REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 31418/2022

1. REPORTABLE: ~~NO~~/YES
2. OF INTEREST TO OTHER JUDGES: ~~NO~~/YES
3. REVISED. ✓

21 Feb 2024
DATE

SIGNATURE

In the matter of:

DEMOCRATIC ALLIANCE **APPLICANT**

And

AFRICAN NATIONAL CONGRESS **First RESPONDENT**

THE DEPUTY PRESIDENT OF THE AFRICAN NATIONAL CONGRESS **Second RESPONDENT**

THE DEPLOYMENT COMMITTEE OF THE AFRICAN NATIONAL CONGRESS — **Third RESPONDENT**

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — **Fourth RESPONDENT**

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — **Fifth RESPONDENT**

THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION — **Sixth RESPONDENT**

AFRIFORUM NPC — **AS *AMICUS CURIAE***

JUDGMENT

THE COURT

A. INTRODUCTION

1. The Democratic Alliance, DA, a political party in its own right, applies to this Court to declare the ruling African National Congress' Cadre Deployment Policy inconsistent with the Constitution of the Republic of South Africa (the Constitution) and therefore unlawful. The orders sought by the DA as set out in its Notice of Motion read:

    i) 'The first respondent's Cadre and Development Policy is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid.

    ii) The second respondent, as chaired by third respondent, is inconsistent with the Constitution and invalid.

    iii) The first respondent's Cadre and Development Policy is inconsistent with Chapter IV, sections 9, 10 and 11 of the Public Service Act 103 of 1994 and invalid.

iv) In the alternative to paragraph (iii), declaring Chapter IV of the Public Service Act 103 of 1994 is inconsistent with the Constitution.

v) That the costs of this application be paid by those respondents who oppose the application.'

2. The DA makes plain in its papers that it wants the policy struck down and gone yesterday. It says the policy is responsible for eviscerating critical state institutions, blurring lines of accountability, and facilitating state capture. The policy has led to poor service delivery and is responsible for breaches of human rights and inhibiting the State's ability to function effectively and promote human rights.

3. The respondents oppose the application. In addition to asserting that the policy is not inconsistent with the Constitution, the respondents raised a two-pronged attack comprising several preliminary objections and defences directed at the merits. The preliminary objections include, *inter alia,* standing, jurisdiction, material non-joinder, ripeness, incompetency of relief, vagueness and inadmissible hearsay. As against the merits, the respondents point out, *inter alia,* that:

3.1 There is no properly pleaded constitutional attack. As a consequence of the DA's failure to properly plead its constitutional attack, the respondents were prejudiced as they could not appreciate the case they were called upon to answer.

3.2 In so far as the DA seeks to rely directly on the Constitution to make a case for alleged violations of the right to equality, the violations of Sections 195 and 197, and more, the respondents submit that the applicant is bound by the principle of subsidiarity.

3.3 The ANC and the President say that the policy is not offensive to the Public Service Act.

3.4 The Minister, joined by the rest of the respondents, submits that courts are governed by a well-established judicial policy, which vests in them a discretion not to decide issues that are abstract, academic, or hypothetical. The applicant's case presents no live issue or 'flesh and blood dispute that the courts can resolve.'[1] On that basis, the court should refuse to exercise its discretion in favour of the applicant.

3.5 Finally, the Minister says the applicant has failed to make a case against him.

4. Owing to the view we take of the matter, we do not deem it necessary to address all the preliminary objections. This judgement therefore, deals with only the following objections: standing, jurisdiction and material non-joinder. In respect of the main defences, the judgment confines itself to the following: (i) whether there is any valid constitutional attack; (ii) aligned to the first issue is the question whether the ANC's or any other political party's influence on government's decisions regarding the appointment of senior staff, such as the Directors General, DGs, Deputy Directors General, DDGs, and or Heads of Departments, HODs, is unconstitutional; and (iii) whether the principle of subsidiarity is applicable. We refer to the applicant as such and at times as the DA. Purely for convenience, we refer to the first, second and third respondents as the ANC, to the fourth and the fifth respondents as the President, and

[1] Heleba S, 'Mootness And The Approach To Costs Awards In Constitutional Litigation: A Review Of Christian Roberts V Minister Of Social Development Case No 32838/05 (2010) (TPD)' (2013) at page 569, PELJ, https://www.ajol.info/index.php/pelj/article/view/85978 accessed on 23 May 2023.

to the sixth respondent as the Minister. Where context permits, the President refers to the person of Mr Ramaphosa.

5. There is a complaint that the DA has unduly impugned the President. We consider the complaint in the course of this judgment.

