IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CCT Case No: 206/2025

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA 1st Applicant

UMKHONTO WESIZWE PARTY 2nd Applicant

and

PRESIDENT CYRIL MATAMELA RAMAPHOSA
AND OTHERS 1st to 5th Respondents

FIRST APPLICANT'S HEADS OF ARGUMENT

PREAMBLE

"***When the President's decision to appoint or dismiss is impugned in the future and she is asked for information that is similar to that asked for in this matter, it would then be open to her to confront that challenge squarely. Only then may we, if the matter ultimately gets to us, traverse the merits that would allow us to provide the guidance now asked for.***"[1]

A: INTRODUCTION

1. The future has arrived and this Court is now required to deal squarely with the situation where the President's decision to appoint or dismiss is impugned. In the present matter both the powers to appoint and to dismiss are in dispute.

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[1] Per Mogoeng CJ in *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC) at paragraph [36].

2. This case is all about accountability. In the main it is about Presidential accountability. It is also incidentally about Ministerial accountability. It is not about keeping or losing a Cabinet position as a "*job*" in respect of which the employer (President) is duty bound to give the "*employee*" (Minister) a fair hearing before a neutral decision maker or what the Americans call "*due process*". The matter also concerns a second sphere of jurisprudential confusion seems to permeate the President's pleadings namely the failure to distinguish between the two occasionally related but separate concepts of procedural fairness and (procedural) irrationality. Once these two misconceptions are properly understood and unpacked, it will be very easy to adjudicate the three main topics raised in the present application.

3. To the extent that implied powers are relied on and the scope of expressly conferred powers is contested, the case is also about interpretation.

4. The application raises intricate questions on the constitutional validity of three recent decisions of the President of the Republic of South Africa ("the President"). These decisions are:

    4.1. The decision to put the Minister of Police, Mr Senzo Mchunu ("Minister Mchunu") on a leave of absence;

    4.2. The decision to appoint Professor Cachalia ("Professor Cachalia") as Acting Minister of Police; and

    4.3. The decision to establish a Judicial Commission of Inquiry chaired by Acting Deputy Chief Justice Madlanga.

5. Simply put, the Applicants impugn the President's conduct in publicly announcing or making these decisions as constitutionally impermissible and/or inappropriate and therefore invalid for being "*inconsistent with the Constitution*" in terms of section 172(1)(a) of the Constitution. This includes the impermissible infringements of the applicants' own fundamental political and/or socio-economic rights as well as the rule of law. The constitutional inconsistencies specifically relate to the alleged failure by the President to fulfil specified constitutional obligations which attach to him specifically.

6. Of the utmost importance is that this series of interrelated decisions was sparked and necessitated by the whistleblowing revelations of allegations of corruption in institutions of the State which are supposed to combat crime and corruption, including, for present purposes, Cabinet Minister and the Judiciary.

7. Before delving into the merits of the application, we shall address the preliminary points of urgency, jurisdiction and/or direct access. These heads of argument are therefore structured as follows:-

    7.1. We highlight the salient background facts;

    7.2. We address the preliminary points which include urgency, jurisdiction, direct access and prematurity.

    7.3. We turn to the merits and demonstrate why each of the decisions listed above are constitutionally impermissible.

    7.4. Finally we deal with the appropriate remedy the question of costs.

8. Of cardinal importance to the merits of this matter is the ***Fedsure*** principle, according to which it is "*central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.*"[2]

9. Closely related to the above is the principle articulated in ***Albutt*** as follows:-

> "*The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them or because there are more appropriate means that could have been selected. But <u>where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved</u>*."[3] (Emphasis added)

10. Lastly, in relation to the distinction between procedural fairness and procedural irrationality reliance will be placed on the eventual clarification of that question in the ***Law Society*** case.[4]

11. The truism that in law context is everything is particularly applicable in this case. We therefore start by briefly examining the facts.

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2 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC) at paragraph [58].
3 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at paragraph [51].
4 *Law Society of South Africa and Others v Minister of Transport and Another* 2019 (3) SA 30 (CC).

B: BRIEF BACKGROUND FACTS

12. On Sunday, 6 July 2025 by Lt Gen Mkhwanazi, the KwaZulu-Natal Provincial Commissioner of the South African Police Service ("the SAPS") in which he made public serious allegations about the existence and operation of a sophisticated criminal syndicate that has allegedly infiltrated law enforcement and intelligence structures in South Africa.[5]

13. In response on Sunday, 13 July 2025, the President issued a statement on "*the establishment of a Commission of Inquiry into allegations regarding law enforcement agencies*" and addressed the nation concerning the security of our country, the integrity of our law enforcement agencies and the safety of our people.[6]

14. Lt Gen Mkhwanazi alleged that the Minister of Police interfered with sensitive police investigations and colluded with business people, including a murder accused, to disband the Political Killings Task Team based in KwaZulu-Natal. He also indicated that a police investigation by the task team in Gauteng "*unmasked a syndicate controlled by a drug cartel, which involves politicians, law enforcement officials from the SAPS, metro police and correctional services, prosecutors and the judiciary, as well as business people*".[7]

15. The allegations raise urgent and serious concerns around the Constitution, the Rule of Law and National Security.

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5 FA, annexure "MK2", p 36-37.
6 FA, annexure "MK2", p 35.
7 FA, annexure "MK2", p 36-37.

16. The President acknowledged that it is vital that we safeguard the integrity and credibility of the police and other law enforcement agencies. The President thereafter proceeded to establish a Judicial Commission of Inquiry to investigate the allegations or revelations. The President stated that the Commission would investigate, among other things, the role of current or former senior officials in certain institutions who may have aided or abetted the alleged criminal activity; failed to act on credible intelligence or internal warnings; or benefited financially or politically from a syndicate's operations. These institutions are the SAPS, National Prosecuting Authority, State Security Agency, the Judiciary and Magistracy, and the metropolitan police departments of Johannesburg, Ekurhuleni and Tshwane.[8] The President had decided to place Minister Mchunu, who was directly implicated in the alleged criminality on leave of absence pending the outcome of the proposed Commission.

17. Notably, the reason originally given by the President for placing the Minister of Police, Mr Mchunu on leave of absence was: *"in order for the Commission to execute its functions effectively*". He further stated that he had decided to appoint Professor Firoz Cachalia as the Acting Minister of Police in terms of Section 91(3)(c) of the Constitution. Professor Cachalia is currently a professor of law at the University of the Witwatersrand and is the Chairperson of the National Anti-Corruption Advisory Council.[9]

18. It is common cause that he is an "*outsider*" in that he is neither a member of the National Assembly, per section 91(3)(b) of the Constitution, nor serving Cabinet member, per section 98 thereof.

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8 FA, annexure "MK2", p 37-38.
9 FA, annexure "MK2", p 39.

