**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT76/17**

In the matter between:

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| **THE ECONOMIC FREEDOM FIGHTERS** | First Applicant |
| **UNITED DEMOCRATIC MOVEMENT** | Second Applicant |
| **CONGRESS OF THE PEOPLE** | Third Applicant |
| **THE DEMOCRATIC ALLIANCE** | Fourth Applicant |

and

| | |
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| **THE SPEAKER OF THE NATIONAL ASSEMBLY** | First Respondent |
| **PRESIDENT JG ZUMA** | Second Respondent |
| **CORRUPTION WATCH (RF) NPC** | *Amicus Curiae* |

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# SUPPLEMENTARY HEADS OF ARGUMENT FOR THE SPEAKER OF THE NATIONAL ASSEMBLY

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**INTRODUCTION**

1. These supplementary heads of argument are filed for the Speaker of the National Assembly, being the first respondent ("*the Speaker*"). They address primarily the case advanced by the intervening party, now the fourth applicant, the Democratic Alliance ("*the DA*").

2. The heads of argument are filed out of time in terms of this Court's directions. The Speaker applies for condonation for their late filing and explains this in the supplementary answering affidavit that is to be filed together with these heads of argument. We submit that a case for the grant of condonation is made out.

3. We structure the heads of argument as follows:

    3.1. The DA's pleaded case.

    3.2. The Speaker's case in summary.

    3.3. Submissions on why the DA's case should fail.

    3.4. Conclusion.

**THE DA'S PLEADED CASE**

4. It is important to view the DA's pleaded case in the context of the case that the applicants pleaded, as per the first applicant's ("*the EFF*") founding affidavit. We submit this because the DA's case is plainly there to close perceived deficiencies in the EFF's pleaded case. The EFF's case is addressed in the heads of argument for the Speaker that were filed by our predecessors ("*the Speaker's main heads*"). Those heads of argument should be read with these heads of argument.

5. The EFF characterised its application as a "*last resort effort to enforce the demands and obligations imposed by the Constitution*" upon the National Assembly ("*the NA*")[1] because the NA had done nothing to enforce the President's accountability since the judgment of this Court in the *EFF* (Nkandla) case.[2] The EFF summarises its case at paragraph 68 of its founding affidavit as follows:

> "68 The Constitutional Court set aside the National Assembly's resolution. In effect, then, there has been no response at all by the National Assembly to the Public Protector's report, the President's conduct in relation to the Nkandla upgrades, and his failure to comply with the report's remedial action. At best, the National Assembly has passively facilitated question and answer sessions and debated a premature motion of no confidence and/or impeachment (at the behest of the Democratic Alliance). There has been no action by the Speaker and the National Assembly to hold the President

[1] Founding Affidavit ("*FA*") para 62 p 38.
[2] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).

> accountable. No accountability mechanisms have been put in place. In any event, there is no limit to how many times different political parties may invoke the accountability mechanisms or be prevented from doing so merely because another party exercised its rights in whatever manner it chose to do so."[3]

6. The EFF also points to certain demands that it had made of the Speaker, and which were declined; and submits that these too point to the failure by the NA to fulfil its constitutional obligations.[4]

7. All of the EFF's demands were plainly unconstitutional and unlawful, and were rightly rejected:

7.1. The first was to demand that the NA institute a disciplinary inquiry against the President, which should consist of three retired Judges and an independent prosecutor approved by a multiparty committee and supported by Parliament.[5] No basis exists in the Constitution or other law for this demand. The Speaker rightly rejected the demand and informed the EFF *inter alia* that:

> "I am advised that there is no provision in the Constitution, law or in the Rules that provides for the procedure you are proposing in your correspondence. Sections 89 and 102 of the Constitution, 1996, provide for the instances in which the President may be removed from office. These provisions provide the criteria and circumstances under which the removal process can take place. As you are aware, on 5 April 2016, the National Assembly already considered a motion

[3] FA pp 40-41.
[4] See "JM11" p 162, "JM12" p 164, "JM13" p 165, "JM14" p 167, "JM15" p 169.
[5] At p 163.

> which has been tabled in terms of section 89 of the Constitution.
>
> …
>
> The drafters of the Constitution also deemed it proper to give only the Assembly the competence to remove a sitting President. In terms of the two provisions mentioned above, the performance of these functions cannot be delegated to an external process. Thus, even if the disciplinary processes of the Assembly applied to the President, such a procedure could only be conducted through the existing mechanisms of the Assembly and not through external processes.
>
> I would in any case wish to remind you that in terms of the procedures of the National Assembly, allegations of improper conduct on the part of a member can only be brought before the Assembly by way of a substantive motion consisting of a properly motivated and supported prima facie evidence."[6]

7.2. The second was to demand that the NA urgently prevent the President from answering questions in the NA. This too was an unconstitutional demand that was rightly refused.[7]

7.3. The third was to demand that the joint sitting of the NA and the NCOP[8] scheduled for 9 February 2017 for the SONA[9] be set aside to debate the failure of Parliament to hold the President to account, despite a clear ruling by this Court that he had "*failed to uphold his oath of office*"; and the threat to our Constitution and democracy of having President Zuma continue as President of the Republic of

[6] At pp 165-166.
[7] At p 167.
[8] National Council of Provinces.
[9] State of the Nation Address.

South Africa. We have not found in the judgment of this Court a finding or order that the President "*failed to uphold his oath of office*", which finding or order the EFF apparently asked the Court to make.[10] This demand too was unconstitutional and was rightly rejected for the reasons that the sitting was lawfully scheduled for the SONA under the Constitution and the Rules.

8. It is on the basis of the pleaded case that the EFF seeks the relief in its notice of motion. The DA supports that relief.

9. The issue of the steps taken by the NA to hold the President to account are addressed in the Speaker's main heads. We do not repeat the submissions made there.

10. We submit, however, that the steps that the NA has taken thus far include the highly publicised and contested motion of no confidence debated and voted upon on 8 August 2017. The Speaker permitted a secret ballot in this motion of no confidence, following this Court's judgment in the *UDM* (secret ballot) case.[11]

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[10] *EFF* at paras 101-105.
[11] *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC) (22 June 2017).

11. Whilst the EFF and the DA would wish to underplay the motion of no confidence as an effective step to hold the President to account *inter alia* following the *EFF* (Nkandla) case and the Public Protector report, all the parties in the *UDM* (secret ballot) case submitted, in line with this Court's authorities, including in *Mazibuko,* that a motion of no confidence in terms of section 102(1) of the Constitution:

> "*... is perhaps the most important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance*."[12]

12. In the *UDM* (secret ballot) case, this Court affirmed the importance of a motion of no confidence as a mechanism to hold the President to account, as per *Mzibuko*.[13] The Court went further to say the following, which is pertinent to the present case:

> *"[45] A motion of no confidence is, in some respects, potentially more devastating than impeachment. It does not necessarily require any serious wrongdoing, though this is implied. It may be passed by an ordinary, as opposed to a two-thirds majority of Members of the National Assembly. Unlike an impeachment that targets only the President, a motion of no confidence does not spare the Deputy President, Ministers and Deputy Ministers of adverse consequences. And the Constitution does not say when or on what grounds it would be fitting to seek refuge in a motion of no confidence*."

[12] *Mazibuko NO v Sidulu NNO* 2013 (6) SA 249 (CC) para 43.
[13] At para 44.

13. To the extent that the basis of the EFF's pleaded case may be understood to include the allegation that there are no mechanisms in place to hold the President to account through the exercise by the National Assembly, as a collective, of the right or power in section 89(1) of the Constitution, these heads of argument also address that case – because this too is the DA's case. In fact, it is not clear at all that this was the EFF's properly pleaded case, hence the DA's belated intervention.[14]

14. In addition to the case that the EFF makes, we understand the DA's case to be in summary that the NA:

    14.1. breached its constitutional duties by failing to create effective mechanisms to allow members of the NA to initiate impeachment investigations and hearings;

    14.2. failed to create any legislation or rules to govern the section 89 impeachment process, including mechanisms to initiate impeachment investigations and hearings;