6. Afriforum NPC filed an application to be admitted as an amicus curiae. Neither the applicant nor the respondents opposed the application. The court thus admitted Afriforum as the Amicus Curiae. We digress to briefly consider the role of the Amicus in these proceedings.

The *Amicus Curiae*

7. In its application to be admitted as Amicus, Afriforum said it intended to canvass seven unique matters which would be helpful to the court. However, during argument Afriforum completely strayed from its intended points and launched into a discussion about the policy, the minutes of the Committee and how the Committee or the ANC seeks to seize control of every aspect of the state in an effort to avoid accountability, including how the ANC no longer has white faces in its ranks. Apart from the apparent irrelevance of some of the points advanced, it was clear that Afriforum had made common cause with the applicant. Its voice as a friend of this Court was missing as it had turned into what the court in *National Treasury and Others* v *Opposition to Urban Tolling Alliance and Others, OUTA,* called the 'fifth wheel of the applicant'[2]. In its

[2] (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012), paragraphs 13-14

closing argument, the ANC respondents urged the court to award it costs against Afriforum in the event they were successful, precisely because of Afriforum's conduct. We consider the issue of costs later in this judgment. Having said that, Afriforum should strive to acquaint itself with the words of the court in *OUTA*[3].

Cadre Deployment Policy

8. It might be convenient at this early stage to set out briefly some of the contents of the policy, prior to considering the preliminary objections. In the relevant parts, the policy reads, inter alia:

> '2. In 1994, the ANC recommended the deployment of suitably qualified personnel into structures of government at all levels with the proviso that a sunset clause was agreed to at the political negotiations process at the Convention for a Democratic South Africa, CODESA. The sunset clause in effect slowed down the implementation of deployment in furtherance of transformation[4].
>
> 4. Strategic deployment of ANC cadres played an important role in the ANC taking control of the post liberation state. The ANC's deployment committee on national and regional levels played a crucial role in state transformation, contributing to reasonable success in deracialising the public service. This also helped ensure that bureaucratic sabotage by reactionary forces intent on undermining the democratic order would be minimised.
>
> 5. The deployment of the ANC started in earnest at the 50th National Conference in Mafikeng in 1997 with the resolution for the establishment of the deployment committee throughout the ANC's organisational hierarchy. It recognised that the ANC needs to put in place its own policy and code of conduct to guide those of its cadres deployed to the public service. There were concurrent discussions about curtailing corruption and the need for guidelines on ethics.
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> 6. The National Conference recognised that a Cadre Policy can only flourish within the context of a mobilised, strong and active organisation.

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[3] Note 2 paragraph 13
[4] Caselines 002-60

9. Our immediate goal as set out in the Strategy and Tactics is to deepen the hold of the liberation movement over the levers of the state and begin to impact positively on other centres of authority and responsibility outside the immediate realm of the state institutions.

10.The following are the key centres of authority and responsibility within the state that should be given priority:-

10.1 Cabinet;

10.2 the entire civil service, but most importantly from director level upwards;

10.3 premiers and provincial administrations;

10.4. legislatures;

10.5. local government;

10.6. education institutions;

10.7. independent statutory commissions, agencies, boards and institutes;

10.8. ambassadorial appointments; and

10.9 International organisations and institutions....

20. A core pool of comrades needs to be identified for deployment in each of the key strategic centres of authority and responsibility, particularly in relation to the legislatures, civil service, parastatals, independent bodies and ambassadorial appointments.[5]

25. A comprehensive human resource development strategy must developed, particularly targeting youth and women in leadership, including the mapping of possible career paths and the advancement of transformation of gender relations...

27, At all times, we must ensure an approach where we broaden the pool of cadres who have an understanding of the policies of the movement and the necessary experience and skills to be able to execute these policies effectively, where they are deployed....

36. Our cadres deployed in whatever centre should take with them the qualities and attributes that we hold dear as a Movement. This includes putting service to the people, an ethic of work and selfness, respect for the senior structures and cadres of the Movement, responsiveness to the needs of the pole and a collective approach to matters.

37. In our deployment we should consciously strive to dispel the notion that we have become a Movement and a leadership which is distanced from the people whom we have served in our long struggle for liberation. We must be true to our tradition of putting the interests of our people and our country first....