19. Apart from the leave of absence of Minister Mchunu with immediate effect, the work of the Judicial Commission and the appointment of Professor Cachalia as Acting Minister of Police is intended to commence on 1 August 2025.[10]

20. To cater for that 2-week interregnum, the President has appointed Minister Gwede Mantashe as the current Acting Minister *"from within the Cabinet"* until Professor Cachalia takes up his post at the beginning of August.[11]

21. Although Minister Mantashe may arguably be disqualified from being a Minister at all, let alone Minister of Police, because of adverse findings of potential criminality made in the Zondo Commission, it is clear that procedurally speaking, he satisfies the requirements of section 98 to be Acting Minister of Police because he is, rightly or wrongly, a serving member of the Cabinet. His appointment is to assail in this particular application but only used as a point of reference.

C: <u>URGENCY</u>

22. The applicants are fully mindful of the fact that this Court is not well-suited to deal with urgent applications.[12] However, we submit that this matter is overwhelmingly urgent. The delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.[13]

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[10] FA, annexure "MK2", p 39.
[11] FA, annexure "MK2", p 39.
[12] *Black Sash Trust v Minister of Social Development and Others (Freedom under Law Intervening)* 2017 (3) SA 335 (CC) paragraph 36.
[13] *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) at paragraph [39]; see also *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 at paragraph [18].

23. Save for the indirect and ill-advised preliminary defence of "*prematurity*", no party has pleaded any frontal challenge to the urgency of the application. Nor can it ever lie in the mouth of the respondents to do so, having acknowledged urgency themselves on many occasions.

24. Regarding prematurity, that defence is still-born and doomed to fail in that:-

    24.1. The grammatical meaning of the relevant portions of the announcement make it clear that the relevant decisions to appoint Professor Cachalia and to establish the Judiciary Commission of Inquiry and to appoint its members, had already been made as at 19h36 on 13 July 2025.

    24.2. The impugned conduct is indeed the prior making of those decisions, not their implementation or consummation.

    24.3. In any event, the decisions have self-evidently been consummated, as supported by the irrefutable and objective evidence.

25. In the circumstances, urgency has been established and the defence of prematurity must be rejected. The matter is inherently urgent and ripe for adjudication. By the look of things, urgency is not really disputed by the two opposing respondents.

D: EXCLUSIVE JURISDICTION

D1: General Principles

26. Section 167(4)(e) of the Constitution provides that:

"Only the Constitutional Court may – decide that Parliament or the President has failed to fulfil a constitutional obligation."

27. It is by now well established that for various good reasons, the above exclusive, jurisdiction section should be afforded a narrow meaning.[14]

28. This Court in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others***[15] interpreted its exclusive jurisdiction power under section 167(4)(e) to relate to, *inter alia*, crucial political issues with important political consequences.[16]

29. In ***Doctors for Life International v Speaker of the National Assembly and Others***[17] the Court held that:

"[23] The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is 'to preserve the comity between the judicial branch of government' and the other branches of government 'by ensuring that only the highest court in constitutional matters intrudes into the domain' of the other branches of government.

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[14] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC) para 25 (*SARFU 1*):
"[25] Counsel were in agreement that s 167(4)(e) of the Constitution is not applicable to the questions decided by De Villiers J. If the section were to be construed as applying to all questions concerning the constitutional validity of conduct of the President it would be in conflict with s 172(2)(a), which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President. It seems to be correct that when the two sections are read together a narrow meaning should be given to the words 'fulfil a constitutional obligation' in s 167(4)(e). The problem is, what should that narrow meaning be? In the view I take of this matter, it is not necessary to decide that question in this application. it may depend on the facts and the precise nature of the challenges to the conduct of the President, which are not before us at this stage."

[15] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (*SARFU 2*).

[16] SARFU 2 paras 72-73.

[17] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) paras 23-24. See also paras 25-30.

And thus while vesting in the Judiciary the power to declare statutes and the conduct of the highest organs of State inconsistent with the Constitution and thus invalid, the Constitution 'entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done'.

[24] The principle underlying the exclusive jurisdiction of this Court under s 167(4)(e) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within s 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court."

30. We submit that this application falls squarely within the exclusive jurisdiction of this Court. The applicants allege that the President has failed to fulfil his constitutional obligation to uphold, defend and respect the Constitution as the supreme law of South Africa. This President-specific obligation is imposed on the President by section 83(b) of the Constitution (read with section 91(2); sections 91(3) and 98; sections 84(2)(f), 177, 178(4) and/or 180 of the Constitution).

31. It is only this Court that has the power decide whether the President has failed to fulfil his constitutional obligations. We submit that section 167(4)(e) is

engaged as soon as a party alleges that the President has failed to fulfil a constitutional obligation.

32. In ***Von Abo v President of the Republic of South Africa***[18] the Court held that:

> *"[36] In Doctors for Life Ngcobo J, writing for the court, observed that the word 'obligation' connotes a duty specifically imposed by the Constitution on Parliament to perform specified conduct. It seems to me that by parity of reasoning the same consideration applies to an 'obligation' relating to the President. ... On the other hand, the Constitution does contemplate that certain duties are pointedly reserved for the President. This class of obligations is derived from the Constitution itself or from legislation. It includes specified duties that the President as Head of State and head of the national executive must fulfil.*
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> *[37] It however remains a complex question whether a specific power exercised by the President under the Constitution or other law amounts to a 'constitutional obligation' which only this court may decide. It is neither prudent nor pressing to describe what amounts to a constitutional obligation under s 167(4)(e) any more that I have done. Even so, ready examples of constitutional obligations specifically entrusted to the President may be found in s 84(2) of the Constitution. Many of the powers and obligations in s 84(2) vest in the President as Head of State and head of the national executive. These duties may correctly be described as functions the Constitution*

[18] *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC).

requires him or her to perform. Ordinarily they would be matters that have important political consequences and which call for a measure of comity between the judicial and executive branches of the State. Some of the obligations do relate to decisions on crucial political questions, referred to in Doctors for Life and necessarily implicate separation of powers issues. Moreover, the decisions to be tested for constitutional compliance are those of the highest office of the Head of State and the head of the national executive. And for that reasons the Constitution provides that disputes of that order must be decided by this Court only."

33. In ***Economic Freedom Fighters v Speaker, National Assembly and Others***[19] also knows as "***EFF1***", the Court held that:

"[18] 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. Even if it is an office-bearer- or institution-specific constitutional obligation, that would not necessarily be enough. Doctors for Life provides useful guidance in this connection. There, Ngcobo J said "obligations that are readily ascertainable and are unlikely to give rise to disputes", do not require a court to deal with "a sensitive aspect of the separation of powers" and may thus be heard by the High Court. This relates, as he said by way of example, to obligations expressly imposed on Parliament where the

[19] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC). see also paras 33-39.

Constitution provides that a particular legislation would require a two-thirds majority to be passed. But where the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this Court to exercise its exclusive jurisdiction would have been met.

[19] 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 judicial branch and the executive and legislative branches of government.

[20] That this Court enjoys the exclusive jurisdiction to decide a failure by the President to fulfil his constitutional obligations ought not to be surprising, considering the magnitude and vital importance of his responsibilities. The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest

office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project."

34. The above general principles apply to this Court's exclusive jurisdiction under section 167(4)(e).

D2: <u>Applying the general principles to the facts of this case</u>

35. It appears from these general principles that there are prior jurisdictional facts under section 167(4)(e) to be satisfied by a litigant. First, a litigant must demonstrate that the constitutional or legislative provision relied upon imposes an obligation. Secondly, a litigant must demonstrate that the obligation alleged is of the nature contemplated in section 167(4)(e).

(a) <u>Do the constitution provisions relied upon by the applicants impose a constitutional obligation on the President?</u>

36. Crucially and in respect of each of the three pleaded grounds or topics on the merits, it has been <u>alleged</u> and supported by the relevant facts and evidence, that the President has:-

36.1. conducted himself in a manner which is inconsistent with the Constitution and/or the Bill of Rights; and

36.2. in so doing, failed to fulfil his exclusive and President-specific constitutional obligations found in sections such as 83, 91, 93, 96, 98 of the Constitution.

37. The applicants specifically rely mainly on section 83(b) of the Constitution which imposes an obligation on the President to uphold, defend and respect the Constitution.

38. For the avoidance of any doubt, the applicants also rely on the alleged violations or breaches of Presidential Oath of Office as contained in section

96(2) of the Constitution, read with Schedule 2 thereof. In respect of the unconstitutional conduct of the President to place Minister Mchunu on leave of absence, and appointing Professor Cachalia as Acting Minister of Police, the Presidential obligations found in sections 93 and 98 of the Constitution, respectively, are at play.

39. In relation to the establishment of the Judicial Commission of Inquiry, the constitutional obligation must be read together with sections 84(2)(f), 177, 178(4) and/or 180 of the Constitution.

40. Manifestly, sections 83(b) 84(2)(f), 91(2)-(3) and 98 all and each impose constitutional obligations on the President exclusively. Other relevant non President specific obligations, such as those contained in section 96 of the Constitution, will also be invoked because the President has introduced them. However these are not relied on for the purposes of exclusive jurisdiction.

(b) <u>Are the constitutional obligation, relied upon by the applicants of the nature and character that trigger the exclusive jurisdiction of this Court?</u>

41. This Court has on many occasions held that 167(4)(e) is to be given a narrow meaning. In line with the prevailing jurisprudence of this Court, we submit that the obligations relied upon by the applicants in respect of the three main topics under consideration, are constitutional obligations envisaged in section 167(4)(e).

41.1. <u>First,</u> the issue about placing a Minister of leave of absence, appointing an Acting Minister and the establishment of a judicial commission of

inquiry are crucial political questions, that a court hearing these issues intrude into the exclusive domain of the President – thereby touching on the sensitive areas of separation of powers.

41.2. Secondly, the nature and character of the impugned constitutional obligation is specifically imposed on the President. Section 83(b) imposes President-specific obligation on the President.

41.3. Thirdly, there is a link between the President's general obligation under section 83(b) with his other more specific obligations under sections 84(2)(f), 91(2)-(3) and 98 of the Constitution.

(c) Crucial political questions standard

42. The decision of the President under sections 91(2) and (3) of the Constitution to appoint and dismiss Deputy Presidents and Ministers are crucial political questions with political consequences – and they are of a political nature[20]. The power to appoint and dismiss Ministers is vested in the President by section 91(2) of the Constitution.[21] It is generally undesirable for courts to intrude into the domain of the executive in breach of the separation of powers doctrine. However, this Court in ***SARFU 1*** as discussed above held that only the Constitutional Court in crucial political questions is permitted to intrude into the domains of the principal legislative and executive organs of state, because it entrusts the Constitutional Court the duty of exercising its supervisory role over crucial political questions with political consequences.

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[20] *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC) para 2.

[21] *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) para 17.

43. The President placed Minister Mchunu on leave of absence, purportedly exercising his constitutional power under section 91(2) of the Constitution. The President alleges that this power to do so derives from his power to dismiss Ministers.

44. In the ***DA v President***[22] High Court version of the matter referred to above, Rogers J, in his previous capacity correctly remarked that:-

> "*It is difficult to imagine a power closer to the heartland of the President's personal preferences than the power to appoint and dismiss ministers and deputy ministers; it is by its nature highly discretionary. It may well be that the exercise of these powers can be impeached on the ground of irrationality but the threshold for judicial interference is likely to be very high. Of course, if bad faith could be properly proved by satisfactory evidence, interference might follow more readily. In general, though, I think it can be said that the primary consequence of decisions to appoint and fire cabinet ministers which the public or sectors of it regard as bad decisions, is political rather than legal*."

45. Similarly, the decision to establish a judicial commission of inquiry on the facts of this case is an obligation imposed on the President by the Constitution, and an intervention by this Court may intrude on the domain of the President to establish a commission of inquiry in terms of section 84(2)(f) of the Constitution.

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[22] Democratic Alliance v President of the Republic of South Africa and Another [2017] ZAWCHC 34 (31 March 2017) at paragraph [7].

46. We submit that the conduct of the President under attack meets the crucial political question standard as enunciated by this Court in ***SARFU 1 & 2*** and ***Doctors for Life***.

(d) <u>There is a link between section 83(b) obligation and other President' specific obligations</u>

47. This Court in ***EFF(1)*** held that section 83(b) imposes an obligation on the President. However, to meet the section 167(4)(e) requirements, conduct by the President himself that tends to show that he personally failed to fulfil a constitutional obligation expressly imposed on him, must still be invoked, to establish the essential link between the more general section 82 obligations and a particular right or definite obligation. This Court further held that a constitutionally sourced and somewhat indirectly imposed obligation complements section 83 for the purpose of meeting the requirement of section 167(4)(e).[23]

48. To be clear, as this Court held in ***EFF(1)***, the indirectly imposed obligation merely provides reinforcement of the primary imposed obligation. In this case, sections 91 and 98 obligations are also primarily agent-specific obligations.

49. Therefore the link is a between primary agent specific obligations. It therefore means that, even without the link, the agent-specificity is established by the applicants' reliance on section 83(b), read with section 91(2)-(3) and 98 of the Constitution.

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[23] EFF para 33. The Court also held that agent specificity is primarily established by section 83. See para 34.

50. We submit that the applicants also meet the agent-specificity requirement.

51. It was correctly stated in the decision of this Court known as "***EFF2***" that once it is found that the matter falls within the exclusive jurisdiction of the court then "*the issue of direct access falls away*".[24]

52. In the unlikely event that this Court finds that its exclusive jurisdiction is not engaged – either on the basis of crucial political questions standard or agent-specificity standard, we submit that it is in the interests of justice to bring the matter directly to this Court. It is to this direct access that we now turn to.

E: <u>DIRECT ACCESS</u>

53. In the unlikely event, that this Court finds that its exclusive jurisdiction is not triggered, the applicants apply for direct access to this Court in terms of section 167(6)(a) read with Rule 18 of the Rules of the Constitutional Court.

54. The President has also pleaded a muted and incomplete defence to direct access solely on the basis that the fact that the application involves matters of public importance does not *"on its own"* justify direct access. We agree. But that is not the only ground pleaded by the applicants. On the assumption that the other grounds are thereby undisputed, then direct access is conceded. Nobody suggested that public importance "*on its own*" justified direct access. The test is the interests of justice.

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[24] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) 571 (CC) at paragraph [17].

55. The applicants submit that it is in the interests of justice that this matter is heard directly by this Court:

55.1. The matter concerns an urgent matter of the utmost public importance.

55.2. The matter concerns crisp constitutional issues with no need for the adjudication of factual disputes.

55.3. The implications of the impugned conduct of the President on the public purse is likely to be catastrophic with every day that passes by. If the application is not heard by this Court, there is likely to be prejudice to the public interest and good governance.[25]

55.4. The matter relates to the exercise of constitutional powers by the President. It is in the interests of justice that this Court determines whether the President acted in a constitutionally compliant manner.

55.5. The matter involves the President's failure to fulfil his constitutional obligations. Secondly, time and costs are saved by coming directly to this Court.[26]

55.6. Finally, the applicants have strong prospects of success in relation to the impugned conduct of the President.

56. We therefore submit that, in such exceptional circumstances, the applicants have made out a proper case for this Court to exercise its discretion to grant them direct access in the interests of justice.

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[25] *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) para 24.

[26] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 598E.

57. Having disposed of all preliminaries, we now turn to dealing with the merits.

F: THE MERITS

58. Chapter 5 of the Constitution is headed "*The President and National Executive*". It therefore stands to reason that the Presidential duties and obligations which are at play in this matter are mainly located in that Chapter.

59. Section 83(b) of the Constitution provides that "*the President must uphold, defend and respect the Constitution as the supreme law of the Republic*".

60. Section 85(1) provides that "*the executive authority of the Republic is vested in the President*."

61. Section 86(2) provides that upon the election of the President by the National Assembly, over which Chief Justice must preside "*the procedure set out in Part A of Schedule 3 applies to the election of the President*."

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

63. In taking the prescribed oath, the President swears that he will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and,

    63.1. promote all that will advance the Republic, and oppose all that may harm it;

63.2. protect and promote the rights of all South Africans;

63.3. discharge his duties with all his strength and talents to the best of his knowledge and ability and true to the dictates of his conscience;

63.4. do justice to all; and

63.5. devote himself to the well-being of the Republic and all of its people.[27]

64. In terms of section 172 of the Constitution, when deciding a constitutional matter, a court must declare that any conduct that is inconsistent with the Constitution is invalid and may grant any just and/or equitable remedies. The other relevant sections of the Constitution which are relevant to this application are quoted under the discussions of the relevant topics below.

65. In sum, the applicants have pleaded in the Notice of Application that the three-pronged conduct or decision/s of the President amount to multiple failures to fulfil agent specific constitutional obligations and must therefore be declared inconsistent with the constitution with just and equitable remedies.

66. We address each of the three topics separately below but bearing in mind the crucial interplay and overlaps among them. Importantly, they must not be viewed in isolation from each other.

67. In this regard, we refer to the first decision to place Minister Mchunu on leave of absence as the triggering decision because on the one hand, the second decision to appoint Professor Cachalia as Acting Minister is an offspring that

[27] Schedule 2 of the Constitution.

first decision. On the other hand that first decision is purportedly impugned made pending the outcome of the judicial commission of inquiry which is the subject matter of the third decision of the President.

68. With this context in mind, we now deal with the impugned conduct and/or decisions in turn.

F1: The decision to place Minister Mchunu on leave of absence

69. The Constitution gives the President the power to appoint and dismiss Ministers. It is common cause that it does not expressly with respect give the President the power to place Minister's on leave of absence.

70. Accordingly, to succeed the respondent can only rely on the implied powers and they indeed attempt to do so. The implied powers relied on purportedly emanate from the original powers in section 91(2) of the Constitution, which provides that:-

> "*(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."*

71. As the argument of the respondent incorrectly goes, the power to dismiss implies the power to place a Minister on leave of absence, which is "*incidental*" thereto. We shall demonstrate the fallacy in this argument.

72. First and as already alluded to, the power to dismiss a Cabinet Minister must not be confused with the "*dismissal*" of an employee or other official. No Minister is entitled to the fair and lawful procedures that employers must follow when taking disciplinary action against an employee, including dismissal. The

dismissal of a Cabinet Minister is a *sui generis* process governed by the Constitution. It is a matter of accountability not employment. To avoid the labour law false analogy it would be perhaps preferable to use the synonymous word "*removal*" instead of "*dismissal*". The two words will be used interchangeably.

73. Second, the President exercises his constitutional responsibility in this regard in the form of a prerogative. This much is articulated by and/or on behalf of the President himself. In other words, when making the impugned decision there can be no doubt that the President was, subjectively and objectively, exercising his prerogative powers.

74. In examining the Presidential powers to appoint and remove Ministers firstly the historical roots of the institution called a Cabinet are found in the fact that such people were appointed to "*minister*" to the Crown and therefore selected "*at his or her own pleasure*". It is therefore important to note that the drafters of the Constitution used the word appoint in section 91(2) but in section 91(3) the word "*select*" is advisedly employed. In this sense to remove a Minister is to "*de-select*" him or her or even to "*withdra*w" him or her. These notions are not as strong as a "*dismissal*" in the labour law sense, which invariably carries a punitive element with it.

75. In this regard the starting point must always be section 85 of the Constitution which vests all the executive authority of the Republic in the President. The role of Cabinet Ministers is therefore to assist the President to discharge his or her executive authority. This is why she has a free hand in the selection and de-selection of such Ministers. This was better expressed by Chief Justice Roberts

in the most recent US Supreme Court decision in Sheila Law LLC[28], and summarised as follows in the headnote,

> "*Article II vests the entire "executive Power" in the President alone, but the Constitution presumes that lesser executive officers will assist the President in discharging his duties. The President's executive power generally includes the power to supervise—and, if necessary, remove—those who exercise the President's authority on his behalf. The President's removal power has long been confirmed by history and precedent.*"

76. A clear example of this is the recent dismissal or removal of Deputy Minister Whitfield for undertaking an international visit allegedly without the permission of the President. Here too, the President was exercising the very same prerogative powers.

