

THE SUPREME COURT OF THE REPUBLIC

EXTRACTS FROM THE CONCOURT JUDGMENT ON NKANDLA

As these extracts show, the Constitutional Court's fifty-page judgment sets out, in profound and unambiguous language, the values of South Africa's constitutional democracy; the constitutional obligations of the president, the national assembly and the institutions of state; and the principles of "rule of law" and "separation of powers" to curb the abuse of state power. The implications for the future are enormous.

THE ORDER

1. This Court has exclusive jurisdiction to hear the application by the Economic Freedom Fighters [EFF].
2. The Democratic Alliance's application for direct access is granted.
3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution is binding.
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.
5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.



One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era.

6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.
7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.

8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.
9. The President must reprimand the Ministers involved pursuant to paragraph 11.1.3 of the Public Protector's remedial action.
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.
11. The President, the Minister of Police and the National Assembly must pay costs of the applications including the costs of two counsel.

INTRODUCTION

[1] One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources



Photo credit: Werner Beukes

that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral

obligation to ensure the continued survival of our democracy. ([2008] ZACC 8)

And the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.

THE PUBLIC PROTECTOR'S FINDINGS

[2] In terms of her constitutional powers, the Public Protector investigated allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic. She concluded that the President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources ...

[3] The Public Protector's report [*Secure in Comfort*, Report No 25 of

2013/14] was submitted not only to the President, but also to the National Assembly presumably to facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable. For well over one year, neither the President nor the National Assembly did what they were required to do in terms of the remedial action.

[4c,d] This Court must declare that the President failed to fulfil his constitutional obligations ... and the National Assembly to fulfil its constitutional obligations.

[6] The Public Protector concluded that several improvements were non-security features. Since the State was in this instance under an obligation only to provide security for the President at his private residence, any installation that has nothing to do with the President's security amounts to undue benefit or unlawful enrichment to him and his family and must therefore be paid for by him. >>

[7] In reasoning her way to the findings, the Public Protector said that the President acted in breach of his constitutional obligations in terms of section 96(1), (2)(b) and (c) of the Constitution which provides: “Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation” ... She concluded that the President violated the provisions of the Executive Members’ Ethics Act and the Executive Ethics Code ...

[12] For its part, the National Assembly set up two Ad Hoc Committees, comprising its members, to examine the Public Protector’s report as well as other reports including the one compiled, also at its instance, by the Minister of Police. After endorsing the report by the Minister exonerating the President from liability and a report to the same effect by its last Ad Hoc Committee, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector.

CONSTITUTIONAL OBLIGATIONS

The President

[26] Section 83 [of the Constitution] does impose certain obligations on the President in particular ... An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national Executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do. It is, no doubt, for this reason that section 83(b) of the Constitution singles him out to uphold, defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This

requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances.

[20, 21, 83] The President is the Head of State and Head of the national Executive. His is 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 ... He is after all, the image of South Africa ... He might have been following wrong legal advice and therefore acting in good faith. But that does not detract from the illegality of his conduct regard being had to its inconsistency with his constitutional obligations.

The National Assembly

[22] Similarly, the National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member’s equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.

The Public Protector

[49, 35, 53] The office of the Public Protector was created to “strengthen constitutional democracy in the Republic”. To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice ... The Public Protector acted, not against the Executive or State organs in general, but against the President himself ... Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental “embarrassment” and censure

[73, 54] The Public Protector’s remedial action might at times have a binding effect. When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness ... In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged.

The Constitutional Court

[15] The exclusive jurisdiction of this Court is governed by Section 167(4)(e) of the Constitution which says: “Only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation.”

[45] This Court, as the highest court in the land and the ultimate guardian of the Constitution and its values, has exclusive jurisdiction also in so far as it relates to the National Assembly. The EFF has thus met the requirements for this Court to exercise its exclusive jurisdiction in the application against both the President and the National Assembly.

THE RULE OF LAW

[54] Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law and respect for every aspect of our Constitution as the supreme law of the Republic are real.

Separation of Powers

[90] The Executive led by the President and Parliament bear very important responsibilities and each play a crucial role in the affairs of our country. They deserve the space to discharge their constitutional obligations unimpeded by the Judiciary, save where the Constitution otherwise permits. This accords with the dictates of Constitutional Principle VI, which is one of the principles that guided our Constitution drafting process in these terms:

There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

[91] And this was elaborated on in the *Certification* case as follows:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.

[92] This court noted [in the *Doctors for Life* judgment]:

Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament ... Parliament “must act in accordance with, and within the limits of, the Constitution”, and the supremacy of the Constitution requires that “the obligations imposed by it must be fulfilled”. 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 ... It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.

[97] The National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector ... 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. **NA**