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[5] Caselines: 02-65

38. The relationship between the structures of the Movement and of government has been amongst some of the difficult issues that we have faced since our ascendency to power in 1994. While the relationship between these structures is often best worked out in practice and convention, some guidelines are necessary to help guide the organisation... '

B. PRELIMINARY OBJECTIONS

(i) Standing

9. The DA says it brings these proceedings in its own interest and in the interests of the public. It says it relies on section 38[6] of the Constitution. To demonstrate its own standing, the DA submits that the Cadre Deployment Policy (the policy) is used as a mechanism by the ANC to control public administration, which has led to state capture and the erosion of independent institutions. As the largest opposition party, the DA and its members have an interest in challenging the policy and its influence on how government functions. It adds that the Constitutional imperatives of accountability, responsiveness and transparency require that the lawfulness of the policy be determined.

10. The respondents submit, relying on *Ramakatsa and Others* v *Magashule and Others*[7], that the ANC is a voluntary organisation. Its constitution, its rules and its policies constitute the terms of the contract between members of the ANC on the one hand,

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[6] 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

[7] (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012), paragraph 79

and on the other, the members and the voluntary association. Axiomatically, the DA is not a member of the ANC. It has no standing to invalidate a contract between members of the ANC.

11. When determining the DA's own interest standing, this court must, as a matter of logic, assume that the complaints brought by the DA are justified[8]. The court is further required to separate standing from merits. This is so because a litigant's standing is not based on the invalidity of the challenged law or public decision but from the impact it has on its own rights, interests or potential interest[9].

12. There can be no doubt that Section 38 of the Constitution is not implicated, as the DA makes no claim about a right in the Bill of Rights having been violated. We add that on the strength of *Ramakatsa*, which is binding on this court, the DA has no legal standing to challenge a term of an agreement to which it is not a member. Ordinarily this is where the matter should end. The question then is, what of the interests of justice in relation to the serious charges made by the DA against the governing party? The Constitutional Court in *Giant*[10] cautioned that courts should be slow to dispose of cases on the basis of standing alone. Our view is that this case calls for the generous approach adopted by the court in *Kruger* v *President of the Republic of South Africa*

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[8] *Giant Concerts CC* v *Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012), paragraph 32.
[9] Note 7, paragraphs 32 - 33.
[10] Note 7 paragraph 34:
"To this observation, one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits."

and Others[11]. It is thus in the interests of justice that the DA be allowed the standing it claims so that this court may interrogate its claims.

(ii) Jurisdiction

13. The ANC and the President submit that this court lacks jurisdiction to entertain the matter. The ANC states that it is elected with a particular set of policies which are expressly or impliedly set out in its manifesto. The South African voters have endorsed it as the majority party since the democratic era began. This court's jurisdiction, according to the ANC, does not extend to making political statements about the content of political party policies. Thus, absent the exclusions set out in section 16 of the Constitution, of hate speech, incitement of imminent violence and advocacy of propaganda, it is not for a court to pronounce on the limits of political party policies. The ANC maintains this is a matter for the legislative and executive branches of government to debate and agree the limits of political party policies, not the court. Finally, the ANC submits that, in bringing this case before this Court, the DA seeks to score a political goal it cannot achieve through the ballot box. It must not be permitted.

14. In reply, the DA avers that a political party is not permitted to adopt policies that are inconsistent with the Constitution. The policies of the ANC do not occupy a constitutional free zone. The DA refers to the Constitutional Court's comments in *Christian Education SA* that the supremacy of the Constitution and the Bill of Rights,

[11](CCT 57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (2 October 2008), paragraph 23.

'...prevent protected associational rights of members of communities from being used to privatise constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control.'

15. Hoexter and Penfold (2021)[12], in a discussion dealing with deference, refer to juristocracy (rule by judges). The authors express that when a country is in danger of becoming a kleptocracy and it seems that only the Courts may be trusted, it is tempting to jettison constitutional law principles. The temptation to jettison the constitutional law principles the authors are referring to, may in appropriate cases, include inviting the court to answer questions of how far political party policies should extend. The authors warn, however, that juristocracy is neither a legitimate nor sustainable alternative.

16. It is difficult to see how the obiter in *Christian Education*[13] supports the DA's case of jurisdiction. Other than a general disquiet about the policy, the DA has so far not pointed to any clause of the policy which offends the Constitution. But there are questions to be answered in the DA's case. One of those is whether any intelligible constitutional attack has been pleaded with the mandatory specificity. Surely this court has jurisdiction to enquire into that aspect of the case and more. We conclude that this court has jurisdiction.

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[12] Hoexter C and Penfold, Administrative Law, 2021 Juta, page 197
[13] As set out in paragraph 13 of this judgment

(iii) Material non-joinder

17. The ANC and the President submit that the DA's papers impugn PRASA, Eskom, Transnet, and SARS but the relevant Ministers of Transport, Public Enterprises, and Finance have not been joined in these proceedings. Without hearing from these political heads, this court is not in a position to decide the matter, submitted the President. The DA says that, by citing government, the fifth respondent, they have cited the previously mentioned Ministers. They add that the relief sought in this case does not affect these Ministers. The test for non-joinder is set out in *Gordon v Department of Health*[14]. The question is whether,

> 'the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests of a party or parties not joined in the proceedings'.

18. Based on the reasoning in *Gordon*, we do not agree that the Ministers mentioned by the respondents would be prejudiced were this Court to issue the order sought by the applicant.

C. APPLICANT'S CASE

19. When peeled into its bare essence, the applicant's case of unconstitutionality is undergird by the following submissions:

    (i) The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, (the Commission) found that the ANC's Cadre Deployment Policy, (policy) is unconstitutional;

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[14] (337/07) [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA); 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA) (17 September 2008), paragraph 9.

(ii) It was admitted before the Commission that the policy had contributed to state capture and corruption;

(iii) The Cadre Deployment Committee (Committee) influences appointments in independent institutions, including judicial appointments.

As may already be apparent, this part of the applicant's case relies heavily on the work of the Commission. We refer to this element of the applicant's case as the Commission Pillar. The second part of the applicant's case rests on minutes of the Committee, the Minutes Pillar. After synthesising the minutes, the applicant makes two further submissions. They are:

(iv) The Committee usurps the Minister's powers to appoint. Thus, the Committee distorts the manner in which the Constitution dictates power may be exercised.

(v) The Committee is directly involved in interviews and selection of candidates for appointment to public office.

20. There is a further point mentioned in the applicant's affidavit titled, 'Evidence of Cadre Deployment as a Conduit to State Capture'. In advancement of the claim, the applicant canvasses several appointments to a number of key state institutions. We enquire into whether there is any justification for the applicant's conclusions in this regard.

The Commission Pillar

21. The applicant suggests that in considering its case, this Court may take judicial notice of certain evidence which was led before the Commission, including the

Commission's reports. The respondents demur. They submit, correctly in our view, that the requirements for judicial notice have not been met. They further say that, bar the evidence of the President and that of Mr Mantashe, the evidence of Ms Hogan, Ms Lynne Brown, and Mr Moyane constitutes inadmissible hearsay, and the DA has not applied[15] for such evidence to be admitted in terms of Section 3(4) of the Law of Evidence Amendment Act[16]. Finally, the respondents submit that the Commission's reports amount to an opinion as expressed by the Chairperson of the Commission, thus, it too is inadmissible.

22. The doctrine of judicial notice allows for the admission into evidence of notoriously and well-established facts. For example, the fact that the Commission had been established is an example of a matter so notoriously established that leading evidence to prove it would be redundant. The probative value[17] of the evidence led before the Commission however, is an entirely different issue. See in this regard *Langa v S*:

> '" The doctrine of judicial notice is, by all the authorities on the law of evidence which I have consulted,... still today rightly confined within very narrow limits. Thus Phipson says that Judges and juries can only take notice of matters "so notoriously or clearly established that evidence of their existence is unnecessary. . ." '

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[15] *Rautini v Passenger Rail Agency of South Africa* (853/2020) [2021] ZASCA 158 (8 November 2021):

[12] It is common cause that the respondent's counsel made no application for any of the hearsay evidence to be admitted in terms of s3 of the Law of Evidence Amendment Act. ...The full court's reliance on hearsay evidence in that regard amounts to a material misdirection that vitiates its ultimate finding on the outcome of the appeal that was before it.

[16] Act 45 of 1988.

[17] *S v Ndhlovu and Others* (327/01) [2002] ZASCA 70; [2002] 3 All SA 760 (SCA) (31 May 2002)

[45] 'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?' ....

(i) The DA submits that the Commission found that the policy is unconstitutional; and

(ii) It was admitted that the policy contributed to state capture and corruption.

23. The context to these two submissions must first be set out. During his testimony before the Commission, the President accepted that the policy can be abused. He expatiates in these proceedings that just as legislation and good policies were transgressed during the period described as the state capture era, so was the policy. Both the ANC and the President submit that the abuse of the policy does not make the policy unconstitutional.

24. The President adds that the policy itself recognises that it can be abused. Given these insights, the ANC, in its 54th conference, in 2017, resolved to take several decisive steps directed at fighting corruption. As such, the policy evolves with the needs of the people and takes into account shortcomings from within. The applicant submits that the Commission made a finding that the policy is unlawful and unconstitutional. To substantiate the point, the applicant relies on the statement set out immediately here below from the Commission's reports:

> 'What is said above makes it clear that within the current constitutional and statutory framework it is unlawful for a President of the country and any Minister, Deputy Minister or Director-General or other government official, including those in parastatals, to take into account a recommendation of the ANC Deployment Committee or any deployment committee or any similar committee or any political party in deciding who should be appointed to a position in the public service or organ of the state or parastatal.'[18]

[18] The applicant references this statement as Volume 2 Part 6 of the Commission's report.