77. In the matter at hand, the serious allegations made against the Minister of Police, Minister Mchunu, include interference with sensitive police investigations and collusion with business people. These allegations, as confirmed by the President himself, raise serious concerns around the Constitution, the Rule of Law and National Security.

78. The attempt by the President to deny that relatively speaking, the Mchunu allegations are much more serious than the Whitfield (or even the Dr Nkabane) allegations, is at best laughable purely at the level of common sense.

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[28] Seila Law LLC, Petitioner v. Consumer Financial Protection Bureau 591 US (2020).

Ultra vires

79. Despite this, the President failed to exercise his constitutional responsibility of dismissing (or retaining) Minister Mchunu and instead placed the Minister on "*leave of absence*" in circumstances where there is no empowering provision by the Constitution to do so. The President's conduct in this regard is therefore *ultra vires*.

80. The President acted inconsistent with the Constitution. The 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. The finding that he acted ultra vires is a finding that he acted in a manner that is inconsistent with the Constitution.[29]

81. To the extent that the President relies on an implied power, reliance will be placed on the ***Amabhungane*** and the ***Mncwabe*** decisions of this Court. In ***Amabhungane***, Madlanga J, as he then was, articulated the positions as follows:

> "*The answer to the question whether an implied primary powers exists is yielded by the usual interpretative exercise that seeks to establish what a statute or provision in it means. There is nothing unusual about this*."[30]

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[29] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraph [20].

[30] Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others 2021 (3) SA 246 (CC).

82. In ***Mncwane***:

> *"Implied powers are the exception, not the rule. These powers only come into existence when they are reasonably necessary to give practical effect to the express powers laid down in legislation. Axiomatically, an implied power must draw from an enabling legislative provision. An implied power is ordinarily less likely to be found where the legislation is aimed at certainty."*[31]

83. As to an ancillary implied power Madlanga J described these as "*a cognate implied power, pegged onto, and owing its existence to, some primary power*".[32]

84. Two legal effects emanate from the above namely firstly, that the onus to prove the existence of an implied power and to label it properly is on the party asserting it. That onus has not been discharged in the present care. Secondly it is self-evident that the aim of the provision is to provide certainty as to whether the President is retaining or dismissing a Minister for accountability purposes. There can be no half-way house like "*leave of absence*" pending non-binding recommendations of a Commission of Inquiry not specifically targetted at the allegations made about a Minister. This cannot meet the Mncwabe standard or discharge the requisite onus.

85. The dismissal of a Cabinet Minister is a process governed by the Constitution. The President exercises his constitutional responsibility in this regard. The power to dismiss is *sui generis*. There is no implied power to follow fair and lawful procedures that employers must follow when taking disciplinary action

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[31] *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others (CCT* 2023 (11) BCLR 1342 (CC) at paragraph [72].

[32] *Amabhungane* at paragraph [72].

against an employee, including dismissal. Employees are suspended with pay pending the outcome of a disciplinary hearing. It is not clear what purpose the placement of Minister Mchunu aims to achieve.

86. These powers to appoint and to dismiss are conferred specially upon the President for accountability and the effective business of government and, in this particular case, for the effective pursuit of national security.[33] It must be viewed within the context of the accountability ensuring powers and obligations of the President.

87. The reason why Constitution does not contain any provisions for the impeachment of a Cabinet Ministers must be because they are appointed and removed by the President in his sole and absolute discretion. There are therefore only two methods for the dismissal of Cabinet Ministers (other than resignation or death). These are:-

87.1. dismissal or removal by the President exercising his prerogative powers in terms of section 91(2) of the Constitution; or

87.2. dismissal or removal as a result of the passing of a motion of no confidence in terms of sections 102(1) or 102(2) of the Constitution.

88. In our respectful submission neither of these methods can include employment-like "*due process*" or any inquiries into guilt or innocence. It would be absurd if they did. No person who gets appointed as Minsters undergoes the usual recruitment, selection and/or interviewing procedures which form an inherent

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[33] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at paragraph [78].

part of employment process. They are simply appointed "*at the pleasure of the President"*, as Ministers often remind us whenever anyone calls for their resignation over one issue or another.

89. In this regard the President has committed another fatal error of conflating the requirements of a Presidential dismissal or removal with impeachment which is inherently punitive. The constitutional distinction between these two things was properly explained in ***EFF (2)*** at paragraphs [134] to [138]. The main distinction is the inherently punitive nature of removal by impeachment. It is this aspect which attracts the right to procedural fairness.

90. It is indisputable that these prerogative powers come from our colonial past. They are modelled in the royal prerogative. Although constitutionalism has correctly introduced the necessary adjustments, particularly by making these powers assailable on the basis of rationality, it would be instructive to refer to a recent articulation of the royal prerogative ancestor of the present constitutionally flavoured variant applicable in South Africa. Lord Justice Lewis articulated the position as follows:-

> "*Ministers of the Crown are appointed by Her Majesty the Queen on the advice of the Prime Minister. They hold office at the pleasure of Her Majesty. They are not employees and the terms of their office are not governed by contract. Removal of a minister from office is a matter for the Queen acting on the advice of her Prime Minister*."[34]

[34] R (on the application of FDA) v Prime Minister [2021] EWHC 3279 (admin) Queen's Bench Divisional Court.

91. Coming to the interpretative exercise referred to in ***Amabhungane***, we note that section 91(2) states that the President "*may dismiss a Minister*", not must. That is perfectly consistent with the prerogative. There is no situation where the President must remove a Minister. It is all up to him ad him alone.

92. Furthermore as was articulated in this Court in ***EFF(2)***, just like the National Assembly in relation to the President as its appointee.

> "*the (President) has the power to appoint (a Minister) but the existence of a ground for dismissal does not mean that (the Minister) must be removed, he (or she) may be removed*."

93. Equally the President may decide to retain the Minister even if he or she is found wanting by some Commission of Inquiry or other Committee. Subject only to the rationality standard, the decision is his sole preserve.

94. Therefore there can be no implied constitutional power to place a Minister of leave of absence pending the irrelevant and non-binding outcomes of an Inquiry. That is so because there can be no rational connection between the two things. The artificial creation of that connection by the President is a clear signal that he has exceeded his powers.

Irrationality and/or unreasonableness

95. Alternatively, and in the unlikely event that this Court finds that the leave of absence was *intra vires*, the President's conduct is in any event irrational. Viewed objectively, there is no rational basis for or legitimate purpose to be achieved by the decision to place Minister Mchunu on leave of absence. This

is an objective enquiry, unaffected by any "*good intentions*" the President may have had.[35]

96. The reasons offered by the President for his decision to place Minister Mchunu on leave of absence, are a moving target depending on what day of the week you ask him. On 13 July 2025 he gave the reason as follows:

> *"In order for the Commission to execute its functions effectively, I have decided to put the Minister of Police Mr Senzo Mchunu on a leave of absence with immediate effect."* (Emphasis added)

97. Subsequently the President gave different reasons, namely that since the allegations were "*untested*" he was prohibited from dismissing Minister Mchunu without due process.

