

BEFORE THE POWERS AND PRIVILEGES COMMITTEE

In relation to the hearing of:

JULIUS SELLO MALEMA, MP

NYIKO FLOYD SHIVAMBU, MP

MBUYISENI QUINTIN NDLOZI, MP

MARSHALL MZINGISI DLAMINI, MP

VUYANI PAMBO, MP

SINAWO TAMBO, MP

Scheduled for 20 November 2023, 21 November 2023, and 22 November 2023.

WRITTEN STATEMENT ON BEHALF OF THE CHARGED MEMBERS OF PARLIAMENT

INTRODUCTION

- 1 This is a statement on behalf of the Economic Freedom Fighters and its six Members of Parliament who have all been separately served with charges that are identical. The charges are as follows:

“During the Joint Sitting, you as well as Mr Nyiko Floyd Shivambu, Mr Vuyani Pambo, Mr Mashall Mzingisi Dlamini, Mr Mbuyiseni Quintin Ndlozi and Mr Sinawo Tambo ascended onto the stage, without the authority to do so and advanced towards the President of the Republic of South Africa (“the President”) and the Presiding Officers in a threatening manner.

Your conduct as particularised above resulted in a suspension of the proceedings and your removal from the House by Security Services of the Republic of South Africa.

Charge 1: Contempt of Parliament

It is alleged that you are guilty of contempt of Parliament in terms of section 13(a) and (c) read with section 7(a) and (e) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ('the Act') and National Assembly Rule 64(a) and (d), Rule 69A9) and (f), in that, as a Member of Parliament and during a Joint Sitting of the Houses of Parliament on 9 February 2023 at City Hall, a precinct of Parliament in terms of section 2(1)(d) of the Act, where the business of the day was the State-of-the-Nation address by the President of the Republic of South Africa, you deliberately created and took part in a serious disturbance, disorder and disruption in the House, and acted in way which was seriously detrimental to the dignity, decorum and orderly procedure of the House by:

1. Acting together with Mr Nyiko Floyd Shivambu, Mr Vuyani Pambo, Mr Marshall Mzingisi Dlamini, Mr Mbuyiseni Quintin Ndlozi and Mr Sinawo Tambo;
2. You ascended onto the stage without authority to do so;
3. And in a threatening manner approached the President of the Republic of South Africa and the Presiding Officers;
4. And had to be physically removed by Security Services of the Republic of South Africa;
5. Resulting in a suspension of proceedings."

- 2 It is clear that the misconduct allegation is not directed at individual, but at group or collective misconduct. It is the EFF that has been charged. The EFF is thus making these submissions collectively and on behalf of each of the charged members. The EFF has not waived any of its rights. Nor has any individual done so. It is incumbent upon the Committee to take these representations into account in its deliberations.

- 3 In order to find the EFF guilty of the charges, the following must be established:
 - 3.1 It must be proven that each member had the intention to breach the Rules. An innocent breach of the rules, which is inadvertent is not misconduct according to the charge as currently formulated.
 - 3.2 To sustain the allegation that the EFF “*approached the President and Presiding Officers in a threatening manner*”, it must be shown that the “threat” or fear relied upon (by the President and the Presiding Officers as alleged in the charge) was objectively genuine, reasonable and one based on a fear of imminent harm.¹ This fear could only have been entertained by the President who has not testified.
 - 3.3 The Committee must be satisfied that objectively viewed, the EFF was not engaging in constitutionally permissible behaviour.
- 4 The sole evidence relied upon is video evidence. It has not been authenticated in any manner. And it is clear that it presents a slanted picture and does not show the entire proceedings. It could only have been so slanted so as to present a false and misleading picture.
- 5 Despite its shortcomings, the video amply demonstrates that the EFF was engaged in peaceful and unarmed protest. It is the security that used force and violence against the EFF in its attempts at ejecting them.

¹ *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* [2019] ZACC 40; 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC) at para 49.

