CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 35/24

In the matter between:

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

Neutral citation:	*Economic Freedom Fighters and Another v Speaker of the National Assembly and Others* [2026] ZACC 17
Coram:	Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J
Judgments:	Maya CJ (first judgment): [8] to [174] Kollapen J (second judgment): [175] to [301] Majiedt J (third judgment): [302] to [387]

Heard on: 26 November 2024

Decided on: 8 May 2026

Summary: Section 89 of the Constitution — Rules of the National Assembly — prima facie findings — accountability — transparency — majoritarianism

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ORDER

The following order is made:

1. This Court has exclusive jurisdiction to hear the application with respect to the challenge to rule 129I of the Ninth Edition of the Rules of the National Assembly (NA Rules).
2. It is declared that rule 129I is inconsistent with the Constitution, invalid and set aside.
3. Pending any amendment, rule 129I shall read as follows (with the words struck out being severed and the underlined words being inserted into that rule):

   "Rule 129I Consideration and referral of panel report

   (1) Once the panel has reported the Speaker must ~~schedule the report for consideration by the Assembly, with due urgency, given the programme of the Assembly~~ inform the Assembly of the report.

   (2) The President must be ~~informed of the scheduling and any decision on~~ provided with a copy of the report forthwith.

   (3) In the event the ~~Assembly~~ panel ~~resolves~~ concludes that ~~a Section 89(1) enquiry be proceeded with~~ sufficient evidence exists as contemplated in Rule 129G, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose.

(4) In the event the panel concludes that sufficient evidence does not exist as contemplated in Rule 129G, the Speaker must schedule the report for consideration by the Assembly; and in the event the Assembly nonetheless resolves that a Section 89(1) enquiry be proceeded with, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose."

4. The severance and reading-in in paragraph 3 of this order shall apply subject to any amendment by the National Assembly.
5. Pending any amendment of the NA Rules, to the extent that any of the other NA Rules are, by implication, affected by the reading-in in paragraph 3 of this order, those rules shall be read consistently with paragraph 3 of this order *mutatis mutandis*.
6. It is declared that the vote of the National Assembly taken on 13 December 2022, declining to refer the Report of the Independent Panel to an Impeachment Committee as envisaged in the NA Rules is inconsistent with the Constitution, invalid and set aside.
7. The Report of the Independent Panel is referred to the Impeachment Committee established in terms of the NA Rules.
8. The first to fourth respondents are ordered to pay the costs of the first applicant, including costs of two counsel where applicable.

JUDGMENT

THE COURT:

[1] In this application, the Economic Freedom Fighters (EFF) and the African Transformation Movement (ATM) challenge the constitutional validity of rule 129I of

the Ninth Edition of the Rules of the National Assembly (NA Rules) and the National Assembly's vote on 13 December 2022 (NA vote) to not refer the Independent Panel's (Panel) Report[1] to the Impeachment Committee. There are three judgments.

[2] The first judgment is written by Maya CJ, with Madlanga ADCJ, Rogers J and Theron J concurring. It finds that this Court enjoys exclusive jurisdiction over the challenge to the validity of rule 129I as well as the related challenge to the validity of the NA vote. It also determines that the challenges are not moot and that the delay in bringing the challenge to the NA vote can be overlooked.

[3] The first judgment holds that rule 129I constitutes a failure by the National Assembly to fulfil its constitutional obligations under section 89(1) of the Constitution. It consequently invalidates and sets aside rule 129I as inconsistent with the Constitution. Further, the first judgment holds that the NA vote amounts to a failure by the National Assembly to fulfil its constitutional obligations. On this basis, the first judgment would invalidate and set aside the NA vote as inconsistent with the Constitution.

[4] The second judgment is written by Kollapen J, with Mathopo J, Seegobin AJ and Tshiqi J concurring. It agrees with the first judgment, albeit for different reasons, that this Court's exclusive jurisdiction is engaged in respect of the challenge to the validity of rule 129I. However, it finds that the rule is constitutional. It further concludes that this Court does not have exclusive jurisdiction over the NA vote and that direct access should not be granted in respect of this challenge.

[5] The third judgment is written by Majiedt J, with Mhlantla J and Tolmay AJ concurring. That judgment agrees with the first judgment that this Court has exclusive jurisdiction over the challenge to the validity of rule 129I. It further finds that the rule is unconstitutional, but for the reasons it states. Consequently, it concludes that the

[1] *Report of the Section 89 Independent Panel Appointed to Conduct a Preliminary Enquiry on the Motion Proposing a Section 89 Enquiry* (30 November 2022) (Report).

NA vote taken under rule 129I is also invalid and that the Report should be referred to the Impeachment Committee to be established in terms of the NA Rules. In all other respects, the third judgment agrees with the reasoning and conclusion of the second judgment.

[6] This Court therefore—

(a) unanimously finds that it has exclusive jurisdiction in respect of the challenge to the validity of rule 129I;

(b) by a majority, finds that it does not have exclusive jurisdiction in respect of the challenge to the NA vote;

(c) by a majority, concludes that rule 129I is inconsistent with the Constitution and invalid;

(d) by a majority, concludes that the NA vote is inconsistent with the Constitution and invalid; and

(e) by a majority, concludes that the Report must be referred to the Impeachment Committee.

[7] This Court makes the following order:

1. This Court has exclusive jurisdiction to hear the application with respect to the challenge to rule 129I of the Ninth Edition of the Rules of the National Assembly (NA Rules).

2. It is declared that rule 129I is inconsistent with the Constitution, invalid and set aside.

3. Pending any amendment, rule 129I shall read as follows (with the words struck out being severed and the underlined words being inserted into that rule):

"Rule 129I Consideration and referral of panel report

(1) Once the panel has reported the Speaker must ~~schedule the report for consideration by the Assembly, with due urgency, given the programme of the Assembly~~ <u>inform the Assembly of the report</u>.

(2) The President must be ~~informed of the scheduling and any decision on~~ provided with a copy of the report forthwith.

(3) In the event the ~~Assembly~~ panel ~~resolves~~ concludes that ~~a Section 89(1) enquiry be proceeded with~~ sufficient evidence exists as contemplated in Rule 129G, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose.

(4) In the event the panel concludes that sufficient evidence does not exist as contemplated in Rule 129G, the Speaker must schedule the report for consideration by the Assembly; and in the event the Assembly nonetheless resolves that a Section 89(1) enquiry be proceeded with, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose."

4. The severance and reading-in in paragraph 3 of this order shall apply subject to any amendment by the National Assembly.

5. Pending any amendment of the NA Rules, to the extent that any of the other NA Rules are, by implication, affected by the reading-in in paragraph 3 of this order, those rules shall be read consistently with paragraph 3 of this order *mutatis mutandis*.

6. It is declared that the vote of the National Assembly taken on 13 December 2022, declining to refer the Report of the Independent Panel to an Impeachment Committee as envisaged in the NA Rules is inconsistent with the Constitution, invalid and set aside.

7. The Report of the Independent Panel is referred to the Impeachment Committee established in terms of the NA Rules.

8. The first to fourth respondents are ordered to pay the costs of the first applicant, including costs of two counsel where applicable.

MAYA CJ (Madlanga ADCJ, Rogers J and Theron J concurring):

Introduction

[8] At the outset, I must take full responsibility for the delay in producing this judgment concerning an extremely difficult matter of great national importance. I tender my sincere apologies to the parties, my Colleagues and fellow South Africans for the inconvenience it has caused.

[9] This is yet another matter in which this Court's intervention is sought to resolve complaints raised by political parties represented in the National Assembly that the latter has failed to hold the President of the country accountable, and that a rule it devised to hold the President accountable is constitutionally defective. Similar complaints were placed before this Court in *EFF I*[2] and *EFF II*.[3]

[10] In this instance, the first applicant, the EFF, a registered political party represented in the National Assembly, has invoked this Court's exclusive jurisdiction and, thus, approached this Court directly in terms of section 167(4)(e) of the Constitution.[4] In the main, it challenges the decision of the National Assembly, taken on 13 December 2022, to not adopt the Report and refer it to the Impeachment Committee, and it seeks to have that decision declared irrational and unlawful. In that Report, the Panel essentially found that the President of the Republic of South Africa, Mr Matamela Cyril Ramaphosa (President), prima facie, may have violated the Constitution and the law, or committed serious misconduct. The EFF further, or

[2] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).

[3] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC).

[4] Section 167(4)(e) of the Constitution provides:

> "(4) Only the Constitutional Court may—
>
> . . .
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation."

alternatively, seeks a declaratory order that rule 129I[5] of the NA Rules is inconsistent with the Constitution and is thus invalid.

[11] After the EFF launched its application, the ATM, which is also a political party represented in the National Assembly, successfully brought an intervention application and was consequently joined as the second applicant in the matter. The Speaker of the National Assembly (Speaker); the National Assembly; the President; and the African National Congress (ANC), another registered political party represented in the National Assembly, are cited in the proceedings as the first, second, third and fourth respondents respectively, and they oppose the application. The Speaker is cited in her nominal capacity as the representative of the National Assembly[6] (and I shall refer to her and the National Assembly collectively as Parliament). The rest of the respondents, the fifth to the sixteenth respondents, are political parties represented in the National Assembly, and do not oppose the application. No substantive relief is sought against the latter respondents or the President, who are cited merely as interested parties.

[5] Rule 129I provides:

> "(1) Once the panel has reported the Speaker must schedule the report for consideration by the [National] Assembly, with due urgency, given the programme of the [National] Assembly.
>
> (2) The President must be informed of the scheduling and any decision on the report.
>
> (3) In the event the [National] Assembly resolves that a section 89(1) inquiry be proceeded with, the matter must be referred to the Impeachment Committee established by this rule for that purpose."

[6] Section 23 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 provides:

> "(1) In any civil proceedings against Parliament or a House or committee, the State Liability Act, 1957 (Act 20 of 1957), applies, with the necessary changes.
>
> (2) For the purposes of subsection (1), where appropriate, a reference in the State Liability Act, 1957, to the Minister of a department must, where the proceedings are against—
>
> (a) Parliament or a House, be construed as a reference to the Speaker or the Chairperson, or to both the Speaker and the Chairperson, as the case requires; or
>
> (b) a committee, be construed as a reference to the chairperson of the committee."

Background

[12] This matter has its genesis in a burglary that occurred on 9 February 2020 at the President's private residence at the Phala Phala Wildlife Game Farm (Phala Phala), during which foreign currency was stolen. The circumstances surrounding the source, storage and subsequent handling of that currency later gave rise to public controversy, criminal complaints and, ultimately, parliamentary proceedings in terms of section 89(1) of the Constitution.

[13] On 1 June 2022, Mr Arthur Fraser, the former National Commissioner for the Department of Correctional Services, issued a media statement announcing that he had laid criminal charges against the President and other parties. According to Mr Fraser, the stolen foreign currency, which he estimated between 4 million USD and 8 million USD, was illegally brought to South Africa by the President's advisor, Mr Bejani Chauke, who collected it during trips he undertook on the President's behalf in countries such as Saudi Arabia, Egypt, Morocco and Equatorial Guinea.

[14] On Mr Fraser's account, the money was not declared to the South African Revenue Service (SARS) or the South African Reserve Bank (SARB). It was initially hidden in a couch in the President's home at Hyde Park in Johannesburg, and then transferred to the couch at Phala Phala. This was done with the assistance of the head of the Presidential Protection Unit of the South African Police Service (SAPS), Major General Walther Rhoode (General Rhoode), with the full knowledge and acquiescence of the President. In Mr Fraser's view, the fact that the President had large, undeclared sums of foreign currency hidden in his furniture at his private residence was prima facie proof of money laundering and was in breach of the law. Thus, he implored SAPS to investigate the conduct of the President and establish the origins of these large sums of foreign currency. He also alleged that the President had sought assistance from his Namibian counterpart, President Hage Geingob, in the arrest of the suspected mastermind of the theft of the money, who was allegedly hiding in Namibia.

[15] The President denied Mr Fraser's allegations. He insisted that the money was the proceeds of a cash sale of 20 buffalo made on Christmas Day in 2019 to a Sudanese businessman, Mr Mustafa Mohamed Ibrahim Hazim, and was far less than Mr Fraser stated. According to him, the money was kept in a safe in an office at Phala Phala and, on his instructions, would be banked on the return of Phala Phala's general manager, Mr Hendrik von Wielligh, who was on leave, and the sale transaction was processed to finality after the festive season. No tax invoice had been generated and the buffalo had not been collected. However, the Phala Phala lodge manager, Mr Dumisani Sylvester Ndlovu, who was going home for the holidays, was uncomfortable about leaving the money in the safe to which several staff members had access. He decided to "store [it] below cushions of a sofa" in a rarely used spare bedroom in the President's residence until his return, as he thought no one would break into the President's house.

[16] On 18 July 2022, the President of the ATM, Mr Vuyolwethu Zungula, submitted a substantive notice of motion to the Speaker in terms of section 89(1) of the Constitution[7] and rules 129A to 129Q of the NA Rules. He requested the National Assembly to initiate an inquiry[8] into the removal of the President from his office on the allegations that he had committed a serious violation of the Constitution and the law, and serious misconduct.

[17] The motion set out four charges in terms of rule 129A.[9] It stated that the President had violated—

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[7] Section 89(1) provides:

> "The National Assembly, by a resolution adopted with a supporting vote of at least two-thirds of its [M]embers, may remove the President from office only on the grounds of—
>
> (a) a serious violation of the Constitution or the law;
>
> (b) serious misconduct; or
>
> (c) inability to perform the functions of office."

[8] The NA Rules use the terms "inquiry" and "enquiry" interchangeably and inconsistently. For the sake of consistency and clarity, this judgment uses the term "inquiry" throughout.

[9] Rule 129A provides:

(a) section 96(2)(a), read with section 83(b) of the Constitution, which prohibits Members of the Cabinet and Deputy Ministers from undertaking any other paid work, in that the President had publicly declared himself a farmer in the cattle and game business who buys and sells animals;

(b) section 34(1) of the Prevention and Combating of Corrupt Activities Act[10] (PRECCA), read with the South African Police Service Amendment Act,[11] which places a duty on persons to report corrupt transactions to a police official in the Directorate for Priority Crime Investigation. This was so because the President had failed to report to the police the housebreaking and theft of foreign currency amounting, according to him, to 580 000 USD that had been concealed in a couch at Phala Phala, and instead reported the matter to General Rhoode;

(c) section 96(2)(b) of the Constitution, in terms of which Members of the Cabinet and Deputy Ministers may not expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests, because General Rhoode had no authority to deal with security issues at Phala Phala and was given unlawful directions by the President whose life was not threatened by the burglary; and

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"(1) Any Member of the [National] Assembly may, by way of a substantive notice of motion in terms of Rule 124(6), initiate proceedings for a Section 89 inquiry, provided that—

(a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in Section 89, which must *prima facie* show that the President:

(i) committed a serious violation of the Constitution or law;

(ii) committed a serious misconduct; or

(iii) suffers from an inability to perform the functions of office;

(b) all evidence relied upon in support of the motion must be attached to the motion;

(c) the charge must relate to an action or conduct performed by the President in person; and

(d) the motion is consistent with the Constitution, the law and these rules."

[10] 12 of 2004.

[11] 10 of 2012.

(d) section 96(2)(b) of the Constitution, in terms of which Members of the Cabinet and Deputy Ministers may not act in a way that is inconsistent with their office, because his unlawful instruction to General Rhoode showed dishonesty and constituted misconduct and unlawfulness, and the President had failed to uphold, defend and respect the Constitution as required of him by section 83(b) of the Constitution.

[18] On 14 September 2022, the Speaker appointed the Panel[12] comprising retired Chief Justice Sandile Ngcobo, retired Judge Thokozile Masipa and Ms Mahlape Sello SC, a practising advocate,[13] and, on 19 October 2022, formally referred the motion to the Panel to conduct a preliminary inquiry in terms of rule 129C.[14]

[19] The Panel conducted an inquiry and submitted its Report in terms of rule 129G on 30 November 2022.[15] A summary of the facts gleaned from that comprehensive

[12] The Speaker made the appointment in terms of rule 129E.

[13] Associate Professor Richard Calland, who was also appointed, withdrew from the Panel.

[14] Rule 129C provides:

> "(1) When the motion is in order, the Speaker must immediately refer the motion, and any supporting documentation provided by the [M]ember, to the independent panel established for the purposes of considering preliminary Section 89 matters.
>
> (2) The Speaker must inform the [National] Assembly and the President of such referral without delay."

[15] Rule 129G provides:

> "(1) The panel—
>
> (a) must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice;
>
> (b) must consider any preliminary inquiry relating to a motion proposing a Section 89 inquiry, referred to it by the Speaker, and must make a recommendation to the Speaker, within 30 days, whether sufficient evidence exists to show that the President—
>
> (i) committed a serious violation of the Constitution or law;
>
> (ii) committed a serious misconduct; or
>
> (iii) suffers from an inability to perform the functions of office; and
>
> (c) in considering the matter—
>
> (i) may, in its sole discretion, afford any [M]ember an opportunity to place relevant written or recorded information before it within a specific timeframe;

document is that the incident occurred during the President's absence from Phala Phala, which sells Ankole cattle and wild animals to local and foreign customers who pay cash or by money transfer. The burglary occurred on 9 February 2020. Upon learning of the incident, the President reported it to General Rhoode, who established an investigating team comprising Sergeant Hlulani Rekhoto, Mr Trevor Fredericks (a social worker) and, reportedly, a National Prosecution Authority investigator, Mr Terrence Joubert. There is no record of a report of the case at the Bela-Bela SAPS station, in whose jurisdiction Phala Phala is situated.

[20] The Panel dealt with the matter on probabilities and found that there were "troubling unsatisfactory features in the explanation of the source of the foreign currency given by the President", that the information he presented "on the storage of the money [was] vague and [left] unsettling gaps" and that, on the probabilities, the money was stored in the leather couch described by one of the suspects subsequently arrested in connection with the matter "with the full knowledge and approval of the President . . . who did not express surprise at being told that the money had not been kept in the safe".

[21] The Panel expressed a number of concerns, including—

(a) that there was no evidence as to how the money came into the country and the exact amount that was stolen;

(ii) must provide the President immediately with copies of all information available to the panel relating to the inquiry;

(iii) must provide the President with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;

(iv) must not hold an oral hearing and must limit its inquiry to the relevant written and recorded information placed before it by Members in terms of this rule; and

(v) must in its report include any findings, including the reasons for such findings, upon which its recommendation is based and any minority view of any panellist must be contained in its report.

(2) The panel may determine its own working arrangements strictly within the parameters of the procedures provided for in this rule."

(b) the SARB investigation strongly suggested that there were no records of the money entering the country or being reported as having been received;

(c) the fact that other than his name, there were no other available particulars of Mr Hazim, such as his contact details and passport number;

(d) Mr Hazim had, for two and a half years, not collected the 20 buffalo he allegedly bought;

(e) instead of keeping the money in the safe until the next banking day it was hidden in a couch for over a month;

(f) the theft was neither reported to the SAPS for investigation as an ordinary crime nor reported under section 34(1) of PRECCA, but was surreptitiously investigated by the team established by General Rhoode, which traced the suspect to Namibia and asked the Namibian Police officials that the matter be "handled with discretion" because of the "sensitivity of the matter and the envisaged fall out it [would] create in South Africa";

(g) the President became involved in the investigation by "[seeking] assistance in apprehending the concerned suspect" from his Namibian counterpart;

(h) information placed before the Panel suggested that more than 580 000 USD was stolen; and

(i) suspects were arrested, interrogated and co-operated with the investigating team, but no one was charged amid accusations of torture and bribery of the suspects, who were allegedly each paid R150 000 to buy their silence.

[22] In the Panel's view, these were weighty considerations that left it in substantial doubt as to whether the stolen foreign currency was the proceeds of a sale. It found that the information placed before it, prima facie, established that—

(a) there was a deliberate intention not to investigate the commission of the crimes committed at Phala Phala openly;

(b) the misconduct based on violations of the provisions of section 96(2)(b) of the Constitution and the violation of section 34(1) of PRECCA were committed to keep the investigation a secret;

(c) the request to the Namibian police to "handle the matter with discretion" confirmed the latter intention;

(d) the President abused his position as Head of State by having the matter investigated as it was, and seeking the assistance of the Namibian President to apprehend a suspect; and

(e) there was more foreign currency concealed in the couch than the amount reflected in the acknowledgement of receipt that Mr Ndlovu gave to Mr Hazim and that was annexed to the Report.

[23] The Panel's ultimate conclusion was that the information placed before it disclosed, prima facie, that the President may have committed: (a) a serious violation of section 96(2)(a) of the Constitution; (b) a serious violation of section 34(1) of PRECCA; (c) serious misconduct in violating section 96(2)(b) of the Constitution by acting in a way that is inconsistent with his office; and (d) serious misconduct in that he violated section 96(2)(b) by exposing himself to a situation involving a conflict between his official responsibilities and his private business. He thus had a case to answer.

[24] The Panel also recorded that, at the time of its investigation, other institutions such as the Financial Surveillance Department of the SARB, which administers and investigates contraventions of the Exchange Control Regulations, SARS and the Public Protector were also investigating the matter, and that it was unaware of the progress of those investigations when it released its Report.

[25] On 5 December 2022, the President launched an application in this Court for the review and setting aside of the Report on the basis that the Panel had misconstrued its mandate, acted on information provided by parties who had no knowledge of the facts and failed to determine whether he had acted in bad faith. On 13 December 2022, the Report came before the National Assembly for consideration and voting on the question

whether to take the matter forward and refer it to the Impeachment Committee. The National Assembly voted by a majority of 214 to 149 against proceeding with the inquiry under section 89(1) of the Constitution. As a result, the matter was not referred to the Impeachment Committee. Save for five of its members, the ANC, as the majority political party at the time, voted against the motion.

[26] Thereafter, on 10 January 2023, the EFF sought direct access to this Court for the review and setting aside of the NA vote, albeit on grounds different to those that have been advanced in these proceedings.[16] On 1 March 2023, this Court dismissed the review applications of the President and the EFF. It held that the President neither made out a case for exclusive jurisdiction nor direct access, and that the EFF also failed to establish a case for direct access. All was quiet for about a year until the EFF launched the present application on 13 February 2024, with a request for its expedited hearing, before the general elections scheduled for 29 May 2024.

Relief sought

[27] The EFF contends that this application concerns the National Assembly's failure to hold the Executive to account by: (a) acting irrationally in blocking the further investigation of a prima facie case against the President despite the objective findings of the Panel; and (b) failing to properly consider the content of the Report by effectively setting aside the Panel's conclusions without establishing a factual or legal basis upon which to do so. In essence, it challenges the resolution of the National Assembly declining to establish and mandate an Impeachment Committee as irrational and unlawful, in breach of various provisions of the Constitution. It also challenges rule 129I as a breach of the National Assembly's constitutional obligation under section 89 of the Constitution to put in place an effective mechanism to hold the

[16] In that matter, CCT 03/23, which was dismissed for lack of urgency, the EFF sought to review, set aside and declare unconstitutional and invalid certain conduct of the Speaker. The issues were whether the Speaker was entitled to call a vote on the adoption of the Report and, if so, whether she was correct to conduct the vote by open ballot.

President accountable in terms of that section.[17] Accordingly, the EFF seeks orders which may be summarised under four main classes.

[28] Firstly, in prayer one of the EFF's notice of motion, it seeks a declarator that this application falls within the exclusive jurisdiction of this Court, in terms of section 167(4)(e), owing to Parliament's failure to uphold its constitutional obligations. In the second prayer, it seeks to have the NA vote declared irrational. In the third and fourth prayers, it seeks further or alternative declarators that the National Assembly's failure and vote infringe, amongst others, sections 1(c) and (d); 42(3); 48; 55(2)(a) and (b)(i); 57(1)(b); 92(2); and 96(1), (2)(b) and (2)(c) of the Constitution.

[29] Secondly, in the fifth prayer, the EFF seeks substitutionary relief that the NA vote be replaced with a decision adopting the Report. In the alternative, a referral of the matter back to the National Assembly to vote on the Report *de novo* (afresh) is sought.

[30] Thirdly, in the sixth and seventh prayers, the EFF challenges the constitutionality of rule 129I and seeks a declarator that it is inconsistent with the Constitution, as it allows the National Assembly to vote against a possible referral to the Impeachment Committee despite a finding of a prima facie case against a sitting President by the Panel; alternatively, because the rule is impermissibly vague. The EFF seeks an amendment of rule 129I to provide for the automatic referral of a prima facie finding to an Impeachment Committee to conduct a full investigation so as to give effect to the constitutional provisions listed in the third prayer. Alternatively, it seeks an amendment providing suitable guidelines as to how the discretion of the National Assembly is to be exercised in order to prevent political interference preceding the commencement of impeachment proceedings. The EFF seeks a suspension of the declaration of invalidity

[17] The EFF characterises the rule as amounting to a failure by the National Assembly to fulfil its (implicit) section 89 constitutional obligation in so far as that rule permits the National Assembly to decline to establish a committee of inquiry under section 89 (an Impeachment Committee in the language of the NA Rules) even in instances where the Panel finds that a prima facie case for impeachment exists.

of the rule for a period of 12 months to allow the National Assembly to amend the rule as requested.

[31] Lastly, the EFF prays for costs on the basis of the *Biowatch*[18] principle, and further and/or alternative relief in terms of section 172(1)(b) of the Constitution.

[32] The President, supported by the ANC, opposes the application on the bases that—

(a) it is, in truth and in fact, a judicial review, which was unreasonably delayed with no explanation and no request for condonation;

(b) it is not subject to this Court's exclusive jurisdiction;

(c) no case has been made out for direct access, as this is a rationality review which should have been instituted in the High Court;

(d) the NA vote was rational and is not reviewable, as it was merely not to proceed with the matter and did not have an enduring legal effect;

(e) the Panel had no evidence before it and misunderstood its mandate, which was to determine whether sufficient evidence existed to warrant an impeachment process, and not whether the information before it established, prima facie, that the President has a case to answer, as it found, and the Report is fundamentally flawed by reason of various misdirections;

(f) this Court should not substitute its decision for that of the National Assembly because this would violate the separation of powers doctrine, as section 89 of the Constitution confers the power to remove the President only on the National Assembly and there are no exceptional circumstances justifying a court to step into its shoes; and

(g) the attack against rule 129I is ill-founded because it is politically motivated, the Panel's mandate was confined by the motion and the rule

[18] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-5.

does permit the National Assembly to decide whether to proceed with an impeachment inquiry.

[33] Parliament concedes that the substantive relief sought by the EFF falls within this Court's exclusive jurisdiction, but it disputes the EFF's contention that rule 129I is unconstitutional. It also argues that, because of the EFF's unreasonable and unexplained delay in launching the application, conducting a section 89 inquiry before the Impeachment Committee has become legally impossible and that the matter is accordingly moot.

Issues

[34] The core issues before this Court are—

(a) whether this Court's exclusive jurisdiction under section 167(4) of the Constitution is engaged and, if not, whether the EFF competently sought and should be granted direct access as envisaged in section 167(6) of the Constitution;

(b) whether procedural issues prevent this Court from entertaining the merits;

(c) if this Court determines that it should entertain the merits of this matter—

(i) whether rule 129I is consistent with the Constitution;

(ii) whether the NA vote is consistent with the Constitution; and

(d) a just and equitable remedy.

[35] I turn to deal with these issues.

Exclusive jurisdiction

[36] The EFF argues that this Court's exclusive jurisdiction is engaged on the basis that Parliament has failed to fulfil its constitutional obligations to put in place an effective mechanism to process impeachment motions against the President, and to hold the President accountable in terms of section 89 of the Constitution.

[37] Section 167(4)(e) of the Constitution permits only this Court to determine whether Parliament or the President has failed to fulfil a constitutional obligation. This Court cautioned, in *Doctors for Life*,[19] that this provision must be construed narrowly and in a manner that does not trench on the powers of the Supreme Court of Appeal and the High Court to make orders concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President.[20] Care must be taken not to unduly deprive other courts of their constitutional jurisdiction even if pleadings allege unequivocally that the President or Parliament has failed to fulfil constitutional obligations. A mere allegation that Parliament or the President has failed to fulfil a constitutional obligation is insufficient.[21]

[38] Although this Court is ordinarily slow to intrude into the functional domain of Parliament, particularly where matters of political judgement and majority decision-making are involved, where the complaint is that Parliament has failed to fulfil a specific constitutional obligation, the Constitution itself requires judicial intervention by this Court alone. The purpose of granting this Court exclusive jurisdiction over defined matters is to preserve comity between the Judiciary and other branches of state, such that only the apex court will intrude into the domain of other branches in disputes implicating "sensitive areas of separation of powers" and "crucial political question[s]".[22] The closer a dispute is to the sensitive area of separation of powers and to crucial political questions, the more likely it is that the issues will fall within section 167(4).[23] It should be noted, however, that "the mere fact that a matter is or may become politically fraught does not of itself mean that only this Court has jurisdiction to deal with it. More is needed."[24]

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[19] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[20] Id at para 15. They are empowered to do so under section 172(2)(a) of the Constitution.

[21] *EFF I* above n 2 at para 17.

[22] *Doctors for Life* above n 19 at paras 23-4.

[23] Id at para 24.

[24] *Women's Legal Centre Trust v President of the Republic of South Africa* [2009] ZACC 20; 2009 (6) SA 94 (CC) (*Women's Legal Centre I*) at para 15.

