned by the Chief Justice (and concurred in separately by Froneman J and Cachalia AJ), held:

> "Public and private sector corruption is a matter of grave concern around the world. And it appears that the political landscape and by extension governance has not been left untouched. The need for efficiency and effectiveness in the prevention, containment and elimination of corruption linked to the private funding of political parties and independent candidates seems to cry out for urgent intervention. For, corruption that flows from secret private funding could otherwise stealthily creep into our political

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36 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) ("**My Vote Counts 2**").

> and governance space, toxify it and fossilise itself to our detriment, if it has not already done so."[37] (own emphasis)

and

> "Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a "rightful place" in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus and deliver on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation."[38] (our emphasis)

and

> "Secrecy enables corruption and conduces more to a disposition by politicians that is favourable towards those who funded them privately once elected into public office. This is likely to flourish even where information on private funding is "held" at the discretion of the funded and unlikely to be exposed to "the light of publicity…"[39] (own emphasis)

and

> "The foundational values of our constitutional democracy like openness, responsiveness, accountability and the realisation of the constitutional vision of building a united

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37 *My Vote Counts* at para [4].

38 *My Vote Counts* at para [41].

39 *My Vote Counts* at para [45].

> nation and improving the quality of life of all, could thus be at the mercy of unknown and even unscrupulous funders. For, there is indeed no free lunch. This is not to say that all funders are, without more, intent on furthering selfish or sectional interests at the expense of national interests. But some big political campaign funders even in old democracies have been exposed as being inclined "to use money for improper purposes". They reportedly tend to determine or influence in a meaningful way, the policy-direction to be pursued by those in whose political life or fortunes they "invested" their resources. And when elected public office-bearers are illegitimately dictated to, that is likely to poison the broader political landscape and governance, thus weakening or throttling our shared values and constitutional vision. Lack of transparency on private funding provides fertile and well-watered ground for corruption or the deception of voters."[40] (own emphasis)

and

> "Transparency in the area of the private funding of political parties and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption. Both the African Union and the United Nations have come to this realisation and have taken appropriate steps to help inject transparency and root out corruption in relation to private funding. Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency. The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better-equipped to make out the real interests these politicians are likely to serve."[41] (own emphasis)

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40 *My Vote Counts 2* at para [48].

41 *My Vote Counts 2* at para [51].

and lastly

> "Access to this information helps voters and contestants to speak against and expose the corrupt "pay-back-time" political practices. The known possibility of voters and political rivals being able to make the necessary connection between private funding and the likely or actual stance of political parties and independent candidates on policy matters of importance, does have the predictable effect of discouraging the pursuit of corrupt or selfish sectarian agendas. And, it also frees our public representatives to do what they promise and are obliged to do, unencumbered by potentially corrupt deals that could be enabled by undisclosable private funding. If secrecy thrives, then our constitutional project would be at risk of being betrayed or shipwrecked."[42] (our emphasis)

30. What *My Vote Counts 2* demonstrates is that this Court has a keen and acute appreciation of the need for those who exercise political power to be held accountable.

31. That this Court has already acknowledged that accountability includes the duty to disclose funders as applying to parties and individuals – which the EFF says applies to the President, too – and inherent to that includes the duty to tell the truth – which the EFF says the President did

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42 *My Vote Counts 2* at para [52].

not do – means this Court is eminently placed to consider not only the question of leave to appeal, but the merits.

32. What is novel about this case is about whether such a duty arises in the context of intra-party contests and where the individual is also an occupant of Executive office. The EFF says yes. The Court *a quo* said no. This Court's jurisdiction is engaged.

33. Moreover, accountability does not require evidence of impropriety. The mere pass-on of funds triggers the need for the relevant Member of the Executive, in this case, the President, to account to Parliament. That includes not placing oneself in a position of wilful ignorance. The EFF said the President's conduct violates this duty. The Court *a quo* disagreed. Yet again, this Court's jurisdiction is engaged.

34. In the circumstances, and over and above the pragmatic reasons as to why this Court should grant the EFF leave to appeal (highlighted above), it is, with respect, clear that the EFF has brought its own case capable of being heard by this Court at this time.

35. In the premises, leave should, with respect, be granted.

C: GROUNDS OF APPEAL

36. Although not dispositive, this Court can be more inclined to grant leave to appeal where there are prospects of success in the appeal.[43] The EFF submits it enjoys prospects of success and addresses its individual grounds of appeal below.

