CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 76/17

In the matter between:

ECONOMIC FREEDOM FIGHTERS	First Applicant
UNITED DEMOCRATIC MOVEMENT	Second Applicant
CONGRESS OF THE PEOPLE	Third Applicant
DEMOCRATIC ALLIANCE	Intervening Party

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent

and

CORRUPTION WATCH (RF) NPC Curiae	Amicus

Neutral citation: *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47

Coram: Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J, Zondi AJ

Judgments: Zondo DCJ (dissenting): [1] to [128]
Jafta J (majority): [129] to [222]

Mogoeng CJ (dissenting): [223] to [278]
Froneman J (concurring): [279] to [286]

Heard on: 5 September 2017

Decided on: 29 December 2017

Summary: ad hoc Committee — mechanisms and processes — Public Protector's remedial action — section 89 process

exclusive jurisdiction — rules of the National Assembly — removal of a President — accountability of a President

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ORDER

In the result the following order is made:

1. This Court has exclusive jurisdiction to hear the application.
2. The 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.
3. The National Assembly must comply with section 237 of the Constitution and make rules referred to in paragraph 2 without delay.
4. 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.
5. The National Assembly must comply with section 237 of the Constitution and fulfil the obligation referred to in paragraph 4, without delay.
6. The National Assembly must pay costs of the application, including the costs of two counsel where applicable.

JUDGMENT

ZONDO DCJ (Mogoeng CJ, Madlanga J, Zondi AJ concurring):

Introduction

[1] In this matter this Court is, once again, called upon to consider and pronounce upon complaints by some of the political parties represented in the National Assembly that the National Assembly has failed to fulfil some of its constitutional obligations. This case is about Parliamentary mechanisms for holding the President of the Republic accountable and the constitutional obligation of the National Assembly to hold him to account. It is not about holding any President of the Republic accountable as such but about the National Assembly holding the current President of the Republic, President Jacob Zuma, accountable for his failure to implement the Public Protector's remedial action contained in the Public Protector's report dated 19 March 2014.

[2] The first applicant is the Economic Freedom Fighters (EFF). The second applicant is the United Democratic Movement (UDM). The third applicant is the Congress of the People (COPE). All these applicants are registered political parties who are represented in the National Assembly. They are all opposition parties. Closer to the date of hearing the Democratic Alliance (DA) brought an application for leave to be joined as an intervening party in the proceedings. The DA made common cause with the EFF, UDM and COPE and said that it sought the same relief as these applicants.[1] Corruption Watch, an organisation that is dedicated to fighting corruption, was admitted as amicus curiae (friend of the court). It made both written and oral submissions in this matter. We are grateful for its assistance.

[1] The DA is the largest opposition party in Parliament and its leader is the Leader of the Opposition. See section 57(2)(d) of the Constitution.

[3] The applicants' complaints are against the National Assembly. They have cited the Speaker of the National Assembly in her representative capacity as a representative of the National Assembly as the first respondent and President JG Zuma as the second respondent. All the orders that the applicants seek are sought against the Speaker in her representative capacity. No order is sought against the President. He is only cited as an interested party. Indeed, the President has not taken part in these proceedings. Before considering the applicants' case, it is necessary to set out the background to this application.

Background

[4] The upgrades effected to the private residence of President Jacob Zuma, about which much is already public knowledge by now, constitute the background to this matter. That background includes the fact that on 19 March 2014 the Public Protector released a report on her investigation into the upgrades to the President's private residence. That report ended with the Public Protector's remedial action against the President. Part of the remedial action against the President was that the President had to "pay a reasonable percentage of the cost of the non-security measures effected in his private residence as determined with the assistance of the National Treasury and reprimand the Ministers responsible for the 'appalling' manner in which the Nkandla project was handled and funds were abused." For a long time after the Public Protector had taken remedial action against the President, the President did not implement the Public Protector's remedial action. It is not necessary in this judgment to give details of what happened after the Public Protector had released her report because that is covered sufficiently in the judgment of this Court in *EFF 1*.[2] The applicants' case focuses on the period after the delivery of that judgment. The relevant background to this matter falls under that period.

[2] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF 1*).

[5] On 31 March 2016 this Court handed down its judgment in *EFF 1*. Some of its conclusions about the President were that—

(a) the President neither paid for the non-security features of the upgrades nor reprimanded the relevant Ministers; and
(b) in neither paying for the non-security installations nor reprimanding the affected Ministers, the President second-guessed the Public Protector's remedial action in a manner that is not sanctioned by the rule of law; and
(c) the President failed to uphold, defend and respect the Constitution as the supreme law of the land. The Court said that "this failure was manifest from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers"; and
(d) the President's failure to comply with the Public Protector's remedial action was inconsistent with the Constitution and invalid.[3]

[6] On 1 April 2016, the day after this Court had handed down its judgment, the President addressed the nation on the judgment. He welcomed the judgment unreservedly. He then said that he respected the role of Parliament to hold the Executive to account "as true representatives of our people". He also said that he respected the judgment and would abide by it. He pointed out that he had "consistently stated that [he] would pay an amount towards the Nkandla non-security upgrades once this had been determined by the correct authority". He asserted that he had "never knowingly or deliberately set out to violate the Constitution, which is the supreme law of the Republic".[4]

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[3] Id at paras 82-3.

[4] Media Statement by President Jacob Zuma in response to the Constitutional Court judgment on the Nkandla security upgrades, Union Buildings, published on *The Presidency* http://www.thepresidency.gov.za/speeches/media-statement-president-jacob-zuma-response-constitutional-court-judgement-nkandla.

[7] The President stated that he "did not act dishonestly or with any personal knowledge of the irregularities by the Department of Public Works with regards to the Nkandla project". He said that his intention "was not in pursuit of corrupt ends or to use state resources to unduly benefit [himself] and [his] family". He also asserted that there was no deliberate effort or intention to subvert the Constitution on his part. He urged all parties to respect the judgment and abide by it.

[8] On 5 April 2016 the Leader of the Opposition[5] moved in the National Assembly a motion for the removal from office of the President in terms of section 89 of the Constitution. The basis advanced by the DA in support of its motion was that the President had committed a serious violation of the Constitution in failing to implement the Public Protector's remedial action. The commission of a serious violation of the Constitution or the law is one of the grounds listed in section 89 of the Constitution for the removal of a President.

[9] Paragraph 2(2) of that motion required "that the National Assembly acknowledges that President Zuma thus seriously violated the Constitution when he undermined the Public Protector's findings when he failed to implement the Public Protector's remedial action." This subparagraph of that notice of motion required the National Assembly to conclude that the President had seriously violated the Constitution in failing to implement the Public Protector's remedial action. After this conclusion in paragraph 2(2), paragraph 2(4) required that the National Assembly "condemns the actions of the President and resolves to remove [him] from office in terms of section 89(1) (a) of the Constitution". This meant that the motion required the National Assembly to first conclude that the President had seriously violated the Constitution, then condemn his actions and, thereafter, resolve to remove him from office. The EFF, UDM, and COPE supported that motion and actively participated in

[5] Section 57(2)(d) of the Constitution provides that the rules and orders of the National Assembly must provide for "the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition".

the debate in the National Assembly. That motion was deliberated and voted upon but it was defeated.

[10] The DA's motion did not include a resolution that the National Assembly establish an ad hoc Committee to conduct an investigation or inquiry in terms of section 89 to establish whether the President had committed a serious violation of the Constitution. In 2014 the Leader of the Opposition – who was the leader of the DA in the National Assembly – successfully moved a motion in the National Assembly for the establishment of an ad hoc Committee to determine whether the President had committed a serious violation of the Constitution as contemplated in section 89 of the Constitution in regard to his role in the Nkandla project. That ad hoc Committee was established but had not completed its task when Parliament was dissolved ahead of the 2014 general election. In 2015 the current Leader of the Opposition moved a motion in the National Assembly for the establishment of an ad hoc Committee to determine whether the President had committed a serious violation of the Constitution as contemplated in section 89 thereof in regard to the departure of President Omar Al-Bashir from South Africa despite the fact that a court had issued an order that he should not be allowed to leave the country.

[11] In the months that followed the motion for the removal of the President on 5 April 2016, there were Question and Answer sessions in the National Assembly in which the President was asked questions concerning his failure to implement the Public Protector's remedial action and he answered those questions.

[12] On 10 November 2016 the Leader of the Opposition moved a motion of no confidence in the President in terms of section 102 of the Constitution read with the relevant rules of the National Assembly.[6] That motion related to the President's failure

[6] Rule 129 provides:

> "Motions of no confidence in terms of Section 102 of Constitution
>
> (1) A member may propose that a motion of no confidence in the Cabinet or the President in terms of Section 102 of the Constitution be placed on the Order Paper.

to implement the Public Protector's remedial action. The motion was deliberated and voted upon but was defeated because it was not supported by the majority of the members of the National Assembly. The EFF, UDM and COPE supported that motion and actively participated in the debate.

[13] The Acting Speaker of the National Assembly, Mr Lechesa Tsenoli, has in his supplementary affidavit drawn attention to the fact that on 8 August 2017 another motion of no confidence in the President was moved, deliberated and voted upon in the National Assembly. That vote was conducted by secret ballot. The Acting Speaker said that this was after the Speaker had ruled that the vote had to be conducted by secret ballot following upon this Court's judgment in *UDM*.[7] That motion also related to, among others, the President's failure to implement the Public Protector's remedial action. The Acting Speaker said that that motion of no confidence was also defeated.

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(2) The Speaker must accord such motion of no confidence due priority and before scheduling it must consult with the Leader of Government Business and the Chief Whip.

(3) The motion must comply, to the satisfaction of the Speaker, with the prescripts of any relevant law or any relevant rules and orders of the House and directives and guidelines approved by the Rules Committee, before being placed on the Order Paper, and must include the grounds on which the proposed vote of no confidence is based.

(4) The Speaker may request an amendment of, or in any other manner deal, with a notice of a motion of no confidence which contravenes the law, rules and orders of the House or directives and guidelines approved by the Rules Committee.

(5) After proper consultation and once the Speaker is satisfied that the motion of no confidence complies with the aforementioned prescribed law, rules and orders of the House and directives or guidelines of the Rules Committee, the Speaker must ensure that the motion of no confidence is scheduled, debated and voted on within a reasonable period of time given the programme of the Assembly.

(6) The debate on a motion of no confidence may not exceed the time allocated for it by the Speaker, after aforesaid consultation process.

(7) If a motion of no confidence cannot reasonably be scheduled by the last sitting day of an annual session, it must be scheduled for consideration as soon as possible in the next annual session.

(8) Rules 120, 123 and 127 do not apply to motions of no confidence in terms of this rule."

[7] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) (*UDM*).

Exclusive jurisdiction

[14] The applicants brought this application on the basis that this Court has exclusive jurisdiction in terms of section 167(4)(e) of the Constitution.[8] For this Court to have exclusive jurisdiction, a matter must be one in which Parliament or the President is said to have "failed to fulfil a constitutional obligation". In a number of cases this Court has dealt with the question of when this Court can be said to have exclusive jurisdiction. These include *EFF 1*. The applicants' case is that the National Assembly has a constitutional obligation to hold the President accountable for his failure to implement the Public Protector's report of 19 March 2014 and it has failed to fulfil this obligation. The applicants also initially said that the National Assembly has a constitutional obligation to put in place mechanisms and processes for holding the President accountable in regard to his failure to implement the Public Protector's report but it has also failed to fulfil this obligation. The applicants later changed their case in regard to this aspect as will be shown later. It is the alleged failure by the National Assembly to fulfil these constitutional obligations that the applicants contend gives this Court exclusive jurisdiction.

[15] In *EFF 1* this Court discussed its exclusive jurisdiction in regard to alleged failures by both the President and the National Assembly to fulfil their respective constitutional obligations. The constitutional obligation that the National Assembly was said to have failed to fulfil was the obligation to hold the President accountable. In this case that is one of the obligations upon which the applicants rely.

[16] In *EFF 1* this Court said that one of the indications that a constitutional obligation that the President or the National Assembly failed to fulfil is one

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[8] Section 167 provides:

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

contemplated in section 167(4)(e) of the Constitution is that the obligation must be specifically-imposed on the President or the National Assembly, as the case may be.[9] The obligation on the National Assembly to hold the President accountable is a specifically-imposed obligation.[10] As was also said by this Court in *EFF 1*, it is a primary and undefined obligation imposed on the National Assembly.[11] This Court pointed out in *EFF 1* that, to determine whether the National Assembly has fulfilled or breached its obligations, will entail a resolution of very crucial political issues. Indeed, said this Court in that case, it is an exercise that may trench on sensitive areas of the separation of powers. As this Court said in *EFF 1*, this exercise—

> "could at times border on second-guessing the National Assembly's constitutional power or discretion. This is a powerful indication that this Court is entitled to exercise its exclusive jurisdiction in this matter. But that is not all."[12]

[17] The obligation on the National Assembly to hold the President accountable after the Public Protector's Report was held in *EFF 1* to be exclusive to the National Assembly. It was not shared.[13] That applies to this case as well. The constitutional obligation involved in this case is the same constitutional obligation that was involved in *EFF 1* on the part of the National Assembly. In the light of this and what this Court said in *EFF 1* in regard to the constitutional obligation that the National Assembly had allegedly failed to fulfil in that case, this Court has exclusive jurisdiction in the present case as well. In the light of this conclusion, the issue of direct access falls away.

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[9] *EFF 1* above n 2 at para 43.

[10] Id.

[11] Id.

[12] Id.

[13] Id at para 44.

Merits

[18] To understand what the applicants' case is, it is convenient to start with the relief the applicants seek in their notice of motion. Apart from orders declaring that this Court has exclusive jurisdiction, an order that the first respondent report to this Court on certain steps taken by her and for costs, the applicants asked for the following material orders:

> "2. Declaring that the first respondent has failed to put all appropriate mechanisms and processes in place to hold the second respondent ('the President') accountable for violating the Constitution in failing to implement the report of the Public Protector dated 19 March 2014.
>
> 3. Declaring that the first respondent has failed in her duty to apply her mind and/or to scrutinise the violation of the Constitution by the President in the course of his failure to implement the report of the Public Protector dated 19 March 2014.
>
> 4. Declaring that the first respondent's failures, set out in paragraphs 2 and 3 above, infringe sections 42(3), 48 and/or 55(2) read with sections 1(c) and 1(d) of the Constitution.
>
> 5. Directing the first respondent to put the requisite processes and mechanisms in place to hold the President accountable for his conduct (and failures) arising from, and incidental to, the report of the Public Protector dated 19 March 2014, including processes and mechanisms to enquire into and determine whether and to what extent the President's violations of the Constitution and/or other conduct satisfied the requirements of section 89(1) of the Constitution.
>
> 6. Directing the first respondent to convene a committee of Parliament and/or any other appropriate independent mechanism, to conduct an investigation into the conduct of the President and, in particular, whether, by any act and/or omission, the President has made himself guilty of an offence or inability which would warrant the exercise of the powers of Parliament, in terms of section 89(1) of the Constitution."

[19] Although in form the applicants ask for certain orders to be made against the Speaker, in effect they are asking for those orders to be made against the

National Assembly. This emerges from the basis upon which the applicants cited the Speaker in these proceedings.

[20] The applicants' case is based on their founding affidavit deposed to by the leader of the EFF, Mr Julius Sello Malema. The Presidents of the UDM and COPE, Mr Bantu Holomisa and Mr Patrick Mosiuoa Lekota, respectively, have signed confirmatory affidavits in which, on behalf of their political parties, they make common cause with the EFF and confirm Mr Malema's affidavit. In that affidavit the deponent explained the basis upon which the applicants cited the Speaker. He said:

> "The first respondent is the Speaker of the National Assembly, who is cited as nominal respondent on behalf of the National Assembly in terms of section 23 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, read with section 2 of the State Liability Act 20 of 1957."

[21] What logically flows from the basis upon which the Speaker is cited is that each one of the orders that the applicants ask this Court to make against her can only be made if this Court concludes that there is an obligation attached to the National Assembly which it has failed to fulfil. In other words, to get the orders that the applicants seek against the Speaker, it will not help them to point to an obligation which attaches to the Speaker but does not attach to the National Assembly.

[22] To point to an obligation attaching to the Speaker but not to the National Assembly would only have helped the applicants if they had cited her simply as the Speaker in respect of obligations that attach to the Speaker as such. An example of this latter scenario is *De Lille v Speaker of the National Assembly*[14] and *Speaker of National Assembly v De Lille MP*.[15] Therefore, the foundation for any orders that we may make in this matter has to be obligations we conclude the National Assembly has which we say it has failed to fulfil. This is, of course, in line with the fact that the

[14] *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) at para 1.

[15] *Speaker of National Assembly v De Lille MP* [1999] ZASCA 50; [1999] 4 All SA 241 (A).

sections of the Constitution upon which the applicants' case is based are sections that relate to obligations of the National Assembly and not obligations of the Speaker. These are sections 42(3), 55, 89, 102 and others.

[23] It is appropriate to go back to the orders that the applicants ask this Court to make in effect against the National Assembly. If one analyses those orders, one will see that the applicants' ultimate objective is for this Court to make the orders embodied in prayers 2, 3, 4, 5 and 6 of the notice of motion.

[24] Prayer 2 in the notice of motion is for a declaratory order that, in effect, the National Assembly "has failed to put all appropriate mechanisms and processes in place to hold [President Jacob Zuma] accountable for violating the Constitution [by] failing to implement the report of the Public Protector dated 19 March 2014". This Court can only make this order if it concludes that the National Assembly failed to put in place mechanisms and processes for holding the President accountable for failing to implement the Public Protector's report and the National Assembly acted in breach of its obligations in so failing. If this Court is unable to reach this conclusion, it cannot grant prayer 2.

[25] Prayer 3 is for a declaratory order that in effect the National Assembly has failed to "scrutinise the violation of the Constitution by the President" in failing "to implement the report of the Public Protector dated 19 March 2014". For the Court to grant this prayer, it would have to first conclude that the National Assembly failed to scrutinise the violation of the Constitution by the President. A conclusion that the National Assembly has failed to scrutinise a violation of the Constitution by the President would mean that it has failed to hold the President accountable for his violation of the Constitution. The President's violation of the Constitution was his failure to implement the Public Protector's report. If this Court cannot reach this conclusion, prayer 3 cannot be granted.

[26] Prayer 4 is for a declaratory order that the National Assembly's alleged failures referred to in prayers 2 and 3 constitute an infringement of sections 42(3) and/or 55(2)[16] read with section 1(c) and (d) of the Constitution. Nothing more needs to be said about prayer 4. Prayer 5 is for an order, in effect that the National Assembly "put the requisite processes and mechanisms in place *to hold the President accountable for his conduct (and failures) arising from, and incidental to, the report of the Public Protector dated 19 March 2014*, including processes and mechanisms to enquire into and determine whether and to what extent the President's violations of the Constitution and/or other conduct satisfied the requirements of section 89(1) of the Constitution". Prayer 5 is linked to, and dependent upon, prayer 2. If prayer 2 is not granted, prayer 5 can also not be granted. This is so because prayer 5 can only be granted if, to say the least, the failure on the part of the National Assembly referred to in prayer 2 has been established.

[27] Prayer 6 seeks an order that the National Assembly "convene a committee of Parliament and/or any other appropriate independent mechanism, to conduct an investigation into the conduct of the President and, in particular, whether, by any act or omission, the President had made himself guilty of an offence or inability which would warrant the exercise of the powers of Parliament, in terms of section 89(1) of the Constitution". So, both prayers 5 and 6 are connected with, or, based on, section 89 of the Constitution. Prayer 6 can also not be granted if the Court were to find that there has been no failure on the part of the National Assembly to put in place mechanisms and processes which the applicants could have used to have a Committee established by the National Assembly to conduct an investigation or inquiry relating to a section 89 procedure. So, prayer 6 can also not be granted if prayer 2 is not granted.

[28] In the light of the above, the fundamental questions which this matter raises are—

(a) whether the National Assembly has failed to put all appropriate mechanisms and processes in place to hold the President accountable for

[16] Section 55(2) is quoted below at [29] and section 42(3) at footnote 34 below.

violating the Constitution by failing to implement the report of the Public Protector dated 19 March 2014;

(b) whether the National Assembly has failed in its duty to scrutinise the violations of the Constitution by the President in the course of his failure to implement the report of the Public Protector;

(c) whether, if this Court determines the issue in paragraph (a) in the applicants' favour, this Court should make the order in prayer 5; and

(d) whether, if this Court determines the issue in paragraph (b) in the applicants' favour, this Court should make the order in prayer 6.