25. In further advancing its case, the DA refers to Mr Mantashe's evidence before the Commission[19] regarding the history of the policy, its purpose, and details of how the policy is implemented. Mr Mantashe traced the policy from its inception in 1985, in Zambia, at a time when the ANC, as a liberation movement, was preparing to govern. The specific focus of his testimony dealt with, amongst others, the development of cadres to give effect to the policies of the ANC and transforming civil service to make it representative of the general citizenry of South Africa. When the President appeared before the Commission, he confirmed Mr Mantashe's evidence regarding the policy, its purpose, and how it is implemented. The DA, placing reliance on an extract from the President's testimony, submits that it was admitted before the Commission that the policy contributed to state capture and corruption. The extract reads:

> 'And let us accept, Chairperson, that some of those deployments were done in a particular era and in a particular way and right now as we look at the past slate we are able to look at it and say we actually need to do things differently. Move away from those types of deployment that happened and that ended up being or some of them being not fit for purpose, as I said in my opening statement.'

26. We commence with the submission that the Commission found that the policy is unconstitutional. From a plain reading of the words[20] used by the Chairperson[21], his remarks are directed at the conduct of public officials. He states that it would be unlawful to take into account recommendations of any political party when making decisions on who should be employed into public service. There is no reference to

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[19] Mr Mantashe testified on 14 April 2021.
[20] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13, paragraph 18
[21] In paragraph 24.

the policy, much less a finding of its unconstitutionality. On the submission that the President (although the applicant does not mention him) admitted that the policy had contributed to state capture and corruption, the extract quoted in paragraph 25 does not admit of such conclusion. At best for the DA, the President conceded to shortcomings in the manner deployments were done at the relevant time and the need to change direction. The two submissions must accordingly be rejected.

27. We interpose a complaint registered by all the respondents regarding the DA's evasion of the rules pertaining to motion proceedings. The alleged pronouncement by the Commission that the policy is unconstitutional was referenced as Part 6, Volume 2 of the Commission's report, which is a record of 485 pages. The alleged admission that the policy contributed to State Capture and corruption is not referenced at all. The point is articulated in *Lipschitz and Schwarz NNO* v. *Markowitz*:

> 'A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice which is designed and which still evolves as a means of accurately identifying issues and conflicts so that Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed.'[22]

See also *Minister of Land Affairs and Agriculture* v *D & F Wevell Trust* [23].

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[22] 1976 (3) SA 772 (W) at paragraph at 775 H.

[23] [2007] SCA 153 (RSA), paragraph 43: 'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained.'

(iii) The Committee influences appointments in independent institutions, including judicial appointments

28. The applicant claims that the Committee influences judicial appointments. In his answers before the Commission on the question whether the Committee plays any role in judicial appointments, the President confirmed that the Committee has no role in judicial appointments as the issue is left to the legal process with which the Judicial Services Commission, JSC, is charged. The same question was raised with the President when he appeared before the Commission on the second occasion. He responded that the ANC, as a governing party, must play a role in the transformation of the judiciary, whilst underscoring that the Committee plays no role in judicial appointments.

29. The Commission's report records that the President's answer, on his second appearance, was a direct contradiction to his and Mr Mantashe's earlier evidence that the Committee does not consider judicial appointments and only encourages candidates to apply. There was also reference to the minutes of the Committee, which demonstrated that the Committee had decided to recommend certain judges for appointment to various courts. The President explains in his affidavit that there was no contradiction at all but a question of varied interpretations of the situation and his answers. He avers that the ANC, like other parties that participate in the legislature, has delegates at the JSC. The views of the ANC, like those of other political parties, are aired at the JSC directly with the candidates. Ultimately, the JSC, makes the

recommendation. He adds that the policy makes no express reference to judicial appointments.

30. To illustrate his point, the President referred to the minutes of 22 March 2019 and submitted that aside from the fact that the Committee had strayed as it was not meant to involve itself in judicial appointments, the words are clear that the Committee recommends. It is, according to the President, manifest that the Committee recommends, as one of the judges was not appointed to the Constitutional Court in 2019. He added:

> 'That the CD Committee minutes may express themselves in a way that suggests to the DA that the Committee plays a more interventionist role in the appointments does not mean that it in fact does. The Committee is entitled to express its wishes and frustrations as it likes.'