    14.3. impeachment proceedings are inherently urgent and controversial matters that must be commenced and completed with all appropriate haste and in the absence of clear impeachment procedures, set out in

[14] DA FA para 58 p 433.

advance of actual cases, impeachment proceedings are likely to be delayed or stymied by disagreements within the NA; and

14.4. impeachment processes under section 89 of the Constitution necessarily require proper investigations and a fair hearing.[15]

15. The DA submits that it supports the relief in paragraphs 2 and 4 of the EFF's notice of motion.[16] It does not formulate particular relief over and above that sought by the EFF and the other applicants. But its intervention plainly addresses another deficiency in the EFF's case – regarding the relief sought. Whereas the constitutional obligations that the EFF relies upon and alleges were breached are those of the NA, the orders it seeks are directed against the Speaker without identifying any provisions of the Constitution that supports such orders.[17]

16. The DA, like the other applicants, has not placed before the Court any Rules or procedures of the NA relevant to section 89(1) proceedings, which it contends are unconstitutional.[18] It contents itself with the case that no

[15] DA Founding Affidavit ("*DA FA*") paras 34-69 pp 421-437.
[16] DA FA para 71 p 437.
[17] DA FA para 72 p 438.
[18] That is not how the case is pleaded. See *Mazibuko* paras 138-139.

effective mechanisms exist to permit the NA, as a collective, to exercise the right or power under section 89(1) of the Constitution.[19]

17. It further contends that the mechanisms must include impeachment investigations and fair hearings;[20] and the mechanisms must be determined in advance as far as possible;[21] and must specify:

17.1. the type of body that will conduct the impeachment investigations, such as a committee of the NA, a specially appointed prosecutor, or some other external body;

17.2. the composition of the body that will hear evidence and afford the President a hearing, which would need to allow a fair representation of opposition parties;

17.3. the timelines for investigations and hearings;

17.4. the rights afforded to the President to present and contest evidence; and

17.5. the manner in which findings will be presented to the NA before a vote.[22]

[19] DA FA para 59 p 433.
[20] DA FA para 63 p 435.
[21] DA FA para 66 p 435.
[22] DA FA para 66.1-66.5 p 436.

18. The DA's contention is further that any *ad hoc* procedures are undesirable.[23]

19. The DA refers to a number of practices and procedures, which it calles "*trial-like*" in other jurisdictions. It does not give any context in respect of those countries, regarding, for example, the countries' constitutional histories and schemes in order to motivate why the "*trial-like*" procedures are required by our Constitution, as opposed to being desirable from its point of view, or the point of view of the other applicants. This is a significant failing.

**THE NA'S CASE IN SUMMARY**

20. Section 89(1) of the Constitution does not place any obligation upon the NA to adopt a particular procedure, including a procedure that must be investigatory, "*trial-like*" or merely fact-finding for all cases or purposes, and always to be undertaken prior to a debate in the NA on a decision whether or not to adopt a resolution to remove the President.[24] It may differ in this regard from the Constitutions of the other foreign countries that the DA and the other applicants place before the Court and places reliance upon.

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[23] DA FA paras 67-68 pp 436-437.
[24] This is no different to the position under section 102(1). *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC) paras 91-95.

21. In the absence of such an obligation in section 89(1) of the Constitution, a failure by the NA to adopt a standing investigatory, "*trial-like*" or fact-finding procedure to precede any and all debate in the NA on a resolution to remove the President could never constitute a failure to fulfil constitutional obligations as envisaged in section 167(4)(e) of the Constitution.

22. The DA realises the above difficulty. It then extends the argument. It says in effect that only when a debate in the NA under section 89(1) is preceded by an investigatory or "*trial-like*" procedure, with all the rights to fairness, which would include procedural fairness, would a mechanism to give effect to section 89(1) of the Constitution be effective. It contends that this flows from a proper interpretation of section 89(1).[25] It also supports its contention for a "trial-like" process by reference to the decision of this Court in *Van Rooyen.*[26] The immediate irony is that the rights to fairness that it introduces will only serve to prolong impeachment proceedings under its preferred system.