6 The EFF cannot be found guilty of misconduct if its conduct is permitted by the Constitution. The conduct of the EFF is permitted by the provisions of section 17 of the Constitution.

7 On the evidence presented to the Committee, no case was made out against the EFF.

NO EVIDENCE TO SUSTAIN THE CHARGES

8 I shall begin with the end of Mr Xaso's evidence. He said under oath that.

“I am here to just explain the roles and the procedures of Parliament... it is really not for me to express an opinion there.... But chair with your permission I will not express an opinion on what is likely to be the finding of this committee on the matter. I just express my view on the application of the Rules.”²

9 Mr Xaso is correct. He is not the Speaker, nor is he in a position to express the reasons behind the Speaker's decision, nor can he even given his opinion on what ought to have happened. He cannot say that the Rules were broken. Since he was the only witness, the Committee can easily dismiss the charge because the initiator failed to call a witness to state that the Rules were broken and how they were broken.

² Transcript, p. 17, lines 20 – 34.

10 Furthermore, when asked whether it was reasonable for the President and the Presiding Officer to perceive the EFF as approaching them in a threatening manner, Mr Xaso answered:

“I think I need to contextualise this by saying firstly, I don’t know what was in their minds... certainly I don’t know what the President felt, I don’t know what the Speaker felt at the time.”³

11 There is thus no evidence that it was reasonable or not reasonable for either the Speaker or the President to perceive the conduct of the EFF as threatening. Mr Xaso gave no evidence on the main issue in the charge being whether the President and the Presiding Officers were threatened. He also gave no evidence whether the EFF acted in a threatening manner. He also refused to give opinion evidence, despite being wrongly led by the initiator to give opinion evidence.

12 As matters stand, the only evidence before the Committee was about the Rules. There is no evidence of breach. And no evidence of threats – objective or subjective. The case presented by the initiator is thus utterly incompetent.

13 No evidence, at all, was led that the EFF intended to approach the President and the Presiding Officers in a threatening manner. This is material as the charged members could only be found guilty if evidence was led that they intended to breach the Rules.

³ Transcript, p. 9, lines 24 – 35.

EFF HOLDING THE PRESIDENT ACCOUNTABLE FOR PHALA PHALA WHICH PARLIAMENT DISMALLY FAILED TO DO

14 The members of this Committee are familiar with certain common cause facts, some of which appear from the video:

14.1 On or about 1 June 2022 Mr Arthur Fraser, a former Director-General of the State Security Agency, filed an affidavit with the South African Police Service, in which he requested that the President be investigated for a range of crimes. Mr Fraser alleged that the President acted “in contravention of the Prevention of Organised Crime Act 121 of 1998 . . . [as well as] the Prevention of Corrupt Activities Act 12 of 2004” and that the President’s conduct amounted to “contraventions of our various fiscal, currency and exchange control and custom and excise and (sic) regulations.”

14.2 A substantive Notice of Motion was submitted to the Speaker of the National Assembly, Honourable Mapisa-Nqakula, by the President of the African Transformation Movement, Mr V Zungula, MP, that the matter should be investigated for a possible impeachment of the President in terms of section 89 of the Constitution.

14.3 On 19 October 2022, the Speaker formally referred the Motion to a Panel comprising two judges and one senior advocate in terms of Rule 129C.

14.4 That panel delivered its report on 30 November 2022. It found in favour of the motion submitted by the African Transformation Movement. It came to these conclusions:

- On or about 10 February 2020, there was a housebreaking and theft (the crime) at the private residence of the President at Phala Phala and an undisclosed sum of money in US\$ that was concealed in a leather sofa was stolen.
- This crime was not reported to the SAPS in Bela Bela, Limpopo, where the farm is located. As a consequence, there was no case number or a docket pertaining to this crime. There was a deliberate decision to keep the investigation secret.
- Following the commission of this crime, the President instructed General Rhooode to investigate the burglary and theft from his Phala Phala farm.
- General Rhooode put together an investigating team which included a former SAPS official who happens to be a social worker.
- This investigating team did not follow the normal SAPS practice of investigation as there was no case number or a docket. The investigation was carried out using the state resources.
- President Ramaphosa requested the President of Namibia to assist with the apprehension of Mr. Imanuwela David, the mastermind behind the farm housebreaking and theft.