Did the National Assembly fail to put in place mechanisms and processes to hold the President accountable for failing to implement the Public Protector's report?

[29] The applicants originally contended that the National Assembly had a constitutional obligation to put in place mechanisms and processes to hold the Executive, including the President, to account but had failed to do so. However, later on the applicants abandoned this part of their case. Although the applicants abandoned this part of their case, I deal with it because the DA continues to maintain that the National Assembly failed to put in place mechanisms and processes to hold the President accountable for failing to implement the Public Protector's remedial action. In his judgment (second judgment), which I have had the opportunity of reading, Jafta J also deals with this aspect. That the National Assembly has the obligation to which the applicants refer is beyond dispute. The obligation arises from section 55(2) of the Constitution. That provision reads:

> "The National Assembly must 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
> (ii) any organ of state."

[30] Section 57(1)(a) and (b) and (2)(a) and (b) of the Constitution provides in relevant parts:

> "(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 Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy".

[31] It needs to be emphasised that the question is specific, not general. The question relates specifically to whether the National Assembly did put in place mechanisms to hold President Jacob Zuma accountable for failing to implement the Public Protector's remedial action. The issue under discussion is about prayer 2 in the notice of motion but the conclusion in this regard may affect prayers 5 and 6 of the notice of motion.

[32] In paragraph 66 of the applicants' founding affidavit the deponent says:

> "[T]he EFF does not ask this Court to direct the National Assembly to put in place particular accountability mechanisms and/or how to go about putting them in place. But this Court is entitled – and, with respect, constitutionally obliged – to ask whether the National Assembly has put in place any accountability mechanisms at all. The answer is 'no'. Only thereafter may the Court, after hearing all sides, propose appropriate relief, if any".

[33] The deponent to the applicants' founding affidavit emphasised this part of the applicants' case when he said:

> "There has been no action by the Speaker and the National Assembly to hold the President accountable. *No accountability mechanisms have been put in place*."[17]

He went on to say:

> "Section 55(2) requires the National Assembly to provide mechanisms for accountability and oversight. Despite having a host of potential mechanisms available, *the Speaker and the National Assembly have failed to provide any*."[18]

[34] From this there can be no doubt that, initially, part of the applicants' case was that the National Assembly had failed to put in place accountability mechanisms to hold the President accountable for failing to implement the Public Protector's remedial action. The Speaker's understanding was also that the applicants' case included this allegation. That is why she said *in paragraph 4* of her answering affidavit:

> "In essence, the Applicant claims that I, and by extension, the National Assembly ("the NA") have failed to put into place mechanisms to hold the President accountable for not complying with the Public Protector's remedial action".

In her answering affidavit the Speaker dealt head on with the allegation that the National Assembly had failed to put in place accountability mechanisms and processes to hold the President accountable for failing to implement the Public Protector's remedial action. The Speaker said:

> "I shall demonstrate in what follows that the allegations of the Applicant are devoid of the truth and that the whole case brought by the Applicant has no merit. I shall also point out that the Applicant has rushed to court without first exhausting its internal remedies. I shall also draw attention to the fact that the mechanisms that the Applicant asks this Court to order are available to the Applicant . . . and have been employed by

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[17] Applicants' founding affidavit at para 68.

[18] Id at para 75.

> the NA and members of the NA to hold the executive, including the President, accountable to the NA."[19]

[35] From the answering affidavit of the Speaker and the supplementary affidavit of the Acting Speaker what emerges is that the rules of the National Assembly make provision for—

(a) Question and Answer sessions in the National Assembly where members of the Executive including the President are asked questions which they have to answer.

(b) any member of the National Assembly to move a motion of no confidence in the Cabinet excluding the President or in the President and for members of the National Assembly to deliberate and vote upon in terms of section 102 of the Constitution.

(c) the establishment of an ad hoc Committee which could be used for a section 89 procedure even though it is not tailor-made for a section 89 procedure.

[36] In *UDM* this Court mentioned a number of accountability and oversight mechanisms which are available for use by the National Assembly to hold the Executive, including the President, accountable.[20] It said that we could take judicial notice of them. Some of those it mentioned were Question and Answer sessions where members of the National Assembly ask members of the Executive, including the President, questions which they have to answer, motions of no confidence under section 102 of the Constitution and motions for the removal of the President in terms of section 89 of the Constitution.

[37] From what this Court said in *UDM* as reflected in the paragraphs quoted above, it is clear that, even if the only oversight mechanism that could have been used to hold

[19] First respondent's answering affidavit at para 7.

[20] *UDM* above n 7 at paras 40-7.

the President accountable for failing to implement the Public Protector's report was the motion of no confidence in the President that would have been enough. This is because, as Mogoeng CJ said in *UDM*, the motion of no confidence in the President is the most effective oversight and accountability mechanism.[21] In *Mazibuko*[22] this Court also made this point about the mechanism of a vote of no confidence. Through Moseneke DCJ this Court said: "[The right to initiate and move a motion of no confidence in terms of section 102(2)] is perhaps the most important mechanism that may be employed by [P]arliament to hold the [E]xecutive to account, and to interrogate executive performance."[23] The rules of the National Assembly do provide for a motion of no confidence in a President.

[38] Rule 124(1) of the Rules of the National Assembly reads:

> "Members of each party are entitled to give notices of motion when recognised by the presiding officer for that purpose."

Rule 129(1), (2) and (5) reads:

> "(1) A member may propose that a motion of no confidence in the Cabinet or the President in terms of section 102 of the Constitution be placed on the Order Paper.
>
> (2) The Speaker must accord such motion of no confidence due priority and before scheduling it must consult with the Leader of Government Business and the Chief Whip.
>
> . . .
>
> (5) After proper consultation and once the Speaker is satisfied that the motion of no confidence complies with the aforementioned prescribed law, rules and orders of the House and directives or guidelines of the Rules Committee, *the Speaker must ensure that* the motion of no confidence is scheduled, debated

[21] Id at para 43.

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

[23] Id at para 44.

and voted on within a reasonable period of time given the programme of the Assembly."

[39] Was there also a mechanism applicable to the removal from office of a President in terms of section 89 of the Constitution? Section 89 of the Constitution reads:

"(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—
(a) a serious violation of the Constitution or the law;
(b) serious misconduct; or
(c) inability to perform the functions of office.
(2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

Although the National Assembly had not put in place a mechanism that is specially tailored for section 89, it had put in place a mechanism that could be used effectively for the removal of a President in terms of section 89. That mechanism is the mechanism of an ad hoc Committee. This was the effect of the undisputed evidence of the Acting Speaker in his supplementary affidavit.

[40] Part 15 of the Rules of the National Assembly governs ad hoc Committees. Rule 253 falls under Part 15. Rule 253(1)-(5) reads:

"(1) An ad hoc committee may be established—
(a) by resolution of the Assembly; or
(b) during an adjournment of the Assembly for a period of more than 14 days, by the Speaker after consulting the Chief Whip and the most senior whip of each of the other parties.
(2) Any decision by the Speaker to appoint an ad hoc committee must be tabled in the Assembly on its first sitting day after the decision was taken, for ratification by the Assembly.

(3) An ad hoc committee may only be *established for the performance of a specific task*.

(4) The resolution of the Assembly or decision of the Speaker establishing an ad hoc committee must—

(a) *specify the task assigned to the committee*; and

(b) *set time frames* for—

(i) the completion of any steps in performing the task, and

(ii) the completion of the task.

(5) An ad hoc committee has those of *the powers* listed in Rule 167 only as are specified in the resolution or decision establishing the committee."

Rule 254(1) reads:

"*The Assembly's resolution establishing an ad hoc committee must either specify the number of members to be appointed or the names of the members who are appointed*."

[41] In relevant parts section 56 of the Constitution reads as follows in regard to some of the powers of the National Assembly or any of its committees:

"**Evidence or information before National Assembly**

The National Assembly or any of its committees may—

(a) *summon any person to appear before it to give evidence on oath or affirmation, or to produce documents*;

(b) *require any person or institution to report to it*;

(c) *compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and*

(d) receive petitions, representations or submissions from any interested persons or institutions."

[42] From section 56 it is clear that a committee of the National Assembly, which would include an ad hoc Committee, may summon anybody to appear before it and, more importantly, may allow any interested person to make representations or submissions to such a committee. This means that a President who is sought to be removed from office by way of the section 89 procedure could be allowed to be heard.

However, he or she could be heard not only if a committee was established but also by the National Assembly if no committee was established. It seems logical, in the light of section 56(d), that a President facing a section 89 procedure may be allowed legal representation by such a committee or the National Assembly, as the case may be, in its discretion.

[43] From the above it is clear that the National Assembly did put in place mechanisms and processes that could have been used to get the National Assembly to hold the President accountable for his failure to implement the Public Protector's report or remedial action.

[44] After the hearing in this Court, the applicants delivered a supplementary affidavit to respond to the Acting Speaker's supplementary affidavit to which they had not had an opportunity to respond before the hearing because it was served on them a day before the hearing. The applicants' supplementary affidavit was also deposed to by Mr Malema. In the supplementary affidavit, the applicants' case on this issue changed. In the applicants' supplementary affidavit the deponent said:

> "6.1. *It is not the Applicants' case that there are not mechanisms to hold the President to account available in the rules. The rules are flexible enough to create a mechanism to hold the President accountable, including establishing an ad hoc committee for that purpose.*
>
> 6.2. *However, the Applicants agree with the DA's position that a regime specifically tailored for section 89 proceedings is required by the Constitution in order to fully fulfil the NA's duties under sections 42 and 55.*"

[45] I take it that the first part of paragraph 6.1 does not mean that it was never the applicants' case that the National Assembly had failed to put in place mechanisms and processes to hold the President accountable for failing to implement the Public Protector's remedial action because, as shown above, that was initially part of their case. What it must mean is that, as at the time of the preparation of the applicants' supplementary affidavit, it was no longer the applicants' case. Understood in this way,

Mr Malema's concession that the National Assembly does have mechanisms to hold the President to account and that its rules are "flexible enough to create a mechanism to hold the President accountable, including establishing an ad hoc committee for that purpose" is well made and is fully justified.

[46] The second judgment concludes that the National Assembly has failed to put in place a mechanism for the section 89 procedure. The second judgment reaches this conclusion despite the fact that, as I have just demonstrated in the preceding paragraph, the applicants' latest position now is that they accept that the National Assembly has put in place mechanisms and processes which are flexible enough to hold the President accountable. The second judgment's conclusion that the National Assembly has not put in place a mechanism for section 89 relates to a permanent mechanism. This case was not about a permanent mechanism but it was about mechanisms and processes to hold the current President accountable for failing to implement the Public Protector's remedial action. The evidence of both the Acting Speaker and the applicants is clear: it is that, the National Assembly has put in place mechanisms and processes which can be used for the section 89 procedure.

[47] The second judgment is only able to reach this conclusion because it rejects as ineffective the Rules of the National Assembly which provide for the establishment of an ad hoc Committee which the Acting Speaker has said may be used effectively for any investigation or inquiry that may be required for section 89. The second judgment's rejection of an ad hoc Committee as a mechanism that may be effectively used for section 89 flies in the face of what is common cause between the Acting Speaker, the EFF, UDM and COPE. This can be seen from the relevant parts of those parties' affidavits.

[48] In the applicants' founding affidavit, the deponent said in part:

> "The EFF submits that an ad hoc committee should be constituted to investigate the President's conduct in the light of the judgment of the Constitutional Court."[24]

This makes it clear that an ad hoc Committee was acceptable to the applicants. In his supplementary affidavit, the Acting Speaker said:

> "The NA Rules and procedures allow for a flexible approach and are adequate to enable oversight in terms of section 89(1) of the Constitution."[25]

[49] In the applicants' supplementary affidavit, the deponent said about the availability of mechanisms:

> "6.1. It is not the Applicants' case that there are not mechanisms to hold the President to account available in the rules. The rules are flexible enough to create a mechanism to hold the President accountable, including establishing an *ad hoc* committee for that purpose."

[50] The deponent to the applicants' supplementary affidavit deposed to that affidavit on behalf of the EFF, UDM and COPE. The EFF, UDM, COPE and the Acting Speaker (on behalf of the National Assembly) are agreed that the National Assembly did put in place adequate mechanisms and processes that were flexible to be used effectively for the section 89 procedure.

[51] The DA said that an ad hoc Committee is not suitable for the section 89 procedure. That was contrary to the version put up by EFF, UDM, COPE and the Acting Speaker who all said that the National Assembly had put in place effective and flexible mechanisms that could be used for the section 89 procedure. This means that there was a dispute of fact between not only the DA's version and the Acting Speaker's version but also between the DA's version and the version of the other applicants, namely, EFF, UDM and COPE. The question that arises is: in such a case, on which version should

[24] Applicants' founding affidavit at para 76.

[25] First respondent's supplementary affidavit at para 120.

this Court rely in making its decision? The DA is an applicant in these proceedings. The Speaker is a respondent. It seems to me that, in line with *Plascon-Evans*,[26] it is the Acting Speaker's version that must prevail. The DA never asked this Court to refer any issue to oral evidence. This Court would not hear oral evidence itself but, if it was asked to, it could have done what it recently did in *SASSA*,[27] namely, refer the disputed factual issue to a referee for the hearing of oral evidence. In any event, the Speaker's version is fully supported by the EFF, UDM and COPE. The second judgment fails to explain why it prefers the evidence of the DA when that evidence is in conflict with the evidence of all the other parties in these proceedings including the evidence of the applicants.

[52] If one then accepts that the decision must be based on the Acting Speaker's and EFF's, UDM's and COPE's version that an ad hoc Committee is acceptable as an effective mechanism for the section 89 procedure, it follows that it simply cannot be said that the National Assembly failed to put in place mechanisms and processes to hold the President accountable. Accordingly, from this it is clear that the conclusion that the National Assembly failed to put in place mechanisms to hold the President to account is untenable, unjustifiable and inexplicable.

[53] In their supplementary affidavit, the applicants say that, had they understood that they could initiate the establishment of an ad hoc Committee, they would have followed that procedure. The deponent to the applicants' supplementary affidavit says:

> "If the EFF had understood the rules that way, it would have followed that procedure. It did not. If the Speaker understood the rules that way, surely she would have advised the EFF to follow that procedure. She did not."

A little later, he also said:

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[26] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623; [1984] 2 All SA 366 (A) (*Plascon-Evans*) at 634G-I.

[27] Order of the Constitutional Court dated 2 August 2017 in the matter of *Black Sash Trust v Minister of Social Development* [2017] ZACC 20.

> "I note the Speaker's position that the EFF could have brought a substantive motion to establish an ad hoc Committee. I do not understand why the Speaker did not provide that advice in response to the EFF's numerous requests for a fact-finding inquiry to investigate President Zuma's conduct."[28]

[54] Mr Malema's complaint that he did not understand why the Speaker did not provide the advice concerning the availability of the route of an ad hoc Committee to the EFF when the EFF wrote to her is not without merit. However, it would appear that the Speaker may also not have been aware that an ad hoc Committee was a mechanism that could be used for the section 89 procedure. Of course, one cannot pretend as if the correspondence that was exchanged between the parties does not reveal some underlying tension between them. Lastly, on this, the fact that the availability of the route of an ad hoc Committee was only raised a day or two before the hearing in this Court does not mean that it is not a defence. The fact that it was raised late could affect the issue of costs in an appropriate case. It would not change the fact that it is a defence.

[55] Although all members of the National Assembly are expected to know the rules of the National Assembly, there is an expectation that the Speaker would know the rules of the National Assembly better than everyone else. In this case the Speaker can be criticised for not having shown that greater knowledge of the rules of the National Assembly. In her answering affidavit she said that rule 85 was the rule that could be used for the section 89 procedure. That was not correct. She also did not point out that an ad hoc Committee – for which the rules of the National Assembly make provision – could be used to conduct any investigation or inquiry that could be needed for a section 89 procedure. It fell upon the Acting Speaker to point this important provision out in his supplementary affidavit. It may well be that, if this had been pointed out much earlier, the matter may have been resolved. Of course, it might as well not have been resolved because on the day of the hearing the parties did try to resolve the

[28] Applicant's supplementary affidavit at para 31.

matter without success after questions from the Bench had been put to counsel for all parties as to why the ad hoc Committee route had not been followed.

[56] Furthermore, in his supplementary affidavit the Acting Speaker said that in 2007 a joint ad hoc Committee of both Houses of Parliament was established to remove from office the then National Director of Public Prosecutions (NDPP). He pointed out that the two Houses of Parliament resolved on that occasion that the NDPP should not continue in office. This had followed upon an inquiry which had been appointed by the then President of the Republic to inquire into the suitability of the then NDPP to continue holding office as NDPP. This is not denied by any of the parties. The question that arises is: if an ad hoc Committee mechanism worked in the case of the removal of an NDPP, why would it not work in the case of the removal of the President? I do not think that a logical explanation can be given as to why it would not work in the case of the removal of a President.

[57] The Acting Speaker has pointed out two other occasions where the Official Opposition has previously moved motions for the establishment of ad hoc Committees in the National Assembly. As indicated earlier, in 2014 the Leader of the Opposition moved a motion in the National Assembly for the establishment of an ad hoc Committee which was accepted by the National Assembly and an hoc Committee was established. The purpose of that ad hoc Committee was to determine whether the President had committed a serious violation of the Constitution in regard to his role in the Nkandla project. That committee had not completed its task when Parliament was dissolved in 2014 ahead of the 2014 general elections.

[58] The Acting Speaker has also pointed out that, when in 2015 the Leader of the Opposition wanted the President to be subjected to a section 89 process in regard to President Al-Bashir's departure from South Africa despite the existence of an order of court that President Al-Bashir should not be allowed to leave the country, he moved a motion in the National Assembly for the establishment of an ad hoc Committee.

[59] The Acting Speaker said that the Rules Committee of the National Assembly established a sub-Committee which was mandated to consider, among others, the issue whether a special mechanism should be put in place for the section 89 procedure. He said that all the political parties including those before us were represented in that sub-Committee. The Acting Speaker's undisputed evidence was that the applicants and the DA were represented in that sub-Committee and were invited to make proposals but their representatives asked for an opportunity to go and consult their parties on what proposals, if any, they should make and they have never returned to the sub-Committee. Instead of going back to the sub-Committee and making their proposals about an appropriate section 89 mechanism, the applicants instituted the present proceedings. They should have gone back to the sub-Committee.

[60] The applicants have not denied the Acting Speaker's evidence that the reason why that sub-Committee has not completed its task is that representatives of the applicants who served on that sub-Committee have not returned to the sub-Committee to tell the sub-Committee what their political parties' respective positions are. They have also not taken this Court into their confidence and explained to us why they came to Court before they went back to the sub-Committee and put their proposals to that sub-Committee. In my view, the most sensible response by this Court to this is to insist that the applicants go back to that sub-Committee and make their proposals to it and see whether any unconstitutional obstacles are put in their way. This approach shows respect for a parliamentary process and seeks to discourage litigants from approaching this Court or any court for that matter in regard to an issue which is capable of being resolved without going to court. The second judgment does not say what is wrong with this approach.

[61] The second judgment says that the use of an ad hoc Committee for the section 89 procedure may result in the matter which is the subject of the section 89 inquiry or investigation not reaching the National Assembly. This view is incorrect. An ad hoc Committee is created by the National Assembly to perform a specific task for and on behalf of the National Assembly. Once it has completed its task, it needs to report back

to the National Assembly with its findings and recommendations. Ultimately, the National Assembly must deliberate on the report of the ad hoc Committee and accept or reject its findings, conclusions or recommendations. So, there is no chance that a matter that the National Assembly has given to an ad hoc Committee to investigate or inquire into may end up not being considered and decided by the National Assembly.

[62] The second judgment also complains that there is no definition of the word "serious" in the term "serious violation" in section 89 and says that this would create a problem because different members of the ad hoc Committee could end up having different views on whether a violation is serious. There is no merit in this criticism either. In terms of section 42(3) of our Constitution the National Assembly is a "national forum for public consideration of issues". That means it is a forum in which issues are publicly debated. Therefore, it is not a bad thing for different members of the National Assembly to hold different views on any issue. Our Constitution expects there to be different views on issues in the National Assembly. That is why it provides in section 53(1)(c) that all questions before the Assembly are decided by a majority of the votes cast.

