IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 35/2024

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE NATIONAL ASSEMBLY OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Fourth to Sixteenth Respondents

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FIRST AND SECOND RESPONDENTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1. In this application, brought directly in this Court in terms of section 167(4)(e) of the Constitution of the Republic of South Africa, 1996 ('**the Constitution**'), the Applicant ('**the EFF**') challenges the constitutionality of Rule 129I of the Rules of the National Assembly ('**the NA Rules**' and '**Rule 129I**') and the constitutionality of a decision in terms of Rule 129I taken by the National Assembly of the Republic of South Africa ('**the NA**') on 13 December 2022.

2. More specifically, the EFF:

    2.1. challenges (in paras 6 and 7 of the EFF's notice of motion)[1] the constitutionality of Rule 129I, which forms part of a sub-set of the NA Rules adopted by the NA on 22 November 2018 ('**the Presidential Impeachment Rules**')[2] to regulate the content of any motion by a member of the NA calling for the removal from office ('**impeachment**') of the President in terms of section 89(1) of the Constitution ('**Presidential impeachment motion**') and to

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[1] Notice of Motion 1: 2-3: 6-7. The number before the first colon is the volume number or supplementary volume number. The number/s before the second colon is/are the page number/s. The number/s or letter/s after the second colon, if any, is/are the paragraph number/s or letter/s.

[2] Annexure NA1 5: 443-448.

regulate the procedures to be followed in relation to and pursuant to such a motion; and

2.2. challenges (in paras 2 to 5 of the EFF's notice of motion)[3] the constitutionality of the decision by the NA, taken on 13 December 2022 in terms of Rule 129I(3), by a majority vote (214 to 149), not to refer to the committee established by Rule 129J of the Presidential Impeachment Rules ('**the Impeachment Committee**') a Presidential impeachment motion calling for removal from office of the incumbent President, Mr Matamela Cyril Ramaphosa, brought by a member of the NA, Mr Vuyolwethu Zungula MP.[4]

3. For reasons set out in the answering affidavit of the First and Second Respondents ('**the Speaker and the NA**'),[5] they do not oppose the relief sought in para 1 of the Notice of Motion declaring that section 167(4)(e) of the Constitution confers on this Court exclusive jurisdiction to hear and determine the EFF's application for the above-mentioned relief.

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[3] Notice of Motion 1: 1-2: 2-5.

[4] Annexure NA2 5: 449-451 (the minutes of the NA proceedings of 13 December 2022); and Annexure NA3 5: 452-516 and 5: 517-545 (Hansard of the proceedings of 13 December 2022).

[5] Speaker's and NA's Answering Affidavit 5: 424-429: 7-15.

4. The Speaker and the NA however oppose the substantive relief described in paras 2.1 and 2.2 above and, consequently, the further (ancillary) relief sought in paras 8-9 of the Notice of Motion.

5. For the reasons set out in their answering affidavit and elaborated upon below, the Speaker and the NA contend that:

    5.1. Rule 129I is not unconstitutional; and

    5.2. the EFF's challenges to the constitutionality of the NA's decision in terms of Rule 129I(3) taken on 13 December 2022 were brought too late, so much so that the subsequent expiry of the term of the NA of the Sixth Parliament in late May 2024 means the Impeachment Committee established by Rule 129J cannot validly conduct a Section 89 Enquiry into Mr Zungula's Presidential impeachment motion.

6. Before addressing the Speaker's and the NA's grounds of opposition, we briefly outline the common-cause facts[6] relevant thereto.

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[6] The EFF objects to the Mr S L Tsenoli deposing to the Speaker's and NA's answering affidavit on the ground that he was not present when the impugned decision was taken on 13 December 2022 (Consolidated Replying Affidavit 6: 569: 5.6). This objection is without merit and irrelevant because [1] following the resignation of the Speaker Mr Tsenoli, the Deputy Speaker, was the Acting Speaker (Speaker's and NA's answering affidavit 5: 423: 3), [2] as Mr Tsenoli explains, the facts set out in his affidavit are within his personal knowledge, unless stated otherwise or the context suggests otherwise, or have been obtained from documentation under his control (Speaker's and NA's answering affidavit 5: 424: 5) and [3] in any event, all of the facts relevant to the Speaker's and the NA's defences are common-cause.