98. In the answering affidavit[36] he gave these and yet new reasons, namely that allegations are serious and have "*profound implications for public confidence in the executive and the police force ad a whole*". He also states that "*placing a Minister on special leave is not unprecedented*"[37].

99. This can never be a rational basis for the decision to place Minister Mchunu on special leave. All the reason progressively proffered by the President do not serve any legitimate constitutional purpose. Regarding the original reason given on 13 July 2025, it is self-evident and not disputed that the Commission will still function effectively even if Minister Mchunu is dismissed.[38] The

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35 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).
36 First Respondent's AA, paragraphs 42 and 43, pages 85 to 86.
37 President's AA, paragraph 43, page 86.
38 FA para 52.8, page 25.

achievement of accountability is not connected or linked to the special leave decision.

100. The original reason is the one which should concern the Court, not any of the reasons offered subsequently as *ex post facto* rationalisation of a bad decision ex post facto rationalisation of a bad decision. Our courts[39] have repeatedly articulated that reasons given subsequent to the decision or in the answering affidavit ought properly not to be considered as having informed the decision.

101. In any event:-

101.1. Placing a Minister responsible for policing on leave of absence, who is alleged to have lied in Parliament regarding his relationship with a criminal suspect and/or his alleged comrade and benefactor is manifestly irrational.

101.2. Placing a Minister responsible for policing on leave of absence, who is alleged to have disbanded the Political Killings Task Team of the South African Police Service without the knowledge or approval of the National Commissioner of Police is manifestly irrational.

101.3. Placing a Minister responsible for policing on leave of absence, who is alleged to have interfered with sensitive police investigations and colluded with business people, including a murder accused, to disband the Political Killings Task Team, is manifestly irrational.[40]

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[39] National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA) at paragraphs 27 and 28; Zuma v Democratic Alliance 2018 (1) SA 200 (SCA) at paragraph [24]

[40] FA, Annexure MK2 p 36.

101.4. Placing a Minister responsible for policing on leave of absence, fully knowing that the allegations against him raise serious concerns around the Constitution, the rule of law and national security is irrational.[41]

102. It is clearly irrational to place Minister Mchunu on leave of absence in circumstances in which the Minister had been entrusted with the constitutional responsibility to provide political leadership over the prevention, combating and investigation of crime, maintenance of public order in terms of sections 205-206 of the Constitution. This Court in ***Glenister v President of the Republic of South Africa and Others [2011] ZACC*** 6 at paragraph 58:

> *"[58] For our country to win the war against these serious crimes, we need to enhance the capacity of the police to prevent, combat and investigate these crimes and other national priority crimes. Strengthening the ability and the capacity of the SAPS to address the scourge of corruption and other national priority crimes is unquestionably a legitimate governmental purpose. Establishing a separate division in the SAPS, the DPCI, for that purpose is rationally related to the achievement of that purpose. ..."*

103. Minister Mchunu is alleged to have worked to weaken the capacity of the police to prevent, combat and investigate these crimes.

104. It is therefore irrational to retain [on leave of absence] a Minister responsible for policing, who is accused of using his political responsibility in policing to weaken the ability of the police to prevent, combat and investigate crime. The Minister

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[41] FA Annexure MK2 p 37.

is in fact being accused of breaching his oath of oath and the Constitution as well as section 96 of the Constitution.

105. In ***Motau*** this Court held that:-

> "*The principle of legality requires that every exercise of public power, including every executive act, be rational*.[42]

106. We submit that by failing to take into account the material and relevant fact that Minister Mchunu is not just a Minister, but a Minister responsible for policing, the President further acted irrationally.

107. To be clear, once Minister Mchunu has been cleared, the President may always re-appoint him as a Minister, and assign him any powers and functions he so wishes. But it is simply irrational to retain him, on leave of absence pending a broad and investigation which is not even specifically targetted at him, judging by the terms of reference, in which there is, at best, only peripheral and generalised inclusion of Mchunu's own conduct.

108. Lastly, we point out that the various defences or explanations given by the President to the considerations pleaded by the applicants as evidence of irrationality betray the unconstitutionality of the impugned conduct.

109. First the President's attempt to explain away the manifest inconsistency in dealing with Mr Whitfield is demonstrably false and unsustainable. The purported distinguishing factor that Mr Whitfield, unlike Minister Mchunu

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[42] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) at paragraph [69].

actually admitted guilt is not borne out of the objective facts and the statement issued by the Presidential spokesperson on the issue.

110. In any event, the theory that an admission and apology would warrant harsher treatment than unsustainable and demonstrably false denials is an absurdity and evidence of irrationality.

111. Secondly the allegations against Mr Whitfield (and/or Dr Nkabane) also remain "*untested*" and in the sense that they have never been subjected to any due process.

112. Thirdly, the likely duration of the proposed Madlanga Commission, which has not been disputed, may well exceed the remainder of Minister Mchunu's term of office, rendering the special leave decision to be plainly irrational and purposeless.

113. Fourthly and lastly, the justification that the President has previously placed another Minister (Dr Mkhize) on leave of absence is no indication of the constitutionality or otherwise of that conduct. It is only an indication that it was not previously challenged.

114. In the totality of the circumstances, the impugned conduct or decision is manifestly inconsistent with the Constitution and in breach of the relevant obligations mainly found in section 91(2) of the Constitution.

F2: *The decision to appoint Professor Cachalia as Acting Minister Of Police*

115. At the risk of repetition, this decision flows from the first illegality of placing Minister Mchunu on special leave.

116. On 13 July 2025, the President states that the decision to appoint Professor Cachalia "*as Acting Minister of Police*" was done "*in terms of section 91(3)(c) of the Constitution*". This is plainly legally unsustainable.

117. However, in his answering affidavit the President seems to concede that his obligations of the President in this regard emanate not only from section 91(3) but also from section 98 of the Constitution as well.[43]

118. In our respectful submission the relevant powers and obligations for appointing an Acting Minister emanate solely from section 98. Section 91(3)(c), with respect has nothing to do with the matter. We explain briefly below.

119. Section 91(3) provides that:

> *"91. Cabinet*
>
> *…*
>
> *(3) The President—*
>
> *(a) must select the Deputy President from among the members of the National Assembly;*
>
> *(b) may select any number of Ministers from among the members of the Assembly; and*
>
> *(c) may select no more than <u>two Ministers from outside the Assembly</u>."*

120. The plain meaning of this is that whenever the President is composing (or re-composing) his or her Cabinet, he may select any number of persons from the

[43] First Respondent's AA, paragraph 47, page 88.

National Assembly and no more than two from "*outside*". This has no bearing on the present issues.

