

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 91139/16

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Applicant

And

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

THE PUBLIC PROTECTOR

Second Respondent

ECONOMIC FREEDOM FIGHTERS

Third Respondent

THE UNITED DEMOCRATIC MOVEMENT

Fourth Respondent

THE CONGRESS OF THE PEOPLE

Fifth Respondent

THE DEMOCRATIC ALLIANCE

Sixth Respondent

MABEL PETRONELLA MENTOR

Seventh Respondent

**COUNCIL FOR THE ADVANCEMENT
OF THE SOUTH AFRICAN CONSTITUTION**

Eighth Respondent

APPLICANT'S REPLYING AFFIDAVIT TO THE RESPONDENTS'

ANSWERING AFFIDAVITS

(Handwritten initials)

(Handwritten signature)

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state that:

1. I am:

1.1 the President of the Republic of South Africa, duly elected as such by the National Assembly in accordance with the relevant sections of Chapter 5 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), as such I am:

1.2 the Head of State of the Republic; and

1.3 the Head of the National Executive.

2. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.

3. Any legal submissions that are made by me are made on the advice of my legal representatives.

INTRODUCTION



4. The purpose of this affidavit is to reply to all the answering affidavits filed by the first to eighth respondents in this matter.
5. It appears that the basis of opposition of the respondents is similar. The answering affidavits contain legal argument and points of law which, I am advised, are best left for argument before the Court.
6. Therefore, it would be unnecessary to reply to each and every legal argument raised in the answering affidavits save to say that I reiterate all the submissions I made in the founding and supplementary affidavits.
7. I am advised that I should reply only to such matters as are warranted and I do so hereunder.

FURTHER GROUND OF UNCONSTITUTIONALITY

8. To the extent that the respondents rely on the alleged conflict of interest I may suffer, given that the remedial action seeks to probe my conduct and that of my family members and therefore renders me unable to perform the function of the President in relation to the appointment of the commission, the remedial action is unconstitutional in that:
 - 8.1 The Constitution already provides a process in terms of which the powers of the President are to be exercised by others, identified in

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section 90 of the Constitution. Relevant in this regard is when the President is unable to perform all the functions of the President.

8.2 The impugned remedial action introduces a process inconsistent with the Constitution when the President (not that this is admitted) is unable to perform all the powers of a president.

8.3 The impugned remedial action now introduces a process not authorised by the Constitution that when a president is unable to exercise a presidential power, the Public Protector derives a power to direct a different process. I am advised that the Public Protector does not have such a power neither in terms of the Constitution or any other law.

8.4 It therefore must mean that if the respondents contention is sound namely, that by reason of the alleged conflict of interest I am unable to exercise the section 84(2)(f) power, then the individuals identified in section 90 of the Constitution must then exercise that power. To suggest that I must still make the appointment but on terms dictated by the impugned remedial action makes me a rubber stamp.

8.5 It is perplexing that the respondents would hold that I am conflicted and not competent to appoint a commission of inquiry and at the same time insist that I must do it when told to do so by the Public Protector through the impugned remedial action.

(A) J. G. R.

- 8.6 The respondents must be constrained to accept that the power to appoint a commission of inquiry can constitutionally be exercised by the President alone.
- 8.7 Further the power to appoint a commission of inquiry in terms of the Commissions Act vests on the President alone.
- 8.8 That an appointment of a commission of inquiry by the President through dictation is unlawful and invalid.
- 8.9 That the impugned remedial action is not advisory in nature. Consistent with the contentions by the respondents it is binding leaving no discretion which I would otherwise have, if it was advice.
- 8.10 That the decision to appoint a commission of inquiry by the President must be decided on his or her own accord.
- 8.11 That it is competent for the President in the exercise of his or her power to appoint a commission of inquiry to do so, if necessary, on the advice of my Cabinet and advisers. The Public Protector is not a member of my Cabinet or my advisers. The impugned remedial action does not purport to be an advice.

PEREMPTION

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9. The respondents also seek to challenge the review application on the basis of a claim to peremption. This is wrong:

9.1 Firstly, for me to have perempted my right to challenge the impugned remedial action, such peremption must be shown that I have acquiesced unequivocally. The evidence shows differently. I consistently made it plain that the implementation of the impugned remedial action would be unconstitutional for reasons already advanced. It is therefore factually wrong that I have acquiesced unequivocally.

9.2 Secondly, all my statements referred to by the respondents that I have stated that I will appoint a commission of inquiry did not say that I would do so in furtherance of the impugned remedial action.

9.3 I am still minded to appoint a commission of inquiry not through dictation because the issues raised in the Public Protector's report are of sufficient public interest.

9.4 Where I to appoint a commission of inquiry while the review is pending, I harbour a suspicion that, which is reasonable, that there would be a court challenge that I cannot appoint a commission of inquiry but must implement the impugned remedial action.

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- 9.5 I also bring the review application, to find legal certainty about what the Public Protector can do or not do, in matters relating to the exercise of a power of the executive.

PRIMA FACIE FINDINGS

10. The respondents contend that the report of the Public Protector is *prima facie* evidence of wrongdoing, amongst others, on my part. This is factually incorrect, in that:
- 10.1 In all the instances, the choice of word used in the report regarding the matters under investigation, are observations or like words, making it plain that no *prima facie* finding is made in the report. For instance, it cannot be *prima facie* if it is still a suspicion.
- 10.2 The other respondents state it as a matter of fact that I am guilty of wrongdoing (various pejorative adjectives are used with reference to me). If this was correct, there would be no need for a commission of inquiry.

