

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:

HELEN SUZMAN FOUNDATION First Applicant
MY VOTE COUNTS NPC Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

PRAVIN JAMNADAS GORDHAN Third Respondent

MCEBISI HURBERT JONAS Fourth Respondent

MALUSI NKANYEZI GIGABA Fifth Respondent

SFISO NORBERT BUTHELEZI Sixth Respondent

REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Private Bag X1, Constitution Hill, Braamfontein 2017

2018 -02- 09

CC-001

GRIFFIER VAN DIE GRONDWETLIKE HOF SUID-AFRIKA

CASE NO. CCT 116/17

FILING SHEET

Presented for service and filing:

1. the Helen Suzman Foundation's ("the HSF's") submissions pursuant to the Directions dated 29 January 2018; and
2. the HSF's list of authorities.

DATED AT JOHANNESBURG ON 9 FEBRUARY 2018


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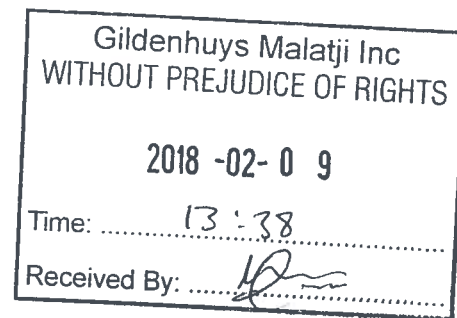
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SFISO NORBERT BUTHELEZI Sixth Respondent

**THE HELEN SUZMAN FOUNDATION'S SUBMISSIONS PURSUANT
TO THE DIRECTIONS DATED 29 JANUARY 2018**

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Introduction

1. These submissions are filed, on behalf of the Helen Suzman Foundation ("**HSF**"), in response to the directions of this Court dated 29 January 2018. Pursuant to the judgment of this Court in *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47 (29 December 2017) ("**the Judgment**"), the HSF submits that a narrower, but critical case remains for this Court to consider.

Issues which need no longer be considered by this Court

2. In light of the findings of this Court in the Judgment, HSF will pursue the issues related to the National Assembly and the second respondent through the parliamentary process which has now been ordered by this Court.
3. As such, HSF submits that the relief sought in prayers 5 to 9 of the notice of motion dated 8 May 2017 ("**the notice of motion**") need not be considered, and neither should the papers filed by the second respondent.

The remaining issues

4. What remains is a discrete case dealing with whether the first respondent acted lawfully in making certain cabinet appointments, and whether in so doing the first respondent violated the Executive

Ethics Code and his constitutional obligations, including his oath of office in Item 1 of Schedule 2 of the Constitution, sections 7(2), 41, 83(b) and (c) and 96(1) of the Constitution, read with paragraphs 2.3(d) and (e) of the Ethics Code, and the principle of legality in respect of Ministerial appointments and removals ("**the discrete case**").

5. The decisions in question ("**the first respondent's impugned decisions**") are:

5.1.1 the decision to remove the third respondent as Minister of Finance;

5.1.2 the decision to remove the fourth respondent as Deputy Minister of Finance;

5.1.3 the decision to appoint the fifth respondent as Minister of Finance; and

5.1.4 the decision to appoint the sixth respondent as Deputy Minister of Finance.

6. The discrete case raises the following critical constitutional questions, which HSF submits are deserving of this Court's attention:

6.1 is the conduct of the President of the Republic of South Africa ("**the President**"), including dismissal and appointment of members of the Cabinet, justiciable;

- 6.2 if so, what standards are imposed by the Constitution;
- 6.3 what level of justification will suffice for the first respondent's impugned decisions;
- 6.4 does a reasonable apprehension of bias suffice to disqualify the President from making such decisions or must actual bias be established;
- 6.5 has the first respondent violated the constitutional obligations and standards in question?
7. The above are live issues, and are of great public importance. They implicate this Court's exclusive jurisdiction under section 167(4)(e) of the Constitution, *alternatively*, are matters in respect of which this Court should grant direct access.
8. As held by O'Regan J in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* at para [229], the disputes raised in litigation of a public character are not merely about the parties, but concern broad, important and forward-looking questions of law and policy, which call for consideration and determination by the courts. Similar considerations were espoused by this Court in *Mohamed v President of the Republic of South Africa and Others*.¹

¹ 2001 (3) SA 893 (CC).

9. It is clear that the discrete case raises important issues of legality and policy. The relief sought in prayers 3 and 4 of the notice of motion, which has not been disposed through the Judgment, requires adjudication of the constraints and obligations imposed on the President when exercising his power to reshuffle the Cabinet. This implicates critical, forward-looking questions of legality, which transcend the facts surrounding the removal of third and fourth respondents as the Minister of Finance and the Deputy Minister of Finance respectively.
10. Further, the HSF has a right to obtain at least a declaratory order under section 172(1) of the Constitution that the President's conduct was unconstitutional and that the President breached his constitutional obligations.² As stated by this Court in *Pheko*, "*Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake.*"³ (emphasis added)
11. The HSF acts in the public interest and it and the public have a clear interest in the adjudication of the important issues which remain in the application.

² *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), para 32; *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (CCT254/16) [2017] ZACC 40 (14 November 2017), para 52; *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), para 103.

³ At para 32.

Exclusive Jurisdiction

12. The discrete case falls within the exclusive jurisdiction of the Constitutional Court under section 167(4)(e) of the Constitution, which provides that only the Constitutional Court may decide that the President has failed to fulfil a constitutional obligation.
13. The relevant constitutional obligations of the first respondent include the:
 - 13.1 obligations under sections 7(2), 41, 83, 91, 93 and 96(1) of the Constitution and his oath of office, which are constitutional obligations specifically imposed on the President;
 - 13.2 obligation to make all decisions rationally and lawfully; and
 - 13.3 obligation to act impartially and to avoid a conflict of interest.
14. A declaration of unlawfulness of any of these decisions is a matter of the highest order, and consequence, under our Constitution, and for this reason, the Constitution reserves this space exclusively for this Court.⁴

Importance of the case

15. In their pleadings, the HSF has established that the first respondent's failure to comply with his constitutional obligations in

⁴ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), paras 25 to 27.

relation to the impugned decisions have prejudiced the Republic as a whole and committed irreparable harm to our democracy.

16. The importance and nature of the President's power to select Ministers and Deputy Ministers, as well as the circumstances surrounding the first respondent's impugned decisions, clearly make this an exceptional case which requires this Court's attention (as the ultimate guardian of the Constitution), even if it does not fall within the exclusive jurisdiction of this Court.

Judicial review of the first respondent's conduct

17. This Court is yet to pronounce on the standard of review that is applicable to the President's powers to appoint and/or remove Ministers and Deputy Ministers under sections 91 and 93 of the Constitution, or the interpretation and import of the oath of office in that context, and sections 83 and 96 of the Constitution.
18. The HSF submits that the exercise of executive power in our constitutional democracy is, however, constrained by the Constitution, and the doctrine of legality.
19. The first respondent's impugned decisions, on his own version in this case, are irrational, unlawful and unconstitutional. It is plain from the documents that there was no good reason for any of the decisions and any reasons that have been proffered are irrational and unconstitutional, and the President took no account of the relevant circumstances or consequences. He was also acting in

circumstances where he was conflicted or, at the very least, where there would be a reasonable apprehension of bias on the part of the President.

20. The President has thus breached numerous, foundational injunctions in the Constitution, including his oath of office and the duties in sections 83 and 96(1). He did so in the context of making some of the most important decisions which the Constitution assigns to the Head of the National Executive. It is imperative that this Court declares this conduct unconstitutional.
21. Having regard to the fact that the illegality and irrationality is patent from the President's own papers, there are no material disputes of fact which need detain this Court.

Conclusions

22. The HSF respectfully submits that the relief sought in paragraphs 3 and 4 of the notice of motion, and the case which supports it, falls within this Court's exclusive jurisdiction, *alternatively*, is deserving of this Court's attention under its direct access jurisdiction.
23. The case which remains following the judgment is of foundational importance to our constitutional democracy and the scope of Presidential powers prescribed by the Constitution.
24. Moreover, the HSF submits that the facts of this case implicate serious violations of key constitutional obligations which require this Court's intervention and declaration of constitutional invalidity,

together with any other relief which this Court may consider just and equitable.

25. Given the public importance and nature of this case, this Court is best placed to bring the matter to finality, vindicate the impaired rights and prevent future harm to critical constitutional institutions.

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THE HELEN SUZMAN FOUNDATION'S LIST OF AUTHORITIES

1. *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC)
2. *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47 (29 December 2017)
3. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC)

4. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 2001 (3) SA 893 (CC)
5. *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC)
6. *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (CCT254/16) [2017] ZACC 40 (14 November 2017)