121. Section 98, which is relevant, provides that:

> *"98. Temporary assignment of functions.*
>
> *The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function."*

122. Firstly, Professor Cachalia is not a member of Cabinet. Secondly, Minister Mchunu will, at all material times,

122.1. be absent from office (because he has been placed on leave of absence); and

122.2. unable to exercise his Ministerial powers or perform his functions (because the President has stripped him of those powers and placed them on Acting Minister Mantashe until the assumption of the office by Professor Cachalia, scheduled for 1 August 2025).

123. The decision to appoint Professor Cachalia is therefore *ultra vires* the Constitution. It is an inescapable conclusion that the President failed to have regard to section 98 of the Constitution at all. Hence, he did not mention that section in his announcement, although section 98 is the only relevant section. He specifically relied on section 91(3), which is irrelevant, as demonstrated above.

124. The President therefore failed to fulfil a constitutional obligation expressly imposed on him i.e. to apply section 98 when appointing an Acting Minister. The section establishes a clear obligation for the President to ensure the continued functioning of government in the absence or incapacity of a Cabinet member. The President cannot assign the powers or functions of Minister Mchunu to a non-member of Cabinet.

125. Textually, section 91(3) of the Constitution makes no provision for the appointment of an Acting Minister. Where there is a need for an acting appointment, the Constitution makes this explicit. For example, section 90 makes a provision for the appointment of an Acting President. Section 98, while it does not use the word "*acting*" is clearly an empowering provision for Acting Ministers, like Minister Mantashe. It makes provision for the temporary (i.e. acting) assignment of functions of one Cabinet member to another Cabinet member as set out in section 98.

126. It must have been at the least one of the purposes of this provision to save taxpayers' money by making sure that such Acting Ministers are always people who will temporarily hold two portfolios and not one. This is in line with acting appointments in many other situations.

127. It seems to be non-contentious between the parties that although section does not specifically refer to an "*acting*" appointment but to the temporary assignment of duties, in substance it deals with acting. We submit that this common understanding is supported by the text of the section.

128. The appointment of an Acting Minister of police, who is a non-member of Cabinet also breaches section 206(1) of the Constitution which essentially prescribes that there must be a member of the Cabinet responsible for policing.

129. It is also *ultra vires* because it breaches the ***Fedsure*** principle referred to above.

130. Even if it could be generously said that the President made a *bona fide* error, that would not save the conduct from irrationality. Good intentions do not cure illegality. Neither can the conduct be saved by the so-called ***Latib*** principle, according to which "*the fact that the decision-maker mentions the wrong provision does not invalidate the … act*." This is so because "*the doctrine does not validate action taken in deliberate reliance on a provision that does not authorise it*."[44]

131. This Court in ***Harris*** also reiterated that the ***Latib*** principle does not apply where the decisionmaker "*consciously made an election to use a different power under a different provision*"[45], as in the present case.

132. Literally no honest or intelligible defence has been advanced by the respondents in respect of this ground. The contents of the answering affidavit effectively amount to a concession or confession.

133. Instead of unnecessarily wasting the time of the Court and the applicants, a reasonable President would have simply conceded this point, which is unanswerable. For the failure to do so, a punitive order of costs will be sought.

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[44] *Howick District Landowners Association v Umngeni Municipality* 2007 (1) SA 206 at paragraphs [19] and [22].

[45] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at paragraph [17].

F3: *The Decision To Establish A Judicial Commission Of Inquiry*

134. Section 84(2)(f) of the Constitution provides that the President is responsible for appointing commissions of inquiry.

135. Our law does not prohibit the appointment of judges, serving or retired, from presiding over commissions of inquiry. It also does not prescribe or compel it. The well-known Truth and Reconciliation Commission is a prime example of a Commission of Inquiry which was not chaired by a Judge. That does not in any way diminish its internationally acclaimed status. It may well enhance it because at the time of its establishment only apartheid Judges would have been available for such appointment.

F4: Reasonable apprehension of institutional bias

136. It is self-evident that constitutional appropriateness or otherwise of appointing a Judge to chair or to serve on a commission of enquiry depends, inter alia, on "*the subject matter of the commission*".

137. In ***South African Association of personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)*** at [31] the court was mindful of not laying down any rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office. At [34] the court held that:

> *"[34] In dealing with the question of judges presiding over commissions of inquiry, or sanctioning the issuing of search warrants, much may depend on the subject matter of the commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial*

> *officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions - independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the judge is required to determine whether grounds exist for the invasion of privacy resulting from searches."*

138. It should therefore be self-evident that, just as it would be constitutionally inappropriate to appoint a Judge to sit in a Commission if that would breach the doctrine of separation of powers, it is equally inappropriate to do so if, as in the present case, it would breach the rules of natural justice such as *nemo iudex in rem sua*. The idea, peddled in some quarters, that conduct which is tainted by bias can at the same time be rational needs only to be stated to be rejected for patent absurdity. Like bad faith, bias irretrievably taints an executive decision such as the one under consideration. This is trite.

139. Furthermore, section 84(2)(f) of the Constitution does not compel the President to appoint a "*judicial*" commission of inquiry. It is a matter within the President's discretion. The exercise of this discretion must be exercised rationally and in line with established legal norms and standards.

140. In the present circumstances and given "*the subject matter of the commission*", the principle "*no person can be a judge in his own case*", which is fundamental

to determining whether the subject matter of the commission and the allegations at hand, clearly militates against a "*judicial*" commission of inquiry.

141. The President correctly points out that the challenge is aimed at both the establishment and composition of the Commission. Those are indeed the twin targets of the constitutional challenge. However that is not to be confused with a recusal application or passing any commentary on the suitability of Justice Madlanga whose credentials are otherwise impeccable, as an individual. This is a matter of institutional or "*structural*" and not individual bias.

142. In the ***Islamic Unity*** case in this Court, Mpati AJ articulated the distinction as follows:-

> "*The present matter does not concern the recusal of a presiding officer. The applicant asserts bias at a structural level. In as much as the applicant raises the issue of a relationship of influence and dependency between the Chairperson of the CCC and other individual members, the argument was that the decision-maker (CCC) is inevitably biased as a result of institutional factors rather than an individual member being biased by virtue of personal traits.*"[46]

143. It is clear that the President failed to exercise such discretion and/or to consider that the judiciary itself is one of the institutions that has been implicated in the allegations made by Lieutenant General Mkhwanazi. Hence the Terms of Reference include an investigation into judicial conduct or alleged misconduct.

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[46] *Islamic Unity Convention v Minister of Telecommunications and Others* [2007] ZACC 26; 2008 (3) SA 383 (CC); 2008 (4) BCLR 384 (CC)

Specifically he failed to take those relevant factors of institutional bias into account. The decision is accordingly irrational.

F5: *Ultra vires* / irrationality

144. The impugned composition of the judicial commission of inquiry is also assailed on the basis of its rationality for exceeding the powers of the President more specifically in that he is constitutionally prohibited from establishing a body which will usurp functions which are specifically and exclusively preserved for the Judicial Service Commission (and the Magistrates Commission).