[39] In *Women's Legal Centre I,* the trigger to this Court's exclusive jurisdiction was said to be dependent on "the nature of the obligation, whether its content can be clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring".[25]

[40] In *EFF I*, the necessary interpretive exercise in relation to section 167(4)(e) was described as follows:

> "First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely examined to determine whether it is of the kind envisaged by section 167(4)(e). . . . An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation shared with other organs of state will always fail the section 167(4)(e) test."[26]

[41] In sum, therefore, in determining whether this Court's exclusive jurisdiction under section 167(4)(e) is triggered—

(a) the constitutional obligation at issue must be one specifically imposed on Parliament or the President;[27]

(b) the words "fulfil a constitutional obligation" must be given a narrow meaning to preserve the constitutional allocation of jurisdiction;[28] and

(c) the provisions must be interpreted contextually and purposively, bearing in mind that this Court alone is entrusted with resolving disputes that have crucial and sensitive political implications.[29]

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[25] Id.

[26] *EFF I* above n 2 at paras 16 and 18; see also *Doctors for Life* above n 19 at para 19.

[27] *EFF I* id at para 16 and *Women's Legal Centre I* above n 24 at paras 16, 20 and 23.

[28] *President of the Republic of South Africa v South African Rugby Football Union* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 25.

[29] *EFF I* above n 2 at para 19.

[42] Two questions must be answered in determining whether this Court's exclusive jurisdiction is engaged in terms of section 167(4)(e). First is whether a party has made out a case in its pleadings before this Court to engage its exclusive jurisdiction. Only if the party has a case on the pleadings does the second question arise: whether the obligations referred to are of the kind contemplated in section 167(4)(e).[30]

Exclusive jurisdiction – the pleaded case

[43] The EFF pleads that the essence of its application is the failure of Parliament to uphold and carry out its constitutional obligation to hold the President accountable. It attacks both the constitutionality of rule 129I and the lawfulness of the NA vote not to refer the Report to the Impeachment Committee on the basis that they violate the accountability provisions in the Constitution. Though describing the application as one for declaratory relief, the EFF places reliance on rationality, which is a legality review ground, and has sought relief which is couched in the language of a legality review.

[44] The EFF's pleaded case is not a model of clarity. However, in *Gcaba*,[31] this Court held that jurisdiction should be determined by considering "not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits".[32] And later, in *Mbatha*,[33] this Court said that an examination of the pleadings is required to determine "the legal basis of the claim under which the applicant has chosen to invoke the court's competence".[34] There is, therefore, a duty to analyse the EFF's founding papers to understand the nature of the challenge it advances and determine whether the shoddy framing of its challenge is fatal to its case.

[30] Id at para 16.

[31] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; [2009] 12 BLLR 1145 (CC); 2010 (1) BCLR 35 (CC); 2010 (1) SA 238 (CC); (2010) 31 ILJ 296 (CC).

[32] Id at para 75.

[33] *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC); [2014] 4 BLLR 307 (CC); (2014) 35 ILJ 349 (CC).

[34] Id at para 160 (dissenting judgment of Jafta J), referencing *Gcaba* above n 31 at para 75.

[45] The EFF's pleaded case is replete with allegations of failures by the National Assembly to fulfil its constitutional obligations to hold the Executive to account. It submits that the current structure of rule 129I defeats the purpose of section 89 of the Constitution to hold the President accountable by permitting the National Assembly to block the process before it reaches the Impeachment Committee. This, it argues, makes it impossible to reach the investigative stage if the political party to which the President belongs holds a majority and the President continues to enjoy the support of that party. It also submits that the failure to refer the Report to the Impeachment Committee constituted a failure to hold the President accountable. Properly understood, the EFF's case is that rule 129I and the NA vote are unconstitutional because they permit the National Assembly to evade its constitutional obligation to hold the President accountable.

Exclusive jurisdiction – the National Assembly's obligations

[46] The next question is whether the obligations identified by the EFF fall within those contemplated by section 167(4)(e) of the Constitution.[35] The Constitution imposes clear and specific obligations on the National Assembly to ensure executive accountability. Section 1(d) entrenches accountability as a foundational value of our constitutional order, and section 42(3) imports that value into the National Assembly's role of scrutinising and overseeing executive action.[36] Section 55(2) then enjoins the National Assembly to put in place "mechanisms" to maintain oversight of the exercise of national executive authority (that is, to ensure accountability).[37] The means through

[35] *EFF I* above n 2 at para 16.

[36] Section 42(3) provides:

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

[37] Section 55(2) mandates the National Assembly to provide for mechanisms—

> "(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of—
>
> (i) the exercise of national executive authority, including the implementation of legislation; and

which these mechanisms are given effect, as this Court in *EFF II* stated,[38] are the NA Rules, adopted pursuant to section 57 of the Constitution.[39]

[47] Accountability obligations are also incorporated into section 89(1) of the Constitution. That might appear contrived because section 89(1), on its express terms, does no more than empower the National Assembly to remove the President from office if one of the listed grounds exists:

> "(1) The National Assembly, by a resolution adopted with a supporting vote of at least two-thirds of its [M]embers, may remove the President from office only on the grounds of—
>
> (a) a serious violation of the Constitution or the law;
>
> (b) serious misconduct; or
>
> (c) inability to perform the functions of office."

[48] Measured solely by its express terms, the section discloses no constitutional obligations at all. If anything, the use of the word "may" suggests that the exercise of

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(ii) any organ of state."

[38] *EFF II* above n 3 at paras 182 and 196.

[39] Section 57 provides:

> "(1) The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
>
> (2) The rules and orders of the National Assembly must provide for—
>
> (a) the establishment, composition, powers, functions, procedures and duration of its committees;
>
> (b) the participation in the proceedings of the [National] Assembly and its committees of minority parties represented in the [National] Assembly, in a manner consistent with democracy;
>
> (c) financial and administrative assistance to each party represented in the [National] Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the [National] Assembly effectively; and
>
> (d) the recognition of the leader of the largest opposition party in the [National] Assembly as the Leader of the Opposition."

the power is entirely optional, and that the section is no source of any obligations at all. Such a conclusion would be fallacious and at odds with the values on which our constitutional order is founded, the full scheme of the Constitution as well as this Court's precedents.

[49] In the first place, the word "may" does not always imply the existence of a discretion.[40] As a default, "may" empowers but is otherwise neutral on the existence of discretion. Furthermore, section 89(1) only uses the word "may" in relation to the removal of the President – the final decision in the impeachment process. Only the removal itself is cast as permissive and discretionary. No other aspect of the section is qualified by the "may" discretion.

[50] This was confirmed by this Court in *EFF II*, in which it was held that the ultimate decision on removal is discretionary in nature:

> "[S]ection 89(1) does not oblige the [National] Assembly to remove the President from office, even where one or more of the listed grounds are established. On the contrary, the [National] Assembly retains a discretionary power to remove the President."[41]

[40] See *South African Human Rights Commission v Standard Bank of South Africa Ltd* [2022] ZACC 43; 2023 (3) SA 36 (CC); 2023 (3) BCLR 296 (CC) (*SAHRC*) at paras 24-9. There, this Court considered the question whether the High Court is obliged to entertain or is "at liberty not to entertain matters falling within its jurisdiction". The case in repudiation of the obligation and in favour of the High Court's alleged liberty relied largely on the word "may" in the sections conferring jurisdiction on the High Court (section 169(1)), the Supreme Court of Appeal (section 168(3)) and the Constitutional Court (section 167(3)), the argument being that this afforded these courts a discretion. This Court observed that "at the centre of [the SAHRC's] proposition was the idea that the word 'may' tells us that the section is permissive: the High Court 'may', not 'must'". This Court rejected that proposition, holding that "[t]here is no discretionary power to decline the assumption of jurisdiction over a matter within the jurisdiction of a court". In the Court's view, those sections, despite using the word "may", were far more neutral: serving "to confer a power". They were "open ended" in that while they did not necessarily imply either a discretion or an obligation, they are capable of comfortably co-existing with an obligation requiring the High Court to "entertain matters falling within its jurisdiction". The same is true for section 89(1)'s use of the word "may", which is not entirely permissive. As in *SAHRC*, where this Court pointed to the provisions in which the High Court's empowering provision was situated, and the logic underlying those sections, in concluding that, by default, the High Court was duty-bound to adjudicate claims brought before it, the scheme, the structure and purpose of section 89(1) are most relevant. As clarified by this Court's jurisprudence, despite the section's use of the word "may", its strictures have both obligatory and permissive dimensions.

[41] *EFF II* above n 3 at para 203.

[51] The use of the word "may" in section 89(1) thus grants the National Assembly a wide, discretionary power limited to the removal of the President if certain grounds exist. Does that mean that section 89 creates no obligations for the National Assembly? The answer is no. This Court's jurisprudence makes clear that permissive language can, in context, confer a power coupled with a duty.

[52] In *Van Rooyen*,[42] it was held that "may" in section 13(3)(aA) of the Magistrates Act[43] imposes an obligation on the Minister to act.[44] In *Premier, Gauteng v Democratic Alliance*,[45] this Court confirmed that section 139(1) of the Constitution confers not mere discretion but a duty to intervene when municipalities failed to fulfil their obligations.[46] Likewise, in *Saidi*,[47] this Court held that Refugee Reception Officers were obliged to extend permits pending determination of refugee status, despite the use of the word "may".[48] Most recently, in *Zuma*,[49] this Court reaffirmed that "may" can, on proper construction, be a power coupled with a duty.[50] Read in this light, the word "may" in section 89(1) can exist quite comfortably alongside obligations.[51] It cannot be concluded that the National Assembly is free of obligations under section 89.

[53] If the text is solely what must be considered, there is minimal textual foundation, if any, for the conclusions that section 89(1) is incapable of founding any obligations and that its matrix is entirely permissive. We must look to the purpose and context of

[42] *Van Rooyen v The State* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*).

[43] 90 of 1993.

[44] *Van Rooyen* above n 42 at paras 178-84.

[45] *Premier, Gauteng v Democratic Alliance* [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC).

[46] Id at para 59.

[47] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC).

[48] Id at paras 16-17.

[49] *Zuma v President of the Republic of South Africa* [2025] ZACC 21; 2025 (12) BCLR 1428 (CC).

[50] Id at para 30.

[51] See also *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at paras 72-3, construing "may" in a particular legislative provision as conferring a power coupled with the duty to exercise it when the requisite circumstances are present.

the provision to understand its role in the constitutional order,[52] since, as is explained below, the National Assembly's power is accompanied by a duty to exercise it responsibly when the circumstances contemplated by section 89(1) arise.

[54] The introduction of our Constitution brought the institution of an interlocking scheme of checks and balances which, framed by founding values and augmented by "a higher duty to respect the law",[53] compels the state in all its forms to "do right, and . . . do it properly".[54]

[55] The National Assembly's powers and its obligation to hold the Executive accountable are exercised and fulfilled through a suite of checks and balances, with some of the "regular or normal ones"[55] being the following:

> "[C]alling on Ministers to: regularly account to Portfolio Committees and *ad hoc* [as needed] Committees; and avail themselves to respond to parliamentary questions as well as other question and answer sessions during a National Assembly sitting. It is also through the State of the Nation Address, Budget Speeches and question and answer sessions that the President and the rest of the Executive are held to account."[56]

[56] But, as further observed by the Court in *UDM v Speaker*, not all such "regular or normal" checks and balances are appropriate or effective mechanisms in all instances and there may come a time when they are not, or appear not to be, effective.[57] When

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[52] See *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 51. See also *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at paras 49-52, observing that the approach to and canons of legal interpretation are the same for the Constitution and statutes.

[53] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) (*Buffalo City*) at paras 60-2.

[54] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 82.

[55] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 106 (CC) (*UDM v Speaker*) at paras 40-1.

[56] Id.

[57] Id at para 41.

"regular or normal" mechanisms are ineffectual under the circumstances, or a "serious" breach is "thought to have occurred",[58] then—

> "the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms. Those measures range from being voted out of office by the electorate to removal by Parliament through a motion of no confidence or impeachment."[59]

[57] Section 89(1) and section 102 have been described as "tools" for fulfilling the National Assembly's overarching constitutional obligation of holding "the [M]embers of the [E]xecutive accountable"[60] and its specific obligation of "holding the President to account".[61]

[58] Section 102 too does not mention the value or obligation of accountability by name. Yet, since *Mazibuko v Sisulu*,[62] this Court has linked section 102 to the duty to uphold accountability. In that decision, this Court said:

> "A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the [National] Assembly a vital power *and duty* to scrutinise and oversee executive action."[63] (Emphasis added.)

[59] And, in *UDM v Speaker*, a unanimous Court made explicit mention of the obligation to hold the Executive to account under section 102:

> "Although a motion of no confidence may be invoked in instances that are unrelated to the purpose of holding the President to account, it is a potent tool towards the achievement of that purpose. In that context, it is inextricably connected to the

[58] Id at para 10.

[59] Id.

[60] Id at para 40.

[61] *EFF II* above n 3 at para 134, referencing *UDM v Speaker* above n 55.

[62] *Mazibuko N.O. v Sisulu N.O.* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC).

[63] Id at para 43.

> foundational values of accountability and responsiveness to the needs of the people. It is a mechanism at the disposal of the National Assembly to resort to, whenever necessary, for the enhancement of the effectiveness and efficiency of its constitutional obligation to hold the Executive accountable and oversee the performance of its constitutional duties."[64]

[60] Likewise, section 89(1) is inextricably linked – even more so – to the foundational value of accountability and the related constitutional obligations. Unlike section 102 motions of no confidence, which can be proceeded with for any reason,[65] section 89(1) is of application where there is "serious"[66] concern about the President and "applies where there is a serious violation of the Constitution or the law, serious misconduct or an inability to perform the functions of the office".[67] The process of such impeachment targets the incumbent of that high office only, not the Executive in whole or part.[68] Only section 89(1) is so explicitly specific as to address serious concerns about the President. Section 89(1) is thus a potent tool in the hands of the Members of the National Assembly for fulfilling their overarching constitutional accountability obligations.[69]

[61] Flowing from these provisions of the Constitution, the National Assembly has three overarching accountability obligations, which were summarised by this Court in *UDM v Speaker* as follows:

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[64] *UDM v Speaker* above n 55 at para 32.

[65] Id at paras 45-6. There, this Court noted:

> "The Constitution does not say when or on what grounds it would be fitting to seek refuge in a motion of no confidence.
>
> As to when and why, a point could conceivably be reached where serious fault-lines in the area of accountability, good governance and objective suitability for the highest office have since become apparent. Those concerns might not necessarily rise to the level of grounds required for impeachment. But, the lingering expectation of the President delivering on the constitutional mandate entrusted to him or her might have become increasingly dim."

[66] Id at para 10.

[67] Id at para 42.

[68] Id at para 45.

[69] Id at para 40.

> "The National Assembly indeed has the obligation to hold Members of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority."[70]

[62] The challenge of the EFF in this case implicates the first two of the National Assembly's overarching accountability obligations: the obligation to "put effective mechanisms in place" and the obligation to "hold [M]embers of the Executive accountable".[71]

[63] The National Assembly bears an obligation to put in place "effective mechanisms" to hold Members of the Executive accountable. The Constitution does not specify the mode of or thresholds for decision-making by National Assembly structures or mechanisms (e.g., committees), or in specific processes. This rule-making authority still involves a substantial measure of discretion as to procedure, mode and mechanism, even though it is constrained by the implied structure for impeachment processes in section 89: a first stage involving a preliminary inquiry during which the National Assembly determines whether a listed ground exists, and, where a listed ground exists, a second voting stage on the question of whether the President should be removed. As this Court put it:

> "The form which this preliminary inquiry may take depends entirely upon the [National] Assembly. It may be an investigation or some other form of an inquiry. It is also up to the [National] Assembly to decide whether the President must be afforded a hearing at the preliminary stage."[72]

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[70] Id.

[71] Id. See also para 12, where this Court recorded:

> "Implicit in this application is a deep-seated concern about just how effective Parliament's constitutionally prescribed accountability-enforcing mechanisms are. Do they ensure that there is enforcement of consequences for failure to honour core constitutional obligations or is it easy to escape consequences by reason of the inefficacy of mechanisms?"

In *EFF II* above n 3 at para 130, the majority stated that the obligation on the National Assembly was alleged to flow from "various provisions of the Constitution" and concerned whether the National Assembly "failed to put in place mechanisms and processes for holding the President accountable in terms of section 89 of the Constitution".

[72] *EFF II* id at para 180.

[64] This Court, in *EFF II*, concluded that, although section 89(1) does not expressly prescribe that mechanisms be established for the impeachment process, the provision "implicitly imposes an obligation on the [National] Assembly to make rules specially tailored for an impeachment process contemplated in that section".[73] So, despite being silent itself, section 89(1) carries an implied obligation to operationalise the provision. When one appreciates section 89 in the broader constitutional scheme, specifically when reading it together with sections 55 and 57 of the Constitution, an express textual requirement of mechanisms and rules becomes apparent. This conclusion was coupled with a corresponding declaration in this Court's order that—

> "[t]he failure by the National Assembly to make rules regulating the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid."[74]

[65] With the enactment of rules following *EFF II*, the question in this case is not whether the National Assembly has failed by not putting in place a mechanism at all. Now that a mechanism exists and is embodied in specific rules, the inquiry is narrower, being reduced to the question of the efficacy of the mechanism.[75] The obligation to put in place effective mechanisms is interlinked with another constitutional obligation, that is, the National Assembly's "obligation to hold [M]embers of the Executive accountable".[76]

[66] As to this second obligation, it was held in *EFF II* that the question is not whether the National Assembly has taken any action to hold the President accountable in

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[73] Id at para 196.

[74] Id at para 222.

[75] *UDM v Speaker* above n 55 at para 40. Put differently, the question is whether rule 129I ensures that the National Assembly can effectively discharge its obligation under section 89(1), read with section 55 of the Constitution. This question also falls within this Court's exclusive jurisdiction because the efficacy of the mechanism is a requirement of a section 167(4)(e) obligation flowing from section 89(1). See *EFF II* id at para 199.

[76] *UDM v Speaker* id at para 40.

fulfilment of its constitutional obligations but, rather, "whether appropriate action has been taken against the President by the [National] Assembly, the only institution mandated to do so".[77] Pronouncing on this question, this Court determined that the National Assembly had "failed to hold the President to account following delivery of this Court's judgment, as was required by section 89(1)".[78] The majority counted *two* obligations under section 89(1),[79] and said:

> "The failure by the National Assembly to determine whether the President has breached section 89(1)(a) or (b) of the Constitution is inconsistent with this section and section 42(3) of the Constitution.
>
> The National Assembly must comply with section 237 of the Constitution and fulfil the obligation referred to in [the above paragraph], without delay."[80]

[67] In essence, this Court has held that implicit in section 89(1) are two obligations: the obligation to put in place rules specially tailored for an impeachment process, which rules must constitute an effective mechanism; and the obligation to take appropriate action against the President where there are allegations of conduct falling within the scope of that section.[81]

[68] Both obligations fit the rubric of section 167(4)(e). The obligation to put in place an effective mechanism rests solely and specifically with the National Assembly[82] and it is for the National Assembly to determine the content of the mechanism through which section 89 is given effect. Judicial review of this type of obligation is reserved

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[77] *EFF II* above n 3 at para 199.

[78] Id at para 208.

[79] See id at para 209, where this Court said:

> "Having held that the [National] Assembly has failed to fulfil two of the obligations under the Constitution, section 172(1) of the Constitution obliges us to declare that these failures are inconsistent with the Constitution."

[80] Id at para 222.

[81] Id at paras 199, 208 and 222.

[82] *EFF I* above n 2 at para 43 and *EFF II* id at paras 16-17 and 129-30.

for this Court, since it "trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers".[83]

[69] So too is the obligation to take appropriate action to hold the President accountable, which is specifically imposed on the National Assembly.[84] Only the National Assembly can take the kind of appropriate action called for when an impeachment ground is alleged to exist.

[70] Such action would subject the President to the checks and balances that form part of the separation of powers, and this Court's review of that action would concomitantly implicate the separation of powers and entail the resolution of sensitive political issues that may border on second-guessing the National Assembly's actions.[85] Where it is contended that the National Assembly has not taken appropriate action to hold the President accountable, this Court's exclusive jurisdiction is engaged, as was recognised in *EFF II*.

[71] This Court, in *EFF II*, was unanimous in holding that its exclusive jurisdiction was engaged in respect of the claims in that case, which included a claim that the National Assembly had failed to hold the President to account through its failure to convene an investigation into whether the President had been guilty of conduct that would warrant the exercise by the National Assembly of its powers under section 89(1). It was this claim that gave rise to this Court's declaration that the National Assembly had failed to determine whether the President had breached section 89(1)(a) or (b) and its consequential order that the National Assembly fulfil that obligation without delay.

[72] The obligation to take "appropriate action" to hold the President accountable does not mean that the National Assembly would be obliged to remove the President from office under section 89, even if the National Assembly were to determine that one

[83] *Doctors for Life* above n 19 at para 26.

[84] *EFF I* above n 2 at para 43 and *EFF II* above n 3 at paras 16-17 and 129-30.

[85] Id.

of the grounds for doing so exists. Both that determination and any removal decision are reserved for the elected representatives serving in the National Assembly. In the words of the majority in *EFF II*:

> "This is because section 89(1) does not oblige the [National] Assembly to remove the President from office, even where one or more of the listed grounds are established. On the contrary, the [National] Assembly retains a discretionary power to remove the President."[86]

[73] As stated, under section 89(1), what is permissive is the exercise of power to remove the President or not. But what is not permissive, and what the obligation to hold the President accountable demands, is that appropriate action must be taken to determine whether one of the section 89(1) listed grounds exists. If it were not so, then it may be asked how this Court, in *EFF II*, could have declared that "[t]he failure by the National Assembly to determine whether the President has breached section 89(1)(a) or (b) of the Constitution is inconsistent with this section and section 42(3) of the Constitution".[87]

[74] Thus, as in *EFF II*, one of the crucial questions before the Court in this case is "whether appropriate action has been taken against the President by the [National] Assembly, the only institution mandated to do so".[88]

[75] In my view, therefore, there is a constitutional obligation upon the National Assembly, at the preliminary inquiry stage of an impeachment process, to make a positive determination as to whether one of the grounds for impeachment exists by

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[86] *EFF II* id at para 203.

[87] Id at para 222. The grounds listed in section 89(1) are preconditions for the removal of a President under that section. But the grounds also form the foundation of the constitutional obligations under section 89(1). That is how this Court understood the grounds in *EFF II* at para 179. Despite describing the grounds as preconditions, the holdings of this Court in *EFF II* are unequivocal that the shortcomings of the National Assembly lay not in it exercising a removal power unavailable to it without one of the grounds (preconditions) being established, but instead constituted a failure to fulfil constitutional obligations, namely, putting in place an effective mechanism and taking appropriate action (that is, facilitating the impeachment process and determining whether one of the grounds exists).

[88] Id at para 199.

taking "appropriate action" when faced with an impeachment motion substantiated by sufficient evidence.

[76] There are section 167(4)(e) constitutional obligations at stake. The challenge to rule 129I implicates the obligations to "put effective mechanisms in place". To be effective, such a mechanism must allow and require the National Assembly to discharge its obligation to "take appropriate action" to hold the President accountable. The challenge to the National Assembly's vote not to refer the Report to the Impeachment Committee implicates the obligation to "hold [M]embers of the Executive accountable" and to "take appropriate action" against the President.

[77] In respect of the challenge to the vote, can it be said that the grounds advanced by a party to demonstrate that an obligation was not fulfilled somehow deprive this Court of its exclusive jurisdiction? In other words, does the fact that the EFF attacks the NA vote on the ground of rationality – traditionally a legality review ground – somehow remove this matter from the ambit of section 167(4)(e)? The answer is no. And to explain that answer, something must be said of this Court's recent decision in *Zuma*.[89]

[78] *Zuma* might seem to suggest that lawfulness and rationality reviews never engage this Court's exclusive jurisdiction, as rationality and lawfulness are universal standards and not specific obligations imposed on Parliament or the President. However, that would not be an accurate reading of that decision. *Zuma* does not hold that, where section 167(4)(e) is engaged, universal standards such as lawfulness and rationality cannot be applied by this Court in the exercise of its exclusive jurisdiction. It makes the narrower point that rationality and lawfulness are constitutional standards that bind all exercises of public power and are not, in themselves, obligations as contemplated in section 167(4)(e).

[89] *Zuma* above n 49.

[79] In *Zuma*, this Court pointed to a crucial difference between a defective exercise of constitutional powers and a failure to fulfil a section 167(4)(e) constitutional obligation, explaining that—

> "[t]he constitutional imperatives of rationality and legality bind all organs of state and public functionaries alike. Any 'failure' to comply with these standards is not a failure to comply with a constitutional obligation uniquely imposed on the President, but rather a breach of general constitutional principles binding on all holders of public power.
>
> . . .
>
> The President's conduct is challenged as irrational and inconsistent with various constitutional provisions, *but his conduct does not arise from obligations imposed specifically and uniquely on the President by the Constitution in the narrow sense required for exclusive jurisdiction*."[90] (Emphasis added.)

[80] To be clear, *Zuma* concerned the allegedly irrational exercise of a discretionary constitutional power,[91] not the allegedly irrational discharge of a specific constitutional obligation. The reliance on rationality alone, and the absence of a claim grounded in a specific and unique constitutional obligation as envisaged in section 167(4)(e), were fatal in *Zuma*. That is not so here. In this case, independent, specific and unique constitutional obligations as contemplated by section 167(4)(e) are implicated. Rationality and lawfulness are simply the standards used to assess whether those obligations have been fulfilled.

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[90] Id at paras 29 and 40. In fuller terms, what this Court said at paras 39 and 40 was this:

> "As already stated, it is trite that our exclusive jurisdiction is not engaged where the President is said to have exercised some power in a manner which conflicts with constitutional principles binding on all persons vested with public power – for example where the President exercises a power arbitrarily, irrationally, for an improper purpose or in bad faith.
>
> The applicants seek to characterise this as a failure by the President to fulfil his constitutional obligations, but the substance of their case is that they disagree with the manner in which he exercised his discretionary powers. *The President's conduct is challenged as irrational and inconsistent with various constitutional provisions, but his conduct does not arise from obligations imposed specifically and uniquely on the President by the Constitution in the narrow sense required for exclusive jurisdiction*." (Emphasis added.)

[91] In the main, the powers at issue in *Zuma* were the powers of the President to appoint commissions of inquiry in terms of section 84(2)(f); appoint ministers and assign their powers and functions in terms of section 91(2); and temporarily assign functions to Members of Cabinet in terms of section 98. See id at para 42.

[81] What *Zuma* establishes, therefore, is that universal standards such as lawfulness or rationality are applied to measure law or conduct across the constitutional spectrum. They cannot, without more, generate section 167(4)(e) obligations, and cannot, by themselves, engage this Court's exclusive jurisdiction.[92] In other words, lawfulness or rationality standards are not themselves sources of obligations for purposes of section 167(4)(e). Instead, a specific and unique constitutional obligation independent of standards such as rationality and lawfulness must be demonstrated to satisfy section 167(4)(e).[93] Standards such as rationality or lawfulness may then find application in evaluating fulfilment, once such an obligation is demonstrated.[94]

[82] It follows from the reasoning in *Zuma* that all that needs to be established is a section 167(4)(e) obligation. It matters not how or why the pleaded failure to fulfil that obligation occurred – whether the failure is due to irrationality, unlawfulness, omission or otherwise. It is equally true that, consistent with *Zuma*, applying various general standards, doctrines and tests does not represent any expansion of this Court's section 167(4)(e) exclusive jurisdiction.[95] Such application is no ordinary legality review: it involves only the adjudication of the fulfilment of section 167(4)(e) constitutional obligations within the confines of their strictures.

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[92] Id at paras 30, 39, 42 and 44.

[93] Id at paras 27, 29 and 35.

[94] When section 167(4)(e) states that this Court has exclusive jurisdiction to decide that Parliament or the President has "failed" to fulfil a constitutional obligation, it means a failure to do so in the manner required by the Constitution. A failure occurs within the meaning of section 167(4)(e) not only when Parliament or the President fails to act at all but also when Parliament or the President, in purporting to fulfil the obligation, acts in a way that is constitutionally invalid. The effect of a successful review in such circumstances – the setting aside of the purported conduct by Parliament or the President in compliance with the constitutional obligation – is to reveal that the obligation has not been fulfilled as required by the Constitution.

[95] If anything, the danger arises from the opposite. If this Court were to hold that the application of one of these universal standards to steps or measures taken in fulfilment of constitutional obligations removed matters from this Court's exclusive jurisdiction, it would involve the other superior courts enquiring into the existence and content of the obligation in question, defining any section 167(4)(e) obligation by determining whether its scope and terms require the steps or measures in question, and then using rationality or lawfulness to evaluate whether the steps or measures taken by Parliament or the President have fulfilled that obligation. In essence, other courts would be tasked with adjudication under section 167(4)(e). That would be completely at odds with this Court's exclusive jurisdiction jurisprudence – a jurisprudence emphatic about precluding other courts from intruding into the domain of other branches of government in disputes implicating sensitive areas of separation of powers and crucial political questions.

[83] To sum up, once there is an allegation of a failure to fulfil a specific obligation of the kind envisaged in section 167(4)(e), as is the case here, this Court's exclusive jurisdiction is engaged. What underpins the failure may be any kind of inconsistency with the constitutional obligation in question, including unlawfulness or irrationality.

[84] In this matter, section 167(4)(e) constitutional obligations were pleaded and have been established. Accordingly, the ineluctable conclusion is that this Court's exclusive jurisdiction is engaged. However, this finding does not dispense with the need to consider the other procedural issues, namely delay and mootness, which were raised in opposition to the application. I proceed to deal with these issues, in respect of which this Court possesses a discretion grounded in its inherent power to protect and regulate its processes,[96] to determine whether it is nonetheless in the interests of justice for the matter to be entertained regardless of their existence.

