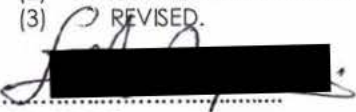


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 136722/2025

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	DATE
	09/12/2025

JACOB GEDLEYIHLEKISA ZUMA

First Applicant

UMKHONTO WESIZWE PARTY

Second Applicant

and

PRESIDENT CYRIL MATAMELA RAMAPHOSA

First Respondent

MINISTER SENZO MCHUNU

Second Respondent

ACTING MINISTER FIROZ CACHALIA

Third Respondent

JUSTICE MBUYISELI MADLANGA ADCJ

Fourth Respondent

SESI BALOYI SC

Fifth Respondent

SANDILE KHUMALO SC

Sixth Respondent

JUDGMENT

THE COURT: (MOLOPA-SETHOSA J, MOSHOANA J and LABUSCHAGNE J)

Introduction

[1] Ours is a nascent constitutional democracy. Given its nascency, and in order to ensure organic growth of constitutionalism and adherence to the law, judicial oversight of the rule of law is an absolute necessity. The preservation of legality is the province of the High Court. The exercise of statutory executive power must be put under perennial check by the judiciary. It does not axiomatically follow that because the executive once acted in a particular manner, the next executive action requires the Courts applying the same standard applied by the executive in the recent past. The role of the Courts is to apply the law and not to approve some practices not predicated on the letter of the law. Consistency is an element of fairness¹ and not rationality.

[2] The rationality of a decision or exercise of public power is a reference to the quality of it being based on reason rather than emotions. There is no magic wand in the word 'irrationality'. In simple terms, an irrational exercise of statutory power is one that is arbitrary, ie. where the means employed are not rationally linked to the purpose of the power exercised.

[3] The above said, the present application concerns itself with the exercise of certain constitutional powers by the President of the Republic of South Africa. The exercise of those constitutional powers was necessitated by the unprecedented explosive revelations made by Lieutenant General Nhlanhla Mkhwanazi ("General Mkhwanazi") on 6 July 2025. The explosive nature of the revelations compelled the President of the Republic of South Africa to abruptly curtail an overseas trip. It is common cause that the first respondent, the President of the Republic of South Africa, exercised effectively three constitutional powers; namely; (a) placed the Honourable Minister Mchunu on leave of absence; (b) established a commission of enquiry; and (c) appointed the Honourable Minister Cachalia as a Minister and temporarily assigned the policing functions to him. All the above exercises of constitutional powers are being impugned by the applicants on the basis of legality and rationality.

¹ See *Southern Sun International Hotel Interests (Pty) v CCMA* (2010) 31 ILJ 452 (LC). See also *Saccawu v Irvin & Johnson Ltd* [1999] 8 BLLR 741 (LAC).

[4] The present challenge took detours before it ended with this Court. Its first sojourn was the Constitutional Court of the Republic of South Africa. Owing to the failure to satisfy the requirements of section 167(6)(a) of the Constitution, the applicants were non-suited. The next sojourn was in the urgent Court of this Division. Since the applicants failed to meet the requirements of rule 6(12) of the Uniform Rules of Court, the urgent Full Court refused to hear the merits of the present application.

Background facts and evidence

[5] The applicants are the uMkhonto weSizwe Party ("the MK Party") and the former President Zuma, who challenge, in review proceedings, four decisions made by President Ramaphosa.

[6] In terms of the Notice of Motion, the following decisions of President Ramaphosa were impugned:

- "2.1 Establish the Madlanga Commission of Inquiry;
- 2.2 Placing Minister Senzo Mchunu on leave of absence;
- 2.3 Appointing Professor Firoz Cachalia as Acting Minister, Minister and/or membership of the Cabinet (sic); and/or
- 2.4 Making the public announcements on 13 July 2025 and/or 1 August 2025."

[7] The applicants apply for the decisions to be declared invalid, illegal, null and void and/or unconstitutional for being inconsistent with the Constitution, in breach of the applicants' fundamental rights and/or the relevant provisions of Chapter 5 of the Constitution and/or the rule of law.

[8] The applicants also seek an interim suspension of the aforesaid decisions pending the granting of just and equitable relief in terms of section 172(1)(b) of the Constitution.

[9] As highlighted at the start of this judgment, the applicants initially brought the application in the Constitutional Court, but the matter failed as it did not engage the Constitutional Court's exclusive jurisdiction and the applicants were denied direct access. The matter was then referred to a Full Court of this Division, which heard

argument on urgency and ruled that the matter lacked urgency. Ultimately, the matter emerged before us in order to hear the merits of the challenge.

[10] On the papers, there are two preliminary applications. The first is a strikeout application in terms of rule 6(15) of the Uniform Rules predicated on allegations of duplicated annexures introduced into the answering affidavit by the first respondent.

[11] The second is an interlocutory application to file a further affidavit pertaining to events that occurred from 1 August 2025 onwards, which application was opposed. At the commencement of the hearing, the applicants informed this Court that they are not proceeding with the two preliminary applications. None of the parties raised the issue of the costs arising from the jettisoned applications. Resultantly, the present judgment shall not deal with any of the issues attached to these abandoned applications.

[12] The genesis of the present application is that on 6 July 2025, General Mkhwanazi, who is the Provincial Commissioner of Police in the Province KwaZulu Natal, convened and addressed a media conference in Durban in which he made public explosive allegations about the existence and operation of a sophisticated criminal syndicate that has allegedly infiltrated law enforcement, intelligence structures and the judiciary in South Africa.

[13] General Mkhwanazi also alleged that the Honourable Minister Mchunu, the Minister of Police, interfered with sensitive Police investigations and colluded with businesspeople, including a murder accused, to disband the Political Killings Task Team ("PKTT").

[14] On 6 July 2025, the Honourable Minister Mchunu issued a media statement, indicating his intention to review General Mkhwanazi's allegations and to take appropriate action.

[15] On 9 July 2025, the Honourable Minister Mchunu issued a media statement, explaining his lack of knowledge of one Mr Matlala and that one Mr Brown Mokgotsi was only known to him as a comrade.

[16] On 10 July 2025, the Office of the Chief Justice, through the Media Liaison Officer: Private Office of the Chief Justice, issued a media statement in response to General Mkhwanazi's "accusations about wrongdoing in the Judiciary".

