

## **The Nkandla Judgment: Nkandla, the President and the Public Protector**

*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11*<sup>1</sup>

**Nkandla:** the private residence of Jacob Zuma, situated in a rural area of KwaZulu-Natal, South Africa.

**The President:** Jacob Zuma (or JZ). In 1994 the first post-apartheid democratic elections were held. Nelson Mandela was elected as the first post-apartheid president of the Republic of South Africa<sup>2</sup>, succeeded by Thabo Mbeki, then Jacob Zuma. The President “*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*”<sup>3</sup>.

**The Public Protector:** Thuli Madonsela, appointed in terms of the Constitution of the Republic of South Africa (“the Constitution”)<sup>4</sup>.

### **The Background:**

When inaugurated as President of the RSA, security upgrades were required to Nkandla, the private residence of Jacob Zuma. Nkandla is a homestead<sup>5</sup> in rural KwaZulu-Natal, his birthplace. The renovations and improvements effected to Nkandla were luxurious, and included a visitors’ centre, an amphitheatre, a cattle kraal, a chicken run and a swimming pool (the latter justified as a “fire pool”). Criticism of the extent and cost of the “security upgrades” dogged the President<sup>6</sup>.

Complaints to the Public Protector, Thuli Madonsela, “*of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic*”<sup>7</sup>, obliged her to conduct an investigation.

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<sup>1</sup> Hereinafter referred to as “the Nkandla Judgment”.

<sup>2</sup> Hereinafter referred to as “the RSA”.

<sup>3</sup> Paragraph [20] of the Nkandla judgment.

<sup>4</sup> Act 108 of 1996.

<sup>5</sup> Or “kraal”.

<sup>6</sup> Other complaints dogged the President: prior to his election as President he was twice charged criminally, first with rape and then corruption.

<sup>7</sup> Paragraph [2] of the Nkandla judgment.

Her report <sup>8</sup> was to the effect that the “security upgrades” were no more than luxurious improvements, and that the President should repay the amounts expended on “unlawful” upgrades. In her words, 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*” <sup>9</sup>.

The President and the National Assembly <sup>10</sup> ignored the Public Protector’s recommendations, contending such recommendations were not binding.

### **The Constitutional challenge:**

Julius Malema, an erstwhile supporter of Jacob Zuma, disenchanted with the President, had formed the “Economic Freedom Front”<sup>11</sup>, with Floyd Shivambu as his second-in-command. Arising from the Public Protector’s report and recommendations on Nkandla, the EFF instituted proceedings in the Constitutional Court of the RSA to declare the President and the National Assembly to be in breach of their obligations in terms of the Constitution of the RSA. The Democratic Alliance (an opposition party to the ANC) joined in the fray.

### **The Constitutional Court judgment:**

The Honourable Chief Justice Mogoeng, delivering the unanimous judgment of the court, said:

*“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. 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.”*<sup>12</sup>

Describing the role of the Public Protector, the Constitutional Court re-affirmed that, being one of the “*Chapter Nine institutions, the office of the Public Protector was created to ‘strengthen constitutional democracy in the Republic’*”<sup>13</sup>.

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<sup>8</sup> *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No 25 of 2013/14 (Public Protector’s Report).

<sup>9</sup> Paragraph [2] of the Nkandla judgment.

<sup>10</sup> Parliament.

<sup>11</sup> “EFF”, in imitable South African style, referred to colloquially as “The Effings”.

<sup>12</sup> Paragraph [12] of the Nkandla judgment.

<sup>13</sup> Paragraph [49] of the Nkandla judgment.

An analysis of the Constitution, the principles of remedial action, and an application of the principles to the facts, compelled the Constitutional Court to the conclusion that

*“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.”<sup>14</sup>*

The Constitutional Court has ruled that the President flouted the Constitution. The President has been ordered to repay the costs of the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool.

### **The President's response:**

The President has said he will respect the judgment. The National Treasury has been ordered to report on the implementation of its Order within 60 days.

Will the President's *ipse dixit* (*I will respect the judgment*) be followed though?

Watch this space...

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<sup>14</sup> Paragraph [105] of the Nkandla judgment