31. Our conclusion on the point dealing with the influence of judicial appointments is dealt with in the discussion dealing with the minutes pillar.

The Minutes Pillar

(i) The Committee usurps the Minister's power to appoint

(ii) The Committee is directly involved in interviews and shortlisting of candidates

32. It is useful to approach this leg of the applicant's case by considering some of the minutes.

> 11 May 2018: The minutes reflect that the Minister of Environmental Affairs is allowed to choose from her identified shortlist.

3 December 2018: The Committee approved Minister Jeff Radebe's names for the Nuclear Energy Board because the chair is a long standing member of the ANC and all the members are from the ANC.
20 January 2019: The Committee reminded the Minister of Trade and Industry that he must follow the deployment processes before there are any adverts and that the Minister must follow the correct process of informing the Committee before any appointments are made.
8 March 2019: There is a further note in the same minutes regarding Rand Water, Nkomati Bloemfontein, and Trans Caledon Board. The minute further records, '*Recommend that Deployment Committee persons for selection panel because it does the shortlisting and interviews.*' (Copied as is from the minutes)

33. Based on the minutes, the applicant submits that the Committee instructs, vetoes, and approves who may be appointed to public institutions. The Committee usurps power from the Minister and in so doing, distorts the manner in which the Constitution directs power must be exercised. The Committee is also said to be involved directly in interviews and selection processes of candidates for appointment to public service. The ANC and the President deny the DA's assertions. They maintain that the Committee recommends. The decision of who to appoint rests squarely with the constitutional agent, in this case, Minister, the Head of Department or any other public official charged with making such decision.

34. In support, the President referred to, *inter alia*, the minutes of 22 February 2019, where a note is made that the Committee: (i) recommended a person as Chair of the Municipal Demarcation Board, and (ii) recommended eight people for the Commission for Gender Equality. The minutes of 14 October 2019, show that the Committee

recommended a female for the board of NEMISA[24] and another female for the board of ZEDNA[25]. He submits that the minutes demonstrate that the Committee is encouraging a constitutional objective of transformation so that public bodies are reflective of the citizenry of this country.

35. The ANC provided a summary of the current version of the policy as:

    (a) The policy recommends; it does not dictate to Government who should be employed.

    (b) Party policy is that the person best qualified for the job must get it, but it is entirely within government's sphere of responsibility to decide who gets the job.

    (c) All appointments are to be made without discrimination but with due regard to the sensitivity to the historical disadvantages suffered by the majority of this country.

    (d) The party does not only recommend party members, even though it prefers candidates who uphold the party's ideals.

    (e) If government appoints a member of the party and that member breaches party discipline, the party can discipline them within the party, not in their work place. Workplace discipline is the exclusive domain of the employer. Non-party members are not subject to party discipline.

36. The question that must be asked is whether this court should reject the versions of the respondents off-hand as palpably implausible, unmeritorious and/or fictitious. The short answer is no. Firstly, the applicant has not placed any admissible evidence for its conclusions. In order to conclude that the Committee usurps power from the

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[24] The minutes use this acronym without stating the name of the organisation in full.
[25] *Ditto.*

Minister, that it is directly involved in interviews and selection of candidates, and that the Committee influences appointments of judicial officers, this court would need to speculate as to what occurred from the point of the minute. The correct approach is to bring to court a specific challenge against a specific appointment or appointments with evidence of unlawful interference by the Committee, or dereliction of duty, on the part of the Minister or public official, or the JSC, as the case may be. That is what happened in *Mlokoti* v *Amathole District Municipality and Another*[26]. The appointment made by the respondent in that case was set aside because, on the evidence before it, the court was satisfied that the respondent had abdicated its discretionary powers and simply executed the dictates of the ANC's Regional Committee.

37. Finally, the applicant had seen the versions of the respondents, yet it did not apply for a referral to trial on any of the disputed issues. Under the circumstances it is not unreasonable to conclude that the DA must have accepted that disputes of fact will be resolved in favour of its opponents. The principle is articulated in *National Director of Public Prosecutions* v *Zuma*:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities...It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'[27]

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[26] (1428/2008) [2008] ZAECHC 184; 2009 (6) SA 354 (ECD); [2009] 2 BLLR 168 (E); (2009) 30 ILJ 517 (E) (6 November 2008).

[27] *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA), paragraph 26; *Wightman v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6 (10 March 2008), paragraph 12; *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006), paragraph 63.