23. The real difficulty for the DA and the applicants is that, first, to their knowledge, the NA Rules do provide for a mechanism that permits members of the NA to table motions for the removal of the President under

[25] DA heads of argument para 28.
[26] DA heads of argument para 30.2. *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

section 89(1) of the Constitution. Those NA Rules even permit the NA, in appropriate cases, and usually at the request of the party introducing the motion, to establish an *ad hoc* committee for the purpose of conducting an investigation, or an inquiry or fact-finding on the issue giving rise to the complaint that the President ought to be removed prior to a debate in the NA on the motion for the President's removal. In establishing the *ad hoc* committee, the NA is entitled to determine the subject matter to be investigated or inquired into, the time lines for the completion of the task, and the powers that the committee will have in discharging the function, which include powers in section 56 of the Constitution.

24. A further failing by the DA and the other applicants is that they do not deal with these mechanisms in the pleaded – when they claim that no mechanisms exist at all. But the facts are that they know that the mechanisms exist, and DA leaders have utilised them in the past to invoke section 89(1) of the Constitution. In one such invocation, the leader of the DA expressly requested the establishment of an *ad hoc* committee for the plain purpose of fact finding. This is not a minor failing. All of the applicants ought to take the Court fully into their confidence, especially in a matter with such far-reaching implications for the separation of powers between the judiciary and the legislature and the comity required in the

adjudication of matters that parties claim to fall within the exclusive jurisdiction of this Court in terms of section 167(4)(e) of the Constitution.

25. A proper case for this Court to determine required the applicants to set out in full the current mechanisms utilised under section 89(1) and to explain why those mechanisms are inconsistent with the Constitution. If such a case was made out, then the Court could make a declaration of invalidity in respect of particular provisions of the NA Rules, and allow the NA an opportunity to rectify any defect. Such a case was avoided because the applicants did not wish to start in the High Court. They wanted to come straight to this Court.

26. Even a case that the existing mechanisms are unconstitutional would have failed. We submit the following reasons in this regard:

    26.1. There is nothing under the Constitution that prohibits *ad hoc* procedures dependant upon the circumstances of each case. This relates only to the establishment of an *ad hoc* committee.

    26.2. The DA accepts expressly that a committee of the NA would be suitable as a body that performs the investigatory or fact-finding functions. It contends only that *ad hoc* decisions "*will generally*

*stand in the way of swift action*".[27] But the Constitution does not brand as invalid every act merely because it is not swift. We accept, however, that all constitutional obligations must be performed diligently and without delay.[28]

26.3. The powers that such an *ad hoc* committee would be clothed with, and the timelines and tasks determined in advance mean that it can fulfil precisely the requirements that the DA and the other applicants hold up as panacea.

26.4. The DA says the mechanisms must be known in advance. On the evidence before the Court the DA has known of the mechanisms for years now and has utilised them against the current President. The other applicants participated in the proceedings that the DA initiated without demur. At the very least, none of them has placed any objections that it might have harboured on record in these proceedings.

27. The appropriate remedy for all of the applicants is to go back to the NA and follow the political process to secure the change that they require in the existing mechanisms. It is not for the Court to grant them their wishes. For

[27] DA FA para 66.1 and 67 p 436.
[28] Section 237 of the Constitution.

the reasons advanced in the Acting Speaker's supplementary answering affidavit, this is a case that fits precisely into the *dicta* by Jafta J[29] in *Mazibuko*,[30] citing Davis J,[31] that:

> "*[83] Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution*. …"

28. We develop our submissions below.

**SUBMISSIONS ON WHY THE DA'S CASE SHOULD FAIL**

**The Constitution**

29. The starting point is the constitutional framework.

30. In terms of section 42(1) of the Constitution, Parliament comprises of the NA and the NCOP.[32] The NA is composed and elected as prescribed in section 46.

31. Members swear or affirm faithfulness to the Republic and obedience to the Constitution in accordance with Schedule 2 to the Constitution.[33]

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[29] (Mogoeng CJ, Zondo J and Mhlantla AJ concurring).
[30] *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (SCA).
[31] *Mazibuko NO v Sisulu and Others NNO* 2013 (4) SA 243 (WCC).
[32] National Council of Provinces.
[33] Section 48.