C1: First Ground – President's Accountability Obligations and Misleading of Parliament

37. The Court *a quo* rejected the EFF's contentions that the President misled Parliament. It did so on the basis that the EFF could not cite a particular rule that underscored its contentions,[44] and that relatedly, the errors of the President stem from Mr Maimane's incorrect facts.[45]

38. But the Court *a quo*'s rejection of the EFF's contention contradicts THE Full Court's decision in Zuma.[46] There, the Full Court said that:

> "The statements made by the President in the National Assembly are not ordinary statements but were made in

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43 See *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at para [3], most recently applied in *Myathaza v Johannesburg Metropolitan Bus Services (Soc) Ltd T/A Metrobus and Others* 2018 (1) SA 38 (CC).

44 CCT Record: Vol 13, Judgment, p 1328, para 68.

45 CCT Record: Vol 13, Judgment, pp 1327 – 1328, para 69.

46 *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP) ("*Zuma*").

> Parliament before the legislative body to whom the President is accountable. They were made by the President in his position as head of state. Section 92(2) of the Constitution provides that Members of the Cabinet — which includes the President — are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions."[47] (own emphasis)

39. The import of the Full Court's judgment was that the President is taken to tell Parliament the absolute truth. It was on that basis that the Full Court held President Zuma had perempted his right of review.[48] In other words are binding. They have consequence.

40. The relevance of this for this matter is two-fold:

40.1. In the first instance, the duty to tell Parliament the truth is not qualified.

40.1.1. The duty to tell the truth – which stems from the Constitution – vests in the individual.

40.1.2. What the Court *a quo*'s judgment now permits is that any occupant of office can escape their duty to

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47 *Zuma* at para [184].

48 *Zuma* at para [185].

tell the truth by simply blaming their questioner for providing them with the incorrect facts.

40.1.3. But that overlooks the President's special position within our constitutional dispensation. As first citizen, the President's duty to tell the truth is absolute. This flows from his unique constitutional office.[49]

40.1.4. So incorrect facts do not and ought not come into play. The President's duty to tell the truth is why the Public Protector found that instead of allowing himself to become flustered and giving an answer in the heat of the moment the President should have not immediately answered.[50]

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49 *Economic Freedom Fighters v Speaker, National Assembly And Others* 2016 (3) SA 580 (CC) at para [20] – [21].

50 CCT Record: Vol 14, PP Founding Affidavit, p 1463, para 26.1. – 26.2.

40.1.5. Once the President made a decision to answer and started telling Parliament things which are untrue, he misled it. His state of mind is irrelevant.

40.1.6. And, respectfully, the facile attempt to allow the President to hide behind section 58 of the Constitution (allegedly with the effect that the President cannot be held accountable for what he says in the House),[51] is wholly without merit.

40.1.7. Section 58 operates to protects a Member of the Executive subject to Parliament's Rules.[52] Furthermore, the section is intended to protect a Member of the Executive from civil and criminal liability.[53] It is not intended to immunise a Member of the Executive from misleading the House.

40.2. In the second instance, the President's misleading Parliament is not unrelated to his conduct. This is because the President

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51 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1418, para 13.

52 Section 58(1)(a) of the Constitution.

53 Section 58(1)(b) of the Constitution.

participated in a scheme that shielded him from details he ought to have known so he could not be held accountable.

40.2.1. The President deliberately misleading Parliament stems from his intention. His intention was to allow his name to be used – for his benefit – but to not be answerable for what was done in his name. The general practice – whatever that means – was that the details were kept away from him.[54] [55]

40.2.2. Respectfully, that demonstrates the point. Despite the President's duty to account, the President participated in a scheme the entire purpose or effect of which was to block him from being questioned by Parliament about the money he was receiving through the CR17 campaign.

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54 CCT Record: Vol 13, Judgment, p 1343 – 1344, para [116].

55 The lack of specificity of what the general practice is or was – unaddressed by the President or the Court *a quo* is further demonstrative of the problem. We simply would not know whether the President's campaign would have ever intervened to stop him acting in the interests of someone who had heavily donated to his campaign. See, for example, CCT Record: Vol 11, EFF AA, p 1122, para 9 – 10.

40.2.3. The President's "partial knowledge" of what his campaign did – but being wilfully ignorant of certain crucial aspects on which he would need to account – demonstrates why the President's conduct amounts to misleading Parliament.

