

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO.

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY

Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

JAMES SELFE

state under oath as follows:

- 1 I am the chairperson of the Federal Executive of the applicant, the Democratic Alliance of South Africa (**the DA**), and I represent it as a Member of the National Assembly of the Parliament of the Republic of South Africa. I am duly authorised to depose to this affidavit on behalf of the DA.
- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.

- 3 Where I make legal submissions, I do so on the advice of the DA's legal representatives.

PARTIES

- 4 The applicant is the **DEMOCRATIC ALLIANCE**.

- 4.1 The DA is a political party registered in terms of section 15 of the Electoral Commission Act 51 of 1996, which has its head office at the Thebe Hosken House, Mill Street, Cape Town.

- 4.2 The DA brings this application in its own interest, as the main opposition party in Parliament, and in the public interest, in accordance with sections 38(a) and 38(d) of the Constitution.

- 5 The first respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**.

- 5.1 The President is cited in his official capacity but, as is explained below, in the event of this application being opposed a personal costs award is sought against him.

- 5.2 The President is cited at Tuijnhuis, Cape Town.

- 6 The second respondent is the **DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY**.

6.1 The Deputy Speaker is cited in his official capacity but, as is explained below, in the event of this application being opposed a personal costs award is sought against him.

6.2 The Deputy Speaker is cited at Parliament, Plein Street, Cape Town.

7 The third respondent is the **SPEAKER OF THE NATIONAL ASSEMBLY**.

7.1 The Speaker is cited in her official capacity. No relief is sought against her (save for an order for costs in the event of opposition) and she is cited only for such interest as she has in this matter.

7.2 The Speaker is cited at Parliament, Plein Street, Cape Town

THE NATURE OF THIS APPLICATION

8 This application arises from a recent question posed to the President in the National Assembly by the leader of the DA, Mr Mmusi Maimane.

9 That question asked the President what the total amount in Rand of all legal costs incurred by (a) his Office and/or (b) the Presidency since 1 May 2009 was in respect of the decision by the National Prosecuting Authority to drop the 783 counts of fraud, corruption and racketeering against him.

10 The President did not provide any meaningful, substantive or proper answer to the question. He did not disclose how much money had been spent in this regard. Instead he provided what can only be described as a non-answer –

which avoided the question entirely. The DA contends that this was unlawful and unconstitutional.

11 This unlawful and unconstitutional conduct of the President was exacerbated and perpetuated by the Deputy Speaker, who was presiding at the time. Instead of directing the President to answer the question and disclose how much money had been spent, the Deputy Speaker regarded the matter as having been dealt and directed that the proceedings continue. The DA contends that this too was unlawful and unconstitutional.

12 The DA accordingly seeks orders:

12.1 Declaring that the conduct of the President and Deputy Speaker in this regard was unlawful and unconstitutional; and

12.2 Directing the President to answer the question in writing within five days.

13 I emphasise that while the question posed and the answer needed are themselves a matter of considerable public importance, as I explain below, the public interest in this application goes significantly further.

13.1 The President's failure to answer the question and the Deputy Speaker's conduct in allowing this to occur fundamentally undermine the constitutional scheme, whereby the President is required to be held accountable by the National Assembly in the public interest.

- 13.2 If the President and other members of the executive can simply refuse to provide information to the National Assembly by providing a non-answer of this sort, this fatally imperils the ability of the National Assembly to perform its constitutionally ordained role.
- 13.3 It is therefore essential that this Court clarify that it is not lawful or constitutional for the President and Deputy Speaker to conduct themselves as they have in this application. If this court does not do so, members of the executive will see this as a licence to avoid answering parliamentary questions posed to them, with resulting damage to our democratic institutions and the public.
- 14 The DA therefore had no option but to approach this court via this application in order to protect the integrity of Parliament.
- 15 This affidavit is structured as follows:
- 15.1 **Part I** sets out the relevant factual background to this application;
- 15.2 **Part II** sets out the President's unconstitutional and unlawful conduct;
- 15.3 **Part III** sets out the Deputy Speaker's unconstitutional and unlawful conduct; and
- 15.4 **Part IV** deals with the relief sought.

FACTUAL BACKGROUND

The litigation

- 16 On 28 December 2007, an indictment containing charges of corruption and money laundering was served on Mr Zuma. The indictment set out 783 counts of fraud, corruption and racketeering against him.
- 17 However, in April 2009, the then Acting National Director of Prosecutions announced that he had made a decision to discontinue the prosecution of Mr Zuma.
- 18 The substance of the charges against Mr Zuma and the purported basis of the NDPP's decision is well known and the subject of multiple judicial decisions and is not set out here.
- 19 Shortly after the NDPP's decision in April 2009, the DA launched a judicial review of the NDPP's decision to discontinue the prosecution. That judicial review has only very recently reached finality – more than eight years later – with the decision of the SCA on 13 October 2017.
- 20 In that eight year period, the matter was heard by the courts on no fewer than six occasions. The judgments resulting were the following:
- 20.1 During June 2010 the North Gauteng High Court heard aspects of the matter, culminating in the judgment of Ranchod J on the question of whether the DA had locus standi to bring the review application.