145. This amounts to the species of irrationality known as unlawful referral or passing the buck in that it is illegal or irrational for the President to refer the investigation of conduct of members of the judiciary to an organ of state (the Madlanga Commission) which is different from the organ(s) which hold the exclusive power to conduct such investigations for reasons related to the independence of the judiciary.

146. In so doing the President has not only exceeded his powers but breached sections 165(3) and/or 165(4) of the Constitution which place obligations on him to protect the courts and ensure their independence.

147. More specifically such conduct is also in breach of the provisions of sections 178(4) and/or 178(5) of the Constitution, read with relevant provisions of the Judicial Service Act which collectively assign the task of investigating judicial conduct and/or "*any matter relating to the judiciary*" to the Judicial Service Commission.

148. In our respectful submission, it ought to be self-evident that the President may not decree the performance of an illegality by means of a patently unlawful referral. Conversely, he may not confer on the Madlanga Commission powers which violate the Constitution. Such conduct is plainly inconsistent with the Constitution and must be so declared.

149. It is no answer to this attack to state, as the President does, that the Commission is intended to cover a wider field than the JSC. The illegality lies in the admitted overlap and is also premised on the interpretation of "*any matter*".

150. To put it more simplistically since the President himself may not usurp the powers and functions exclusively conferred on the JSC for all the well-known public policy reasons, he can equally not delegate such powers to the Madlanga Commission, which is, for the purposes of this argument and with all due respect, nothing but a "*Presidential Advisory Panel*".

151. This Court may take judicial notice of the widely articulated frustrations of Justice Zondo at the President's failure to implement his recommendations and to appoint Ministers found wanting by the Zondo Commission.[47] This is answerable for this week's screaming headlines of "*Zondo blasts Ramaphosa*".

152. For all of the above reasons the decision of the President in establishing this particular Commission of Inquiry is inconsistent with the Constitution and is in breach of his obligations mainly located in section 84(2)(f) of the Constitution.

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[47] Sunday Times 27 July 2025.

153. The *ex post facto* reasons offered by the President that Lieutenant General Mkhwanazi's allegations exclude Constitutional Court Judges are baseless and in any event constitute *ex post facto* rationalisation.

G: APPROPRIATE REMEDY

154. It is trite that section 172 of the Constitution provide respectively for the requisite declaratory relief and the consequential just and equitable remedies. The former is compulsory and the latter is the subject of a very wide discretion.

155. All three decisions of the President ought therefore to be simultaneously declared invalid and set aside with the matter referred back to the President to make constitutionally compliant decisions within 15 days of the order of the court, where appropriate.

156. To the extent that it is motivated by bias and since all the Trencon requirements have been exceedingly met, it is open to this Honourable Court to grant an order of substitution in respect of the "*triggering*" decision to place Minister Mchunu on "*special leave*". That order would cynically amount to the retention of Minister Mchunu which may allow the President to start from scratch.

157. We pause to mention that if, when arguing that remittal is the proper remedy, an organ of state is able to raise the fact that it has this discretion without more, a court would virtually never have the power to grant a remedy of substitution thereby constraining the power of the courts to grant just and equitable remedies. It is a fundamental principle of the rule of law that organs of state can only exercise power that has been conferred onto them. They cannot, on their own volition, confer power unto themselves that was never there.

158. In fashioning the appropriate, just and/or equitable remedies this Court will also be called upon to consider the body of law relied on to justify its exclusive jurisdiction.

159. Finally in this regard and in the likely event that judgment will be reserved and/or only handed down after the 1 August starting date for Prof Cachalia and/or the imminent commencement of the Commission, this Court will be requested in the exercise of its wide discretion to grant interim relief aimed at preserving the status quo and/or suspending the operation of the decisions contained int eh impugned announcement.

H: CONCLUSION AND COSTS

160. The applicants persist with the order as claimed in its notice of motion with costs on the punitive scale for the reasons articulated above and in the pleadings.

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27 July 2025

LIST OF AUTHORITIES

South African cases

1. Albutt v Centre for the Study of Violence and Reconciliation 2010(3) SA 293 (CC)

2. Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others 2021(3) SA 246 (CC)

3. Assign Services (Pty) Ltd v National Union of Metal Workers of South Africa and Others [2018] ZACC; 2018(5) SA 323 (CC)

4. Black Sash Trust v Minister of Social Development and Others (Freedom under Law Intervening) 2017(3) SA 335 (CC)

5. Democratic Alliance v President of the Republic of South Africa 2017(4) SA 253 (GP)

6. Democratic Alliance v President of the Republic of South Africa and Another [2017] ZAWCHC 34

7. Democratic Alliance v President of South Africa and Others [2012] ZACC

8. Doctors for Life International v Speaker of the National Assembly and Others 2006(6) SA 416 (CC)

9. Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC).

10. Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018(2) 571 (CC)

11. Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999(1) SA 374 (CC)

12. Glenister v President of the Republic of South Africa and Others [2011] ZACC

13. Howick District Landowners Association v Umngeni Municipality 2007(1) SA 206

14. Islamic Unity Convention v Minister of Telecommunications and Others ([2007] ZACC 26; 2008(3) SA 383 (CC); 2008(4) BCLR 384 (CC)

15. Law Society of South Africa and Others v Minister of Transport and Another 2019(3) SA 30 (CC)

16. Masetlha v President of the Republic of South Africa and Another 2008(1) SA 566 (CC)

17. Minister of Education v Harris 2001(4) SA 1297 (CC)

18. Minister of Defence and Military Veterans v Motau 2014(5) SA 69 (CC)

19. Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others (CCT 2023 (11) BCLR 1342 (CC)

20. Pharmaceutical Manufacturers Association of South Africa and Another: In re *Ex Parte* President of the Republic of South Africa and Others 2000(2) SA 674 (CC)

21. President of the Republic of South Africa v Democratic Alliance and Others 2020(1) SA 428 (CC)

22. President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999(2) SA 14 (CC)

23. Ramakatsa and Others v Magashule and Others 2013(2) BCLR 202 (CC)

24. South African Association of personal Injury Lawyers v Heath 2001(1) SA 883 (CC)

25. Transvaal Agricultural Union v Minister of Land Affairs and Another 1997(2) SA

26. United Democratic Movement v Speaker of the National Assembly and Others 2017(5) SA 300 (CC)

27. Von Abo v President of the Republic of South Africa 2009(5) SA 345 (CC)

28. Zondi v MEC for Traditional and Local Government Affairs 2005(3) SA 589 (CC)

Foreign cases

1. R (on the application of FDA) v Prime Minister [2021] EWHC 3279 (admin) Queen's Bench Divisional Court.

2. Seila Law LLC, Petitioner v. Consumer Financial Protection Bureau 591 US (2020).