[17] On 11 July 2025, the Honourable Minister Mchunu received a letter from the Acting Registrar of Members' Interests, informing him of the complaint lodged by Members of Parliament from the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF) for the alleged breach of Code of Ethical Conduct and Disclosure.

[18] On 13 July 2025, the President signed President's Act 250/2025, placing the Honourable Minister Mchunu on leave of absence with immediate effect, until further notice.

[19] On 13 July 2025, President Ramaphosa addressed the nation and issued a media statement. President Ramaphosa announced:

- 19.1 The establishment of a Judicial Commission of Inquiry, chaired by Acting Deputy Chief Justice Mbuyiseni Madlanga.
- 19.2 That the Commission will investigate the role of current or former officials in certain institutions who may have aided or abetted the alleged criminal activity, failed to act on credible intelligence or internal warnings, or benefited financially or politically from a syndicate's operations. These institutions include SAPS, NPA, SSA, the Judiciary and Magistracy.
- 19.3 That in order for the Commission to execute its functions effectively, he has decided to put the Minister of Police on leave of absence with immediate effect.
- 19.4 That he has decided to appoint Professor Firoz Cachalia as Acting Minister of Police.
- 19.5 That he is appointing Professor Cachalia in terms of section 91(3)(c) of the Constitution.

[20] On 13 July 2025, the Honourable Minister Mchunu issued a media statement, expressing his support for the President's announcement of 13 July 2025.

[21] On 14 July 2025, the MK Party issued a media statement, "Dismissing and rejecting the illegitimate and unconstitutional announcement by Cyril Ramaphosa."

[22] On 15 July 2025, the applicants, through their attorneys, wrote a letter of demand to President Ramaphosa to demand *inter alia* that the announcement of 13 July 2025 be withdrawn by no later than 18 July 2025. President Ramaphosa was informed that, if he fails to meet the demand, the applicants will approach the Constitutional Court on an urgent basis.

[23] On 15 July 2025, the President's Office acknowledged receipt of the letter of demand.

[24] On 16 July 2025, the applicants, through their attorneys, sent a courtesy letter to the Chief Justice to inform her and the Constitutional Court about an imminent application in connection with the allegations made by General Mkhwanazi. The Chief Justice was informed that the proposed date for the urgent hearing was 28 July 2025.

[25] On 18 July 2025, the Parliamentary Portfolio Committee on Police and Justice announced that they would recommend the establishment of an *ad hoc* committee to look into the allegations made by General Mkhwanazi.

[26] On 18 July 2025, the President responded to the applicants' letter of demand and refused to meet the demands of the applicants.

[27] On 18 July 2025, the applicants filed an urgent exclusive jurisdiction, alternatively direct access application with the Constitutional Court.

[28] On 20 July 2025, the Constitutional Court issued directions and directed the respondents to file their answering affidavit on or before 22 July 2025 and the applicants to file their replying affidavit on 24 July 2025. On 21 July 2025, the

Honourable Minister Mchunu submitted affidavits to the Acting Registrar of Members' Interests. On 23 July 2025, President Ramaphosa filed his answering affidavit in opposition to the applicants' application.

[29] On the same day, the Honourable Minister Mchunu filed his answering affidavit in opposition to the applicants' application. On 24 July 2025, the applicants filed their composite replying affidavit.

[30] On 25 July 2025, the Constitutional Court issued further directions setting the matter down for a hearing on Wednesday, 30 July 2025, at 11:00.

[31] On 30 July 2025, the application was argued before the Constitutional Court.

[32] On 31 July 2025, the Constitutional Court found that the matter does not engage its exclusive jurisdiction and the application for direct access was refused.

[33] On 31 July 2025, Professor Cachalia was appointed Minister without Portfolio in the exercise of powers emanating from section 91(3)(c) with effect from 1 August 2025, in terms of President's Act 278/2025.

[34] On 31 July 2025, the Presidency invited the media to the swearing-in ceremony of the Minister-Designate, Professor Firoz Cachalia.

[35] On 1 August 2025, President Ramaphosa addressed the swearing-in ceremony. President Ramaphosa announced that he has decided to appoint Professor Cachalia as Minister of Police, the portfolio indicated in the signed President's Act 282/2025. It reads:

“PRESIDENT'S ACT NO. 282/2025

In terms of section 98 of the Constitution of the Republic of South Africa, 1996, I hereby appoint Mr Firoz Cachalia as the acting Minister of Police and assign to him generally the powers and functions of the Minister of Police, with effect from 1 August 2025.

The appointment of Mr Gwede Mantashe as acting Minister of Police in terms of President Act No. 246 of 2025 is hereby terminated.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this 1st day of August, Two thousand and twenty-five.”

[36] Professor Cachalia elected to do the affirmation. After the swearing-in ceremony, Professor Cachalia and President Ramaphosa conducted separate media interviews.

[37] In his media interview, President Ramaphosa indicated that he knows there is a technicality about seeming to have two Ministers in the same portfolio, but that this issue would be resolved within a short space of time.

[38] In the separate media interview, Professor Cachalia indicated that “in the time I am Minister, I will be able to take the country forward ...” Professor Cachalia indicated that he was appointed Minister, not Acting Minister, and that the idea of an acting appointment is not provided for in the Constitution.

[39] On 4 August 2025, the applicants, through their attorneys, sent a letter of demand to the President, giving him until 8 August 2025 to meet the demands of the applicants.

[40] On 8 August 2025, the President responded to the applicants’ letter of demand, refusing to meet any of their demands.

[41] On 12 August 2025, the applicants filed their application in this Division seeking to review and set aside the decisions of the President announced on 13 July and 1 August 2025.

[42] On 18 August 2025, the President filed his answering affidavit in response to the applicants’ case. On 20 August 2025, the Honourable Minister Mchunu filed his answering affidavit. On 25 August 2025, the Acting Judge President informed the

parties that the matter is not suitable for the urgent court and will not be heard on 26 August 2025, and that the matter will instead be case managed.

[43] On 27 August 2025, the parties attended a case management meeting and the Acting Judge President allocated the application before the Full Court on 18 September 2025, leaving 19 September 2025 open as a second day of hearing, if necessary.

[44] On 29 August 2025, the first applicant filed an application in terms of rule 6(5)(e) to be granted leave to file a further affidavit.

[45] On 8 September 2025, the President filed a notice opposing the first applicant's application for leave to file a further affidavit.

[46] On 9 September 2025, the first applicant filed his replying affidavit in the interlocutory application.

[47] On 10 September 2025, the second case management meeting took place and all issues pertaining to the rule 6(5)(e) application were referred to the Full Court.

[48] The Full Court heard the application on 18 September 2025. Subsequently, in a written judgment, the Full Court struck the application off the urgent roll and reserved the issue of costs.

Evaluation

[49] In order to properly locate the legal dispute in the present application, the best place to begin is to establish what the relevant constitutional powers of the President are.

Powers of the President

[50] The President is the Head of State and of the National Executive. All executive powers vest in the President (section 85(1) of the Constitution) and are exercised by him and his Cabinet (section 85(2) of the Constitution).

[51] The President's power to appoint and dismiss Ministers is pivotal in the present application. The President is expressly empowered to appoint Ministers, assign them their powers and functions, and may dismiss them (section 91(2) of the Constitution). Also, the President is empowered to select no more than two Ministers from outside the Assembly (section 91(3)(c) of the Constitution). Temporary assignment of functions is governed by section 98 of the Constitution. And in order to have legal effect, all the President's decisions need to be reduced to writing (section 101(1) of the Constitution).

[52] It must be so that the third source of power in section 84(1) is a wide power, actuated by the necessity to perform the functions assigned to the President either by the Constitution or by some other legislation. Contrary to the submission of Mr Mpofu SC, appearing for the first applicant, long before the *AmaBhungane* case, the Constitution had already created space for the so-called "necessity power".

[53] It is significant to highlight at this stage that section 84(1) expressly provides that the President's sources of power are; (a) the Constitution; (b) legislation; (c) those necessary to perform the functions of Head of State and head of national executive. These necessary powers are referred to below as the "third source". It bears mentioning that in terms of section 83(1)(a), the President is the Head of State and head of the national executive. A Head of State is the chief public representative of a country. He or she is indeed, as submitted on behalf of the President, the Chief Executive Officer (CEO) or Managing Director (MD) of the Republic of South Africa. As a Head of State, the President is obligated to (a) uphold; (b) defend; and (c) respect the Constitution as the supreme law of the Republic.

[54] Technically, an implied power is a power that owes its existence to the express power. In other words, such power can only co-exist and not exist on its own. On the contrary, this third source is expressly legislated. In our considered view, it permits the President to do something unexpected but effective in response to a problem. We hasten to mention that there must always be a demonstration that the "something" done is necessary, ie. causally linked to the performance of constitutional functions. In

this particular instance, the need for the power to suspend a Minister has come into sharp focus.

[55] In our view, arising from this third source, a President is empowered to do anything that is necessitated by the performance of the functions assigned to a President. Pertinent to the present application, one of the functions solely assigned to the President by section 91(2), in relation to Ministers, is to dismiss them. In order to perform that function, it may be necessary for the President to take an interim step (which includes placing a Minister on leave of absence), *en route* to the performance of the function to dismiss. We conclude that the third source may be used to action the interim step.

[56] Undoubtedly, any of the decisions of the President, sourced from any of the three sources of power, are executive actions. In *Minister of Defence and Military Veterans v Motau and Others*,² the interplay between rationality and legality was formulated as follows:

“The principle of legality requires that every exercise of public power, including every executive act, be rational.”

[57] The above simply decrees that the President does not have unfettered powers. It cannot be so, as submitted by both applicants' counsel, that the President has a free hand to hire and fire Ministers at will. In this regard, this Court is reminded of the seminal judgment of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*,³ where the following was expressed sagaciously by the Court:

“... Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.”

² [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 69.

³ 2019 SCC 65, [2019] 4 SCR 653.

[58] The above sentiments sufficiently gainsay a submission of hire and fire at will. The minimum threshold for all executive actions is rationality.⁴

Rational exercise of powers

[59] The President's powers are constrained by rationality. In other words, the exercise of power by a President, irrespective of the source, must be not be arbitrary, non-whimsical, and adorned with reasons. When a decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved.⁵ It is not the duty of courts to second-guess what the decision maker could do. The court merely assesses whether there is a rational link between the means chosen to achieve some public good.

[60] Assuming that the President ultimately dismisses the Honourable Minister Mchunu, an executive action, when challenged, the route to place the Honourable Minister on leave of absence will be considered as a means the President selected *en route* the exercise of the executive action. Then, and even now, the role of a court is not to say to the President, he should have docked his salary instead of placing him on leave of absence. The role is simply this; is the means selected – placing the Honourable Minister on leave of absence – rational with reference to the purpose of the power to dismiss or not dismiss.

The impugnability, legality and rationality of the announcements made by the President.

[61] Although there are four decisions sought to be challenged, the public announcements on 13 July and 1 August 2025 cannot be categorised as decisions capable of being reviewed. The decisions that have legal effect in terms of section 101(1) of the Constitution are those in the President's Acts 250/2025, 278/2025 and 282/2025.

⁴ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85.

⁵ *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[62] The announcements do not have legal effect as they merely reference the other decisions. In essence, only the first three decisions in the notice of motion are the subject matter of the present application. The view this Court takes is that not every word coming out of the mouth of a sitting President constitutes an executive decision. The announcements, intentions or desires of a President become a subject of judicial review if they meet the requirements of section 101(1) of the Constitution. Accordingly, the announcements are not impugnable and cannot be tested by this Court regarding their legality or rationality. Courts do not operate like politicians. In the political space, politicians are free to be critical of each other's political expressions or statements. The inchoateness is laid bare by the fact that, save for placing Minister Mchunu on leave of absence on 13 July 2025, no written decisions existed for the other announcements. The decisions came later.

[63] In making a similar point, the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* 2018 SCC 26⁶ had the following to say:

"Not all decisions are amenable to judicial review under a superior court's jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting of premises and hiring of staff – and such decisions are not subject to judicial review... In making these contractual decisions, the public body is not exercising 'a power central to the administrative mandate given to it by Parliament' but rather exercising private power... Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority. Second, while it remains true that 'almost all powers exercised by public authorities today have a statutory basis', it is important to recognise that public authorities can function based on powers that do not owe their existence to enactments. The Crown has powers of a natural person and can conduct some of its affairs without relying on statutory powers. Indeed, even some fairly sophisticated administrative regimes have operated without any comprehensive statutory framework. Where a public authority is operating under powers that do not arise from an enactment, remedies under section 2(2) (b) of the Judicial Review Procedures Act will not be available, though remedies

⁶ *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* 2018 SCC 26 (hereafter the *Highwood* case).

under section 2(2) (a) will remain available if the public authority's activities have sufficient public character.⁷"

The legality and rationality of the decision of the President to place the Honourable Minister Mchunu on leave of absence.

[64] The labelling and colouring of the President's action towards the Honourable Minister Mchunu is of no moment. In whatever name it goes by, it remains an executive act, which, as stated before, may later serve as a means towards the bigger decision of dismissal, if the rationality of the bigger decision is impugned. The first applicant takes issue with the term "placing" a person on leave. The link to a precautionary suspension is recognised, but is alleged to be on a different footing from a voluntary stepping down. Counsel for the Honourable Minister Mchunu was at pains to convey that the leave of absence is something to which his client had agreed. It was not unilaterally imposed.

[65] Valiant as this contention might be, it does not detract from the need to establish a presidential right to do what he did to the Honourable Minister Mchunu. If there were no such right, then the Honourable Minister Mchunu's agreement would not validate an illegality.

[66] The applicants contend that a Minister is a political appointee who serves in Cabinet at the pleasure of the President. Appointing and dismissing Ministers is a constitutional executive act. A Minister is not entitled to an interview before appointment, and is not entitled to due process, including *audi alteram partem*, when dismissed, so went the submissions on behalf of the applicants. In fact, a Minister who is dismissed does not have a right to reasons why he or she is dismissed, so went the contention. That flows from a category of executive decisions specific to Ministers, so it is suggested. However, the decisions (to appoint and dismiss) can be assailed on the basis of rationality.

⁷ *Highwood case 26.*

[67] Inasmuch as we agree with regard to the precarious tenancy of Ministers in a Cabinet, we strongly take the view that in a constitutional order, more is required of decisions to appoint and dismiss ministers. This is consistent with the approach of Rogers J (as he then was) in *Democratic Alliance v President of the Republic of South Africa*.⁸

“It is difficult to imagine a power closer to the heartland of the President’s personal preferences than the power to appoint and dismiss ministers and deputy ministers; it is by its nature highly discretionary. It may well be that the exercise of these powers can be impeached on the ground of irrationality but the threshold for judicial interference is likely to be very high”.

[68] To do nothing would be irrational due to the political fallout and the public outcry that would follow. To dismiss Minister Mchunu outright based on untested allegations could be assailed as irrational. There must be a power to protect the public confidence in the executive and to investigate whether there are grounds for a dismissal. A power to suspend, as a precursor to a decision to dismiss or not, in terms of section 91(2), is available under the third power contemplated in section 84(1), ie. implied as necessary for the President to exercise his powers to appoint or dismiss ministers.

[69] The argument of the first applicant conflates the question of whether a power to suspend exists or not with whether the power was rationally exercised. As it shall be demonstrated below, such a conflation is unwarranted. The doctrine of *ultra vires*, as it was known by its common law name, is separate and distinct from rationality. A decision may be *intra vires* and yet irrational. An irrational exercise of public power does not equate to a lack of power.

[70] Before us, the applicants dispute that there is a link between a leave of absence on the part of Minister Mchunu and the outcomes of the Madlanga Commission. To put it as it was vociferously and with apparent sagacity put, the means (placing on leave of absence) does not justify the end (the decision to dismiss/retain). However, the applicants are at the wrong end of the stick.

⁸ [2017] ZAWCHC 34 at para 7.

[71] The fact that the findings and recommendations of the Commission are non-binding and may not lead to a dismissal, as it was done with the likes of the Honourable Ministers Mantashe and Kodwa, is of no moment when rationality, as a species of legality, is judicially assessed. It is the primary postulate on behalf of the applicants that there is no rational connection between the means (the placing of the Honourable Minister Mchunu on leave) and the end sought to be achieved (the decision whether to dismiss or retain the Honourable Minister Mchunu). It is contended that the latter decision is not rationally linked to the outcomes of the Commission. We disagree with this postulation, however elegant and passionately it was pressed before us. Counsel for the second applicant, wisely, conceded that the Commission would, amongst others, make factual findings. However, for reasons that are, with respect, unsound in law, she contended that such factual findings may not assist the President to make a decision whether to dismiss or retain the Honourable Minister. However, such factual findings may assist the President, and are thus rationally linked to the ultimate exercise of the constitutional power to dismiss.

[72] Punting for the quick exercise of the discretionary power to dismiss, the applicants contend that there is no rational link and there is no legal basis to await the Madlanga Commission findings. This point is unwarranted. There is no justifiable evidence to suggest that the President is refusing to exercise the statutory power. The President simply wishes to proceed cautiously, owing to the fact that, as required by the Constitution, he owes the Honourable Minister Mchunu procedural rationality.

[73] The applicants' contention is that, as the Minister serves at the pleasure of the President, the removal of a Minister is a political matter on which *audi alteram partem* is not required. The contention is that, as the Honourable Minister Mchunu is not entitled to a hearing in respect of the allegations made against him, the President's decision to await the outcome of the Madlanga Commission is not rationally connected to the question whether he may be dismissed or not. This postulate assumes that a disciplinary process was envisaged, which would be irrational. The President, however, wants to be sure that there are grounds for a dismissal.

[74] The applicants contend that the President has been advancing mutating reasons for his decision, as an indication of irrationality. This culminates in the submission that the President has advanced false justifications which indicate bias, an improper motive and/or bad faith.

[75] This latter point is based on inferential reasoning with reference to other instances where a Deputy Minister was dismissed – Mr Whitfield. The President contends that, as Mr Whitfield admitted guilt in travelling overseas without his permission, that case is different from that of the Honourable Minister Mchunu. The reason why the Whitfield example is relied upon by the applicants is that the facts pertaining to his wrongdoing are equally “untested”.

[76] The third basis on which this ground is motivated is the contention that the special leave decision may result in the Honourable Minister Mchunu being suspended for the remainder of his term of office.

[77] The fourth contention is that the President’s reliance on a precedent of having placed Dr Mkhize on leave of absence is not a justification, but merely an indication that the matter was not previously raised in a court challenge.

[78] The applicants suggest that there is a fifth reason, namely a special political relationship between the President and the Honourable Minister Mchunu. It is for that reason that the President is treating the Honourable Minister Mchunu with kid gloves. There is allegedly an ulterior motive in his suspension, rather than an outright dismissal.

[79] All the above contentions are oblivious of the fact that the power to dismiss is discretionary. It takes the President alone to exercise that discretionary power. The only available remedy to compel a functionary to perform a statutory function is to seek a *mandamus*.⁹ Absent that, a case of irrationality is incapable of being conjured up simply because a functionary failed to exercise statutory power. In *East Luther Grand Valley (Township) v Ontario (Minister of*

⁹ See *Moll v Civil Commissioner of Paarl* (1897) 14 SC 463 at 468.

Environment and Energy),¹⁰ O'Connor J, placing reliance on *Baker v Canada (Minister of Citizenship and Immigration)*,¹¹ expressed the following:

"It follows that a discretionary decision will not be subject to judicial review merely because a party wishes the discretion had been used to come to a different conclusion. To do so would be to hold a discretionary decision to a "correctness" standard. This will result in the abrogation of discretionary powers legislated by parliament."¹²

[80] Similarly, to suggest when and how a discretionary power should be exercised, to dismiss the Honourable Minister Mchunu now, will certainly result in the abrogation of the discretionary power legislated by parliament. The President responded to the suggestion of mutation of reasons for his decision to place the Honourable Minister Mchunu on special leave. In his press statement of 13 July 2025, the President stated that: "In order for the Madlanga Commission to execute its functions effectively, I have decided to put the Minister of Police, Mr Senzo Mchunu on leave of absence with immediate effect."

[81] Relying on the seriousness of the allegations implicating the Honourable Minister Mchunu, the President stated in his answering affidavit before the Constitutional Court that the allegations "have profound implications for public confidence in the executive and the Police Force as a whole. So I decided that a proper investigation into the veracity of the allegations was warranted." This was repeated in the answering affidavit in the proceedings before this Court.

[82] The power to place the Minister of Police on special leave derived, so says the President, from section 91(2) of the Constitution, which provides:

"The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."

[83] In addition to the third power in section 84(1), the power to suspend is incidental to the power to dismiss. The President relies in this regard on *Mphele v Government*

¹⁰ 2000 CanLII 22361 (ON SC).

¹¹ [1999] 2 SCR 817, 174 D.L.R. (4th) 193.

¹² *Id* at para 32.

of the Republic of South Africa and Another¹³ and *Masetlha v President of the Republic of South Africa and Others*.¹⁴ In the latter, Moseneke DCJ held that the power to dismiss the head of a national intelligence agency was necessarily implied in section 209(2) of the Constitution. The submission by the applicants that the situation that obtained in *Masetlha* applies only in respect of employees as opposed to Cabinet members is without a propelling force. As such, it cannot be accepted by this Court. The decision in *Mphele* is that of a single judge. Although, on application of the *stare decisis* principle, it is not binding on this Court, this Court unreservedly agrees with it and gives it its imprimatur.

[84] In *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others*,¹⁵ the Constitutional Court endorsed *Masetlha* but drew a distinction between an implied primary power and an ancillary implied power. The Court held that an ancillary power “arises in the context of one power being necessary in order for an unquestionably existing power to be exercised.”¹⁶ Of significance, the Court expressed itself in the following terms:

“So, the interpretative exercise is not confined to the four corners of a statute. The answer to the question whether an implied primary power exists is yielded by the usual interpretative exercise that seeks to establish what a statute or a provision in it means. There is nothing unusual about this....”¹⁷

[85] It follows that implied powers emerge as a result of an interpretative exercise. Properly interpreted, sections 91(2) and 98 yield the implied power to place the Honourable Minister Mchunu on either suspension or leave of absence. In the answering affidavit, the President described his position as follows:

“My decision in this case was informed by the seriousness of the allegations implicating Minister Mchunu. Those allegations raise the question whether Minister Mchunu has breached his most basic duties, including his oath of office and the duties under section 96 of the Constitution. They also raise the question

¹³ 1996 (7) BCLR 921 (Ck) at 930 D.

¹⁴ [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

¹⁵ [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

¹⁶ *Id* at para 65.

¹⁷ *Id* at para 71.

whether Minister Mchunu has engaged criminal conduct. I therefore considered it necessary to remove Minister Mchunu temporarily from his position, to take his current powers away from him, and to do so pending the outcome of an investigation into his conduct through the Madlanga Commission. I also did not consider it appropriate for Minister Mchunu to be moved to a different portfolio. The seriousness of the allegations against Minister Mchunu meant that he should not be exercising any powers while on suspension. The allegations have profound implications for public confidence in the executive and the police force as a whole. So I decided that a proper investigation into the veracity of the allegations was warranted.”

[86] The implications of the above-stated is that upon conclusion of the investigations by the Madlanga Commission, the President will decide, based on the information before him at the time, whether to dismiss the Honourable Minister Mchunu or not.

[87] The first applicant contends that the President’s powers in section 91(2) are non-punitive and deprive him of the power to adopt interim measures such as special leave. As the Minister would not be entitled to argue the absence of *audi alteram partem*, being a political appointee, an interim measure in order to consider the evidence of the Madlanga Commission is not an implied power in terms of section 91(2). This is stated with reference to *Economic Freedom Fighters v Speaker of the National Assembly*.¹⁸

[88] Counsel for the President contends that the President’s right to establish the veracity of allegations before deciding whether to remove a Minister is what is at stake, and not the Minister’s right to be heard. It is accepted that the Minister is not entitled to *audi alteram partem*, but it is contended that the President is entitled to seek information in order to satisfy himself that the removal of the Minister is warranted. This step satisfies the procedural rationality leg of the exercise of the power to dismiss. There is a conceptual difference between procedural fairness and procedural rationality. The former concerns itself with affording the affected party an opportunity to respond to the allegations before an adverse decision is taken. The latter involves

¹⁸ [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC).

itself with the process followed before a decision is made.¹⁹ The Honourable Minister Mchunu is entitled to, at a minimum, procedural rationality before the President exercises the power to dismiss or not.

[89] Section 98 of the Constitution empowers the President to temporarily assign powers to Ministers. It is contended on behalf of the President that the express power to assign includes the ancillary or implied power to withdraw powers and functions from a Minister for a period of time, such as in a precautionary suspension.

[90] The President also relies on section 96 of the Constitution, which requires Ministers to act in a way that is consistent with their office, not to expose themselves to a risk of conflict and not to enrich themselves personally. It is contended by the President's counsel that section 96 imperatives leave scope for the President to properly inform himself before taking a decision to dismiss a member of Cabinet.

[91] It is contended that the President has, given the seriousness of the allegations against the Honourable Minister Mchunu, found sufficient reason to withdraw powers and functions from him pending the outcome of the Madlanga Commission's investigation. As there is a rational connection between the means and its end, the challenge to the exercise of the implied power must fail.

[92] The contribution of the Honourable Minister Mchunu to the determination of the issues at hand is of limited value, as he was not the decision maker in respect of the decisions that are being impugned.

[93] It is clear that the Constitution does not provide to the President an express power to place a Minister on leave or even precautionary suspension.

[94] Section 84(1) of the Constitution reads:

¹⁹ See *Eskom Holdings SOC v Resilient Properties (Pty) Ltd; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others*; *Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* [2020] ZASCA 185; 2021 (3) SA 47 (SCA); [2021] 1 All SA 668 (SCA) at para 85 and *Road Accident Fund v Auditor-General of South Africa and Others* [2024] ZAGPPHC 358; [2024] 3 All SA 914 (GP).

"The President has the powers entrusted by the *Constitution* and *legislation*, including *those necessary to perform the functions* of Head of State and head of the national executive"

[95] The interpretation question invoked in these proceedings relates to whether a power to suspend a Minister is a "necessary" power, that is, necessary in order to exercise the express power to dismiss a Minister in terms of section 91(2). As correctly submitted by Adv Madonsela SC, counsel for the Honourable Minister Mchunu, section 84(1) provides the President with direct powers to place a Minister on leave of absence. As already pointed out above, the third source of power expressed in section 84(1) is wide enough to directly empower the President to place a Minister on leave of absence.

[96] Additionally, the power to place a Minister on leave of absence may be implied from the power to appoint as well as the power to dismiss, as contended for by the President. In *AmaBhungane*, an ancillary implied power was described as "a cognate implied power, pegged it to, and owing its existence to, some primary power". This echoes a reasonable necessity test in order to imply such ancillary power.

[97] An implied power necessary to execute a primary power must rise above the level of expedience. More is required- ie. the necessity of the power in order to execute the primary function.

[98] In *Mncwabe v President of the Republic of South Africa*,²⁰ the Constitutional Court expressed itself in the following terms:

"Implied powers are the exception, not the rule. These powers only come into existence when they are reasonably necessary to give practical effect to the express powers laid down in legislation. Axiomatically, an implied power must draw from an enabling legislative provision. An implied power is ordinarily less likely to be found where the legislation is aimed at certainty." (Footnotes omitted).

²⁰ [2023] ZACC 29; 2024 (1) SACR 447 (CC); 2023 (11) BCLR 1342 (CC) at para 72.

[99] In *Mphele*, the Court held that the power to suspend a Member of the Executive Council in the Eastern Cape Government is incidental to the power to dismiss. The application of this principle to the powers of the President *vis-à-vis* Ministers has received academic support.²¹ As indicated earlier, this Court also endorses *Mphele*.

[100] In *Masetlha*, the Constitutional Court considered whether the President was empowered to dismiss the Head of the National Intelligence Agency despite there being no express power in the Constitution and the applicable statutory framework. The Court held that the power to appoint necessarily includes the power to dismiss, finding as follows:

“In sum, I have found that section 209(2) of the Constitution does confer on the President an implied power to dismiss a head of the Agency and that the power includes the power to amend the term of office of the incumbent of the Agency in such a manner as to end the term. I have also found that section 3(3)(a) of ISA contains a similar implied power to dismiss.”²²

[101] The President’s decision to appoint, dismiss, and assign powers to Ministers is highly discretionary, with a very high threshold for judicial interference.

[102] The power to place a Minister on precautionary suspension is an ancillary power to the President’s constitutional power to dismiss a Minister in terms of section 91(2) of the Constitution. It matters not whether this is described as an ancillary or implied auxiliary power.

[103] The exercise of a power to suspend a Minister is reasonably necessary when it is not apparent whether the facts warrant the dismissal of a Minister or not. The appointment of the Madlanga Commission as a step in answering this question indicates that it was a reasonably necessary requirement to appoint the Commission to enable the President to, in due course, exercise his constitutional powers.

²¹ See Murray & Stacey “The President and the National Executive” in Woolman & Bishop (ed) *Constitutional law of South Africa* 2nd Edition (Juta & Co Ltd, Cape Town 2013) vol 1.

²² *Masetlha* above n 13 at para 73.

[104] The President has explained that he placed the Honourable Minister Mchunu on leave of absence due to the serious nature of the allegations and the need to protect public confidence in the executive authority. Further, the President needs to have the benefit of the Madlanga Commission Report to decide whether he should dismiss the Honourable Minister or not. This explanation indicates that the suspension of the Honourable Minister was to enable the President to exercise his power in terms of section 91(2) to dismiss a Minister. In essence, he needs to assure himself that there are sufficient grounds for a dismissal. His decision must, as a matter of law, be rational. In fact, it must also be procedurally rational.

[105] A delay in exercising a power to dismiss due to the need for certainty by awaiting the recommendations of the Madlanga Commission is indicative of procedural rationality.

[106] The argument by the applicants that only the Parliamentary Portfolio Committee may scrutinise the conduct of a Cabinet Minister (because he is also a Member of Parliament) loses sight of the fact that the Madlanga Commission has a different purpose. There is no impediment to the Parliamentary Portfolio Committee proceeding to investigate the same issues that served before the Madlanga Commission.

[107] The applicants further contend that a judge may not preside over a commission where allegations against judges are investigated. They rely on the incident of natural law expressed in the dictum **nemo iudex in sua causa**. The allegations are however not against the judiciary specifically, but relate to specific instances. As long as the issues fall within the terms of reference of the Commission there is no impediment to an impartial judge presiding over the Commission. It is not correct to suggest that only the Judicial Services Commission is empowered to investigate allegations of impropriety against judges. Whilst the Judicial Service Commission (JSC) has been created to regulate the appointment and conduct of Judges, its proceedings are not designed to assist the President in the exercise of his constitutional powers and functions in relation to Ministers. The JSC may very well investigate complaints against Judges within the remit of its judicial powers and functions. However, the exercise of the JSC's oversight and disciplinary roles is not the only means of enquiry available to

the President. Appointing a Commission places the President in control of the time frame to produce a report. The JSC is not beholden to the President to act expeditiously to suit the needs of the President. It acts within its own statutory framework.

[108] The threat to public trust in the Minister of Police and the seriousness of the allegations against the Honourable Minister Mchunu are sufficient reasons for the establishment of the Commission. It involves “a matter of public concern” as envisaged in section 1(1) of the Commissions Act,²³ which Act has been expressly invoked in the appointment of the Commission. The President will also take guidance from the Commission Report on whether he should retain or dismiss the Honourable Minister Mchunu.

[109] The establishment of the Madlanga Commission, in order to assist the President and to ventilate a matter of public concern, is rationally linked to the exercise of the President’s powers expressed in sections 91(2), 91(3)(c), 96 and 98 of the Constitution read with section 1(1) of the Commissions Act. Basically, there is nothing unlawful or irrational in establishing the Madlanga Commission. Accordingly, an attack against its establishment and or composition falls to be rejected and dismissed.

The legality and rationality of the appointment of the Honourable Minister Cachalia.

[110] The applicants contend that the Constitution does not provide for the appointment of an Acting Minister from outside the ranks of members of Parliament. An appointment in terms of section 91(3)(c) of the Constitution would therefore be *ultra vires*.

[111] The applicants proceed from the vantage point that, at the time Professor Cachalia was assigned the acting powers of Minister of Police, he was not a Cabinet Minister. The suggestion is even made that the subsequent appointment of Professor Cachalia as a Minister was an *ex post facto* correction of an error pointed out by the applicants in their letter of demand.

²³ Act 8 of 1947 as amended.

[112] The applicants contend that the appointment of Professor Cachalia is not rational because having two Ministers in the same portfolio is a waste of public resources.

[113] The President's Acts referred to below, annexed to the President's answering affidavit, however, make it clear that Professor Cachalia was first appointed Minister in terms of section 91(3)(c) of the Constitution. In a separate Presidential Act a day later, he was assigned the powers of Minister of Police in the temporary absence of Minister Mchunu.

[114] In President's Act 250/2025, dated 13 July 2025, the President placed Minister Mchunu on leave of absence, with immediate effect, until further notice. We interpose to deal with a submission that the usage of "until further notice" is indicative of a lack of a rational link between the placing on special leave and the outcome of the Commission. We disagree. The required rational link is that of the special leave and the ultimate exercise of dismissal power. The usage of the phrase until further notice, is a surplusage that lacks meaningful legal consequences. On the contrary, nothing meaningful is to be attached to it²⁴. In President's Act 278/2025, dated 31 July 2025, he appointed Professor Cachalia as Minister without portfolio in terms of section 91(3)(c) of the Constitution. In President's Act 282/25, dated 1 August 2025, he assigned in terms of section 98 to Professor Cachalia the powers of the Minister of Police.

[115] The applicants have therefore approached the court on a factually erroneous basis. There is no reason to second-guess Presidential Acts, which are numbered in sequence, and which confirm that Professor Cachalia was a Cabinet Minister when he was assigned the powers of the Minister of Police.

[116] Further, it is within the President's powers to appoint two Cabinet Ministers from outside the ranks of members of Parliament.

²⁴ Effectively, the phrase 'until further notice' simply means until an announcement is made (that something has been changed back to the way it was).

[117] There is therefore no basis to impugn the appointment of Prof Cachalia as Minister without portfolio and to then assign to him the powers of the Minister of Police.

[118] This is particularly so where the temporary absence of the Honourable Minister Mchunu is for reasons clearly stated by the President, namely:

118.1 To protect public confidence in the position of the Minister of Police.

118.2 To permit the Madlanga Commission to operate without interruption.

In this regard, the Honourable Minister Mchunu would be a witness in the Commission's proceedings and would need to attend the Commission proceedings to be apprised of allegations made against him. He would not have been free to do this if he still had to continue with his obligations as Minister of Police.

[119] Mr Mpofu SC fervently argued that section 91(2) of the Constitution must be interpreted to mean that the appointment of a Minister must symbiotically happen with the assignment of powers and functions. There are textual pointers in sec 91 indicating otherwise. The text of section 91(2) clearly affords the President three sets of powers; namely; (a) to appoint; (b) to assign powers and functions; and (c) to dismiss. It is illogical to think that all these powers ought to be exercised simultaneously. There is a comma used after the power to appoint, which is followed by the usage of "and" before the power to dismiss in the text of the section.

[120] Commas are crucial for clarity and preventing ambiguity. They are used as separators and to connect independent clauses. Punctuation may seem trivial in everyday language, but in the realm of statutory, it holds immense significance.²⁵ On the proper interpretation of the section using text, context and purpose, there is nothing that would prevent a President from first appointing and later assigning powers and functions. Later, in respect of a Minister, if needs be, the President may dismiss the appointed and assigned Minister. Punctuation is part of a statute and cannot be ignored by Courts when interpreting a statute. Where punctuation discloses a proper legislative intent or conveys a clear meaning, the courts should give due weight to it.

²⁵ See Marcin "Punctuation and the interpretation of Statutes" (1977) 9 *CONN L Rev* 227.

[121] The usage of a comma in the section illuminates the clear intention of the legislature that the assignment of powers and functions can, and must, follow an appointment as a Minister. In order to buttress this point, regard must be had to the provisions of section 91(1). The section informs us that a Cabinet consists of (a) the President; (b) the Deputy President; and (c) Ministers. Of significance, the section does not state that only “assigned” Ministers form part of the Cabinet. In terms of section 46(1) of the Constitution, the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system. When this section is read with section 91(3)(b), these women and men are all potential Ministers. It is from this Assembly that a President may select Ministers. Once a Minister is selected by the President, such a Minister may be appointed to Cabinet.

[122] Once a Minister is so appointed, he or she becomes a member of Cabinet. Section 95 provides that before Ministers can begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution. This section confirms, in our view, the sequence that must happen in the case of a selected Minister; namely; (a) appointment; (b) assignment of powers and functions; and (c) swearing in. The text of the Constitution uses the word “Minister”, even for the purposes of selection. Take, for example, two persons from outside the Assembly are referred to as Ministers even before appointment. Section 98 makes the point clearer. There, reference is made to a Cabinet member, who we know that, in terms of section 91(1), may either be a Deputy Minister or Minister.

[123] Reference to Cabinet members in section 98 is suggestive of the fact that the Cabinet may have been appointed but not yet assigned powers and functions of Ministers. For all the above reasons, the conclusion we reach is that a sensible and business-like interpretation to adopt is that an appointment of a Minister precedes the assignment of functions. Having happened with Honourable Minister Cachalia, there is no illegality in his appointment.

The legality and rationality of the establishment of the Madlanga Commission.

[124] Earlier, this Court briefly touched on the issue of the Madlanga Commission when dealing with the placing of the Honourable Minister Mchunu on leave of absence. Now, this Court pointedly deals with the impugned decision raised by the applicants before us. The appointment of the Madlanga Commission is assailed with reference to academic writing by Michael Bishop²⁶ and Grant Hoole²⁷, contending that:

- 124.1 Commissions engaged no legal consequences in their own right as they make no binding findings, but reflect the opinions of the Commissioner.
- 124.2 Governments tend to abuse Commissions of Inquiry to defer or escape accountability.
- 124.3 Sometimes the costs of Commissions do not justify the limited benefit.
- 124.4 The institution of such Commissions needs to be viewed with scepticism and caution.
- 124.5 The most useful value of such Commissions is the enhancement of public participation in a democracy.

[125] The authors merely make the point that Commissions may be used to deflect attention. But the wide scale participation brought about by them enhances our democracy.

[126] The Madlanga Commission was appointed by the President in terms of section 84(2)(f) of the Constitution due to "serious constitutional, security and rule of law concerns". In terms of the proclaimed terms of reference, the Commissions Act shall apply.

[127] The Commission is granted broad investigatory powers, but in terms of paragraph 14 of the terms of reference, it is expected of the Commission to make recommendations in its final report to enable the President to take appropriate action. This is a clause which links the appointment of the Madlanga Commission to the

²⁶ Michael Bishop: *An accidental Good: The Role of Commissions of Inquiry in South African Democracy* (2014) <http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/11/Bishop.pdf>.

²⁷ Grant Hoole *Reconsidering Commissions of Inquiry as Plural and Participatory Institutions: A Critical Reflection on Madingwana*, (2018) 8 CCR 221

question whether, amongst others, the President should retain the Honourable Minister Mchunu or dismiss him.

[128] The President has made it clear that the precautionary suspension of the Honourable Minister Mchunu and the appointment of the Madlanga Commission are linked in that the allegations by General Mkhwanazi would influence the question of whether the Honourable Minister Mchunu should be retained or dismissed.

[129] The power of the President to appoint a Commission in terms of section 84(2)(f) is an original constitutional power which cannot be delegated. Further, a high bar to judicial interference is set by virtue of the President's expressed need for information in order to execute his executive powers pertaining to the retention or dismissal of the Honourable Minister Mchunu.

[130] Nothing that is said publicly by the President, the Honourable Minister Mchunu or third parties regarding the establishment of the Commission will detract from the President's authentic constitutional power to so appoint a Commission.

[131] A similar debate was entertained by the Constitutional Court in *President of the Republic of South Africa v SARFU*.²⁸ Procedural questions, as far as the President's conduct is concerned, are not governed by public utterances. Such public utterances do not detract from the President's power to appoint a Commission.²⁹ The only question in this regard is whether the President applied his mind when instituting a Commission.³⁰

[132] In this instance, the President, on the facts presented, did rationally apply his mind to the establishment of the Madlanga Commission. It is a decision that cannot be faulted from a legality and rationality vantage point.

[133] In the premises, the entire application falls to be dismissed.

²⁸ [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

²⁹ *Id* at para 44.

³⁰ *Id* at para 45.

[134] It is apposite for this Court to also very briefly deal with the issue of the suspension or interdict referred to in the Notice of Motion. Mr Mpofu SC correctly submitted that a setting aside of a President's decision required confirmation by the Constitutional Court - hence a suspension pending confirmation. As already outlined above, this Court is not making such a declaration. We do mention in passing that a temporary interdict or temporary relief mentioned in section 172(2)(b) still has to tick all the boxes applicable to an interdict remedy, failing which a court must refuse to exercise its discretionary powers³¹. On this score, the applicants have failed to persuade the Court. What the applicants sought is a temporary interdict contemplated in section 172(2)(b) of the Constitution. Since no constitutional invalidity order has been made, that should be the end of the enquiry.

The issue of costs

[135] The normal rule of an award of costs is that it follows the results. When it comes to costs, this Court possesses a very wide discretion.

[136] The applicants asserted the infringement of constitutional rights. Although they failed in the quest to vindicate any constitutional infringement, on application of the *Biowatch* principle, they ought not to be mulcted with costs. This matter raises a matter of national importance and requires an interpretation of the Constitution to determine the rights and obligations of the President. To that extent, the application of the *Biowatch* principle is warranted. The principle should also apply in respect of the reserved costs of 18 September 2025.

[137] Because of all the above reasons, the following order is made.

1. The application is dismissed.
2. Each party to bear its own costs.

³¹ *Setlogelo v Setlogelo* 1914 AD 221, as endorsed in *National Treasury and others v OUTA* 2021 (11) BCLR 1148 (CC) at para 50.


L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA


G N MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA


E T LABUSCHAGNE
JUDGE OF THE HIGH COURT
GAUTENG, PRETORIA

Date heard: 27 November 2025
Date of judgment: 10 December 2025

Appearances

For the First Applicant: D.C Mpofu SC, B.H Matlhape and K.D Monareng instructed by KMNS Incorporated c/o Nkome Attorneys Incorporated.

For the Second Applicant: M.A Qofa-Lebakeng and Z Makangela instructed by T Mpumlwana & Associates c/o Nkome Attorneys Incorporated.

For the First Respondent: N.H Maenetje SC, N Muvangua, N Stein, N Rasalanavho, K Moyo (pupil) and J Hunter-

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For the Second Respondent:

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