THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case:

In the matter between:

MATAMELA CYRIL RAMAPHOSA	Applicant
and	
SANDILE NGCOBO NO	First Respondent
THOKOZILE MASIPA NO	Second Respondent
MAHLAPE SELLO NO	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
VUYOLWETHU ZUNGULA	Fifth Respondent

APPLICATION FOR REVIEW

PLEASE TAKE NOTICE

1. The applicant applies to this court for the following orders:

    1.1 It is declared that, in terms of section 167(4)(e) of the Constitution, only this court may decide this application.

    1.2 The applicant is granted leave in terms of section 167(6)(a) of the Constitution to bring this application directly to this court.

    1.3 The report of the Independent Panel, dated 30 November 2022, rendered in terms of rule 129G of the Rules of the National Assembly (*the Report*), and particularly the

recommendations in paragraph 264 of the Report, are reviewed, declared unlawful and set aside.

1.4 It is declared that any steps taken by the National Assembly pursuant to the Report are equally unlawful and invalid.

1.5 The respondents opposing this application, if any, are ordered jointly and severally to pay the applicant's costs.

1.6 The applicant is afforded alternative relief.

2. The applicant will rely on his accompanying founding affidavit including its annexures.

3. This court can deal with this matter without oral evidence.

4. The applicant has appointed the address of his attorneys of record mentioned below at which he will accept service of all documents in these proceedings.

5. If you wish to oppose this application, you must, within ten days, give notice of your intention to oppose to the applicant and the Registrar of this court and in the notice appoint an address at which you will accept notice and service of all documents in these proceedings.

6. This matter will be disposed of, in accordance with, the directions of the Chief Justice.

DATED AT JOHANNESBURG ON THIS 5th DAY OF DECEMBER 2022.

HARRIS NUPEN MOLEBATSI INC.

Applicant's attorneys
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Ref: P Harris / R Mokgatle

TO: **THE REGISTRAR**

JOHANNESBURG

AND TO:

Justice Sandile Ngcobo
Chairperson: Section 89 Independent Panel
First Respondent
Tel: 082 242 0089
Email: sheleni01@gmail.com

PER EMAIL

AND TO:

Justice Thokozile Masipa
Member: Section 89 Independent Panel
Second Respondent
Tel: 082 852 2640
Email: masipathoko@gmail.com

PER EMAIL

AND TO:

Advocate Mahlape Sello, SC
Member: Section 89 Independent Panel
Third Respondent
Tel: 083 414 4428

PER EMAIL

Email: msello@duma.nokwe.co.za

AND TO:

The Speaker of the National Assembly **PER EMAIL**
Fourth Respondent
Office of the Speaker of the National Assembly
Parliament of the Republic of South Africa
Parliament Street
Cape Town, 8000
Email: xgeorge@parliament.gov.za;
zadhikarie@parliament.gov.za; Llouw@parliament.gov.za;
mxaso@parliament.gov.za

AND TO:

Hon. Vuyolwethu Zungula, MP **PER EMAIL**
African Transformation Movement President
Fifth Respondent
Tel: 083 240 7095
Email: vzungula@parliament.gov.za

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FOUNDING AFFIDAVIT

T.C

TABLE OF CONTENTS

T.C

I, the undersigned,

MATAMELA CYRIL RAMAPHOSA

make the following statement under oath.

THE PARTIES

1 I am the applicant. I am the President of South Africa. I have personal knowledge of the matters to which I depose in this affidavit except where it is evident from the context that I do not. My submissions of law are made on the advice of my lawyers.

2 The first, second and third respondents are cited in their capacities as members of an Independent Panel appointed in terms of rule 129D of the Rules of the National Assembly. They are:

2.1 Justice Sandile Ngcobo, a former Chief Justice of South Africa.

2.2 Justice Thokozile Masipa, a former judge of the High Court of South Africa.

2.3 Advocate Mahlape Sello SC, a senior advocate in private practice.

2.4 The first, second and third respondents conducted their business from Room 701, 7th Floor, 100 Plein Street Building, Parliament, Cape Town.

3 The fourth respondent is the Speaker of the National Assembly, Parliament, Cape Town.

4 The fifth respondent is Mr Vuyolwethu Zungula, a member of the National Assembly and the leader of the African Transformation Movement. I do not seek any relief against him. I cite him only because he proposed the motion which triggered the National Assembly's appointment of the Panel.

THE ESSENCE OF THIS APPLICATION

5 Section 89(1) of the Constitution provides for the removal of the President as follows:

> "*The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of -*
>
> *(a) a serious violation of the Constitution or the law;*
>
> *(b) serious misconduct; or*
>
> *(c) inability to perform the functions of office.*"

6 Rules 129A to 129Q of the Rules of the National Assembly prescribe the procedure for the removal of the President. A a copy of the Rules are annexed to the Report as "Annexure IP 5"[1].

7 On 18 July 2022, the fifth respondent, Mr Zungula, initiated proceedings for my removal from office by the submission of a notice of motion in terms of rule

[1] Pp.11-15, Volume 2.

T.C

129A. A copy of the notice of motion is annexed to the Report as "Annexure IP2".[2]

8 The National Assembly appointed the first, second and third respondents as an Independent Panel to undertake a preliminary inquiry in terms of rules 129D to 129H.

9 The Panel rendered its report on 30 November 2022. Annexure **"MCR1"** is a copy of the report. It comprises three volumes. Volume 1 is the report itself. Volumes 2 and 3 comprise the information on which the Panel based its report. I shall, for convenience, refer to volume 1 as "*the report*" unless I specify otherwise.

10 As appears from paragraph 264 on page 82 of the report, the Panel concluded that the information placed before it "*discloses, prima facie, that the President may have committed*" serious violations of the Constitution and the law and serious misconduct within the meaning of section 89(1) of the Constitution.

11 The purpose of this application is to review and set aside the report and particularly its recommendation in paragraph 264. The Panel rendered its report and made its recommendation in the exercise of public power. They are thus reviewable under the constitutional principle of legality. I submit that the Panel misconceived its mandate, misjudged the information placed before it and misinterpreted the four charges advanced against me. It moreover strayed beyond the four charges and considered matters not properly before it.

12 I bring this application directly to this court on the following grounds:

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[2] Pp. 2-4. Volume 2.

T-C

12.1 The first is that this is an application for a decision of the kind contemplated by section 167(4)(e) of the Constitution in that the court is asked to decide that the Panel, an organ of the National Assembly, failed to fulfil its obligations in terms of section 89 of the Constitution read with the rules of the National Assembly.

12.2 I also apply for the leave of this court to allow me to bring this matter directly to this court in the interests of justice in terms of section 167(6)(a) of the Constitution and rule 18 of the rules of this court.

THE BACKGROUND

13 The facts relevant to this application relating to the Phala Phala farm and its operations are set out in my submission to the Panel which is in the Panel's report volume 3 at page 1627. I ask that those facts be read as incorporated herein to the extent necessary.

THE PANEL

14 On 14 September 2022, the Speaker appointed the Panel.

15 On 19 October 2022, the Speaker formally referred the Motion to the Panel in terms rule 129C9.[3]

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[3] Report vol 1 para 15

16 Shortly after the referral of the Motion to it, the Panel issued a timetable to conduct the preliminary enquiry, setting out the timelines for its work. In addition, the Panel issued a Notice in terms of rule 129G(1)(c)(i) inviting additional information from members of the National Assembly within six days of the publication of the Notice in the Announcements, Tablings and Committee Reports.[4]

17 The Panel received submissions from the African Transformation Movement, Economic Freedom Fighters and the United Democratic Movement on 27 October 2022.[5]

18 Under cover of two letters dated 20 and 28 October 2022, the Panel provided me with copies of the information before it. It comprised documents running to 1627 pages and ten video clips.

19 In its letter of 28 October 2022, annexure **"MCR2"**, the Panel invited me to respond, in writing, to "*all relevant allegations*" against me. Its invitation accorded with rule 129G(1)(c)(iii). The Panel gave me 10 calendar days to respond. It meant that I had to respond by 6 November 2022, that is, after only six weekdays.

20 I understood the Panel's invitation to mean that I was invited to respond only to the allegations relevant to the four charges against me. I made that clear in my response dated 6 November 2022. There is a copy of my response in the

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4 Report vol 1 para 17

5 Report vol 1 para 18

T.C

Panel's report volume 3 at pages 1627 to 1765. I confined my response to the allegations which I considered to be relevant to the four charges against me.

21 I shall later demonstrate that the Panel strayed beyond the four charges. In so far as it did so, it strayed beyond its mandate. It was also unfair to me because it raised matters to which I have never been invited to respond.

DIRECT ACCESS TO THIS COURT

Exclusive jurisdiction in terms of section 167(4)(e)

22 The possible removal of an elected President through impeachment is a matter of pre-eminent constitutional importance. A President is elected by the National Assembly. Members of the National Assembly, in turn, are elected through their political parties by voters exercising their rights in terms of section 19 of the Bill of Rights.

23 Section 89 of the Constitution provides a mechanism for holding the executive accountable. A removal also directly affects the political choices of the voters. It is thus extremely important that a removal of the President from office must be lawful and consistent with the Constitution.

24 I am advised that only this Court can decide whether or not Parliament has failed to fulfil a constitutional obligation, in terms of section 167(4)(e) of the Constitution. Parliament is under an obligation to act lawfully when fulfilling its constitutional obligations.

25 Parliament must, via one of its organs, the National Assembly, *"provide for mechanisms - (a) to ensure that all executive organs of state in the national*

T-C

sphere of government are accountable to it" (Section 55(2) of the Constitution). One of the mechanisms for discharging this obligation is to create procedures for the removal of a President under section 89 of the Constitution. Any removal of the President under section 89 of the Constitution must be lawful.

26 When the Panel conducts an inquiry, it is fulfilling the constitutional obligations of Parliament provided for in sections 55(2), and 89 of the Constitution. If it conducts its affairs unlawfully and invalidly, it is failing to give effect to the constitutional obligations imposed on Parliament.

27 The Panel has decided that I have a case to answer. The Panel is an organ of Parliament. It is established by Parliament and reports to the Speaker.

28 Just like Parliament is required to act lawfully, the Panel must act lawfully when conducting an inquiry. The inquiry by the Panel is a first step in the removal proceedings under section 89 of the Constitution. If there is no valid report of the Panel, the second step, which is the establishment of an impeachment committee may not be taken. The third step, namely the placement of the item for the removal of the President for a vote in Parliament, may not be taken as well. Therefore, a valid report is the jurisdictional requirement for any valid impeachment proceedings against a President.

29 It is submitted that the Panel had a duty to fulfil its constitutional obligations by conducting its inquiry lawfully and constitutionally. Its failure in this regard is the failure of constitutional obligations.

T-C

30 It is also relevant to the enquiry of exclusive jurisdiction that the conduct in issue here is my conduct as President. The Panel has relied on section 83(b) of the Constitution, which is an obligation, exclusively imposed on the President. Only this Court can decide whether or not I have failed to fulfil the obligation imposed by section 83(b) of the Constitution.

31 It follows that this matter falls within the exclusive jurisdiction of this Court.

Application for direct access

32 In the event this Court were to conclude that it does not have exclusive jurisdiction as submitted above, I submit that direct access ought to be granted to this Court on the grounds set out hereunder.

33 Section 167(6)(a) of the Constitution, and Rule 18 of this Court's Rules, allow a litigant to approach this Court directly, but only when it is in the interests of justice; there are exceptional circumstances; the matter in question must be of public importance and there would be prejudice to the public interest, the ends of justice or good governance.

34 The question of whether it is in the interest of justice is decided on a case-by-case basis.[6]

35 First, the impeachment of a sitting President is a matter of great constitutional significance. The President is the Head of State and Head of the National Executive. Of the several offices that the Constitution creates, it is to the

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[6] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157; 1998 (7) BCLR 855 at para 32 and *Dudley v City of Cape Town and Another* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC) ; [2004] 7 BLLR 623 (CC) at para 7.

President alone that it places a direct duty to uphold, defend and respect the Constitution.

36 The removal of a President from office has significant consequences - not only on the public's trust in that office, but also on the very functioning of the Executive branch of government.

37 Self-evidently, the legality of any process that results in the removal of the President cannot be dealt with by any court other than this Court. It is for that reason that this Court has the final say as to whether the President has failed to fulfil a constitutional obligation. I respectfully submit that given the office in question, and the constitutional consequences following from the Panel's decision, it is only this Court that should pronounce on the legality of the Panel's decision.

38 Second, it is as a result of this Court's judgment in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47 that the Panel was created. It would be undesirable for another Court, other than this Court, to pronounce on the legality of the Panel's processes.

39 Third, it cannot be gainsaid that the outcome of this application will have far-reaching and important political consequences for the Republic of South Africa and all its citizens. Therefore, the lawfulness of the process that results in the removal of the President cannot be understated. It is only this Court, as the apex Court of the land, that can pronounce, with finality, on the legality of the Panel's discharge of its mandate and recommendations.

T-C

40 Fourth, it is the first time in our constitutional history that a Panel of this kind has ever been created. The lawfulness of its processes, its rules and its decision making has never been tested. Guidance from this Court about how the Panel is to conduct its work in the process of removing a sitting President is of utmost importance.

41 Fifth, there must be finality and certainty about the legality of the Panel's processes. This is because of the consequences that follow from its recommendations. The country cannot afford instability in the office of the President. Instability risks destabilizing the country, least of all because an impeachment process impairs the continued functioning of government.

42 It is also for these reasons that the circumstances of this case are exceptional. It is not every day that a sitting President is under threat of impeachment. If the President is to be removed, the decisions leading up to his removal must be beyond reproach. Furthermore, the Panel in question is one of a kind - its sole purpose is to make recommendations about whether the National Assembly should embark on a full impeachment process, and it is for the first time in our history that such a Panel has been constituted.

43 There is urgency in resolving the issue of the legality of the recommendations and findings of the Panel. Any delay is harmful to the public interest and will potentially create uncertainty.

44 For all these reasons I submit that it is both in the interests of justice and the public interest for this Court to grant direct access.

T.C

THE PANEL'S MANDATE

Introduction

45 Section 89(1) of the Constitution sets a high bar for the removal of the President. He may only be removed for "*a serious violation of the Constitution or the law*" or "*serious misconduct*" and then only by a two-thirds majority of the National Assembly.

46 The rules of the National Assembly moreover define the grounds upon which the President may be removed as follows:

> "*a serious misconduct" means "unlawful, dishonest or improper behaviour performed by the President* ***in bad faith***"." (my emphasis)
>
> "*a serious violation of the Constitution or the law" means "behaviour by the President amounting to an* ***intentional or malicious*** *violation of the Constitution or the law performed* ***in bad faith***"." (my emphasis)

47 As these definitions make clear, the President may only be removed for intentional or malicious conduct in bad faith. Only deliberate misconduct can found the removal of the President.

A substantive notice of motion

48 Rule 129A provides that the process for the removal of the President may only be triggered by a substantive notice of motion. It must comply with the following requirements:

T-C

48.1 The notice of motion must be limited to "*a clearly formulated and substantiated charge*" on the grounds specified in section 89 of the Constitution.

48.2 The clearly formulated and substantiated charge must "*prima facie show that the President committed a serious violation of the constitution or law;* [or] *committed a serious misconduct*" as defined.

48.3 The charge must be confined to the President's conduct "*in person*".

48.4 The notice of motion must be accompanied by all the evidence on which it is based.

49 I highlight the fact that the notice of motion must be limited to "*a clearly formulated and substantiated charge which... must prima facie show*" that the President is guilty of conduct of the kind contemplated in section 89 of the Constitution. A prima facie case is, in other words, a threshold requirement for such a notice of motion. It does not get out of the starting blocks unless it makes a prima facie case.

50 In terms of rule 129B, the Speaker must ensure that the notice of motion complies with rule 129A.

The appointment of an Independent Panel

51 If the notice of motion meets the threshold requirements of rule 129A, the National Assembly must appoint an Independent Panel to undertake a preliminary inquiry in terms of rules 129D to 129G. This requirement

T.C

recognizes that, in a democratic society, the removal of a democratically elected president is a grave matter of high national importance. It is not something upon which Parliament should lightly embark. That is why Parliament may not embark on an impeachment process unless an independent panel has considered the evidence and concluded that there is good cause to do so.

52 The Panel's procedure is subject to the following rules:

52.1 The Panel may, in terms of rule 129G(1)(c)(i) afford members of the National Assembly an opportunity to place relevant information before it.

52.2 The Panel must provide the President all the information in terms of rule 129G(1)(c)(ii).

52.3 The Panel must provide the President with a reasonable opportunity to respond, in writing, to "*all relevant allegations against him or her*".

53 Rule 129G(1)(b) defines the Panel's mandate. It must determine and make a recommendation to the Speaker "*whether sufficient evidence exists to show that the President*" committed a serious violation of the Constitution or the law or committed a serious misconduct. I emphasise that the Panel must determine whether "*sufficient evidence exists*" to show those matters. The Panel must, in other words, exercise a value judgment. It must do so because the process for the impeachment of a president is a grave matter of high public importance. The Panel must judge whether there is sufficient evidence to embark on such a process.

T.C

The subsequent processes

54 The National Assembly considers the Panel's report in terms of rule 129I. If it decides to proceed with the matter, it refers the matter to the Impeachment Committee.

55 The Impeachment Committee must "*proceed to establish the veracity and, where required, the seriousness of the charges and report to the Assembly thereon in terms of rule 129M*".

56 The Committee reports to the National Assembly in terms of rule 129O. If its report recommends that the President be removed from office, the question is put to the National Assembly for a vote. Such a resolution may only be adopted by a two-thirds majority.

Core features of the process

57 I emphasise the following core features of the process for the removal of the President.

58 The President may only be removed for serious misconduct committed in bad faith.

59 The misconduct of which the President is accused, is limited to "*a clearly formulated and substantiated charge*" in the original notice of motion. The entire process is confined to the charge so formulated. The Panel is confined to a consideration of the charge and so is the Impeachment Committee in terms of rule 129M(1).

60 It is a threshold requirement that the charge "*must prima facie show*" that the President has been guilty of serious misconduct. A prima facie case is, in other words, a threshold requirement for a charge. If it does not make a prima facie case, it does not get out of the starting blocks.

61 The Panel's remit is to determine whether there is "*sufficient evidence*" to show that the President is guilty of serious misconduct. It requires more than a prima facie case. It recognises that an impeachment process is a serious matter of high public importance. The Panel must assess whether there is "*sufficient evidence*" to justify such a process.

62 In making its assessment, whether there is "*sufficient evidence*" that the President is guilty of serious misconduct, the Panel must bear in mind that serious misconduct is confined to the President's deliberate personal conduct in bad faith. The Panel must, in other words, determine whether there is sufficient evidence, not merely that the President committed misconduct, but that he did so deliberately and in bad faith. There cannot be sufficient evidence that the President is guilty of misconduct as defined unless there is also sufficient evidence that he acted deliberately and in bad faith.

THE PANEL MISUNDERSTOOD ITS MANDATE

63 The Panel considered its mandate from page 25 in paragraphs 67 to 77 of its report. It seems clear that it misunderstood its mandate in at least two respects.

T.C

64 First, it interpreted its remit, to determine "*whether sufficient evidence exists*" to mean "*whether there is a prima facie case against President*". It put it as follows in paragraph 75:

> "*In the context of the scheme for the removal of the President from office, we therefore construe the phrase "whether sufficient evidence exists" to mean whether, based on the information received, the President has a case to answer. Put differently, we construe the phrase to require the Panel to determine whether there is a prima facie case against the President.*"

65 The Panel repeated in paragraph 76 that it functions as a filter to ensure that only a motion "*which establishes, prima facie, that the President has a case to answer, is considered by the Impeachment Committee*".

66 The Panel implemented this standard as appears from its final recommendation on page 82 in paragraph 264. It concluded that the information before it "*discloses, prima facie*" that the President may have been guilty of serious misconduct.

67 The Panel was thus mistaken. It is a threshold requirement for any charge against the President that it discloses a prima facie case in terms of rule 129A. The Panel does not simply repeat the same requirement. It must determine whether "*sufficient evidence exists*" to warrant an impeachment process.

68 The Panel's second misunderstanding of its mandate was that it overlooked the fact that "serious misconduct" and "a serious violation of the Constitution or the law", as defined in the rules of the National Assembly, are confined to

deliberate misconduct by the President acting in bad faith. The Panel did not inquire into the President's bad faith at all. It could not rationally conclude that there is sufficient evidence of the President's misconduct without any assessment of the question whether he had acted in bad faith.

THE PANEL'S EVALUATION OF THE EVIDENCE

The Panel's approach

69 In terms of Rule 129G(1)(b) the Panel was required *"[to] consider the preliminary enquiry relating to the motion … and make a recommendation to the Speaker … whether sufficient evidence exists to show that the President:*

i. committed a serious violation of the Constitution or the law;

ii. or committed a serious misconduct; or…"

70 I am advised that this required the Panel to do three things, namely:

70.1 determine whether the charges, if proven, would establish a basis for impeachment under section 89(1)(a) or (b) of the Constitution;

70.2 establish, as a matter of fact, whether there is evidence to support the charges. I am advised that over and above establishing as a matter of fact whether evidence exists, the Panel is also required to consider the admissibility of such evidence and its probative value; and

T-C

70.3 determine whether the evidence is sufficient – i.e., whether if the evidence was established, it would be sufficient to establish the charges at the relevant standard of proof in a section 89 impeachment enquiry.

71 What then was the Panel meant to make of my submissions and the evidence I provided?

71.1 I am advised that my submissions and evidence I provided could not and should not have diverted the Panel from the enquiry outlined above. The Panel ought to have considered my explanation and the evidence I provided only if all three questions referred to above were answered in the affirmative. It ought to have determined whether (a) the explanations and/or evidence provided undermine some of the evidence placed before it to support the charges and (b) whether whatever evidence is left undisturbed would still nevertheless be sufficient to prove the charges.

71.2 The enquiry does not start with a presumption that the charges are established and then move on to considering the explanation and/or evidence provided by the President to determine whether it would be sufficient to defeat the charges.

72 Respectfully, the Panel misconstrued the enquiry it was supposed to conduct:

72.1 The Panel determined that it was not required to conduct the enquiry outlined above:

T.C

"It is inconceivable that the National Assembly would have given both the Panel and the Impeachment Committee the same powers, namely, to recommend whether the President is in fact guilty on any of the grounds for the removal of the President from office. Were this to be the case, the work of the Impeachment Committee would be superfluous. We think that the lack of the power to test the reliability of the information placed before it, in particular the absence of the power to hear evidence from persons or institutions that might have information relevant to the removal of the President from office, ineluctably leads to the conclusion that it was never intended that the Panel should make a finding on whether the President is in fact guilty of any of the acts listed in section 89(1)."[7]

72.2 I am advised that this is a fundamental misdirection. The fact that a Panel cannot conduct a hearing is no impediment to the discharge of its mandate to consider whether (a) the charges brought if proven would rise to an impeachable ground under section 89(1)(a) or (b), (b) there exists evidence to support the charges and (c) whether the evidence is sufficient.

72.3 The Panel determined that *"[i]t is not the function of the Panel to enquire into whether the President is guilty of a serious violation of the*

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[7] Report vol 1 para 71

Constitution or the law, or a serious misconduct"[8] but instead to *" … conduct a preliminary assessment of the Motion proposing a … section 89(1) enquiry … and to make a recommendation as to whether the … President … has a case to answer."*[9] I am advised that this is not correct. As the Panel records in paragraph 72 of the Report, *"this Panel is required to "make a recommendation whether sufficient evidence exists to show that the President committed" one of the grounds for removal from office."* This enquiry is moored on the Motion and the charges set out in it because those are the charges that have to be supported by sufficient evidence to establish a ground of impeachment.

72.1 The Panel determined that there was no difference between "evidence" and "information" – *"Nor does the use of the word "evidence" instead of "information" in the Terms of Reference for this Panel matter."*[10] Based on that determination it went on and considered "information" placed before it, not evidence – *"The provisions of Rule 129G(1)(c)(iv) are clear and admit of no ambiguity; the Panel "must limit its enquiry to the relevant written and recorded information placed before it by members in terms of this rule".*[11]

73 Accordingly, the Panel did not consider the charges levelled against me to determine whether:

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[8] Report vol 1 para 75

[9] Report vol 1 para 73

[10] Report vol 1 para 74

[11] Report vol 1 para 74

73.1 if proven, they would amount to impeachable grounds under section 89(1)(a) or (b) of the Constitution; and

73.2 there was sufficient evidence to support the charges.

74 I am advised and submit that once the Panel set itself on the wrong path, it could not conduct a rational enquiry nor could it reach a rational conclusion. In this chapter I analyse the flawed enquiry in relation to the principles the Panel ought to have applied when considering whether the evidence placed before it was sufficient. In the next chapter I analyse each of the charges further to show that the Panel's approach was fundamentally flawed.

75 Once the Panel determined that there was no difference between evidence and information it:

75.1 failed to undertake the enquiry to determine (a) whether there was evidence to support the charges and (b) whether such evidence was sufficient.

75.2 failed to consider and interrogate whether there was lawfully obtained admissible evidence, and if so, what was its probative value.

Legality of the information

76 I am advised that it is trite that unlawfully obtained evidence may be excluded in civil or criminal proceedings. This principle applies with equal force to a section 89 enquiry. The Panel was established because its members have

T-C

legal expertise. They are trained in the rules of evidence and can test the evidence for admissibility.

77 I submit that the Panel failed to test the evidence for admissibility in two crucial respects. First, whether it would be admissible during the enquiry by reference to the credibility and legality of its sources. If the evidence has been obtained in breach of the law, it may be inadmissible on that account alone. Second, the evidence should have been tested for admissibility by applying the provisions of section 3 of the Law of Evidence Amendment Act, 1988. The provision states:

> *"3 Hearsay evidence*
>
> *(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -*
>
> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) the court, having regard to-*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*

T.C

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

78 The Panel did not apply any of these mandatory provisions. It did not appreciate the default rule that hearsay evidence must be excluded, and can only be admitted in certain defined circumstances. As a result, the Panel made conclusions, based on hearsay statements, without regard to the law. Save for the limited evidence I introduced in my response, there was no evidence before the Panel.

79 For completeness, I point to the following fundamental errors of law. The *"[i]nformation submitted by the ATM"* to the Panel included:

79.1 Mr Fraser's two statements to the SAPS (one on 1 June 2022 and the other 23 June 2022) and their "annexures"; and

79.2 Mr Fraser's statement to the Public Protector on 26 September 2022 and its annexures, which, in turn, includes a *"confidential report by the Namibian Police pertaining to Mr Imanuwela David"*.

T-C

80 The panel also refers to an *"audio clip"* of an *"intervie[w]"* with *"a suspect or suspects"*. The panel does not identify the suspect or suspects (it may be Mr David, but the panel does not seem to know). We also do not know who interviewed the suspect (it may be Major-General Rhoode, someone else from SAPS, or someone from the Namibian police – no one knows).

81 There is no explanation for how the confidential Namibian police report and the audio clip found their way to the Panel. All that appears is that the confidential police report was an annexure to one of Mr Fraser's statements, and that the audio clip was "provided" to the Panel. But the crucial question is whether the report lawfully landed in Mr Fraser's hands. Mr Fraser should have explained this. The Panel had a duty to ensure that any evidence before it is lawfully obtained, or exclude it. It is likely that the Namibian report, if it is at all legitimate, landed in Mr Fraser's hands unlawfully.

82 The Panel did not consider whether the confidential Namibian police report or the audio clip were lawfully obtained. On its own, this was an irregularity.

82.1 The panel was under a duty to satisfy itself that the information placed before it was lawfully obtained.

82.2 The Panel knew (or must have known) that the Namibian police report was confidential. After all, the Panel describes it as "confidential". The Namibian police are presumably the custodians of the report. The Panel knew (or must have known) that it did not get the report from the Namibian police. Instead, the Panel reports that it was part of one of Mr Fraser's statements.

TC

82.3 If, as the Panel describes it, the Namibian police report is confidential, then it follows that no one besides the Namibian police is entitled to distribute the report.

82.4 It is therefore possible that the Namibian police's confidential report reached the panel by unlawful means. The Panel – being a panel of lawyers and judges – should have enquired whether the report was lawfully obtained and excluded the report if it came to it unlawfully. However, quite the contrary, the Panel placed heavy reliance on the report without testing its reliability, source and whether it formed part of other documents which were carefully excluded when the report was made available to Mr Fraser.

82.5 This was a relevant consideration that the panel failed to take into account.

82.6 The same goes for the audio clips. The Panel describes it as a recording of an interrogation. The Panel knew (or must have known) that it did not get the audio clip from the SAPS or their Namibian counterparts.

82.7 There exists a real possibility that the clip reached the panel by unlawful means. The Panel did not enquire into the circumstances in which the clip made its way to it, the conditions of the interrogation, or whether any other facts were unearthed during the interrogation which could explain or contradict it. The clip which tells a one-sided story appears carefully curated to present a particular version. The Panel should have been

T-C

astute enough not to allow itself to be presented with a slanted picture emanating from obscure sources, which have not been identified. The evidence must be credible. The clip was not examined by the Panel for credibility. It is not an answer for the Panel to say that its function is not to test veracity. Its duty is to establish sufficient evidence. That means that the starting point is that the evidence must qualify as evidence that is admissible, reliable and credible. In situations like this there is every incentive to hoodwink decision-makers to make rushed decisions based on half-truths. This is what appears to have happened. While I accept that ultimately the veracity of the evidence would be tested in a hearing before the Committee, I am advised and submit that the Panel is duty bound to make formal enquiries whether the evidence before it appears to be admissible, reliable and credible. The Panel failed to do so.

82.8 This was another relevant consideration that the Panel failed to consider.

83 I submit that there exists a real possibility that this information came to the possession of Mr Fraser illegally and it is unclear if any other information was known but deliberately suppressed from the same sources. I am, however, advised that this Court does not need to decide whether the confidential Namibian police report or the audio clip were, in fact, unlawfully obtained (and, if so, whether the Panel should have excluded them). It is not necessary because the Panel's failure to consider this point is fatal on its own.

84 The Panel should have considered the source of the confidential Namibian police report and the audio clip and how they made their way from Namibia - or wherever the audio clip is from, the Panel does not say - to Parliament. The

Panel should then have considered whether they would be admissible. I am advised that the second leg of the enquiry involves several factors including the nature and content of the evidence, and whether attempts were made to obtain it by lawful means. The Panel failed to consider any of this, and so it failed to consider a relevant consideration about the sufficiency of the evidence to support the charges against me.

85 I am advised that this analysis applies just the same to what Mr Fraser said in his statements about the confidential Namibian police report and the audio clip. Said another way, if the Panel should have excluded from its consideration the confidential Namibian police report and the audio clip, then it should also have excluded from its consideration what Mr Fraser had to say about them in his statements.

86 I am also advised that it does not matter that there might have been other evidence to support the Panel's findings (which I deny). It does not matter because the Panel's irregular consideration of the confidential Namibian police report and the audio clip taints its other reasons.

86.1 The Panel did not consider whether the Namibian police report and the audio clip were lawfully obtained (nor did it consider whether to exclude them if they were unlawfully obtained).

86.2 This was a failure to consider a relevant consideration.

86.3 The failure to consider this relevant consideration means the Namibian police report and the audio clip - or, more accurately, the Panel's

consideration of them - are a bad reason for the Panel's recommendation.

86.4 The Panel's consideration of other evidence thus does not matter because, so I am advised, if a decision-maker takes into account any reason for the decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated (to be clear, though, I deny there are other good reasons for the Panel's recommendation).

87 To sum up this point:

87.1 The Panel failed to consider whether Mr Fraser (or someone else) lawfully obtained the confidential Namibian police report and the audio clip of the unknown suspect's interrogation.

87.2 The Panel's failure to consider whether to exclude the Namibian police report and the audio clip:

87.2.1 is, on its own, an irregularity; and

87.2.2 taints its consideration of the Namibian police report and the audio clip as a bad reason, and it does not matter if there are other reasons for the Panel's recommendation (which I deny).

Irrational evaluation of the evidence

88 The Panel has a clear mandate: make a recommendation whether "sufficient evidence exists". There are two parts to that statement of the Panel's mandate.

88.1 The first part sets the standard for the Panel's mandate: sufficiency.

88.2 The second part explains what the standard must be applied to: evidence.

89 The Panel's approach had no rational connection to its mandate or purpose:

89.1 The Panel did not apply the standard of sufficiency. It instead asked, to use its words, *"whether there is a prima facie case against the President."*

89.2 The Panel did not apply its standard to "evidence". It instead applied its standard (*of prima facie*) to, in its words, "information".

The Panel imposed a reverse onus on me

90 I am advised that sufficient evidence means enough evidence. This means that the Panel's purpose was to determine whether the evidence placed before the panel shows, <u>on its own</u>, a serious violation of the law or the Constitution or serious misconduct.

91 I am advised that the concept of *prima facie* is different. This will be dealt with in argument, but this summary suffices:

91.1 The concept of *prima facie* proof is tied to the onus of proof, which, in turn, is the duty that is placed on a party to ultimately convince the decision-maker of his or her case.

91.2 *Prima facie* proof means evidence that discharges a party's onus if the evidence is not rebutted at the close of the case.

91.3 It is in this sense that courts sometimes say that *prima facie* proof is evidence that 'calls for an answer'. The Panel echoes this phrase several times in its report (it says, for example, that there are *"unanswered questions"* and that I have a *"case to answer"*).

92 This framework has no rational connection to the Panel's purpose because this stage of the removal process does not require me to rebut the evidence that is placed before the Panel. The Panel must instead consider all the evidence that is placed before it and decide whether that evidence is enough.

93 The Panel's approach ended up something like this: *"Mr Fraser makes these allegations; the President should answer them; the President's response leaves some questions unanswered"*.

94 If anything, the Panel's use of a *prima facie* framework ended up placing a reverse onus of proof on me. This explains the Panel's reference to there being *"unanswered questions"* and that I have a *"case to answer"*. This was

irrational because the Panel's task was to determine the sufficiency of the evidence that was before it; its task was not to consider whether there are questions that I should answer. The only rational way for the Panel to achieve its purpose is to ask, 'is this evidence, on its own, enough to show a serious violation of the law or the Constitution or serious misconduct?' The Panel asked a different question that missed the mark set in the Panel's mandate.

95 For similar reasons, it was irrational for the Panel to focus on an absence of explanations. An absence of evidence is not evidence of absence. The Panel's approach reduced to this: anything I did not answer is *prima facie* true. As a matter of logic and a matter of law, there is no rational connection between that approach and the Panel's evidence-based purpose.

96 A good example of the Panel's irrational (and illogical) absence-of-evidence approach is the Panel's conclusion that the "information" placed before the Panel *"prima facie discloses"* that I asked the president of Namibia to *"assist with the apprehension"* of Mr David (paragraphs 163 to 168 of the report). The only "information" - note: not "evidence" - before the Panel on this point was Mr Fraser's allegations. The rest of the Panel's reasoning was based on nothing more than an absence of evidence to the contrary. The Panel should have asked whether the evidence was sufficient to support its conclusion. There was no evidence, let alone sufficient evidence because all the Panel had was Mr Fraser's say-so. The rest of the Panel's reasoning is an illogical and irrational attempt to patch together evidence from an absence of evidence.

97 Another example of the Panel's irrational (and illogical) approach to evidence is the rejection of the only evidence before it and relying on conjecture or speculation instead. In this regard the Panel speculated that I gave permission that the cash should be stuffed inside a sofa, when the only evidence which was before the Panel was that I had given the contrary instruction to Mr Ndlovu, that the money must be banked. The basis given by the panel for its conclusion as to my "knowledge" and "acquiescence" of the placement of the money inside a couch is that, according to the Panel, it is improbable that Mr Ndlovu did so on his own. The reason why it is suggested that this would be improbable is solely because he is a junior employee. But the Panel ignores the actual evidence and instead relies on its own speculative inferences which are not grounded on any actual fact. The fact that Mr Ndlovu was a junior employee is entirely neutral.

The distinction between "information" and "evidence"

98 The Panel's approach was irrational for another reason: though its purpose was to consider "evidence", the Panel ended up considering, to use its vague word, "information". On its own version, it did not sift through the "information" to focus on "evidence", as its mandated purpose directed.

99 This argument goes to the very purpose of the Panel: make a recommendation based on evidence. Evidence has probative value. Information sometimes has probative value, but not always. The Panel never sifted through information to focus on evidence.

T-C

100 Take the first charge (that I allegedly undertake "other paid work" contrary to section 96(2)(a) of the Constitution) as an example. According to the report, the *"source of the foreign currency"* forms the *"foundation"* of this charge.

101 According to the report, the *"main source of information"* about the source of the dollars is Mr Fraser's *"statements"* (paragraph 90 of the report).

101.1 What is in Mr Fraser's statements?

101.1.1 According to the report, Mr Fraser's statements *"sugges[t]"* that *"this money was illegally brought into the country after the President's advisor, Mr Chauke, collected the money for both him and the President on certain trips he undertook to the Middle Eastern and African countries, on behalf of the President"* (at paragraph 90 of the report).

101.1.2 The report then lists Mr Fraser's four *"alleg[ations]"* (at paragraph 91 of the report).

101.2 That is all: a suggestion and some allegations. What Mr Fraser suggests and what he alleges is not evidence.

101.3 The Panel says this out loud: Mr Fraser *"has not disclosed the source of his information"* (at paragraph 92 of the report).

101.4 The closest Mr Fraser comes to evidence is a laundry list of "records" that he says "may be obtained" (at paragraph 92 of the report). But note well: Mr Fraser's wish list is not presented as a list of incriminating

documents that he (somehow) knows is out there. His list does not say, for example, *"Mr Chauke's travel records that reveal ABC"*, or the *"mobile telephone and tower networks of both Mr Chauke and Major Rhoode's mobile telephones and vehicle tracking devices that show XYZ"*. The list is neutral. If a mere list of documents can ever have any probative value, the list would at least have to describe what the documents actually show, not what they might show.

101.5 Yet the Panel leaps to conclude that Mr Fraser's statements *"provide information that may help verify the truthfulness or otherwise of his allegations"* (paragraph 92 of the report). But how? Mr Fraser speculated about documents that might exist and that might prove his allegations. He gave the Panel no evidence, just a wish list of potential evidence.

101.6 In this way, the Panel's conclusion on the *"foundation"* of the first charge skips a big step: Mr Fraser did not *"provide information that may help verify the truthfulness or otherwise of his allegations"* (at paragraph 92 of the report). Instead, Mr Fraser speculated about a list of documents and it is those documents that, in turn, might *"provide information that may help verify the truthfulness or otherwise of his allegations"*.

101.7 There is, in other words, no rational link between the list of documents in paragraph 92 of the report and the conclusion in paragraph 94 of the report that Mr Fraser's statements *"provide information that may help to verify the truthfulness or otherwise of his allegations"*.

TC

102 Another example is this: the amount of money that was stolen. The acknowledgment of receipt confirms that the amount received from Mr Hazim was $580,000. The Panel confirms that my "version" is that *"the only foreign currency that was in the sofa was a sum of US$ 580,000"*. Yet the Panel goes on to conclude that *"[i]nformation placed before the Panel suggests that more than US$ 580,000 was stolen."*

103 What information? Under the heading "How much was stolen?", the Panel considers only two pieces of "information" other than my submission (at paragraphs 133 to 135 of the report):

103.1 Mr Fraser's allegation about speculation: he alleges that *"the quantum [of the amount stolen] was speculated to be in the region of approximately US$4 million to US$8 million"*; and

103.2 the audio clip.

104 Neither is nearly enough to justify the Panel's conclusion that there is *"[i]nformation" to suggest more than $580,000 was stolen (let alone sufficient evidence of that proposition, which, after all, is the standard that panel should have applied). All Mr Fraser could muster is an "alleg[ation]"* about what was "speculated". Alleged speculation is not evidence. The audio clip fares no better. The Panel does not (and presumably could not) identify either the "suspect" (or "suspects") or the "investigators".

105 The Panel reached the same irrational conclusion about *"the instructions that were given to General Rhoode"*. The Panel somehow discounted Major-

T.C

General Rhoode's own sworn statements against Mr Fraser's allegations (at paragraphs 155 to 171 of the report). Mr Fraser alleges something from a movie: a "fictitious drug smuggling claim", a clandestine "informal investigation team" meeting in "no man's land", and a mysterious list of telephone numbers "extracted" from unidentified "devices".

106 The Panel never explains why Mr Fraser's allegations have any probative value. Yet the Panel concludes *"as a matter of probability"* that Major-General Rhoode went to Namibia as part of his Phala Phala investigation and that *"information … prima facie discloses that"* a *"SAPS official"* set up a meeting with the Namibian Special Branch" about the theft.

107 What actual evidence supports those conclusions? There is only Mr Fraser's allegations and a redacted report of the Namibian Police Crime Intelligence.

107.1 Mr Fraser's allegations are just that: allegations, which are based on speculation, fiction and conjecture. They are not evidence. It is understandable why the Panel ended up like this – it drew no distinction between evidence and information. Yet the rules of Parliament require it to focus on evidence.

107.2 The Panel does not explain the origins of the crime intelligence report, how it came to be in Mr Fraser's possession, or how it has any probative value despite its redactions.

108 Similarly, the Panel concludes that I asked the president of Namibia to *"assist with the apprehension of [Mr David], the mastermind behind the farm housebreaking and theft."* As I noted above, this conclusion is based on no more

than an absence of evidence to the contrary - a logically flawed and legally irrational way for the Panel to have gone about discharging its mandate.

Failure to apply the hearsay rule

109 The Panel's purpose is tied to evidence: it was to make a recommendation about whether there is "sufficient evidence" of a constitutional violation. To rationally achieve that evidence-based purpose, the Panel had to determine the admissibility and probative value of the evidence it was considering.

110 The Panel never properly engaged with the hearsay nature of Mr Fraser's allegations.

110.1 If anything, it is charitable to describe Mr Fraser's allegations as hearsay. They are better characterised as conjecture and speculation, without a single fact to underpin them. The Panel notes that Mr Fraser did not *"indicate the basis of his allegations"* (paragraph 97 of the report; the use of "Nor" in the next sentence suggests a "not" is missing from that sentence in the report). Mr Fraser did not claim, as the report notes, that he *"obtained this information from a source or was advised of this."* The Panel should have stopped there: if Mr Fraser did not "indicate the basis" for his allegations and did not explain the source of his "information", then considering what he had to say served no rational purpose.

110.2 That threshold point aside, if Mr Fraser did not explain the source of his information, then everything he said is hearsay. It is hearsay because,

on Mr Fraser's own version, the probative value of his allegations depends on someone else's credibility.

110.3 The Panel acknowledged that Mr Fraser's statements are "full of hearsay" (paragraph 83 of the report, noting that my criticism on this point was "rightly" made). The panel's stated cure was to seek corroboration in *"some other independent information"*. But, in the main, there is no other "independent information". Time and time again, the panel reflexively falls back to Mr Fraser's say-so.

110.4 What's more, the Panel did not even bother to apply the legal framework for the admission of hearsay evidence. The Panel says not a word about the Law of Evidence Amendment Act and its careful calibration of when hearsay evidence should be admitted in the interests of justice. The Panel skipped considering, for example, the nature, reliability, and probative value of Mr Fraser's statements, which it ought to have considered under the Act. Because the Panel's purpose is tied to evaluating the sufficiency of evidence, this failure is fatal.

111 The Panel tried a rough and ready balancing act: Mr Fraser's hearsay should be balanced against "some aspects" of my evidence, which, according to the Panel, were "also hearsay". The panel pointed to my evidence about what Mr Ndlovu told me about the sale.

111.1 That is not how admissibility of hearsay evidence works: one party's hearsay evidence does not get weighed against another party's hearsay

T-C

evidence. As part of its mandated purpose to recommend whether there is sufficient evidence of a constitutional violation, the Panel should have considered each item of evidence (and, where necessary, decide whether each item of evidence is hearsay evidence and, if so, whether it should be admitted in the interests of justice).

111.2 The Panel's assessment was, in any event, on a flawed understanding of the rule relating to hearsay. I am advised that it is not hearsay for me to give evidence about what Mr Ndlovu told me. That is direct evidence, not hearsay evidence. That evidence has probative value because our conversation informed what I knew about the money that was received and later stolen. The probative value of the evidence depends on my credibility because I was a party to the conversation. This means that my evidence about the conversation was not hearsay.

111.3 In the end, the Panel's consideration of hearsay information led it to balance out my evidence and Mr Fraser's allegations as though they had equal probative value. This was an irrational way for the Panel to try to discharge its mandate.

T. C

CHARGE 1: "*OTHER PAID WORK*"

The Charge

112 The President is guilty of serious violation of section 96(2)(a) of the Constitution, which provides that members of the Cabinet and Deputy Ministers may not undertake any other paid work, in that:

(a) He, in response to allegations by Mr. Arthur Fraser, told delegates to a Conference of the African National Congress in Limpopo that *"I'm a farmer, I am in the cattle business and the game business… I buy and I sell animals…. This that is being reported was a clear business transaction of selling animals."*;

(b) The statement by the President confirms that he is actively running his farming business and this also means the President misled the nation when in 2014, on assuming office as Deputy President, he said that all his business interests would be managed by a blind trust; and

(c) By violating section 96(2)(a) of the Constitution, he failed to uphold, defend and respect the Constitution as the supreme law of the Republic, as required of him by section 83(b) of the Constitution.

112.1 On 10 October 2022 Mr Zungula submitted supplementary information in relation to this charge. He said:

T-C

"Mr. Ramaphosa is on record admitting that a certain amount of dollars was stolen in his Phala Phala Farm but was evasive about the exact amount and how that foreign currency got into the country. This was laid bare by the letter from the South African Reserve Bank which also sought answers about the origins of this foreign currency and the underlying transaction. If this money had come to the country lawfully the SARB systems would reflect all the pertinent details and there would have been no need for the SARB to be writing to him.

In addition to the irregularity of how this money came into the country, it constitutes concrete evidence of payment for the work or business that he conducts in his farm himself in violation of the Constitution. The fact that it's him personally that is accounting to the South African Reserve Bank is further evidence that indeed there is no Blind Trust or any other entity that is trading independently without his involvement."

I did not do "other paid work"

113 The Panel considered this charge from page 60 in paragraphs 181 to 204 of the Report. It concluded that I undertook "other paid work" in contravention of section 96(2)(a) of the Constitution because I am the sole member of a closed corporation which carries on the business of a farm. It did so only because it interpreted the prohibition to mean that a member of the Cabinet may not have any other business interests. It gave the prohibition this wide interpretation

because, it asserted, that the purpose of the prohibition was to avoid any conflict of interest.

114 I submit that its interpretation was mistaken for the following reasons:

114.1 The prohibition provides that a member of Cabinet may not "*undertake any other paid work*". Its language is plain. A member of Cabinet may not do other work for which he or she is paid. I did not do any other work and I was certainly not paid for anything of the kind.

114.2 The Panel is mistaken in its assertion that the purpose of the prohibition is to avoid conflicts of interest. There is a separate prohibition in section 96(2)(b) of conduct involving the risk of conflicts of interest.

114.3 The Panel's interpretation of the prohibition, to extend to all business interests, is thus incompatible with its language and its purpose.

I acted in good faith

115 I in any event, at all times, acted in good faith.

116 I remain the sole member of Ntaba Nyoni. I have systematically declared this, and any other financial interests, with the Secretary of Cabinet and, when I was a member of Parliament, to the relevant Parliamentary authorities. In all instances, my membership of Ntaba Nyoni has been reflected in the public section of the declaration; it is therefore readily available for those wishing to see it, contrary to the assertions by the ATM. A copy of the latest publicly available declaration is attached marked **"MCR3"**. In this regard, attached

T-C

hereto marked "**MCR 4**" is an affidavit deposed to by the Director-General and Secretary of Cabinet, Ms. Phindile Baleni.

117 The Panel never considered whether I acted in bad faith and accordingly could not conclude that there was sufficient evidence that I had done so.

118 The Panel's finding on this issue is thus legally flawed and irrational.

CHARGE 2: SECTION 34 OF PRECCA

The charge

119 "*The President is guilty of serious violation of section 34(1) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No 12 of 2004) (the Act), which places a duty on any person to report corrupt transactions to any police official, in that:*

> *(a) The President failed to report the theft on his farm to any police official as required by the Act;*
>
> *(b) Reporting the matter to General Wally Rhoode, a member of the Presidential Protection Unit, is not in compliance with the South African Police Service Amendment Act, 2012 (Act No 10 of 2012) which directs that reporting should be made to the police official in the Directorate for Priority Crime Investigation in terms of Section 34(1) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004); and*

T.C

(c) The fact that there is no case number to date is proof that the manner in which the purported reporting was made was irregular and unlawful."

I did not contravene section 34

120 In paragraph 249 of the Report the Panel concluded that I was dutybound to report the theft at Phala Phala because I am the sole member and therefore a person who holds the position of authority within the meaning of sections 34(1) and 34(4).

121 The Panel's conclusion is based on the misunderstanding of section 34(4)(e) which provides that *"For purposes of subsection (1) the following persons hold a position of authority, namely ... the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984)."*

122 The distinction between a company and a close corporation, and the inclusion of a member of a close corporation but not a shareholder of a company among persons who hold a position of authority is because a member of a close corporation is entitled to participate in the running of the business whereas a shareholder of a company has no such entitlement. It is clear therefore that a member of a close corporation is included amongst persons who hold a position of authority to the extent that they are responsible for the operations of the business. Where a separate management team is responsible for the running of the operations it is therefore that management team that holds the position of authority. As I have always maintained,

122.1 I am the sole member of Ntaba Nyoni but I do not run Phala Phala. It has a management team; and

122.2 I did not know about the theft until I was informed of it by Mr Ndlovu.

123 Submissions are made in my submission to the Panel in relation to why the provisions of PRECCA are inapplicable in the circumstances, both in relation to the purpose of PRECCA and the applicability of section 34.[12]

124 On the basis highlighted above, I was therefore under no duty to report the theft in terms of section 34(1) of PRECCA.

125 In any event, I reported the matter to Major-General Rhoode and assumed that he would do whatever had to be done. Major-General Rhoode, in fact, reported the matter to the Deputy Commissioner of Police who assumed responsibility for the matter.

I acted in good faith

126 I, in any event, did not deliberately fail to report the matter in bad faith. The Panel did not even enquire into the question whether I had acted in bad faith. It could accordingly not rationally conclude that I was guilty of "*a serious violation of… the law*" as defined in the rules of the National Assembly.

[12] Annexure IP82, page1649-1650 of Volume 3 of the Report.

T-C

CHARGES 3 AND 4: MY REQUEST TO GENERAL RHOODE

The charges

127 These charges relate to the alleged abuse of my position for my own personal benefit in that I asked General Rhoode, a member of the Presidential Protection Services ("PPS") to investigate a crime committed on my private farm.

128 Charge 3 reads:

> *"The President is guilty of serious misconduct by violating section 96(2)(b) of the Constitution, which provides that Members of the Cabinet and Deputy Ministers may not, inter alia, expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests, in that:*
>
> > *(a) A member of the Presidential Protection unit, General Wally Rhoode, was directed to deal with security issues in the private farm (of the President) in violation of the provisions of section 96(2)(b) of the Constitution;*
> >
> > *(b) President Ramaphosa's life and limb was not threatened by the burglary and thus General Wally Rhoode had no business to be investigating anything at the Phala Phala farm as unlawfully directed by the President; and*
> >
> > *(c) By violating section 96 (2) (b) of the Constitution, he failed to uphold, defend and respect the Constitution as the supreme law*

of the Republic, as required of him by section 83(b) of the Constitution."

129 Charge 4 reads:

"*The President is guilty of serious misconduct by violating section 96(2)(b) of the Constitution, which provides that Members of the Cabinet and Deputy Ministers may not, inter alia, act in a way that is inconsistent with their office, in that:*

(a) The President gave an unlawful instruction to General Wally Rhoode, a member of the Presidential Protection Unit, to investigate the burglary on his private farm and the instruction to investigate rather than to report the matter in terms of the law shows dishonesty and constitutes misconduct and unlawfulness on the part of the President; and

(b) By violating section 96(2)(b) of the Constitution, he failed to uphold, defend and respect the Constitution as the supreme law of the Republic, as required of him by section 83(b) of the Constitution."

The scope of the charges

130 The charges accused me of abusing the services of General Rhoode, who was a member of the "*PPS*", to do a criminal investigation which should have been done by a regular SAPS detective.

T-C

131 I was not guilty of any misconduct on this score because I did not say or suggest that General Rhoode must personally undertake the investigation. I left it to General Rhoode to deal with the matter in whatever way was appropriate. It was entirely appropriate for General Rhoode to consider the matter in so far as it exposed a risk to my security and safety. I did not tell him how to take the matter further. I understand that he in fact reported the matter to the Deputy Commissioner of Police who took charge of the matter.

132 Respectfully, such alleged abuse of my position by asking a member of the PPS to look into a breach of security at my farm could never rise to the level of serious violation of the Constitution or the law as defined the rules of the National Assembly. In any event, that is a matter the Panel never considered.

133 The Panel's findings are on something unrelated. They suggest that General Rhoode embarked on a rogue investigation to conceal the crime. I do not understand how that can be blamed on me. First, the charges did not accuse me of anything of the kind. There is, in any event, no evidence that I was complicit in any rogue investigation. The highwater mark was the suggestion that I had asked the President of Namibia for assistance to apprehend the culprit. But even that would be entirely lawful and appropriate.

134 The Panel never considered whether I acted in bad faith and accordingly could not conclude that there was sufficient evidence that I had done so.

135 The Panel's finding on this issue is thus flawed and irrational.

T-C

THE SOURCE OF THE FOREIGN CURRENCY

136 On page 32 in paragraph 87 of its report, the Panel held that, one of the issues "*which form the foundation of the proposed charges*", is "*the source of the foreign currency that was stolen*". It then devoted an entire chapter to this issue from page 33 in paragraphs 89 to 138.

137 The Panel was confined to the four charges raised in the Motion and none of them raised this issue.

138 Some of the examples of the Panel going beyond the charges include the following enquiries:

138.1 The panel remarks that, "*General Rhoode travelled to Namibia. Why he travelled to Namibia is a contested issue.*" Various conclusions are thereafter reached throughout the report in relation to Major-General Rhoode's trip to Namibia, such as that "*the information before the Panel also establishes, prima facie: that the President sought assistance from the President of Namibia in apprehending the suspect who was in Namibia at the time*". This enquiry has nothing to do with the four charges.

138.2 The panel asked rhetorically *"How did he get this huge amount of cash into South Africa? When he entered the country, did he declare to the South African authorities at the point of entry that he was carrying this amount of cash? What is the source of this cash he had in his possession? Did he produce any document indicating that he had*

authority from his country to take out of his country this amount of money? How did Mr. Hazim carry this money into South Africa?"

138.3 The Panel thereafter makes the following finding: *"We find the behaviour of Mr. Hazim in carrying more than half a million US$ in cash into South Africa and thereafter transporting it to the farm to be un-businessmenlike."* (sic) and *"as a businessperson we would not have expected Mr. Hazim to go about the country carrying more than half a million US$ in cash."*

138.4 However, matters relating to Mr Hazim and Phala Phala were not raised in any of the charges.

138.5 The Panel also explores matters connected to the transaction for the buffalos and questions the reasons for Mr Hazim not collecting the buffalos following the transaction. The panel expresses reservations about the acknowledgement of receipt furnished to Mr Hazim on the basis that it does not, amongst other things, reflect his particulars or that of his business and further asks, "*why would anyone pay such a huge sum of money in cash and thereafter leave the goods without indicating when he would come back to collect the buffaloes or leaving an address for the delivery of the animals…"* Once again, this has nothing to do with the charges in the Motion.

139 I made it clear to the Panel in my response, that I confirmed my submissions to the allegations relevant to the charges

140 The Panel acknowledged that there was a paucity of information on these matters extraneous to the charges. That caused it to resort to suspicion and speculation:

> *"On this source of the foreign currency, we only have the statement by the President, which is based on what he was told by Mr. Ndlovu, who did not confirm this information. It is true the President's version is supported by the acknowledgement of receipt. Admittedly, on its face, the acknowledgement of receipt states that Mr. Sylvester Ndlovu received a sum of US. $580,000 from a Mr. Hazim as payment for 20 buffaloes.*
>
> *But as we have pointed out earlier, there are a number of important questions relating to this transaction that remain unanswered. These questions relate to Mr. Hazim's visit to the farm; the acknowledgement of receipt itself; concealment of the money inside a sofa; the fact that for over two years the buffaloes are still on the farm; the fact that Mr. von Wielligh, the General Manager, did not know about the money; and the amount that was stolen. It is significant that the origin and the transaction pertaining the foreign currency became the subject of an investigation by the SARB. This suggests that the SARB had no records of this currency coming to South Africa. The Panel has no information whether this investigation has been concluded, and if so, what the outcome was."*[13]

[13] Report vol 1 paras 256 and 257

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141 The findings of the Panel in paragraphs 136, 171 and 263 are based on these extraneous enquiries and are central to the Panel's recommendation.

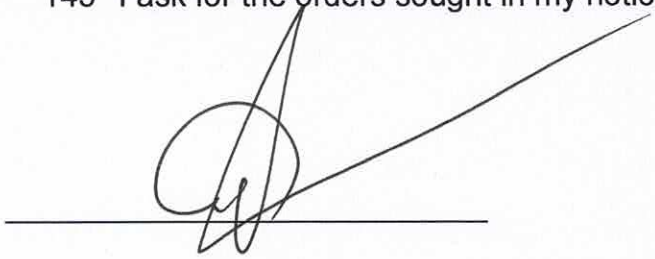
142 The Panel accordingly exceeded its mandate. It was also most unfair to me because I was never called upon to address these issues beyond the four charges.

CONCLUSION

143 This application does not come easily. I have carefully considered the report and respectfully submit that the process followed by the Panel and its conclusions are seriously flawed, thus making the recommendations irrational. In summary I submit that the Panel misconceived its mandate, misjudged the information placed before it and misinterpreted the four charges advanced against me. It moreover strayed beyond the four charges and considered matters not properly before it.

144 I submit that a proper case is made out for this Court to review and set the report aside.

145 I ask for the orders sought in my notice of motion.



Matamela Cyril Ramaphosa

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at 05 on this day of **DECEMBER 2022.** The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, have been complied with.

W/O
7134366-1
MASOKA

COMMISSIONER OF OATHS

I certify that the above statement was taken by me and that the deponent has acknowledged that he / she knows and understands the contents of this statement. This statement was sworn to / affirmed before me and the deponent's signature / mark was placed thereon in my presence.
at HYDEPARK on 05-12-22 at 15.27
(SIGNATURE) COMMISSIONER OF OATHS
TEBOGO CAIPHUS MASOKA
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS
4 CORNER TROYE & PARK SUNNYSIDE
BUSINESS ADDRESS (STREET ADDRESS)
W/O
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S A POLICE SERVICE

SOUTH AFRICAN POLICE SERVICE
PRESIDENTIAL PROTECTION SERVICE
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SOUTH AFRICA POLICE SERVICE

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