- 20.2 In February to March 2012, the SCA heard an appeal in that matter and delivered a judgment holding that the DA had the necessary locus standi.
- 20.3 In July 2013 the North Gauteng High Court again heard aspects of the matter, culminating in the judgment of Mathopo J (as he then was) on the duty of the NDPP to provide the DA with various parts of the Rule 53 record.
- 20.4 In August 2014, the matter returned to the SCA, which delivered a judgment compelling the NDPP to provide the parts of the Rule 53 record sought.
- 20.5 In March to April 2016, a Full Bench of the North Gauteng High Court heard the merits of the review application and delivered a judgment reviewing and setting aside the NDPP's decision as irrational.
- 20.6 In September to October 2017, the SCA heard the application for leave to appeal against this judgment and dismissed the appeal. It thus confirmed that the NDPP's decision to discontinue the prosecution was irrational.
- 21 The SCA ultimately held in every one of the three judgments that the President should be liable (jointly and severally with the NDPP) for the DA's costs.
- 22 The President was, via his legal team, an active participant in every one of these six hearings and the filing of papers and heads of argument preceding

them. At every such hearing he was legally represented by a private attorney and by at least three counsel.

23 It is therefore apparent that the costs involved in these proceedings were very substantial. I estimate that the costs incurred by the President in relation to his legal representation in this regard must have exceeded R10 million, possibly substantially so.

24 It appears that it is the public purse that has borne all or most of these costs involved, rather than the President in his personal capacity. The DA has considerable doubts about whether this is lawful or appropriate but for purposes of the application this is irrelevant and need not be determined.

The question and the President's non-answer

25 Given this apparently very substantial expenditure of public funds in an ultimately futile attempt to prevent the President facing the charges concerned, the DA considered that it was appropriate and necessary for the National Assembly and public to be informed as to the extent of the expenditure concerned.

26 Accordingly, on 17 October 2017, the Mr Maimane submitted a written question, to be answered by the President during his scheduled question and answer session in the National Assembly on 2 November 2017. A copy of the submission of the question is attached marked **FA1**. The question read as follows:

“What is the total amount in Rand of all legal costs incurred by (a) his Office and/or (b) the Presidency since 1 May 2009 in respect of the irrational decision by the National Prosecuting Authority to drop the 783 counts of fraud, corruption and racketeering against him in his personal capacity?”

27 On 2 November 2017, the President appeared in the National Assembly.

28 The President proceeded to give the following answer to the question posed by Mr Maimane:

“Deputy Speaker, the litigation referred to was not at the instance of the President but was initiated by the political party. The President has defended it as he is entitled to do so, at state expense according to the provisions of the State Attorney Act 56 of 1957.

This benefit is extended to all who are employed in the service of the state. Thank you very much.”

29 What followed was an interchange between Mr Maimane, the President, the Deputy Speaker (who was presiding) and Mr John Steenhuisen (the DA’s Chief Whip) about what the DA considered was the President’s failure to answer the question. The interchange can be found at page 53 of the Unrevised Hansard for the National Assembly on 2 November 2017, which is annexed hereto, marked **FA2**. It states as follows:

“The LEADER OF THE OPPOSITION: Deputy Speaker, the question says how much? That is the question. I am not ready for my supplementary; he has not answered. Can we deal with that before I get onto my supplementary?”

The PRESIDENT OF THE REPUBLIC: I don’t know what provokes the answer. I am answering the question because the answer gives an impression that I have been running to courts and spending a lot of money. I am therefore saying that I have been defending what the political parties have been doing in terms of taking me to court. I have spent money and the government has spent money.

The CHIEF WHIP OF THE OPPOSITION: Deputy Speaker?

The DEPUTY SPEAKER: Yes, what are you rising on?

The CHIEF WHIP OF THE OPPOSITION: May I address you in terms of Rule 142 of the Rules? We are one of the few countries in the world where the executive are sent the questions so long in advance; 16 calendar days. The President has had this question for 16 calendar days. There is no reason why you couldn't come to the House today to give an answer to the question that was on the Order Paper.

If he doesn't know the numbers, surely someone in his department must know the numbers. How on earth are we supposed to hold the President accountable when he shows such contempt for the question he has had for 16 calendar days?

The DEPUTY SPEAKER: Hon members, I have given the President a chance to respond and he has responded. You ask your supplementary question sir. [Interjections.] My role is to request you now to ... I asked the President, you ask your question sir.