[63] A matter that has been the subject of a section 89 process is no exception. When it reaches the National Assembly, it would also be decided by a vote. In all probability there would be some members of the National Assembly who would take the view that there has been a serious violation of the Constitution whereas others would take the view that there has not been a serious violation of the Constitution. If it is permissible for different members of the National Assembly to take different views on whether a violation is serious, why should this be objectionable if it happens in an ad hoc Committee – a creation of the National Assembly? In any event, even members of this Court could take different views on such an issue if this Court were called upon to decide it. Even different members of a permanent Committee that could deal with section 89 processes in the future could take different views on whether or not in a particular case a violation is serious.

[64] The second judgment also seems to take the view that there must be rules that define the word "serious" or the terms "serious violation" or "serious misconduct" in section 89. There is no need for that. Whether a violation is serious or not is a value judgment that a person must form in a given set of facts. No definition of the word "serious" would ensure that members of a Committee or of the National Assembly have the same view in every case on whether a violation of the Constitution is serious. In our law there are no rules defining the word "fair" or the word "reasonable" and yet our courts and various tribunals make decisions on what is reasonable or fair all the time and there are no problems about that.

[65] The second judgment also seems to find it problematic that the proportional representation of political parties in the National Assembly is used to determine the size of the representation of different political parties in an ad hoc Committee. That criticism finds no support in the Constitution. In fact such proportional representation is authorised by section 57(2)(b) of the Constitution. That provision says that "(t)he rules and orders of the National Assembly must provide for . . . (b) the participation in the proceedings of the National Assembly *and its committees of the minority parties represented in the Assembly in a manner consistent with democracy…"*. Any representation of political parties on a Committee of the National Assembly will have to be based on the size of that political party's proportional representation in the National Assembly. There is nothing constitutionally objectionable about that.

[66] I conclude that the Speaker has successfully shown that the allegation or contention that the National Assembly has failed to put in place mechanisms and processes for holding the President accountable has no foundation. As already indicated, the applicants now accept this. This conclusion means that prayer 2 of the notice of motion cannot be granted.

Can prayers 5 and 6 of the Notice of Motion be granted?

[67] This conclusion also means that prayers 5 and 6 cannot be granted. Prayer 5 is a prayer for an order directing in effect the National Assembly "to put the requisite

processes and mechanisms in place to hold the President accountable for his conduct (and failures) arising from, and incidental to, the report of the Public Protector dated 19 March 2014 including processes and mechanisms to inquire into and determine whether and to what extent the President's violation of the Constitution and/or other conduct satisfied the requirements of section 89(1) of the Constitution."

[68] There is no need or justification for this prayer because, as I have found above, there are mechanisms and processes that the National Assembly has put in place which can be used effectively to hold the President accountable for the conduct in question. All that the applicants need to do is to initiate those mechanisms and processes. If they choose to use the motion of no confidence, they can force the President to resign provided that they are able to get the support of the majority of the members of the National Assembly for that motion. If they choose to use the section 89 procedure, they would need to move a motion in the National Assembly for the removal of the President and that motion should contain a resolution to be passed by the National Assembly that the President has committed a serious violation of the Constitution or the law or has committed serious misconduct and should have a provision for the removal of the President. In the case of a section 89 procedure, the President would be removed only if the motion of removal from office were to be supported by a two thirds majority of the members of the National Assembly.

[69] If a President is removed from office in terms of section 89, he or she forfeits all benefits of the office of President and is disqualified from occupying any public office. The second judgment says that, when a President is removed from office in terms of section 89, he or she may lose the benefits of that office. In other words, the second judgment takes the view that the loss of benefits is not automatic upon removal from the office of President. The wording of the provision is such as to preclude a person who has been removed from the office of President from receiving the benefits of such office if the removal is based on a serious violation of the Constitution or the law or serious misconduct. He or she also gets precluded from thereafter holding any public office. When the removal from office is based on a President's inability to perform the

functions of office, the person removed from the office of President does not forfeit the benefits of office. Nor does he or she get precluded from holding any public office thereafter. Section 89(2) provides that "(a)nyone who has been removed from the office of President in terms of subsection 1(a) or (b) may not receive any benefits of that office and may not serve in any public office". Subsection 1(a) and (b) are serious violation of the Constitution or the law and serious misconduct.

[70] Prayer 6 in the notice of motion cannot survive the conclusion that the National Assembly did put in place mechanisms and processes that could be used to hold the President accountable for his failure to implement the Public Protector's remedial action. Prayer 6 is for an order "[d]irecting the National Assembly to convene a committee of Parliament and/or any other appropriate independent mechanism, to conduct an investigation into the conduct of the President and, in particular, whether, by any act and/or omission, the President has made himself guilty of an offence or inability which would warrant the exercise of the powers of Parliament in terms of section 89(1) of the Constitution".

[71] There is also no need or justification for this prayer because, as the applicants have conceded, the National Assembly did put in place a mechanism and process that could be used to perform the task that would have been performed by the Committee contemplated in prayer 6 if prayer 6 were to be granted. That is the mechanism of an ad hoc Committee provided for in the rules of the National Assembly. The applicants have not said that they availed themselves of these avenues and were frustrated or anything of that kind and, therefore, had to come to this Court and ask for relief.

[72] Should the Court order the National Assembly to convene a Committee to conduct a section 89 inquiry? There is no legal basis for the Court to make such an order. This is because, if the applicants want such a Committee, they have a right in terms of the rules of the National Assembly to table in the National Assembly a motion with a resolution for the establishment of an ad hoc Committee with a mandate to conduct such an investigation or inquiry. Once they have done that, the motion would

be deliberated upon and voted on in the National Assembly. If the motion is passed, such a committee will be established. The establishment of a committee must follow the process or procedure prescribed by the rules of the National Assembly. Those procedures include that a motion must be moved in the National Assembly for a resolution establishing such a committee and that motion must be deliberated and voted upon.

[73] In any event, an order that the National Assembly convene such a committee would assist the applicants to bypass a democratic process of which such a Committee is constitutionally required to be the product. I say this because section 53(1)(c) of the Constitution is to the effect that "all questions before the Assembly are decided by a majority of the votes cast". This means that one cannot speak of a decision of the National Assembly unless it is a decision or resolution that is supported by the majority of votes cast. A litigant cannot, therefore, ask a court to make a decision that should be the outcome of votes cast in the National Assembly when he or she fears that the majority in the National Assembly might not support the decision he or she wants. In other words, there is a democratic process that must first take place in the National Assembly before such a Committee may be established. That is a constitutional requirement. Prayer 6 seeks to bypass that constitutional process.

[74] Courts exist to adjudicate disputes. Before the applicants instituted these proceedings, there was no dispute between them and the National Assembly or the Speaker about whether or not any committee provided for in the rules of the National Assembly should be established to investigate or inquire into anything concerning the President's conduct. The EFF had asked the Speaker for the establishment of a committee or panel to discipline the President which fell outside the rules of the National Assembly. There is no suggestion by anybody that any member of the applicant parties or the DA ever moved in the National Assembly a motion for the establishment of a committee to investigate or inquire into the President's conduct and the National Assembly refused to establish it. The applicants and the DA came to Court to ask it to order the National Assembly to convene such a Committee without

there being a dispute about whether such a Committee should be established. This Court should insist that there should be a dispute first before it can be asked to make an order in regard to an issue. This judgment says so. The second judgment seeks to adjudicate a non-existent dispute in this regard.

Should this Court order the National Assembly to put in place a special mechanism for section 89?

[75] The starting point in dealing with this part of the applicants' case is section 57(1) of the Constitution. Section 57(1) reads:

> "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."

This provision means that it is the National Assembly and not the Court which the Constitution gives the power to determine and control the National Assembly's own proceedings and procedures. It is important to recall what this Court said through the Chief Justice in *EFF 1*:

> "It falls outside the parameters of judicial authority to prescribe to the National Assembly . . . *what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly*. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum total of the constitutionally permissible judicial enquiry to be embarked upon."[29]

[29] *EFF 1* above n 2 at para 93.

When, therefore, the National Assembly considers two or more options or models of mechanisms to determine which one should be decided upon for the section 89 procedure, this Court would infringe the doctrine of the separation of powers if it were to prescribe to the National Assembly which option or model the National Assembly should adopt. That is not the role of courts.

[76] In paragraph 6.2 of the applicants' supplementary affidavit the applicants say that they join the DA in seeking the establishment of permanent mechanisms for the section 89 procedure. A reading of the DA's affidavit reveals quite clearly that it is asking this Court to make an order establishing a permanent mechanism for the section 89 procedure. One can see this from the way that the DA complains that an ad hoc Committee is simply inadequate for the section 89 procedure.

[77] Mr James Selfe, who deposed to the DA's affidavit, expressed various complaints about ad hoc Committees and said that ad hoc Committees are not suitable for impeachment investigations. He then said:

> "These ad hoc committees illustrate precisely *why specialised rules and procedures are required for impeachment* investigations and hearings, established in advance of actual cases."[30]

Later, Mr Selfe again said:

> "This confusion [about two or so ad hoc Committees to which he had just referred] again highlights why procedures must be in place to govern impeachment investigations and hearings in advance of actual cases."[31]

He went on to say:

[30] DA's replying affidavit to the first respondent's answering affidavit at para 60.

[31] Id at para 67.

> "The DA's case is that the National Assembly has breached its constitutional obligations by failing to enact legislation or to pass rules creating effective mechanisms for impeachment proceedings. This does not require a challenge to the existing Rules, which are entirely silent on impeachment procedures."[32]

[78] Reference has been made above to the evidence of the Acting Speaker about a sub-Committee of the Rules Committee of the National Assembly which was mandated to consider whether a special mechanism should be put in place for the section 89 procedure or whether the position should be left as it was then and as it still is now. That is that the rules of the National Assembly provide for the establishment of an ad hoc Committee which may be established to deal with specific tasks including the section 89 procedure. The Acting Speaker says that any member of the National Assembly may move a motion for the establishment of an ad hoc Committee which may conduct the investigation and inquiry that may be required in a specific case concerning the removal of a President under section 89(1). It seems implied in his affidavit that it is the member of the National Assembly seeking a resolution of the National Assembly removing a President who must move a motion for the establishment of an ad hoc Committee if he or she wants such a Committee to conduct such an investigation or inquiry.

[79] From the supplementary affidavit of the Acting Speaker, it is clear that the sub-Committee would have to decide whether to recommend that the status quo be retained in which case an ad hoc Committee would be used if a Committee were required for a section 89 procedure or whether a permanent mechanism should be put in place for a section 89(1) procedure. The Acting Speaker points out that the section 89 procedure is not something that is invoked regularly. This is because attempts to impeach a President do not happen very often. He says that this may make the mechanism of an ad hoc Committee a more suitable option than the option of putting in place a permanent mechanism.

[32] Id at para 99.

[80] The Acting Speaker goes on to say:

> "The NA Rules currently enable proceedings under section 89(1) to be initiated when a member of the NA tables a substantive motion requiring such an initiation of the proceedings in which there may be a request for the establishment of an ad hoc committee inter alia to gather relevant facts or to conduct an inquiry or an investigation prior to the adoption of a resolution by the NA as envisaged in section 89(1) of the Constitution."[33]

This is not denied or disputed by any of the applicants including the DA.

[81] It is appropriate at this stage to once again refer to the sub-Committee to which the Acting Speaker referred in his supplementary affidavit. In part he said the following with regard to that sub-Committee:

> "61. During proceedings of the subcommittee, the possible need for the NA Rules to regulate section 89 motions was raised and discussed for the first time in September 2015. At this point it was agreed that research on the matter was necessary and the subcommittee tasked the Chief State Law Advisor and National Assembly Secretariat to undertake the research.
>
> 62. The research was accordingly presented and the draft rules produced by an external consultant [were] presented to the subcommittee.
>
> 63. Following further deliberations on the matter, members of the subcommittee agreed that policy guidance was required from political parties, and resolved to refer the proposed rules to political parties for their input. This decision was reflected in the report of the subcommittee. . ..
>
> 64. Since May 2016 to date, not a single political party, including any of the applicants, have made any input with regard to the proposed rule."

[82] From this quotation from the Acting Speaker's supplementary affidavit, it is clear that it is the representatives of the political parties represented in the

[33] First respondent's supplementary affidavit at para 68.

sub-Committee including the representatives of the applicants who did not return to the sub-Committee to make proposals that the rules should make provision for a special mechanism for the section 89 process. The applicants and the DA have not denied this. That, therefore, means that the applicants defaulted on their obligations towards the National Assembly. Had they returned to the sub-Committee and proposed that a permanent mechanism be established, there may long have been a special mechanism for the section 89 process. This means that the applicants and the DA are the authors of the situation about which they have now come to court. They cannot be allowed to benefit from their own breach of their obligations to the National Assembly. They have given us no explanation why they did not go back to the sub-Committee to make their proposals. They owed us that explanation. This judgment insists that, in the absence of a sound explanation for that default on their part, this Court should tell them to go back to that sub-Committee and make use of that Parliamentary structure. The second judgment overlooks this important aspect of the applicants' case. Overlooking this encourages political parties which are represented in the National Assembly to ignore internal remedies and Parliamentary structures and processes. That is bad for our constitutional democracy.

Has the National Assembly failed to hold the President accountable?

[83] The applicants' case is also that the National Assembly has an obligation to hold the Executive, including the President, accountable but that, since 31 March 2016 when this Court handed down its judgment in *EFF 1,* the National Assembly has done nothing to hold the President accountable for his failure to implement the Public Protector's remedial action. That the National Assembly has such a constitutional obligation is beyond dispute. Sections 42(3) and 55(2) of the Constitution place such an obligation on the National Assembly.[34] Section 92(2) of the Constitution provides that members

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[34] 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."

Section 55(2) provides:

of the Cabinet "are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions". Furthermore, this Court's judgments in *Mazibuko*, *EFF 1* and *UDM* have also emphasised that obligation. What is in dispute between the applicants and the Speaker under this heading is whether or not since 31 March 2016 the National Assembly has held the President accountable for his failure to implement the Public Protector's remedial action. The applicants say that it has not whereas the Speaker says it has.

[84] In prayer 3 the applicants ask this Court to make an order:

> "Declaring that the first respondent has failed in her duty to apply her mind and/or to scrutinise the violation of the Constitution by the President in the course of his failure to implement the report of the Public Protector dated 19 March 2014."

Although prayer 3 contemplates a declaratory order that the first respondent has failed to scrutinise the violation of the Constitution by the President, the applicants actually mean the National Assembly because they cited the first respondent in her representative capacity on behalf of the National Assembly. Therefore, prayer 3 must be understood to contemplate a declaratory order that the National Assembly has failed to scrutinise the violation of the Constitution by the President in failing to implement the Public Protector's remedial action.

[85] The applicants' case here is that the National Assembly has breached its obligation to hold the President accountable for his conduct in failing to implement the Public Protector's remedial action. In this regard the applicants say that the National Assembly has done absolutely nothing to hold the President accountable for his failure

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"The National Assembly must 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

(ii) any organ of state."

to implement the Public Protector's remedial action which is a violation of the Constitution. There are a number of areas in the applicants' founding affidavit where the deponent makes it clear that part of the applicants' case is that the National Assembly has not done anything to hold the President accountable for that failure. I refer to a few below.

[86] In the applicants' founding affidavit the deponent said:

> "The crux of the application is the alleged failure of Parliament to fulfil its unique constitutional obligations to hold the President accountable, both generally and ultimately, in terms of section 89 of the Constitution."[35]

Later, in the same affidavit, he said:

> "The National Assembly, under the leadership of the first respondent, *has failed to take any action in response to the judgment of the Constitutional Court, despite it being her duty to hold the President accountable and to scrutinise his conduct*. The constitutional violations by the President require consideration and examination by the National Assembly."[36]

The applicants have also said:

> "This application seeks to compel the National Assembly to carry out its constitutional functions to scrutinise and enquire into the conduct of the President in two respects: first it seeks a declaratory order that the inaction of the National Assembly in the face of such egregious violations of the Constitution by the President is unconstitutional. Second, it seeks an order compelling the first respondent to cause the taking of all the necessary and appropriate steps to determine the seriousness of the violations by the President as a prelude to reporting to the National Assembly and for the purposes of holding the President accountable."[37]

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[35] Applicants' founding affidavit at para 10.

[36] Id at para 23.

[37] Id.

[87] The question that arises, therefore, is whether it is true that, since the hand down of this Court's judgment in *EFF I* on 31 March 2016, the National Assembly has not done anything to hold the President accountable for failing to implement the Public Protector's remedial action. The second judgment deals with the matter as if the applicants' case is that the National Assembly failed to use the section 89 procedure to hold the Presidents accountable. That is not the applicants' case. As the passages I have quoted above from the applicants' affidavits show, the applicants' case is that the National Assembly failed to do anything to hold the President accountable for failing to implement the Public Protector's report. The Speaker has denied the applicants' accusation that the National Assembly did not do anything to hold the President accountable after this Court's judgment in *EFF1* had been handed down. She went on to say: "I shall demonstrate in what follows that the allegations of the applicants are devoid of the truth and that the whole case brought by the applicants has no merit".

[88] In support of her assertion, the Speaker referred to the following—

(a) on 5 April 2016 and following upon the hand down of this Court's judgment in *EFF 1*, the Leader of the Opposition moved a motion in terms of the Rules of the National Assembly for a resolution by the National Assembly removing the President from office in terms of section 89(1); this was on the basis, inter alia, that this Court had found that the President's failure to implement the Public Protector's remedial action was unlawful, inconsistent with the Constitution and invalid; that motion was deliberated and voted upon but was defeated; the Speaker or Acting Speaker said that the leaders of the applicants supported that motion and actively participated in the debate in the National Assembly; the EFF, UDM and COPE did not at that stage say that the motion should have been preceded by a fact-finding inquiry; it is implied in the Speaker's response that she thinks that the applicants' belated criticism of that motion as having been premature is opportunistic.

(b) in terms of the rules of the National Assembly, if the Leader of the Opposition had deemed it necessary that the vote be preceded by the establishment of an ad hoc Committee that would conduct an investigation and inquiry for the section 89 procedure, he was free to move a motion for the establishment of such an ad hoc Committee by the National Assembly but he did not do so; since the DA never moved a motion for the establishment of such a Committee and was frustrated in one way or another, the DA cannot justify coming to Court and complaining that the National Assembly has not held the President accountable in terms of section 89 after a fact-finding committee.

(c) on 10 November 2016 the Leader of the Opposition moved a motion of no confidence in the President in terms of rule 129 of the Rules of the National Assembly read with section 102(2) of the Constitution; this motion was deliberated and voted upon in the National Assembly. The majority voted against the motion. Therefore, the motion was defeated.

(d) pursuant to this Court's judgment in *EFF 1*, 27 questions relating to that judgment and surrounding issues were put to the Executive including the President; in 2017 16 questions were put to the Executive and a number of responses had been provided as at the date of the signing of the Acting Speaker's supplementary affidavit.

On 8 August 2017 the Leader of the Opposition moved a motion of no confidence in the President for his failure to implement the public protector's remedial action. That motion was debated. It was then voted upon in secret after the Speaker had ruled that the vote should be by secret ballot. That was the National Assembly holding the

President accountable for his failure to implement the Public Protector's remedial action.

[89] The fact that on 5 April 2016 a motion for the removal of the President was moved, deliberated and voted upon but was defeated in the National Assembly and the fact that on 10 November 2016 and on 8 August 2017 motions of no confidence in the President were moved, deliberated and voted upon but were defeated prove that the National Assembly did not just sit idle and do nothing as the applicants claim but that it acted upon the President's conduct and held him accountable. The fact that those motions were defeated does not detract from the fact that the National Assembly did hold the President accountable. In the applicants' supplementary affidavit the deponent says that it is not the applicants' case that a motion for the removal of a President in terms of section 89 must succeed before it can be said that the National Assembly has held the President accountable. The applicants' position must be the same as well in regard to motions of no confidence in the President which are moved, deliberated and voted upon but are defeated.

[90] In *UDM* this Court held that Question and Answer sessions in the National Assembly involving the Executive, including the President, motions of no confidence in the President in terms of section 102 and motions for the removal of the President in terms of section 89 are accountability mechanisms that can be used and are used by the National Assembly to hold the Executive, including the President accountable.[38] This Court also referred to the mechanisms provided for in sections 89 and 102 of the Constitution. Those are, respectively, the motions for the removal of the President from office and the motion of no confidence in the President. With regard to the motion of no confidence, this Court had this to say in *Mazibuko*:

[38] *UDM* above n 7 at para 40.