(iv) Evidence of Cadre Deployment as a Conduit of State Capture

38. In expatiating on this point, the applicant records various details on the appointments of Mr Siyabonga Gama - by Transnet; Mr Brian Molefe and Mr Anoj Singh - by Eskom; Mr Tom Moyane - at SARS; and Mr Lucky Montana - at PRASA. The applicant does not advance any admissible evidence to support the conclusion that any of these individuals were appointed as a result of the policy or that the Committee recommended them for appointment. On the applicant's version, Mr Gama was apparently President Zuma's preferred candidate, while Mr Moyane had been earmarked by President Zuma for the role of Commissioner of SARS. The applicant merely speculates that Mr Montana was deployed. In short, the applicant failed to place evidence that any of these individuals were recommended by the Committee or that the policy had anything to do with their appointments. It follows that the conclusion cannot be justified.

39. The applicant further refers to a notice and an affidavit deposed to by one of its numbers, Mr Leon Schriber. The ANC and the President point out that the affidavit and the Notice are irrelevant to the present enquiry. They say, neither the notice nor the affidavit evidence the harm complained of by the DA in this application, based on the following:

    (i) There is no evidence that the people who attended the meeting were subjected to the policy or the Regional Cadre Deployment Committee.

(ii) The policy does not state that people who have been deployed may be summoned by the ANC and must ensure they attend and may be held responsible for other people's failure to attend.

D. The ANC's policy of cadre deployment is unconstitutional.

40. We commence this section with the summary of our findings:

(a) We uphold the respondents' defence that there is no properly pleaded constitutional attack.

(b) We further uphold the respondents' defence that the applicant is bound by the principle of subsidiarity.

(c) We agree that there is no valid constitutional attack on Chapter IV of the Public Service Act, PSA. In the event, the applicant's attack of unconstitutionality fails *in toto*. There is thus no need to interrogate the remainder of the defences.

(d) We also conclude that the ANC, like any other political party, is entitled to influence government decisions, including the appointment of senior staff to public administration, as long as the bright line between state and party is observed. It goes without saying that influencing government decisions is not the same as political meddling in the affairs of government.

The applicant's submissions:

(i)The Policy is inconsistent with the Constitution and PSA.

41. In its heads of argument, the applicant says it seeks the order of unconstitutionality of the policy because the policy, inter alia, (i) is inconsistent with Sections 195 and 197

of the Constitution; (ii) undermines the rule of law; and (iii) undermines the right to equality. The applicant says it seeks the relief on the basis of the following undisputed facts:

(a) The deployment Committee seeks to influence appointments in public service.

(b) When a Minister or office bearer fails to carry out the recommendation of the Committee they may be subject to discipline.

(c) The policy has resulted in corruption, maladministration and state capture. The policy is also unconstitutional just because of its mere existence.

42. The question may be asked, on what flesh and blood facts does the DA base the three conclusions set out in (a)-(c)? In its founding papers, the applicant commenced its case of unconstitutionality of the policy with references to Sections 7 and 8 of the Constitution and merely recorded that the policy is at odds with Section 7 of the Constitution. Very briefly, Section 7 summarised provides that the Bill of Rights, BOR, is the cornerstone of our democracy. Section 8 provides that the BOR is binding on both the natural and juristic persons, (horizontal application). The applicant made no effort to set out explicitly the sections of the policy that are offensive to the Constitution, the right or set of rights in the BOR that are offended by the policy and the factual circumstances to sustain the claimed infringements of the rights.

No valid constitutional attack has been pleaded

43. The President and the ANC submit that the DA has not made a case against any of the specific provision of the policy, much less the entire policy. They point out that the

policy carries provisions which, on the DA's version, are not constitutionally offensive, such as, Clause 25, which calls for the development of a comprehensive human resources strategy targeting youth and women leadership. Clause 39 calls for the development of guidelines to guide the organisation on the relationship between the constitutional structures of the ANC and government executives. Clause 36 demands that deployees uphold the values of selflessness and responsiveness[28]. They submit that the complaint should fail for want of specificity.

44. We must first record that it is not common cause that the policy has resulted in corruption, maladministration and state capture. Thus far, the DA has not placed any admissible evidence before this court to sustain these claims. On the constitutional complaint, we note in the first instance that the applicant has failed to heed the words of the Constitutional Court in *South African Transport and Allied Workers Union and Another v Garvas and Others* where the court warned:

> 'The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be led and that the requirements of the separation of powers are respected.'[29]

45. Similarly in *Minister of Cooperative Governance and Traditional Affairs* v *De Beer and Another*, where the contention was that the Regulations promulgated by the Minister

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[29] (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012) paragraph 112.

to combat the spread of COVID were unconstitutional, the Supreme Court of Appeal admonished:

'"...it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded.'[30]

In paragraph 99:
'At the very least it was for the respondents to allege: (a) each specific regulation sought to be impugned; (b) which constitutional right was alleged to be violated by the impugned regulation; and, (c) how the regulation allegedly infringed the specific right. Absent this, it could hardly have been expected of the Minister to appreciate the scope of the challenge and put up the necessary evidence to justify the regulation. It was not for the Minister to justify each of the regulations in a vacuum.'