The LEADER OF THE OPPOSITION: Deputy Speaker, I am not willing to move on because I do not understand. The President is not answering the question. [Interjections.]

The DEPUTY SPEAKER: Order! Order! Hon members.

The LEADER OF THE OPPOSITION: What is the point of this interaction?

The DEPUTY SPEAKER: Hon members, Order! Hon Maimane, I have asked the President to respond to you. He gave you a response ... [Interjections.]

The LEADER OF THE OPPOSITION: He did not! [Interjections.]

The DEPUTY SPEAKER: I am not going to be involved in the quality of the response. So, I am requesting you to ask a supplementary question."

THE UNLAWFUL CONDUCT OF THE PRESIDENT

- 30 As section 1 of the Constitution makes clear, our Constitution is built on the principles of openness, accountability and the rule of law.

- 31 Section 1 of the Constitution must be read together with the other relevant provisions of the Constitution as well as relevant provisions of the National Assembly Rules and Executive Ethics Code.
- 32 Without in any way seeking to be exhaustive, given that full legal argument will be advanced at the hearing of this matter, these relevant provisions include the following:
- 32.1 Sections 42(3) and 55 of the Constitution make clear that the National Assembly is the key democratic institution with the responsibility to hold the National Executive accountable. This includes section 55(2) of the Constitution which requires that the National Assembly must provide mechanisms: *“to ensure that all executive organs of state in the national sphere of government are accountable to Parliament”*.
- 32.2 Section 83 of the Constitution imposes on the President the duties to uphold, defend and respect the Constitution as the supreme law of the Republic and to promote the unity of the nation and that which will advance the Republic.
- 32.3 Chapter 10 of the National Assembly Rules (a copy of which Chapter is attached marked **Annexure FA3**) deals with questions in the National Assembly. Of particular relevance is Rule 140 which provides that oral questions to the President must be:
- 32.3.1 scheduled in accordance at least once per quarter;
- 32.3.2 limited to matters of national and international importance; and

32.3.3 submitted to the Speaker at least 16 calendar days before the question day on which they are to be answered, for the Speaker's approval as complying with the rules.

32.4 The Executive Ethics code (a copy of which is attached as **Annexure FA4**) deals with for General Standards which ought to be observed by members of the executive. These are:

"2. General Standards

2.1 Members of the Executive must to the satisfaction of the President or the Premier, as the case may be

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfil all the obligations imposed upon them by the Constitution and law; and

(c) act in good faith and in the best interest of good governance; and

(d) act in all respects in a manner that is consistent with the integrity of their office or the government."

32.5 The Code further prohibits members of the executive acting in certain ways. These are spelt out in clause 2.3 of the Code as follows:

"2.3 Members of the Executive may not

(a) wilfully mislead the legislature to which they are accountable;

(b) wilfully mislead the President or Premier, as the case may be;

(c) act in a way that is inconsistent with their position;

(d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;

(e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;

(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;

(g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive or

(h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowance or payments.”

(Emphasis added)

33 I am advised that the SCA has expressly recognised that questions addressed by opposition parties to the Executive serve as an important mechanism at the disposal of Parliament for exercising oversight and holding the executive and organs of state to account. In *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape* 2015 (3) SA 545 (SCA), the Court held at paras 22-24:

“[I]t seems to me, that our constitutional model sets fairly exacting standards for Cabinet Ministers particularly in their interaction with Parliament. According to s 1 of the Constitution, the Republic of South Africa is ‘one, sovereign, democratic state’ founded, inter alia, on ‘a multi-party system of democratic government, to ensure accountability, responsiveness and openness’. In Coetzee v Government of the Republic of South Africa... albeit with reference to the Interim Constitution, Sachs J observed:

‘The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality . . . The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which . . . [we derive] the principles and rules . . . [we apply], and the final measure . . . [we use] for testing the legitimacy of impugned norms and conduct.’

Questions addressed by opposition parties to the Executive and Organs of State (see s 239 of the Constitution) serve as an important mechanism at the disposal of Parliament for exercising oversight and holding the executive and organs of state to account (s 55 of the Constitution). And, in terms of s 92(2) of the Constitution, Cabinet Members are collectively, individually and directly accountable to Parliament for the exercise of their powers and the performance of their functions. Moreover, s 13 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 makes a member, which by definition includes a Minister or Deputy Minister (s 1), guilty of contempt of Parliament if such member, inter alia, commits an act mentioned in section 17(1)(e). Section 17(1)(e), in turn, provides that ‘[a] person . . . [who] wilfully furnishes a House or committee with information, or makes a statement before it, which is false or misleading,

commits an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.’ Further, consistent with the National Assembly’s constitutional responsibility to ‘provide for mechanisms to ensure that all executive organs of State in the national sphere of government are accountable to it’, the Rules of the National Assembly includes specific procedures for the questioning of Ministers, the Deputy President and the President (rules 109-111). There is, as well, the Executive Ethics Code, which not just re-affirms our commitment to the ‘promotion of an open, democratic and accountable government’ (s 2.2), but also provides that Members of the Executive may not ‘wilfully mislead the legislature to which they are accountable’ (s 2.3(a)). Tellingly, in England, Ministers who knowingly mislead Parliament are expected to offer their resignation to the Prime Minister and such an offence might also be proceeded against as a contempt.