> "A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action."[39]

In *UDM* the Chief Justice said: "A motion of no confidence is, in some respects, potentially more devastating than impeachment."[40]

[91] The applicants have not advanced any ground upon which it can be said that the motion of no confidence in the President that were moved by the Leader of the Opposition on 10 November 2016 and on 8 August 2017 and which related inter alia to the President's failure to implement the Public Protector's remedial action were in any way deficient. The applicants have not shown any basis for any suggestion, if one is intended, that these motions did not constitute holding the President to account on the part of the National Assembly.

[92] In this regard, it must be borne in mind that it is not necessary that there be many motions of no confidence in the President before it can be said that the National Assembly has held the President accountable for his failure to implement the Public Protector's remedial action. A single motion of no confidence in the President is enough. The position is not that, if a motion of no confidence in the President was deliberated and voted upon but there was no motion for the removal of the President in terms of section 89, the National Assembly has not held the President accountable. This has to be so because, if a single motion of no confidence in the President were to succeed, nobody could say that the National Assembly had failed to hold the President accountable.

[93] It cannot be, and I think the applicants accept this, that, if the motion of no confidence in the President succeeds, the National Assembly will be said to have held the President to account but, if the motion is defeated, it would be said that the National

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[39] *Mazibuko* above n 22 at para 43.

[40] *UDM* above n 7 at para 45.

Assembly has not held the President to account. Whether the National Assembly has held the President to account through a motion of no confidence in him or not cannot depend upon the result of the vote. If this is correct, then the fact that motions of no confidence in the President were moved, deliberated and voted upon on 10 November 2016 and 8 August 2017 means that the National Assembly did hold the President to account through such motions. This, therefore, means that the foundation of the applicants' case on this issue, namely, that the National Assembly has done nothing since the judgment of this Court in *EFF 1* to hold the President accountable has been shown to be untrue and unjustified. The National Assembly did do something and it did hold the President to account. Therefore, the applicants' contention that the National Assembly did nothing to hold the President to account falls to be rejected.

[94] In the applicants' founding affidavit the deponent says that "[*a*]*t the very least, then, the National Assembly should take steps to investigate the severity of the President's misconduct. Again, how the Speaker and the National Assembly go about doing so may well be within their sole but rational discretion. The EFF submits that an ad hoc committee should be constituted to investigate the President's conduct in light of the judgment of the Constitutional Court (including whether he misled Parliament). As far back as April 2016, the EFF and the Democratic Alliance requested the Speaker to institute investigative action along those lines. Like the Public Protector's report and the judgment of the Constitutional Court, both requests were met with silence*."

[95] In the applicants' supplementary affidavit the deponent said that it is not the applicants' case that the National Assembly has not put in place mechanisms and processes to hold the President accountable. He added that indeed there are such mechanisms and they include an ad hoc Committee which can be used for the section 89 procedure. Once the applicants concede this, then the position is that they failed to use mechanisms and processes to hold the President accountable in terms of section 89. If they had the same right as everyone else in the National Assembly to get the National Assembly to hold the President accountable under section 89 but they did not use the

opportunity, they cannot complain that the National Assembly did not use the section 89 procedure properly to hold the President accountable.

[96] The deponent to the applicants' founding affidavit says:

> "The EFF is therefore forced to approach this Court for relief. The Speaker and the National Assembly persist in their failure to scrutinize and oversee the President's conduct. *They perpetuate a culture of impunity and unaccountability. As with the Public Protector's report, the judgment of the Constitutional Court requires the urgent attention of, and an intervention by, the Speaker and the National Assembly. Once again, their obligations to scrutinise and oversee executive action and hold the President accountable have been triggered. They cannot be allowed to persist in their silence and inactivity.*"

It is clear from what the deponent says in some of the excerpts from the applicants' founding affidavit quoted above that what the applicants wanted to achieve by bringing this application was to compel the National Assembly "to take steps to investigate the severity of the President's misconduct". Taking those steps actually means, in this part of the applicants' case, the establishment of an ad hoc Committee that would conduct an inquiry into the President's conduct in terms of section 89.

[97] The applicants' founding affidavit also says that "[t]he purpose of this application is to compel the Speaker to cause the National Assembly to finally discharge the constitutional obligation of oversight over the President". If, as the applicants say, the purpose of this application was to "compel the National Assembly to carry out its constitutional functions to scrutinise and enquire into the conduct of the President", certain questions arise. One of them is: what needs to be done in order to get the National Assembly to take all necessary and appropriate steps to determine the seriousness of the violations by the President as a prelude to reporting to the National Assembly? Another question is: is the Speaker the only person who can cause the taking of those steps? Yet another question is: are the applicants' members who are members of the National Assembly not also free to take the steps necessary to cause the National

Assembly to determine the seriousness of the violations of the Constitution by the President? The answer is: Yes, they too, have a right to cause those steps to be taken by the National Assembly. Indeed, as part of the National Assembly, they are obliged to take such steps.

[98] If the applicants or their members who are part of the National Assembly are also free to do what needs to be done in order to get the National Assembly to determine the seriousness of the violations, did the applicants ever get their members to take these steps and, maybe, they got frustrated? If the applicants did not get their members who are part of the National Assembly to take those steps in order to achieve the removal from office of the President in terms of section 89, why did they approach this Court without first getting their members to take those steps and see whether there would be any opposition to the establishment of an ad hoc Committee? The applicants have indicated that they were not aware that an ad hoc Committee can be used as a mechanism for the section 89 process and that, if they had been aware, they would have used it. I accept this explanation. This explanation is supported by the fact that the applicants stated in the founding affidavit that at least an ad hoc Committee should be constituted to investigate the conduct of the President in regard to the Public Protector's remedial action. It seems to me that, if they knew an ad hoc Committee could be established for the section 89 process they would have taken steps to have an ad hoc Committee established. It may be that, once the applicants had received the Acting Speaker's supplementary affidavit in which he explained that an ad hoc Committee could be used for the section 89 process, this aspect of the matter should have been resolved between the applicants and the Speaker. The Court is aware that there were attempts to resolve the entire matter on the day of the hearing but they were not successful. Nothing more needs to be said about the issue of a possible resolution of the matter between the parties.

[99] Are the applicants entitled to a declaratory order that the National Assembly has failed to hold the President accountable in terms of section 89? In my view, they are not. For the National Assembly to hold the President accountable under section 89, a

member of the National Assembly needs to move a motion for the removal of the President under that section and that motion needs to be deliberated and voted upon. If that member thinks that the case against the President is such that the National Assembly should establish an ad hoc Committee which will conduct an inquiry into the existence or otherwise of any one or more of the grounds listed in section 89, that member is required to include that in the resolution that he or she asks the National Assembly to pass. If the National Assembly passes that resolution, an ad hoc Committee will be established and it will conduct an inquiry and report back to the National Assembly with its findings and recommendations. The National Assembly will then decide whether to accept or reject the findings or recommendations of that Committee.

[100] It is clear from section 89, which has been quoted above, that in order to achieve the removal of a President under that section, one or more of the three grounds set out in that section should exist. Those grounds are that the President must—

(a) have committed a serious violation of the Constitution or the law;
(b) have committed serious misconduct; or
(c) be unable to perform the functions of office.

[101] The mere fact that one of the grounds for the removal of a President from office in terms of section 89 is present or exists does not mean that, therefore, the President will or must necessarily be removed from office. The presence of at least one of the grounds is a precondition that must be satisfied before the National Assembly may resolve to remove or not to remove a President. This means that one could have a situation where one of the grounds is present, but the President does not get removed and continues in office. This could happen despite the fact that the President may be guilty of a serious violation of the Constitution or the law or may be guilty of serious misconduct. This may sound strange because it may be difficult to understand why a President who is guilty of a serious violation of the Constitution or the law or who is

guilty of serious misconduct should continue in office as President. However, the reason why this is so is the way that the first part of section 89 is formulated.

[102] Section 89 says that "the National Assembly . . . may remove a President from office". The use of the word "may" in that provision suggests that it is permissive. Another requirement in section 89 is that the National Assembly must adopt a resolution which is supported by at least a two thirds majority of the members of the National Assembly. If, at least, one of the three grounds is present and the National Assembly adopts a resolution removing a President from office and that resolution is supported by two thirds of the members of the National Assembly, the President is removed from office. If, however, the motion fails to get the support of two thirds of the members of the National Assembly, that President is not removed and continues in office.

[103] Before the National Assembly may vote on a motion for the removal of a President in terms of section 89, the National Assembly must satisfy itself that at least one of the three grounds in section 89 exists. If the National Assembly were to pass a resolution with the support of two thirds of the members of the National Assembly removing a President from office under section 89 in the absence of any of the grounds listed in section 89, that resolution would be inconsistent with the Constitution and invalid. It could be set aside on review.

[104] When a member of the National Assembly believes that the President may have committed a serious violation of the Constitution or of the law or may have committed serious misconduct or is unable to perform the duties of office as envisaged in section 89, he or she is not confined to the section 89 procedure if he or she wants to achieve the vacation of office by the President. He or she can invoke the section 89 process which has very onerous requirements or he or she can take the attitude that by virtue of his or her belief or suspicion that the President may be guilty of one or more of the types of conduct listed in section 89, he or she has lost confidence in the President and the majority of the members of the National Assembly have also lost confidence in the President. He or she can then initiate a vote of no confidence in the President and,

if that motion is supported by a simple majority of the members of the National Assembly, the President would be obliged to resign. Proof that the President is guilty of such misconduct would not be required. All that would be required is the passing of a vote of no confidence in the President by a simple majority. Section 102(2) sets the bar very low whereas section 89 sets it extremely high.

[105] Under section 89, that the President is guilty of the conduct listed therein must objectively exist. A two thirds majority of the members of the National Assembly needs to be persuaded that that is so. Even when that has been shown, it does not necessarily follow that the President is removed. Section 89 says that he or she "may" be removed.

Does section 89 always require that there be a committee that will conduct an inquiry in terms of section 89?

[106] In my view, although in many, if not most, cases it will be necessary or convenient that a Committee conducts an inquiry into whether there is a serious violation of the Constitution or whether the President has committed serious misconduct or whether there is inability to perform the functions of his or her office, there may be cases where no such committee may be necessary. This will be where all the material facts are common cause among all parties including the President. In such a case all that the National Assembly would be asked to do would be to draw their conclusions or inferences from the common cause facts and decide whether one or more of the grounds listed in section 89 is or are present. If none is present, that is the end of the matter and the President cannot be removed. If however, one or more such ground or grounds is or are present, then a motion for the removal of the President may be moved, deliberated and voted upon.

[107] Another scenario where no Committee may be necessary would be where, to take an extreme example, the President, angry at the attacks on him or her by members of the Opposition, leaves the podium in the National Assembly and physically attacks a member of the Opposition inside the National Assembly and in full view of members of the National Assembly and that member subsequently dies as a result of that assault.

In that case there would be no facts for the National Assembly to inquire into and, therefore, no need for a Committee. The facts of the case would be fully well-known to the members of the National Assembly. In such a case the National Assembly would simply be asked to draw its conclusions on whether the President was guilty of a serious violation of the Constitution or the law or of serious misconduct. In fact, in that scenario, there would be no dispute that the President is guilty of a serious violation of the law. What would remain is whether a resolution removing him in terms of section 89 should be passed. It would not follow that, just because the President is guilty of a serious violation of the Constitution or the law or serious misconduct, he is automatically removed from office. It would depend on the vote.

[108] Here is why in the present case there was no need for a fact-finding investigation or inquiry before the members of the National Assembly could vote on the motion of 5 April 2016 for the removal of the President. In *EFF 1* this Court made the finding or reached the conclusion that the President's conduct in failing to implement the Public Protector's remedial action was unlawful and inconsistent with the Constitution. This Court thus concluded that the President had in that way violated the Constitution. This finding or conclusion became *res judicata* among all the parties to that case. Those were the EFF, UDM, COPE, DA, the National Assembly and President Jacob Zuma. All those parties were bound by that finding or conclusion of this Court. They could not seek to change it by any means. Furthermore, by virtue of section 165(5) of the Constitution, that decision of this Court bound all those parties. Section 165(5) reads: "(5) *An order or decision issued by a Court binds all persons to whom and organs of state to which it applies*."

[109] In fact one of the orders issued by this Court in *EFF 1* was a declaratory order that the conduct of the President in failing to implement the Public Protector's remedial action was inconsistent with the Constitution. That order appears in paragraph 4 of the order of this Court in that case. That meant that that conduct on the part of the President violated the Constitution. On 1 April 2016 the President addressed the nation and said that he accepted the judgment of this Court unreservedly and he respected it. He urged

everybody to accept and respect the judgment. This means that the President also accepted the conclusions that this Court had reached in regard to his conduct. That includes the conclusion that he had violated the Constitution. In fact he said that he had not deliberately violated the Constitution.

[110] Furthermore, the question whether or not the President's conduct was consistent with the Constitution or whether or not he had violated the Constitution by failing to implement the Public Protector's remedial action was an issue in respect of which this Court had the final say in terms of section 167(5) of the Constitution. Section 167(5) reads in relevant parts:

> "The Constitutional Court makes the final decision whether . . . conduct of the President is constitutional…"

[111] Once this Court had pronounced that the President had violated the Constitution, nobody – not least the National Assembly or any committee or body created by it – could conduct an investigation whether, indeed, that was so. No such committee could alter that conclusion or second-guess it. Therefore, that finding or conclusion or order stood. We held in *EFF 1* that the National Assembly and the President could not second-guess the Public Protector's remedial action. In this case we cannot make a pronouncement the effect of which is that a decision of this Court could or can be second-guessed by the National Assembly or any committee or structure created by it. Therefore, there is no room for the proposition that some fact-finding process was required to establish whether the President had violated the Constitution by failing to implement the Public Protector's remedial action.

[112] When this Court handed down its judgment on 31 March 2016 in *EFF 1*, its conclusion that the President had violated the Constitution by failing to implement the Public Protector's remedial action was final. The result was that by the time the Leader of the Opposition gave notice of the motion for the removal of the President on 31 March 2016 – which he moved on 5 April 2016 – it had already been established that

the President had committed a violation of the Constitution. When the Leader of the Opposition moved the motion for the removal of the President on 5 April 2016, the President had already announced his acceptance of the judgment of this Court and, with that, its conclusion that he had violated the Constitution.

[113] What remained in terms of satisfying the requirements of section 89 was for the National Assembly to take a view on whether the violation was serious and, if so, whether the President should be removed from office. The question whether the violation of the Constitution was serious is not a question of fact that needed to be investigated. Like the question whether particular conduct is fair, the question whether a violation of the Constitution is serious is a question of a value judgement.[41] The National Assembly must pass the value judgement. Therefore, it, too, did not require a fact-finding investigation by any committee or body.

[114] In my view, a reading of the motion of 5 April 2016 reveals that it was intended that the National Assembly should make its conclusion about whether the President's violation of the Constitution was serious on the basis of the conclusions reached by this Court against him in its judgment. It seems to me that this is the view that was taken by the Leader of the Opposition in initiating that motion. Given the above, the Leader of the Opposition was perfectly entitled to take that view. He was entitled to say: "simply on these findings or conclusions of the highest Court in the land, the National Assembly must conclude whether the violation of the Constitution by the President was serious, and, if it was, decide whether to remove him from office in terms of section 89 and I, as the Leader of the Opposition say that the violation is serious and the National Assembly should remove the President from office". The President would have been aware of the motion for his removal and, if he felt that he needed to place before the National Assembly any facts or representations, he would have asked for that opportunity. He probably felt that the National Assembly was aware of his side of the

[41] *Media Workers Association of South Africa v Press Corporation of South Africa Ltd* [1992] ZASCA 149; 1992 (4) SA 791 (AD) at 802.

story as he had been party to the proceedings in this Court. After all he had said that he accepted the judgment unreservedly.

[115] The question that arises, therefore, is: what was there to be investigated by any Committee if the motion was based on nothing else but the findings or conclusions of this Court against the President? In my view, nothing. Therefore, the motion moved by the Leader of the Opposition on 5 April 2016 for the removal of the President for failing to implement the Public Protector's remedial action was in order. Through it, the National Assembly did hold the President accountable for failing to implement the Public Protector's remedial action.

[116] One of the orders made by the second judgment directs the National Assembly to initiate a process under section 89(1). The aim of the section 89 process is for the National Assembly to hold the President accountable for his failure to implement the Public Protector's remedial action after 31 March 2016. That means that, on the second judgment's approach, there must be a committee established to conduct a fact-finding investigation or inquiry whether the President committed a serious violation of the Constitution in failing to implement the Public Protector's remedial action. That Committee would make its recommendations to the National Assembly and the National Assembly would decide whether to accept or rejects its findings or recommendations including on the question whether the President committed a serious violation of the Constitution in failing to implement the Public Protector's remedial action.

[117] There is another difficulty with this proposition. The difficulty is that through the motion of 5 April 2016 the DA already pronounced that the President had seriously violated the Constitution and it condemned the President for that. That is in the wording of that motion. It is common cause that the EFF, UDM and COPE argued for the adoption of that motion by the National Assembly during the debate and voted in support thereof. The second judgment also makes the point that the applicant also supported that motion. That means that all those parties have already passed judgment

that the President's violation of the Constitution was serious. They were within their rights to reach that conclusion. Whether that conclusion was right or wrong is not for this Court to say. That being the case, how can the same parties seek an investigation by a committee which must make recommendations to the National Assembly and, thus, to them, on an issue on which they have already passed judgement? In this regard it must be remembered that the Constitution gives the responsibility of deciding whether a President has committed a serious violation of the Constitution to the National Assembly. So, if any committee conducts any inquiry or investigation, it is not its function to decide that issue. It must make a recommendation to the National Assembly which, in turn, makes the final decision.

[118] It seems to me that it is not competent for the National Assembly to establish a committee that will make a recommendation to it on whether the President's violation of the Constitution was serious when, as large a section of the National Assembly as is represented by members of the DA, EFF, UDM and COPE has passed judgement and said that the violation was serious. In fact, even in these proceedings the applicants have repeated their view that the President's violations of the Constitution are serious. In paragraph 51 of the applicants' founding affidavit, the deponent said on behalf of the applicants: "in particular, [the President] has not been asked to explain his violations of the Constitution *which are self-evidently of a serious nature*".

[119] The applicants are not the only members of the National Assembly who are disqualified from passing judgement on the issue. Also, those members of the National Assembly who opposed the motion of 5 April 2016 are disqualified from making any decisions in regard to the same issue because they, too, already passed judgement in the President's favour when they opposed that motion and voted against it. Therefore the National Assembly cannot deal with the same issue that was covered by the motion of 5 April 2016. If the committee that the second judgment orders should investigate whether the President committed a serious violation of the Constitution reports to the National Assembly it has found that he did, the National Assembly, consisting of its members who participated in the deliberations and voting in regard to

the motion of 5 April 2016, will be required to pass judgement on an issue in regard to which it has already passed judgement. It cannot be a fair process nor can it be constitutional that a body that has already passed its verdict on a case be required to again sit in judgement on the same issue involving the same person. The suggestion or proposition that such a process should be embarked upon should never come from this Court, because it simply does not accord with the notion of justice contemplated in our Constitution.

[120] The view that it is not competent for the National Assembly to make the decisions required by section 89 of the Constitution in respect of the President's failure to implement the Public Protector's remedial action does not mean that it is not competent for the National Assembly to make any decisions required by section 89 against the President at all. Of course it would be competent for the National Assembly to make decisions required by section 89 against the President in respect of any matter that falls outside of the motion of 5 April 2016. Indeed, if an issue arises in respect of which there should be a fact-finding investigation under section 89 because the facts are not common cause in respect of any conduct of the President, the National Assembly would be free to establish a committee that would investigate such an issue or matter if it falls outside the scope of the motion of 5 April 2016.

[121] In any event, in my view the mechanism of the motion of no confidence under section 102 is always available to the National Assembly and it may be resorted to whenever the National Assembly feels that it has lost confidence in a President or his or her Executive. Unlike the requirements of the section 89 process, the requirements of the motion of no confidence under section 102 are easier to satisfy. The section 89 process can be challenged on a number of grounds in court whereas it would be difficult to challenge the outcome of the vote of the motion of no confidence under section 102 in court as long as the motion was supported by at least a simple majority of the members of the National Assembly. Therefore, in my view even where the National Assembly suspects that a President may be guilty of a serious violation of the Constitution or the law or of serious misconduct or of inability to perform the functions

of the office of the President, it may use section 102 as long as it has lost confidence in the President. In that event it will not be necessary to prove that the President actually committed or is actually guilty of any one or more types of unacceptable conduct listed in section 89 nor will it be necessary to secure the support of two thirds of the members of the National Assembly for the President to vacate his or her office.

Who may cause the National Assembly to take the steps required for section 89?

[122] The applicants say that they brought this application in order to compel the Speaker and/or the National Assembly to take the steps necessary to hold the President accountable and in particular to take the steps required for the section 89 procedure. The question that arises is: why must they come to Court in order to get the National Assembly to take those steps? Does the Speaker have exclusive jurisdiction to get the National Assembly to take those steps or is this something that the applicants can themselves do through their members who are members of the National Assembly?

[123] Rule 119 of the Rules of the National Assembly allows every member of the National Assembly to propose a motion. It reads: "a member may propose a subject for discussion, on a draft resolution for approval as a resolution of the House, with or without debate". This rule makes it crystal clear that any member of the National Assembly may propose "*a draft resolution for approval as a resolution of the House*." Section 89 of the Constitution envisages that for the National Assembly to remove a President from his or her office, it i.e. the National Assembly must pass a resolution supported by a two thirds majority of the members of the National Assembly. The resolution referred to in section 89 is a resolution contemplated in this rule. Rule 124(1) reads:

> "Members of each party are entitled to give notices of motion when recognised by the presiding officer for that purpose."

[124] In the applicants' founding affidavit the EFF, UDM and COPE have suggested through the deponent to that affidavit that at least an ad hoc Committee of the National

Assembly should be established "to investigate the President's conduct in light of the judgment of [this Court] (including whether he misled Parliament)". If the three parties wanted an ad hoc Committee of the National Assembly to be established to undertake that task for the purposes of the section 89 procedure, there was no need for them to come to Court. This is so because such a Committee may be established by the National Assembly – a body in which they have members. All that was needed to achieve that was that any member of any one of the three applicants in the National Assembly move a motion for the establishment of such a Committee and specify the task of the Committee in the motion and achieve a *two thirds majority* required support among the members of the National Assembly. The ad hoc Committee would then undertake the task of establishing whether at least one of the grounds listed in section 89 is present and report back to the National Assembly. The National Assembly would then decide whether it removes the President or not. If it decides to remove the President, the President will be removed from office. If it decides not to remove him, he will continue in office. I have already quoted the relevant parts of Part 15 of the Rules of the National Assembly which deal with ad hoc Committees. There is no need to repeat that exercise.

[125] There is no suggestion by the applicants that, if they had moved a motion for the establishment of an ad hoc Committee for the purposes of a section 89 procedure, anybody including the Speaker would have done anything unlawful that would have frustrated those efforts. The Speaker has made a similar point in her affidavit. In fact the applicants are aware that the DA has previously moved a motion in the National Assembly for the establishment of an ad hoc Committee for the section 89 procedure. That motion related to the departure of President Al-Bashir from South Africa after a court had granted an order interdicting his departure.

[126] Some correspondence was exchanged between the Speaker and the Chief Whip of the EFF in which the EFF asked the Speaker to establish a disciplinary panel which would conduct a disciplinary inquiry into the President's conduct and the Speaker refused to do so. It is not necessary to say much about that correspondence because, in my view, the EFF was asking the Speaker to do something that fell outside the rules of

the National Assembly but, in any event, they had no need to ask the Speaker. What they could have and should have done is to move a motion for the establishment of an ad hoc Committee which would inquire into the existence or non-existence of any one or more of the section 89 grounds in the President's conduct and seek the support of at least two thirds of the members of the National Assembly.

[127] I have read the judgments prepared by the Chief Justice (third judgment) as well as the one prepared by Froneman J (fourth judgment). The third judgment concurs in this judgment. The fourth judgment points out that there might not be much difference between my understanding of section 89 and the understanding of that provision as reflected in the second judgment. While I agree that this judgment and the second judgment reflect some common understanding of certain features of section 89, it seems to me that the differences that exist between the two judgments in regard to that section are quite significant and may well be fundamental.

[128] In the result I would dismiss the application and make no order as to costs.

JAFTA J (Cameron J, Froneman J, Kathree-Setiloane AJ, Kollapen AJ, Mhlantla J, Theron J concurring):

[129] I have had the benefit of reading the judgment prepared by the Deputy Chief Justice (first judgment). I agree that this matter falls within the exclusive jurisdiction of this Court. This is because the claims raised by the applicants concern a failure by the National Assembly to fulfil its obligations under various provisions of the Constitution. In terms of section 167(4) of the Constitution only this Court may decide that Parliament has failed to fulfil a constitutional obligation.[42]

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

> "Only the Constitutional Court may—

[130] I also agree with the first judgment that two main issues arise. The first is whether the Assembly has failed to put in place mechanisms and processes for holding the President accountable in terms of section 89 of the Constitution. Although the relief set out in the notice of motion is inelegantly formulated, when read in its entirety, it becomes apparent that the mechanisms and processes the applicants claim that the Assembly failed to put in place relate to section 89(1) of the Constitution. In prayer 5, the applicants seek an order directing the Assembly to put in place mechanisms and processes for determining whether the President's alleged violations of the Constitution and other conduct meet the requirements of section 89(1). And in prayer 6 they seek an order directing the Assembly to establish a committee or an appropriate mechanism to investigate whether grounds for removing the President from office in terms of section 89 exist.

[131] The second issue is whether the Assembly has failed to hold the President to account in that it failed to scrutinise the violation of the Constitution by the President. This was said to have arisen from the President's failure to implement the Public Protector's report of 19 March 2014.

[132] However, I am unable to agree with the conclusion reached by the first judgment on both issues and the order it proposes to the extent that the application should be dismissed. In my view, the application must succeed on both issues. But, before I address these issues, it is necessary to outline briefly the constitutional scheme and the factual background.

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144."

Constitutional framework

[133] Our Constitution, like many others, devolves power among the three arms of the State in all spheres. To prevent one arm or sphere from exercising powers which belong to other arms, the Constitution adopted the principle of separation of powers.[43] In order to prevent the abuse of power by those who hold office in the three arms, checks and balances were put in place. With regard to the President and the National Executive, these checks and balances are contained in Chapter 5 of the Constitution. This chapter consists of 20 sections. The chapter is devoted to matters including election of the President; an outline of his or her powers; his or her term of office; the establishment of Cabinet and an outline of its powers and functions; and the removal of the President and Cabinet from office.

[134] As to the removal of the President from office, two provisions are relevant. These are sections 89 and 102. This Court has described them in the recent past as tools for holding the President to account.[44] Cabinet and the President hold office for the duration of their term if they continue to enjoy the confidence of the Assembly. Should Cabinet lose the Assembly's confidence for whatever reason and a motion of no confidence, supported by a simple majority of its members be passed, Cabinet must vacate office.[45] The President may reconstitute a new Cabinet. But if a motion of no confidence is passed against the President, then the President and the entire Cabinet must resign.

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[43] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) and *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).

[44] *UDM* above n 7.

[45] Section 102 of the Constitution provides:

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

[135] What is apparent from the language of section 102 is that both the President and Cabinet need the support of the majority of members of the Assembly to remain in office. Absent that support they run the risk of being removed through a motion of no confidence. Although other members of Cabinet are appointed by the President, they too are subject to the Assembly's power of removal from office.

[136] The other provision that regulates the President's removal from office is section 89 with which we are concerned in this matter. A removal effected in terms of this provision must be supported by a vote of at least two thirds of members of the Assembly and that removal must be based on one or more of the grounds listed in section 89(1). If the President is removed from office on account of inability to perform the functions of office, he or she does not lose benefits. But if he or she is removed on the other grounds, he or she may lose benefits.[46]

[137] It is apparent from both sections 89 and 102 that members of the 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.

[138] 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.

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[46] Section 89(2) of the Constitution provides:

> "Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

[139] To enable members of the Assembly to exercise its powers without outside influence, the Constitution insulates them from repercussions from any quarter.[47] Section 58 of the Constitution guarantees freedom of speech in the Assembly which is subject only to its rules and orders. Not even legislation may limit free speech in the Assembly.[48] Members are immune from civil and criminal liability, arrest or imprisonment for performing their functions in the Assembly. Without this protection some of the functions of the Assembly could easily be frustrated by those who would be adversely affected by the Assembly's decisions.

[140] In *UDM* the Chief Justice observed:

> "The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for Members who are known to have contributed to the loss. To allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism.
>
> Conversely, a Member of Parliament could be exposed to a range of reasonably foreseeable prejudicial consequences when called upon to pronounce through a vote on the President's accountability or continued suitability for the highest office."[49]

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[47] Section 58 of the Constitution provides:

> "(1) Cabinet members, Deputy Ministers and members of the National Assembly—
>
> (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
>
> (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
>
> (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
>
> (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.
>
> (2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation."

[48] *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para 47 (*Democratic Alliance*).

[49] *UDM* above n 7 at paras 74-5.

[141] Since the Assembly is elected "to represent the people and to ensure government by the people under the Constitution", the interests served and advanced by the exercise of its powers must be the collective interests of the people it represents.[50] The powers of the Assembly must primarily be exercised to promote only the people's interests and the institutional objectives of the Assembly.

[142] The Assembly "ensures government by the people" by scrutinising and overseeing executive action. It also achieves this purpose by choosing the President and providing a national forum for public consideration of issues. This underscores the role played by the Assembly as the people's representative.

[143] Although the Assembly plays no role in the appointment of members of the Cabinet, it has been empowered to remove them from office. In doing so the Assembly may target Cabinet members only or together with the President. It is the Assembly alone which is the repository of these powers of removal and which may be exercised in the interests of the people it represents. This explains the low threshold for exercising the section 102 power. Although the Constitution imposes no condition for the exercise of that power, it is implicit from the constitutional scheme that members of the Assembly may lose confidence in Cabinet or the President if their conduct is at variance with the people's or national interest.

[144] The fact that members of the Assembly assume office through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives. For example, members may not frustrate

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[50] Section 42(3) of the Constitution 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."

the realisation of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution.[51]

[145] Political parties themselves derive their existence and power from the Constitution, first and foremost.[52] Section 19 affords every citizen the right to form a political party and the right to participate in the activities of a party of his or her choice, including the right to campaign for a political party or its causes. But all these rights must be exercised in a manner that is consistent with other provisions of the Constitution. They cannot be invoked to undermine the powers and functions of the Assembly. This is the backdrop against which the claims made by the applicants must be assessed.

Factual background

[146] Following complaints lodged by members of the public and a member of Parliament, the Public Protector undertook an extensive investigation into the construction of certain improvements at the President's private residence in Nkandla. Upon completion of her investigation, the Public Protector made adverse findings against the President. Flowing from those findings, she declared the remedial action which the President was required to carry out.

[147] But the President failed to comply with the Public Protector's remedial action. Various actions were undertaken by the President in response to the Public Protector's

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[51] *UDM* above n [7].

[52] Section 19(1) of the Constitution provides:

> "Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause."

See *Ramakatsa v Magashule* [2012] ZACC 31; 2013 (2) BCLR 202 (CC).

findings and recommendations. These included an instruction to the Minister of Police to investigate whether the improvements effected at his residence included non-security features, as the Public Protector had found, and, if so, the amount which constituted a reasonable percentage to be paid by the President. The Minister produced a report that exonerated the President from any liability.

[148] The Assembly also got involved after the Public Protector had submitted her report to the Speaker. The Assembly set up two ad hoc committees to examine all reports on the matter. The Public Protector's report and the one by the Minister of Police were among those that were considered by the committees. These committees preferred the Minister's report which exempted the President from liability over the Public Protector's report, and presented their own report on the matter to the Assembly.

[149] For its part, the Assembly endorsed the committees' report and absolved the President of all liability. Consequently, the President did not comply with the Public Protector's remedial action. Unhappy with this turn of events, the EFF instituted an application in this Court seeking declaratory relief. This included an order declaring that the President had failed to fulfil a constitutional obligation; a declaration that the Public Protector's remedial action had a legally binding effect on the President; an order directing the President to comply with the remedial action and a declaration to the effect that the Assembly too had breached a constitutional obligation. It was contended that the Assembly failed to hold the President to account as it was obliged by section 42(3) of the Constitution. It will be recalled that this provision obliges the Assembly to, among other duties, scrutinise and oversee executive action.

[150] Delivering judgment in *EFF 1*, this Court held with regard to the Assembly:

> "On a proper construction of its constitutional obligations, the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The exception would be where the findings and remedial action are challenged and set aside by a court, which was of course not done in this case. Like the President, the National Assembly may, relying for example

> on the High Court decision in *DA v SABC*, have been genuinely led to believe that it was entitled to second-guess the remedial action through its resolution absolving the President of liability. But, that still does not affect the unlawfulness of its preferred course of action.
>
> Second-guessing the findings and remedial action does not lie in the mere fact of the exculpatory reports of the Minister of Police and the last Ad Hoc Committee. In principle, there may have been nothing wrong with those 'parallel' processes. But, there was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and 'remedial action'. This, the rule of law is dead against. It is another way of taking the law into one's hands and thus constitutes self-help.
>
> By passing that resolution the National Assembly effectively flouted its obligations. Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect or has been set aside through a proper judicial process. The ineluctable conclusion is therefore, that the National Assembly's resolution based on the Minister's findings exonerating the President from liability is inconsistent with the Constitution and unlawful."[53]

[151] It is apparent from this statement that the Court concluded that the Assembly in exonerating the President from liability had acted in a manner that was unlawful and inconsistent with the Constitution. This was a serious indictment on the Assembly which, as set out above, plays a pivotal role in our democratic order. Without it playing its role properly, the objective of government by the people may not be realised.

[152] For his part, the President conceded on the eve of the hearing of that case that the Public Protector's remedial action was binding and submitted to the Court a draft order that was consistent with the Public Protector's remedial action.[54] The Court went on to hold:

[53] *EFF 1* above n 2 at paras 97-9.

[54] Id at para 100.

> "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. Consistent with this constitutional injunction, an order will thus be made that the President's failure to comply with the remedial action taken against him by the Public Protector is inconsistent with his obligations to uphold, defend and respect the Constitution as the supreme law of the Republic; to comply with the remedial action taken by the Public Protector; and the duty to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.
>
> Similarly, the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President. And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action."[55]

[153] In the result the Court issued an order in these terms:

> "4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid.
>
> . . .
>
> 10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside."[56]

[154] The complaint in the current proceedings is that the Assembly has failed to hold the President to account in terms of section 89(1) of the Constitution. This complaint was formulated in these words:

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[55] Id at paras 103-4.

[56] Id at para 105. This order included nine further paragraphs.

> "Some six months after the Constitutional Court delivered its judgment, the National Assembly remains silent. The President has not been held to account. In particular, he has not been asked to explain his violations of the Constitution, which are self-evidently of a serious nature. He has also not been taken to task in relation to the statements he made to Parliament before the judgment of the Constitutional Court where he sought to falsely justify himself by misrepresenting the findings and report of the Public Protector and by the inaccurate portrayal of the role played by the state in the funding of the upgrades to his home."

[155] In elaboration of this claim it was asserted:

> "The applicants submit that there is a duty imposed on Parliament by the various sections of the Constitution mentioned in the notice of application to scrutinise the conduct of the President and to require him to account for his well-established violations of the Constitution. . . . The National Assembly is under a duty to consider the numerous violations by the President and in particular to take a view as to the seriousness of the violations by the President and whether any sanction is necessary.
>
> The President also violated the ethical codes of Parliament. This alone constitutes serious misconduct and a violation of the law, both impeachable offences."

[156] With regard to the alleged failure by the Assembly to put in place mechanisms to hold the President accountable, the applicants aver:

> "Section 55(2) requires the National Assembly to provide mechanisms for accountability and oversight. Despite having a host of potential mechanisms available, the Speaker and the National Assembly have failed to provide any. For example, section 89(1) of the Constitution empowers the National Assembly to remove the President on the grounds of a serious violation of the Constitution, or for serious misconduct. Doing so requires a two thirds majority of the National Assembly, but it also requires a prior assessment of the severity of the President's misconduct."

[157] The DA, which was allowed to intervene as a party in these proceedings, pleaded the second issue thus:

> “9 The essence of the DA’s submissions is that the National Assembly has not only breached its constitutional duties by *failing to launch* impeachment investigations, but it has also breached its constitutional duties by *failing to create effective mechanisms* to allow members of the National Assembly to initiate impeachment investigations and hearings.
>
> 9.1 As the applicants have correctly submitted, impeachment processes under section 89 of the Constitution necessarily require an investigation, to determine whether there are grounds for impeachment, and a fair hearing to allow the President to respond to charges.
>
> 9.2 At present, the National Assembly has failed to create any legislation or rules to govern the section 89 impeachment process, including mechanisms to initiate impeachment investigations and hearings.
>
> 9.3 Impeachment proceedings are inherently urgent and controversial matters that must be commenced and completed with all appropriate haste. In the absence of clear impeachment procedures, set out in advance of actual cases, impeachment proceedings are likely to be delayed or stymied by disagreements within the National Assembly over the proper procedure for conducting impeachment investigations and hearings. Impeachment procedures devised in the heat of the moment are also unlikely to be fair or objective.”

[158] In the supplementary answering affidavit deposed to by the Acting Speaker, the allegation that the Assembly has not put in place “legislation or rules to govern the section 89 impeachment powers, including mechanisms to initiate impeachment investigations and hearings” was not denied. Instead the Acting Speaker averred:

> “It is sufficient for [the Assembly] to ensure that it has mechanisms in place – in its Rules and Orders – to enable the fulfilment of the oversight function in section 89(1) of the Constitution, bearing in mind also that there are other oversight mechanisms other than section 89(1) of the Constitution. The Constitution does not require that a step to remove the President under section 89(1) of the Constitution must succeed in order for [the Assembly] to have fulfilled its constitutional obligations.”

[159] The Acting Speaker asserted that an impeachment process may be instituted in terms of rule 85.[57] This rule prohibits members of the Assembly from directly attacking the integrity and dignity of other members during debates in the National Assembly. It allows for improper and unethical conduct on the part of members to be raised by way of a substantive motion. This prohibition also protects the President and members of Cabinet who are not members of the Assembly. The Acting Speaker went on to state:

> "Since a motion in terms of section 89(1) would likely bring wrong-doing on the part of the President to the attention of [the Assembly], it would need to comply with Rule 85(2). To my knowledge, this is understood by all the political parties in [the Assembly], including those represented in these proceedings."

[160] However, it is apparent that rule 85(2) does not regulate the impeachment process. The rule was designed to govern improper and unethical behaviour by members of the Assembly. Although it also shields the President and members of the Cabinet from verbal abuse during debates in the assembly, the objective of the rule is not the serious misconduct envisaged in section 89(1) of the Constitution. The rule does not refer at all to the other grounds listed in that section, upon which the President may be impeached.

[161] What is more, under the rule 85 procedure alluded to by the Acting Speaker, a motion calling for impeachment of the President would be subject to the generosity of the Speaker. This is how the Acting Speaker put this issue:

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[57] Rule 85 provides:

> "(1) No member may impute improper motives to any other member, or cast personal reflections upon a member's integrity or dignity, or verbally abuse a member in any other way.
>
> (2) A member who wishes to bring any improper or unethical conduct on the part of another member to the attention of the House, may do so only by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge that in the opinion of the Speaker prima facie warrants consideration by the House.
>
> (3) Subrules (1) and (2) apply also to reflections upon the President and Ministers and Deputy Ministers who are not members of the House."

> "Should a member of [the Assembly] table a substantive motion calling for the removal of the President and the Speaker is of the view that the allegations warrant the attention of [the Assembly], she must refer it to [the Assembly] for consideration. She has done so in all past instances where the President's removal was sought. There is no basis to suggest that she may not do so in future."

[162] What emerges from this statement by the Acting Speaker is the fact that motions for removal of the President from office were addressed in terms of rule 85. What is surprising though is the absence of an explanation for the Speaker's response to the EFF request, which did not mention this process. It will be recalled that the Speaker rejected the request on the ground that the rules do not provide for it. She did not point out to the EFF that they needed to submit a substantive motion in terms of rule 85. Of course, one accepts that technically the Speaker's response was correct because what was requested by the EFF fell outside what was provided for in the rules. But, as an impartial officer who had the duty to "ensure that the National Assembly provides a national forum for public consideration of issues . . . and scrutinises and oversees executive action",[58] the Speaker ought to have directed the EFF to follow rule 85 in terms of which such matters were dealt with in the past.