40.2.4. Indeed, the President's wilful ignorance is made worse when regard is had to his conducting certain financial affairs of his campaign.[56]

40.2.5. Again, given the President's unique position within our constitutional dispensation, this kind of deliberate evasion of his duty to account to Parliament amounts to intentionally misleading it.

40.2.6. He knew what he did – and also knew what he did not. His campaign set up its operations with his blessing. He cannot, with respect, escape that now.

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[56] CCT Record: Vol 7, PP Answering Affidavit, annexure BM7 (email from the President to a Mr Donald, undated), p 894.

41. The duty of full knowledge – rejected by the Court a quo[57] - is an explicit, alternatively implicit obligation, when regard is had to the overall regime regarding disclosures of Members of the Executive.

42. This Court's dictum in *My Vote Counts 2* (above), particularly with respect to the role of money in politics, makes that abundantly clear.

43. And, equally importantly, the EFF did not have to adduce evidence or proof of actual wrongdoing on the part of the President.[58] Consonant with My Vote Counts 2 and section 96(2)(b) of the Constitution, the true test is risk or the threat of a risk of a conflict of interest.

44. This is why the President's contention that the EFF wants the President to "know everything"[59] is laughable. The President is obligated to know everything which may put him at the threat of a risk of a conflict of interest. Onerous maybe. Completely justified.

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57 CCT Record: Vol 13, Judgment, p 1329, para 72..

58 CCT Record: Vol 13, Judgment, p 1329, para 72.

59 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1418, para 12.2 – 12.3.

45. The President sought to avoid that risk by ultimately misleading Parliament. The Court a quo commended him for this. This Court should not.[60]

46. In the context of the High Court proceedings, the President's answers, if anything, demonstrated that he violated section 96(2)(b) of the Constitution as well as the Executive Ethics Act.

47. On his version, people authorised by him used his name to raise significant sums of money which were used for his political advantage and where, instead of ensuring he knew everything he could know in order to avoid a risk of a conflict of interest, he impermissibly and effectively turned a blind eye to that conduct.

48. In short: the President cannot have it both ways. He cannot, on one hand, contend that he has no duty to disclose, but on the other hand deliberately put in place a scheme that keeps him in ignorance so that he does not have to disclose information that would otherwise be disclosable.

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60 CCT Record: Vol 13, Judgment, p 1328, para 71.

49. The purpose of effect of the President's conduct in how the CR17 campaign was run would have the effect of misleading Parliament. Mr Maimane's question, and the President's answer thereto, simply demonstrates it.

50. Had the President known the facts – as he was obliged to – he would have not misled Parliament in the way that he did.

C2: Second Ground – Jurisdiction

51. The Court *a quo* denied the Public Protector jurisdiction to investigate the CR17 campaign because it characterised it as being concerned with intra-party contests, was in the context of political rights contained in section 19 of the Constitution, and, essentially, a private matter. The Court a quo ultimately concluded that the Public Protector incorrectly conflated the President's campaign with the President himself.[61]

52. This is mistaken.

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[61] CCT Record: Vol 13, Judgment, p 1338 – 1341, para [100] – [106].

53. First, practically, it denies the political reality of the ANC's hegemonic political support as enabled by our system of multi-party democracy. In other words, although the Party and the State are legally separate entities, to suggest that the internal affairs of the former do not impact the affairs of the latter is the height of artifice.[62]

54. What happens inside a political party undoubtedly influences the direction of the State, especially where that political party is in power. This is self-evident.

55. Second, as a matter of interpretation, and in further support of the Public Protector's decision to investigate the CR17 campaign, it ought to be noted that section 96(2)(b)(2) of the Constitution does not restrict itself to the categories of conduct suggested by the Court *a quo*.

56. The Court a quo may have been correct had the complaints been made under section 182(1)(a) of the Constitution. Instead, they were clearly made under the Public Protector's concurrent jurisdiction, being that afforded to her under the Executive Ethics Act. The Executive Ethics

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62 CCT Record: Vol 2, Founding Affidavit, annexure MCR1 (PP Report), p 131 para 5.2.20.1.

Act, which gives effect to section 96(2) of the Constitution, which creates a wide remit.

57. The Public Protector is entitled to "*look through*" into the private affairs of a subject the Executive Ethics Act to determine whether or not such a breach has been established. The Executive Ethics Act – which gives effect to section 96(2)(b) of the Constitution, sustains no such distinction.

58. Given the injunction in section 1 of the Constitution, that South Africa is a multi-party democracy based on openness and accountability, this Court has a "*duty ... to construe the sections of the Constitution in a manner that strikes harmony between them and gives effect to each and every section*".[63]

59. As such, and although section 182(1)(a) seems to restrict the investigatory remit of the Public Protector, it is clear that section 96(2)(b)(2), when read with section 1, gives it proper meaning.

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63 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at para [61]

60. The CR17 campaign could be investigated.

61. Third, and in practice, in order for the Public Protector to be able to establish that there has been malfeasance in state affairs, or the public administration, she may (and in most cases must) investigate the so-called "*private*" conduct of an occupant of high office.

62. That is because when an occupant of high office acts in a way that is inconsistent with the legal obligations and duties attaching to their position, they can only ever be acting in their private interests.

63. What is crucial therefore is that, in order for the Public Protector to establish that State affairs or the public administration have been compromised, she is able to look through any distinction between the public and private sides to an elected representative's life.

64. It would be highly unusual if an elected representative were to abuse their office for any reason that did not in some way result in their private benefit.

65. Consequently in order to establish that an actual or perceived conflict of interest exists, it is necessary for the Public Protector to be able to investigate "private" conduct and order appropriate remedial action that limits the potential impact of such conduct.

66. This position was endorsed by the Full Court in *Zuma.*[64] The Court in that matter protected the Public Protector's ability to issue remedial action that had the effect of curtailing the President's power to appoint the chairman of a Commission of Enquiry where the President's private interests may have improperly affected how he discharged the powers of his office.

67. The Court should bear in mind that the proper threshold for determining whether a Cabinet Member has violated section 96(2)(b)(2) of the Constitution is not that an actual conflict of interest has been established. It is sufficient that if the Cabinet Member concerned has exposed themselves to a risk of a conflict of interest, that a violation of section 96(2)(b)(2) has been established.[65]

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64 *Zuma* above.

65 CCT Record: Vol 1, FA, p 37 para 92.3.

68. Indeed, so strong is the Court's resistance to permitting an elected representative from making a decision that may fall exclusively within their discretion, but which may be improperly influenced by their private interests no matter how remote, that the Full Court has previously found the President unable to discharge his duty to appoint the NDPP and delegated that power to his Deputy.[66]

69. In other words, the Public Protector is specifically empowered to look at and sanction conduct falling within the private life of an elected representative where that conduct does, or can, have the effect of prejudicing State affairs or the public administration.

70. In the context of this case, the Constitution and these findings (above) are authority for the Public Protector's investigation of the CR17 campaign.

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66 *Corruption Watch (RF) NPC v the President of the Republic of South Africa* 2018 (1) SACR 317 GP. By the time this judgment was confirmed by the Constitutional Court (*Corruption Watch (RF) NPC v the President of the Republic of South Africa (Helen Suzman Foundation, amicus curiae)* 2018 (2) SACR 442 (CC)), then President Zuma had vacated his Office and the Constitutional Court permitted President Ramaphosa to appoint the NDPP because, unlike his predecessor, he did not face a similar conflict of interest.

71. For the reasons above, it is clear that the Public Protector was entitled to investigate the CR17 campaign and that her findings in respect thereof are unassailable due to an apparent lack of jurisdiction.

72. Accordingly, the Court *a quo* erred in its ultimate finding that the Public Protector lacked the jurisdiction to investigate the CR17 campaign.[67]

73. Thus, the Court *a quo*'s description of the Public Protector's investigation as an "*extension of her jurisdiction*",[68] was mistaken.

74. The Public Protector always had jurisdiction to investigate same because the President's conduct in the realm of his political party threated to expose him to the risk of a conflict of interest in his official capacity.

75. For state affairs to be given sensible meaning, it is to understand that a constitutional office-bearer's conduct in a private capacity can or could impact their conduct in an official capacity.

C3: Third Ground – President's Duty to Disclose

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67 CCT Record: Vol 13, Judgment, p 1342, at para [111].

68 CCT Record: Vol 13, Judgment, p 1336, at para [92].

76. The duty to disclose emanates from section 96(2)(b)(2)(b) of the Constitution, the Ethics Act, and the Code. The Court *a quo*'s attempt to define the specific kind of benefit,[69] in this instance, is misplaced because it fails to appreciate the true test: a risk of a conflict of interest.

77. In any event, the benefit was, with respect, obvious. The President was boosted by the financial contributions to increase his campaign activities which was necessary for him to win his party's leadership.

78. The President conceded he benefitted from his campaign and its financing. The Court *a quo*'s contrary finding that the President did not personally benefit was thus mistaken, as was the finding that he was not under a duty to disclose such benefits.[70]

79. The constitutionally compliant interpretation of the duty to disclose must, with respect, include all contributions otherwise accountability will be fundamentally undermined. The Court *a quo*'s exclusion of

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69 CCT Record: Vol 13, Judgment, pp 1345 – 1346, para [120] – [121].

70 CCT Record: Vol 13, Judgment, p 1346, para 122.

"*indirect benefit*" is not sustainable when the impact on accountability is properly understood.[71]

80. If the Court *a quo* had proper regard to its own accepted definition from the Code,[72] being "*assistance from any source other than the member in his personal and private capacity*", it would have reached this conclusion. The Court *a quo*'s attempt to regulate direct and indirect benefits differently is, thus, unsustainable.[73]

81. This is especially when the Court *a quo* had already accepted that the President's belonging to a political party was a private matter.[74]

82. Logically, the money the President received fits this definition of a benefit as it was neither from the ANC (his party), nor was it to benefit anyone other than the President (in his private capacity).

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71 CCT Record: Vol 13, Judgment, p 1347, para 126.

72 CCT Record: Vol 13, Judgment, p 1347, para 125.1.

73 CCT Record: Vol 13, Judgment, p 1348, para 128.

74 CCT Record: Vol 13, Judgment, pp 1338 – 1339, para 101–103.

83. The Court *a quo*'s suggestion that such a finding of disclosure could only be reached after evidence of the President's private benefit was adduced,[75] was misplaced.

84. So, too, was the conclusion that the EFF's argument regarding "*indirect benefits*" is of no assistance to the Public Protector because it conflates the President and the CR17 campaign.[76]

85. The campaign is self-evidently, and even on the Court *a quo*'s understanding, a campaign for his benefit (albeit a particular faction within the ANC).[77]

86. Respectfully, the Court *a quo*'s attempt to distinguish *Zuma* for the purpose of showing the President had not duty to disclose is mistaken.[78] *Zuma* shows that the Public Protector's remedies were correct.

87. The President was under a duty to disclose.

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75 CCT Record: Vol 13, Judgment, p 1347, para 126.

76 CCT Record: Vol 13, Judgment, p 1347, para 127.

77 CCT Record: Vol 13, Judgment, para 107.

78 CCT Record: Vol 13, Judgment, para 130–131.

C4: Fourth Ground – Remedial Action Consultation

88. The Public Protector's powers regarding affording an implicated person a right to make representations stem directly from the PP Act.

89. Section 7(9) provides:

> "(9)(a) If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.
> (b)(i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.
> "(ii) Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section."

90. The President contends that the EFF's argument advanced in the Court *a quo*, that the Public Protector only owes the right to make representations on findings and not remedial action, as farcical.[79]

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79 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1428, para 41.

91. The President says so because the Public Protector's allegedly determining "*the remedial orders against him obviously constituted adverse findings upon which he was entitled to be heard before they were made*".[80]

92. In amplification of this, the President has resort to this Court's decision in *Law Society*[81] in order to impeach the Public Protector's failure to give the President an audience, which, on the President's version, amounts to procedural irrationality.[82] The Court *a quo* found for the President on this score.[83]

93. In this Court, the President contends that this is not a sufficiently important issue that warrants the attention of this Court before the Supreme Court of Appeal – so self-evident was the Court *a quo*'s reliance on the *audi* principle.[84]

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80 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, pp 1427 – 1428, para 39.

81 *Law Society of South African & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC) at para [64].

82 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1428, para 42.

83 CCT Record: Vol 13, Judgment, p 1358, para [155].

84 CCT Record: Vol 15, 2nd AA, p 1580, para 28.

94. But of these arguments are clearly without merit.

94.1. Insofar as the latter argument, the Court *a quo*'s decision does warrant this Court's attention at this stage.

94.1.1. The Court *a quo* has now created an obligation for the Public Protector not contained in the PP Act. This is addressed below.

94.1.2. At the very least, the Court *a quo*'s informal reading in of the automatic right of a party to make representations in respect of the remedial action amounts to the kind of order this Court recently criticised in *Moyo*.[85]

94.1.3. A further reason this Court's intervention, then, is the fact that the Court made no order was made to this effect. The Court *a quo* simply invented this obligation out of the ether by means of an

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85 *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* 2020 (1) SACR 373 (CC) at paras [50]-[62].

interpretive exercise. And, nor could it. No party sought such relief from the Court to this effect.

94.1.4. Significantly, then, the Court *a quo* simply interpreted section 7(9) to include words that the Legislature left out.

94.1.5. The relevance of this is that the President's attack on the Public Protector – and upheld by the Court *a quo* – is wholly improper because the President asserted a right not contained in the PP Act.

94.1.6. The PP Act is the singular instrument through which an affected person's right to make representations is founded. It is also the instrument which regulates the Public Protector's conduct.[86]

94.1.7. If the President's attack that the failure to include such a right in respect of remedial action is good in

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86 *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of The Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [90].

law, it can only serve as reviewable ground when a Court orders that the deficiency is unconstitutional and sets aside the Public Protector's conduct in terms thereof as being unlawful.

94.1.8. The Court *a quo* in this case did the latter in the absence of the former. However, it is the very absence of the former – the failure of the PP Act to create a right to make representations in respect of remedial action – that prevented it from making such an order as it did.

94.1.9. This is impermissible. The President should have brought a frontal challenge to the PP Act if he contended that the Public Protector's conduct in infringed his rights by not affording him a hearing he should have had. He did not.

94.1.10. The Court *a quo*'s finding on this front is, thus, improper.

94.1.11. The Court *a quo*'s justification also seems to have been improperly motivated to reach this conclusion because of the allegedly serious implications the Public Protector's remedial action would have on the President in his *ex officio* capacity.[87]

94.1.12. This, too, is mistaken. Self-evidently, any remedial action involving constitutional office bearers would have serious consequences. But the seriousness of those consequences cannot be used to fault the Public Protector's conduct where her conduct was and is consistent with the PP Act as it stands on the statute book.

94.1.13. This alone justifies this Court's interference with the Court *a quo*'s order on appeal.

94.2. Insofar as the former argument, the Court *a quo'*s decision was simply wrong.

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87 CCT Record: Vol 13, Judgment, p 1360, para [162].

94.2.1. Section 7(9)(a) of the PP Act makes clear that the Public Protector only bears an obligation to afford an affected person in respect of "*adverse findings*". It uses words to this effect.

94.2.2. Tellingly, the PP Act repeatedly uses the word "finding" or "findings" which has been understood to be the substantive contents of her Report.[88]

94.2.3. The PP Act itself differentiates findings from, *inter alia*, "remedial action",[89] "recommendations",[90] and "views".[91] The President says these differences are farcical.[92]

94.2.4. But these words are used deliberately to mean something other than "findings". The choice of those words are specific and deliberate and in the

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88 See, for example, sections 5(3), 7(9), 8(1), 8(2)(b), 8(3) of the PP Act.

89 See, for example, Preamble to the PP Act.

90 See, for example, sections 5(3), 6(4)(c)(ii), and 8(1) of the PP Act.

91 See, for example, sections 5(3), and 8(1) of the PP Act.

92 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1428, para 41.

context of the Public Protector's powers, are terms of art.[93]

94.2.5. Significantly, section 7(9) only affords an affected person in respect of "adverse findings" and not any other kind of conduct of the Public Protector.

94.2.6. In other words, the remedial action to be imposed by the Public Protector, be it adverse or otherwise, is *ex facie* excluded from the right of representations attaching to "adverse findings".

94.2.7. The deliberate silence of the PP Act in respect of remedial action means that the there is no duty on the Public Protector to afford the President any right of *audi*.

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[93] Compare, for example, this Court's attitude to the meaning "multi-party democracy" in *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) at para [25].

94.2.8. The Court *a quo* failed to appreciate this,[94] and misdirected itself in interpreting the PP Act contrary to its clear, plain-text meaning.[95] This is, with respect, incorrect.

95. *Law Society*, then, does not assist the President. *Law Society* and the authorities it refers to in paragraph 64 is about a general right to procedural fairness. In this case, it is common cause that the Public Protector gave effect to this regarding findings.[96] So Law Society was given effect to.

96. But, if *Law Society* is good for the proposition that procedural fairness includes the right to make representations on the remedial action despite the wording of the statute, the Court a quo's finding in favour of the President is still improper because no attack to that effect was mounted, and the Court *a quo*'s reinterpretation of the section violates this Court's principles regarding reading-in in *Moyo*.

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94 CCT Record: Vol 13, Judgment, p 1358, para [156].

95 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

96 CCT Record: Vol 8, PP AA, p 823, para 137.2.

97. Although Ngcobo J (as he was then) recognised in *Masetlha* that the Constitution requires "fundamental fairness" (which is presumably what the President contends for here),[97] that fundamental fairness is itself constrained by the context of the specific legislation in which the power in question is exercised.

98. In this case, the PP Act creates only a limited number of instances where the President can make representations. Simply put, remedial action is not one of them. Absent a frontal attack on the PP Act for that differentiation, the Public Protector is immunised from a finding of having acted unlawfully.[98]

D: CONDONATION

[97] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para [179].

[98] In a different context, and where the appellant had failed to make a frontal attack on the functionary's empowering statute, the Labour Appeal Court observed "*an administrative decision must be respected, and validity is presumed until that presumption is disturbed."* See *Gerhard Potgieter Maintenance Services (Witbank) (Pty) Limited t/a Mr Clean v Contract Cleaning National Provident Fund and Others* (JA98/2018) [2020] ZALAC 13 (22 May 2020) at para [9].

99. The President takes the point that the EFF has failed to properly plead a case on condonation for the apparent lateness of its application for leave to appeal in this Court.

100. With respect, that objection is of no substance.

101. What the EFF did do is timeously launch its application for leave before the High Court.[99]

102. It was then confronted with the Public Protector's application for leave in this Court.

103. Instead of applying to seek that the appeal be stayed pending the EFF's application for leave to appeal on the High Court, the President mounted full opposition to the application. This was on 29 April 2020.[100]

104. Nowhere in his answer does the President say the matter should be stayed. He sought dismissal, necessitating a debate on the merits. Indeed,

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99 CCT Record: Vol 15, 2nd AA, p 1580, para 2.

100 CCT Record: Vol 15, President's Answering Affidavit to the Public Protector ("**1st AA**"), p 1509.

the President said that because the EFF's application was already pending, the Public Protector's application ought to be dismissed.[101]

105. The very next day, and self-evidently in response to the fact that this Court would be called upon to consider the merits of the Public Protector's application for leave to appeal, which involves the same issues as the EFF's application for leave to appeal in the High Court, the EFF launched its conditional application for leave to appeal. This was on 30 April 2020.[102]

106. The EFF quite clearly explained why it launched a conditional application. It said "*the EFF ought to be granted leave to appeal as a matter of course if this Court grants leave to appeal to the Public Protector*".[103]

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101 CCT Record: Vol 15, 1st AA, pp 1516 – 1517, para 23 - 26.

102 CCT Record: Vol 15, EFF FA, p 1554.

103 CCT Record: Vol 15, EFF FA, p 1557, para 8.

107. And that "*a consolidated appeal procedure before this Court ... is the most prudent approach, ensuring minimum waste of judicial resources and at least cost to the parties*".[104]

108. And again, "*as to the appropriate forum to determine the appeal, and without commenting on the Public Protector's approach in seeking to appeal for leave directly [to] this Court, the EFF if of the view that its conditional application is most prudent ...*"[105]

109. In other words, the EFF never sought to abandon its original application for leave to appeal.[106] But, faced with the prospect that this Court may adjudicate the matter, it approached this Court to place its application before it.

110. It was only in the position to do so after it had sight of the President's answer to the Public Protector. The EFF took one day to file its application, and some sixteen days after the Public Protector launched

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104 CCT Record: Vol 15, EFF FA, p 1558, para 9.5.

105 CCT Record: Vol 15, EFF FA, p 1560, para 13.

106 CCT Record: Vol 15, EFF FA, p 1561, para 14.

her application.[107] Both of these clarified what the EFF's options were and informed its conduct.

111. Its delay therefore is not a true delay. The EFF did not approach this Court directly for leave and was out of time as a result therefrom. It approached this Court conditionally when it became clear that its timeously filed appeal had been overtaken by the facts. Its delay is no true delay at all.

112. All of the President's objections on this score, therefore, are without merit.

112.1. On proper evaluation of the facts, the EFF has not pegged its delay to the Public Protector.[108] Its "delay" was caused, ironically, when it became clear that the President would fight the merits of the Public Protector's leave to appeal in this Court. Faced with this, the EFF's delay – of sixteen or one day, depending – is justifiable.

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107 CCT Record: Vol 15, EFF FA, p 1562, para 19.

108 CCT Record: Vol 15, 2nd AA, pp 1580 – 1581, para 29 - 32.

112.2. The EFF is not forum shopping.[109] Instead, it is placing its leave to appeal before this Court because this Court has been asked, again ironically, by the President, to consider its merits. In any event, the EFF's correspondence to the High Court demonstrates that it is not harassing the President to "fight on two fronts".

112.3. The EFF has stayed its High Court appeal depending on the outcome here.[110] The High Court agreed. The EFF is entitled to do this particularly in circumstances where this Court may dismiss the applications on a technical ground but not on the merits. In other words, this Court's dismissal may not be a judgment of final effect such that the merits/issues become *res judicata*. Far from being harassing or abusive of the President, and in those circumstances, the High Court would be entitled to once again consider the EFF's application for leave.

113. In the premises, a good case for condonation has been made and with respect ought to be granted.

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109 CCT Record: Vol 15, 2nd AA, pp 1571 – 1752, para 6 – 8.

110 CCT Record: Vol 15, EFF FA, Annexure JSM 1 (Letter dated 29 April 2020), p 1565.

E: COSTS

114. If the EFF is successful in its application for leave to appeal, and/or on the appeal itself, it should be entitled to its cost. Costs follow the result.[111]

115. But, if the EFF is unsuccessful on either score, it should not be made to pay costs.

116. The President's contentions as to why the EFF should pay costs are without merit. Although the President's request in this Court is largely unsubstantiated,[112] in the High Court, the President contended that EFF has a peripheral interest in the matter, and has relied on speculative reasoning[113] – whatever that may mean.

117. None of these reasons serve to justify why the EFF ought to be made to pay costs at all. In the first instance, the EFF's case squarely falls within the realm of public-interest litigation contemplated in *Biowatch*.[114] Its

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111 See, for example, *Gavric v Refugee Status Determination Officer and Others* 2019 (1) SA 21 (CC) at para [121].

112 CCT Record: Vol 15, 2nd AA, p 1581, para 33.

113 CCT Record: Vol 14, President's AA to the EFF HC Leave to Appeal, p 1431, para 47.

114 *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para [23]. Also see, for example, *Ferguson v Rhodes University* 2017 JDR 1768 (CC) especially from para [22] onward.

conduct does not fall within the exceptions contemplated in *Affordable Medicines*.[115]

118. The EFF participates before this Court to vindicate important principles of constitutional law which are directly related to Executive accountability. While that may cause discomfort for the President, that is no reason that it should be punished if it is unsuccessful.

119. The true test, then, even if the EFF is unsuccessful, as this Court recently reiterated in Gordhan, is that:-

> "Regardless of the EFF's motivation to involve itself in these proceedings, as a private party acting seemingly in the public interest, it pursued arguments of genuine constitutional concern. Although those arguments have been unsuccessful in both the High Court and on appeal before this Court, it would be parsimonious to contend that the constitutional arguments the EFF raised were of a specious or opportunistic calibre. The EFF therefore should have received the benefit of the *Biowatch* principle and should not have had costs awarded against it."[116]

120. That the EFF is acting in the public interest is not in dispute. Even the President, who through his legal representatives have used colourful

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115 *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at para [138].

116 *Gordhan* at para [83].

language to describe the EFF's case, cannot seriously contend that the EFF is not bringing constitutional matters of public importance to this Court for adjudication.

121. In consequence, it should be immunised from an adverse costs order if it is unsuccessful.

F: CONCLUSION

122. The President should not be permitted to prevail on his "*wilful ignorance*" defence as this would set a dangerous precedent for accountability.

123. This Court's pronouncement thereon will, unlike the judgment of the Court *a quo*, prevent other politicians from avoiding their accountability obligations by using a "wasn't me" type of defence. This is especially the case where they stand to benefit from the activities they claim ignorance in respect of.

124. The duty to know and the duty to account are matters squarely falling within the Public Protector's jurisdiction in terms of the Executive Code, the Executive Ethics Act, and section 96(2)(b) of the Constitution.

125. That the Public Protector did not consult the President before determining the appropriate remedial action is, as we have shown, also without merit.

126. Accordingly, leave to appeal ought to be granted, the Court *a quo*'s judgment and order should be set aside on appeal, and the EFF should be entitled to its costs.

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The Economic Freedom Fighters

Chambers, Sandton
14 August 2020

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3. *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa* 2006 (6) SA 103 (CC).
4. *MEC for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC).
5. *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe And Another* 2003 (4) SA 584 (CC).
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9. *Cole v Government of the Union of South Africa* 1910 AD.
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11. *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC)
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19. *Corruption Watch (RF) NPC v the President of the Republic of South Africa* 2018 (1) SACR 317 GP.
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