32. At the first sitting after its election, or when necessary to fill a vacancy, the NA must elect a Speaker and a Deputy Speaker from among its members.[34] The Speaker performs a special rule under the Constitution. When presiding at a meeting of the NA, the Speaker has no deliberative vote other than in the circumstances specified in section 53(2) of the Constitution. She is required to act impartially and fairly to all parties represented in the NA.[35]

33. Section 55(2)(b)(i) of the Constitution requires *inter alia* that the NA must provide for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation. The Constitution does not prescribe what those mechanisms should be. They should facilitate oversight.

34. Section 57(1) of the Constitution empowers the NA to:

    34.1. determine and control its internal arrangements, proceedings and procedures; and

[34] Section 52(1).
[35] *Tlouamma and others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another* [2016] 1 All SA 235 (WCC) para 75-82.

34.2. make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

35. The Constitution does not tell the NA what procedures, rules and orders to adopt, subject to the requirement that such procedures, rules and orders must be consistent with the Constitution. In *Doctors for Life*[36] this Court said the following:

> "123. It is apparent that the Constitution contemplates that Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement. Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to "determine and control [their] internal arrangements, proceedings and procedures" and to make their own rules and orders concerning their businesses.[125]
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> 124. It follows that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. …
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> 145. To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have

[36] *Doctors for Life International v Speaker of the National Assembly and others* 2006 (12) BCLR 1399 (CC).

> broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less."

36. The rules and orders must also deal with the establishment, composition, powers, functions, procedures and duration of its committees.[37]

37. The committees so established have the powers in section 56 of the Constitution, as does the NA itself. The powers are extensive and include the powers to summon any person to appear before the committee to give evidence on oath or affirmation or to produce documents; to require any person or institution to report to it; and to compel, in terms of national legislation[38] or the rules and orders, any person or institution to report to it.

38. The powers in section 56 are broad enough to enable a committee of the NA, including *ad hoc* committees, to conduct effective investigations or inquiries when required to do so.

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[37] Section 57(2).

[38] See Chapter 5 of the Powers, Privileges and Immunities of Parliament and the Provincial Legislatures Act, 4 of 2004 gives effect to section 56 of the Constitution.

39. Two of the mechanisms for oversight over the executive are prescribed by the Constitution itself. They are in sections 89 and 102 of the Constitution. The myriad of other oversight mechanisms that have been used to hold the executive accountable are fully dealt with in the previous written submissions filed on behalf of the Speaker.

40. Section 89(1) provides simply that the NA, 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:

40.1. a serious violation of the Constitution or the law;

40.2. serious misconduct; or

40.3. inability to perform the functions of office.

41. Section 89 does not prescribe a procedure for how the NA is to decide on a resolution to remove a President. However, it is clear from the section that a vote is envisaged, which should yield two-thirds support of the members of the NA in order for the President to be removed. This is in line with the position that, except where the Constitution provides otherwise, section 53 regulates the manner in which members of the NA exercise power collectively, which is by making decisions through a voting process, as per

*Ambrosini*.[39] An open and transparent debate would precede the voting process.

42. As to what must precede the voting process, the section is silent. This is understandable because in some instances the facts giving rise to any complaint under sections 89(1)((a), (b) or (c) may be well known or well established that an immediate debate is possible, whereas in others certain of the grounds may require investigation or the gathering of facts and reporting first. The Constitution leaves the choice of procedures in the hands of the NA; and it is permitted flexibility as long as it does not breach the Constitution in the sense that there is no mechanism to operationalize section 89(1), which is effective – in the sense that it facilitates, as opposed to thwarting, the ability of members to exercise the power or right in section 89 of the Constitution *qua* NA members as a collective.[40]

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[39] *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC):

> *"[37] The language used in all these sections contemplates the making of a decision in relation to an unresolved question. Naturally, because members may disagree on whether laws should be passed or amended, Speakers elected or removed, rules made or resolutions adopted, there is a need for some voting mechanism to resolve these questions. This is the purpose served by section 53. Except where the Constitution provides otherwise, section 53 regulates the manner in which members of the Assembly exercise power collectively, which is by making decisions through a voting process*."

[40] *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC) (22 June 2017) para 43.

43. The mechanism should not place "*invincible giants*" in the NA's path to exercising the section 89(1) power.[41]

44. The position under section 102(1) of the Constitution is no different. No particular procedures are required nor prescribed either, as per *Mazibuko* (Jafta J):[42]

> "[148] Central to the applicant's contention that the Rules are inconsistent with the Constitution is a simple proposition that they fail to provide for a deadlock-breaking mechanism. The error in the edifice which the applicant sought to construct is in its foundation. The premise from which she proceeds is unsound. Section 102(2) of the Constitution does not require the Assembly specifically to make Rules regulating the passing of a motion of no confidence in the President. It merely confers the power to pass such motion on the Assembly. The process to be followed by the Assembly in exercising that power is left to the Assembly's discretion. This is in line with the general power in section 57(1). Exercising this power the Assembly made Rules regulating the scheduling of motions, including motions of no confidence in the President. As stated earlier, these Rules prescribe the process followed when motions are introduced in the Assembly."

45. In *Mazibuko*[43] this Court held that because the NA can only act through its members, these members have a right in terms of section 102 to table a motion of no confidence in the NA for the exercise of the power. The same would apply to section 89 proceedings and none of the applicants have

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[41] *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC) para 64-65.
[42] *Mazibuko* paras 91 and 148. *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC) (22 June 2017) para 50.
[43] Mazibuko para 90

demonstrated how the existing procedures thwart the exercise of the section 89(1) power.

**The NA Rules provide for a constitutionally compliant mechanism**

46. The Acting Speaker sets out the mechanism under the NA Rules that applies and has been utilised in respect of section 89(1) proceedings. He also sets out the drafting history in respect of the current NA Rules.[44]

47. The Acting Speaker also explains that in the NA, the applicants before the Court have not raised particular issues with the existing mechanism and the need to amend it to incorporate the proposals that the DA makes to this Court as the minimum requirements for an effective mechanism for purposes of section 89(1).

48. We submit that what the Constitution requires is not that a special rule be adopted for the exercise of any specific form of executive oversight, such as under section 89 or 102. That would elevate form over substance.

49. What is required is that, in substance, the NA Rules create a framework that permits and facilitates executive oversight in terms, for example, of those sections of the Constitution. On the evidence before the Court, the NA Rules do precisely that; and the applicants are incorrect that no mechanism,

[44] Under the heading, "*THE RELEVANT NA RULES*".

or no effective mechanism, exists for purposes of section 89(1) proceedings; or that they have been hindered in their attempts to trigger section 89(1). Quite the contrary is true.

50. 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.

51. Debates in the NA about whether or not an *ad hoc* committee should be established for purposes of section 89(1) of the Constitution do not in any way detract from the Constitution. They are the lifeblood of NA business under the Constitution and foster transparency and accountability.

52. The Acting Speaker describes the particular NA Rules that apply in the supplementary answering affidavit. We do not repeat the discussion here, as it is fully set out there.[45] The Acting Speaker also explains that the leaders of the DA, to the knowledge and participation of all parties in the NA, have thrice previously triggered the relevant NA Rules for purposes of

[45] Under the heading, "*Current mechanisms to institute impeachment proceedings*".

section 89(1) proceedings.[46] In this sense, the applicable mechanisms is known in advance by all the parties represented in the NA.

53. It is submitted that any investigation under section 89(1) of the Constitution must follow the procedures laid down in the NA Rules, which are not presently challenged for any inconsistency with the Constitution. The political parties represented in this matter may not simply overlook such procedures, as they have done, and ask the Court, directly or indirectly, to impose their preferred procedures on the NA.