As De Vos and Freedman explain:

‘Accountability is the hallmark of modern democratic governance and implies that members of the executive have to explain their actions to Parliament and its committees so that Parliament can play a role in checking the exercise of power by members of the executive.’

They add:

‘... accountability requires the establishment of institutional arrangements to effect democratic control over the executive as members of the executive, unlike the MPs, are not directly democratically elected.’”

- 34 In light of the provisions and dictum cited, I respectfully submit that it is clear that when a question to the President has been submitted to the Speaker’s office and approved to be put to the President, the President is under a constitutional duty to answer the question properly, meaningfully and diligently. If he does not have the information to which the question refers, his officials must seek to find it and if they cannot, the President must say so in his answer.
- 35 What the President cannot do is simply seek to avoid the question by providing a non-answer of the kind he gave in this case.

35.1 The question asked the President for a Rand figure regarding the legal fees spent on the case involving the NDPP's decision to discontinue his prosecution.

35.2 The President's "answer" provides no rand figure or estimate of expenses at all.

35.3 Instead, he proceeded to embark on an attempted explanation as to why the State covered his legal fees. But that was self-evidently not the question posed and his response was therefore not an answer to the question posed. It was a non-answer.

35.4 The consequence of this is that even though Mr Maimane posed an importantly and legitimate question seeking to understand how much was spent on the legal fees concerned, both he, the National Assembly and the public remain in the dark as to how much was in fact spent.

36 I submit that the President's conduct in this regard was unlawful and unconstitutional.

THE UNLAWFUL CONDUCT OF THE DEPUTY SPEAKER

37 I have already set out the various provisions of the Constitution and Rules which make clear that questions to the President are an important mechanism by which the National Assembly holds the executive accountable.

38 In this regard, the person presiding at one of the National Assembly's question-and-answer sessions bears a duty to ensure that the President answers the

questions put to him properly, meaningfully and diligently. If the President fails to provide proper, meaningful and diligent answers in the National Assembly to the questions put to him, the fundamental purpose of calling the President to account in the National Assembly is defeated. This undermines essential and fundamental aspects of our constitutional scheme.

39 In the present case, the Deputy Speaker (who was presiding) did not fulfil these obligations. The Deputy Speaker failed to require the President to provide a proper answer to the question posed – even though it was quite clear (and pointed out by Mr Maimane and Mr Steenhuisen) that the President had not answered the question and had given non-answer.

40 The approach of the Deputy Speaker, as appears from the factual section set out above, was that “*I am not going to be involved in the quality of the response.*”

41 I submit that this was a breach of the Deputy Speaker’s obligations. While it may not be the role of the Deputy Speaker to comment on or check the factual correctness of answers given by the President, the Deputy Speaker must at least ensure that the question has been answered – that is, that the information sought has been provided. In the present case, it was quite plain that the question had not been answered and the information sought had not been provided and yet the Deputy Speaker declined to take any steps at all to ensure that a proper and meaningful answer was given.

42 I submit that the Deputy Speaker's conduct in this regard was unlawful and unconstitutional.

REMEDY

43 If this Court finds, as I submit it must, that the conduct of the President and the Deputy Speaker was unlawful and unconstitutional, then it must issue a declaration to this effect in terms of section 172(1)(a) of the Constitution. That is the relief sought in prayer 1 of the Notice of Motion.

44 In addition, and in any event, it is necessary that this Court grant "just and equitable" relief in terms of section 172(1)(b) of the Constitution. In this case, what is just and equitable is an order directing the President to provide a proper and meaningful answer to the question, in writing within five days of this Court's order. That is the relief sought in prayer 2 of the Notice of Motion.

45 In relation to costs:

45.1 The DA sincerely hopes that, upon receipt of this application, the President and Deputy Speaker recognise that what occurred during the question and answer session was not consistent with constitutional requirements and do not oppose the relief sought. In that event, only an ordinary order for costs is sought.

45.2 In the event, however, that the President or Deputy Speaker does oppose the relief sought, then a punitive costs award is sought against them in their personal capacity. In all the circumstances of this case,

there is simply no reason that the public purse should be forced to bear the costs of this application.

46 In the circumstances I pray for the relief as set out in the notice of motion.

JAMES SELFE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **CAPE TOWN** on this the ____ day of NOVEMBER 2017, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS