



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

23 April 2014

Hon. MV Sisulu  
Speaker of the National Assembly  
Cape Town

Per email: [speaker@parliament.gov.za](mailto:speaker@parliament.gov.za)

Dear Mr Speaker

We are pleased to attach a written submission for consideration by the Ad Hoc Committee on the President's submission in response to the Public Protector's Report.

We request you to make the submission available to the members of the Committee and trust that it will assist in their deliberations on this important issue.

Yours sincerely

Lawson Naidoo  
Executive Secretary

Council for the Advancement of South African Constitution

Telephone: [+27 21] 685 8809 • Facsimile: [+27 21] 685 8819

[info@casac.org.za](mailto:info@casac.org.za)

[www.casac.org.za](http://www.casac.org.za)



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

---

**SUBMISSION TO PARLIAMENT  
BY THE COUNCIL FOR THE ADVANCEMENT  
OF THE SOUTH AFRICA CONSTITUTION (CASAC)**

**23 APRIL 2014**

---

**INTRODUCTION**

1. On 9 April 2014 the Speaker of the National Assembly made the following Announcement:-

*“On 2 April 2014, the President of the Republic of South Africa submitted the following documents which were tabled on the same day –*

- a) *Letter in response to Public Protector’s report [Report No. 25 of 2013/14];*
- b) *Proclamation by the President of the Republic of South Africa (Proclamation No. R59, 2013); and*
- c) *Copy of the Public Protector’s report.*

*After consultation with the Chief Whip of the majority party and senior whips of the other parties, I have decided in terms of Rule 214(1)(b) to appoint an ad hoc committee, the committee to –*

- a) consider the submissions by the President of the Republic of South Africa in response to the Public Protector's report and make recommendations, where applicable;*
- b) exercise those powers as set out in Rule 138 that are necessary in carrying out this task;*
- c) consist of twelve members, as follows:-*

<i>ANC</i>	<i>7</i>
<i>DA</i>	<i>2</i>
<i>COPE</i>	<i>1</i>
<i>IFP</i>	<i>1</i>
<i>Other parties</i>	<i>1; and</i>

*d) report no later than 30 April 2014."*

2. The Committee has since been established. From the reports of the media, other than the Congress of the People, all other political parties have taken up their positions in the Committee.

3. In terms of its constitution, the Council for the Advancement of the South African Constitution (CASAC) stands for several founding values. These include:-
  - 3.1 the idea of progressive constitutionalism;
  - 3.2 the protection and advancement of the founding values of the Constitution which include a deliberative, participatory and inclusive democracy;
  - 3.3 the notion that the Constitution is a living, not a static, document and must evolve to deepen democracy;
  - 3.4 the rule of law must be used as an important foundational block in advancing constitutionalism;
  - 3.5 the notion that private and public power should be exercised within the law and must enhance a culture of responsibility and accountability to guard against arbitrary use and abuse of power and authority;
  - 3.6 in advancing its mission, CASAC acknowledges that there is a gap in the living reality of many South Africans who do not have access to the constitutional promises embodied by the

notions of equality, human dignity and socio-economic rights.

For this gap to be closed, on a progressive basis, public resources ought to be used in the interests of the majority of the people, rather than to benefit a few.

4. It is with these considerations in mind that CASAC welcomes the decision by the Speaker to appoint an *ad hoc* committee to conduct an investigation into the report of the Public Protector and the President's response, and make appropriate recommendations. We note, however, that the *ad hoc* committee has not been provided with specific terms of reference. In terms of Rule 138 the Committee will exercise the same powers as those conferred on any other committee of the National Assembly, an aspect to which we revert below.
  
5. Furthermore, the time limit provided for the committee to undertake its assignment is extremely short, bearing in mind the complexity and length of the report under consideration. These factors may ultimately challenge the forensic ability of the *ad hoc* committee and place a question mark over the reliability of its findings or recommendations. Nevertheless, we make these submissions on the basis of what we consider to be the important findings made by the Public Protector, which require answers from the President.

6. It is worth recalling, briefly, some important provisions of the Constitution.

### **RELEVANT CONSTITUTIONAL PROVISIONS**

7. South Africa is founded on several values, articulated in Section 1 of the Constitution. They include human dignity, the achievement of equality and the advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law, and a multi-party system of government to ensure accountability, responsiveness and openness.
8. Section 83 establishes the office of the President. The President is, under Section 83(1) the head of the State and the head of the National Executive. He is obliged to uphold, defend and respect the Constitution as the supreme law of the Republic. The President is also required to promote the unity of the nation and that which will advance the Republic.
9. In terms of Section 89 of the Constitution, the President can be removed from office by the National Assembly. Section 89 provides as follows:-

*“(1) The National Assembly, 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 –*

*a) a serious violation of the Constitution or the law;*

*b) serious misconduct; or*

*c) inability to perform the functions of office.*

*(2) Anyone who has been removed from the office of President in terms of sub-section (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.”*

10. The National Assembly is responsible for holding the National Executive accountable. Section 55 of the Constitution sets out the oversight powers of the National Assembly. In Section 55(2) the National Assembly is required to provide mechanisms “*to ensure that all executive organs of State in the national sphere of government are accountable*” to Parliament. Furthermore, the National Assembly is required to maintain oversight of the exercise of National Executive

authority, including the implementation of legislation and the oversight over any organ of State.

11. Section 181 provides for the establishment of six institutions which support constitutional democracy. They include the Public Protector, whose report is the subject of examination by the present committee. Section 181(2) provides that Chapter 9 institutions are independent and subject only to the Constitution and the law. These institutions should be impartial and exercise their powers and perform their functions without fear, favour or prejudice. In Section 181(3) it is provided that other organs of State through legislative and other measures "*must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.*" No person or organ of State may interfere with the functioning of Chapter 9 institutions. (Section 181(4)). Under Section 181(5), Chapter 9 institutions are accountable to the National Assembly.

## **THE FINDINGS AGAINST THE PRESIDENT**

12. The Public Protector has made several findings in her report. We do not wish to focus on each and every finding made in the report. Our interest is limited to the findings made against the President and to



making submissions pertaining to how Parliament should hold the President accountable for the findings made by the Public Protector.

13. The findings appear from page 427 onwards in the Report of the Public Protector. An extract of the relevant findings is the following:-

*“(4) It is my considered view that the President, as the head of South Africa Incorporated, was wearing two hats, that of the ultimate guardian of the resources of the people of South Africa and that of being a beneficiary of public privileges of some of the guardians of public power and State resources, but failed to discharge his responsibilities in terms of the latter. I believe the President should have ideally asked questions regarding the scale, cost and affordability of the Nkandla Project. He may have also benchmarked with some of his colleagues. He also may have asked whose idea were some of these measures and viewed them with circumspection, given Mr Makhanya’s non-security background and the potential of misguided belief that his main role was to please the President as his client and benefactor.*

- (5) *It is also not unreasonable to expect that when the news broke in December 2009 of alleged exorbitant amounts, at the time R65 million on questioned security installations at his private residence, the dictates of sections 96 and 237 of the Constitution and the Executive Ethics Code required of President Zuma to take reasonable steps to order an immediate enquiry into the situation and immediate correction of any irregularities and excesses.*
- (6) *His failure to act in protection of State resources constitutes a violation of paragraph 2 of the Executive Ethics Code and accordingly amounts to conduct that is inconsistent with his office as a member of Cabinet, as contemplated by Section 96 of the Constitution."*

#### **IMPLICATIONS OF THE FINDINGS**

14. Section 96(2)(b) of the Constitution provides that members of the Cabinet (including the President) may not "act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests".

15. The section sets a very high standard. It does not prohibit only actual conflict of interest. It also prohibits the President from putting himself in a position where there is a "*risk of a conflict*". This requires far more from members of the Cabinet than the Constitution requires from ordinary public servants.
16. The rationale for this stringent requirement for members of Cabinet is clear: members of the Cabinet exercise immense power and they must be above suspicion that they have abused their powers. In a democracy, people agree to grant the power to govern them to others on condition that those who exercise the power do so fairly, lawfully, honestly and in the public interest. That is even truer of the office of the President.
17. When a member of cabinet places herself in a position where a decision in the public interest will may be in her private interest, it undermines public trust not only in the individual, but in the office itself. Any situation that can be said to undermine public trust or faith in the office or its occupant must be said to be contrary to s 96(2)(b).
18. The findings of the Public Protector with regard to President Zuma clearly meet that threshold. When the President addresses the question of public spending on his residence at Nkandla, he inevitably affects his own private interests. In other words, there is

"the risk of a conflict between" his official responsibilities and his private interests: the public interest is to prevent unnecessary or wasteful expenditure; his private interest is to secure a more lavish or comfortable home. That conflict of interests will inevitably lead to a loss of trust in President Zuma, and the office of President.

19. Section 89 states that Parliament "may" remove the President on the grounds of "*a serious violation of the Constitution or the law*" or "*serious misconduct*". The purpose of the provision, unlike the motion of no confidence provision in s 102, is to ensure that the President does not abuse his position. It is not linked, like s 102 is, to a President's popularity or performance. There are specific instances that can justify a removal under s 89: violations, misconduct and inability. The section exists to protect the office, and to protect the Republic from those who cannot exercise the powers of the office faithfully.
  
20. The use of the adjective "*serious*" indicates that there are some constitutional violations and some forms of misconduct that are not serious enough to justify removing the President. Where is the line between "*serious*" and non-serious violations or misconduct? This, in CASAC's view, is an issue that must primarily be dealt with by

Parliament. While courts may in some situations be required to rule on the issue,<sup>1</sup> s 89 affords the power to Parliament as a legislative and political body to determine when misconduct is so serious that it warrants the President's removal.

21. However, while the ultimate determination of how to act under s 89 is, by its nature, a principally political matter, Parliament is obliged to act rationally in reaching that decision. The Constitutional Court has repeatedly made clear that not only must decisions be rational, the process that is followed in reaching those decisions must also be rational.<sup>2</sup> In the words of Justice Yacoob: "*[B]oth the process by which the decision is made and the decision itself must be rational.*"<sup>3</sup>

22. The Public Protector found that President Zuma knowingly benefitted from the upgrades to the Nkandla residence, and failed to take any steps to curb out of control spending that redounded to his benefit. Those are serious findings. Depending on the exact facts, it could

---

<sup>1</sup> For example, if a President is removed and challenges his removal on the ground that his misconduct was trivial.

<sup>2</sup> See, for example, *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC); and *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

<sup>3</sup> *Democratic Alliance* (above) at para 34.

legitimately be treated as serious misconduct, or a serious constitutional violation.

23. For the National Assembly to make a rational determination of whether President Zuma's conduct warrants removal, it must make sure it has all the relevant facts before it. What did the President know and when? Why did he fail to act to prevent the uncontrolled spending? Was his misleading of Parliament indeed bona fide as the Public Protector concluded? Were the costs related to private renovations separated from state expenditure? The Public Protector made findings on these issues, and was unable to make findings on others. Some of her findings depart from those of the task team established by Government to investigate the issue.
24. The Assembly has the power under s 56 of the Constitution to summon any person to "*give evidence under oath*" and to require them to produce documents. In order to make a rational decision on whether or not the President is guilty of serious misconduct or serious violations of the Constitution, it must not merely consider the Public Protector's Report; it must obtain additional information to address the unanswered questions in the Report. The Public Protector's Report makes many negative findings, but also raises many questions. In order to determine whether the President's

established misconduct and violations of the Constitution are indeed “*serious*”, he needs to be questioned by Parliament.

## **THE BREACH OF THE CODE OF ETHICS FOR MEMBERS OF THE EXECUTIVE**

25. The Public Protector has also found that the President has breached paragraph 2 of the Code of Ethics.
26. Paragraph 2 of the Code of Ethics provides for “general standards” to be observed by members of the Executive. Consistently with the finding that the President failed to uphold the provisions of section 96 and 237 of the Constitution, it is submitted that the Committee can probe the issue of whether the President acted in breach of paragraph 2.1(b) and 2.1(d).
27. The above provisions (i) impose an obligation on the President to fulfil the obligations imposed; and (ii) require the President to act in a manner which safeguards the integrity of the office of the President or the government.
28. The factual finding of the Public Protector is that in December 2009, the President became personally aware of the expenditure at his property, which at that stage was estimated at R65 million. Despite

this awareness, he failed to take action to prevent further expenditure, thereby placing his personal interest in conflict with those of his office. Furthermore, the finding of the Public Protector shows that the failure by the President to take steps in December 2009 in effect allowed further unchecked expenditure, resulting in more than R200 million by the time the matter came to be investigated by the Public Protector.

29. When considering the implications of the violations of the Ethics Code, as found by the Public Protector, the Committee must take into account that the President, as Head of the National Executive, is required to exercise executive oversight over other members of National Executive. That creates a responsibility that he must lead by example.

#### **THE ISSUE OF THE SPECIAL INVESTIGATING UNIT INVESTIGATION**

30. Before the establishment of the *Ad Hoc* Committee, it was reported that the President had decided that he would respond to the Report of the Public Protector, after certain further investigations had been conducted by the Special Investigating Unit (SIU). The President confirmed this in his letter to the Speaker dated 01 April 2014.



31. This stance by the President should not be entertained for the following reasons:

31.1 In terms of section 55 of the Constitution, it is clear that the President is accountable to the National Assembly, in his capacity as Head of the Executive. He is unable to dictate the terms of his engagement with the National Assembly.

31.2 In terms of section 181 of the Constitution, all organs of state, including the executive must assist chapter 9 institutions to ensure their effectiveness, impartiality and independence. The view taken by the President, effectively to equate the report of the Public Protector with a report prepared by members of the President's Cabinet, diminishes the status of the report of the Public Protector. Furthermore, the failure to act in terms of the report – without challenging the report in any court of law – effectively undermines the effectiveness and the independence of the Public Protector.

31.3 The SIU investigation is limited to the matters outlined in the Proclamation by the President (No. R. 59, 2013) which focus on the Department of Public Works. The SIU is not competent to investigate the findings of the Public Protector, namely that the President acted in breach of the Constitution

and the Code of Ethics. Any investigation by the SIU will not address those issues. Under the Constitution and the Executive Members Ethics Act, that is the responsibility of Parliament.

32. It is therefore submitted that the investigation by the National Assembly cannot be made subject to the report of the SIU. The National Assembly is not subservient to the SIU. If (as we submit) the President must answer certain questions, there is no legal or constitutional impediment to such course of action.

Lawson Naidoo

Executive Secretary  
CASAC