Delay

[85] Any legality review must be brought without undue delay.[97] Courts have the power to refuse to consider a review application in the face of delay, or to overlook the delay.[98]

[86] It must be recognised that the rule of law generates an inherent tension when challenges to exercises of public power are delayed. Courts are enjoined not to allow procedural obstacles to shield judicial scrutiny over exercises of public power, but, at the same time, must bear in mind the public interest in finality and certainty, which requires such challenges to be lodged without undue delay.[99]

[96] Section 173 of the Constitution.

[97] *Khumalo v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC); (2014) 35 ILJ 613 (CC) (*Khumalo*) at para 44.

[98] Id.

[99] Id at paras 45-7 and *Buffalo City* above n 53 at paras 68-9.

[87] To manage this tension, this Court has developed a two-stage approach to delay, which has been described as flexible,[100] factual, multi-factored and context-sensitive.[101] In the first stage, it must be determined whether the delay is undue or unreasonable, and in the second stage, the enquiry is whether the Court should nevertheless overlook the delay.[102]

[88] The National Assembly took the impugned decision on 13 December 2022, and the EFF brought this application 14 months later, on 13 February 2024. The EFF's founding affidavit contains no explanation for its delay in challenging the constitutionality of the NA vote. Instead, it argues that delay is not a consideration because this is a declaratory application rooted in sections 1 and 172 of the Constitution. It also submits that even if this Court were to apply the principles of delay, the interests of justice demand that the National Assembly discharge its duty by holding the President to account for the violations which the Panel found that he prima facie committed and, therefore, warrant the grant of the relief it seeks.

[89] The EFF's substantial delay, which was not explained, is unreasonable.[103] This is a significant factor in the adjudication of this matter, even if it is accepted that the application is one for declaratory relief, as the EFF claims.[104] As already indicated, however, the challenge launched by the EFF is, in substance, a legality review. This Court has previously held that it is not incumbent on a party launching a legality review

[100] *Buffalo City* id at paras 49-51 and 54.

[101] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (*Tasima I*) at para 144.

[102] *Khumalo* above n 97 at paras 49-52. This Court has also articulated the so-called "*Gijima* rule", which applies in cases where the delay cannot be overlooked, but the unlawfulness of the impugned decision is clear and not disputed (see *Buffalo City* above n 53 at paras 63, 66 and 71). In these instances, this Court may be constitutionally compelled to declare the decision unlawful in terms of its duty under section 172(1)(a) of the Constitution. But this application is not such a case, and nothing more need be said about the rule.

[103] *Khumalo* id at para 50, finding that an unexplained delay must be viewed as unreasonable.

[104] Applications for declaratory relief must also be launched within a reasonable time. See, for example, *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) at para 34 and *Samancor Holdings (Pty) Ltd v Samancor Chrome Holdings (Pty) Ltd* [2021] ZASCA 60; [2021] 3 All SA 342 (SCA); 2021 (6) SA 380 (SCA) at para 38.

application to bring a formal application for condonation.[105] Although the EFF did not have to seek condonation, its submission that its delay is irrelevant is fallacious. It must still be determined whether the interests of justice require that the delay should be overlooked, as the EFF itself obliquely acknowledged.

[90] I have already found that the lengthy and unexplained delay in this case is unreasonable. Therefore, it remains to be determined whether, even in the face of an extensive delay and absent an explanation, the delay should be overlooked, mindful that this Court's discretion is not unlimited and that its exercise must be guided by the values of the Constitution.[106] The relevant factors include potential prejudice to affected parties and adverse consequences that may result if the NA vote is set aside;[107] the nature of the impugned decision and the merits of the challenge;[108] the conduct of the applicant and whether it acted in good faith;[109] whether there was early notification of the challenge to the other parties;[110] the continued existence and availability of evidence;[111] and the practical possibility of reversing the defect.[112] But, ultimately, the overarching consideration is what the interests of justice require.[113]

[91] It is important that courts should not treat delay as an end in itself. Delay assumes significance for practical reasons. The delay bar has a purpose. An inordinate delay may weaken a court's ability to assess the matter because—

[105] In *Buffalo City* above n 53 at para 51, this Court noted that in a legality review, no explicit condonation application is required. See also *Khumalo* above n 97 at para 44.

[106] *Khumalo* id.

[107] Id at para 52 and *Buffalo City* above n 53 at para 54.

[108] *Khumalo* id at para 57 and *Buffalo City* id at para 55.

[109] *Buffalo City* id at paras 59-62.

[110] *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC) at para 23.

[111] Id.

[112] Id.

[113] In *Mogale* id at para 19, this Court noted that "even where there are delays in bringing public participation challenges, this Court considers whether it is in the interests of justice to non-suit applicants on that basis".

> "[t]he clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, [because] of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."[114]

If there is no prejudice to an opposing party or the court's ability to adjudicate a matter, delay should not ordinarily foreclose a review challenge.

[92] Although the EFF's delay is unreasonable, several factors favour overlooking it. None of the respondents have been prejudiced by it and this Court's ability to adjudicate the matter has not been impaired. The NA vote was made on the basis of the Report, which is part of the record of these proceedings, and the dispute turns on discrete legal questions. There is no question of unavailable evidence and this Court and the parties stand in the same position in which they would have been had the challenge been brought timeously.

[93] Regarding the conduct of the parties, while the delay is unexplained, some latitude should be extended to the EFF as it cannot be said that it conducted itself in bad faith even though it ought to have acted more diligently. It should also be noted that the question of delay in exclusive jurisdiction cases has, to date, only arisen in the context of public participation challenges.[115] This Court has not previously pronounced on whether delay may operate to exclude adjudication on the merits in matters which trigger its exclusive jurisdiction outside that context. The dearth of authority on how delay is to be treated in other exclusive jurisdiction matters somewhat mitigates the EFF's failure to address the issue adequately. While the contention that delay is not a factor is unsustainable, the delay itself is pardonable.

[114] *Khumalo* above n 97 at para 48. See also *Tasima I* above n 101 at para 160.

[115] *Doctors for Life* above n 19 at paras 216 and 218 and *Mogale* above n 110 at para 19.

[94] The nature of the decision, the prospects of success, as well as the importance of what is at stake must also be factored into the equation. The National Assembly's oversight role over the President lies at the heart of our constitutional scheme. Accountability is one of the foundational values of our Constitution, and the National Assembly bears the responsibility to ensure that the President is held accountable. The issues are of tremendous importance. It would be injudicious to permit delay to foreclose an interrogation of whether the National Assembly has fulfilled its responsibility of holding the President accountable, where the delay has neither caused prejudice nor hindered this Court's ability to adjudicate the matter and the merits are, at least, arguable.

[95] Overlooking an excessive delay, even where a proper explanation is lacking, is not without precedent in this Court. In *Mogale*, a delay of over two years was overlooked,[116] and in *Tasima I*, a "porous" explanation for a five-year delay was not a bar to this Court engaging on the merits.[117]

[96] I am satisfied in all the circumstances that in this instance there is a proper basis to overlook the delay.

Mootness

Whether the challenge to rule 129I is moot

[97] The opposing parties rightly did not contend that the EFF's challenge to rule 129I is moot. Indeed, nothing precludes the adjudication of the challenge to this rule in light of this Court's finding in *O'Brien*[118] that provisions of law have enduring effect. This Court put it thus:

[116] *Mogale* id at para 31.

[117] *Tasima I* above n 101 at paras 158-71.

[118] *O'Brien v Minister of Defence and Military Veterans* [2024] ZACC 30; 2025 (2) SA 613 (CC); 2025 (4) BCLR 460 (CC).

> "[A] constitutional challenge to existing and fully operational statutory provisions can never be considered moot. Constitutional-validity inquiries are always objective. Here, moreover, the specific facts relating to the case fortify the applicant's constitutional challenge in the sense that they bear out his constitutional-invalidity complaints. The challenges brought by the applicant plainly raise an existing or live controversy between the parties over the constitutionality of the impugned provisions and their proper interpretation. Any orders declaring the legislation to be constitutionally invalid would also have an immediate practical effect or result not only for the applicant, but also for all members of the [South African National Defence Force] and the broader public."[119] (Footnote omitted.)

[98] There is no fixed time period within which a challenge to a statutory provision must be brought. It may be subjected to constitutional scrutiny for as long as it is operative. In the present context, it hardly makes sense that a constitutional challenge to statutory provisions governing the National Assembly would become moot simply because the term of a particular National Assembly has come to an end, given that the legal effect of those provisions continues to operate beyond the lifespan of that National Assembly. The rules regulating the National Assembly remain part of the statutory framework and remain extant across the lifespans of various National Assemblies until they are struck down, amended or repealed. That the composition of the National Assembly has changed does not detract from the relevant rule's binding force. It simply means that the operation of the provisions will continue into the next Administration.

[99] In other words, whether a rule or law is constitutionally valid is an objective inquiry which examines whether those provisions conform to the Constitution, and that inquiry subsists as long as the provisions are in effect. To dismiss a challenge of that nature for mootness would, among other risks, allow potentially unconstitutional rules to persist without question, undermine constitutional supremacy and leave future National Assemblies subject to defective rules. Thus, even after a National Assembly's term ends, the controversy is not extinguished. The relevant piece of legislation

[119] Id at para 56.

continues to regulate the institutional framework of representative democracy, and its validity remains a pressing constitutional question.

[100] The constitutionality of rule 129I, therefore, remains a live issue that requires resolution. The question of mootness can relate only to the EFF's attack on the NA vote.

Whether the challenge to the NA vote is moot

[101] Parliament and the ANC argue that, owing to the EFF's delay and the expiry of the term of the Sixth Parliament, the relief sought by the EFF has become moot. They contend that any order that this Court may make regarding the NA vote will not have any practical effect either for the parties or others. This is so, they argue, because the Sixth Parliament ceased in terms of section 49 of the Constitution,[120] which fixes the lifespan and competence of each National Assembly. They also point to rule 351(2)[121] which provides that all business before the National Assembly will lapse on the last sitting day of the National Assembly's term. They contend that the Sixth Parliament's term ended on 21 May 2024 and, because the impeachment motion formed part of the business of the Sixth Parliament, which has already concluded its business and no longer exists, the motion lapsed and cannot be revived, therefore, rendering consideration of the issue academic. A section 89 inquiry, they submit, is now legally impossible.

[102] The ANC further argues that, on 14 June 2024, the EFF submitted an urgent motion to the newly sworn-in Seventh Parliament and tabled this matter for consideration by the new National Assembly. In the ANC's submissions, it is inappropriate for this Court to decide a matter that is pending before the new National

[120] Section 49(4) of the Constitution provides that "[t]he National Assembly 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 [National] Assembly".

[121] In terms of this rule, "[a]ll business before the [National] Assembly or any [National] Assembly committee on the last sitting day of a term of the [National] Assembly or when the [National] Assembly is dissolved, lapse at the end of that day".

Assembly, thus, this application is a forum-shopping exercise and an abuse of this Court's process.

[103] The EFF insists that the matter is not moot, given the risk of partisan interests allowing obstruction over legality. It also contends that mootness is no bar to considering an issue, as the interests of justice must be considered. It further argues that the National Assembly's decision continues to have legal consequences because it enables a President who may lack eligibility to remain in office, which constitutes a continuing wrong.

[104] The EFF further contends that the National Assembly's continuing duty of accountability encompasses, among other things, ensuring that the President is lawfully entitled to hold the office he occupies. It argues that every National Assembly is duty-bound to hold the President accountable and that nothing prevents the new National Assembly from pursuing impeachment proceedings, since the prima facie case against the President remains.

[105] It must be considered, therefore, whether the impugned vote, adopted during the term of the Sixth Parliament which expired on 28 May 2024, remains justiciable despite the expiry of that National Assembly's term under section 49 of the Constitution and the transitional provisions that allow the National Assembly to function until the day before polling for the next Parliament.

[106] In terms of section 16(2)(a)(i) of the Superior Courts Act,[122] "[w]hen at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on [mootness] alone".

[107] This Court explained mootness in *National Coalition*[123] as follows:

[122] 10 of 2013.

[123] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC).

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[124]

[108] However, even though a matter may be moot, as between the parties in this matter, that does not necessarily operate as an absolute bar to justiciability. This Court still retains a discretion to entertain the matter if it is in the interests of justice to do so.[125] So, the test for mootness is a two-stage inquiry in which a court first considers whether the dispute still presents a live controversy and, in the appropriate case, goes on to determine whether it should nevertheless decide the case in the interests of justice even if it is moot. In keeping with this principle, this Court has claimed its discretion to adjudicate cases where the interests of justice so dictate.[126]

[109] In that exercise, this Court has identified several factors that are relevant when deciding whether to hear a matter that has become moot. These include: whether an order will have any practical effect either on the parties or on others;[127] the nature and extent of such practical effect;[128] the importance of the issue and fullness of the argument advanced;[129] the need to resolve disputes between different courts;[130] and the

[124] Id at fn 18. See also *JT Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC).

[125] *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32 and *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) (*Shuttleworth*) at para 27.

[126] *Shuttleworth* id; *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2019 (11) BCLR 1403 (CC); 2020 (1) SA 428 (CC) at para 17; and *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg Municipality*) at para 11.

[127] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29.

[128] *Langeberg Municipality* above n 126 at para 11.

[129] *Director-General, Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR 306 (CC) at para 40.

[130] *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs, KwaZulu Natal v The Nkandla Local Municipality* [2021] ZACC 46; 2022 (8) BCLR 959 (CC); (2022) 43 ILJ 505 (CC) at para 16.

prospects of success.[131] To this should be added that "the courts should never exercise their discretion against hearing a matter if there is any public benefit to be derived from a decision being made".[132]

[110] There are several reasons why the challenge to the NA vote cannot be considered moot. First, the official capacities of functionaries are generally held to enduring legal obligations attaching to those capacities despite the succession of incumbents or change in their ranks.[133] For example, in *O'Brien*,[134] the High Court granted an order in August 2021 during the incumbency of a particular Minister of Defence. By the time this Court heard the matter in confirmation proceedings and issued its order in December 2024, a new Cabinet had been constituted following the general elections on 29 May 2024, and the Ministry was headed by a different Minister.

[111] In *DA v Minister of COGTA*,[135] where there was no prior order of this Court, the application was launched by a Minister whose stint as the executive head of the relevant state department thereafter ended, leading to replacement with a new incumbent while the matter was still pending. The application was heard by this Court on 6 February 2025 and judgment was delivered on 27 February 2026, after yet another Minister had taken over the office. This demonstrates that a change of the office-holder has no bearing on the status, rights and obligations of the office itself.[136]

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[131] *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at para 53.

[132] Loots "Standing, Ripeness and Mootness" in Woolman et al (ed) *Constitutional Law of South Africa* Service 5 (2013) at 25.

[133] This would also be the case for lease holding, property holding, boards of directors and even in the case of transmission of responsibility to a deceased's estate upon their death.

[134] *O'Brien* above n 118 at para 30.

[135] *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* [2026] ZACC 8; 2026 (5) BCLR 381 (CC).

[136] See also *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) at para 94, where this Court said:

> "We cannot withdraw the President's signature. But, we may direct him to withdraw his signature to the Protocol. One President is a successor in title of another and the obligations are similarly transferable from one to the other. For the execution of the duties attendant to the presidential office and antecedent authority is never really incumbent-specific. The power and obligations devolve from one personality to another – it is, after all, the Presidency. Whoever

[112] Secondly, it might be argued that the NA Rules do not apply to executive functionaries in the same way they apply to the National Assembly and that, given the stipulations of rule 351, the decision has lapsed and is now moot. That is, this Court cannot revive a motion that has been extinguished by the NA Rules. But such a view is untenable as it would elevate the NA Rules above the Constitution's provisions which require consistency with its injunctions and render orders of court binding.[137]

[113] Additionally, there are important practical considerations to take into account. The process of an impeachment motion being considered by the Speaker, its referral to the Panel, an investigation of the matter by the Panel, a consideration by the National Assembly of the Panel's Report and then a full-blown inquiry by an Impeachment Committee, could take many months. If impeachment proceedings that started in one Administration could not be carried over to the next, it would be practically impossible to initiate and finalise impeachment proceedings, despite potentially serious misconduct by a President, in the year or two before the end of the life of that Administration. The delays inherent in the process would be even greater if there was intervening litigation, as has occurred in this case.

[114] *Women's Legal Centre II*[138] amply illustrates that court orders issued in respect of the National Assembly continue to apply to its successors even after a particular National Assembly is dissolved, rule 351 is triggered, an election is conducted and the composition of the National Assembly is changed.[139] In that matter, notwithstanding

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> the President happens to be will be directed to withdraw the President's signature to the Protocol."

[137] Such orders are competent and binding under section 172 and, pursuant to constitutional imperatives, even when cutting across extant statutory provisions. See *Electoral Commission v Mhlope* [2016] ZACC 15, 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 133.

[138] *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC).

[139] This Court stated subsequently that its "declaration of constitutional invalidity of 28 June 2022 was suspended for a period of 24 months to allow Parliament to correct the defect, and was due to expire on 27 June 2024". See *Speaker of the National Assembly v Women's Legal Centre Trust* [2024] ZACC 18; 2025 (1) BCLR 103 (CC) (*Women's Legal Centre III*) at para 2. This meant that the original order spanned an election period – between

the relevant lapse and change in composition after elections, the order of this Court remained extant, unaffected by the elections, and Parliament was obliged to pass the contemplated legislation by the deadline or seek an extension.[140] Parliament chose the latter option.[141]

[115] Lastly, it is established that "[o]ur Constitution confers on the courts the role of arbiter of legality".[142] This, by implication, involves the courts routinely exercising their expansive review powers to correct the final but irregular decisions of functionaries.[143] In the ordinary course, in public law, a court remits the decision to the functionary upon the invalidation of the exercise of public power; or, in exceptional circumstances, the court may substitute a decision for its own.[144]

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10 May 2024 and 30 June 2024 – when the incumbent President was re-elected and a new Cabinet was formed. See also *Blind SA v President of the Republic of South Africa* [2025] ZACC 9; 2025 (7) BCLR 757 (CC) at para 11.

[140] In *Women's Legal Centre III* id at para 20, this Court, when taking judicial notice of the delay caused by the 2024 elections, said:

> "In the new term, Parliament will comprise new [M]embers. Some of them will require time to familiarise themselves with the Parliamentary rules and procedures governing the law-making processes as well as with the subject matter of the Bill, taking into account its complexity in as far as the laws governing various traditional and religious faiths are concerned."

[141] Id at paras 1, 2 and 5.

[142] *Tasima I* above n 101 at para 147.

[143] See, for example, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (3) BCLR 229 (CC); 2011 (4) SA 113 (CC) at paras 81-7; *Khumalo* above n 97 at para 53; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) BCLR 1 (CC); 2014 (1) SA 604 (CC) at para 25; *EFF I* above n 2 at para 103; *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) at paras 33 and 117 (dissenting judgment of Jafta J); *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at paras 52-3; and *EFF II* above n 3 at para 209. In *EFF I* above n 2 at para 103, this Court noted:

> "Declaring law or conduct inconsistent with the Constitution and invalid is plainly an obligatory power vested in this Court as borne out by the word 'must'. Unlike the discretionary power to make a declaratory order in terms of section 38 of the Constitution, this Court has no choice but to make a declaratory order where section 172(1)(a) applies. Section 172(1)(a) impels this Court, to pronounce on the inconsistency and invalidity of, in this case, the President's conduct and that of the National Assembly. *This we do routinely whenever any law or conduct is held to be inconsistent with the Constitution. It is not reserved for special cases of constitutional invalidity*." (Emphasis added.)

[144] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 42. See also *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Corruption Watch*) at paras 68-90; and Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) (Hoexter and Penfold) at 780-7.

[116] The corollary of this Court exercising its review powers to correct final but irregular decisions is that those decisions are quashed and reduced to a nullity in a legal-technical sense. Typically, but not always, the quashed decision is either then returned to the relevant functionary or replaced by that of the court. Therefore, by means of a legal fiction, it is as if – legally – the irregular decision was never taken.

[117] Where there is interference by a court in the form of setting aside and remittal, the *status quo ante* (pre-existing state of affairs) would be revived. In this case, the *status quo ante* would be a time before the NA vote not to refer the Report to the Impeachment Committee was made and before rule 351 took effect. With a return to that *status quo ante*, the impeachment motion would not have been disposed of through a vote. Nor would it have been caused to lapse by the operation of rule 351, which would not have taken effect. Upon remittal, there would thus remain a live controversy before the National Assembly.[145] It must follow on this reasoning that the challenge to the NA vote is not moot.

[118] Clearly, the challenges mounted in this matter are not moot, and so this Court need not consider whether it should exercise its discretion to overlook any mootness and reach the merits.

[119] Having established that this Court may scrutinise the impugned rule and NA vote in the exercise of its exclusive jurisdiction, I proceed to determine whether rule 129I and the NA vote pass constitutional muster.

[145] Having regard to the findings of this judgment and the terms of the proposed order, the remittal in this case would not, strictly speaking, involve referring the decision back to the functionary that originally took it, but would rather consist of sending the decision to the competent authority not previously seized with the matter. That would not be a remittal in the orthodox sense, but rather a constructive remittal. On constructive remittals, see Herd "Schrödinger's Interdict? Subsidiarity and Avoidance; the Rule of Law and Constitutional Rights" (2024) 14 *Constitutional Court Review* 413 at 428-9.

Validity of rule 129I

[120] At first glance, it may appear that the National Assembly has complied with the obligation articulated in *EFF II*. It did put in place mechanisms to regulate the impeachment process envisaged in section 89, by inserting rules 129A to 129Q into the NA Rules in 2018. But mere formal compliance with the obligation to put in place mechanisms is insufficient. The Constitution requires not merely the existence of a mechanism, but one that is effective.

[121] Section 89(1) contemplates a two-stage process for impeachment: a preliminary inquiry to determine whether a listed ground exists,[146] followed (if such a ground is established) by a decision by the National Assembly on whether to remove the President from office.[147] Both stages must be governed by rules adopted by the National Assembly, because "[w]ithout rules defining the entire process, it is impossible to implement section 89".[148]

[122] Under the current NA Rules, an impeachment motion must be screened for compliance by the Speaker,[149] assessed for sufficiency and merit by the Panel,[150] considered by the National Assembly on the question of referral for an inquiry,[151] examined by an Impeachment Committee of inquiry[152] and then referred to the National Assembly as a whole for it to be voted upon.[153]

[146] *EFF II* above n 3 at para 180.

[147] Id at para 173: "This provision empowers the [National] Assembly and the [National] Assembly alone to remove the President from office." See also id.

[148] Id at paras 180 and 182.

[149] Rule 129B.

[150] Rule 129G.

[151] Rule 129I.

[152] Rules 129J-129N.

[153] Rule 129O.

[123] In this case, the National Assembly voted not to refer the matter to the Impeachment Committee. This might appear to be a straightforward instance of decision-making by the National Assembly as contemplated in section 53.[154]

[124] If the question was properly before the National Assembly, it would appear that section 53 was complied with. But that is the very question here: should the Report have been tabled before the National Assembly at that juncture of the impeachment process? In response to that question, section 53 is silent. Section 53 does not prescribe which decisions must be taken by the National Assembly as a whole, which may or must be assigned to committees or other mechanisms; nor does it determine the model of decision-making within those structures.[155]

[125] It follows that the only constitutional basis for the vote by the National Assembly being interposed between the Panel step and the Impeachment Committee step, other than the exercise of the National Assembly's own authority and discretion, is its authority to "determine and control its internal arrangements".[156]

[126] The National Assembly's authority and discretion to regulate its own processes is not unfettered. Although section 57 states that it "may" make rules and orders concerning its business, this Court has already held that the making of "specially

[154] Section 53(1) provides:

> "Except where the Constitution provides otherwise—
>
> (a) a majority of the [M]embers of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
>
> (b) at least one third of the [M]embers must be present before a vote may be taken on any other question before the [National] Assembly; and
>
> (c) all questions before the [National] Assembly are decided by a majority of the votes cast."

[155] All the Constitution requires, as per section 55(2), is that the National Assembly must provide for mechanisms to ensure that the Executive is accountable to it. Elsewhere, in section 57, the National Assembly is vested with the power to regulate its own proceedings and procedures. Neither section 55(2) nor section 57 stipulate the model of decision-making for committees of the National Assembly or its accountability mechanisms.

[156] Section 57(1) of the Constitution.

tailored" rules is obligatory to regulate the process of impeachment under section 89(1).[157]

[127] Through rules governing the impeachment process, the National Assembly is required to ensure that impeachment motions are dealt with efficiently and thoroughly. A preliminary inquiry must be conducted and, as held in *EFF II*, "[t]he form which this preliminary inquiry may take depends entirely upon the [National] Assembly".[158]

[128] Of course, there are still constitutional limits within which the National Assembly must formulate its rules. It could hardly be contended, for example, that since the National Assembly is free to determine the form of the preliminary inquiry, it may formulate an irrational or unlawful process. Another such limit on the National Assembly's freedom to determine the impeachment process flows from section 57(1)(b). This section requires the rules and orders of the National Assembly to be subject to the principles of "representative and participatory democracy, accountability, transparency and public involvement".[159] Rule 129I interposes a vote by the National Assembly between the Panel step and the Impeachment Committee step of the preliminary inquiry stage. Does this balance the section 57(1)(b) values and does it result in an effective mechanism that enables the National Assembly to take appropriate action?

[129] The fact that the National Assembly is vested with the power to make its own rules and orders, define the grounds and craft a mechanism for the operation of section 89(1), means that it has significant control over the entire impeachment process from start to finish. Moreover, the value of representative democracy[160] predominates

[157] *EFF II* above n 3 at para 196.

[158] Id at para 180.

[159] Section 57(1)(b) of the Constitution.

[160] In the one-dimensional sense of Members deliberating and voting as a collective, as opposed to a more nuanced understanding which would involve the electorate being more informed both before and after aggregating their will at the ballot box and the representatives themselves being equipped with a better and more informed appreciation of the questions placed before them. This latter conceptualisation of representative democracy

in the second stage of the impeachment process, with the National Assembly being the ultimate authority under section 89 in determining whether "one of the listed grounds exists",[161] which "it alone is entitled to determine".[162] This ultimate "exclusive jurisdiction of the [National] Assembly" must be respected,[163] leaving democratic decision-making the ultimate *modus* (method) of section 89(1).

[130] That said, by its very nature, the same is not true of the first stage which entails a preliminary inquiry. The preliminary inquiry, as this Court confirmed in *EFF II*, consists of a "sifting mechanism [to] determine whether there is a case for the President to answer"[164] and adjudication of the facts and applicable law. The primary purpose is to determine whether a ground listed in section 89(1) exists, thereby giving effect to the requirements of accountability and transparency under section 57(1)(b). Thus, the principle of democracy is inherently limited in the first stage by the structure, nature and objects of the section 89(1) process.

[131] Further constraint is to be imposed upon the democratic decision-making of the National Assembly by its own definitions for the section 89(1) grounds, in accordance with the NA Rules. The scope and content of the grounds are not defined in the Constitution. Instead, they are left to the National Assembly's collective predetermination so as to provide normative certainty and constrain the National Assembly from the outset.[165] In other words, the National Assembly cannot define the

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comports with the elected representatives in the National Assembly having an obligation to scrutinise executive action.

[161] *EFF II* above n 3 at para 179.

[162] Id at para 178.

[163] Id.

[164] Id at para 189.

[165] This accords with the oft-cited statement in *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 108 that—

> "[t]he law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

The promotion of certainty itself – if effective – engenders greater consistency, equality and fairness in decision-making. See, in the context of *stare decisis* (the legal doctrine meaning "to stand by things decided", requires courts to follow established principles or rulings), Brickhill "Precedent and the Constitutional Court" (2010) 3 *Constitutional Court Review* 79 at 93. See also *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331

grounds ad hoc, after the fact and potentially capriciously in the course of its inquiry. This view was articulated as follows in *EFF II*:

> "It is evident that the drafters left the details relating to these grounds to the [National] Assembly to spell out. But the drafters could not have contemplated that [M]embers of the [National] Assembly would individually have to determine what constitutes a serious violation of the law or the Constitution, and conduct on the part of the President which, in the first place, amounts to misconduct and whether, in the second place, such conduct may be characterised as serious misconduct. If this were to be the position, then we would end up with divergent views on what is a serious violation of the Constitution or the law and what amounts to serious misconduct envisaged in the section.
>
> And since the determination of these matters falls within the exclusive jurisdiction of the [National] Assembly, it and it alone is entitled to determine them. This means that there must be an institutional pre-determination of what a serious violation of the Constitution or the law is. The same must apply to serious misconduct and inability to perform the functions of the office."[166]

[132] The section 89(1) grounds have been described as "conditions for the President's removal".[167] They are, in essence, jurisdictional facts[168] requiring an investigation or inquiry that is adjudicative in nature, involving the application of law to facts on an objective basis,[169] and which is capable of being subjected to objective scrutiny.[170] This

(CC); 2004 (7) BCLR 735 (CC) at paras 94-5. On discretion and constraint in the context of rights, see *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 46-55.

[166] *EFF II* above n 3 at paras 177-8.

[167] Id at para 179.

[168] *Premier, Gauteng v Democratic Alliance; All Tshwane Councillors who are Members of the Economic Freedom Fighters v Democratic Alliance; African National Congress v Democratic Alliance* [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) at para 69.

[169] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (*Simelane*) at paras 14-20. In the context of the President appointing a National Director of Public Prosecutions, this Court held that, objectively, the law requires any prospective holder of that office to be "fit and proper" to occupy that position as required by law, a qualification which requires the presence of certain objectively ascertainable jurisdictional facts, the finding of which is subject to judicial review.

[170] In *Simelane* id at para 23, this Court noted that—

> "[i]t is correct that the determination whether a candidate does fulfil the fit and proper requirement stipulated by the [National Prosecuting Authority Act 32 of 1998] involves a value judgment. But it does not follow from this that the decision and evaluation lie within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any [M]ember of the Executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not

leaves minimal scope for the preliminary inquiry to be a politically-driven exercise.[171] Properly understood, the kind of determination required of the National Assembly under section 89(1) does not involve the weighing of options, balancing incommensurables and divergent factors and navigating political objectives to reach a subjective value judgment, removed from an objective inquiry into whether a ground exists. Plainly, determining whether any of the section 89(1) grounds exists is not an inherently and exclusively democratic exercise, but predominantly an inquisitorial, factual and legal exercise.[172]

[133] This Court's judgment in *Oriani-Ambrosini*[173] makes clear why accountability and transparency are undermined when the National Assembly performs a gatekeeping function at an early stage of a constitutional process. There, this Court invalidated rules of the National Assembly which required an individual Member to obtain the National Assembly's permission before introducing a Bill.[174] In this Court's view, those rules requiring permission from the National Assembly at the outset of the legislative process placed "power exclusively in the hands of the National Assembly, functioning as a collective body" and "[creating] a high risk" of the power being "paralysed".[175] This amounted to unconstitutional gatekeeping by the National Assembly.

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objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny."

[171] See *Mazibuko v Sisulu* above n 62 at paras 61-2 and *EFF II* above n 3 at paras 190-4. Further, the determination being concerned with whether an objectively ascertainable jurisdictional fact is present means that polycentric considerations and motivations are excluded from the assessment of the facts and the application of the law. See id at paras 14-20.

[172] Functionally, this would involve gathering evidence, examining and testing the evidence, distilling and ascertaining the facts from the evidence and applying the law on a preliminary basis. Although ultimately susceptible to binary democratic decision-making, that is not an inherently democratic function. This is why – at least in part – this Court, in *EFF II*, recognised that the ultimate determination is reserved for our elected representatives bearing their political mantle, but the prior process cannot be managed and controlled by a proportionally constituted committee. See *EFF II* id at paras 190-5.

[173] *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).

[174] Id at paras 5, 94 and 96. It should be noted that an objective factual and legal determination under section 89(1) is worlds apart from the kind of legislative action that the Court confronted in *Oriani-Ambrosini* – a wide discretion in the centre of policy-making for the country. Despite the highly polycentric nature of legislating, that function being in the heartland of Parliament's domain, and the National Assembly's greater control over its procedures in that context, this Court nonetheless rejected the National Assembly's assertion of a discretion to lock out private Members' bills by a full vote.

[175] Id at paras 64-7, 75, 77 and 81.

[134] This Court gave several rationales for this conclusion, namely that—

(a) the power of the National Assembly to make rules is a qualified power constrained by the values of "representative and participatory democracy, accountability, transparency and public involvement";[176]

(b) representative and participatory democracy requires a genuine platform for engagement in the process of law-making and consideration of issues of public importance;[177]

(c) proper and full engagement with a matter "before its fate is decided" enhances transparency – an imperative that is undermined where the National Assembly refuses permission for introduction of a Bill;[178] and

(d) public participation is facilitated by processes that permit issues to be fully ventilated, thereby cultivating an "active, informed and engaged citizenry",[179] because "the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues before the [National] Assembly".[180]

[135] The same concerns arise in this case. Rule 129I permits the National Assembly to terminate the impeachment process at a preliminary stage, before a full inquiry can be conducted into whether a ground exists. This has the effect of foreclosing full engagement with the merits of the motion, thereby stifling informed debate and undermining the values of accountability and transparency that must inform the National Assembly's processes. This is particularly problematic given the limited powers of the Panel.[181] As this Court remarked in *Oriani-Ambrosini*, such gatekeeping

[176] Id at para 62, quoting section 57(1)(b) of the Constitution.

[177] Id at para 63.

[178] Id at para 64.

[179] Id.

[180] Id.

[181] The Panel's function is confined to a preliminary assessment of whether sufficient information exists to warrant further investigation. It does not conduct a full inquiry or test evidence and has no wide investigative powers. Yet, under rule 129I, the National Assembly may, on the basis of this limited assessment, bring the process to an end before it has all the information at its disposal.

by the National Assembly constitutes the unconstitutional "deployment of invincible giants"[182] as obstacles to the pursuit of constitutional ends (namely, an impeachment motion being more fully and properly ventilated and scrutinised, and only thereafter decided upon by the National Assembly).[183]

[136] A rule allowing the National Assembly to thwart an impeachment motion at an early stage, despite a finding that the complaint is sufficiently substantiated, would fall foul of the Constitution for multiple reasons. It would, for example—

(a) foreclose any participation by any person or party in a further impeachment process;

(b) bar "appropriate action" in the form of testing and examining evidence and informed debate and engagement in the impeachment process "before its fate is decided";

(c) deny a genuine platform for the ventilation of informed views on a matter of momentous national importance; and

(d) deprive the citizenry of the opportunity to be "active, informed and engaged" and to "properly hold their elected representatives accountable" by not informing them "of the relative merits" of the impeachment motion.

[137] By imposing itself as a gatekeeper through rule 129I, the National Assembly fails in its obligation to facilitate the impeachment inquiry. When confronted with a sufficiently substantiated impeachment motion disclosing or yielding a case to answer,[184] the National Assembly must facilitate steps to be taken in this regard and the

[182] *Oriani-Ambrosini* above n 173 at para 64. Unlike in *Oriani-Ambrosini*, in this case the National Assembly is under an obligation to see sufficiently substantiated impeachment motions disclosing or yielding a case to answer through to an appropriate end.

[183] Id, where this Court stated:

> "This is achievable by, amongst other things, interpreting section 57 as empowering the [National] Assembly to make rules that do not constitute an inadvertent deployment of invincible giants in a [M]ember's path to exercising her section 55(1)(b) or section 73(2) power."

[184] In *EFF I* above n 2 at para 44, this Court observed that the receipt by the National Assembly of the report of the Public Protector "effectively operationalised the House's obligations in terms of sections 42(3) and 55(2) of

process to be followed, "[n]ot only at a preliminary stage but also at the stage of actual impeachment up to the final stage of voting on whether the President should be removed from office, so as to determine whether the removal is supported by the necessary two-thirds majority".[185] But how far must the National Assembly go in taking appropriate action and how are unmeritorious motions to be treated?

[138] It is not sufficient, for purposes of the obligation to take "appropriate action",[186] for the National Assembly to proceed directly from receipt of the Report to a vote and thereby suppress an impeachment motion that discloses, prima facie, the existence of a ground under section 89(1).[187] The National Assembly is required to do more than have a substantiated motion merely "tabled, debated and voted on".[188] There must be an inquiry of some proportion or other into impeachment motions that are not plainly unmeritorious;[189] and there must be a determination as to "whether the President has breached section 89(1)(a) or (b) of the Constitution"[190] or, in terms of section 89(1)(c), is unable to perform the functions of their office.

[139] There need not be a full-blown, exhaustive inquiry into every single impeachment motion that survives an initial sifting. However, where the Panel concludes that sufficient evidence exists to disclose a prima facie case, its

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the Constitution", making the report a subject to be further treated by the National Assembly as opposed to being susceptible to suppression.

[185] *EFF II* above n 3 at para 181.

[186] Id at para 199.

[187] It may be sufficient for the National Assembly to proceed directly to a debate and vote where the chosen sifting mechanism – under the current NA rules, the Panel – has determined the motion to lack merit. If it were otherwise, there would be little point in having the sifting mechanism.

[188] *EFF II* above n 3 at para 204.

[189] In *EFF II*, this Court declared the National Assembly proceeding to a vote, without a proper inquiry into the substance of the motion, as a failure to hold the President to account. It must be recalled that this declaration was made about the National Assembly proceeding directly to a vote upon receipt not of a preliminary Panel Report, but a damning and far more categorical and substantiated Report by the Public Protector – the latter offering greater scope for the National Assembly to correspondingly render a categorical decision. Yet, this Court held the National Assembly to its obligation to satisfy itself of the veracity and seriousness of the alleged impeachment charge by way of further investigation – this, over the remonstrations of dissent on this very score. See *EFF II* id at para 266.

[190] Id at para 222.

recommendation that a section 89 inquiry be proceeded with must be implemented through a referral to an Impeachment Committee, unless and until the Report is set aside on review. This follows from the institutional design of the NA Rules, which entrusts the preliminary sifting function to an independent body, and it would be inconsistent with that design for the National Assembly to decline to give effect to such a recommendation.

[140] It may be that the evidentiary basis underpinning such a motion – despite being found prima facie, substantial and credible by the independent sifting mechanism (currently, the Panel) – cannot survive initial scrutiny by the inquiry (currently, the Impeachment Committee).[191] Once seized with the matter, the Impeachment Committee performs a distinct investigative function and, subject to the NA Rules, particularly rule 129M, retains control over its own proceedings and the scope of its inquiry. It may therefore become apparent, even at an early stage, that the evidentiary foundation underpinning the charges cannot sustain a finding that the alleged conduct will be established.

[141] In such an instance, if appropriately regulated by the NA Rules, the termination of the inquiry without a full-blown "trial" may well be justified.[192] This possibility does not qualify the obligation of referral following a positive prima facie finding; it reflects,

[191] For example, a scenario where witnesses identified in the motion or by the Panel collapse under cross-examination, leaving the motion without a sufficient evidentiary predicate to sustain the charge, results in an early report by the relevant structure tasked with conducting the inquiry (currently the Impeachment Committee). Albeit not identical, such an early termination of the inquiry could be compared – conceptually – to a section 174 discharge under the Criminal Procedure Act 51 of 1977 or absolution from the instance in civil proceedings. Further, if the mandated structure – currently the Impeachment Committee – concludes early on that there is actually no merit to the motion, then it could resolve at that point that the impeachment inquiry be terminated and recommend that the National Assembly "determine" that no ground exists. This conclusion applies both at the level of constitutional law and to the current dispensation under the NA Rules. In terms of rule 129M, the Impeachment Committee must conduct its inquiry in a reasonable and procedurally fair manner and within a reasonable timeframe. It is inquisitorial in nature, and the process is flexible. Thus, subject to the obligation to "take appropriate action", the standards of lawfulness and rationality and what the NA Rules provide for in regulating such termination, the inquiry could be brought to an end at any time. In other words, the Impeachment Committee may be entitled to terminate its proceedings – and make a corresponding recommendation to that effect to the National Assembly – on the basis that the charges could not possibly be established.

[192] For a discussion of adequacy in the context of analogous internal investigations, see Herd and Murcott "The Uncertain Constitutional Duty to Internally Investigate and Remedy State Impropriety" (2023) 34 *Stellenbosch Law Review* 27 at 51-2.

instead, the distinct institutional roles of the Panel and the Impeachment Committee – the former determining whether there is a case to answer, and the latter determining whether that case can ultimately be sustained.

[142] This construction of section 89 abides by the scheme established by this Court in *EFF II*. It also leaves the National Assembly's ultimate and exclusive decision-making power intact; catalyses the National Assembly's representative and democratic machinery after an adequate accountability and transparency-focused process has been carried out; and gives effect to the values of "representative and participatory democracy, accountability, transparency and public involvement" contemplated by section 57(1)(b) of the Constitution.

[143] This is in contrast with rule 129I which installs the National Assembly as a gatekeeper – the very invincible giant that this Court has warned of.[193] With power exclusively in the hands of the National Assembly, functioning as a collective body,[194] there is a high risk of section 89(1) being paralysed,[195] thus making it easy for the President to escape consequences.[196] Instead of ensuring accountability and transparency, rule 129I gives the National Assembly an ability to frustrate and thwart subsequent steps in the process which would enable it and the public to make informed decisions in the fulfilment of their obligations and exercise of their rights. In this case, the mechanism designed and chosen by the National Assembly is both an ineffective one and one that undermines key constitutional values that it is required to live up to.

[144] This is a breach of the constitutional obligations imposed upon the National Assembly by section 89(1) of the Constitution, that is, to put in place an effective mechanism and to take appropriate action to hold the President accountable in terms of that section. Rule 129I is, therefore, inconsistent with the Constitution and invalid.

[193] *Oriani-Ambrosini* above n 173 at para 64.

[194] Id at para 66.

[195] Id.

[196] *UDM v Speaker* above n 55 at para 12.

The validity of the NA vote

[145] The vote must follow in the rule's footsteps. It is defective because it was taken in a manner inconsistent with the Constitution. As explained above, it is proscribed for the National Assembly to prematurely gatekeep within the first stage of the section 89 impeachment process.

[146] This conclusion applies with as much force to the vote taken pursuant to the rule as it does to the rule, irrespective of the rationale actuating each individual vote cast by Members of Parliament. What matters is that legally, the vote and the rule are on the same constitutional footing, and so the one must follow the other. The vote was influenced by a material error of law.[197] It is therefore inconsistent with the Constitution and must accordingly fall.[198]

[147] This is sufficient to vitiate the vote. Since a majority of this Court concludes that it was not constitutionally permissible for the National Assembly to vote on the Report at the stage it did, it is unnecessary to consider whether such a vote, had it been constitutionally permissible, was impeachable on grounds of irrationality.

Just and equitable remedy

[148] It remains to consider what remedy would be just and equitable in the circumstances. As this Court pronounced in *Mazibuko v Sisulu*—

[197] See Hoexter and Penfold above n 144 at 395-8. An instructive, analogous precedent is *Genesis Medical Aid Scheme v Registrar, Medical Schemes* [2017] ZACC 16; 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164 (CC) (*Genesis*). In that matter, this Court dealt with the policy posture of the Registrar of Medical Schemes on the import of section 35 of the Medical Schemes Act 131 of 1998 as reflected in circulars issued by the Registrar. The policy posture was informed by the High Court's interpretation of that section in *Registrar of Medical Schemes v Ledwaba N.O.*, unreported judgment of the Gauteng High Court, Case No 18545/06 (30 January 2007) (*Omnihealth*) and was on the same footing as that High Court judgment. This Court differed with the High Court, and overturned *Omnihealth*. See *Genesis* at para 22. By extension, incorporating the *Omnihealth* error of interpretation as it did, the Registrar's policy posture reflected in the circulars was bad in law.

[198] In the words of this Court, "[w]hen *Omnihealth* tumbles, as it must, [the circulars] must tumble too." *Genesis* id at para 62. By parity of reasoning, if the EFF's challenge to rule 129I is successful, then "[w]hen [rule 129I] tumbles, as it must, [the NA vote] must tumble too".

> "once we have found, as we have, that the rules . . . are unconstitutional, we must so declare. An order of constitutional invalidity is not discretionary. Once the Court has concluded that any law or conduct is inconsistent with the Constitution, it must declare it invalid."[199]

[149] The declaration of invalidity, consequent upon a finding of invalidity, is therefore non-negotiable for this Court.[200] What is discretionary is the remainder of any remedy that might be sought or warranted. This Court possesses wide remedial competence under section 172(1)(b) of the Constitution to craft a "just and equitable" remedy that is fair and just within the context of the particular dispute.[201] This power has repeatedly been described as "ample" and "flexible" – extending even beyond the pleadings where necessary to vindicate constitutional rights and the rule of law.[202] In *Fose*,[203] this Court emphasised that constitutional remedies may require innovation. In later cases, it has stressed that substance must prevail over form, and that remedies must resolve the real dispute in a constitutionally compliant manner.[204]

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[199] *Mazibuko v Sisulu* above n 62 at para 70.

[200] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Section 172(1)(a) of the Constitution is, then, the judicial mechanism by which section 2's consistency injunction is actualised and enforced, requiring that—

> "[w]hen deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

Under section 172(1)(a), this Court has no discretion. It is obliged to declare inconsistency invalid once established. See *EFF I* above n 2 at para 103. See also *Khumalo* above n 97 at para 53 and *Electoral Commission v Mhlope* above n 137 at para 129.

[201] Section 172(1)(b) of the Constitution provides that—

> "[w]hen deciding a constitutional matter within its power, a court—
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

[202] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at para 97 and *EFF II* above n 3 at paras 210-11.

[203] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[204] *Hoërskool Ermelo* above n 202 at para 97.

[150] That said, however, the power is not limitless. This Court emphasised, in *Corruption Watch*, that just and equitable relief must remain tethered to the constraining factors of justice and equity, and continued thus:

> "There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make any order that is just and equitable. The operative word 'any' is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.
>
> What must be paramount in the relief that a court grants is the vindication of the rule of law. The effect of that is the reversal of the consequences of the constitutionally invalid conduct."[205]

[151] It is important to acknowledge at the outset in a case such as this that the National Assembly traditionally and constitutionally enjoys primacy in regulating its "internal arrangements, proceedings and procedures" through its "rules and orders concerning its business".[206] This recognition cleaves to the exclusive jurisdiction assessment, since judicial review of Parliament's internal procedures "trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers".[207] Judicial review of a case of this nature by this Court is, therefore, permissible. However, this Court must be scrupulously circumspect in crafting its order.

[152] This case, in part, concerns the NA Rules. This Court made it clear in *Mazibuko v Sisulu* that it would constitute overreach for it to embark on a substantial formulation of rules such that it substitutes the policy choices of the National Assembly for its own. There, the majority held that the judicial review of and a declaration of invalidity striking at provisions of the NA Rules—

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[205] *Corruption Watch* above n 144 at paras 68-9.

[206] Section 57(1)(a) and (b) of the Constitution.

[207] *Doctors for Life* above n 19 at paras 26-7.

> "would not be invasive because it is declaratory in kind. The Court would not be formulating rules for the [National] Assembly. The Court would be properly requiring the [National] Assembly to remedy the constitutional defect that threatens the right of [M]embers of the [National] Assembly".[208]

[153] But that does not mean that the remedy of reading-in is never available when the rules of a legislature are impugned. Reading-in is, ultimately, a corollary of severance and can be utilised where "just and equitable".[209]

[154] That said, this Court is enjoined, as are all courts, to "endeavour to be as faithful as possible to the [existing] legislative scheme within the constraints of the Constitution".[210] Importantly, under the current NA Rules, an impeachment motion that reaches the National Assembly as a vote on removal must, prior to such a vote, be—

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[208] *Mazibuko v Sisulu* above n 62 at para 71.

[209] *National Coalition* above n 123 at paras 73-5, which held:

> "Having concluded that it is permissible in terms of our Constitution for this Court to read words into a statute to remedy unconstitutionality, it is necessary to summarise the principles which should guide the court in deciding when such an order is appropriate. In developing such principles, it is important that the particular needs of our Constitution and its remedial requirements be constantly borne in mind.
>
> The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.
>
> In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely."

[210] Id at para 75.

(a) screened for compliance by the Speaker;[211]

(b) assessed for sufficiency and merit by the Panel;[212]

(c) considered by the National Assembly on the question of referral for an inquiry;[213] and

(d) examined by an Impeachment Committee.[214]

[155] The declaration of invalidity in this case strikes at the third step. Without any ancillary remedial interventions, a legal vacuum would open up, and there would no longer be a rule governing how an impeachment motion would progress from the Panel to the Impeachment Committee, if it progresses at all. Such a lacuna would itself be unconstitutional because "[w]ithout rules defining the entire process, it is impossible to implement section 89".[215] It follows that a limited severance coupled with reading-in is not only appropriate, but necessary.

[156] There can scarcely be a more deferential order than severing the offending provisions and importing a narrowly tailored reading-in solely to bridge a procedural gap in the wake of a declaration of invalidity. Such an order preserves the National Assembly's own pre-existing legislative choices, while abiding by the Constitution. This is what this Court said in *Arena Holdings*.[216]

[157] In that matter, this Court confirmed the High Court's declaration of invalidity in respect of provisions of the Promotion of Access to Information Act[217] (PAIA) and the Tax Administration Act[218] (TAA) to the extent that those legislative dispensations

[211] Rules 129A-129C.

[212] Rule 129G.

[213] Rule 129I.

[214] Rule 129J.

[215] *EFF II* above n 3 at para 182.

[216] *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* [2023] ZACC 13; 2023 (5) SA 319 (CC); 2023 (8) BCLR 905 (CC).

[217] 2 of 2000.

[218] 28 of 2011.

completely prohibited the disclosure of taxpayer information to the public[219] and "totally immunised" such information from a public interest disclosure override embedded in section 46 of PAIA.[220]

[158] This Court held that it was not justified to cloak all taxpayer information in absolute secrecy all the time and that there had to be a mechanism in place to regulate its disclosure.[221] However, with the declaration of invalidity threatening a legislative lacuna,[222] this Court was faced with a choice of remedial options, including:

(a) to innovate and insert into the statutory scheme its own test for the disclosure of taxpayer information, thereby reaching further into the National Assembly's domain than required (albeit for the interim) and in the process breaching the separation of powers; or

(b) to suspend the declaration of invalidity to allow the National Assembly to craft its own disclosure test in line with the judgment and thereby meet the imperative of deferring to the National Assembly in its legislative role, but deny the parties (and every other person with standing) constitutional relief for the entirety of the period of the suspension.

[159] Neither option was suitable on its own. This Court then carved a course to provide immediate and effective relief to the parties, while ensuring comity. This Court coupled a reading-in to its order of severance and cured the defect "with the least interference" by "merely extend[ing] the Legislature's existing formulation of section 46 of PAIA",[223] inserting a section number into section 46 of PAIA and cross-referencing that section to the TAA.[224] Thus, this Court utilised the National

[219] *Arena Holdings* above n 216 at para 195.

[220] Id at para 148.

[221] Id at para 141.

[222] Neither a prohibition on the disclosure or accessing of taxpayer information, thereby allowing circumscribed dissemination, nor a mechanism to ensure access where justified, would have existed once this Court issued its order.

[223] *Arena Holdings* above n 216 at para 199.

[224] Id at para 205, where this Court ordered, among others, that:

Assembly's own legislative mechanism as the solution in deferring to its pre-existing legislative choices, while upholding constitutional supremacy.[225] A similar, deferential solution of invalidating and reading-in with "the least interference" can be achieved in this case.

[160] Just as the section 46 override in *Arena Holdings* obviated an extensive reading-in, such that all that was required was bridging the gap to that section, an extensive reading-in is unnecessary here because the National Assembly has already adopted a means for the receipt and collection, examination, testing and evaluation of evidence into the rules – the Impeachment Committee. All that is required is the textual bridging of the step at which the Panel renders its report. If the Panel concludes that the motion is meritorious, the motion should automatically proceed to the Impeachment Committee without an intervening vote by the National Assembly.

"Pending any measures Parliament might take to address the constitutional invalidity, the impugned provisions shall be read as follows:

(a) Section 46 of PAIA shall read:

'46 Mandatory disclosure in public interest.— Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 35(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—

(a) the disclosure of the record would reveal evidence of—

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

(b) Subsection 69(2) of the TAA shall be read as if it contained an additional paragraph (bA) after the existing paragraph (b):

'(bA) where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act 2 of 2000'

(c) Section 67(4) of the TAA shall be read as if the phrase 'unless the information has been received in terms of the Promotion of Access to Information Act 2 of 2000' appeared immediately before the full stop."

[225] Id.

[161] The entirety of this exercise would occur within the bounds of the impugned rule 129I. The severance and reading-in combination would involve no—

(a) major textual surgery that would be fraught with complications, thereby making severance impracticable;[226]

(b) substitution of the National Assembly's policy choices on mechanism, save to exclude the impermissible;

(c) enduring prescriptions to the National Assembly as to what it should insert into the mechanistic gap, if any;[227] and

(d) substantial interference with or augmentation of the architecture and scheme of that mechanism, or its foundational definitions and thresholds.

[162] If anything, the remedy preserves the National Assembly's pre-existing choices and leaves everything else to it. Severing the offending provisions and introducing the reading-in for an indefinite period, but subject to amendment by the Legislature, is an important feature of any constitutional relief interfering with statutory language. This is so because a court's word in this regard is not final.[228] This Court acknowledged this fact thus:

> "Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits."[229] (Footnotes omitted.)

[163] As this Court explained in *Bhe*:[230]

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[226] *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature* [2012] ZACC 3; 2012 (4) SA 58 (CC); 2012 (6) BCLR 583 (CC) at para 23.

[227] In effect, all that is communicated is what is impermissible under the Constitution.

[228] *National Coalition* above n 123 at para 76.

[229] Id.

[230] *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC).

> "The Court must accordingly fashion an effective and comprehensive order that will be operative until appropriate legislation is put in place. Any order by this Court should be regarded by the Legislature as an interim measure. It would be undesirable if the order were to be regarded as a permanent fixture."[231]

[164] This is true of the order I would propose to make in this instance. It draws the constitutional boundaries, and within them the National Assembly retains control, able to choose whether to retain the reading-in for as long as it wishes to, adjust or augment the reading-in, or devise a new mechanism in light of the Court's pronouncement.

[165] Regarding whether a suspension of the declaration of invalidity of rule 129I is warranted, the impeachment motion must return to the National Assembly and be treated in a constitutional manner. Although a suspension of a declaration of constitutional invalidity is sanctioned by section 172(1)(b) of the Constitution, such suspension is permissible only if it constitutes just and equitable relief. In this instance, a suspension would not be just and equitable as it would merely result in the return of the decision to the National Assembly under the same ineffective rule, with a high risk of a repeat of the same inappropriate action. The proposed remedy is an efficient means of foreclosing any lacuna incidental to the invalidity and any prejudice flowing therefrom.

[166] Furthermore, suspending the declaration of invalidity of rule 129I and halting the National Assembly's reconsideration of the impeachment motion in this case would unduly delay a process of accountability that should otherwise be accorded prompt attention.[232] On this score, *EFF II* observes that "[t]he Constitution demands of all those on whom it imposes obligations, to fulfil them diligently and without delay. It is the duty of this Court to ensure that this injunction is followed."[233]

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[231] Id at para 116.

[232] See *Mazibuko v Sisulu* above n 62 at para 66, discussing the similar device of a motion of no confidence under section 102 of the Constitution.

[233] *EFF II* above n 3 at para 217.

[167] Summing up the position on the relationship between suspending a declaration of invalidity and reading-in, this Court, in *J v Director General*,[234] held:

> "Where the appropriate remedy is reading in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the Legislature need not be given an opportunity to remedy the defect, which has by definition been cured. In the present case, the effect of the order is not to leave a lacuna but to remedy the constitutional defect complained of by the applicants by a combination of reading in and striking down. Under the circumstances, it is not an appropriate case for our order to be suspended."[235]

[168] It would be just and equitable, in addition to the declaration of invalidity and reading-in, to direct the National Assembly to itself carry out the task that the Constitution requires of it and correct the defect in the affected rule, but without any delay occasioned by a *de novo* vote awaiting amendments to the NA Rules. Instead, the vote should be referred to the Impeachment Committee consistent with the reading-in remedy ordered.

[169] This relief seeks neither to displace the National Assembly's constitutional role, nor entrench judicial supervision beyond the necessary extent. Rather, it aims to restore constitutional accountability by removing the impermissible procedural hurdle, whilst leaving the substance of the relevant exercise of power to the National Assembly.

[170] This approach respects the separation of powers for several reasons. It avoids an extensive judicial formulation of parliamentary rules and leaves the content and

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[234] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) BCLR 463 (CC); 2003 (5) SA 621 (CC).

[235] Id at para 22.

design of the amended rule to the National Assembly itself.[236] Furthermore, it does not substitute this Court's judgment for that of the National Assembly on the ultimate question of impeachment. Instead, it requires the National Assembly to fulfil its constitutional responsibilities lawfully and rationally, without dictating the substantive outcome once the Impeachment Committee's report has been referred to the National Assembly.

[171] Importantly, this remedy recognises that the constitutional failure in this case lies not in the National Assembly's eventual determination of whether a removal of the President from office should occur, but in its use of a procedurally defective rule to block the process at a preliminary stage. By removing that block and requiring the National Assembly to act again, within constitutional bounds, this Court vindicates constitutional supremacy without collapsing the distinction between judicial review and parliamentary decision-making. It restores constitutional accountability in a manner that is principled, restrained and effective by correcting an unconstitutional rule and, by default, nullifying the resultant parliamentary decision, and returning the matter to the National Assembly to act in accordance with the Constitution. Anything less would risk allowing an unconstitutional avoidance of accountability to persist under the guise of institutional deference.

Costs

[172] The EFF initially sought costs, including the costs of two counsel where so employed. The ATM also asked for costs and sought those of three counsel where so employed. However, both parties changed their stance at the hearing. The EFF seeks a *Biowatch* costs order on the premise that it seeks to protect and enforce its constitutional rights and should, therefore, be shielded from the costs of an unsuccessful application and awarded costs, including the costs of three counsel where so employed, if it should be successful. The ATM no longer seeks costs against the respondents and asks that no costs be ordered against it should it be unsuccessful.

[236] *Mazibuko v Sisulu* above n 62 at para 71.

[173] The EFF has been successful in its application and should be awarded its costs, though not the costs of three but two counsel where so employed, having regard to the merits of the matter. The opposing parties, the first to fourth respondents, must bear those costs.

Order

[174] The order I would have granted is almost identical to the one of the Court above. The only difference is that I would have declared that this Court has exclusive jurisdiction over the challenge to the NA vote. For these reasons, and the reasons given above, I support the order of the Court. I would have made the following order:

1. This Court has exclusive jurisdiction to hear the application.
2. It is declared that rule 129I is inconsistent with the Constitution, invalid and set aside.
3. Pending any amendment, rule 129I shall read as follows (with the words struck out being severed and the underlined words being inserted into that rule):

   "Rule 129I Consideration and referral of panel report

   (1) Once the panel has reported the Speaker must ~~schedule the report for consideration by the Assembly, with due urgency, given the programme of the Assembly~~ inform the Assembly of the report.