COMMON-CAUSE FACTS RELEVANT TO THESE SUBMISSIONS

7. As mentioned above, on 22 November 2018 the NA adopted the Presidential Impeachment Rules to regulate the content of any Presidential impeachment motion and the procedures to be followed in relation to and pursuant to such a motion.

8. During 2022 Mr Zungula submitted to the Speaker a Presidential impeachment motion in relation to President Ramaphosa ('**Mr Zungula's Motion**').[7] It contained allegations against the President arising from the house break-in and theft that occurred at the Phala Phala Wildlife Game Farm and asked that he be removed from office on '*the grounds of serious violation of the Constitution or the law, and serious misconduct*' contemplated in section 89(1) of the Constitution and the Presidential Impeachment Rules.[8]

9. On 14 September 2022 the Speaker appointed the three members of an Independent Panel ('**the Panel**'), as contemplated in Rule 129D, to conduct a preliminary inquiry into Mr Zungula's Motion in accordance with Rule

[7] Annexure EFF1 1: 67-69: 9.

[8] Annexure EFF1 1: 72: 16.

129G.[9] The Speaker appointed one of them, being retired Chief Justice Sandile Ngcobo, as the chairperson of the Panel in terms of Rule 129F.

10. On 30 November 2022 the Panel submitted to the Speaker its report ('**the Panel Report**'). It ended with the following:[10]

'*In the light of all the information placed before the Panel, we conclude that this information discloses, prima facie, that the President may have committed:*

264.1 A serious violation of section 96(2)(a) [of the Constitution].

264.2 A serious violation of section 34(1) of [the Prevention and Combatting of Corrupt Activities Act 12 of 2004].

264.3 A serious misconduct in that the President violated section 96(2)(b) [of the Constitution] by acting in a way that was inconsistent with his office.

264.4 A serious misconduct in that the President violated section 96(2)(b) by exposing himself to a situation involving a conflict between his official responsibilities and his private business.'

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[9] Annexure EFF1 71:14.

[10] Annexure EFF1 1: 145: 264.

11. On 13 December 2022 the NA considered and debated the Panel Report and, by a majority vote (214 to 149), decided in terms of Rule 129I(3) not to refer Mr Zungula's Motion for the President's removal from office to the Impeachment Committee for a Section 89 Enquiry in terms of Rule 129M.[11]

12. Nearly 14 months later, on 7 February 2024, the EFF brought the present application.[12]

[11] Annexure NA2 5: 449-451; Annexure NA3 5: 451-516 and 6: 517-545.

[12] Notice of Motion 1: 4. It was stamped by the Registrar on 13 February 2024: see Notice of Motion 1:1 and 4.

CHALLENGE TO THE CONSTITUTIONALITY OF RULE 129I

13. The EFF challenges the constitutionality of Rule 129I[13] on the grounds that:[14]

    13.1. it allows the NA to vote against referring a motion for the President's removal to the Impeachment Committee in circumstances where an Independent Panel established in terms of Rule 129D of the NA Rules has found that a *prima facie* case of impeachable conduct has been made out, alternatively

    13.2. because it is impermissibly vague.

14. More specifically, the EFF contends, in effect, that Rule 129I is unconstitutional because:

    14.1. the rule permits the NA to vote against the referral to the Impeachment Committee of a motion calling for the President's removal from office in terms of Section 89(1), in circumstances

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[13] In their written submissions, counsel for the EFF impermissibly question the constitutionality of Rule 129G (EFF's Written Submissions 61-62: 238-242). As the EFF's Notice of Motion does not seek any relief in relation to that rule and the issues concerning it are not raised in the EFF's founding papers, the question of its constitutionality is not one for decision in this case and we shall accordingly not address it.

[14] Notice of Motion 1: 2: 6.1.

where an Independent Panel has reported that sufficient evidence exists to support the charge(s) in the motion,[15] alternatively

14.2. the rule contains no criteria or guidelines as to what the NA must take into account when exercising its discretion and, consequently, the rule is impermissibly vague.[16]

15. The EFF seeks an order directing the NA to amend Rule 129I in such a way that:[17]

15.1. if the Panel finds that *prima facie* evidence exists, the Presidential impeachment motion is automatically referred to the Impeachment Committee, alternatively

15.2. the rule contains suitable guidelines structuring the exercise by the NA of its discretion.

16. There are three basic difficulties with this part of the EFF's case.[18]

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[15] Founding Affidavit 1: 51-52: 184-188 and 1: 53-54: 195-199. In their written submissions, counsel for the EFF add that Rule 129I '*allows members of a majority party to vote down any possible impeachment proceedings from commencing in order to protect the party's political motives*' (EFF's Written Submissions 9: 28.3.1) and the rule enables the NA '*to arbitrarily halt the impeachment process at the preliminary stage*' (EFF's Written Submissions 63: 246).

[16] Founding Affidavit 1: 20: 58-59 and 1: 54: 200-202.

[17] Notice of Motion 1: 2: 6.2.

[18] Another difficulty is the EFF's inexplicable failure to challenge the constitutionality of Rule 129P which, amongst other things, provides that [1] the NA makes the final and binding decisions relating to matters dealt with in the Impeachment Rules and, pertinently, [2] a recommendation made by a Panel is not final and binding on the NA.

17. First, although the power to decide whether a Section 89(1) Enquiry must be proceeded with, conferred on the NA by Rule 129I(3), is capable of being abused, that possibility[19] has no bearing on the constitutionality of the rule. Should the power be abused the remedy lies not in invalidating the rule, but in the remedies afforded by our law for abuses of public power.

18. This was made clear by this Court in *Van Rooyen*:[20]

'*Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.*'

19. In our submission it is only where an empowering provision will invariably be abused that it will be unconstitutional on that account. That however is

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[19] In reply, the EFF candidly acknowledges that '*[t]he Rule is attacked on the basis that it is open to abuse*' (Consolidated Replying Affidavit 6: 600: 74.2). In their written submissions, the EFF's counsel argue that Rule 129I is open to abuse because it confers on the NA the discretion to adopt the Panel's report or not, there is no '*definitional guidance*' relating to the exercise of the discretion and, consequently, the majority party may use the rule to '*defend its President*' (EFF's Written Submissions 65: 252).

[20] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 37. See further *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 52:

'*The fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that the power should, for this reason, be characterised as infringing s 11(1) of the Constitution. The law does not sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena.*'

not the case with Rule 129I, nothing in which impels the NA to 'do the wrong thing'.

20. Second, the conferral of broadly-framed discretionary decision-making power is not unconstitutionally vague in circumstances where the factors relevant to the exercise of the discretionary power are clear.[21] Here, when Rule 129I is interpreted contextually[22] and purposively,[23] as it must be,[24] the relevant factors are clear: the NA must consider and decide whether or not it agrees with the Panel's recommendation that sufficient evidence exists or does not exist to show that the President committed the alleged serious violation(s) of the Constitution or the law (as defined in the NA Rules), committed the alleged serious misconduct (as there defined) or suffers from the alleged inability to perform the functions of office.

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[21] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 53:

> '*Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear.*'

Cf. *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 25; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 34; and *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) para 51.

[22] More specifically, in relation to the matter which Rule 129G(1)(b) and (c)(v) requires the Panel to consider, recommend to the Speaker and include in its report.

[23] More specifically, in relation to the purpose of the decision, which is to decide whether the matter must be referred to the Impeachment Committee for it to proceed with an enquiry (Rule 129I(3)) aimed at establishing the veracity and, where required, the seriousness of the charges and reporting to the NA on its findings and recommendations and the reasons therefor (Rules 129M(1) and 129O(1) and (2)).

[24] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28; *Minister of Water and Sanitation and Others v Lötter NO and Two Similar Cases* 2023 (4) SA 434 (CC) para 33.

21. We point out that the EFF's contentions in reply on this issue are contradictory. On the one hand, the EFF asserts that '*the contention that Rule 129I contains factors to be considered when exercising discretionary power in deciding whether or not to adopt the Independent Panel's Report is incorrect*'.[25] On the other hand, it gives as one of the reasons for that assertion the following: '*When it receives the report, the National Assembly must determine whether it agrees with the Panel's findings that there is sufficient evidence that the President breached Section 89 of the Constitution.*'[26]

22. Third, the primary remedy proposed by the EFF,[27,28] if granted, will shift, from the NA to the Panel, the power to decide whether a motion for the impeachment of the President should be referred to the Impeachment Committee. The resulting conferral on non-members of the NA (the Panel) of the power to direct a committee of the NA (the Impeachment Committee) to conduct a presidential impeachment trial, or not to do so, would entail this Court (our highest judicial body) dictating to the NA (our

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[25] Consolidated Replying Affidavit 6: 603: 75.13.

[26] Consolidated Replying Affidavit 6: 603: 75.13.1.

[27] That is the order in Notice of Motion 1: 2: 6.2, described in para 15.1 above, directing the NA to amend Rule 129I in such a way that, if the Panel finds that *prima facie* evidence exists, the Presidential impeachment motion is automatically referred to the Impeachment Committee.

[28] In its written submissions, the EFF wrongly asserts that '*the respondents have not put up any defence to the remedy sought in prayer 6 and 7 of the EFF's notice of motion which relates to its constitutional attack on the Rule 129I*' (EFF's Written Submissions 70: 264).

highest legislative body) that it (the NA) must accept the opinion and decision of outsiders (non-members of the NA) on whether or not the President has a case to answer and hence whether a Section 89(1) Enquiry in the Impeachment Committee must ensue.

23. The outcome contended for by the EFF is inconsistent with the principle of the separation of powers and with the conferral on the NA, by section 57(1)(a) of the Constitution, of the authority to determine and control its internal arrangements.

24. The decision to refer a Presidential impeachment motion to the Impeachment Committee is clearly the kind of matter which must be determined by the NA itself. This is because:

    24.1. section 42(3) of the Constitution provides that the NA is elected to represent the people and to ensure government by the people under the Constitution, and that it does so by, amongst other things, choosing the President and holding the executive to account;

24.2. directing that a Section 89 Enquiry be held by the Impeachment Committee is one of the crucial accountability-enhancing instruments at the disposal of the NA;[29]

24.3. the holding of a Section 89 Enquiry by the Impeachment Committee may impact negatively on the ability of the President to discharge the duties of their office and to lead the national government effectively while the enquiry is underway; and

24.4. consequently, it is essential that the NA, aided but not bound by the contents of a report by an Independent Panel, must decide for itself whether there is sufficient evidence to warrant the holding of a Section 89 Enquiry by the Impeachment Committee.

25. The proposition in para 24.4 above is supported by the finding of this Court in *EFF I* that:[30]

'*The National Assembly was indeed entitled to seek to satisfy itself about the correctness of the Public Protector's findings and remedial action before it could hold the President accountable in terms of its ss 42(3) and 55(2) obligations. These sections impose responsibilities so important that*

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[29] *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) para 10.

[30] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 87.

the National Assembly would be failing in its duty if it were to blindly or unquestioningly implement every important report that comes its way from any institution…'.

26. The outcome contended for by the EFF is also inconsistent with the approach of the majority of this Court in *EFF II*,[31] namely that the NA is the institution which bears the obligation to put in place and implement mechanisms and processes to hold the President accountable in terms of section 89(1) of the Constitution. That approach is informed by the fact that section 89(1) confers the power to impeach the President on the NA, alone. As explained by Froneman J in his separate concurrence in *EFF II*:[32]

'*According to the second [i.e. majority] judgment, s 89(1) requires that, before a resolution to remove the President is voted upon, an investigation into the existence of the preconditions set out in that subsection must be carried out… The second judgment directs the National Assembly to make rules for this procedure. That direction merely compels the National Assembly to do what it already has the competence to do under section 57 of the Constitution, which provides that the National Assembly may determine and control its own arrangements and "make rules and orders*

[31] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) paras 129-131, 134, 136, 138, 170-196, 197-208 and 222.