- A SAPS official, whose name is readily ascertainable, set up a meeting with the Commissioner of the Namibian Special Branch, whose name is readily ascertainable, in “No man’s land” at Ariamsvlei. At this meeting, this SAPS official provided the Namibian Police with information pertaining to the housebreaking and theft at the farm and confirmed that Mr. Imanuwela David, who at the time had been arrested by the Namibian Police, was the mastermind behind the housebreaking. This SAPS official also supplied photographs and names of the accomplices.
- No other investigation was authorised in connection with this crime committed at Phala Phala.
- There is no information of any other SAPS official who was investigating the housebreaking and theft other than General Rhooode.
- General Rhooode accompanied Mr. Chauke to Namibia on 25 June 2020. They were met by the Namibian Police at “no man’s land”. They travelled to Windhoek where Mr. Chauke held a meeting with President Geingob.

14.5 In relation to the President, the Panel found:

- “Accordingly, we are satisfied that the evidence discloses, prima facie, a violation of section 96(2)(a) read with section 83(b) of the Constitution. In all the circumstances, we are satisfied that the President has a case to answer in relation to Charge 1.”

- “Furthermore, the information before the Panel also establishes, prima facie: that the President sought assistance from the President of Namibia in apprehending the suspect who was in Namibia at the time and General Rhoope went to Namibia in the pursuit of the investigations of the house breaking and theft of money.”

- “Based on all the information placed before the Panel, we think that the evidence presented to the Panel, prima facie establish that the President:

238.1. thrust himself into a situation where there was a conflict of interest between his official responsibilities as the Head of State and as businessperson involved in cattle and game farming; and
238.2. acted in a manner that was inconsistent with his office.”

14.6 “In all the circumstances, we think that the evidence presented to the Panel, prima facie, establishes that the President may be guilty of a serious violation of the sections 96(2) misconduct involving a violation of section 96(2)(a) as alleged in charge 1; and committing a serious misconduct by violating the provisions of section 96(2)(b) read with section 83(b) of the Constitution”.

14.7 “On the information presented to us, the housebreaking and theft of US\$580,000 was not reported to a police official in the Directorate for Priority Crime Investigation as required by Section 34(1). Nor was it reported to any SAPS station as no case was opened or a docket registered for this offence. In our view this information, prima facie,

discloses that the President violated section 34(1) read with section 34(2) of PRECCA.”

- 15 The EFF and other political parties including the African Transformation Movement, the United Democratic Movement, requested for the establishment of a formal impeachment process.
- 16 On 13 December 2022 the resolution of the National Assembly, supported overwhelmingly by the ANC was that the formal impeachment process should not be proceeded with. According to the EFF and the ATM this outcome was a demonstration of the ANC’s willingness to use its numbers in Parliament to shield the President from accounting to Parliament.
- 17 The ATM brought an application to the Western Cape High Court for the review of the proceedings of 13 December 2022 on the basis that the matter should have been disposed of by a secret ballot. This application was unsuccessful, but it is evidence that the ATM was not satisfied with the failure of the National Assembly to hold the President accountable.
- 18 Since 13 December 2022 the first time the President appeared in Parliament was on 9 February 2023 during the State of the Nation. Since Parliament had failed to hold him accountable, the EFF intended to protest in his presence with placards which state the fact that there is a Panel which has made certain findings and recommendations against him. There was no violence involved on the part of the EFF. There were no threats made. There was a mere protest inside the Chamber, which is allowed by law.

THE VIDEO

- 19 The Initiator played a video for the Committee. That video, viewed objectively, demonstrates that the EFF members were carrying placards with their messages of protest. As they were climbing onto the stage to carry out the protest, they were physically removed from the chamber. The President and the Speaker – who are alleged to have been threatened – are in fact shown in the video to be smiling. This shows that the case of the Initiator is makeweight.
- 20 The peaceful and unarmed protest was met with violence and indignity—in fact, the Security Services did not even wait for the full protest to be manifested. Instead, they attacked the EFF without regard to their rights under the Constitution and their rights as members of Parliament to hold the Executive accountable.

CONDUCT IS PROTECTED BY THE CONSTITUTION

- 21 Members of Parliament have a right, under section 58(1) of the Constitution, to freedom of speech. They also have a right to exercise every other right in the Constitution—this includes the right to protest and assemble.
- 22 As the Constitutional Court held in *Mlungwana*:

“Section 17 guarantees the right to assemble peacefully and unarmed. The content and scope of this right must be interpreted generously. But

its meaning is clear and unambiguous. Everyone has the right to assemble, demonstrate, picket, and present petitions. The only internal qualifier is that anyone exercising this right must do so peacefully and unarmed. “Everyone” in section 17 must be interpreted to include every person or group of persons—young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their station in life, everyone is entitled to exercise the right in section 17 to express their frustrations, aspirations, or demands. Anything that would prevent unarmed persons from assembling peacefully would thus limit the right in section 17.”⁴ (Emphasis added.)

23 Furthermore, that:

“Accordingly, section 17 provides for a solemn undertaking to citizens and non citizens alike that everyone has a right, peacefully and unarmed, to assemble, demonstrate, picket and present petitions. The language in section 17 is unambiguous: everyone has a right to engage in any of the activities that it spells out. “Everyone” is a word of wide import. In its ordinary sense it is all-inclusive. The only internal qualifier contained in this constitutional provision is that anyone exercising this fundamental right must do so peacefully and unarmed.”⁵

24 Importantly, the right to protest and assemble is interwoven with the right to freedom of expression enjoyed by Members of Parliament. Justice O’Regan, writing for a majority of the Constitutional Court, wrote:

“[F]reedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a

⁴ *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) at para 43.

⁵ *Id* at para 62.

democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.”⁶

25 The Constitutional Court and Supreme Court of Appeal have since that decision affirmed that freedom of assembly is directly linked to the rights to freedom of speech, freedom of religion, dignity, freedom of association, and to stand or vote for public office.⁷

26 Therefore, we submit that a Member’s right to freedom of expression, as specially guaranteed by section 58(1) of the Constitution, cannot be divorced from a Member’s right to protest. Members of Parliament cannot be found guilty for conduct which is protected by the Constitution.

27 In fact, no evidence was led by Mr Xaso to a single rule of Parliament that forbids a member from protesting inside the Chamber—rightfully so, as we submit, as no such rule would pass constitutional muster. The fact that the members of the EFF intended to stand in front of the Speaker and the President with their placards to raise their concerns on a range of issues, including the Phala-Phala scandal and the abject failure of Parliament to hold the President accountable cannot mean that the conduct is proscribed.

⁶ *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (SANDU) at para 8. O’Regan J was quoting from *Case v Minister of Safety and Security*, *Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 608 (CC) at para 27.

⁷ *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (African National Congress) at paras 124-5; *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA) at para 62.

28 It is Parliament that allowed police to enter Parliament and use violence against the member of the EFF. The EFF wrote a letter of complaint against the conduct of the Speaker to allow members of the security forces to violate the EFF MPs. This fell on deaf ears.

CONCLUSION

29 On the evidence presented to the Committee:

29.1 There was a peaceful protest. Violence emanated from the Speaker. Some of the members who assaulted EFF members carried guns on them.

29.2 No case was made out that the conduct in issue amounts to misconduct as per the charges.

29.3 No case was made out about the threats experienced by the Speaker, the Chairperson of the National Council of Province and the President; and

29.4 No case was made out that there has been a breach of the Rules.

30 We submit that the Committee should find the EFF not guilty on the evidence presented and on the common cause facts.

JULIUS MALEMA, MP

21 NOVEMBER 2023