   (2) The President must be ~~informed of the scheduling and any decision on~~ provided with a copy of the report forthwith.

   (3) In the event the ~~Assembly~~ panel ~~resolves~~ concludes that ~~a Section 89(1) enquiry be proceeded with~~ sufficient evidence exists as contemplated in Rule 129G, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose.

   (4) In the event the panel concludes that sufficient evidence does not exist as contemplated in Rule 129G, the Speaker must schedule the report for consideration by the Assembly; and in the event the

Assembly nonetheless resolves that a Section 89(1) enquiry be proceeded with, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose."

4. The severance and reading-in in paragraph 3 of this order shall apply subject to any amendment by the National Assembly.
5. Pending any amendment of the NA Rules, to the extent that any of the other NA Rules are, by implication, affected by the reading-in in paragraph 3 of this order, those rules shall be read consistently with paragraph 3 of this order *mutatis mutandis*.
6. It is declared that the vote of the National Assembly taken on 13 December 2022, declining to refer the Report of the Independent Panel to an Impeachment Committee as envisaged in the NA Rules is inconsistent with the Constitution, invalid and set aside.
7. The Report of the Independent Panel is referred to the Impeachment Committee established in terms of the NA Rules.
8. The first to fourth respondents are ordered to pay the costs of the first applicant, including costs of two counsel where applicable.

KOLLAPEN J (Mathopo J, Seegobin AJ and Tshiqi J concurring):

Introduction

[175] More than 30 years into democracy, we understandably continue to debate and examine key features of our democratic system in our transformative trajectory. This case highlights an issue of significance that transcends the interests of the litigating parties. The narrow issue engages the NA Rules and the processes that apply to the removal of the President under section 89 of the Constitution. That issue, however, is best understood when it is located within a broader examination of our constitutional model. And, in particular, how this model navigates the power that elected majorities may wield within the constitutional space, as well as the constraints that the Constitution

legitimately places on the exercise of such power. All of this plays itself out on the canvas of a composite constitutional text that evidences our transition from an unjust and unequal society to one premised on democratic values.

[176] I have read the carefully-structured and well-reasoned judgments of my Colleagues Maya CJ (first judgment) and Majiedt J (third judgment) in which both uphold the challenge to the constitutionality of rule 129I of the NA Rules, but for different reasons. The first and third judgments also set aside the NA vote as a result of the unconstitutionality and invalidity of the rule.

[177] These judgments deal with a number of preliminary issues, including the exclusive jurisdiction of this Court, the lateness of the challenge brought by the applicants and whether the relief sought is moot. I intend to address my disagreement with the first and third judgments by separating out the challenge to the constitutionality of rule 129I (rule challenge), on the one hand, and the challenge to the NA vote (vote challenge), on the other. I do so since different considerations apply to those challenges, even though there are some commonalities.

[178] The first judgment provides a comprehensive overview of the background to the application, the legal framework that is applicable, as well as an overview of the parties' submissions. I do not intend to repeat them, save to the extent that it is necessary to advance the reasoning in this judgment. I will, however, indicate where I take a different view on the interpretation of the legal framework as invoked by the first judgment.

[179] By way of summary, I set out hereunder the conclusions I reach.

[180] I agree that our exclusive jurisdiction is engaged in the rule challenge but not for the reasons advanced in the first judgment. Section 89 locates the exclusive power to remove the President with the National Assembly. To discharge this responsibility, this Court, in *EFF II*, concluded that the National Assembly has the constitutional obligation

to develop rules and a mechanism to facilitate the removal of the President. This Court has the exclusive jurisdiction to determine whether the National Assembly has discharged that responsibility. It is on this basis that I conclude that our exclusive jurisdiction is engaged in respect of the challenge to the rule.

[181] On delay and mootness, I take the view that neither arise. A challenge to the constitutionality of the rule is not time-bound and, in addition, can never be moot, for as long as the rule continues to endure, then any challenge to its constitutionality will continue to remain relevant and timely.

[182] On the merits, I disagree with the first judgment that section 89 creates a constitutional obligation to hold the President accountable and that the constitutionality of the rule must be assessed in accordance with that obligation. The only obligation section 89 creates is for the National Assembly to put in place a mechanism in the NA Rules to facilitate the removal of the President, if the National Assembly so elects. It is against that objective that the rule falls to be assessed. In this way, I accept that section 89 is a tool of accountability, in that it grants the National Assembly the permissive power to remove the President, but that does not translate into a constitutional obligation to hold the President accountable. In other words, should a section 89 process unfold and culminate in the removal of a President, all of which constitutes the exercise of permissive powers, accountability is achieved to the extent that it enables the National Assembly to sanction the President where a section 89(1) removal ground has been established.

[183] Following my finding that our exclusive jurisdiction is engaged by this part of the challenge, I conclude that rule 129I is not unconstitutional in that it properly recognises and gives effect to how the permissive power of the National Assembly to remove the President is to be operationalised.

[184] With regard to the challenge to the vote, I persist with my view that section 89 creates a permissive power on the part of the National Assembly to remove the

President. As such, the vote in question constitutes the exercise of a permissive power by the National Assembly. There is no constitutional obligation on how Members may vote under the rule and our exclusive jurisdiction is accordingly not engaged under section 167(4)(e). Lastly, given my view that the challenge to the vote is one based on the rationality and/or the legality of the vote which is unconnected to the constitutionality of rule 129I, our exclusive jurisdiction is also not engaged.

[185] There are two fundamental and insurmountable contradictions in the outcome arrived at by the first and third judgments.

[186] First, both judgments conclude that the rule must be impugned because it allows the National Assembly to impermissibly shut down the preliminary inquiry when the Panel recommends that it ought to proceed. Both judgments also conclude that the NA vote must be set aside in that it was taken in terms of an unconstitutional rule. But this conclusion is not founded in law nor the reasoning of the first and third judgments. First, it cannot be that a vote taken in terms of an unlawful rule is automatically impugned by virtue of the unlawfulness of said rule. This very point is illustrated by the first and the third judgments. Despite the reasons posited for the unconstitutionality of the rule in each of these decisions, the rule, in its current form, may still yield lawful votes by the National Assembly. This would occur in the circumstances where the National Assembly accepts a positive recommendation of the Panel and the matter proceeds to the Impeachment Committee, or where it refuses to accept a negative recommendation of the Panel and the matter proceeds to the Impeachment Committee despite the Panel's finding.

[187] With the above in mind, I am of the view that, whilst an act taken in terms of an unlawful empowering provision may be invalidated where the empowering provision is declared unlawful, this should not be considered automatic. This finding is supported by this Court's decision in *Corruption Watch* when it said that "if the first act is set

aside, a second act *that depends for its validity on the first act* must be invalid".[237] There are no reasons proffered in the first or third judgments to support the position that the validity of the second act in these circumstances, being the NA vote, necessarily depends on the validity of the first, being the rule. I have, in any event, shown that the rule is capable of producing valid votes by the National Assembly despite the invalidation of the rule.

[188] I also note that the same outcome as a declaration of invalidity, as ordered in the first and third judgments, may be achieved through a rationality challenge to the vote. And so, this raises the inevitable question – why unnecessarily impugn the rule when the same outcome may be achieved through a challenge to the NA vote?

[189] Second, the order proposed by the first and third judgments would obligate the National Assembly to accept a positive recommendation from the Panel, but would allow it the discretion to overturn a negative recommendation from the Panel, if need be. There can be no conceivable reason for this contrasting approach to positive and negative recommendations from the Panel. It recognises the validity of the National Assembly's power to grapple with a negative recommendation from the Panel, whilst denying it the exercise of such power when a positive recommendation is made. This contradiction lends support to my conclusion that the source of the first and third judgments' discomfort can be addressed through a challenge to the NA vote, without impugning the rule.

[190] Before addressing the two substantive challenges, I provide some necessary context within which this dispute must be located. It relates to what I refer to as the relationship between majoritarianism and counter-majoritarianism, and how the Constitution allocates power arising out of that relationship. The former denotes, in the main, a system of government where the will of the majority prevails in most decisions

[237] *Corruption Watch* above n 144 at para 33 (emphasis added).

and where there are limited restraints on the power that the majority may wield.[238] The latter system is one characterised by restraints on the power of the majority, and where the Constitution and courts play a more visible and active role in policing the exercise of that power.[239]

[191] Thereafter, I consider the principles associated with the removal and accountability of the President.

Majoritarianism and counter-majoritarianism

[192] It is important to provide a broad context, both constitutional and political, within which this dispute falls to be adjudicated. The narrow issues before this Court are the constitutionality of the NA Rules that regulate the removal power afforded to the National Assembly by section 89 of the Constitution and the concomitant NA vote. My Colleagues and I arrive at largely divergent conclusions. Ordinarily, this would not be unusual, but in doing so we should strive to arrive at a common understanding of the constitutional context within which the dispute is adjudicated. I attempt to capture that.

[193] In modern democracies, particularly those emerging from an authoritarian and undemocratic past such as ours, counter-majoritarianism is an attractive constitutional option. It is seen as providing the necessary constraints on how a majority may exercise power and contributes to the idea of an inclusive political model that is broadly accommodating of all.[240] However, in many of those contexts, the outgoing regime may insist on counter-majoritarian guarantees which could be used in either a democracy-enhancing or democracy-subverting manner, as the case may be.[241] Alongside this must also be the recognition that, at the very heart of democracy, is the power of the people to make free and informed choices about who should represent and

[238] *Transport and Allied Workers Union of South Africa v Putco Ltd* [2016] ZACC 7; 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) at para 61.

[239] Levitsky and Ziblatt "When Should the Majority Rule?" (2025) 36 *Journal of Democracy* 5 at 6.

[240] Id.

[241] Id at 7-8.

govern them, investing in them the powers necessary to do so. Often, the results of this tension are models of governance and constitutionalism that incorporate elements of both majoritarianism and counter-majoritarianism. John Rawls argues that majority rule remains an essential component of democratic decision-making, but it operates within a framework of principles that constrain what majorities may do.[242] In this sense, he offers a justification for constitutional democracy that neither abandons majoritarianism, nor treats it as sufficient.

South Africa's transition to democracy

[194] Nicholas Haysom highlights the political stakes implicit in these two democratic models. He says that in negotiating the constitutional settlement, South African actors were acutely aware of the risks associated with both unrestrained majority rule and excessive minority vetoes.[243] The resulting constitutional design reflects a deliberate effort to balance these concerns by entrenching a robust system of rights, judicial review and institutional checks, while preserving the central role of electoral democracy. The aim was not to displace the will of the majority, but to ensure that it would be exercised within a framework that protects all members of the political community.[244]

[195] In the South African context, we need no reminding of our painful past when, for millions of our people, the right to vote was shut out. When the vote was finally won, it represented a powerful symbol of the new nation, the restoration of the dignity of so many and a real opportunity for change. Therefore, we must understand majoritarianism within this historical fabric and pay due regard to its telling expression and place in the Constitution.

[242] Rawls *A Theory of Justice* revised edition (The Belknap Press of Harvard University Press, Cambridge 1999) at 312-13.

[243] Haysom "Conflict Resolution, Nation-Building & Constitution-Making" (2005) 19 *New England Journal of Public Policy* 151 at 163-4.

[244] Id.

[196] We must therefore, at a doctrinal level, avoid seeing counter-majoritarianism as necessarily democracy-enhancing and majoritarianism as necessarily democracy-subverting. Just as majoritarianism may threaten to override the rights and interests of smaller groups, counter-majoritarianism may subvert democracy by over-emphasising these interests – and may even give minorities power considerably in excess of the legitimate outcome of the electoral process. While there are not always clear lines in how we are to deal with the tension between majoritarianism and counter-majoritarianism,[245] we must respect those lines where we find them in the Constitution.

The expression of majoritarianism and counter-majoritarianism in the Constitution

[197] The Constitution balances political majoritarianism by establishing a supreme Constitution,[246] a justiciable Bill of Rights,[247] independent courts,[248] independent human rights and accountability bodies[249] and a multi-party system that protects minority voices.[250] Similarly, the Constitution firmly entrenches the participation of the public in law and policy-making.[251] In totality, these provisions constrain how the

[245] Id.

[246] See section 1(c) and (d) of the Constitution, which establishes constitutional supremacy rather than parliamentary sovereignty and requires the rule of law, regular elections and a multi-party system of democratic government.

[247] See chapter 2 of the Constitution, which protects individual and minority rights against majority decisions, including equality (section 9), human dignity (section 10) and freedom of expression (section 16).

[248] See section 165(2) of the Constitution, which guarantees the independence of courts; and section 167(5) of the Constitution which grants this Court final jurisdiction to decide on the constitutionality of any law or conduct of the President or Parliament, allowing it to strike down majority-driven decisions where unconstitutional.

[249] See chapter 9 of the Constitution, which establishes bodies like the Public Protector and the South African Human Rights Commission to strengthen democracy by investigating abuses of power by the ruling majority.

[250] See section 57(2)(b) of the Constitution, which ensures that the National Assembly is constituted through a system that allows minority parties representation proportional to their support, reducing the ability of one party to hold total control; and section 19 of the Constitution, which guarantees the right to form political parties, campaign and take part in regular, free and fair elections.

[251] See sections 59 and 72 of the Constitution, which require the National Assembly and National Council of Provinces to facilitate public involvement in legislative and other processes, including public committee meetings; section 152(1)(e) of the Constitution, which obliges municipalities to encourage the involvement of communities and community organisations in local governance; section 195(1)(e) of the Constitution, which requires that people's needs are responded to and encourages the public to participate in policy-making; and section 32 of the Constitution, which establishes a right to access information held by the state, thereby facilitating informed participation.

majority may exercise power by ensuring that it is lawful and within the parameters of the Constitution.

[198] This structure is further reinforced by the Constitution's commitment to participatory democracy. The requirement that legislative and policy-making processes must facilitate public involvement, as recognised by this Court in *Doctors for Life*,[252] affirms that democratic legitimacy is not exhausted by electoral outcomes alone. The Constitution instead contemplates a broader conception of democracy which includes deliberation, accountability and inclusion. In this way, the notion of majority rule itself is mediated through constitutionally prescribed procedures and values.

[199] On the other hand, and in due recognition that the will of the majority continues to remain relevant, the Constitution includes numerous provisions that strengthen majoritarianism in democratic governance. These provisions do so primarily by empowering the majority in the National Assembly to exercise control over the executive branch[253] and drive legislative agendas.[254] These decisions are taken on the strength of a simple majority.

[252] *Doctors for Life* above n 19 at para 98.

[253] See section 86(1) of the Constitution, which prescribes that the President is elected by the National Assembly from among its Members and consequently empowers the party with the majority of seats to control the selection of the Head of State and the Head of the National Executive; and section 102 of the Constitution, which allows the National Assembly to remove the President, Deputy President or Ministers (Cabinet) through a majority vote of no confidence. Conversely, this structure means a majority party may also block such motions. See also sections 125 and 132 of the Constitution which, similar to the national level, allow the majority party in a Provincial Legislature to elect the Premier and appoint the Members of the Executive Council.

[254] See section 91 of the Constitution, which authorises the President, once elected, to appoint the Deputy President and Ministers from Members of the National Assembly. This section also names the President as the Head of the Cabinet automatically. This directly ties the Executive branch to the majority in the Legislature, allowing the majority party to dominate both branches. See also section 46 of the Constitution, which requires the appointment of Members of the National Assembly through an electoral system that results, "in general, in proportional representation". In effect, this provision establishes a closed-list system where parties nominate representatives. This strengthens party discipline, as Members of Parliament owe their positions to the party leadership, thereby enabling the majority party to act cohesively. Finally, see sections 44 and 73-77 of the Constitution, which vest national legislative authority in Parliament, allowing the majority party to pass legislation, set the national agenda and pass budgets with limited ability for minority parties to halt these.

[200] There are also provisions that contain elements of both majoritarianism and counter-majoritarianism, including the impeachment of judges,[255] the amendment of the Constitution[256] and the removal of the President.[257] In each of these provisions, except in a motion of no confidence, the requirement of a supermajority vote (two-thirds majority or more) moderates the partisanship of a large party.

[201] This is not a uniquely South African phenomenon, but one that many constitutional democracies are required to grapple with. The answer may be complex, but the challenge is not insurmountable. I have shown how the imperatives of majoritarianism and counter-majoritarianism find expression within a carefully delineated space in the text of our Constitution.

[202] This Court, in the *Certification* judgment,[258] commented on what it called the political features of the Constitution, which provided useful guidance on how courts should approach this issue. It said:

> "Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [new constitutional text],[259] save to the extent that such choices may be relevant either to compliance or non-compliance with the [Constitutional Principles]. Subject to that qualification, the wisdom or otherwise of any provision of the [new constitutional text] is not this Court's business."[260]

[255] Section 177 of the Constitution.

[256] Section 74 of the Constitution.

[257] Sections 89 and 102 of the Constitution.

[258] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 24; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[259] In the *Certification* judgment, this Court was charged with certifying the new constitutional text as complying with the Constitutional Principles.

[260] *Certification* judgment above n 258 at para 27.

This is not merely guidance that we should heed. It also establishes a critical doctrinal basis from which we are to commence our approach to these issues. We must understand the deliberate design of the Constitution and the political choices it makes, and incorporate this understanding into our deliberations when arriving at a meaning of accountability in the context of section 89.[261] This demands that we be mindful that the term is used and understood differently across the text of the Constitution.

[203] Our entire democratic system, including the power vested in the courts, arises from the political agreement expressed in the text of our Constitution. We are required to uphold the supremacy of the Constitution by discharging our responsibilities as the Judiciary, but we are to do so in a manner which defers to those parts of the constitutional text, such as section 89, that provide a less searching and scrutinising role for courts. Although our training as lawyers and the orientation of our legal system as a result of our shameful past may instinctively draw us to the principles of counter-majoritarianism, we must show restraint in how we navigate this space and, in doing so, show fidelity to the political choices made in the Constitution. This exercise of restraint is not the abdication of judicial responsibility but rather its proper discharge. In contrast, when we seek to moderate or second-guess the effect of the political choices the Constitution makes, we infringe the separation of powers and undermine the supremacy of the Constitution.

Removal and accountability

[204] The related but conceptually different imperatives of removal and accountability, and how they are dealt with in our Constitution, also underpin why there is a need to be cognisant of both the political and legal dimensions of the Constitution. Within this framework, it is apparent that removal and accountability seek to advance different but related objectives within an integrated composite constitutional design.

[261] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC) at para 132.

[205] The National Assembly is charged with electing a President from among its Members at its first sitting. All that the Constitution requires is that the candidate be a Member of the National Assembly at the time of the election.[262] Beyond that, the National Assembly is at liberty to elect any such Member in accordance with the procedure the National Assembly prescribes. It is a wide and untrammelled power entrusted to the National Assembly and is arguably the purest form of democracy, in that the people, through their elected representatives, elect the President. That election occurs within the framework of the Constitution as an expression of popular will – an indispensable feature of a democratic state.

[206] And just as the power to elect the President is given in wide terms, so too is the power to remove the President. That power is located expressly in section 89,[263] to which reference has already been made, as well as in section 102[264] through a motion of no confidence.

[207] In *EFF II*, this Court, in describing the scope of these sections, said:

> "It is apparent from both sections 89 and 102 that [M]embers of the [National] Assembly wield enormous power. They may remove the President and Cabinet from office for only the reason that they have lost confidence in them. Ordinarily, the loss of confidence may stem from the manner in which the President or Cabinet performs functions or exercises power. But the Constitution does not prescribe any conditions for the exercise of the power to remove by means of a motion of no confidence. All that is required is a motion of no confidence supported by a simple majority."[265]

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[262] Section 86 of the Constitution.

[263] Quoted at n 7 above.

[264] Section 102 of the Constitution, entitled "Motions of No Confidence", reads as follows:

> "(1) If the National Assembly, by a vote supported by a majority of its [M]embers, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
>
> (2) If the National Assembly, by a vote supported by a majority of its [M]embers, passes a motion of no confidence in the President, the President and the other [M]embers of the Cabinet and any Deputy Ministers must resign."

[265] *EFF II* above n 3 at para 137.

[208] However, this Court went on to distinguish the power of removal as one that may only be exercised if certain conditions are met, largely on account of the punitive nature of a removal. It said:

> "In contrast, removal of the President by means of impeachment is subject to certain conditions. It must have, as its foundation, at least one of the grounds listed in section 89(1). And the impeachment itself must be supported by a two-thirds majority. The reason for this distinction in process is that impeachment is punitive. Depending on the ground on which it is based, the impeached President may lose all benefits and be barred from occupying any public office."[266]

[209] And so, while section 89 also vests the Members of the National Assembly with enormous power, that power is constrained in that it may only be exercised by the National Assembly where one of the grounds of removal is established. If such a ground is established, the National Assembly is then at liberty to remove the President, or not, as the case may be. It is not obliged to effect the removal of the President even if the conditions required for removal were met. This much was said in *EFF II*:

> "[S]ection 89(1) does not oblige the [National] Assembly to remove the President from office, even where one or more of the listed grounds are established. On the contrary, the [National] Assembly retains a discretionary power to remove the President."[267]

[210] Accountability is a very different matter, however. It courses through the text of the Constitution in a strong and consistent continuum. It is best exemplified in the words of Etienne Mureinik:

> "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the

[266] Id at para 138.

[267] Id at para 203.

> fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."[268]

[211] Variations of the word "accountable" appear approximately twenty-two times in the text of the Constitution. It is used in the aspirational sense as a foundational value of the Constitution[269] and is similarly used to describe the ideal government.[270] In other instances, it is used in a permissive sense as an empowering but not obliging action that will lead to its advancement.[271] Finally, it is used in a peremptory form by creating clear and enforceable constitutional obligations.[272]

[212] Tellingly, section 89 does not make any reference to the terms "accountable" or "accountability". In other sections, its use is clear – there is no ambiguity in its meaning nor in what is expected of constitutional subjects. I accept, however, that section 89 is a tool of accountability in that, when invoked, it can lead to the removal of the President, which is the ultimate form of accountability. But this is far from it creating a constitutional obligation to hold the President accountable. This is an issue to which I will return.

[213] Where the term is used permissively, as is the case in section 57(1)(b),[273] it can never be interpreted as an obligation. In other words, section 57(1)(b) cannot be read to obligate the National Assembly to make NA Rules and orders of the kind contemplated. The National Assembly may elect do so, but is not obliged to. It enjoys

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[268] Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32.

[269] See section 1(d) of the Constitution.

[270] See sections 92, 93(2), 116(1)(b), 133, 152(1)(a), 181(5) and 196(5) of the Constitution.

[271] See sections 57(1)(b) and 70(1)(b) of the Constitution.

[272] See sections 41(1)(c), 55(2)(a), 114(2)(a), 195(1)(f), 199(8) and 215(1) of the Constitution.

[273] Section 57(1)(b) of the Constitution reads as follows:

> "(1) The National Assembly may—
>
> . . .
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

the widest discretion in making that choice and the decision of the majority of its Members will be dispositive thereof.

[214] By contrast, where the term is used peremptorily, as is the case in section 55(2),[274] the Constitution creates an obligation which cannot be avoided. Section 55(2) says that the National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. This provision creates an obligation on the part of the National Assembly that it must discharge. Here, the National Assembly is precluded from using its majority to sidestep the constitutional obligation the section prescribes – it is an obligation that it is obliged to discharge.

[215] There is accordingly a clear conceptual difference in the treatment of removal and accountability in our Constitution. In the context of majoritarianism and counter-majoritarianism, I would say that, generally, the peremptory provisions on accountability represent a strong expression of counter-majoritarianism that creates binding constitutional obligations that allow the strong review powers of courts to oversee the discharge of those obligations. Removal, in the permissive terms of section 89, is instead a strong expression of majoritarianism, vesting the National Assembly with wide discretionary power and limited judicial oversight.

[216] Sections 89 and 102 may be properly described as tools of political accountability. If invoked, they can effect the highest form of accountability – the removal of the President – but whether they are invoked is wholly within the discretion of the National Assembly. That is how I understand their description as tools of accountability as opposed to the obligation to hold accountable found in section 42(3), read with section 55(2), of the Constitution.

[274] Quoted at n 37 above.

[217] This is not an accident in drafting but rather, as Haysom reminds us,[275] a deliberate and careful attempt not to displace the will of the majority, but to ensure that it would be exercised within a framework that protects all members of the political community and beyond. That framework, as is evidenced in the text of our Constitution, incorporates both aspirations of democratic expression, which must be honoured and respected equally as part of the constitutional design expressing the will of the people.

[218] Having provided that context, I proceed to deal with the challenges before us.

Exclusive jurisdiction

The rule challenge

[219] In line with the first judgment, I agree that we enjoy exclusive jurisdiction over the rule challenge in terms of section 167(4)(e). However, the reasons I advance for this finding diverge from those in the first judgment. The National Assembly does not have an obligation to hold the President accountable under section 89, and our exclusive jurisdiction over the rule challenge cannot be found there. Rather, it is the obligation of the National Assembly to create a mechanism for the removal of the President in terms of section 89 that engages our exclusive jurisdiction. I explain.

[220] In *EFF I*, this Court said:

> "To determine whether a dispute falls within the exclusive jurisdiction of this Court, section 167(4)(e) must be given a contextual and purposive interpretation, with due regard to the special role this apex Court was established to fulfil. As the highest court in constitutional matters and 'the ultimate guardian of the Constitution and its values', it has 'to adjudicate finally in respect of issues which would inevitably have important political consequences'. Also to be factored into this process is the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications. This is necessary to preserve the comity between the

[275] Haysom above n 243.

> judicial branch and the executive and legislative branches of government."[276] (Footnotes omitted.)

[221] The "crucial and sensitive political implications" of the NA Rules governing the removal of a sitting President cannot be overstated. But there is further useful guidance to be extracted from *EFF I* which clearly establishes our exclusive jurisdiction in the rule challenge at hand. As already quoted above,[277] this Court identified a key indicator of a constitutional obligation, as contemplated in section 167(4)(e), when it said that such obligations must be specifically imposed on the President or the National Assembly, as the case may be.[278]

[222] Whether the NA Rules governing the removal of the President in terms of section 89 fall within the exclusive remit of the National Assembly has already been decided. This Court, in *EFF II*, held that section 89 of the Constitution imposes an exclusive obligation on the National Assembly to put in place rules for the removal of the President.[279] In the present matter, it is the EFF's case that the NA Rules for the removal of the President, which have since been adopted by the National Assembly, do not, in their current form, fulfil that constitutional obligation. Given that the content and application of these NA Rules are inextricably linked to the constitutional obligation vested solely in the National Assembly by section 89, our exclusive jurisdiction in terms of section 167(4)(e) is engaged with respect to this challenge.[280]

The vote challenge

[223] With respect to the challenge to the vote, I disagree with the first judgment's finding of exclusive jurisdiction for the reasons I set out hereunder.

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[276] *EFF I* above n 2 at para 19.

[277] See the first judgment at [40].

[278] *EFF I* above n 2 at paras 18 and 23.

[279] *EFF II* above n 3 at paras 173 and 196.

[280] Id at para 196.

[224] In its founding affidavit, the EFF stated that "the essence of this application is the failure of Parliament to uphold and carry out its constitutional obligation to hold the President accountable in terms of section 89 of the Constitution". As is apparent from this wording, the vote challenge rests on the National Assembly's obligation to hold the President accountable as allegedly required by section 89. Whilst I do not dispute that the obligation to hold the President to account rests on the National Assembly, this constitutional obligation cannot be located in section 89, and it is for this reason that the EFF's reliance on the obligation of accountability to establish exclusive jurisdiction in respect of the vote challenge cannot be sustained. This conclusion is firmly rooted in the jurisprudence of this Court as it pertains to constitutional obligations and section 167(4)(e).

[225] Whilst much of that jurisprudence has already been referenced in the first judgment, I highlight only those features that are central to my reasoning.

[226] First, *Women's Legal Centre I* reminds us that our exclusive jurisdiction is dependent on whether the obligation "is stated unambiguously in the Constitution".[281] Second, in *SARFU I*, this Court held that "a narrow meaning should be given to the words 'fulfil a constitutional obligation' in section 167(4)(e)",[282] so as to avoid any conflict with the lower courts' powers to make orders concerning the validity of presidential or parliamentary conduct.[283] Third, this Court in *EFF I*, specifically noted that "due regard [must be given] to other constitutional provisions that are materially relevant to the one being interpreted".[284]

[227] With the above in mind, the wording of section 89[285] simply fails to establish an obligation to hold the President accountable on the part of the National Assembly

[281] *Women's Legal Centre I* above n 24 at para 15. See also *Zuma* above n 49 at paras 27 and 35.

[282] *SARFU I* above n 28 at para 25.

[283] See also *Doctors for Life* above n 19 at paras 19-20 and *Zuma* above n 49 at para 28.

[284] *EFF I* above n 2 at para 17.

[285] Quoted at n 7 above.

through removal. Not only is the section drafted permissively, it also does not make any reference to "accountable", "accountability", "account" or any other words affiliated with such an obligation. What is apparent from the wording of section 89 is that the National Assembly is charged with the discretion to remove the President if a jurisdictional ground is met and a two-thirds majority vote is obtained.

[228] Were this Court to find that section 89, beyond creating an obligation to make rules governing removal, also establishes a constitutional obligation to hold the President accountable, it would be importing the peremptory language of section 42(3), read with section 55(2), into the text of section 89. By so doing, the text of section 89 would be impermissibly distorted through the creation of a constitutional obligation of accountability that the text of section 89 simply does not support. It is obvious, but worth recalling, that section 89 is a constitutional provision and the imposition of constraints onto it, which are not apparent from the section itself, would impermissibly tread on the remit of the drafters of the Constitution.

[229] If we are to hold that section 89 creates an obligation to hold the President accountable, we would have to read section 89 as follows: "The National Assembly may, by a resolution of a two-thirds majority, remove the President but must in doing so hold the President accountable". In my view, a permissive and peremptory power cannot exist in contradiction with one another in the balanced formulation of section 89.

[230] The principle of subsidiarity requires that the more specific norm be preferred over the general norm when addressing an issue.[286] In the present circumstances, this norm would, if this Court sought to locate a constitutional obligation on the part of the National Assembly to hold the President accountable, direct this Court to section 42(3) and not to section 89. This Court cannot rely on section 89 to found this obligation

[286] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at paras 46 and 121.

when section 42(3) exists with far greater specificity. This is the design of the Constitution, which we are required to respect.[287]

[231] We must now turn to sections 42(3) and 55(2), read with section 92, as materially relevant to the interpretation of section 89 in establishing an obligation of accountability. What is apparent is that these sections do, in fact, create clear and unambiguous obligations on the part of the National Assembly to hold the President accountable without dictating how it is to do so. These sections are prescriptive and demand action from the National Assembly whilst also lacking specificity. In contrast, one cannot rely on the deliberately permissive language used in section 89 to establish a positive, and very specific, obligation to hold the President accountable through removal.

[232] In this regard, I do not seek to relegate accountability to some secondary imperative. It is not. It is a critical feature of our constitutional framework but its expressions and attainment are treated differently in different spaces on the constitutional canvas. I accept that accountability is not irrelevant in a section 89 process as it has been correctly described as a tool of accountability. However, this is very different, as I have shown from a reading of section 89, from creating an accountability obligation. In fact, most of the reasoning the first and third judgments adopt is based on this, with respect, incorrect and elevated understanding of accountability in the section 89 process.

[233] In any event, if this Court were to allow the exercise of a permissive power to engage our exclusive jurisdiction without more, it risks expanding the scope of section 167(4)(e). This Court is required to interpret the constitutional obligation in section 167(4)(e) narrowly.

[287] See also this Court's exposition of the principle of subsidiarity in *Commissioner, South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3; 2025 (5) SA 617 (CC); 2025 (6) BCLR 639 (CC) at paras 124-30.

[234] In the circumstances, having concluded that section 89 does not create an accountability obligation, the failure to fulfil the supposed obligation cannot be relied upon to establish this Court's exclusive jurisdiction in the vote challenge. Such an obligation simply does not exist in section 89.

[235] A final consideration of the inapplicability of section 167(4)(e) to this challenge is this Court's decision in *Zuma*. In a challenge to presidential conduct, this Court was meticulous in distinguishing between an exercise of constitutional powers and the failure to fulfil constitutional obligations as per section 167(4)(e). It stated that:

> "The distinction between exercising constitutional powers and failing to fulfil constitutional obligations is crucial. Section 167(4)(e) addresses only the latter category. When the President exercises a power – even if that exercise is challenged as improper – the inquiry concerns a positive act rather than an omission or failure. The challenges advanced by the applicants fall squarely into the former category. Their contention that the President lacked authority to suspend Minister Mchunu or appoint Professor Cachalia, and that his appointment of Madlanga ADCJ was irrational, raises familiar questions of administrative review that apply uniformly across the exercise of public power. The constitutional imperatives of rationality and legality bind all organs of state and public functionaries alike. Any 'failure' to comply with these standards is not a failure to comply with a constitutional obligation uniquely imposed on the President, but rather a breach of general constitutional principles binding on all holders of public power."[288]

[236] The vote challenge is also premised on grounds of irrationality and unlawfulness, with the applicants seeking to characterise this as a failure by the National Assembly to fulfil its constitutional obligations. This would be a proper basis to engage the exclusive jurisdiction of this Court if the vote were linked to a constitutional obligation. However, when one cuts to the bone of the challenge, the substance of their argument is that they disagree with the manner in which the discretionary powers of the National Assembly were exercised when it voted. There was no failure to exercise the obligations imposed

[288] *Zuma* above n 49 at para 29.

on it by section 89. As said by this Court in *Zuma*, "[s]uch complaints concern the manner of exercising constitutional powers, not the failure to fulfil constitutional obligations, and fall within the standard review jurisdiction of the High Court under section 172(2)(a)".[289]

[237] It is for these reasons that I conclude that this Court does not have exclusive jurisdiction in respect of the vote challenge.

Direct access

[238] Having found that the vote challenge does not engage this Court's exclusive jurisdiction, I turn now to the EFF's alternative submissions for direct access under section 167(6)(a) of the Constitution. The test for allowing direct access to this Court is trite: whether exceptional circumstances exist, and whether it is in the interests of justice to grant direct access.[290] In support of its request for direct access, the EFF submits that the interests of justice justify the granting of direct access.

[239] In advancing this argument, the EFF overlooks the fundamental role the lower courts play in the adjudication of these kinds of issues. In acknowledgment of the High Court and Supreme Court of Appeal's role in the assessment of the Executive's conduct, this Court in *EFF I* stated that it "is the responsibility they share with this Court – a terrain that must undoubtedly be adequately insulated against the inadvertent and inappropriate monopoly of this Court".[291] Further grounding of this fundamental principle may be found in *Women's Legal Centre I*, where this Court said:

> "[T]he power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, and with good reason. It is loath to be a court of first

[289] Id at para 30.

[290] *UDM v Speaker* above n 55 at para 23.

[291] *EFF I* above n 2 at para 17. See also *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 9-11; *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 3; and *Zondi v MEC, Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2006 (3) BCLR 423 (CC) at para 12.

> and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other courts' insights."[292] (Footnote omitted.)

[240] Here, there are no exceptional circumstances and the interests of justice do not favour granting direct access. The High Court enjoys the necessary jurisdiction to deal with review challenges to executive action. Should this matter end up before this Court, it would benefit from the High Court's insight. In closing, this Court in *Mkontwana*,[293] makes clear that—

> "the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another court."[294]

Alleged delay in the challenge to rule 129I

[241] I associate myself with the finding of the first judgment that there is no delay in the rule challenge.[295] As a matter of logic, and on the strength of this Court's decision in *O'Brien*,[296] a challenge to the constitutional validity of a rule which applies in perpetuity can never be extinguished by delay. If the rule is operative, it is subject to constitutional scrutiny and any challenge brought while the rule endures will be timely.

Merits

[242] The first judgment says this case is about the constitutional obligation to hold the President accountable. It says:

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[292] *Women's Legal Centre I* above n 24 at para 27. See also *AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 30.

[293] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[294] Id at para 11.

[295] See the first judgment at [97] to [100].

[296] *O'Brien* above n 118.

> "This is a breach of the constitutional obligations imposed upon the National Assembly by section 89(1) of the Constitution, that is, to put in place an effective mechanism and to take appropriate action to hold the President accountable in terms of that section."[297]

[243] However, as already explored, the alleged constitutional obligation of accountability that the first judgment relies on in reaching these findings is not a part of section 89, but is rather a central feature of sections 42(3) and 55(2). There is, therefore, an impermissible conflation of the provisions of sections 42(3) and 55(2) with that of section 89, with the latter provision going no further than to endow the National Assembly with the permissive power to remove the President. It would also, as I have indicated, infringe the principle of subsidiarity.

[244] Similarly, the NA Rules that empower the National Assembly to discharge its permissive power to remove the President do no more than require it to put in place a mechanism which ensures that, if or when the National Assembly decides on commencing a process for the removal of the President, that process can be properly facilitated. The National Assembly has discharged this obligation.

[245] For completeness' sake, I turn to the mechanisms which are catered for in the NA Rules to give effect to the true accountability obligation contained in section 55(2). These mechanisms include: statements by Members and the Executive;[298] questions to the Executive;[299] the formation of standing committees[300] and portfolio committees;[301]

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[297] See the first judgment at [144].

[298] Governed by chapter 9 of the NA Rules, which allows Members of the National Assembly to make statements on any matter and for Cabinet Members to make statements regarding policy implementation.

[299] Governed by chapter 10 of the NA Rules, which empowers the National Assembly to issue questions for oral or written reply by Cabinet Members, including questions on matters of accountability.

[300] Governed by chapter 12 of the NA Rules, which establishes specific standing committees to oversee certain areas of government. For example, the Standing Committee on Public Accounts was formed to oversee government spending as is mandated by section 55 of the Constitution.

[301] Governed by chapter 12, part 10 of the NA Rules, these committees are the primary oversight mechanism of the National Assembly. They are mandated to monitor, investigate, inquire into and make recommendations regarding the legislative programme, budget and other listed activities of specific government departments.

the receipt of public petitions;[302] the powers to summon;[303] and, lastly, debates on urgent matters.[304] Over and above these mechanisms, the National Assembly may, as was noted by this Court in *EFF II*, "wield enormous power"[305] by removing the President through a section 89 impeachment process or a section 102 motion of no confidence.

[246] So, too, is it important to bear in mind that this is not a closed list. As recently as 2 December 2025, the National Assembly voted in favour of and established a dedicated Committee on the Presidency with the intention of strengthening executive accountability following the recommendations made by the Judicial Commission of Inquiry into Allegations of State Capture. This Committee enables Parliament to scrutinise the Presidency's budget and operations by requiring the Director-General in the Presidency to account and the President and Deputy President to appear before the National Assembly annually. The Committee is the first of its kind and was established after the National Assembly amended the NA Rules to provide for the creation of such a committee.

[247] In sum, the mechanisms for the National Assembly to hold the Executive, including the President, accountable are properly catered for in the Constitution and the NA Rules. Section 89 cannot be laboured with carrying that obligation. It was never the intention that it would, and the plain reading of its text militates against that view.

[248] The structure of section 89, while permissive in the widest sense, does, however, constrain the National Assembly when it attempts to remove the President. It does so in two ways. First, one of the grounds of removal must be present and accompany any resolution for removal. Second, at least two-thirds of the Members of the

[302] Governed by chapter 14, part 3 of the NA Rules, allowing the receipt of petitions from the public.

[303] Governed by section 56 of the Constitution, rule 167 of the NA Rules and chapter 15, part 4 of the NA Rules, empowering the National Assembly or its committees to summon any person to give evidence on oath, produce documents or report to it to maintain oversight.

[304] Governed by rule 130 of the NA Rules, which allows for the discussion of urgent matters of national public importance by the National Assembly.

[305] *EFF II* above n 3 at para 137. Also quoted above at [207].

National Assembly must support the removal. The grounds of removal are: a serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of office.[306] Accordingly, any resolution purporting to remove the President that fails to satisfy any one of these grounds will be found to be lacking and any such removal effected will likely be unlawful. In *EFF II*, this Court said that the process envisaged in section 89(1) necessarily involves an antecedent determination by the National Assembly to the effect that one of the listed grounds exists.[307]

[249] I agree with the first judgment when it says that the two-stage impeachment process involves—

> "a preliminary inquiry to determine whether a listed ground exists, followed (if such a ground is established) by a decision by the National Assembly on whether to remove the President from office."[308] (Footnotes omitted.)

[250] And so, while the National Assembly is not obliged to remove the President, it is obliged, if it reaches the stage when a vote is taken on the removal of the President, to demonstrate that a listed ground for removal exists. This, as I have indicated, is a condition precedent for the benefit of the President given the punitive nature of removal under section 89.

[251] The primary issue in these proceedings pertains to the authority of the National Assembly during the initial phase of the impeachment inquiry. The NA Rules, in structuring the preliminary inquiry, provide for a two-stage preliminary process. First, they contemplate the appointment of a Panel to consider the evidence in support of a motion to remove. In this regard, the Panel is required to make a recommendation to the Speaker on whether sufficient evidence exists to show that the President committed

[306] See section 89(1) of the Constitution.

[307] *EFF II* above n 3 at para 180.

[308] See the first judgment at [121].

a serious violation of the Constitution or law, committed serious misconduct or suffers from an inability to perform the functions of office.[309]

[252] The second stage of the preliminary inquiry would arise if the National Assembly accepted a recommendation of the Panel that sufficient evidence exists to establish a listed ground in section 89. This would culminate in the impeachment process being referred to an Impeachment Committee, whose task it is to assess the veracity of the allegations of misconduct and consider a recommendation for the removal of the President. Both these stages, however, form part of the preliminary inquiry.

[253] The first judgment concludes that rule 129I is unconstitutional on the basis that it—

> "installs the National Assembly as a gatekeeper – the very invincible giant that this Court has warned of. With power exclusively in the hands of the National Assembly, functioning as a collective body, there is a high risk of section 89(1) being paralysed, thus making it easy for the President to escape consequences. Instead of ensuring accountability and transparency, rule 129I gives the National Assembly an ability to frustrate and thwart subsequent steps in the process which would enable it and the public to make informed decisions in the fulfilment of their obligations and exercise of their rights. In this case, the mechanism designed and chosen by the National Assembly is both an ineffective one and one that undermines key constitutional values that it is required to live up to."[310] (Footnotes omitted.)

The effect of this holding is that the National Assembly, which is partisan and majority-controlled, cannot take a decision on the outcome of the first stage of the preliminary inquiry involving the Panel. I disagree with this conclusion and do so for a number of reasons.

[309] *EFF II* above n 3 at paras 176 and 180.

[310] See the first judgment at [143].

[254] The first judgment locates its reason for impugning the rule in the premature shutting down of the preliminary inquiry by a political majority before a full ventilation of the facts. However, on the approach of the first judgment, there will indeed be a shutting down of the preliminary inquiry if the Panel does not recommend an impeachment trial. There will also not be a full ventilation of the facts that the first judgment says is necessary. The difference between a permissible shutting down and one that is impermissible lies not in the NA Rules but in how the National Assembly votes, and it is that conduct that must be challenged. I have indicated in my response to the third judgment that the rule does not permit the National Assembly to act unlawfully, nor is there anything in the rule which may remotely suggest otherwise.

[255] This Court confirmed, in *EFF II*, that section 89 empowers the National Assembly and the National Assembly alone to remove the President from office.[311] It is what I have earlier described as the exclusive nature of the power given to the National Assembly in terms of section 89. This Court then reasoned that, as the drafters of our Constitution gave the power to the National Assembly to elect the President from among its Members, it was only fitting that the same body should have the power to remove from office the person it had elected.[312] Beyond that, this Court explained that the locus of that power included any preliminary processes.[313]

[256] This all points firmly to the conclusion that section 89, as understood and interpreted by this Court, locates the outcome of the preliminary inquiry, as well as the power to remove the President, with the National Assembly and decidedly does not create a bifurcated process. The National Assembly constitutes both the Panel and the Impeachment Committee and allocates the powers and responsibilities to both bodies. Importantly, these structures can do no more than make recommendations to the National Assembly.

[311] *EFF II* above n 3 at para 173.

[312] Id.

[313] Id at paras 180-1.

[257] In crafting the NA Rules relating to the removal of the President, the National Assembly was conspicuous in retaining its section 89 power. This is evident from the content of rule 129P which provides that:

> "(1) The [National] Assembly will make the final and binding decision relating to any matter dealt with in this rule.
>
> (2) Any recommendation made by the independent panel or the Impeachment Committee or any decision made by the Speaker in terms of this rule is not final and binding on the [National] Assembly, including on any decision the [National] Assembly intends to make in terms of this rule."[314]

[258] And so, it must follow that the NA Rules do not purport to hand control over the preliminary inquiry to the Panel as the first judgment suggests. That control has always been vested in the National Assembly by section 89. Included in that control is the power vested in the National Assembly not to proceed to the second part of the preliminary inquiry. This is not constitutionally offensive as common sense would support the view that, arising out of the sifting, it is practical and efficient not to belabour the Impeachment Committee with an impeachment trial with insufficient evidence. At the same time, the National Assembly should not be bound to refer the matter to the Impeachment Committee where it takes a different view from the Panel based on the information before the Panel. Of course, the National Assembly may establish structures or create processes to assist it, as it did under the NA Rules, but it does not, in so doing, divest itself of the power the Constitution gives to it under section 89.

[259] Were this Court to hold that the control over the preliminary inquiry should not be vested with the National Assembly, but in some other structure, such as the Panel, it would be this Court which would be divesting the National Assembly of control over the preliminary inquiry. That would offend both the structure of section 89 and the location of the political power that section 89 vests in the National Assembly. That was

[314] Rule 129P.

a choice made by the drafters of the Constitution and it is a choice this Court is obliged to respect.

[260] Furthermore, this will also result in an irreconcilable disjuncture in the removal process. The first judgment appears to close the door to the expression of partisanship in the preliminary inquiry but accepts that partisanship may prevail in the final vote on the removal of the President. That partisanship, however, must be expressed by way of a supermajority. The effect of its holding is that it would be unconstitutional to allow the National Assembly to vote against a recommendation of the Panel, but constitutional for the very same National Assembly to ignore a recommendation of the Impeachment Committee to remove the President – a far fuller recommendation arrived at after a complete consideration of all the evidence and tested through cross-examination. Section 89 is, with respect, not capable of being interpreted in such a bifurcated manner.

[261] In my view, there is no justification in the attempt by the first judgment to distinguish between the role of the National Assembly in relation to the preliminary inquiry and its role in the final vote. The power of the National Assembly to remove and its power in the preliminary inquiry are the same. The powers in respect of both processes are located in section 89 which must be interpreted as giving the National Assembly the permissive power in both processes. Accordingly, it is not sustainable to argue that whilst the ultimate power granted to the National Assembly to remove the President is wide, the National Assembly's power in the preliminary stage is either constrained or should be removed altogether. This cannot occur – this Court cannot deprive the National Assembly of its powers in the preliminary inquiry but reallocate them in the final process.

[262] In bolstering its argument in this respect, the first judgment turns to rely on this Court's decision in *Mazibuko v Sisulu*.[315] It does so by extending the principle against majority control, as enunciated in this decision, to impugn the majoritarian nature of the

[315] *Mazibuko v Sisulu* above n 62.

National Assembly itself in the present matter.[316] However, this decision is clearly distinguishable and any reliance thereon in the present matter is misplaced. *Mazibuko v Sisulu* was concerned with issues of majority control in committees charged with a particular function, which had the ultimate consequence of preventing a motion of no confidence from coming before the National Assembly. Committees of this nature are not vested with the powers enjoyed by the National Assembly but are tools relied upon by the National Assembly to assist it in exercising said powers. To divest the National Assembly of its majoritarian nature by placing it on equal footing as committees formed under its auspices would be to render a political body non-political. The effect of this decision was to vindicate the right of the National Assembly to vote, as the real decision-maker, in terms of section 102 of the Constitution. The ratio of this judgment shares this purpose.

[263] Similarly, the first judgment turns to the decision in *Oriani-Ambrosini* for support.[317] The first judgment takes the view that that decision "invalidated rules of the National Assembly which required an individual Member to obtain the National Assembly's permission before introducing a Bill".[318] In so doing, it concludes that *Oriani-Ambrosini* "makes clear why accountability and transparency are undermined when the National Assembly performs a gatekeeping function at an early stage of a constitutional process".[319] I disagree. This Court's decision in *Oriani-Ambrosini* was targeted at protecting the power of individual Members of the National Assembly to introduce legislation as provided for in section 73(2) of the Constitution. This Court correctly sought to protect the right vested in individual Members by section 73(2), as we ought to do for the power vested in the National Assembly by section 89. The vindication of one constitutional power cannot be relied on for the subjugation of another.

[316] See the first judgment at [132].

[317] *Oriani-Ambrosini* above n 173. See also the first judgment at [133].

[318] See the first judgment at [133].

[319] Id.

[264] The first judgment also relies on the principles of accountability and transparency in reaching its conclusion on the unconstitutionality of rule 129I. It says:

> "A rule allowing the National Assembly to thwart an impeachment motion at an early stage, despite a finding that the complaint is sufficiently substantiated, would fall foul of the Constitution for multiple reasons. It would, for example—
>
> (a) foreclose any participation by any person or party in a further impeachment process;
>
> (b) bar 'appropriate action' in the form of testing and examining evidence and informed debate and engagement in the impeachment process 'before its fate is decided';
>
> (c) deny a genuine platform for the ventilation of informed views on a matter of momentous national importance; and
>
> (d) deprive the citizenry of the opportunity to be 'active, informed and engaged' and to 'properly hold their elected representatives accountable' by not informing them 'of the relative merits' of the impeachment motion."[320]

[265] Again, and while I associate myself with many of the principles captured above as they relate generally to accountability and to open debate and participation, my view is that the NA Rules under review here do not undermine any of those imperatives. Let me explain.

[266] One of the founding values located in section 1 of the Constitution is a system of multi-party democratic government that is accountable, responsive and open. That imperative of accountability is given further expression in sections 42(3),[321] 55(2)[322] and 92[323] of the Constitution. Sections 42(3) and 55(2) oblige the National Assembly

[320] See the first judgment at [134].

[321] Quoted at n 36 above.

[322] Quoted at n 37 above.

[323] Section 92 of the Constitution, entitled "Accountability and responsibilities", reads as follows:

> "(1) The Deputy President and Ministers are responsible for the powers and functions of the [E]xecutive assigned to them by the President.

to oversee executive action and provide mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. This, of course, would include the President. Section 92(2), on the other hand, provides that Members of Cabinet[324] are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. So, there are dedicated and mandatory provisions and structures to ensure the accountability of the President to the National Assembly. These are important provisions of the Constitution which this Court underpinned in *UDM v Speaker* when it held:

> "The National Assembly indeed has the obligation to hold [M]embers of the Executive accountable, put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority."[325]

[267] The first judgment holds, however, that if the National Assembly decides not to proceed with the impeachment process in the face of a recommendation by the Panel, it would constitute a failure by the National Assembly to fulfil its constitutional obligation to hold the President accountable.[326] But this cannot be the result of a vote not to accept the recommendation of the Panel. The provisions of section 89, while they may advance accountability, are not reasonably capable of being interpreted as creating a constitutional obligation to hold the President accountable.

[268] The NA Rules require that the Report be tabled before the National Assembly for consideration and a decision on the Report. This process ensures that the Report is

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> (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
>
> (3) Members of the Cabinet must—
>
> (a) act in accordance with the Constitution; and
>
> (b) provide Parliament with full and regular reports concerning matters under their control."

[324] Section 91(1) of the Constitution provides that—

> "[t]he Cabinet consists of the President, as [H]ead of the Cabinet, a Deputy President and Ministers."

[325] *UDM v Speaker* above n 55 at para 40.

[326] See the first judgment at [74] to [76].

available to the National Assembly and the public at large, thereby satisfying the requirements of accountability and openness. The requirement that the Report be considered suggests that the Report and its recommendations are open for discussion, creating the platform that the first judgment says is important for engaging with the content of the Report. A final point on this score is that the President must be given notice of when the Report of the Panel is to be considered by the National Assembly. If the President elects to appear and participate in that debate, it further advances the imperatives of accountability, openness and public debate.

[269] I accordingly disagree that the tabling of the Report and the discussion and debate that follow undermine the imperatives of accountability, openness, public discussion and engagement. On the contrary, these processes all contribute to advancing those imperatives. But, ultimately, what remains important is that the National Assembly retains the power to make the institutional pre-determination it must make, something which – as *EFF II* reminds us – is the responsibility of the National Assembly and that of the National Assembly alone.

Overall conclusion

[270] Ultimately, I return to my view that section 89 clearly evidences how the Constitution allocates considerable political power to the National Assembly when it seeks to remove the President. To the extent that the power is constrained, those constraints exist for the benefit of the President, given the punitive nature of removal. It can hardly be open to this Court, despite its impressive and formidable powers, to second-guess that choice and moderate the operation of section 89 by turning it into an accountability obligation process. It is not, and that is not the end of accountability. I have shown that there are dedicated provisions of the Constitution that clearly and unambiguously provide for the accountability of the President.

[271] Finally, I pose a "not so hypothetical" question. Should a President who has committed serious misconduct be removed from office? Those who are drawn to counter-majoritarianism would probably say yes, and would do so on the basis that the

values of the Constitution, including those of accountability and the disdain the Constitution must show for serious misconduct, demand such removal to protect the integrity of the constitutional order. Those who are drawn to majoritarianism would probably say no and, in doing so, may say that, while serious misconduct should not go without consequences, other factors including the stability of the democratic order or the need to avoid the disruption of important government work may outweigh the benefit of removing the President. They may also point out that, outside removal, there are other mandatory mechanisms to hold the President accountable that will ensure serious misconduct will not pass without consequence. Finally, they may argue that just as the Constitution provides the National Assembly with wide powers to elect the President, it endows the National Assembly with equal powers to remove the President, moderated only by the specific grounds for removal and a supermajority vote.

[272] Without having to choose which of these equally compelling responses is more persuasive, this Court need do no more than recognise that the provisions of section 89 intentionally cater for the principle of majoritarianism. It does not do so as an affront to the principles of counter-majoritarianism, but rather as part of a careful constitutional design which ensures the proper expression of both legitimate principles.

[273] It is for these reasons that I disagree with the reasoning and the conclusion of the first judgment that rule 129I is unconstitutional to the extent that it allows the National Assembly the choice of rejecting a recommendation by the Panel. My view is that rule 129I is consistent with the provisions of the Constitution. In its formulation, it recognises the wide powers of removal vested in the National Assembly by section 89 and retains that wide power and discretion of the National Assembly in its consideration of the Report.

The third judgment

[274] I have also read the judgment of my Colleague, Majiedt J, in which he reaches the conclusion that rule 129I is unconstitutional for reasons other than those which the

first judgment relies on. I disagree with both the conclusion and the reasoning arrived at in the third judgment. My reasons follow.

[275] The third judgment rests on two related substantive propositions:

(a) The National Assembly is constitutionally obliged to determine whether a ground for removal under section 89 exists;[327] and

(b) The antecedent third step, which allows the National Assembly to vote on the Report and Panel recommendation, is a fatal flaw in the rule in that it allows the National Assembly to terminate the impeachment process and, thereby, abstain from the section 89(1) removal vote.[328]

[276] The National Assembly is obliged to determine whether a ground for removal exists if it wishes to proceed with a vote under section 89, but it is not required to get to that point in every impeachment process. The National Assembly may, for good reason, never reach that stage under section 89, as I will explain. On the third judgment's reasoning, the antecedent step of voting is described as a fatal flaw in the rule and must be expunged. On that reasoning, the determination of the Panel will be dispositive of that stage of the inquiry. In that event, if the Panel does not determine that the matter should be referred to the Impeachment Committee, the section 89 inquiry will come to an end. That too will prevent the National Assembly from establishing a ground for removal and, for that matter, considering the removal of the President. The third judgment describes this as a fatal flaw and a violation of the Constitution. But how can that be when on the third judgment's own reasoning it can be a lawful outcome if the determination of the Panel is final? The same rule cannot be fatally flawed in the one instance and not the other. Indeed, and on the reasoning of the third judgment, the National Assembly is not constitutionally obliged in every impeachment process to determine whether a removal ground exists.

[327] See the third judgment at [318].

[328] See the third judgment at [322].

[277] If the National Assembly does not establish the existence of a ground for removal of the President, the consequence is that it may not proceed with the removal. This position is wholly consistent with this Court's previous findings in *EFF II*.[329] Put differently, the National Assembly is only required to do so as a precursor to a vote on the removal of the President. It may never get to that point, and it is not constitutionally offensive if it does not as the preliminary inquiry is divided into two phases – the Panel and the Impeachment Committee phases. It makes sense not to proceed to the Impeachment Committee stage, if the first stage determines there is insufficient evidence to proceed with the impeachment. I will demonstrate that there may be many cogent reasons why an inquiry may not have to proceed beyond the Panel stage, as I will also show that there are many reasons why the determination of the Panel cannot be final.

[278] The second proposition says that the antecedent third step of allowing the National Assembly to vote on the Report and recommendation of the Panel is the fatal flaw in the rule, as it allows the National Assembly to shut down the impeachment inquiry. My view is that the antecedent step is an important part of the preliminary inquiry and falls within the wide remit of the National Assembly in deciding on the form of the preliminary inquiry. The third judgment says that the antecedent third step is not constitutionally required. That can never be a basis to impugn the step. Given that the third judgment accepts that the form of the preliminary inquiry is for the National Assembly to determine, it can never be suggested that the antecedent third step is offensive, as it serves as a practical and efficient mechanism for the National Assembly to decide whether to proceed with the section 89 inquiry. I will also show that the rule in its current form is properly aligned with giving effect to the section 89 process, both conceptually and in substance.

[279] On the current formulation of the rule, a Panel report and recommendation serve before the National Assembly for consideration. Rule 129I provides:

[329] *EFF II* above n 3 at para 176.

"Consideration and referral of panel report

(1) Once the panel has reported the Speaker must schedule the report for consideration by the [National] Assembly, with due urgency, given the programme of the [National] Assembly.

(2) The President must be informed of the scheduling and any decision on the report.

(3) In the event the [National] Assembly resolves that a section 89(1) inquiry be proceeded with, the matter must be referred to the Impeachment Committee established by this rule for that purpose."

[280] At the conclusion of its consideration, the National Assembly may—

(a) decide to accept a positive recommendation of the Panel, and refer the matter to the Impeachment Committee;

(b) decide to refuse a positive recommendation of the Panel. There may be objectively valid grounds for doing so (this may occur where there is no proper basis for the recommendations or as a result of limited or unreliable information before the Panel);

(c) disagree with a recommendation by the Panel not to proceed with a referral to the Impeachment Committee and resolve to refer the matter to the Impeachment Committee. Again, there may be objective grounds to do so and they include that the information before the Panel supports the continuation of the process; or

(d) decide not to follow a positive recommendation of the Panel to proceed to the Impeachment Committee. This may be in the absence of discernible legitimate grounds to reject the recommendation of the Panel.

[281] None of the first three outcomes would serve as a basis to vitiate the rule, as none are inconsistent with the Constitution. They ensure that the National Assembly is able to discharge its power to decide whether an impeachment trial before the Impeachment Committee is warranted or not. In doing so, the National Assembly is able to subject the Report to proper scrutiny and thereby properly discharge its obligation. Removing

the National Assembly's power to vote on the Report effectively prevents the National Assembly from doing any of the above, and divests it of all powers in relation to the Report. In turn, it would unduly charge the Panel with the power to make decisions that are binding on the National Assembly. This would amount to a radical retreat from the holding of this Court in *EFF II* that it is the National Assembly, and it alone, that determines the scope and form of the preliminary inquiry.

[282] The third judgment says that the National Assembly is not, after receipt of the Report, required to assess the veracity and seriousness of the misconduct claims.[330] I agree, but that is not what the National Assembly does at that point. It decides whether, following the sifting that the Panel would have conducted, the inquiry should proceed or not. In doing so, it oversees the work and the recommendations of the Panel created to advise it. Why must the National Assembly be divested of this power in the antecedent third step when there are means to challenge the exercise of the National Assembly's power in this step if it acts unlawfully?

[283] In this scenario, the concern would not just be that the National Assembly would have been divested of the lawful competence to consider the Report, but its effect would be to shut down any consideration of an outcome other than that which the Panel determines. Such possible outcomes, as I have demonstrated, all fall within the scope of the legitimate competencies of the National Assembly and are aligned with the Constitution. Impugning that part of the rule has far-reaching consequences by closing down the constitutional space that is given to the National Assembly in the impeachment process. It is conceptually and substantively a very unsettling proposition that the third judgment advances and one that is substantially at variance with the holding of this Court that it is the National Assembly that determines the form of the preliminary inquiry. Of course, it must do so in a manner that is constitutionally compliant.

[330] See the third judgment at [333].

[284] Despite the above, the third judgment takes issue with the power the rule vests in the National Assembly to shut down the preliminary inquiry.[331] The conclusion of the inquiry at this stage is not always unconstitutional or a fatal flaw as the third judgment says. It may be warranted depending on the information then available. Why must the National Assembly be compelled to hold an impeachment trial in the absence of sufficient evidence in support of serious misconduct, or any other ground? Conversely, why must the National Assembly be obliged to terminate a section 89 process when the information before the Panel supports the continuation of such a process? These are the outcomes that may materialise if the competence of the National Assembly is to vote on the Report. These outcomes are, in my view, inconsistent with the Constitution, as they prevent the National Assembly from discharging its powers under section 89.

[285] There is nothing in the text of the rule that requires the National Assembly to shut down the preliminary inquiry. It may do so, and, as I have pointed out, the third judgment must be read to accept that there may well be instances when the National Assembly will not make a determination on whether a removal ground exists and, arising from that, will not vote on a removal motion.

[286] The third judgment's discomfort appears to be located in the fourth outcome that I have referred to. This is where the National Assembly uses its power under the rule to shut down the preliminary inquiry when the Panel, on sufficient evidence, recommends that it proceed to the next stage. It articulates this concern as follows:

> "Thus, a Member of the National Assembly may properly initiate impeachment proceedings, supported by evidence; the Panel may conclude that sufficient evidence exists; and yet the National Assembly may resolve not to proceed."[332]

[331] See the third judgment at [337].

[332] See the third judgment at [329].

[287] And therein lies what the third judgment identifies as the fatal flaw. I have already shown that, on the scenario that the third judgment contemplates, this will automatically happen if the Panel does not recommend that the inquiry before the Impeachment Committee be proceeded with. On the rule as it stands, it will also occur if the National Assembly accepts a recommendation by the Panel not to proceed to the Impeachment Committee stage and votes that way. In all these scenarios, however, there will be a proper shutting down of the preliminary inquiry. It will, according to the third judgment, only be improper to do so when the National Assembly refuses to act on a recommendation by the Panel to continue with the section 89 process. And ultimately, what distinguishes this impermissible outcome from the other permissible outcomes is not the rule, but how the National Assembly in a given case exercises its power when it votes on the Report and the recommendation of the Panel.

[288] The rule, however, requires the National Assembly to exercise its powers lawfully and consistently with the Constitution. There is nothing in the rule that exempts the National Assembly from doing so. Indeed, this Court reminded us in *Pharmaceutical Manufacturers*[333] that "[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law".[334]

[289] And so we come back to the key question. Is the cause of the problem that the third judgment identifies the rule or is it the manner in which the National Assembly has exercised its power under the rule? For all the reasons I have given, it is the latter. The rule is not facially constitutionally offensive. It does not prescribe how the National Assembly must consider and deal with the recommendations of the Panel, nor does it permit the National Assembly to act unlawfully. In its capacity-giving function, it empowers the National Assembly to consider the Report and, in doing so, the National Assembly would be at liberty to consider a variety of options arising from its

[333] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[334] Id at para 20.

consideration of the Report. It is worth recalling that the operative part of rule 129I says that, in the event that the National Assembly resolves that a section 89(1) inquiry be proceeded with, the matter must be referred to the Impeachment Committee. There is nothing in how this power is granted to the National Assembly that is offensive, unconstitutional or permits the National Assembly to act unlawfully. If it is suggested that the National Assembly acted unlawfully, which is what ultimately the third judgment comes down to saying, then the problem the third judgment identifies lies in the conduct of the National Assembly and not in the rule.

[290] The third judgment says that there are no criteria or directions in the NA Rules that indicate how the National Assembly must process the Report.[335] This is not correct. Apart from having the duty to act lawfully, it must be recalled that the National Assembly creates the Panel, which is required by the NA Rules to undertake a limited assessment on the information before it to determine whether there is sufficient evidence of misconduct. This is the question the National Assembly considers; this is what shapes its determination. It does not answer a question "in the air" as it is suggested, nor does it do so in the absence of criteria that form an integral part of the NA Rules, which establish the Panel and give it its powers and function. The National Assembly determines whether, in making the recommendation it does, the Panel discharged the mandate it was given. If the National Assembly should be barred from doing this, no other entity would be empowered to do so and this Court would have elevated the Panel from an advisory structure to a decision-making structure – far in excess of this Court's already considerable powers.

[291] If the reasoning and conclusion of the third judgment is good, then conceivably every unlawful exercise of power in terms of a lawful rule would render the rule unlawful. Having a right to vote on a matter cannot be impugned because that vote may be abused. Power exercised under any rule may be abused, but equally it may be misinterpreted and the functionary may genuinely believe that it is entitled to act in a

[335] See the third judgment at [331].

particular way. Courts deal with such issues regularly. It cannot mean that when there is an error or abuse under a rule, the rule stands to be invalidated. This is particularly so when there is nothing in the rule to countenance the error or the abuse and when there are other lawful mechanisms to challenge the consequence of the error or the abuse. The Constitution controls the exercise of all power it grants, and if the lawful power given is abused or exercised in error then the remedy lies in how the power was exercised rather than in the rule that gives the power. In all of this, I do not express a view on the lawfulness or otherwise of the NA vote on the Report. My judgment does not reach that point, as I conclude that our exclusive jurisdiction is not engaged on that aspect of the dispute.

[292] On this very issue, this Court, in *Van Rooyen*, captured that very important distinction between the adequacy of a rule and the exercise of power under a rule. It said:

> "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."[336]

[293] This Court, in *Bernstein*,[337] expressed similar views when dealing with a challenge to the constitutionality of certain provisions of the Companies Act.[338] It said:

> "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 section 11(1) of the Constitution. The law does not sanction such abuse; it merely recognises that it is difficult to control it

[336] *Van Rooyen* above n 42 at para 37.

[337] *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

[338] 61 of 1973.

> and that a clear case of abuse must be established in order to secure a discharge from a subpoena."[339]

[294] The third judgment says that this judgment's reliance on *Van Rooyen* and *Bernstein* is "misplaced" because those cases "concern powers that are constitutionally sound in their design but may be abused in particular instances".[340] I have some difficulty in appreciating the distinction the third judgment seeks to draw in this respect. There is nothing constitutionally unsound about rule 129I. It simply allows the National Assembly to consider the Report and decide whether the inquiry should proceed further. The fact that a particular undesirable outcome may emerge from an exercise of this power does not mean that the rule stands to be impugned. If the power is exercised to achieve an outcome not sanctioned by law, then it is the exercise of that power that must be challenged. *Van Rooyen* and *Bernstein* remain relevant and point in the direction of the remedy to address the real source of the third judgment's discomfort – the manner in which the National Assembly exercised its power under rule 129I.

[295] These observations fortify my disagreement with the third judgment and I am unable to agree with its conclusion that the rule falls foul of the Constitution. The rule serves a very important purpose in enabling the National Assembly to properly discharge its function under section 89 and does not permit the National Assembly to exercise its power unlawfully. Excising the voting power of the National Assembly from the rule will not only impermissibly constrain the power of the National Assembly but will lead to consequences at odds with the constitutional scheme. In particular, and for the sake of emphasis, I repeat: it will compel the National Assembly to convene the Impeachment Committee even when the recommendation of the Panel to do so is unsustainable in law.

[296] Equally, it will also prevent the National Assembly from convening the Impeachment Committee when the recommendation of the Panel not to move to the

[339] *Bernstein* above n 337 at para 52.

[340] See the third judgment at [378].

Impeachment Committee is unsustainable in the face of compelling information before it. Both these outcomes are not only undesirable but will effectively prevent the National Assembly from discharging its obligations under section 89. This Court should tread with extreme caution and restraint when the consequences of what it does interfere with the powers of the National Assembly in ways that are impermissible. It has serious implications for the constitutional design and how power is allocated in accordance with that design.

[297] Finally, there is the real risk that if the rule is impugned on the basis that the National Assembly should be barred from considering the recommendation of the Panel in all instances or even in only some instances, it would render the work of the Panel beyond scrutiny. The Panel has its powers and functions given to it by the National Assembly under rule 129G and it must determine whether sufficient evidence of serious misconduct exists. The National Assembly must then consider the recommendation emerging from the Panel as the reasoning and conclusion of the Panel is not immune from scrutiny. There is nothing untoward about this.

[298] Removing the National Assembly's power to do so will render the obligation of the Panel, under rule 129G, academic. If the Panel makes a recommendation, either positive or negative, about the sufficiency of the evidence, that recommendation would carry the day whatever legal inadequacies may attach to it. In fact, it would not be a recommendation but a decision that will not be the subject of any consideration or scrutiny by the National Assembly, but would simply become binding on the National Assembly. This Court cannot remove the power of the National Assembly and reallocate that power to the Panel – a structure created by and that reports to the National Assembly. It certainly cannot do that when the concern the third judgment has identified is capable of being properly addressed through other legal means.

[299] In all of this, it is clear that the issue of concern that in part triggered these proceedings was a view that the NA vote was unlawful. I have shown that even if that

were the case, the basis for the alleged unlawfulness is not to be located in rule 129I but, rather, the vote taken under that rule. There is no basis to impugn the rule.

[300] It is for these reasons that I disagree with the reasoning and conclusion of the third judgment.

[301] Had I commanded the majority, I would have made the following order:

1. This Court has exclusive jurisdiction to hear the application in respect of the challenge to rule 129I.
2. The challenge to the constitutionality of rule 129I is dismissed.
3. This Court does not have exclusive jurisdiction in respect of the challenge to the vote of the National Assembly taken on 13 December 2022.
4. Direct access to challenge said vote is refused.
5. There is no order as to costs.

MAJIEDT J (Mhlantla J and Tolmay AJ concurring):

Introduction

[302] I have had the pleasure of reading the well-crafted and extensively reasoned judgments of Maya CJ and Kollapen J. I agree with all aspects addressed in the second judgment, save in regard to the important issue of the constitutionality of the impugned rule 129I. In that regard, I agree with the first judgment that the rule is constitutionally invalid, but I do so for different reasons.

[303] As a reminder – in the sixth prayer of the notice of motion, the EFF challenges the constitutionality of rule 129I as being inconsistent with the Constitution, as it allows the National Assembly to vote against a possible referral to the Impeachment Committee, despite a finding of sufficient evidence against a sitting President by the Panel, alternatively, because the rule is impermissibly vague. It seeks a declarator to

that effect and an amendment to the rule.[341] The central question is whether rule 129I ensures that the National Assembly can effectively discharge its obligation under section 89(1), read with section 55 of the Constitution. For the reasons that follow, I conclude that it does not.

[304] A constitution reflects the soul of a nation.[342] It speaks to that nation's beliefs, aspirations and aims. A constitution, as supreme law, amongst many other things, directs how the nation is to be governed; in this instance, how its Executive Head, the President, is to be removed from office. The impugned rule is one of a set of rules that are meant to expand on the provisions for removal (often simply referred to as "impeachment"; these terms are used interchangeably in this judgment) contained in section 89 of the Constitution.[343]

[305] Accountability has been highlighted as one of the central values of our Constitution, serving as a check on unrestrained power, lest that power be abused.[344] Section 89 is one of the key provisions that fulfils the purpose of a check on presidential power, by holding the President accountable to Parliament. The section is amplified by rule 129I as part of the rules adopted by Parliament to meet that constitutional requirement.

[306] Ours is a constitutional democracy, where the will of the people is reflected proportionally in the composition of the political parties represented in Parliament as the people's representatives. This ensures "government by the people". Parliament is

[341] The amendment that the applicants seek would make provision for the automatic referral of a sufficient evidence finding to an Impeachment Committee to conduct a full investigation so as to give effect to section 1(c) and (d); 42(3); 48; 55(2)(a) and (b)(i); 57(1)(b); 92(2) and 96(1), (2)(b) and (2)(c) of the Constitution. As an alternative, it seeks an amendment providing suitable guidelines as to how the discretion of the National Assembly is to be exercised in order to prevent political interference preceding the commencement of impeachment proceedings.

[342] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 97 (concurring judgment of Sachs J) and *S v Acheson* 1991 (2) SA 805 (NM) at 813A.

[343] Quoted at n 7 above.

[344] *EFF I* above n 2 at para 1 and *UDM v Speaker* above n 55 at paras 2-3.

unequivocally directed by the Constitution to scrutinise and oversee executive action (including the exercise of presidential powers). This it does on behalf of the people.[345]

[307] Section 89 is under chapter 5 of the Constitution. That chapter deals with the checks and balances on the President and the National Executive. An important related provision is section 55(2) of the Constitution, which requires the National Assembly to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to Parliament and to maintain oversight over the exercise of executive authority.

[308] The system of checks and balances and the principle of separation of powers[346] are essential cogs in a constitutional system like ours, where powers are devolved to the three arms of the state.[347] They serve to ensure that powers are exercised only by the arm of the state in which they vest and to prevent their abuse.[348] In relation to these two central features of our Constitution, in the *Certification* judgment, this Court said:

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another."[349]

[309] A brief recap: in *EFF I*, this Court held that the National Assembly had failed in its constitutional duty to hold the then-President accountable for failing to implement the Public Protector's remedial action contained in her report of 19 March 2014.

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[345] See section 42(3) of the Constitution, quoted at n 36 above. See also *EFF II* above n 3 at paras 141-2.

[346] As to the separation of powers principle, see *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC). See also O'Regan "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution" (2005) 8 *Potchefstroom Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 120.

[347] *EFF II* above n 3 at para 133.

[348] Id.

[349] *Certification* judgment above n 258 at para 109.

Pursuant to that finding and concomitant orders, in *EFF II*, this Court had to consider a complaint that the National Assembly had failed to put in place mechanisms to hold the President accountable in terms of section 89(1). This Court held that the failure was a violation of the Constitution and that the National Assembly must comply with section 237 of the Constitution and make rules for a section 89(1) removal without delay.

[310] And now we have reached the question concerning the adequacy of the rules put in place for this purpose, more particularly rule 129I. Succinctly stated, the present complaint is that the mechanism chosen by Parliament to meet the requirements stipulated in *EFF II* perpetuates the same abuse that this Court has already sanctioned in that judgment as being institutionally impermissible. As Froneman J observed in *EFF II*, "*[w]hether the order [made in EFF II] will achieve its aim is for history to determine*".[350] We have now arrived at that point. It is important to bear in mind that at this juncture the merits of the Report, on which much time was spent in both the written and oral submissions of the parties, is not the issue here. Instead, we are concerned with an anterior question, the constitutionality of the impugned rule.

Adequacy of the impugned rule

[311] Self-evidently, the set of rules, and, in particular, the impugned rule, must be *effective* mechanisms to fulfil the purpose of section 89(1). It must be fit for purpose and constitutionally compliant. Whether these requirements have been met is to be answered with reference to the Constitution and the findings of this Court in *EFF II*. That judgment bears brief consideration to chart the further reasoning.

[312] *EFF II* makes plain that impeachment is a punitive measure – in terms of section 89(2), a President removed from office by reason of a serious violation of the Constitution or the law, or for serious misconduct, may not receive any benefits of that

[350] *EFF II* above n 3 at para 286 (emphasis added).

office and is barred from holding any public office.[351] For this reason, impeachment is subject to conditions. There must be a ground for removal listed in section 89(1) and a supermajority vote is required.

[313] The importance of the role of the National Assembly in the impeachment process cannot be overstated. As the people's representatives, they must ensure that the President, "the first citizen of this country" with "the highest calling to the highest office in the land",[352] is held accountable. Everyone who holds public office, and, I daresay, the President in particular, because of his unique position, is accountable to the Constitution and the law. This is one of the cornerstones of our democracy. And, in the case of section 89(1) read with section 55 of the Constitution, it is the National Assembly which must ensure that there are effective mechanisms in place to remove a sitting President where the constitutional prerequisites are met.

[314] In what follows, I will endeavour to show that rule 129I removes that power from the National Assembly. This is because—

(a) in violation of section 89(1), it deprives the full National Assembly of the opportunity to vote on the existence of a ground for impeachment; and

(b) it precludes a full ventilation of the facts that inform the vote.

[315] These two shortcomings will be discussed in turn. It bears emphasis that, while there is nothing in section 89 which *requires* the National Assembly to impeach the President (it remains a discretionary power throughout), the rules it adopts cannot frustrate impeachment from serving as a crucial constitutional backstop where necessary. This is to ensure the constitutional accountability of the holder of this country's highest office.

[351] Id at para 138.

[352] *EFF I* above n 2 at para 20.

Rule 129I does not pass constitutional muster

Deprivation of the power to vote on the existence of a ground of impeachment

[316] It bears emphasis that the power of removal vests in the National Assembly alone. What does this power entail? It is the National Assembly itself that must make the determination that one of the grounds for removal exists. The National Assembly is constitutionally obliged to determine whether the President has committed conduct falling within section 89(1) *and that determination must be rational, evidence-based and attributable to the National Assembly as the ultimate decision-maker*.

[317] In *EFF II*, this Court interpreted section 89(1) as entailing a structured two-stage process. First, there must be an investigative and evaluative stage in which the relevant facts are gathered and assessed. Second, there must be a decision stage in which the National Assembly determines whether the jurisdictional facts for removal exist and, if so, whether to remove the President. Maya CJ deals at length with these aspects in the first judgment, and I need say no more about them.

[318] The crucial point is this: while the investigative and evaluative tasks may be performed by committees or through other mechanisms, the constitutional obligation to determine whether a ground for removal exists rests solely with the National Assembly. That entity, and it only, must engage with and decide that question on the basis of the available evidence.

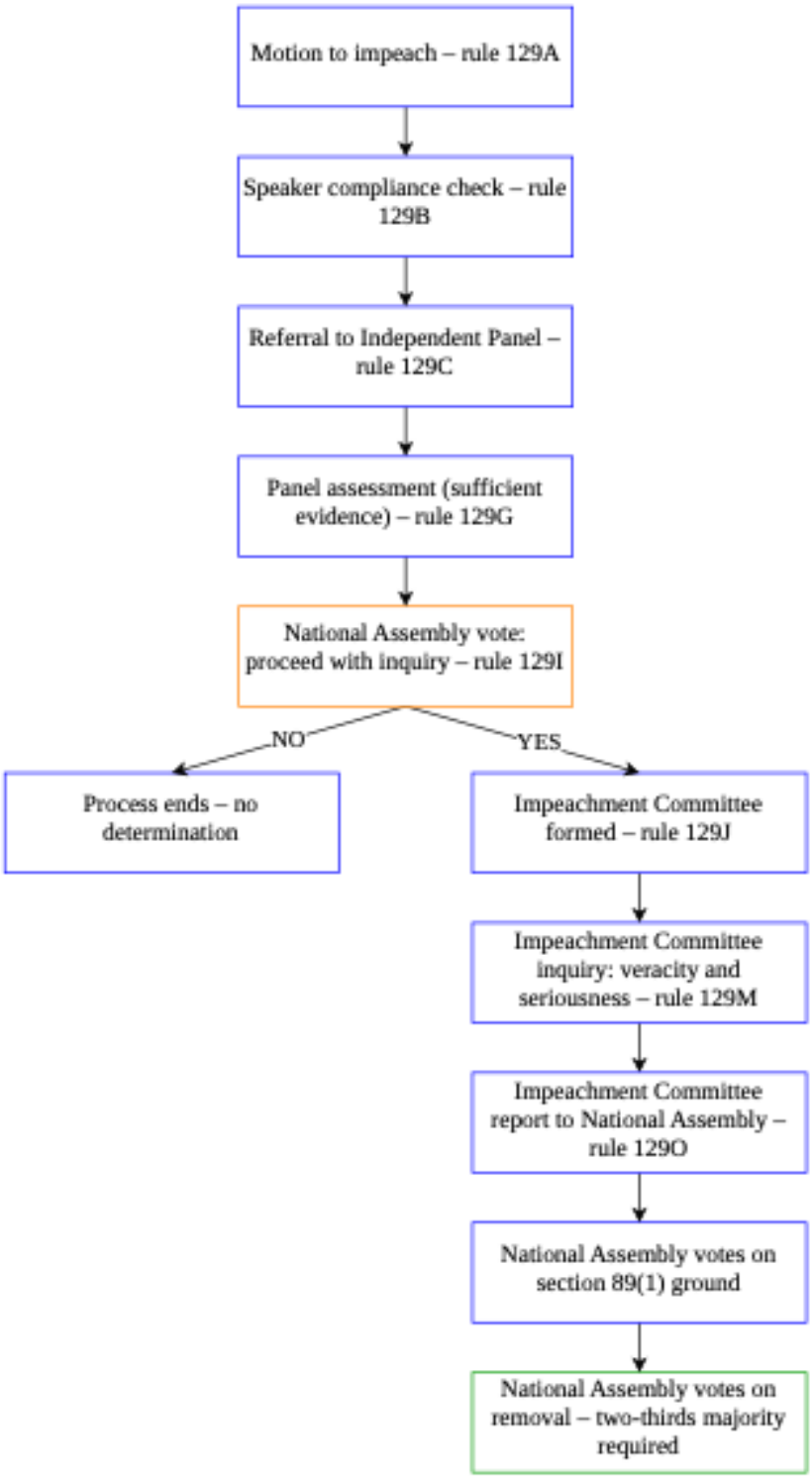
[319] *EFF II* explained:

> "[A]ny process for removing the President from office must be preceded by a preliminary inquiry, during which the [National] Assembly determines that a listed ground exists. The form which this preliminary inquiry may take depends entirely upon the [National] Assembly. It may be an investigation or some other form of an inquiry. It is also up to the [National] Assembly to decide whether the President must be afforded a hearing at the preliminary stage."[353]

[353] *EFF II* above n 3 at para 180.

[320] Properly understood, section 89(1) prescribes a clear sequence: the National Assembly must first determine whether a ground exists, and only thereafter does it decide whether to remove the President. There is no constitutional requirement for an antecedent step in which the National Assembly determines whether it will engage in that process at all. The first judgment comprehensively elaborates on the process and nothing more need be said about it.

[321] Diagrammatically, the full impeachment process looks like this:



[322] The difficulty is that rule 129I inserts such an antecedent third step prior to rule 129J. According to that rule, once a motion is initiated and referred to a Panel, the Panel conducts a preliminary assessment and reports on whether sufficient evidence for an inquiry exists. Thereafter, the National Assembly is required to vote, *not* on whether a section 89 ground exists nor on whether the President should be removed (that is, the

two steps envisaged in *EFF II*), but on whether a section 89 inquiry should proceed further. If the National Assembly resolves not to proceed, the process terminates at that point, and the section 89(1) impeachment motion is never voted on. The National Assembly never gets to consider either stage one or stage two. This is a fatal flaw and a violation of the Constitution.

[323] The difficulty emanates from the placement of the impugned rule within the scheme of the NA Rules. Rule 129I is triggered immediately after the Panel has reported on whether sufficient evidence exists to warrant the commencement of an impeachment process. It thus operates before the Impeachment Committee has undertaken its investigative function. That investigation is not merely a formality. It is the mechanism through which allegations are tested, witnesses are heard and the factual basis for the exercise of the National Assembly's power is established.

[324] Before the present iteration of the NA Rules dealing with removal was in place, there was provision for an ad hoc committee. In that regard, *EFF II* strongly cautioned against a scenario like the one we are facing here. This Court observed:

> "The rules relevant to the establishment of ad hoc Committees do not determine the size of a committee. Nor do they require that all parties be represented. They merely state that the resolution establishing such committee must specify the number of members to be appointed or their names. If more than one party is represented, the representation mirrors their representation in the [National] Assembly. The majority party would have majority representation. *This raises the risk of an impeachment complaint not reaching the [National] Assembly, even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus, as provided in rule 255. A decision by members of the majority party in the ad hoc Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader*.
>
> . . .

> By parity of reasoning, the committee system is not suitable here too. The ad hoc Committees do not constitute a mechanism contemplated in section 89(1) for all the reasons set out in this judgment."[354] (Footnote omitted and emphasis added.)

[325] Rule 129I inserts a threshold "gatekeeping" stage that precedes, and may wholly displace, the constitutionally mandated two-stage inquiry confirmed in *EFF II*. Instead of moving directly from investigation to determination by way of a two-stage inquiry, the process is, first, a preliminary assessment by the Panel; second, a vote by the National Assembly on whether to proceed; and, only if that vote is favourable, third, a full inquiry and eventual determination.

[326] The Constitution requires the National Assembly to move forward through a two-stage process culminating in a determination. The NA Rules, however, require the National Assembly first to step back and decide whether to engage in that process at all and permit them to halt the process before it even begins. This is not only contrary to constitutional prescripts, but also dissonant with this Court's judgment in *EFF II*.

[327] It may be argued that the establishment of the Panel is the first investigative stage contemplated in *EFF II*, and that the National Assembly's vote on the Panel's recommendation preserves its role as ultimate decision-maker. While it is correct that the Panel performs an evidentiary and preliminary assessment function, this does not cure the defect. *The difficulty lies not in who makes the decision, but in what decision is made*. The Constitution requires the National Assembly to determine whether a section 89 ground exists. But rule 129I requires the National Assembly to decide only whether to proceed with an inquiry. These are completely different questions.

[328] Even if the National Assembly were to consider the Report, its vote at the rule 129I stage remains a procedural decision rather than a substantive constitutional determination. It is not a finding about whether the President has committed a serious violation or misconduct, nor does it pronounce on his or her inability to perform the

[354] *EFF II* above n 3 at paras 192 and 194.

functions of office. The decision is merely whether to continue with an investigation which is at that stage incomplete. The fact that the National Assembly is formally the ultimate decision-maker is therefore irrelevant. A constitutionally required decision cannot be replaced with a discretionary decision about whether to make that decision.

[329] Thus, a Member of the National Assembly may properly initiate impeachment proceedings, supported by evidence; the Panel may conclude that sufficient evidence exists; and yet the National Assembly may resolve not to proceed. In that event, the question pertinently raised in section 89(1), whether the President has committed a ground for removal, is never determined by the National Assembly at all, despite a motion properly being brought before the National Assembly. The motion brought to impeach the President is therefore technically never voted on. This plainly deprives the National Assembly of its constitutional power in section 89(1), as explicated in *EFF II*.

[330] This Court held in *EFF II*:

> "What needs to be decided though is whether the processing of that motion complied with the requirements of section 89(1). If it did, that would be the end of the matter. This is because section 89(1) does not oblige the [National] Assembly to remove the President from office, even where one or more of the listed grounds are established. On the contrary, the [National] Assembly retains a discretionary power to remove the President.
>
> *But the process envisaged in section 89(1) involves necessarily an antecedent determination by the [National] Assembly to the effect that one of the listed grounds exists. This is because those are grounds for the President's removal. With regard to the motion of 31 March 2016, this was not done. It was simply tabled, debated and voted on.*"[355] (Emphasis added.)

[331] Rule 129I provides that once the Panel has issued its report, that report must be referred to the plenary National Assembly for consideration. The section 89(1) inquiry only proceeds when the National Assembly so resolves. Rule 129I offers no criteria or

[355] Id at paras 203-4.

direction for the National Assembly's consideration of the report. The interposition of the National Assembly's decision between bodies which the rules have chosen to establish whether a listed ground exists – the Panel and the Impeachment Committee – appears to be a "sifting mechanism" aimed at deciding whether an impeachment inquiry ought to continue. But it is not a determination on the merits of the underlying impeachment motion. This leads to a curious and utterly untenable position. The rule 129I vote, which is unconnected to any of the phases of the impeachment inquiry, has the potential to prevent the National Assembly's consideration of whether a listed ground exists.

[332] This is akin to the situation where an individual Member of the National Assembly submits a Bill for consideration, but, as a "sifting mechanism", the National Assembly votes as a whole not to allow the Bill to be tabled. In *Oriani-Ambrosini*, this Court made plain that such a state of affairs is not permissible:

> "The 'rights of all to be heard and have their views considered', within the context of the legislative process, dictate that individual [M]embers ought to have the power to initiate or prepare legislation. In this way, an opportunity would be availed to them to promote their legislative proposals so that they could be considered properly."[356]

[333] The fact that the National Assembly never applies its mind to the section 89(1) question is further underscored by rule 129M, which takes place at the Impeachment Committee stage. That stage is never reached if the National Assembly decides not to proceed beyond the Panel. Rule 129M provides that once the National Assembly has resolved to proceed, the Impeachment Committee must "establish the veracity and, where required, the seriousness of the charges". This necessarily means that the National Assembly's consideration under rule 129I is not related to the veracity of the report. Nor does it form part of the National Assembly's determination of whether a listed ground has been established. But these are precisely the questions that define the first stage of the section 89 inquiry. As was held in the passage cited above in *EFF II*,

[356] *Oriani-Ambrosini* above n 173 at para 48.

it is this evaluative exercise that must inform the National Assembly's determination of whether a ground for removal exists.

[334] And yet, the impugned rule requires the National Assembly to decide whether to proceed before this evaluative exercise has been undertaken. The National Assembly is thus required to make a threshold decision without the benefit of the very findings that are constitutionally relevant to the first-stage determination. More fundamentally, as stated, the structure of the NA Rules demonstrates that the National Assembly has not as yet applied its mind to the first-stage question at all. Instead, the issues of veracity and seriousness are expressly deferred to a later process, contingent upon the National Assembly first resolving to proceed.

[335] If the National Assembly were in fact performing the first stage contemplated in *EFF II*, it would necessarily be engaging with and determining the veracity and seriousness of the allegations. But the NA Rules make clear that it does not do so at the rule 129I stage. Instead, it is asked only whether an inquiry should take place, leaving the substantive evaluation for a later stage, which may never occur. The National Assembly is therefore required to make a decision in the absence of the information that the Constitution requires for that decision. The result is that the preliminary stage does not facilitate the constitutional inquiry; it displaces it. Instead of enabling the National Assembly to determine whether a ground exists, the NA Rules permit the National Assembly to avoid making that determination altogether.

[336] This also undermines the majoritarian design of section 89(1). The Constitution envisages that the decisive judgment, whether to remove the President, is to be taken by a supermajority of the National Assembly after engagement with the merits. But, because rule 129I allows the process to be halted at the threshold, the National Assembly is never called upon to make that value judgment.

[337] In summary, rule 129I introduces an impermissible preliminary step that allows the National Assembly "to decide whether to decide". It inserts a gatekeeping

mechanism that enables the National Assembly to terminate the process before performing its constitutionally-mandated function of determining whether grounds for impeachment exist once a motion for impeachment commencing the section 89(1) process has been brought. The fact that the National Assembly votes on the Panel's recommendation does not cure this defect, because it is not required to decide the constitutionally prescribed question. By permitting the process to end before any determination of the existence of a section 89 ground is made, the rule undermines the two-stage structure identified in *EFF II*, frustrates the accountability purpose of section 89 and defeats the very constitutional mechanism it purports to give effect to. It is therefore unconstitutional.

The section 89 power cannot be exercised without a factual foundation

[338] Both the election and removal of the President confer a wide discretion on the National Assembly, which, in the case of an election, makes its ultimate decision by a majority vote; and, in the case of impeachment, by a supermajority vote. In both instances, the National Assembly acts as an *informed* representative of the people. In *My Vote Counts II*,[357] this Court recognised that "much more is required of a choice-maker if the choice to be made is political in character and affects important national interests".[358]

[339] As far as impeachment is concerned, the National Assembly's obligation to inform itself is thus elevated. In that sense, impeachment is different from an ordinary exercise of majoritarian voting. It is not a vote up in the air. As section 89(1) makes clear, the National Assembly may remove the President from office only on the grounds of a serious violation of the Constitution or the law, serious misconduct or inability to perform the functions of office. A failure to appreciate this difference is to simply render impeachment a motion of no confidence with a higher threshold.

[357] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC).

[358] Id at para 27.

[340] As stated, impeachment is punitive. If the National Assembly adopts a mechanism that is incapable of arriving at such a finding, it would have failed its constitutional obligation to preserve the efficacy of impeachment as an accountability tool. This is so even if that mechanism employs majoritarian voting. The preservation of the National Assembly's discretion to decide whether a section 89(1) ground has been established suggests that this finding is partly factual (does there exist conduct capable of meeting such a ground?) and partly normative (does the conduct meet the level of seriousness envisaged by that section?). It bears repetition that, as *EFF II* recognises, this question is for the National Assembly, and it alone, to decide. The only issue this Court may consider is whether the means employed by the National Assembly enable it to decide that question when necessary.

[341] In considering this issue, it is important to bear in mind that, as stated in *EFF II*, "the process envisaged in section 89(1) involves necessarily an antecedent determination by the [National] Assembly to the effect that one of the listed grounds exists".[359] Self-evidently, the grounds cannot possibly be established without some form of *factual finding*. This finding is an essential addition to the National Assembly's exercise of majoritarian voting, whether in the normative determination as to whether a ground has been established or, if such a ground has been established, the eventual decision whether to remove the President from office.

[342] The difficulty is that, in this instance, we have the exercise of raw power granted to the National Assembly without it first considering the proposal on some factual basis. This is especially so in the context of section 89(1) where the Constitution requires the establishment of a listed ground. The National Assembly, in the exercise of its discretion, is free to select the means for doing so, including by a majority vote. But rule 129I completely destroys that discretion. The rule subjects the discretion to an antecedent majority vote, aimed at establishing whether a listed ground needs to be established (which the NA Rules already provide for at an earlier stage), rather than

[359] *EFF II* above n 3 at para 204.

providing a process for determining whether such a ground exists. That vote, as the NA Rules stand, relates neither to the factual finding nor to the normative determination of whether a listed ground exists.

[343] The addition of such a layer – extraneous to the section 89(1) process, and indeed capable of frustrating its proper consideration – is therefore unconstitutional. It is not the majoritarian nature of the rule 129I vote that renders it so; rather, it is the capability of the vote to lead a valid impeachment motion into the proverbial cul-de-sac without allowing a section 89(1) process to take effect at all. This risks transmogrifying the section 89(1) process into a *brutum fulmen* (a meaningless, ineffective exercise), where the process may be aborted before any consideration of its merits takes place on a set of facts before the National Assembly as decision-maker. A related problem is the lack of transparency and openness in the process.

Transparency and openness as conditions for the legitimate exercise of the section 89 power

[344] Section 89 vests the power of removal in the National Assembly as a representative body acting on behalf of the public. That function is not exercised in private. It is a public power, directed at a matter of the highest constitutional significance, and it must therefore be exercised in a manner that is open, transparent and capable of public scrutiny. These requirements do not limit majoritarian decision-making; they enable it by ensuring that the National Assembly's exercise of power is transparent, accountable and understandable to those in whose name it acts.

[345] This Court has long recognised that democratic decision-making is strengthened, not weakened, by transparency.[360] Openness ensures that both the information relevant to a decision and the reasons underlying it are exposed to scrutiny. In the context of

[360] See among others *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at paras 111-13 and *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) at paras 64-5 and 70.

impeachment, where the National Assembly is called upon to assess allegations of serious misconduct or constitutional violation, transparency is particularly important. It allows the public to understand the basis upon which their representatives act and to evaluate whether that action is consistent with the constitutional standards governing removal.

[346] Rule 129I subverts this requirement of transparency. It permits the National Assembly to terminate the impeachment process at a stage when the relevant factual and evaluative issues have not been publicly ventilated in a structured and comprehensive manner. The Panel conducts its work on a limited written record, and the more rigorous processes of testing evidence, assessing veracity and evaluating seriousness are reserved for the Impeachment Committee stage. If the process is halted before that stage is reached, the National Assembly's decision is taken without the benefit of a full and public exposition of the issues.

[347] The consequence is that the decisive exercise of power may occur in conditions where neither the evidentiary basis of the allegations, nor their constitutional significance, has been fully developed or publicly examined. The National Assembly may debate the Report, but it is not required to engage in a process that exposes the factual disputes and evaluative judgments that lie at the heart of section 89. In this way, the rule permits a decision of great constitutional consequence to be taken without the level of transparency that such a decision demands.

[348] The absence of transparency has consequences beyond the immediate decision. Where evidence is properly tested and placed in the public domain, it equips the electorate with information that bears directly on the exercise of political choice, including at the next election. It also enhances the conditions under which Members of the National Assembly themselves deliberate. A process that brings to light the full factual matrix and its constitutional implications creates space for Members to engage with the merits of the matter, rather than relying on incomplete accounts or partisan

positions. In this way, transparency strengthens both public and parliamentary judgement without dictating their outcomes.

[349] This does not mean that the National Assembly is obliged to reach any particular outcome, nor does it diminish its authority to decide whether to remove the President. It means only that the process through which that authority is exercised must be sufficiently open to allow for meaningful public scrutiny of the issues and the decision. By enabling the process to be concluded before that level of transparency is achieved, rule 129I undermines the conditions for properly exercising the section 89 power. For that reason, it is inconsistent with the Constitution.

[350] The NA Rules envisage that the neutral, fact-finding function aimed at objectively determining legal, and not political, questions performed by the Impeachment Committee must operate free from premature political intervention. Rule 129I disrupts that sequence. By allowing the process to be terminated before the Impeachment Committee has performed its function, it prevents the National Assembly from receiving the very material that is necessary to inform its judgement. In doing so, it does not preserve majoritarianism, but deprives it of its proper foundation.

[351] It bears emphasis that if majoritarian control applies at the preliminary stage, then the section 89 mechanism can be neutralised before any facts are ventilated and exposed to public scrutiny. As stated, the preliminary stage serves a procedural and informational function. The objective is to ensure that the National Assembly's finding as to whether a ground of removal exists is informed by the full and correct facts. The suggestion in the second judgment that majoritarianism must operate with equal force at this stage is thus unsustainable, as it collapses the distinction between objective fact-finding, which admits no partisanship, and the final decision whether to remove the President, which takes on a more political character.

Divergence between the first judgment and this judgment on the constitutionality of the rule

[352] The difference between the first judgment and this judgment lies not in outcome, but in the point of constitutional departure and the focus of the inquiry. The first judgment is primarily concerned with the consequences of permitting the National Assembly to intervene at a stage where the process remains evidentiary and incomplete. In particular, it emphasises that where the Panel finds that sufficient evidence exists, the National Assembly may not terminate the process at that point, as this would foreclose the further investigation necessary to properly ventilate the issues and give effect to section 89. It thus focuses on preventing the premature termination of a potentially meritorious impeachment process.

[353] This judgment, by contrast, proceeds from the constitutional obligation resting on the National Assembly itself. It asks whether the mechanism adopted enables the National Assembly to perform the determination that section 89(1), read with *EFF II*, requires of it. On this approach, the central defect in rule 129I is that it does not direct the National Assembly to determine whether a listed ground exists, but instead requires it to decide whether to proceed with an inquiry. That decision is neither structured nor guided by any criteria linked to section 89(1). It is, in that sense, colourless. The consequence is that the rule permits the National Assembly to avoid making the constitutionally required determination altogether or to act without a sufficient factual foundation to do so.

[354] This difference between the two judgments manifests most clearly in the treatment of the Panel's findings. The first judgment recognises that an impeachment process may, in appropriate circumstances, fail at an initial sifting stage, with the result that no further investigation is required. This judgment accepts that position, but insists that even in such a case the National Assembly must still perform its constitutional function by determining, on the material before it, that no ground for removal exists. Where, however, the Panel finds that there is sufficient evidence, the National Assembly cannot make that determination without a further investigation because the factual

record is not yet complete. In this way, while both judgments require further investigation where sufficient evidence exists, this judgment additionally emphasises that the National Assembly must always determine the existence or non-existence of a ground, and that it must do so on a sufficiently developed factual basis. Both judgments also invoke the importance of transparency, but they do so for different reasons: the first judgment treats transparency as a democratic value that ensures fuller engagement with the process, whereas this judgment treats it as a condition precedent for the proper and informed determination by the National Assembly of whether a ground for removal exists.

Second judgment

Criticism regarding the decisions of the Panel and the removal of discretionary power from the National Assembly

[355] The starting point is that the response of the second judgment proceeds from a misapprehension of the central claim advanced here. This judgment does not seek to limit the National Assembly's discretion, nor does it suggest that the Report is beyond scrutiny. Criticisms directed at those propositions, therefore, do not engage with the reasoning of this judgment. The point made is a narrower, but decisive one – the impugned rule fails to require the National Assembly to answer the question that the Constitution obliges it to determine. That is the crux of the outcome and underlying reasoning of this judgment.

[356] It may be contended that rule 129I is constitutionally compliant on the basis that the National Assembly remains the ultimate decision-maker. On this view, once the Panel reports to it, the National Assembly may, by majority vote, decide whether to proceed with an inquiry. If the Panel finds no sufficient evidence and the National Assembly agrees, the matter may validly end there. Conversely, if the National Assembly disagrees with the Panel and considers that further investigation is warranted, it must be entitled to refer the matter to an Impeachment Committee.

[357] This argument conflates the National Assembly's authority with the content of the decision it is constitutionally required to make. Even if rule 129I is characterised as part of the preliminary inquiry (stage one), the question the National Assembly is required to answer at that stage remains the wrong one. A vote on whether to proceed, framed either as the National Assembly's agreement with a "no sufficient evidence" finding, or otherwise, is not a determination that a section 89(1) ground does exist. It is a threshold judgment about whether further inquiry is warranted on what can at that juncture only be an incomplete record. Rule 129I provides no direction as to what the National Assembly is deciding or on what basis.

[358] The rule is not framed as a determination of whether a listed ground exists, nor does the rule prescribe the criteria to be applied. It does not require the National Assembly to consider the elements of section 89(1) or to assess the veracity or seriousness of the allegations. The consequence is that, at the rule 129I stage, the National Assembly is invited to cast a vote that is devoid of reason and direction. The rule does not instruct the National Assembly what question they are to answer, nor does it anchor the vote to the criteria in section 89(1). Instead, it leaves the decision unstructured and unguided by any defined standards. The National Assembly is not required to assess the veracity or seriousness of the allegations, or the existence of a constitutional ground. Those inquiries are postponed for later determination.

[359] The result is a vote that is, in effect, up in the air, a decision taken without guidance and lacking direction in respect of both form and substance. Neither the object of the vote nor the basis upon which it must be made is specified. In this way, rule 129I permits a discretionary and potentially arbitrary exercise of power. That is incompatible with the requirement that the National Assembly's determination be rational, evidence-based and directed to the existence of a section 89 ground. If rule 129I is to be constitutionally compliant, it would, at a minimum, need to require the National Assembly to vote on whether the facts disclose a listed ground. The redrafting of the rule should ultimately be left to Parliament, and consequently, nothing further is said about that here.

[360] The second judgment also argues that rule 129I is constitutionally permissible because it preserves the National Assembly's role as the ultimate decision-maker by allowing it to accept, reject or override the Panel's recommendations. It contends that this power is necessary to ensure proper scrutiny of the Report and to prevent the Panel from becoming the de facto decision-maker. Removing this power, it argues, would improperly bind the National Assembly and undermine its authority to determine the form and scope of the preliminary inquiry.

[361] There are at least two reasons why this argument misses the point. First, the constitutional difficulty does not arise from the National Assembly's ability to engage with, scrutinise or even disagree with the Panel. Those powers are unobjectionable and must be preserved if the National Assembly is to remain the ultimate decision-maker. The decision can only be made by the National Assembly – it is the only constitutional entity empowered to do so.

[362] The problem, here too, is the decision required at the rule 129I stage. It bears repetition that the rule does not direct the National Assembly to determine whether a section 89(1) ground exists, nor does it require any assessment of veracity or seriousness. Instead, it asks only whether to proceed with an inquiry. That is a procedural, indeterminate question and not the constitutionally mandated one. While outcomes (a) to (c) listed by the second judgment[361] may, in particular circumstances, reflect rational engagement with the Report, they do not address the constitutional difficulty. The rule does not require the National Assembly, when making any of these decisions, to determine whether a section 89(1) ground exists, nor does it tether the vote to any criteria directed at that question. The constitutionality of a rule is not assessed by reference to outcomes that may appear acceptable in particular cases, but by what it authorises in all cases. Outcome (d) illustrates the point: it permits a decision not to

[361] See the second judgment at [280].

proceed in the absence of discernible or constitutionally relevant grounds. In this way, rule 129I invites a decision that is unguided and indeterminate.

[363] The second reason is that the logical consequence of the second judgment's approach is untenable. If the National Assembly may, at its discretion, interpose a vote at the stage contemplated by rule 129I, there is no principled basis upon which such a vote could not be inserted at an even earlier stage of the process. On that reasoning, the National Assembly could, by majority decision, decline to refer an otherwise valid impeachment motion to the Panel altogether, thereby preventing even the preliminary evidentiary assessment from taking place. The effect would be to permit the National Assembly to determine not whether a section 89 ground exists, but whether the constitutionally mandated process for determining that question should be triggered at all. This would render the carefully structured mechanism envisaged in *EFF II* illusory and reduce the obligation to design an effective impeachment process to a matter of legislative discretion capable of being neutralised at will. Such an outcome cannot be reconciled with the Constitution and is directly in contrast with *EFF II*.

[364] The National Assembly must exercise its powers through clear rules, not by ad hoc standards. Properly understood, *EFF II* affirms that the National Assembly determines the form of the preliminary inquiry, but it must do so by designing a constitutionally compliant rule-based process that directs its own decision-making toward the constitutional question.

"Double standard" created by this judgment's reasoning

[365] The other principal criticism advanced in the second judgment is that this judgment adopts an impermissible double standard. It considers that there is no principled reason for this judgment to distinguish between (a) the lawful termination of an impeachment process after the Panel finds that no sufficient evidence exists; and (b) the constitutionally impermissible termination of the process notwithstanding a finding by the Panel that sufficient evidence exists. On that basis, it is further contended that

the flaw lies not in the rule itself, but only in how the National Assembly exercises its power in a given case.[362]

[366] With respect, that criticism rests on a false equivalence. It is premised on the absence of evidence and the presence of sufficient evidence being constitutionally interchangeable positions. They are not. They represent fundamentally different states of affairs, which call for fundamentally different responses.

[367] The line of reasoning in this judgment is that the exercise of the National Assembly's power under section 89 must be tethered to, and proportionate with, the factual material available to it. The mechanism adopted must enable the National Assembly to make a constitutionally compliant determination and the thoroughness of the process undertaken must correspond to the evidentiary position disclosed. This explains why it is appropriate, and in fact necessary, to accord disparate treatment to different recommendations of the Panel.

[368] Where the Panel concludes that there is not sufficient evidence, the position is straightforward. The material before the National Assembly discloses no factual basis upon which any of the grounds in section 89(1) could be established. The National Assembly is therefore able to bring the matter to finality by voting, on the basis of the Report, that no ground has been established. In such a circumstance, the National Assembly is entitled to find that no ground for removal exists since its designated sifting mechanism has found that even the lowest threshold of veracity has not been met. This does not detract, however, from the National Assembly's ability to require further investigation of the allegation if it so desires, and in the form it desires. The National Assembly may even, by virtue of the power afforded to it as ultimate decision-maker, resolve to continue with the process, notwithstanding the Panel's conclusion that no sufficient evidence exists. Put differently, it cannot be bound by the Panel's findings and conclusion.

[362] See the second judgment at [287].

[369] This does not involve the avoidance of the constitutional function. On the contrary, it constitutes the National Assembly's execution of its constitutional duties in a form proportionate to the evidentiary position. Where the Panel finds that there is no sufficient evidence, unlike the facts of the present matter, the National Assembly is not deciding in the air. It is making a determination, grounded in the *confirmed* absence of substantiating facts, that the threshold for impeachment has not been met.

[370] The position is altogether different where the Panel finds that there is sufficient evidence. In that event, the material before the National Assembly does not resolve the constitutional question. It does not establish that a ground exists, nor does it establish that it does not. It indicates only that there is a sufficient basis to warrant further inquiry.

[371] In such circumstances, the constitutional question – whether one of the grounds in section 89(1) exists – cannot be answered on the available record. A vote by the National Assembly at that stage, whether to affirm or reject the existence of a ground, would not be tethered to a sufficiently developed factual foundation. It would amount, in substance, to the exercise of unstructured or raw power.

[372] It is for this reason that a further investigation by the Impeachment Committee is constitutionally required in that instance. The function of that Committee is to test the veracity of the allegations, to develop the factual record and to place before the National Assembly the material necessary to enable it to make the determination that section 89 requires.

[373] Properly understood, therefore, there is no double standard. There is a principled distinction between—

(a) a case in which the available material conclusively indicates that no ground exists; and

(b) a case in which the available material indicates that a ground may exist, but requires further investigation before any section 89 determination can be made.

[374] Rule 129I fails to respect this distinction. It permits the National Assembly to terminate the process in both situations in the same manner, including in circumstances where the evidentiary threshold has been met but the factual record remains incomplete. In doing so, it authorises the National Assembly to avoid making the determination that the Constitution requires it to make on a properly informed basis.

[375] The defect, therefore, lies not in the fact that some processes may end without a full inquiry. It lies in the rule's capacity to permit the premature termination of a process in circumstances where further investigation is necessary to enable the National Assembly to discharge its constitutional function. That is constitutionally untenable and contrary to this Court's holding in *EFF II*.

[376] The Constitution does not demand a uniform process in all cases. It demands an effective mechanism, one in which the degree of investigation and deliberation is proportionate to the evidentiary position and sufficient to enable the National Assembly to make an informed determination. And the National Assembly has a discretion on how to achieve that outcome, fettered only by the demands in the Constitution, as explicated by this Court in *EFF II*. Rule 129I does not meet that standard.

[377] This judgment's approach also accords with the demands of transparency: the degree of public ventilation must be proportionate to the veracity of the claim. Where the material discloses no credible basis for the allegation, there is correspondingly little public interest in an extended inquiry and the process may properly be brought to finality without further factual investigation. In this way, the procedure performs a legitimate sifting function while ensuring that the National Assembly remains the ultimate decision-maker and its constitutional role is preserved, albeit exercised in a form proportionate to the evidentiary position.

Reliance on Van Rooyen and Bernstein

[378] The second judgment's reliance on *Van Rooyen* and *Bernstein* is misplaced.[363] They are distinguishable on the law. Those cases concern powers that are constitutionally sound in their design but may be abused in particular instances, with the remedy lying in the review of their exercise. This case is different. Rule 129I does not merely create the possibility of abuse; it permits, as part of its ordinary operation, the termination of an impeachment process after it has been established that there is sufficient evidence but before the National Assembly performs the constitutional task assigned to it under section 89. In that sense, the failure to determine whether a ground for removal exists is not a mere aberration but is an outcome of the rule itself. The defect therefore lies not in how the power might be exercised in a given case but in the structure of the rule, which enables the avoidance of a constitutional obligation, thus rendering it constitutionally deficient.

Conclusion

[379] Rule 129I does not pass constitutional muster because—

(a) it interposes an antecedent step of referral of the Report to the plenary National Assembly for consideration of whether to proceed with the removal process, and the section 89(1) inquiry only moves forward when the National Assembly so resolves. This subverts the two-stage structure identified in *EFF II*, frustrates the accountability purpose of section 89 and defeats the very constitutional mechanism it purports to give effect to, namely, the ability of the National Assembly to remove the President where the constitutional prerequisites exist; and

(b) the decision taken by the National Assembly in this irregular, constitutionally non-compliant antecedent stage occurs without any factual foundation whatsoever and lacks transparency.

[363] See the second judgment at [292] to [293].

[380] I therefore agree with the first judgment that the rule is unconstitutional, but for the reasons enunciated here, and not those contained in the first judgment.

Remedy

[381] Accordingly, this Court's order setting aside the NA vote is justified because the vote was taken pursuant to a rule that misdirected the National Assembly as to the constitutional task it was required to perform and subsequently prevented the National Assembly from undertaking the constitutional determination that section 89 demands. Therefore, the vote resulting from the constitutionally invalid rule lacks a lawful foundation.

[382] As stated, I agree with the second judgment that, for the reasons advanced there, the challenge to the vote does not engage this Court's exclusive jurisdiction. Nothing more need be said about it, except this. Having reached this result regarding the unconstitutionality of rule 129I, even if this Court had exclusive jurisdiction regarding the vote challenge it would not have been necessary, and would indeed be imprudent, to consider that challenge. This is so because, once the conclusion is reached that the impugned rule is constitutionally invalid, the vote becomes academic. In criminal procedure parlance, the vote is fruit of a poisoned tree (the rule) and it must perish with the rule.

[383] This conclusion regarding the challenge to the NA vote finds support in this Court's judgment in *Genesis*.[364] In that case, the Registrar of Medical Schemes issued certain circulars advising compliance with the High Court's judgment in *Omnihealth.*[365] On appeal, this Court overruled *Omnihealth*. The central issue in *Genesis* was the characterisation of Members' contributions to their medical aid scheme. Put more directly, does a medical scheme hold any part of its Members' contributions in trust for

[364] *Genesis* above n 197.

[365] The High Court in *Genesis* held that *Omnihealth* was wrongly decided: *Genesis Medical Scheme v Registrar of Medical Schemes* 2015 (4) SA 91 (WCC). The Supreme Court of Appeal split 3-2 in upholding the appeal: *Registrar of Medical Schemes v Genesis Medical Scheme* [2016] ZASCA 75; 2016 (6) SA 472 (SCA). By that narrow margin, the Court thus affirmed *Omnihealth.*

them as trustees? That question was directly related, on a practical level, to the status of Members' contributions in the event of their medical aid's insolvency.

[384] In narrating the background and issues in *Genesis*, the majority in this Court noted:

> "The correctness of *Omnihealth* is thus key: . . . if it is wrong, the Registrar's formal statutory rejection of Genesis's statements must tumble, together with the circulars that embody and explain the Registrar's approach."[366]

[385] This Court, in disagreeing with the minority's view regarding the fate of the circulars, held:

> "[T]he circulars themselves derive their sole force and impact from *Omnihealth*. When *Omnihealth* tumbles, as it must, they must tumble too. It would be a far-going misconstruction not only of the statute, but of the parties' dispute, to require Genesis to have sought, separately, to set the circulars aside – when what it did do was to challenge the Registrar's decision that sought to enforce the circulars. When *Omnihealth* tumbles, the Registrar's decision tumbles, and with it the circulars, all in one."[367]

[386] The same applies here. The finding that the vote is invalid has as its jurisdictional basis the invalidation of rule 129I – to declare that the vote is invalid is simply to state the consequence of the finding that the rule is invalid. The one *ipso jure* (automatically, by operation of law) follows upon the other.

[387] I agree with this Court's order. Paragraph 3 of the order makes allowance for both scenarios in the Panel's report – where the Panel concludes that sufficient evidence exists, as contemplated in rule 129G, and where it finds that there is no sufficient

[366] *Genesis* above n 197 at para 11.

[367] Id at para 62. See also the judgment of Zondo J at para 174.

evidence. The further courses of action in the event of either scenario, proposed in the order, accord with my reasoning on rule 129I.

THE COURT:

[388] Regard being had to the first, second and third judgments, the following order is made:

1. This Court has exclusive jurisdiction to hear the application with respect to the challenge to rule 129I of the Ninth Edition of the Rules of the National Assembly (NA Rules).
2. It is declared that rule 129I is inconsistent with the Constitution, invalid and set aside.
3. Pending any amendment, rule 129I shall read as follows (with the words struck out being severed and the underlined words being inserted into that rule):

   "Rule 129I Consideration and referral of panel report

   (1) Once the panel has reported the Speaker must ~~schedule the report for consideration by the Assembly, with due urgency, given the programme of the Assembly~~ inform the Assembly of the report.

   (2) The President must be ~~informed of the scheduling and any decision on~~ provided with a copy of the report forthwith.

   (3) In the event the ~~Assembly~~ panel ~~resolves~~ concludes that ~~a Section 89(1) enquiry be proceeded with~~ sufficient evidence exists as contemplated in Rule 129G, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose.

   (4) In the event the panel concludes that sufficient evidence does not exist as contemplated in Rule 129G, the Speaker must schedule the report for consideration by the Assembly; and in the event the Assembly nonetheless resolves that a Section 89(1) enquiry be

proceeded with, the matter must be referred to the Impeachment Committee established by this rule (or by the National Assembly Rules) for that purpose."

4. The severance and reading-in in paragraph 3 of this order shall apply subject to any amendment by the National Assembly.
5. Pending any amendment of the NA Rules, to the extent that any of the other NA Rules are, by implication, affected by the reading-in in paragraph 3 of this order, those rules shall be read consistently with paragraph 3 of this order *mutatis mutandis*.
6. It is declared that the vote of the National Assembly taken on 13 December 2022, declining to refer the Report of the Independent Panel to an Impeachment Committee as envisaged in the NA Rules is inconsistent with the Constitution, invalid and set aside.
7. The Report of the Independent Panel is referred to the Impeachment Committee established in terms of the NA Rules.
8. The first to fourth respondents are ordered to pay the costs of the first applicant, including costs of two counsel where applicable.

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For the Fourth Respondent:	T Ngcukaitobi SC, L Zikalala, N Chesi-Buthelezi and N Qwabe instructed by Ka-Mbonane Cooper