54. The political parties plainly want the Court to borrow such procedures from select jurisdictions without proper regard to context, which include the constitutional history and scheme in such jurisdictions in contrast to our own. They do not ask for this in their relief, but clearly want the Court to make findings as to the minimum requirements for a procedure that would be compliant with section 89(1) of the Constitution. If the Court does so, nothing would be left to the imagination and discretion of the NA. Such an approach would trench separation of powers. This Court has repeatedly emphasised the need to respect separation of powers, including in the recent *UDM* (secret ballot) case.[47]

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[46] Under the heading, "*Previous section 89 proceedings initiated by members of the DA*".
[47] At para 93.

**The DA's interpretation of section 89(1) and reliance upon *Van Rooyen***

55. The DA's case is in essence that upon a proper interpretation, section 89(1) requires a "*trial-like*" procedure to precede debate and voting on a resolution to remove the President in terms of section 89(1) of the Constitution. It asks the Court in effect to draw comparisons with the procedures for the removal of Magistrates that this Court considered in *Van Rooyen.*

56. We submit that the DA's contentions in this regard lack merit.

57. The following considerations are important in the evaluation of the DA's case, and they work against the DA's interpretation.

57.1. The first is that although the interpretation of the Constitution requires a purposive approach, the language employed and its context are important. In *Kubyana*,[48] this Court cited the *dicta* of Kentridge AJ in *S v Zuma*[49] that:

> "[18] It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by section 2(1) of the Act, which expressly requires a purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant

[48] *Kubyana v Standard Bank of South Africa Ltd (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2014 (4) BCLR 400 (CC).
[49] *S v Zuma and others* 1995 (2) SA 642 (CC).

> framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."

57.2. In *S v Zuma*, this Court was dealing with the interpretation of constitutional provisions. It said:

> "[18] We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination. If I may again quote S v Moagi (supra) at 184, I would say that a constitution
>
> > "embodying fundamental rights should *as far as its language permits* be given a broad construction."[50]

57.3. The second is that where the Constitution prescribes a two-stage procedure for the removal of a functionary, which requires a finding of fact first to be made by a specified body, it says so. We give by way of example:

57.3.1. the position of Judges under sections 177, 178(5) and 178(6) of the Constitution; and

57.3.2. the removal of the Public Protector, the Auditor-General or a member of a Commission established under Chapter 9 of the

[50] Kentridge AJ's emphasis.

Constitution, as provided for in section 194 of the Constitution.

57.4. The third is that, in the case of sections 89(1) and section 102(1) of the Constitution, the matter is mainly political; the difference being only that section 89(1) is constrained by the grounds for removal and the consequences of a removal, i.e. only the President is removed and he loses any benefit of office. Because of these far-reaching consequences, reasons for removal are required and the majorities required to carry a resolution to remove are high.

57.5. The fourth is that there may be many instances in which the facts regarding the grounds for removal are well established, perhaps even admitted, leaving only a value judgment by the NA on whether or not the President should be removed. In such circumstances, such as where debate is based solely on Court judgments or binding findings of fact by the Public Protector, there might not be a need for a preceding investigation under the NA's auspices itself. In other circumstances, such a need may be indicated. A flexible approach under the current mechanism, which permits the appointment of an *ad hoc* committee for purposes of any inquiry or investigation, plainly meets the constitutional purpose.

58. The case of *Van Rooyen* does not assist the DA. At footnotes 29 to 31 of the DA's heads of argument, it quotes from paragraphs 204 to 205 of the judgment of this Court.[51] It does so out of context because it ignores the empowering provisions under the Magistrates Act that this Court was considering at the time. Those provisions contain completely different language to the language used in section 89(1) of the Constitution. This Court summarised the provisions at paragraph 160 of the judgment as follows:

> "**The impeachment of magistrates: sections 13(2), (3) and (4) of the Magistrates Act**
>
> [160] Section 13(2) of the Magistrates Act provides that a magistrate may not be suspended or removed from office otherwise than in accordance with the provisions of the Act. Sections 13(3) and (4) of the Act deal with the grounds on which magistrates may be removed from office, and the procedure to be followed in such cases. They provide as follows:
>
> '(3)(a)The Commission may provisionally suspend a magistrate from office pending an investigation by the Commission into such magistrate's fitness to hold office.
>
> (aA)The Minister may confirm such suspension if the Commission recommends that such magistrate be removed from office -
>
> (i) on the ground of misconduct;
>
> (ii) on account of continued ill-health; or
>
> (iii) on account of incapacity to carry out the duties of his or her office efficiently.
>
> (b)A magistrate so suspended from office shall receive, for the duration of such suspension, no salary or such salary as

[51] DA heads of argument footnotes

may be determined by the Minister on the recommendation of the Commission.