COUNTER APPLICATION OF THE PUBLIC PROTECTOR

11. The Public Protector contends that in the event that the remedial action is found to be invalid, the appropriate relief must be one that remits the matter back to the Public Protector. This would be an appropriate relief.

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12. However, the Public Protector also seeks that such an order of remittal must also include in it that I ensure that the Office of the Public Protector is provided with sufficient resources to conduct the investigation. This can hardly be an appropriate remedy in that:

12.1 The Constitution vests Parliament and Parliament only regarding appropriations out of the State Revenue Fund.

12.2 No member of the executive can instruct Parliament on how to make the appropriation.

12.3 It remains open for the Public Protector should the matter be remitted, to approach Parliament for a special appropriation on good cause shown.

A JUDGE NOMINATED BY THE CHIEF JUSTICE

13. The respondents argue that the Chief Justice must nominate a judge to preside over the commission of inquiry and seek to justify that if I appointed a judge, there is a likelihood I would appoint one to address my interests or that of members of my family. This is a slight on the judiciary. The Constitution states in very clear terms that the judiciary is independent and judges are to exercise their powers without fear, favour or prejudice. To suggest that one appointed by me, would not exercise his or her powers without fear, favour or prejudice is a

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gratuitous insult to such a judge. I have just recently appointed judges, which if this logic is correct, would mean that they stand to further my interest in the performance of their duties. This is clearly wrong.

FUNCTUS OFFICIO

14. Regarding whether the Public Protector is functus officio having made her report, the respondents appear to be making contradictory propositions:

14.1 Firstly, the Public Protector contends that the commission is to continue and finalise the investigation into matters in respect of which the report makes "provisional findings". If this was correct, it must mean that at the end of the commission's work it must take remedial action on findings of fact that it makes. This would be unconstitutional.

14.2 Secondly, if the commission's work is separate, from that of the Public Protector, then it must refer its factual finding back to the Public Protector. The commission does not have such a power.

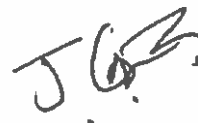
EXPLANATION FOR THE DELAY

15. I am advised that my supplementary affidavit was filed out of time and that I must explain the delay. In this regard my attorney of record did the following:

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- 15.1 On receiving the Rule 53 record my attorney had to copy 17 arch lever files which took time.
- 15.2 Anticipating that the supplementary affidavit may be out of time, wrote to the other parties requesting their indulgence to enable the supplementary affidavit to be filed later than as directed by the Judge case manager. A copy of this letter is attached hereto marked "RA1".
- 15.3 Receiving no favourable response, my attorney wrote to the Judge case manager requesting an extension of time for the filing of my supplementary affidavit. Attached hereto is a copy marked "RA2".
- 15.4 My attorney did not receive a response to that request.
- 15.5 Once the supplementary affidavit was settled, my attorney could not reach me given the fact that I was in a remote part of the country and only returned late on the date of filing.
- 15.6 As soon as I received the supplementary affidavit, was satisfied therewith, promptly signed it and had it commissioned, it was filed on the Monday following the Friday on which the supplementary affidavit was to be filed.



16. I had no intention to disregard the direction of the Court, and the delay is deeply regretted. I therefore ask that the explanation for the late filing of the supplementary affidavit be condoned, to the extent necessary.
17. I attach a confirmatory affidavit of my attorney of record.

COSTS

18. The respondents, barring the Public Protector, pray for an order that I be ordered to pay any costs out of my pocket and on a punitive scale in the event the application fails. This relief would be inappropriate in that
- 18.1 The review application is made in vindication of my constitutional right to submit any dispute capable of resolution by application of law to a court or tribunal. This is what I did. I cannot be made to pay a cost if my attempt at vindicating my right is found to be constitutionally unsound. Further legal argument would be addressed in this regard.
- 18.2 The review application deals with important constitutional issues including the ambit of the power of the Public Protector, there is no frivolity about the application itself.
- 18.3 The matters in the review application all obtain and arise out of the work I did in my official capacity. I am advised that it will have a chilling

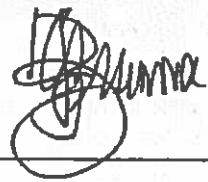
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effect if public office bearers or state officials stand at risk of being ordered to pay out of their pockets, costs in litigation that go against them in their official capacity.

18.4 I have not been cited in these proceedings in my personal capacity.

19. For all these reasons, I am advised that it would be inappropriate to order such a relief. Further legal argument would be advanced at the hearing of this application.



JACOB GEDLEYIHLKISA ZUMA

THUS SIGNED AND SWORN TO before me at Cape Town on this the 07th day of September 2017 by the deponent who acknowledges that he/she knows and understands the contents of this affidavit; that it is the truth to the best of his/her knowledge and belief and that he/she has no objection to taking the prescribed oath and regards the same as binding on his/her conscience and the administration of the oath complied with the Regulations contained in Government Gazette No R1258 of 21 July 1972, as amended.

SOUTH AFRICAN POLICE SERVICE
STATION TOWNHUB PPS CAPE TOWN
PRESIDENTIAL PROTECTION SERVICE
WESTERN CAPE

2017 -09- 07

PRIVATE BAG X1 STALFLEIN 8005
CAPE TOWN
SOUTH AFRICAN POLICE SERVICE



SGT
7096260
O'REILLY

COMMISSIONER OF OATHS