



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 206/25

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

First Applicant

UMKHONTO WESIZWE PARTY

Second Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER SENZO MCHUNU

Second Respondent

MINISTER GWEDE MANTASHE

Third Respondent

FIROZ CACHALIA

Fourth Respondent

**ACTING DEPUTY CHIEF JUSTICE
MBUYISELI MADLANGA**

Fifth Respondent

Neutral citation: *Zuma and Another v President of the Republic of South Africa and Others* [2025] ZACC 21

Coram: Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J

Judgment: Mathopo J (unanimous)

Heard on: 30 July 2025

Order issued on: 31 July 2025

Reasons issued on: 3 October 2025

Summary: Exclusive jurisdiction under section 167(4)(e) of the Constitution — direct access under section 167(6)(a) of the Constitution — conduct of the President — distinction between exercise of constitutional powers and failure to fulfil constitutional obligations — pleaded case insufficient to ground exclusive jurisdiction or direct access — no order as to costs

REASONS FOR ORDER

MATHOPO J (Kollapen J, Majiedt J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J concurring):

Introduction

[1] On 31 July 2025 this Court issued an order that its exclusive jurisdiction was not engaged and refusing direct access. The Court reserved its decision as to costs. Paragraph 3 of that order stated that reasons would follow in due course. These are the reasons. At issue in this matter on the merits are three crisp questions. First, may the President place a Minister on leave of absence without express constitutional authority? Secondly, does section 91(3)(c) of the Constitution empower the President to appoint an Acting Minister from outside Cabinet to exercise the powers and functions of a Minister who remains in office but is unable to perform his duties? And lastly, may a Judge chair a commission of inquiry investigating allegations that implicate the judiciary itself?

[2] These questions arose when the first respondent, President Cyril Matamela Ramaphosa, announced four interrelated decisions on 13 July 2025: placing the second respondent, Minister Senzo Mchunu (Minister Mchunu), on leave of absence; appointing the fourth respondent, Professor Firoz Cachalia (Professor Cachalia) as

Acting Minister of Police in terms of section 91(3)(c) of the Constitution with effect from 1 August 2025; appointing Minister Gwede Mantashe, the third respondent, as the Acting Minister of Police until Professor Cachalia assumed office; and establishing a judicial commission of inquiry (Commission) to be chaired by the fifth respondent, the then Acting Deputy Chief Justice Mbuyiseli Madlanga (Madlanga ADCJ). The applicants challenge the first, second and fourth decisions (the impugned decisions). Only the President and Minister Mchunu filed papers in opposition to the application. References in this judgment to the respondents are to these two respondents.

[3] The applicants, Mr Jacob Gedleyihlekisa Zuma and the uMkhonto weSizwe Party, impugned all three decisions as constitutionally impermissible. They contend that: the President has no power to suspend a Minister; a non-Cabinet member cannot serve as an Acting Minister; and that the judiciary cannot investigate itself. They sought this Court’s intervention on an urgent basis by invoking our exclusive jurisdiction in terms of section 167(4)(e) of the Constitution, which reserves for this Court the competence to determine whether “Parliament or the President has failed to fulfil a constitutional obligation”. Alternatively, the applicants sought direct access under section 167(6)(a) of the Constitution on the basis that exceptional circumstances exist and it is in the interests of justice to grant such access.¹

[4] The preliminary issue that arises is the jurisdictional basis on which this Court may adjudicate this matter. And, more pertinently, whether the applicants have met the requirements for this Court to entertain the challenges mounted against the respondents on the merits, either under our exclusive jurisdiction in terms of section 167(4)(e) or by way of direct access under section 167(6)(a) of the Constitution. This is a threshold question. To provide proper context for the jurisdictional analysis that follows, I briefly

¹ Section 167(6) of the Constitution provides:

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.”

outline the factual background and the parties' submissions before turning to the dispositive jurisdictional issues which resulted in this Court making the order previously mentioned.

Background

[5] On 6 July 2025, Lieutenant-General Nhlanhla Mkhwanazi (General Mkhwanazi), the KwaZulu-Natal Provincial Commissioner of the South African Police Service, held a media briefing ostensibly convened to address the work of the Political Killings Task Team (PKTT). In it, he made serious allegations concerning the existence of a sophisticated criminal syndicate that had allegedly infiltrated law enforcement, intelligence, and judicial structures in South Africa. These allegations implicated, among others, the erstwhile Minister of Police, Minister Mchunu.

[6] In response to these revelations, and on 13 July 2025, the President announced the impugned decisions. On 18 July 2025, the applicants launched this application on an urgent basis, seeking to impugn all three decisions as constitutionally impermissible. They asserted that in announcing the impugned decisions, the President failed to fulfil a constitutional obligation imposed on him. In the main, the applicants sought a declarator that the President had no constitutional power to place a Minister on leave of absence, that his appointment of an Acting Minister was ultra vires (beyond his legal powers), and that the establishment of the Commission as constituted was irrational. They pressed for urgent relief, arguing that the continued implementation of the impugned decisions would cause ongoing constitutional harm and undermine the rule of law.

[7] On Friday, 25 July 2025, the Chief Justice issued directions setting the matter down for hearing on Wednesday, 30 July 2025. On Thursday 31 July 2025, this Court made an order in the following terms:

“The Constitutional Court has considered the application for exclusive jurisdiction and direct access. It has concluded that the application does not engage the Court’s exclusive jurisdiction and no case for direct access has been made out.

Order:

1. Direct access is refused.
2. Costs are reserved.
3. Reasons for this order shall be given at a later date.”

[8] This Court cannot consider the merits of the applicants’ substantive challenges if its exclusive jurisdiction is not engaged and if direct access is not warranted. Accordingly, these reasons focus solely on these threshold issues.

Before this Court

Applicants’ submissions

[9] The applicants advanced two grounds which, they contend, engage this Court’s jurisdiction and serve as the basis for their challenge to the impugned decisions. The first is that the impugned conduct falls squarely within the exclusive jurisdiction of this Court in terms of section 167(4)(e) which provides that “[o]nly the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation”. The applicants argue that the President has failed to fulfil his constitutional obligation to uphold, defend and respect the Constitution as the supreme law of South Africa, citing the President-specific obligation imposed by section 83(b) read with sections 91(2), 91(3), 98, 84(2)(f), 177, 178(4) and 180 of the Constitution.

[10] The applicants further rely on alleged breaches of the Presidential Oath of Office as contained in section 96(2) of the Constitution, read with Schedule 2 thereof. This was, however, first mentioned in the applicant’s replying affidavit. To buttress their argument regarding the President’s failure to fulfil a constitutional obligation, the applicants rely on *Von Abo*.² They submit that section 167(4)(e) is engaged as soon as

² *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC).

a party alleges that the President has failed to fulfil a constitutional obligation, and that the impugned decisions involve crucial political questions with important political consequences that touch on sensitive areas of separation of powers.

[11] The second ground, pleaded in the alternative, is that the applicants should be granted direct access in terms of section 167(6)(a) of the Constitution. In support of this alternative basis, they argue that this application concerns an urgent matter of utmost public importance; involves crisp constitutional issues requiring no factual adjudication; that no useful purpose would be served by taking the matter to lower courts given its inevitable referral to this Court; and that they have strong prospects of success. The applicants submit that the implications of the impugned decisions on the public purse are likely to be catastrophic with every day that passes, and that there is likely to be prejudice to the public interest and good governance if the application is not heard by this Court.

[12] On the merits, the challenges mounted against the President's decisions are three-pronged. First, the applicants argue that there is no empowering provision for the President to place a Minister on leave of absence, characterising it as suspension with pay without legal authority. In particular they contend that section 91(2) only grants powers to appoint and dismiss, not to suspend. They also challenge the decision on grounds of rationality. They contend that it is irrational to retain a Minister responsible for policing in circumstances where allegations of breach of his constitutional responsibilities are brought against him. The applicants contend the President's decision demonstrates bias toward Minister Mchunu based on their political alliance, contrasting the treatment with the summary dismissal of Deputy Minister Whitfield³ for travelling abroad without permission. They argue that this inconsistency reveals favouritism and irrationality.

³ Mr Andrew Whitfield is the erstwhile Deputy Minister of Trade, Industry and Competition. On 25 June 2025, he was removed from office in terms of section 93(1) of the Constitution.

[13] Secondly, the applicants challenge the appointment of Madlanga ADCJ to chair the Commission, arguing that it is inappropriate for the judiciary to investigate itself given that General Mkhwanazi's allegations implicate judicial officers. They contend that this violates the common law rule against bias, expressed in the maxim *nemo iudex in sua causa* (no one should be a judge in their own case), and that only the Judicial Service Commission has constitutional authority to investigate judicial misconduct.

[14] Lastly, the applicants argue that the appointment of Professor Cachalia as Acting Minister violates sections 91(3) and 98 of the Constitution, since he was neither a Cabinet member nor a Member of Parliament when he was assigned ministerial functions.

Respondents' submissions

[15] The President contends that this Court's jurisdiction is not engaged. He submits that this case is not about his alleged failure to fulfil a constitutional obligation but a challenge to the impugned decisions which the applicants disagree with. The President argues that the applicants essentially differ with him about the manner in which he has elected to manage the investigation of the allegations made by General Mkhwanazi, and the leadership of law enforcement agencies while that investigation is underway.

[16] Relying upon *EFF I*,⁴ the President contends that section 167(4)(e) of the Constitution does not permit the applicants to bypass the High Court on a matter that involves a challenge to the lawfulness of the exercise of decision-making powers, as opposed to a case involving his failure to fulfil a constitutional obligation. If no such case can be advanced, so the submission went, then the result must be that this Court's exclusive jurisdiction is not engaged.

⁴ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).

[17] Regarding direct access, the President argues that the considerations advanced by the applicants do not constitute the exceptional circumstances necessary to warrant direct access to this Court. That the application involves matters of public importance that may ultimately be referred to this Court does not, on its own, justify the approach to this Court without first ventilating the matter before the High Court. Moreover, the President argues that approaching any court at this stage is premature, given that at the time of deposing to his affidavit, the terms of reference for the Commission had not yet been gazetted and would only be gazetted by the end of that week. Furthermore, the President's act of appointing Professor Cachalia had not yet been finalised and executed.

[18] Minister Mchunu submits that he would abide the decision of this Court in relation to whether the application is urgent and whether this Court should entertain it based on exclusive jurisdiction or direct access. On the merits, however, he argues that the African National Congress (which decides on the step-aside rule)⁵ is not cited as a party to this litigation. It was therefore inappropriate for the applicants to make veiled and speculative assertions as to why the step-aside rule had not been applied in respect of him, when the relevant political party who may make such a decision had not been cited.

[19] Minister Mchunu also contends that the applicants' approach amounts to clutching at straws in attempting to draw parallels between his situation and that of the erstwhile Deputy Minister Whitfield. The cases differ fundamentally, he says: there was no dispute that Deputy Minister Whitfield had in fact travelled to the United States without the approval of the President and had publicly and repeatedly admitted this transgression. In contrast, Minister Mchunu has denied the allegations made by General

⁵ The "step-aside rule" refers to an internal policy of the African National Congress adopted at its 54th National Conference in December 2017, implementing earlier resolutions from 2015. The rule provides that:

"ANC leaders and members who are alleged to be involved in corrupt activities should, where necessary, step aside until their names are cleared."

Mkhwanazi and has not been given a fair opportunity to have those allegations tested. The comparison was, so it was contended, therefore misplaced.

Discussion

Exclusive jurisdiction

[20] The threshold issue for determination, as earlier mentioned, is whether this Court has exclusive jurisdiction to entertain the applicants' challenge and, if not, whether direct access should be granted. This requires us to examine what the applicants have pleaded in their founding papers, and to determine whether their pleaded case engages either this Court's exclusive jurisdiction under section 167(4)(e) or warrants direct access under section 167(6)(a) of the Constitution.

[21] This Court's approach to jurisdiction is well-established. As *Gcaba*⁶ authoritatively explained—

“[j]urisdiction is determined on the basis of the pleadings, . . . and not the substantive merits of the case In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.”

[22] With the above features of the jurisdiction of this Court in mind, it is necessary to place in context the precise nature of the applicants' challenge as pleaded in the founding affidavit. What emerges from a careful reading of the founding papers is a case that challenges the lawfulness of specific decisions that the President has made. What is notably absent, however, is anything more than a broad allegation that the President is alleged to have failed to comply with specific constitutional obligations.

⁶ *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75, citing *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) at paras 155 and 169. See also *Makhanya v University of Zululand* [2009] ZASCA 69, [2009] 4 All SA 146 (SCA) at paras 34 and 71.

The founding affidavit is scant and devoid of material evidence to sustain a claim of this Court's exclusive jurisdiction. As this Court said in *Molusi*:⁷

“The purpose of pleadings is to define the issues for the other party and the court. And it is for the Court to adjudicate upon the disputes and those disputes alone.”⁸

[23] The applicants were required to plead their case with the necessary specificity to enable the respondents to appreciate the nature of this claim and prepare their defence accordingly. An assertion without adequate supporting averments that our exclusive jurisdiction is engaged falls short of meeting the requirements set out in section 167(4)(e) of the Constitution. Accepting the applicants' pleaded case would set the jurisdictional bar unacceptably low and open the floodgates to unmeritorious claims. The applicants' case is fundamentally concerned with the lawfulness of the exercise of presidential powers rather than the failure to fulfil constitutional obligations. This distinction is crucial for jurisdictional purposes.

[24] While they broadly invoke section 83(b) of the Constitution (the President's duty to uphold, defend and respect the Constitution), and section 96(2) of the Constitution (the President's duty to abide by his Oath of Office), the applicants' actual complaint is directed at how the President exercised his discretionary powers under sections 91(2),⁹ 91(3),¹⁰ 98,¹¹ and 84(2)(f)¹² of the Constitution. The fundament of their claim for this

⁷ *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC).

⁸ *Id* at para 28.

⁹ Section 91(2) provides that “[t]he President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them”.

¹⁰ Section 91(3) of the Constitution reads:

“The President—

- (a) must select the Deputy President from among the members of the National Assembly;
- (b) may select any number of Ministers from among the members of the Assembly; and
- (c) may select no more than two Ministers from outside the Assembly.”

¹¹ Section 98 deals with the temporary assignment of functions. It reads:

“The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.”

¹² Section 84(2)(f) provides:

Court's exclusive jurisdiction, as set out in their founding affidavit, was pleaded in these terms:

“The announcement and the specific decisions contained therein constitute the body of conduct the nature of which clearly falls squarely within the exclusive jurisdiction of this Court in terms of section 167(4)(e) of the Constitution of this Court on an urgent basis. The main thrust of this application concerns the cause of action that the President failed to fulfil constitutional obligations which fall or rest exclusively within his constitutional remit.

That conclusion is indisputable if one considers the allegations made in this affidavit holistically and against the parameters set out in the relevant case law, including the well-known *Nkandla* and *My Vote Counts* cases upon which reliance will be placed in the unlikely event of exclusive jurisdiction being disputed.”

[25] From a careful reading of these paragraphs, there is nothing in the applicants' pleaded case that engages this Court's exclusive jurisdiction. The paragraphs contain no identification of a constitutional obligation specifically placed on the President. Instead, in an attempt to bolster their argument during the hearing the applicants placed much stock on section 83(b) of the Constitution. The interpretation of this section on its own does not raise a constitutional issue which engages this Court's exclusive jurisdiction. This section is only triggered if the alleged constitutional obligation which the President has failed to fulfil is set out.¹³

[26] Section 91(2) of the Constitution does not impose a duty on the President, but confers a discretion. The applicants accordingly do not allege that the President failed to fulfil a duty imposed on him by that section. The analysis shows that this case concerns the exercise of a discretion rather than a specific constitutional obligation

“The president is responsible for—

...

(f) appointing commissions of enquiry.”

¹³ *EFF I* above n 4 at para 33.

placed on the President. The specified constitutional obligation that the President allegedly failed to fulfil is not pleaded.

[27] Section 167(4)(e) of the Constitution provides that only this Court may decide that the President has failed to fulfil a constitutional obligation. The specific constitutional obligation must be alleged and pleaded. This Court has consistently held that this provision must be narrowly and restrictively construed. There are compelling reasons for this approach. This section must be read and understood in conjunction with section 172(2)(a) of the Constitution which gives other courts jurisdiction over the conduct of the President.¹⁴ It gives other courts authority to scrutinise the constitutionality of the President's and Parliament's conduct, and this includes acts or omissions which are subject to courts' review. On the other hand, where an allegation is made that Parliament or the President failed to fulfil a constitutional obligation this would trigger this Court's exclusive jurisdiction. A review of the applicants' evidence in their founding affidavit reveals that they were aware of the implications of section 172(2)(a) of the Constitution and the remedies available to them, and yet they elected not to exercise that option (to approach the High Court). This is not without consequences.

[28] The Constitution distinguishes disputes related to the conduct of the President from those where he has failed to fulfil a constitutional obligation. In *SARFU I*,¹⁵ this Court held that "a narrow meaning should be given to the words 'fulfil a constitutional obligation' in section 167(4)(e)",¹⁶ so as to avoid any conflict with the power given to the High Court and Supreme Court of Appeal on all questions concerning the constitutional validity of the conduct of the President. I accept that it may be difficult in some instances to determine the precise scope of what that narrow meaning should

¹⁴ *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) at para 6.

¹⁵ *President of the Republic of South Africa v South African Rugby Football Union* [1998] ZACC 21; 1999 (2) SA 14; 1999 (2) BCLR 175 at para 25.

¹⁶ *Id.*

be in each case. That question was left open in *SARFU I*.¹⁷ However, in *Doctors for Life*,¹⁸ this Court adopted and resorted to a narrow construction in order not to constrict the powers of the lower courts to test legislation and the conduct of the President for constitutional compliance.

[29] The distinction between exercising constitutional powers and failing to fulfil constitutional obligations is crucial. Section 167(4)(e) addresses only the latter category. When the President exercises a power – even if that exercise is challenged as improper – the inquiry concerns a positive act rather than an omission or failure. The challenges advanced by the applicants fall squarely into the former category. Their contention that the President lacked authority to suspend Minister Mchunu or appoint Professor Cachalia, and that his appointment of Madlanga ADCJ was irrational, raises familiar questions of administrative review that apply uniformly across the exercise of public power. The constitutional imperatives of rationality and legality bind all organs of state and public functionaries alike. Any “failure” to comply with these standards is not a failure to comply with a constitutional obligation uniquely imposed on the President, but rather a breach of general constitutional principles binding on all holders of public power.

[30] President-specific constitutional obligations are readily identifiable by their mandatory character: provisions that provide that the President “must” act in specified circumstances.¹⁹ A failure to perform any of these mandatory, President-specific obligations would engage this Court’s exclusive jurisdiction under section 167(4)(e). By contrast, section 84(2) and other provisions confer discretionary powers on the President using permissive language that indicates that the President “may” exercise those powers. While the conferring of a power may in certain circumstances be coupled with a duty to exercise it, this would only arise where, on a proper construction of the

¹⁷ Id.

¹⁸ *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

¹⁹ These include sections 49(2), 50(1), 79(1), 79(4), 79(5), 108(3), 174(6), 177(2), 178(2), 193(4), 194(3)(b), 196(12), 201(3), 201(4), 202(1), 203(2), 207(1) and 209(2) of the Constitution.

power in question, it is a power coupled with a duty. The present case does not involve such a failure. The applicants' complaint in this case is not that the President failed to exercise his powers, but rather that he exercised them irrationally or ultra vires. Such complaints concern the manner of exercising constitutional powers, not the failure to fulfil constitutional obligations, and fall within the standard review jurisdiction of the High Court under section 172(2)(a).

[31] Cases that engage this Court's exclusive jurisdiction come to this Court first and last. No other court may opine on those cases. This is one reason for construing exclusive jurisdiction narrowly rather than broadly. As this Court recognised in *Fourie*:²⁰

“Not only is the jurisprudence of this Court greatly enriched by being able to draw on the considered opinion of another court. Proper evidential foundations, where appropriate, can be laid. Issues, both in relation to substantive law and appropriate orders to be made, are crystallised out for focused research and attention.”²¹

[32] Second, section 167(4)(e) must be interpreted in light of section 167(5), which recognises confirmatory jurisdiction for this Court in matters involving conduct of the President. If section 167(4)(e) were to be construed broadly to encompass all challenges to presidential conduct, it would render section 167(5) nugatory insofar as it concerns presidential power.

[33] Third, matters that fall within exclusive jurisdiction under section 167(4)(e) impact on the separation of powers in a different way from standard challenges to presidential conduct. As this Court held in *EFF I*,²² exclusive jurisdiction is not engaged where all that is alleged is conduct of the President that conflicts with

²⁰ *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

²¹ *Id* at para 39.

²² *EFF I* above n 4. See also *President of the Republic of South Africa v Tembani* [2024] ZACC 5; 2024 (9) BCLR 1152 (CC); 2025 (2) SA 371 (CC) at paras 100-1.

constitutional principles such as the rule of law binding on all persons vested with public power.

[34] The applicants attempt to anchor their jurisdictional argument by relying on *EFF I* and *My Vote Counts*.²³ This reliance is fundamentally misplaced and demonstrates a misunderstanding of the legal principles established in those decisions. *My Vote Counts* concerned specific constitutional obligations regarding transparency and access to information that bear no resemblance to the generalised challenges to presidential decision-making power advanced here.

[35] The position adopted by this Court in *EFF I* guides our approach to the present application. In that case, this Court made plain that section 167(4)(e) requires more than merely invoking section 83(b) coupled with any other constitutional provision that applies to the President. Mogoeng CJ framed the proposition as follows:

“Section 83 is in truth very broad and potentially extends to just about all the obligations that rest, directly or indirectly, on the shoulders of the President. . . . An overly permissive reliance on section 83 would thus be an ever-present guarantee of direct access to this Court under its exclusive jurisdiction.”²⁴

[36] What *EFF I* established is that section 83(b) must be coupled with a specific constitutional obligation in respect of which there has been a failure. In that case, the constitutional hook was the President’s obligation to act in accordance with the remedial action of the Public Protector under section 182(1)(c) of the Constitution. The Court reiterated:

“This means that it is not open to any litigant who seeks redress for what government has done or failed to do, merely to lump up section 83 with any other constitutional obligation that applies also to the President, as one of the many, so as to bypass all

²³ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC).

²⁴ *EFF I* above n 4 at para 31.

other superior courts and come directly to this Court. Reliance on section 83 coupled with a section that provides a shared constitutional obligation will not, without more, guarantee access to this Court in terms of section 167(4)(e) in a matter against the President.”²⁵

[37] I embrace the above reasoning. The principles established in *EFF I* are reinforced by this Court’s earlier decision in *Women’s Legal Centre Trust*.²⁶ There, this Court was at pains to emphasise that section 167(4)(e) has an agent-specific focus which mentions Parliament and the President, and them alone. The Court explained that the exclusive jurisdiction relates to obligations resting on these agents only, in contradistinction to constitutional duties they may bear together with other agents. Applying these established principles to the present case reveals fundamental deficiencies in the applicants’ jurisdictional case. The applicants’ pleaded case for exclusive jurisdiction is deficient and cannot pass muster or satisfy the narrow threshold for exclusive jurisdiction.

[38] The reasoning of *EFF I* in relation to invoking section 83(b) seems to me to be equally valid in relation to the applicants’ invocation of section 96(2) and the Presidential Oath of Office. Section 96(2)(b) broadly holds that members of the Cabinet may not “act in any way that is inconsistent with their office”. The Presidential Oath of Office, much like section 83(b), provides broad obligations that could be read to implicate any obligation or act by the President. Invoking the obligation of the President to uphold his Oath of Office cannot be sufficient on its own, or in conjunction with section 83(b), to establish this Court’s exclusive jurisdiction under section 167(4)(e).

[39] The President’s contention that the decisions taken by him fall outside our exclusive jurisdiction under section 167(4)(e) has force. As already stated, it is trite that our exclusive jurisdiction is not engaged where the President is said to have exercised some power in a manner which conflicts with constitutional principles binding on all

²⁵ Id at para 38.

²⁶ *Women’s Legal Centre Trust v President of the Republic of South Africa* [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 16.

persons vested with public power – for example where the President exercises a power arbitrarily, irrationally, for an improper purpose or in bad faith.

[40] The applicants seek to characterise this as a failure by the President to fulfil his constitutional obligations, but the substance of their case is that they disagree with the manner in which he exercised his discretionary powers. The President’s conduct is challenged as irrational and inconsistent with various constitutional provisions, but his conduct does not arise from obligations imposed specifically and uniquely on the President by the Constitution in the narrow sense required for exclusive jurisdiction.

[41] The applicants eventually seek refuge in section 83(b) of the Constitution. This *volte face* (about turn) cannot assist them. As stated above, section 83(b) on its own is insufficient to ground exclusive jurisdiction. In their written submissions, the applicants accept that to trigger section 167(4)(e) a litigant must first demonstrate that the constitutional or legislative provision relied upon imposes an obligation. Second, a litigant must demonstrate that the obligation alleged is of the nature contemplated in section 167(4)(e). What is missing in this case is the kind of specific constitutional obligation that was present in *EFF I*. There, the President had a specific obligation to comply with remedial action taken against him personally by the Public Protector. Here, no such agent-specific obligation is identified.²⁷

[42] The applicants’ challenge concerns the manner of exercise of powers granted to the President under sections 91(2), 98, and 84(2)(f) of the Constitution. These are discretionary powers, and challenges to their exercise fall to be determined under our standard constitutional scheme, which contemplates initial adjudication by the High Court. The subsequent appellate pathway depends on the outcome at first instance. Where the High Court dismisses such a challenge, the matter may proceed

²⁷ This analysis finds further support in this Court’s decision in *Tembani* above n 22 at para 101, where it was said that—

“[e]xclusive jurisdiction is likewise not engaged where the President is said to have exercised some or other power in a manner which conflicts with constitutional principles, such as the rule of law, binding on all persons vested with public power.”

through the ordinary appellate hierarchy, either to the Supreme Court of Appeal and potentially thereafter to this Court, or directly to this Court where the circumstances warrant such an approach. Conversely, where the High Court upholds a challenge and declares presidential conduct constitutionally invalid, section 172(2)(d) requires confirmation by this Court before such an order takes effect, though the affected party retains the right to appeal the underlying order. This well-established constitutional architecture ensures proper judicial scrutiny while preserving the hierarchical structure of our courts.

[43] In conclusion, the broad approach taken by the applicants to the issue of exclusive jurisdiction without sufficient averments in the pleadings to make out such a case is legally untenable. Another fallacy in the applicants' case is the reliance on *Von Abo* as authority for the proposition that because this case has political consequences it therefore implicates separation of powers and thus triggers section 167(4)(e). This proposition cannot be accepted. The mere fact that a case involves political decisions or has political ramifications does not automatically engage this Court's exclusive jurisdiction. What matters is whether a specific constitutional obligation placed uniquely on the President has been breached, not whether the decision has political significance. The applicants' complaint is the manner in which the President has dealt with the revelations made by General Mkhwanazi. None of the impugned decisions constitute a failure by the President to fulfil his constitutional obligations.

[44] Reliance on the written submissions to remedy the imperfections in the founding papers is equally unsustainable. A litigant must make their case in the founding papers and not in subsequent pleadings or submissions.²⁸ Similarly, the argument by the applicants in their written submissions that they may request interim relief at the hearing of this matter without any proper case being made out for it in the notice of motion and founding papers is misconceived. This Court must be satisfied on the basis of evidence

²⁸ *Gcaba* above n 6 at para 75.

that a proper case has been made and it is simply not enough to make a bold claim that the matter falls within our exclusive jurisdiction.

[45] It follows from the above analysis that no case for exclusive jurisdiction has been made out. Having determined that this Court's exclusive jurisdiction is not engaged, I proceed to consider the alternative ground of direct access under section 167(6)(a) of the Constitution.

Direct access

[46] This Court grants direct access only in exceptional circumstances and if it is in the interests of justice to grant it.²⁹ The constitutional scheme envisages that challenges to presidential conduct ordinarily start in the High Court, with this Court exercising confirmatory jurisdiction under section 167(5) of the Constitution.³⁰ As this Court made plain in *Women's Legal Centre Trust*:³¹

“[T]he power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, and with good reason. It is loath to be a court of first and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other courts' insights.”

[47] On the range of factors relevant in determining whether direct access is in the interests of justice, this Court in *Zondi*³² held that these include—

²⁹ *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 9-11; *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 3; and *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (*Zondi*) at para 12.

³⁰ Section 167(5) reads:

“The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”

³¹ *Women's Legal Centre Trust* above n 26 at para 27.

³² *Zondi* above n 29.

“[t]he importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise in the case, the possibility of obtaining relief in another court, and time and costs that may be saved by coming directly to this Court.”³³

[48] Applying these principles to the present case, several considerations militate against granting direct access in this matter. First, the novelty and importance of the issues raised favour initial consideration by the High Court. These are precisely the circumstances in which this Court benefits from a reasoned judgment of another court – the applicants, in their written submissions describe the questions as “intricate”. The applicants state in their founding affidavit:

“Under the wide rubric of just and equitable remedy this Court may be asked to grant a holding interim order preventing the assumption of office by the Acting Minister and/or the Commission, pending the delivery of the judgment in the main application. It would be in the interests of justice to grant such relief”.

There is no reason or legal basis why the same order could not be sought in the High Court. The applicants have failed to adequately explain why they chose to approach this Court directly rather than seeking relief in the High Court, which would have been the appropriate forum for their challenge.

[49] Second, there is no urgency, on its own, that necessitates this Court sitting as a court of first and last instance. Although Professor Cachalia was scheduled to assume office on 1 August 2025, this Court has regularly dealt with challenges to appointments after they have taken effect.³⁴ Moreover, if the appointment is subsequently found to be unlawful, section 172(1)(b) of the Constitution provides ample scope for just and equitable relief.

³³ Id at para 12.

³⁴ See, for example, *Corruption Watch (RF) NPC v Speaker of the National Assembly* [2025] ZACC 15 and *Mncwabe v President of the Republic of South Africa* [2023] ZACC 29; 2023 (11) BCLR 1342 (CC); 2024 (1) SACR 447 (CC).

[50] Third, and importantly, although a High Court declaration that the President has acted unconstitutionally would require confirmation by this Court to be effective, section 172(2)(b) empowers the High Court to grant interim relief pending our confirmation. The applicants have not adequately explained why they did not pursue this available avenue.

[51] Lastly, the fact that appellate or confirmation proceedings might follow a High Court judgment cannot undermine what the Constitution says about the proper allocation of jurisdiction. If cost and delay in moving cases through the courts were reasons to seek direct access, this Court would unceasingly be approached directly. That cannot be the constitutional design. The analysis shows that, in the present case, the interests of justice do not favour direct access. The High Court is well-equipped to deal with urgent constitutional challenges to executive action. This Court's increasing workload, as it has previously observed, requires it to be engaged mostly as a court of last resort to advance the administration of justice. The importance of the issues in a case do not, without more, constitute exceptional circumstances and justify this Court being a court of first and last instance. *Mkontwana*³⁵ makes this clear. In that case this Court observed that it is ordinarily not in the interests of justice for this Court to be a court of first and last instance. It is precisely for this reason that—

“the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another court.”³⁶

[52] It follows from the above analysis that this application cannot succeed on either threshold ground. This is not a matter that falls within this Court's exclusive jurisdiction under section 167(4)(e) of the Constitution, nor is it one where the interests of justice favour direct access under section 167(6)(a) of the Constitution.

³⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

³⁶ *Id* at para 11.

[53] In light of the above finding, it is not competent for this Court to opine on the merits of the applicants' challenge to the impugned decisions, and that issue must be left for the right time and at the appropriate forum should the applicants be so inclined.

Costs

[54] I turn to the question of costs, which were reserved. It is the applicants' case that they have raised important constitutional issues about the powers of the President as set out in the Constitution. They argue that because they sought to vindicate important constitutional guarantees they should not be unduly mulcted in costs for attempting to do so, in the event that they are unsuccessful. The respondents disagree and reiterate that the case as pleaded by the applicants raises no issue engaging the exclusive jurisdiction of this Court. Minister Mchunu urges us to show our displeasure at the conduct of the applicants through an adverse costs order.

[55] Although the applicants' case for exclusive jurisdiction and direct access was unsuccessful, the constitutional questions they sought to raise were not entirely without merit. The jurisdictional claims, though insufficiently pleaded, were not so manifestly hopeless as to warrant costs. In these circumstances, *Biowatch*³⁷ protection is warranted and each party should bear their own costs. This approach recognises both the constitutional importance of the underlying issues and the procedural deficiencies in the application.

[56] It is for these reasons that the order of 31 July 2025 was made. There is no order as to costs.

³⁷ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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