(c)A report in which the suspension in terms of paragraph (aA) of a magistrate and the reason therefor are made known, shall be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(d)Parliament shall, within 30 days after the report referred to in paragraph (c) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

(e)After a resolution has been passed by Parliament as contemplated in paragraph (d), the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be.

(4)The Minister shall remove a magistrate from his or her office if Parliament passes a resolution recommending such removal on the ground of misconduct of the magistrate or on account of his or her continued ill-health or his or her incapacity to carry out his or her duties of office efficiently."

I deal first with the grounds for removal and then with the procedure prescribed by the Act and the regulations for the removal of a magistrate from office." (Emphasis added)

59. The Court then summarised the procedure for the removal of Magistrates in paragraphs 166 to 167 of the judgment, as follows:

"**The procedure to be followed**

[166] Sections 13(2), (3) and (4) of the Act prescribe the procedure that has to be followed in order to remove a magistrate from office. An initial enquiry must be undertaken by the Commission, which is empowered provisionally to suspend a magistrate pending its investigation. If, in the light of its investigation, the Commission recommends that the magistrate be removed from office, section 13(3)(aA) of the Act provides that "[t]he Minister may confirm such suspension".

> [167] Parliament, however, has the final say. If the Minister confirms the suspension, a report dealing with the suspension and the reasons therefor must be tabled in Parliament by the Minister within 14 days of the suspension. Within 30 days of the report, "or as soon thereafter as is reasonably possible" Parliament must resolve whether or not the magistrate concerned should be restored to office. The Minister is obliged to act in accordance with that resolution, and either restore or remove the magistrate from office, as the case may be." (Emphasis added)

60. It is abundantly clear from the paragraphs quoted above that the position of Magistrates is comparable to that of Judges and Chapter 9 institutions under the Constitution and not that of the President under section 89(1) of the Constitution.

61. Section 89(1) of the Constitution does not require or prescribe a particular procedure for the NA to adopt in order to give effect to it. It leaves that broad discretion as to procedure to the NA. For the reasons submitted above, the procedure that the NA currently follows under the existing NA Rules is compliant with the Constitution. No textual support exists for a different finding.

62. We therefore submit for the reasons set out above and in the Acting Speaker's supplementary answering affidavit that the DA's case, along with that by the other applicants, should fail.

**CONCLUSION**

63. In the Speaker's main heads it is submitted at paragraph 29 that "*we do not concede the issue of exclusive jurisdiction*" but for purposes of the application "*do not oppose the Court exercising jurisdiction over this matter and thus, do not oppose direct access*". This position remains the same. There is no case at all for exclusive jurisdiction. As far as direct access is concerned, we leave the matter in the hands of the Court. If the applicants persuade the Court that a proper case is made out for direct access, the Speaker puts up no opposition. Relevant facts for the Court to exercise its discretion have been fully set out in the affidavits of the Speaker and the Acting Speaker.

64. If direct access is granted, we submit that the applications by all the applicants should be dismissed.

65. If the Court finds against the NA on any basis, which is contested, the proper remedy is to refer the matter to the NA in order to remedy any constitutional defects identified without prescribing to the NA as to the contents of the Rules to be devised. Doing the contrary would limit the range of constitutionally compliant options available to the NA and deprive it of its broad discretion under the Constitution.

**NGWAKO HAMILTON MAENETJE SC**
**GCOBANI NGCANGISA**
**MUKESH VASSEN**

**CHAMBERS, SANDTON AND CAPE TOWN**
**4 AUGUST 2017**

## LIST OF AUTHORITIES

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4. *Mazibuko NO v Sidulu NNO* 2013 (6) SA 249 (CC)

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8. *S v Zuma and others* 1995 (2) SA 642 (CC)

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