[32] *EFF II* note 31 above paras 283-284.

concerning its business." Nowhere does the second judgment prescribe the content of those rules.'

27. Froneman J's remarks in *EFF II* are supported by this Court's finding in *EFF I* that the NA and not the courts must determine how best it should carry out its parliamentary oversight mandate in terms of sections 42(3) and 55(2)(b) of the Constitution:[33]

'*It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give it, for the purpose of holding the executive accountable and fulfilling its oversight role of the executive or organs of state in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the "vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government". Courts should not interfere in*

[33] *EFF I* note 30 above para 93.

the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.'

28. It is submitted that the primary relief sought by the EFF – the replacement of the NA with the Panel as the arbiter of whether a Section 89 Enquiry should be held – does precisely what the majority of this Court was careful not to do in *EFF II* and what this Court was at pains to warn against in *EFF I.*

29. For these reasons, the relief sought in para 6 of the Notice of Motion must be dismissed.

CHALLENGE TO THE 13 DECEMBER 2022 DECISION BY THE NA – UNREASONABLE DELAY LEADING TO LEGAL IMPOSSIBILITY AND MOOTNESS

30. The EFF alleges that, in taking the impugned decision, the NA irrationally (notice of motion para 2) and in breach of various specified provisions in the Constitution (notice of motion paras 3 and 4) rejected the Panel Report and resolved not to initiate a Section 89 Enquiry in the Impeachment Committee aimed at determining whether or not the President was guilty of the serious violations of the Constitution and the law and the serious misconduct alleged in Mr Zungula's motion calling for his removal from office.

31. As already mentioned, the NA took the impugned decision on 13 December 2022 and the EFF brought the present application nearly 14 months later on 7 February 2024.

32. We submit that the EFF's right to challenge in this Court the constitutionality of the NA's 13 December 2022 resolution, like the right to challenge in a court an exercise of public power on the ground that it infringes the principle of legality in the Constitution,[34] is subject to a

[34] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) para 49 referring to *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) para 33.

requirement that the relevant challenge be instituted without unreasonable delay.

33. Although the EFF has cast this challenge as a series of declarators,[35] the substance of the relief sought is judicial review and the setting aside of the impugned decision, coupled with its substitution by this Court with a decision that the Panel Report is adopted, alternatively a referral of the matter back to the NA for a fresh vote on the Panel Report (which is premised on the setting aside of the impugned decision).[36] In their written submissions, counsel for the EFF, in effect, concede this.[37]

34. In any event:

    34.1. declaratory relief is a discretionary remedy that must be justified to resolve a live issue;[38] and

    34.2. substitution, and setting aside and referral back, are discretionary remedies, made in terms of the courts' power to grant just and equitable relief in terms of section 172(1)(b) of the Constitution[39]

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[35] Notice of Motion 1: 1-2: 2-4. This is done in an attempt to avoid the issue of its delay and having to explain the delay (Consolidated Replying Affidavit 6: 582: 31 and 6: 583: 34).

[36] Notice of Motion 1: 2: 5.

[37] EFF's Written Submissions 48: 173 read with 45: 161.

[38] *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and Another* [2023] 4 All SA 589 (SCA) para 72.

[39] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) paras 81-84 (setting aside); *Khumalo v Member of the Executive Council for Education:*

or section 8(1) of the Promotion of Administrative Justice Act 3 of 2000 (not relevant here); and unreasonable delay is a factor which may result in a discretionary remedy being refused.[40]

35. We submit that the EFF's delay of 14 months is unreasonable.

36. We point out that the EFF's founding affidavit does not contain an explanation for its delay in challenging the constitutionality of the NA's 13 December 2022 resolution. Instead, in the only relevant paragraph of its founding affidavit (para 89), the EFF deals laconically with the issue of its delay in bringing the present proceedings by making the following points:

36.1. incredibly, without giving any reasons or explanation, it denies that it has delayed;[41]

36.2. it submits that, if and to the extent that delay is a factor, '*the need to investigate the President's prima facie breach of the Constitution, Executive Ethics Code, and Exchange Control Regulations, should trump any attempt to let the President escape*

KwaZulu Natal 2014 (5) SA 579 (CC) para 53 (setting aside); *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) paras 82-92 (substitution).

[40] *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* 2021 (6) SA 380 (SCA) para 38.

[41] Founding Affidavit 1: 27: 89.

accountability on a flimsy basis like Parliament has done here';[42] and

36.3. it submits that '*[t]he interests of justice demand that Parliament, acting on behalf the people, discharge its duty to them by holding the President as the first citizen to account for what an independent body (i.e. the Panel) have found him to have prima facie breached. This is especially so where the President has failed, to date, to rebut the prima facie evidence in the correct forum (Parliament) which, apart from inviting the adverse inference being drawn against him, also undermines confidence in the other branches of State (i.e. the Executive and the Legislature)*'.[43]

37. We submit this Court should not exercise its discretion in favour of condoning the EFF's unreasonable delay because of its cavalier approach to the issue in its founding papers; and, moreover, for the reasons which follow, due to the delay conducting of a Section 89 Enquiry before the Impeachment Committee has become legally impossible:

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[42] Founding Affidavit 1: 27: 89.1.

[43] Founding Affidavit 1: 27: 89.2.

37.1. Section 49(1) of the Constitution provides that the NA is elected for a term of five years.

37.2. Section 49(2) of the Constitution provides that the President must call and set dates for an election, which must be held within 90 days of the date the term of the NA expired.

37.3. Section 49(4) of the Constitution provides that the NA remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next NA.

37.4. As the first session of the NA of the Sixth Parliament constituted after the advent of democracy took place on 22 May 2019, its term expired on 21 May 2024.[44]

37.5. As the President called and set 29 May 2024 as the date for the election of a new NA (i.e. of the Seventh Parliament), the NA of the Sixth Parliament remained competent to function until 28 May 2024.[45]

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[44] Speaker's and NA's Answering Affidavit 5: 424: 2 and 5: 434: 26.1.

[45] Speaker's and NA's Answering Affidavit 5: 434: 26.1.

37.6. Rule 351(2) of the NA Rules provides, as it has done since the current edition of the NA Rules was adopted on 26 May 2016: '*All business before the Assembly or any Assembly committee on the last sitting day of a term of the Assembly or when the Assembly is dissolved, lapse at the end of that day*'.[46]

37.7. Even if Mr Zungula's Motion for the President's removal from office had been pending before the NA on 21 May 2024, which was not the case because it had run its course when the NA took the impugned decision on 13 December 2022, it would have lapsed at midnight on 21 May 2024.

37.8. Rule 129M(1) provides that the purpose of a Section 89 Enquiry is to establish the veracity and, where required, the seriousness of the charges and to report to the NA thereon.

37.9. The charges in question are those formulated and substantiated, in accordance with Rule 129A, in the Presidential impeachment motion in question.

37.10. A Section 89 Enquiry cannot be held into charges in a Presidential impeachment motion which has lapsed.

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[46] Speaker's and NA's Answering Affidavit 5: 434: 26.2.

37.11. This is the position regardless of whether or not, by the time when the motion lapses, a Panel has reported to the Speaker that sufficient evidence exists to show that the President committed the serious violations of the Constitution and the law and the serious misconduct with which the President was charged in the motion.[47]

38. In short, due to the EFF's unexplained, unreasonable delay, the relief it is seeking has become moot (i.e. there is no longer a live issue).

39. As this Court explained in *Van Wyk*:[48]

'*[29] It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any*

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[47] The EFF's allegations that '*the Panel's Report remains in existence*', '*[u]ntil the Impeachment Committee decides the issues in the Panel's Report, the President still has a case to answer*', '*there is nothing stopping the incoming Parliament and the Impeachment Committee from proceeding with the Impeachment proceedings against the President*', '*the incoming National Assembly would be obliged to re-institute the impeachment proceedings*' and '*the Court can make an order that is capable of being implemented after the general elections*' (Consolidated Replying Affidavit 6: 583: 37.2 and 37.4, 6: 584-585: 40, 6: 584: 43 and 6: 614: 138) are, therefore, incorrect insofar as they mean that after the election of the Seventh Parliament the new and differently constituted NA may validly be ordered by this Court to re-commence the impeachment process against the President started by Mr Zungula's motion for his removal from office during the Sixth Parliament. A similar problem besets the motion in the NA which the EFF submitted on 14 June 2024, calling upon the NA to refer the matter to the Impeachment Committee based on the Panel's report (ANC's Answering Affidavit (Supplementary Record) 3: 893: 154.3; also referred to in the EFF's Written Submissions 75: 289 and 81: 306.5 & 306.6).

[48] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) paras 29-30.

practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty.

[30] If the only hurdle that the applicant had to surmount was mootness, the position would have been entirely different. Here the applicant has to surmount two hurdles, the first being the inordinate delay coupled with a lack of a reasonable explanation for the delay. Mootness adds a further hurdle and renders the first hurdle insurmountable. Mootness is but one of the factors that must be taken into consideration in the overall balancing process to determine where the interests of justice lie. It assumes a particular significance in this case where there was an inordinate delay of some 11 months and the absence of a reasonable explanation…' (underlining added).

40. Accordingly, the mootness of the relief the EFF is seeking in relation to the impugned decision of 13 December 2022, renders insurmountable the hurdle to these proceedings presented by the EFF's unexplained and inordinate delay in bringing them.

41. For these reasons, the relief sought in paras 2 to 5 of the Notice of Motion must be dismissed.

CONDONATION

42. All of the parties have brought applications for condonation.

43. The Speaker and the NA do not oppose:

43.1. the President's application for condonation of the late filing of his answering papers;[49]

43.2. the ANC's application for condonation of the late filing of its answering papers;[50] and

43.3. the EFF's application for condonation of the late filing of its reply to the ANC's answering papers.[51]

44. None of the other parties has opposed the application by the Speaker and the NA for condonation of the filing of their answering papers three court days late on 4 April 2024.[52] We submit a proper case for condonation is made out in the relevant part of the main answering affidavit of the Speaker and the NA,[53] and respectfully ask that it be granted.

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[49] President's Application for Condonation 6: 556-558

[50] ANC's Application for Condonation (Supplementary Record) 3: 831-836.

[51] EFF's Application for Condonation (Supplementary Record) 5: 1042-1045.

[52] Speaker's and NA's Application for Condonation (Supplementary Record) 3: 827-830.

[53] Speaker's and NA's Answering Affidavit 5: 437-438: 32-36.

CONCLUSION

45. For the reasons given above, the EFF is not entitled to relief as claimed in paras 2 to 9 of the Notice of Motion.

46. The Speaker and the NA do not seek costs against the EFF.

47. In the premises, the Speaker and the NA respectfully ask for the following relief:

    47.1. condonation for the late filing of their answering affidavit; and

    47.2. the dismissal of the EFF's application for the relief set out in paras 2 to 9 of the Notice of Motion.

A M BREITENBACH SC

A TOEFY

First & Second Respondents' Counsel
Cape Town
12 August 2024

LIST OF AUTHORITIES

1. *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 34
2. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) paras 81-84
3. *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 52
4. *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28
5. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 53
6. *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 87
7. *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) paras 129-131, 134, 136, 138, 170-196, 197-208, 222 and 283-284
8. *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and Another* [2023] 4 All SA 589 (SCA) para 72
9. *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) para 33
10. *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 2

11. *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) para 51

12. *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) paras 49 and 53

13. *Minister of Water and Sanitation and Others v Lötter NO and Two Similar Cases* 2023 (4) SA 434 (CC) para 33

14. *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* 2021 (6) SA 380 (SCA) para 38

15. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) paras 82-92

16. *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) para 10

17. *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 52

18. *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) paras 29-30