[163] In addition to the rule 85 process, the Acting Speaker pointed out that the impeachment process could be dealt with in terms of rule 253 which provides for the

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[58] Rule 26 provides:

> "(1) In exercising the authority of the Speaker, as provided for in the Constitution and legislation and the rules of Parliament, the Speaker must—
>
> (a) ensure that the National Assembly provides a national forum for public consideration of issues, passes legislation and scrutinises and oversees executive action in accordance with Section 42(3) of the Constitution;
>
> . . .
>
> (3) The Speaker is responsible for the strict observance of the rules of the House and must decide questions of order and practice in the House, such a ruling being final and binding as provided for in Rule 92.
>
> (4) The Speaker must act fairly and impartially and apply the rules with due regard to ensuring the participation of members of all parties in a manner consistent with democracy."

establishment of ad hoc Committees. However, the Acting Speaker's affidavit on this point reveals a troubling confusion in the application of the rules. He said:

> "Significantly, the initiator of the removal process may either request that the matter be referred to an *ad hoc* committee for investigation or may even recommend that it goes straight to [the Assembly] for debate. This is consistent with the Constitution since it is [the Assembly], acting collectively, that has the power to remove the President under section 89(1) of the Constitution, and the *ad hoc* committee is to assist it. Its composition and workings will be controlled by [the Assembly] in terms of [the Assembly's Rules] and Orders.
>
> Should [the Assembly] agree that the matter be considered by a committee, it may establish an *ad hoc* committee or refer the matter to an existing committee."

[164] It is not clear whether on past occasions when the Assembly dealt with impeachment processes in terms of rule 85, any investigation contemplated in section 89(1) of the Constitution was ever undertaken. It seems, on the Acting Speaker's opinion, that such an investigation depends on the choice of the person who initiates the motion. The initiator "may request that the matter be referred to an ad hoc Committee for investigation or may even recommend that it goes straight to [the Assembly] for debate". Where a request for establishing an ad hoc Committee is made, the Assembly may still, according to the Acting Speaker, "refer the matter to an existing committee". But he does not tell us which of the existing committees is mandated to consider a request for impeachment. Nor does he explain why an ad hoc Committee may be established in a case where there is an existing committee with authority to consider an impeachment request.

[165] In illustrating his appreciation of what section 89 requires, the Acting Speaker concluded by stating:

> "Given that section 89(1)(a) and (b) of the Constitution uses the word '*serious*', the *ad hoc* committee's recommendation to [the Assembly] must take into account whether the breach of section 89(1)(a) or (b), if any, was serious enough to warrant the President's removal from office."

[166] But the Acting Speaker's affidavit displays non-compliance with the investigative process referred to above, except in April 2014 when the Assembly established an ad hoc Committee at the behest of the then Leader of the Opposition who initiated proceedings for the removal of the President from office in terms of section 89(1) of the Constitution. However, that committee ceased to exist before concluding its task, by reason of the Assembly's term coming to an end.

[167] Another motion in terms of section 89(1) was tabled in the Assembly by the Leader of the Opposition on 4 August 2015. The motion sought the removal of the President from office on the ground that he "failed to have President Omar al-Bashir detained when he visited the country". No ad hoc Committee was established to undertake an investigation on that occasion. Nor was the matter referred to an existing committee. Instead, the Assembly permitted a debate to take place that was followed by voting. Although it is not clear from the Acting Speaker's affidavit, it may well be that this motion was processed in terms of rule 85(2) which he had said was applied in the past.

[168] The third motion purportedly in terms of section 89(1) and calling for the President's removal was made by the Leader of the Opposition on 31 March 2016. This motion made reference to judgments of the Supreme Court of Appeal and this Court in *EFF 1*,[59] and the Public Protector's report on the upgrades at the President's residence in Nkandla. A debate on the motion was held on 5 April 2016 and that debate was followed by a vote of 235 against the motion and 143 in favour. Again, we are not told why the matter was not referred first to an ad hoc or existing committee. We can only surmise that it too was dealt with in terms of rule 85(2).

[169] It is now convenient to consider the two issues that arise here. I propose to begin with whether the Assembly was obliged to put in place mechanisms and procedures

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[59] *EFF 1* above n [2] at para 7.

regulating an impeachment process. For the Assembly may be held to be in breach if, in the first place, it was under a duty to do so.

Duty to put mechanisms and procedures in place

[170] The determination of this issue requires us to interpret section 89 of the Constitution. This is so because section 57 empowers the Assembly to make rules and orders, regulating the general or ordinary business.[60] It is in terms of those rules and orders that the members' right to freedom of speech, guaranteed by section 58, may be limited. The Assembly's rules must govern its normal business "with due regard to representative and participatory democracy, accountability, transparency and public involvement".[61] Those general rules and orders must provide for the establishment, composition, power, functions, procedures and duration of committees. The rules must also secure participation of minority parties in the Assembly's proceedings.[62]

[171] As mentioned, in the current form the rules of the Assembly do not cater specifically for impeachment proceedings envisaged in section 89 of the Constitution.

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[60] Section 57 of the Constitution 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 Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
>
> (c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
>
> (d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition."

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

[62] Section 57(2) of the Constitution.

The question whether this provision requires its own special procedure depends mainly on the interpretation assigned to it.

Meaning of section 89

[172] Section 89 provides:

> "(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—
>
> (a) a serious violation of the Constitution or the law;
>
> (b) serious misconduct; or
>
> (c) inability to perform the functions of office.
>
> (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office."

[173] This provision empowers the Assembly and the Assembly alone to remove the President from office. The drafters of our Constitution were alive to the fact that the need to remove a sitting President from office may arise. Hence section 89 allocates that power to the Assembly, presumably because it is the Assembly that elects, from among its members, the President. It is only fitting that the same body should have the power to remove from office the person it had elected.

[174] But once the President is elected, he or she becomes the leader of the entire nation. He or she ceases to be a member of the Assembly and is obliged to assume office within five days from the date of election.[63] Thus in *EFF 1* the Chief Justice described the President in these terms:

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[63] Section 87 of the Constitution provides:

> "When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2."

> "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."[64]

[175] Consistent with the pivotal role played by the President in our democratic order and bearing in mind the obligation imposed singularly on him or her to uphold, defend and respect the Constitution as our supreme law, the drafters of the Constitution sought to limit the power given to the Assembly to impeach and remove a President from office. Although the Constitution does not use the word "impeach", it is apparent that what section 89(1) authorises constitutes impeachment in other jurisdictions. This was acknowledged by this Court in *Mazibuko.*[65]

[176] The power to remove the President from office is available to the Assembly only if one of the listed grounds is established. One of those grounds is a serious violation of the Constitution or the ordinary law. What qualifies this ground is the word serious.

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[64] *EFF 1* above n [2] at para 20.

[65] *Mazibuko* above n 22 at para 39.

The second ground is serious misconduct and the third is inability to perform the functions of the office. None of these grounds is defined in the Constitution.

[177] It is evident that the drafters left the details relating to these grounds to the Assembly to spell out. But the drafters could not have contemplated that members of the 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.

[178] And since the determination of these matters falls within the exclusive jurisdiction of the 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. The Acting Speaker describes the first two grounds as exhibiting wrong-doing on the part of the President. I could not agree more. This is evident from the language of section 89(2) which stipulates that a President removed from office on any of these two grounds may lose benefits. Once more, it is left to the Assembly to determine circumstances under which the President removed from office on one of those grounds may forfeit benefits.

[179] For the impeachment process to commence, the Assembly must have determined that one of the listed grounds exists. This is so because those grounds constitute conditions for the President's removal. A removal of the President where none of those grounds is established would not be a removal contemplated in section 89(1). Equally, a process for removal of the President where none of those grounds exists would amount to a process not authorised by the section.

[180] Therefore, any process for removing the President from office must be preceded by a preliminary enquiry, during which the Assembly determines that a listed ground exists. The form which this preliminary enquiry may take depends entirely upon the Assembly. It may be an investigation or some other form of an inquiry. It is also up to the Assembly to decide whether the President must be afforded a hearing at the preliminary stage.

[181] Since the power to remove is institutional, the Assembly must decide and facilitate the initiation of the preliminary stage. It may well be that each member of the Assembly has a right to initiate the preliminary process. Even so, the Assembly must facilitate steps to be taken in this regard and a process to be followed. Not only as 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.

[182] Without rules defining the entire process, it is impossible to implement section 89. The present facts, as set out in detail in the Acting Speaker's affidavit, confirm this point. Some of those facts were referred to earlier. It would appear that sometimes the Assembly treated an impeachment complaint as a motion to be processed in terms of rule 85(2). On another occasion an ad hoc Committee was established but ceased to exist before completing its task. But notably, the Acting Speaker does not outline the procedure followed by that committee, in carrying out its mandate. However, the Acting Speaker accepts that if the ad hoc Committee route is followed, there may be an investigation.

[183] On this point the Acting Speaker said:

> "The [Assembly's] Rules currently enable proceedings under section 89(1) to be initiated when a member of the [Assembly] tables a substantive motion requiring such an initiation of the proceedings in which there may be a request for the establishment of an *ad hoc* committee *inter alia* to gather relevant facts or to conduct an inquiry or

> an investigation prior to the adoption of a resolution by the [Assembly] as envisaged in section 89(1) of the Constitution."

[184] The proposition that the current rules regulate the section 89(1) proceedings was based on the Acting Speaker's mistaken belief that rule 85(2) applies. In this regard he said: "[s]ince a motion in terms of section 89(1) would likely bring wrong-doing on the part of the President to the execution of the [Assembly], it would need to comply with Rule 85(2)." He also referred to rules 123, 124 and 126, which govern motions generally. I refer to these facts not for the purpose of interpreting section 89 but in order to show that the present rules are not suitable for regulating a process required by section 89(1).

[185] The process followed in construing the section did not take us to uncharted waters. A similar approach was followed in *Mazibuko*.[66] In that matter, this Court was confronted with the question whether section 102 of the Constitution imposed an obligation on the Assembly to make rules that regulate specifically motions of no confidence envisaged in that provision. The section does not expressly impose the obligation in question. It merely states that if the Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and members of Cabinet must resign.

[186] Writing for the majority in *Mazibuko*, Moseneke DCJ held:

> "The Constitution requires that the Assembly must have a procedure or process which would permit its members to deliberate and vote on a motion of no confidence in the President. In order for members of the Assembly to vote on a motion, the rules of the Assembly must permit a motion of no confidence in the President to be formulated, brought to the notice of members of the Assembly, tabled for discussion and voted for in the Assembly. The voting on a motion is done by members of the Assembly collectively. However, section 102(2) is silent on the source or origin of the motion of no confidence. Given the text and purpose of the provision, in our judgment, any

[66] Id at paras 42-7.

> member of the Assembly has the right to formulate and request to have a motion of no confidence serve before and voted for in the Assembly."[67]

Ad hoc Committee

[187] In opposing the claim that the Assembly failed to put in place mechanisms for deciding impeachment proceedings, the Acting Speaker also called in aid rule 253 which governs the establishment of ad hoc Committees. He said a member of the Assembly may request that an impeachment matter be referred to an ad hoc Committee established in terms of the rule. This rule, he continued, requires the Assembly to "specify the task assigned to the committee, which may include conducting an inquiry or investigation and reporting or recommending to the [Assembly] on steps to be taken pursuant to its findings". He then concluded:

> "Given that section 89(1)(a) and (b) of the Constitution uses the word 'serious', the ad hoc committee's recommendation to the [Assembly] must take into account whether the breach of section 89(1)(a) or (b), if any, was serious enough to warrant the President's removal from office."

[188] Significantly, the Acting Speaker does not tell us the meaning assigned to "serious" by the Assembly. Nor does he say what would happen if each member of the ad hoc Committee attaches a meaning to that crucial word which is different from the interpretation of other members. All that he says is that the committee's recommendation will have to state whether the breach is serious enough to warrant the President's removal.

[189] On this approach, it is the initiator of the process who determines whether the President has committed a serious misconduct or a serious violation of the Constitution or the law. If the initiator holds that opinion, he or she may request that an ad hoc Committee be established to investigate and recommend to the Assembly that the

[67] Id at para 41.

President be removed from office. This process lacks a sifting mechanism which would determine whether there is a case for the President to answer.

[190] But over and above that, the ad hoc Committee process does not have a set procedure for the committee to follow when carrying out its task. More importantly, in terms of rule 255 a question before an ad hoc Committee is decided by "agreement among the majority of the members present" unless the resolution establishing the committee provides otherwise.[68]

[191] The other shortcoming of the ad hoc Committee system which appears from the Acting Speaker's affidavit is that in committees, including ad hoc Committees, "parties are entitled to be represented in substantially the same proportion as the proportion in which they are represented in the Assembly, except where the rules prescribe the composition of the committee or the number of members in the committee does not allow for all parties to be represented."

[192] 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.[69] If more than one party is represented, the representation mirrors their representation in the Assembly. The majority party would have majority representation. This raises the risk of an impeachment complaint not reaching the 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

[68] Rule 255 provides:

> "Unless a resolution establishing an ad hoc committee provides otherwise, a question before an ad hoc committee is decided when a quorum in terms of Rule 162(2) is present and there is agreement among the majority of the members present."

[69] Rule 254(1) provides:

> "The Assembly resolution establishing an ad hoc committee must either specify the number of members to be appointed or the names of the members who are appointed."

Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader. In recognition of the point that impeachment proceedings are partisan, the Acting Speaker averred:

> "The initiation of such proceedings is inherently partisan, as the aim from the outset is the removal of the President, who will almost always be a leader of a party represented in [the Assembly]."

[193] In the context of section 102 of the Constitution, this Court in *Mazibuko* rejected the proposition that the tabling of motions of no confidence envisaged in that section, with only the support of a majority decision in a committee, was consistent with the Constitution. This Court said:

> "A majority decision of the programme committee on the scheduling of a motion of no confidence could frustrate the vindication of the right envisaged in section 102(2). This would be so because, again as in the case of consensus requirement, it would be within the discretion and generosity of the majority within the programme committee whether a motion of no confidence in the President would ever see the light of the day."[70]

[194] 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. In *Mazibuko* this Court went further to declare:

> "To the extent that the rules regulating the business of the programme do not protect or advance or may frustrate the rights of the applicant and other members of the assembly in relation to the scheduling, debating and voting on a motion of no confidence as contemplated in section 102(2), they are inconsistent with section 102(2) and invalid to that extent."[71]

[195] Here, the applicants did not seek that the rules be declared invalid to the extent that they fail to provide for regulation of impeachment proceedings. But the similarities

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[70] *Mazibuko* above n [22] at para 62.

[71] Id at para 61.

between *Mazibuko* and this matter are remarkable. That said, however, section 102(2) with which the Court was concerned in *Mazibuko* does not require proof of any conditions before a motion of no confidence is tabled, debated and voted on. Here grounds for impeachment must be established before the motion to remove the President from office is debated and voted on.

[196] In the result, I conclude that section 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section. And, I hold that the Assembly has in breach of section 89(1) of the Constitution failed to make rules regulating the impeachment process envisaged in that section.

Failure to hold the President accountable

[197] The complaint pertaining to this claim is that after this Court had delivered its judgment in *EFF 1* on 31 March 2016, the Assembly failed to take action against the President in terms of section 89(1) of the Constitution. It will be recalled that in that matter this Court held that the President had violated the Constitution by failing to uphold, defend and respect it in two respects. First, by disregarding the remedial action taken against him by the Public Protector. Second, by failing "to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness" by complying with her remedial action."[72]

[198] The applicants contend that these breaches constitute a serious violation of the Constitution. Furthermore, they assert that in her report the Public Protector had found that the President had breached provisions of the Executive Members' Ethics Act and the Executive Ethics code as well as section 96 of the Constitution. They add to this an assertion that the President has committed serious misconduct envisaged in section 89(1) of the Constitution. They conclude by stating that the Assembly has done nothing to hold the President to account.

[72] *EFF 1* above n 2 at para 83.

[199] While it is not accurate to say that the Assembly did nothing to hold the President accountable since the delivery of this Court's judgment in *EFF 1*, the crucial question is whether appropriate action has been taken against the President by the Assembly, the only institution mandated to do so. It is true, as pointed out in the first judgment, that questions were answered by the President in the Assembly and that in November 2016, a motion of no confidence in terms of section 102(2) of the Constitution was tabled against the President in the Assembly. That motion was deliberated and voted upon.

[200] But it is self-evident that both these steps were not actions taken in terms of section 89(1). That section does not require the question and answer sessions. Nor does it authorise the tabling of a motion of no confidence against the President. Such a motion may be tabled under section 102 of the Constitution and for which the Assembly's rules provide special procedures.

[201] That leaves out the motion for the President's removal which was tabled on 31 March 2016 by the Leader of the Opposition. This motion was purportedly made in terms of section 89(1) of the Constitution. It was based on the judgment of this Court in *EFF 1* and alleged wrongdoing on the part of the President. It sought his removal from office.

[202] As the Acting Speaker points out in his affidavit, the motion was debated and voted on by the members of the Assembly on 5 April 2016. The applicants participated in the debate and supported the motion. The Acting Speaker, rightly so, criticises the applicants for now claiming that the motion was premature, when there was no demur on their part on 5 April 2016.

[203] 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 Assembly to remove the

President from office, even where one or more of the listed grounds are established. On the contrary, the Assembly retains a discretionary power to remove the President.

[204] But the process envisaged in section 89(1) involves necessarily an antecedent determination by the 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.

[205] The Assembly did not approach the processing of the motion on the footing that the President had indeed committed a serious violation of the Constitution. This was a necessary condition for commencing a section 89 process. Without accepting that one of the listed grounds existed, the Assembly could not authorise the commencement of a process, which could result in the removal of the President from office. Moreover, it does not appear from the papers that the President was afforded the opportunity to defend himself. Without knowing whether the Assembly holds the view that the President has committed a serious violation of the Constitution, it would be difficult for him to mount an effective defence. The procedure followed by the Assembly here does not accord with section 89.

[206] If that motion had succeeded, it would not have constituted impeachment and removal of the President, as contemplated in section 89(1). Instead, it would have been an unconstitutional removal of the President from office and would have been liable to be set aside on review.

[207] The Acting Speaker agrees with the applicants that a removal of the President must be preceded by a finding by the Assembly that the President has committed a serious misconduct or a serious violation of the Constitution or the law. This view of the parties accords with the language and requirements of section 89(1). If the President is removed in terms of section 89(1)(a) or (b), he or she may forfeit benefits of the office. That is why the Acting Speaker describes those provisions as requiring proof of wrongdoing on the part of the President.

[208] Therefore, I conclude that the Assembly has failed to hold the President to account following delivery of this Court's judgment, as was required by section 89(1).

Remedy

[209] Having held that the 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.[73] In *EFF 1* this Court reaffirmed:

> "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."[74]

[210] However, this Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable. In *Hoërskool Ermelo* the Court said about a just and equitable remedy:

> "The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it 'may make any

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[73] Section 172(1) of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (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."

[74] *EFF 1* above n [2] at para 103.

> order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute."[75]

[211] The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution. In *Hoërskool Ermelo* Moseneke DCJ declared:

> "A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."[76]

[212] Here it is just and equitable to direct the Assembly to perform its constitutional obligations. With regard to putting in place rules that govern impeachment proceedings under section 89(1), the Acting Speaker tells us that the process of making those rules is at an advanced stage. Research was done on the matter and draft rules have been produced. The process awaits inputs from political parties represented in the Assembly. The matter was referred to parties in May 2016 but to date none of them have responded. From this lack of response, he deduces that it must be accepted that parties prefer that rule 85 must apply to impeachment proceedings.

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[75] *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 96.

[76] Id at para 97.

[213] It may be mentioned that the inference drawn by the Acting Speaker is not the most plausible to be deduced from the parties' failure to respond. But even if it was, the Constitution does not impose the obligation to make rules for impeachment upon political parties. That duty falls squarely on the shoulders of the Assembly. It is an institutional obligation which may be fulfilled by the Assembly alone.

[214] Moreover, I have already demonstrated that rule 85 is inapplicable to the section 89(1) process. So, even if it was the preference of political parties, this would not relieve the Assembly from the obligation imposed by section 89(1). Therefore, it will be just and equitable to direct the Assembly to fulfil the relevant obligations within a fixed period of time, so as to act in a manner that is consistent with the Constitution.

[215] The special circumstances of this case demand that the Assembly be directed to fulfil its constitutional obligations without delay. Like motions of no confidence brought in terms of section 102(2) of the Constitution, an impeachment complaint must be accorded priority over other normal business of the Assembly. Once lodged the Assembly must take steps to ensure that it is addressed without delay. It is the special office the President occupies which warrants that these matters must be promptly addressed and resolved so that the President may continue to perform his or her duties without a dark cloud hanging over him or her.

[216] In any event the proposed order does not usurp the Assembly's powers. It merely directs that the Assembly must exercise its powers without delay.

[217] The Constitution demands of all those on whom it imposes obligations, to fulfil them diligently and without delay.[77] It is the duty of this Court to ensure that this injunction is followed. An order issued to achieve this purpose therefore cannot be

[77] Section 237 of the Constitution provides:

> "All constitutional obligations must be performed diligently and without delay."

described as trenching upon the separation of powers. In *Doctors for Life* this Court elaborated on its responsibility in relation to making certain that Parliament fulfils its obligations:

> "Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations".[78]

Further judgments

[218] I have read the third and fourth judgments here. I agree with the fourth and disagree with the third judgment. The divergence of views in this matter flows solely from different interpretations assigned to section 89 of the Constitution. This is not novel. It happens frequently in courts presided over by panels of Judges. But what is unprecedented is the suggestion that the construction of the section embraced by the majority here constitutes "a textbook case of judicial overreach." The suggestion is misplaced and unfortunate.

[219] Conceptually it is difficult to appreciate how the interpretation and application of a provision in the Constitution by a court may amount to judicial overreach. The Constitution itself mandates courts to interpret and enforce its provisions. The discharge of this judicial function cannot amount to overreach whether one agrees or disagrees with a judgment that construes and applies the Constitution in a particular way. A disagreement with a particular interpretation of the Constitution cannot sustain the suggestion in question.

[220] What this judgment does is to interpret section 89 of the Constitution and apply it to the present facts. Based on the meaning assigned to this provision, I conclude that

[78] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 38.

the Assembly has failed to fulfil two obligations arising from the provision. To remedy this the Assembly must fulfil those obligations. The order proposed does not involve the exercise by this Court of the Assembly's powers. On the contrary, it requires the Assembly itself to exercise those powers and perform its constitutional functions without delay. This cannot be and is not a breach of the principle of separation of powers but consists in no more than the Court fulfilling its constitutionally assigned duty.

Costs

[221] The applicants and the intervening parties have succeeded and consequently the respondents must pay the costs.

Order

[222] In the result the following order is made:

1. This Court has exclusive jurisdiction to hear the application.
2. The 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.
3. The National Assembly must comply with section 237 of the Constitution and make rules referred to in paragraph 2 without delay.
4. 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.
5. The National Assembly must comply with section 237 of the Constitution and fulfil the obligation referred to in paragraph 4, without delay.
6. The National Assembly must pay costs of the application, including the costs of two counsel where applicable.

MOGOENG CJ:

Why this concurrence

[223] I have read the first and the second judgments and concur in the first. The second judgment is a textbook case of judicial overreach - a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament. The extraordinary nature and gravity of this assertion demands that substance be provided to undergird it, particularly because the matter is polycentric in nature and somewhat controversial.

[224] It is at odds with the dictates of separation of powers and context-sensitive realities to prescribe to the National Assembly to always hold an inquiry, and to never rely only on readily available documented or recorded evidential material, to determine the existence of a ground of impeachment. It is just as insensitive to this doctrine to hold that impeachment grounds must always be determined by the Assembly before the debate and voting on a motion of impeachment could take place. And it is even more so when the consequential order then directs the Assembly to make rules that would effectively regulate the process as so prescribed. This, in circumstances where that conclusion is resoundingly negated by the deposition of almost all applicants to the effect that the seriousness of the constitutional violation in relation to Nkandla is "self-evident" or "well-established". Without any inquiry these parties represented in the Assembly were able to determine the existence of an impeachment ground. Yet the second judgment in effect says that it is constitutionally impermissible for them to do so.

[225] The second judgment's inability or failure to confront squarely, the issues pertinently raised by the first and this judgments in relation to the very essence of an inquiry and its alleged indispensability is, in view of the centrality of the inquiry to the declaratory order, most concerning. For, the basis for any critical move by a court must be capable of easy clarification. An inquiry has a clear purpose to serve. It is to unearth the unknown or ascertain the unclear. When all the information or evidence necessary

to resolve any issue is already well-established or available or well-known to decision-makers, embarking on an investigation or inquiry, just because the evidential material is documented or recorded, would be an absurdity or a sheer waste of resources. What follows exposes the illogicality of effectively prescribing an inquiry to the Assembly as the only mechanism that can help determine the existence of a ground of impeachment.

[226] There is a striking similarity between the determination of the existence of a ground for impeachment, and of a ground relied on for a desired court outcome. In High Court opposed motion proceedings, parties file affidavits and annex supporting documents to help the court resolve even highly complex legal or constitutional issues. Similarly, this Court exercising its direct access or exclusive jurisdiction, has routinely resolved very intricate constitutional issues. Barring negligibly few remittals to the lower courts, this mechanism has been most effectively and impressively employed without the need to resort to any inquiry or investigation before argument in court (debate) and the decision (voting). And at least a century of litigation history in this country has amply demonstrated that grounds on which decisions or orders are based can be properly established either through a trial or motion proceedings.

[227] Courts are themselves therefore not required to always determine grounds for the order sought or resolve complex constitutional issues only through a process of calling witnesses to testify and have their versions tested. And they do not ordinarily have to predetermine the existence of any ground before argument (debate) and a decision (voting) on the issue presented for determination, except where a legally permissible preliminary point is taken. For this reason, if people choose to have their case resolved on the papers, as they are constitutionally allowed to, their case would stand or fall on those papers.

[228] By parity of reasoning, it must be constitutionally permissible and practicable for another arm of the State to properly determine the existence of a ground of impeachment either through an inquiry (trial) or sheer reliance on the abundance of documented or otherwise recorded evidential material (motion proceedings equivalent)

readily available to it. A determination of the existence of a ground on the papers, which does not necessarily or always have to be made before the commencement of the debate, would ordinarily include the President's written or recorded defence (side of the story), and more if she wishes to add to what she might have already said. To undertake this task successfully, the Assembly need not import or have imposed on it rules or procedures similar to those followed by the courts. And comity among the arms of the State demands that it be reasonably assumed that Members of the Assembly are right-thinking or responsible and would therefore not, by two-thirds majority, pass a motion to impeach a President when no grounds for impeachment exist.

[229] There is no formula that is peculiar to the determination of the seriousness of a violation of the Constitution or the law. A conclusion that something is serious, be it an accident, mental problem, crime or threats to judicial independence, as is the case with the existence of any ground, flows from an assessment of facts or information, however presented. To arrive at that conclusion correctly, does not only become possible when people had been called to present oral evidence. Otherwise even appeal courts would always require some sort of an inquiry, before argument, to assess whether the existence of a ground or "seriousness" has been properly established, whenever it is a requirement. A record of what happened would, on this inquiry is-always-a-must reasoning, never be enough.

[230] Additionally, parties always leave it to the real decision-maker to determine the existence of a ground for the relief or outcome sought. Although they have the right to, they need not even express an opinion on whether grounds have been established but are only really required to provide the critical evidential material orally or in writing, as the case may be, before argument and judgment. This extends to an impeachment process. What the Assembly really needs is not necessarily the opinion of the one(s) moving for impeachment and the one sought to be impeached. It is relevant material on which it can base its own determination of the existence or otherwise of a ground.

[231] The need to afford the President a fair hearing can never serve as the reason or excuse for excluding the possibility of documentary or recorded evidential material ever being sufficient to help the Assembly determine the existence of any ground of impeachment or the seriousness of a constitutional breach if it be the only issue to determine. It bears repetition that based on what this and other Courts have done over many years in motion proceedings, the President's right to be heard in an impeachment process may at times be fully exercised by presenting sworn affidavits or electronically recorded statements or written representations. That right does not always require an enquiry or oral presentation to find full expression.

[232] In any event, the mainstay of the declaratory order in the second judgment is not the need to afford the President the opportunity to be heard. It is to ensure that there is an effective operationalising mechanism that would facilitate the Assembly's fulfilment of its obligation to hold the President accountable via the impeachment avenue. And that mechanism is, according to the second judgment: (i) One that ensures that the debate and voting on impeachment are always preceded by an inquiry; (ii) conducted by a structure or committee whose size and party representation are provided for in the rules; (iii) rules that guarantee that the majority party in the Assembly would not use its numerical strength to frustrate the tabling and debating of impeachment motions in order to shield the President who is their leader; and (iv) the purpose or mandate of the inquiry or committee, respectively, should always be to predetermine the existence of a constitutional ground to be relied on for impeachment before the merits or demerits of impeachment could be debated.

[233] The Assembly does at least have a choice between an inquiry and an appropriately adapted equivalent of motion proceedings, most of which are disposed of by this Court without a hearing. A recognition of the existence of that choice would obviously militate against the possibility of the order in the second judgment being made. And that order may only be properly made if all the Nkandla material, which includes the President's defence, cannot help the Assembly determine the existence of an impeachment ground – an exercise that this Court may not and has not embarked

upon. A recognition of that choice would thus constrain this Court to leave Members of the Assembly desiring to impeach the President to examine closely, all the documented or otherwise recorded evidential material relating to Nkandla to determine whether a ground exists and whether the President's version is included therein. It is not for this Court to assume that the ground does not exist or that his version is not included and to then view this as the additional ground for the declaratory order.

[234] All of the above and the well-known history of the Nkandla saga, the non-recognition of what to me is an undenied and undeniable possibility of the Assembly sometimes being able to determine a ground of impeachment on the papers or recorded evidential material, together with the order, explain the need for the perspective given in this concurrence. That perspective is more about the futility of holding an inquiry even when all the evidential material necessary for the determination of the existence of a ground for impeachment might be readily available in whatever form. And that material could include the President's defence or side of the story. Meaning, her defence does not always have to be presented orally and at a hearing, and not holding an inquiry does not, without more, justify the conclusion that the President's defence or version is not included.

[235] This Court is the guardian of our constitutional democracy and the final arbiter of all constitutional or legal disputes. It is in terms of our constitutional architecture, a stabilising, tension-dissolving and potentially unifying force – the non-partisan and much-needed voice of reason, particularly when a constitutional crisis looms large or has already set in. Its impartiality must therefore never be open to reasonable doubt. For, its moral authority without which it would cease to enjoy legitimate public confidence and ready compliance with its decisions by all, owes its existence to its predictable and self-evident execution of its mandate without any apparent fear, favour or prejudice. It is after all the embodiment of the legendary Lady Justice – a dispenser of justice who is blind and deaf to images of and reports on the good reputation or notoriety of personalities before her, but never misses any legitimate and relevant legal

or factual point for or against any litigant. As in *Makwanyane*[79], where the death penalty was declared unconstitutional against the well-known wishes of almost every citizen, this Court is required to always display the critical boldness to go against overwhelmingly popular and forceful opinion.

[236] When approached for intervention, this Court's role is to help only those who are constitutionally incapable of helping themselves. And, if the solution has already been provided and it is within the applicants' remit to address their own problem effectively, this Court is duty-bound to let them do it themselves. Mindful of the dictates of separation of powers, this ought to be even more so when help-seekers are the bearers of the primary constitutional responsibility, in another arm of the State, to do what they seek to achieve through an order of this Court. The running of State affairs is a trilateral responsibility – shared by the Executive, the Legislature and the Judiciary. It would be quite concerning if a court were to grant an order that does not serve or advance any practical purpose and in circumstances where that order deals with what has been achieved already or could be improved on if only cooperation were forthcoming from applicants, in a process that is already under way.

[237] None of the Applicants has asked the National Assembly to initiate or has attempted to table a motion for the impeachment of the President. And, none was thwarted from doing so. The only request made was for an inquiry, chaired by three Judges, to be held so that the President could be disciplined by the Assembly for the controversial Nkandla upgrades. In response, the Speaker correctly said that she lacked the power to do so.

[238] That said, stripped of all legal niceties or jargons, this matter is about whether it is constitutionally and practically possible for a Member of the Assembly to table a motion and demonstrate the existence of a ground, for the impeachment of President Zuma for the Nkandla saga through any other process or whether the

[79] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

Assembly necessarily requires some inquisitorial or investigative mechanism to be able to establish the existence of that ground. Moving from the premise that last year's motion for his impeachment for Nkandla was tabled, debated and voted on without any hindrance, the only issue then is the feasibility of determining a ground for impeachment in relation to Nkandla without any inquiry.

[239] The Public Protector's Nkandla report and its findings that were not set aside by any court, this Court's *EFF 1* judgment, all the Assembly's investigations on Nkandla, the open and usually televised question and answer sessions, debates on grounds relied on for motions of no confidence and impeachment ought to be readily available to enable any Member of the Assembly to determine the existence or otherwise of a ground for the President's impeachment for Nkandla. No one has said why this body of documented or recorded evidential material could never be adequate for the purpose of determining the existence of a ground of impeachment or the seriousness of a violation of the Constitution or the law and whether the material contains the President's defence or version. Courts enjoy the flexibility of resolving disputes or issues through either a trial (enquiry) or motion proceedings (a straight impeachment motion without an enquiry) and should thus be the last to prescribe to the Assembly to either retain these logically and realistically available options or abandon any. And for a court to prescribe any would be an imposition of its own preference. That amounts to the usurpation of the Assembly's section 57 powers to determine whether it prefers one or both mechanisms.

[240] Furthermore, this case has four disturbing features. One, the National Assembly admittedly has flexible and effective mechanisms that have been employed to hold State functionaries accountable and that could also be used to hold the President accountable. Two, the Assembly's process of exploring the possibility of either retaining or improving on its impeachment regulatory framework is already at an advanced stage. Three, those without whom that process cannot yield fruit have, instead of participating in the Assembly's rule-drafting sub-Committee to address their concerns, chosen to approach this Court to do what they are able and constitutionally obliged to do. Four,

without even attempting to demonstrate how the existing ad hoc Committee mechanism has failed in practice and why written or well-known evidential material can never be sufficient for the determination of an impeachment ground, the second judgment seeks to prescribe to the Assembly what the key and inherent features of the impeachment process should be. In spite of evidence to the contrary, it also intends to declare that the Assembly has failed to make rules that regulate the impeachment process and has thus failed to hold the President accountable for the Nkandla saga.

The existing mechanism

[241] The President has been held accountable for the Nkandla debacle almost exhaustively. It has just not been possible to remove him from office which would probably explain the relentless efforts being made to find another and even more onerous way to remove him. It cannot therefore objectively and justifiably be said that there is any available constitutional ground on which the President has never been held accountable for the non-security upgrades at his Nkandla private residence. That position would be sustainable only if the constitutionally accepted notion of holding him accountable for Nkandla were nothing short of his actual removal from office.

[242] Where an enquiry or investigation is deemed necessary before debating and voting on a motion, an ad hoc Committee mechanism is available to the National Assembly to hold the President accountable. Confidence in the appropriateness and efficacy of an ad hoc Committee mechanism for the impeachment motion was displayed by the DA, with the implicit concurrence of all other opposition parties involved in this matter. Applicants have expressly acknowledged this reality. In other words, those who, in terms of section 57, bear the constitutional obligation to determine the procedure best-suited to a section 89 process accept that the ad hoc Committee could be an effective mechanism for holding the President accountable for Nkandla. The applicants themselves further say that "despite having a host of potential mechanisms available, the Speaker and the National Assembly have failed to provide any".

[243] An ad hoc Committee is an accountability-enforcing mechanism created and available to be utilised by political parties represented in the National Assembly. And it must be repeated that even the DA does to some extent agree although it prefers a "permanent structure". That would explain why it successfully asked for the establishment of an ad hoc Committee in the President Al-Bashir-related impeachment process.

The second judgment's preferred mechanism

[244] To sustain the order it makes, the second judgment records a dissatisfaction with the suitability of an ad hoc Committee as an impeachment-activating mechanism. It says that an ad hoc Committee creates "the risk of an impeachment complaint not reaching the Assembly. The other reasons advanced for this are that rules in terms of which an ad hoc Committee can be established do not specify the size of, and party representation in, the Committee and the set procedure it is to follow in doing its work. Another criticism is that the ruling party is likely to enjoy majority representation in the ad hoc Committee as in the Assembly and could use it to prevent an impeachment complaint from reaching the Assembly in order to shield the President who is its leader. Reliance is placed on *Mazibuko*[80] where this Court sought to address the real risk of the Assembly's Scheduling Committee thwarting or frustrating the tabling of a motion of no confidence. Not only does the second judgment seem to trivialise the role of the question and answer sessions and the two motions of no confidence, it also treats as good as not having happened, the Nkandla-provoked impeachment that was tabled, debated and voted on in 2016.

[245] This Court would thus prefer a regulatory framework that is more elaborate with specific provision for size, party representation, procedure as well as in-built safeguards against the possibility of the majority party shielding the President against being dealt with properly through an impeachment process. Also central to the second judgment's rationale for the declaratory order is the view it takes of what the role of its ideal and

[80] *Mazibuko* above n 22. .

effective operationalising-mechanism for a section 89 process, must be. It is essentially the following:

> "[178] And since the determination of [the grounds for impeachment] falls within the exclusive jurisdiction of the 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.
>
> [179] For the impeachment process to commence, the Assembly must have determined that one of the listed grounds exists. This is so because those grounds constitute conditions for the President's removal.
>
> [180] Therefore, any process for removing the President from office must be preceded by a preliminary enquiry, during which the Assembly determines that a listed ground exists. The form which this preliminary enquiry may take depends entirely upon the Assembly. It may be an investigation or some other form of an inquiry.
>
> . . . .
>
> [182] Without rules defining the entire process, it is impossible to implement section 89."

[246] What appears in the last two paragraphs is the sum-total of what underscores the inflexible requirement of an enquiry, the total and permanent exclusion of written or recorded evidential material as the sole basis for determining a ground, rules that define the "entire process" and the institutional predetermination of the existence of a ground for impeachment, the declaratory order sought to be made and the rejection of the ad hoc Committee as a suitable mechanism for acting against the President in terms of section 89. And there is nothing more to explain the proposition that "grounds for impeachment must be established before the motion to remove the President from office is debated and voted on", and that "without rules defining the entire process, it is impossible to implement section 89". The second judgment fails to explain why, unlike in motion proceedings and appeals, the allegations relied on for the President's impeachment and his defence can never be properly disposed of on the papers.

[247] The National Assembly must be left to enjoy its constitutionally-guaranteed functional independence to determine its own procedures or processes. The conclusion

that a debate and voting on the impeachment of the President must be preceded by an institutional predetermination of the existence of a ground or what a serious violation of the Constitution or law is, and that section 89 is incapable of proper implementation without rules defining the entire process, lacks the foundation. And so does the assertion that "any process for removing a President from office must be preceded by a preliminary enquiry, during which the Assembly determines that a listed ground exists." If the institution or the Assembly has taken a collective decision that a ground for impeachment exists or a serious violation has been committed, what then would the debate be about? At best for that process, the only remaining leg would be voting.

[248] And, even that enquiry or investigation is unlikely to include all Members of the Assembly. If it is grounded on a legitimate concern about what is in the best interests of the President, then no enquiry and no new rule is necessary. The Assembly's rules are not required to be perfect or water-tight. At most, this Court could in passing or cautiously allude to the possible beneficial effect of factoring the possibility of expressly recognising the President's right to be heard in the section 89 specific rules that the sub-Committee is already considering – not to make a declaratory order. But even then, as in motion proceedings, the right to be heard is not only exercisable orally, but also in writing.

[249] The approach that insists on an enquiry all the time, prohibits any debate or voting unless an institutional predetermination has been made. How then would the enquiring structure or committee's obviously non-binding decision or determination become a collective predetermination by the Assembly? Or is it proposed that the entire Assembly be involved in that preliminary process? Besides, parties represented in the Assembly could, as they are entitled to in any genuine democracy, still disagree on the existence of a ground for impeachment. And this would mean that there would never be any debate or voting on an impeachment unless an agreement has been reached? This is bound to paralyse rather that inject effectiveness in an impeachment process.

[250] There is no justification for the inflexible position adopted to the effect that the grounds for impeachment must always "be established before the motion to remove the President from office is debated and voted on". The existence or otherwise of grounds for impeachment is all about a value judgement that Members of the Assembly are required, best placed and well-able to make. It is one thing for this Court to hold the view that a particular procedure would best advance the course of accountability, and it is another to impose its detailed preference on another arm of the State.

[251] And no provision of the Constitution requires of the Assembly to make a rule exclusively for the section 89 process. If a rule exists that makes adequate or satisfactory provision for this section to find practical expression whenever necessary, then that rule ought to suffice, even if it also applies to a range of other accountability-enforcing obligations of the Assembly. A section 89 specific rule is thus nothing to be particularly dogmatic or pedantic about. But, the second judgment prefers a more elaborate process that relates only to section 89.

Separation of powers

[252] We said in *EFF 1* that ours is a less intrusive role and that we are not to prescribe to the National Assembly what mechanics to adopt for holding the President accountable:

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

> authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government."[81]

[253] Similarly, in *UDM* we chose not to prescribe a secret ballot voting procedure to the Assembly for a motion of no confidence.[82] This, in circumstances where there is already a strong constitutional pointer to a secret ballot, for electing the President and other constitutional office-bearers, as the implicitly appropriate method for voting him or her out of office. Our appropriate self-restraint was again informed by our ever-abiding consciousness of the vital strictures of our powers and our super-alertness to impermissible encroachment on Parliament's powers. We could, many would reasonably argue with some force, have decided that a secret ballot was the only appropriate voting procedure for a motion of no confidence. But sensitivity to the dictates of separation of powers forbade us. For, it is for the National Assembly to make that choice, not the Judiciary. Respect for separation of powers again constrained us from directing the Speaker to schedule a debate on a motion of no confidence on a particular date. We remitted the request to the Speaker to have the motion tabled in terms of whatever procedure she considered appropriate.

[254] This time around, we are even specific about size, representations, procedure, provision for the entirety of the process, avoiding abuse of majority representation, institutional predetermination of grounds before debating and voting on impeachment. That, in my view, is an unprecedented and unconstitutional encroachment into the operational space of Parliament by Judges.

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[81] *EFF 1* above n 2 at para 93.

[82] *UDM* above n 7. See para 69 for instance.

[255] Worse still, under substantially similar but far less permissive circumstances than in *UDM*, we are now prescribing to the National Assembly to only process impeachment after an inquiry and a collective predetermination of the seriousness of the violation of the Constitution or the law or the existence of any ground has been established. And we do so when there is a tension between what "we" consider appropriate as against the mechanism the Assembly already has, that it has previously used, and most applicants deem appropriate, and the possible improvement that the Assembly seeks to effect through its own sub-Committee based on legal advice already received from the Chief State Law Advisor and Parliament's in-house legal team. There exists no jurisdiction in the whole world, that I am aware of, where a court has decided for Parliament how to conduct its impeachment process. Respect for separation of powers explains why this is so.

Adequacy of the existing mechanism

[256] Parties recognise an ad hoc Committee as a mechanism that is flexible and wide enough to suitably accommodate the impeachment process. Applicants in their founding affidavit specifically and quite correctly say that it is not their case that there is no mechanism. This means that if it proves necessary to conduct an enquiry before the initiation of an impeachment process, there is a procedure or mechanism available for that purpose. It is public knowledge that the existing accountability-enforcement mechanisms have all been unleashed on the President for Nkandla. The suspicion or concern of the President being shielded by his party by preventing the debate and voting is thus belied by the realities. A total of three Nkandla-related attempts to remove him from office has been recorded – two motions of no confidence and one impeachment motion. The National Assembly has been fulfilling its obligations.

[257] This Court now says the President has never really been held to account through an impeachment process and seeks to declare it impermissible for Members of the Assembly to be satisfied with the existence of an impeachment ground or the seriousness of a constitutional violation absent an inquiry and institutional predetermination of the existence of the ground for impeachment. This, regardless of

whether Assembly Members might be having all the facts they need as the DA seemingly believed it did when it embarked upon its 2016 impeachment process. Again I say, it is their value judgement to make. It ought to be practicable for a Member to move for impeachment based on documents or a record that she believes supports the ground relied on and so other Members to then be able to satisfy themselves on all documented information and legal advice they have, whether a ground exists. Unsurprisingly, the DA and other parties represented in the National Assembly moved for the adoption of the resolution to impeach the President, apparently satisfied with the abundance of information already in their possession.

[258] The second judgment also says that the resolution to remove the President would have been unconstitutional had it been passed, simply because the Assembly would not in effect have almost ritualistically embarked on an investigation or enquiry and predetermined the existence of a ground for impeachment. Again, this is an impeachment process with a very long, documented and well-known history. No one has suggested that all the existing material has been found wanting by any party or the Assembly or this Court. If the basis for the inquiry is to first be satisfied that a ground for the intended impeachment process exists and form an opinion, for whose sake is the enquiry to be held? The parties, represented in the Assembly, have themselves said that the constitutional violation in relation to Nkandla is "well established" and "self-evidently of a serious nature". Who needs an enquiry to establish what is already "well-established"?

[259] The one example that exposes the impracticality or illogicality of an inflexible rule about an enquiry follows. If the President were to shoot and kill say twelve Members of the Assembly in full view of the Members of the Assembly during a televised sitting, and after presenting a defence a court convicts him or her of murder and imposes a wholly suspended sentence, what would be the need for an enquiry? For what practical reason? Why would a recording of what Members actually witnessed and the record of court proceedings never be adequate? If after the Public Protector's report, findings and remedial action, which no court has set aside, this Court concludes

as it did in *EFF 1* about the President, what would an inquiry realistically be expected to achieve? What about the many question and answer sessions, two motions of no confidence and one impeachment motion, all debated extensively and voted on? In almost all of the above the President stated his defence or side of the story. Add to that the reality that a mechanism does exist and has been successfully operationalised for a section 89 process that was not taken to its logical conclusion by one of the applicants. Also that judicial notice may properly be taken of the reality that the governing party's majority was not used to hinder the establishment of ad hoc Committees to enquire into SABC and Eskom and that no majority appears to have been used to thwart the establishment of a similar committee in the previous removal process of a National Director of Public Prosecutions. These are the undeniable realities.

[260] It ought to be open to the Assembly to be content with what is already common knowledge or what the President does not deny. That possibility may well exist now or in the future. The Public Protector's findings have never been set aside by a court and this Court's judgment in relation to Nkandla stands. So, the Assembly has them readily available to it. All this points to the discretion the Assembly has, to hold an inquiry only when it is justifiable or necessary but to otherwise rely on documented or otherwise recorded evidential material and proceed to debates and votes in circumstances where an enquiry would be a robotic and pointless exercise to embark upon. It cannot be emphasised enough that it is for the Assembly or any of its Members alone to assess the available information and to decide whether an impeachment motion based on that information would be sustainable or proves the existence of a ground. On all the Nkandla material available to the Assembly, its Members may well be in a position to decide on the existence of the ground, and that extends to the seriousness of a constitutional violation. Based on that assessment an individual or group may then decide whether or not to table an impeachment motion. Judges themselves never hold an inquiry to resolve very difficult issues in direct access or exclusive jurisdiction applications. Why should it be always unconstitutional for Members of the Assembly in relation to all impeachment matters?

Mazibuko will not help

[261] Unlike in *Mazibuko*, there is no rule that could potentially muzzle or frustrate the progression of a motion for impeachment. Unsurprisingly, none of the applicants seeks a declaration of invalidity because there is no rule or chapter equivalent to the *Mazibuko* scenario, to declare constitutionally invalid. And, the ad hoc Committee is a section 89 appropriate mechanism that has proved to be effective even in the removal of an NDPP. The same applies to the SABC and Eskom. And not a single incident of its establishment being hindered has been cited. No evidence to the contrary exists – only a suspicion or supposition. *Mazibuko* did not make a choice for the National Assembly in relation to its constitutional responsibilities. It provided guidance in broad terms.

[262] *Mazibuko* held that Chapter 12 of the Rules of the National Assembly is inconsistent with section 102(2) of the Constitution to the extent that it does not provide for a political party represented in, or a Member of, the National Assembly to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for debate and voted on in the National Assembly within a reasonable time or at all. The Court then suspended the declaration of invalidity for six months to allow the Assembly to correct the constitutional defect.

[263] And, it cannot be emphasised enough that it lies with the constitutional powers of the National Assembly, not this Court, to decide which procedure would best work for it. The primary concern in *Mazibuko* was that the existing rules thwarted or frustrated steps to table motions of no confidence in the President instead of protecting, advancing or facilitating the exercise that right as they should.[83] None of the applicants have said that motions for a section 89 process and the request for an enquiry through an ad hoc Committee mechanism have ever been thwarted by the majority party to shield its leader. On the contrary, the DA and this Court, through the second judgment, suspect that it might, and that is why it does not prefer a mechanism that has seemingly worked well and that at least three parties represented in the Assembly have had the

[83] See paras 47, 57, 60 and 61 of *Mazibuko*.

opportunity to express their satisfaction with. As indicated, it was previously secured by the DA in respect of an impeachment process - presumably because it accepted its efficacy and appropriateness. No incident of frustrating its access has been cited. And Rule 6 of the Assembly Rules empowers the Speaker to innovatively fill up any regulatory lacuna that might exist in relation to even the ad hoc Committee based impeachment process, where necessary.

[264] There is also nothing to suggest that an ad hoc Committee would not be set up to enquire into what might prove necessary to be enquired into, pending the completion of the current section 89 rule-making process. It is just that no attempt was made. And its ability to do the work satisfactorily has not been called into question. And a section 89 specific mechanism is being looked into and would probably have been finalised or agreed upon, had applicants returned to the sub-Committee to resume their rule-making responsibilities. *Mazibuko* is therefore no authority for the proposition that the Assembly has failed to create an operationalising mechanism for a section 89 process.

The inescapable discretion

[265] All of the above lead to the inescapable conclusion that there would be impeachment cases that require some sort of an enquiry. But, there would also be others that would render an enquiry an unnecessary and senseless process. For, there ought not to be no enquiry into what all or most decision-makers consider to be well established – for example where the evidential material required by both the "accuser" and the "accused" is well-documented or otherwise recorded. It would be a waste of scarce resources and a needless exercise or incident of going through the motions. The need to honour the President's right to be heard, when all the necessary information, including his or her defence, is readily available, cannot always justify an enquiry or the setting up of a committee. Where the defence is not already incorporated in the documented or recorded evidential material, then it may at times be supplied in writing.

[266] The effect of the preferred indispensability of an enquiry and the institutional predetermination of the existence of a ground for impeachment is that it is constitutionally impermissible for the National Assembly to ever be satisfied that any ground for impeachment exists unless an inquiry has first been held. Meaning, even if there is a well-documented and conclusive proof, or a court judgment or a well-known incident that happened before the eyes of all Members of the Assembly, it would be most inappropriate and unconstitutional for them to ever be satisfied with the obviously conclusive evidence. In motion proceedings a response or defence is not required to be oral. Only debates or argument may be. Why should it be any different with impeachment under all circumstances? There is nothing so special about this constitutional issue that it should require of the Assembly to do what this Court itself never has to do or what the High Court does not always have to do?

[267] Let me lay bare my deep-seated agony and bafflement about the second judgment's refusal to recognise the discretion the Assembly obviously has. At the risk of being too repetitive, the Public Protector investigated the Nkandla saga thoroughly. She then made findings and took remedial action against the President. It took her years to complete her thorough-going investigation. In *EFF 1*, this Court upheld the Public Protector's remedial action, and shared its perspective on that matter at considerable length. Debates and voting took place on that same matter, almost exhaustively and for quite sometime now. All applicants have severally expressed their views on what they regard as the "self-evident" seriousness and the "well-established" nature of the constitutional breach the President's conduct entails. No wonder they have already moved more than once for the President to be removed from office because of Nkandla. Based on this documented and recorded evidential material, a real likelihood exists that a ground for impeachment might well be determined by the Assembly without the need for any enquiry. Without anybody suggesting that this is not the case, or this Court satisfying itself otherwise, it however seeks to prescribe an enquiry and has an order ready to support it.

[268] Whereas it is conceivable that an enquiry may at times be necessary, it is inconceivable that Members of the National Assembly could never be able to properly dispose of a section 89 matter without an enquiry or the near-impossible collective predetermination of the existence of a ground before the debate and voting. To hold otherwise, would amount to an unjustifiable introduction of rigidity into the section 89 process – an inexplicable determination to make a declaratory order against the National Assembly. Flexibility is required and is a natural consequence of a realistic and practical application of this section with due regard to circumstances that would have triggered its operation. An enquiry ought not to be insisted on, for instance, when clarity abounds or when the President does not even deny that she has made herself guilty of a serious violation but won't just resign. And circumstances might well exist where that is so.

The implications of a discretion

[269] The language of section 89 is in my view being overly strained to divine from it an elusive justification for a particular conclusion. Not even a single word from either section 89 or section 57 or any other constitutional provision or best practice is being relied on to sustain the preferred conclusion.

[270] And of course the approach that prescribes the inevitability of an enquiry and predetermination of a ground as a prerequisite, is essential for the second judgement's declaratory order. The recognition of what strikes me as an obvious discretion the Assembly, just like courts, has to sometimes do without an enquiry where the ground for impeachment is self-evidently well established, as most applicants in this case, have said, would militate against a declaratory order. This insistence on how an impeachment facilitating committee may have to be constituted in disregard for a democratically-secured majority representation in the Assembly, how it should operate, and the prescription of an enquiry and predetermination that is not objectively based on anything but judicial preference, reaches over the bold and sharp bright line of separation of powers.

Avenue for improving the mechanism

[271] As for the apparent concern that the existing section 89 activating mechanism cries out for improvement, here lies the answer. In the exercise of its constitutional rule-making powers the National Assembly set up a sub-Committee to revise its rules. Remarkable progress was made. For instance, in compliance with *Mazibuko*, an apparently satisfactory provision was made for processing motions of no confidence in the President.

[272] A deliberate effort was also made by that National Assembly sub-Committee to consider the retention of the ad hoc Committee mechanism or making express or specific provision in the rules for the possible removal of a President of the Republic in terms of section 89 of the Constitution. The profundity of the matter necessitated that Members of the Assembly, serving in that sub-Committee, consult with their political principals whereafter a final position would be taken in relation to the section 89 process-regulating mechanism. Representatives of political parties, including applicants, have for undisclosed reasons not yet returned to the sub-Committee for some 8 months. And that is why no decision on either the section 89 specific rule or retention of the ad hoc Committee mechanism has been made. Midstream this process of fulfilling its constitutional obligation, the Assembly is now being ordered through the second judgment to do what it is busy doing.

[273] By the way, *Mazibuko* was not called upon to decide the implications of an order that seeks to have the Assembly do what it is already doing and did not therefore decide this issue. There is nothing to suggest that the section 89 specific activating mechanism would, if considered necessary by the Assembly, not be crafted if this Court were to leave the Assembly to do what it alone is mandated to do, unconstrained by a judgment that is even specific on some of the sensitive details like the unsubstantiated possible abuse of majority power. The declaratory order would serve no purpose whatsoever except to make the Assembly look like it is failing to honour its obligations when it is not so. Such is not our role.

[274] It ill-behoves political parties who know and largely accept that there is an effective mechanism in place and who, through their members, were remiss in the fulfilment of their constitutional obligations by not participating in a structure set up to achieve the kind of compliance they seek, to have their concerns addressed or improve on the mechanism they already have, to then turn around and blame it all on the institution that they have failed. This, as if they are not an integral and essential part of its functionality.

[275] What the applicants should do is initiate the section 89 process and ask for the establishment of an ad hoc Committee if considered necessary or pour themselves into the Nkandla evidentiary material and decide if a ground does, contrary to the view they previously held, not exist or go back to the sub-Committee to complete the section 89 rule-making process they have abandoned half-way through. After all, it is their primary obligation as parties represented in the National Assembly. The Assembly has not prevented them from doing so. The ball is and has always been in their court. And courts ought to frown upon rather than encourage that posture – a disregard for existing mechanisms and self-dislodgement from structures established to address concerns, instead seeking "urgent" help from courts.

Conclusion

[276] Imperfect as it may be, the ad hoc Committee does, according to most applicants, suffice for a section 89 inquiry where necessary. Additionally, applicants cannot conveniently strip themselves of their constitutional obligations for the purpose of securing court orders. Having failed to resume participation in a process to achieve what they or one of them prefers, they have now approached this Court to in effect say "we have failed in our obligation to draft the section 89-specific rule, please order us to do so, and to do so speedily."

[277] The sub-Committee that already exists to develop the apparently preferred regulatory framework has not been dissolved. It will naturally resume its duties as soon as Members return with a mandate from their parties. What different purpose then

would the declaratory order in the second judgment serve? Is it to treat that sub-Committee as if it does not exist? Is it to disband it and effectively order the establishment of a new committee? Or is it to prod Members of the National Assembly, like the applicants, to do what they always had the opportunity and the constitutional obligation to do but simply did not do for unexplained reasons? In sum, to what end is the order being made?

[278] This case has never been about impeachment in general. It has always been about the impeachment of President Zuma. It is context-sensitive or situation-specific. Little, if any, room therefore exists for over-indulging in generalities about motions for impeachment. Most applicants have stated that an impeachment ground is well-established and self-evident, and that mechanisms to facilitate the process exist. All of the above has the benefit of the President's repeatedly stated position on the seriousness or otherwise of the Nkandla saga. Well-documented or electronically recorded evidential material on Nkandla including the President's side of the story exists. And it might well suffice for the second Nkandla impeachment motion, if only this Court were to allow the Assembly, including applicants, to examine that material and form its own opinion.

FRONEMAN J (Cameron J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Mhlantla J, Theron J)::

[279] I concur in the judgment of my brother Jafta J (second judgment). But for the first paragraph of the Chief Justice's judgment (third judgment), I would have been content for my concurrence to merely be noted in the usual manner. The Chief Justice, however, characterises the second judgment as "a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of

Parliament".[84] He himself recognises "the extraordinary nature and gravity of this assertion".[85] It should not be left unanswered.

[280] It is part of constitutional adjudication that, as in this matter, there may be reasonable disagreement among Judges as to the proper interpretation and application of the Constitution.[86] The respective merits of opposing viewpoints should be assessed on the basis of the substantive reasons advanced for them. There is nothing wrong in that substantive debate being robust, but to attach a label to the opposing view does nothing to further the debate.

[281] For the reasons lucidly set out in the second judgment, I do not agree with the reasoning of the Chief Justice and the Deputy Chief Justice in their respective judgments. I do not, however, consider the different outcome that they reach to be the product of anything other than a serious attempt to grapple with the important constitutional issue at hand. The fact that I do not agree with their reasoning or the outcome that they propose does not mean that I consider them to have abdicated their responsibility to ensure that the National Assembly acts in accordance with the Constitution.

[282] I consider that the outcome reached in the second judgment is the product of equally serious, honest and detached reasoning on the part of Jafta J and those of my colleagues who concur in his judgment.

[283] According to the second judgment, section 89(1) requires that, before a resolution to remove the President is voted upon, an investigation into the existence of the preconditions set out in that subsection must be carried out. As I understand the first judgment, the Deputy Chief Justice does not in any fundamental respect dissent

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[84] See [223].

[85] Id.

[86] This is true of adjudication in other spheres as well. Compare *Phakane v S* [2017] ZACC 44 at para 61.

from this interpretation.[87] And despite much confusion and posturing, the parties appeared to accept at the hearing that this is indeed the proper interpretation.

[284] The second judgment directs the National Assembly to make rules for this procedure.[88] That direction merely compels the National Assembly to do what it already has the competence to do under section 57 of the Constitution, which provides that the National Assembly may determine and control its own arrangements and "make rules and orders concerning its business".[89] Nowhere does the second judgment prescribe the content of those rules.[90]

[285] Thus the second judgment does nothing more than interpret section 89(1) and direct the National Assembly to act in accordance with the Constitution. It attempts to provide the National Assembly with guidance on the tools necessary to enable it to fulfil its constitutional duty, to hold the President to account in the direst of situations. It does not seek to tell the National Assembly how to use those tools.

[286] Whether the order in the second judgment will achieve its aim is for history to determine. I am confident that it, and future South Africans, will recognise the value of the substantive interpretive exercise undertaken in the second judgment in order to assist the National Assembly to do what section 89(1) of the Constitution demands of it. That exercise is self-evidently serious, impartial, and future-directed; the last of these matters more than the question of who may have been to blame for bringing the issue to this Court in a less than perfect manner.

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[87] See [100] to [105].

[88] See [222].

[89] See above n 60.

[90] In fact, the second judgment explicitly refrains from doing so. See, for example, [170], [171] and [180].

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