46. Secondly, an imprecise and diffuse pleading means the court will be frustrated in crafting the correct order. This is so because the power of the court to declare law or conduct unconstitutional as provided for in section 172 (1) (a) of the Constitution is circumscribed as may be gleaned from the extract from *Minister of Health and Others* v *Treatment Action Campaign and Others*:

'We have earlier referred to section 172(1)(a) of the Constitution, which requires a court deciding a constitutional matter to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. A declaration to that effect must therefore be made in this matter. The declaration must be in a form which identifies the constitutional infringement...'[31] (own emphasis)

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[30] Case no (538/2020) [2021] ZASCA 95 (1 July 2021), paragraph 87.
[31] (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002), paragraph 121.

47. The import of the remarks in *Garvas* and *De Beer* is that it is impermissible of a litigant to rely on a generalised disenchantment and broad sweeping conclusions in pleading a constitutional attack such as the applicant has done in this case. We set out few but striking examples to illustrate the point. In its founding affidavit, the applicant charges:

    (i) 'The policy undermines the BOR, it erodes the democratic values of human dignity, equality, and freedom and it weakens the ability of the state to protect and promote the rights in the Bill of Rights[32].

    (ii) Cadre deployment cultivates and fosters corruption. It favours those who are politically connected over other candidates who are not[33].

    (iii) The corruption at Transnet happened at the hands of Mr Gama who was the decided choice of Mr Zuma and the latter refused to consider Mr Maseko[34].

    (iv) The Constitutional Court recognised in Glenister that Section 7 requires the state to adopt measures that combat corruption.

    (v) Cadre deployment is one of those cognate corrupt practices...'

48. The applicant's reliance on the *Glenister v President of the Republic of South Africa and Others*[35] requires further remarks. The reliance both at the level of fact and law is a misdirection. *Glenister* was concerned with a challenge of rationality against a public decision of dissolving the Directorate of Special Operations, commonly known as the Scorpions, which was located within the NPA, and replacing it with the Directorate for Priority Crimes Investigation (otherwise known as the Hawks). Aside from the fact that this case is concerned not with a public decision but a policy of a voluntary organisation, the applicant relies on a set of complaints with no facts illustrate the alleged infractions of the Constitution. The two cases are incomparable.

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[32] Paragraph 106 of the FA.
[33] Paragraph 107 of FA.
[34] 108.
[35] (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011).

49. The respondents further charge that the applicant in its heads of argument, appears to rely on the argument that the policy is inconsistent with the rule of law[36] and right to equality[37], without having laid any basis for such claims in its pleadings. The point is made in *Bock and Others* v *Duburoro Investments (Pty) Ltd*. Admittedly, the issues of unconstitutionality arose in the context of a commercial agreement but the point holds true even in the present context:

> 'Procedurally, the way this point has been dealt with by the appellants is unacceptable. They, in one sentence in the answering affidavit, submitted that what Nedcor did by means of parate executie was unconstitutional... Before us it became the main point. It has more than once been said that this is unsatisfactory especially where, as in the present case, the attack becomes diffuse and the ramifications of the decision are difficult to envisage. Where unconstitutionality may involve questions of fact, especially when questions of reasonableness and justifiability have to be considered, this method of dealing with such important commercial matters ought not to be countenanced.[38]

50. It is indeed impermissible of a litigant to rely on a case that was not made out in its pleadings as the court pointed out in *Dikoko* v *Mokhatla*:

> '...It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought...'[39]

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[36] 006-45.
[37] 006-55.
[38] (228/2002) [2003] ZASCA 94; [2003] 4 All SA 103 (SCA) (26 September 2003), paragraph 12
[39] (CCT62/05) [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) (3 August 2006), paragraph 107; *Singh v Commissioner for the South African Revenue Service* (500/2001) [2003] ZASCA 31 (31 March 2003), paragraph 24

The applicant is bound by the principle of subsidiarity

51. The applicant submits in its heads of argument that the policy is inconsistent with Chapter 10 of the Constitution, sections 195 and 197. Section 195 deals with the values governing public administration while Section 197 deals with public service. The Minister, joined by the respondents, argues, correctly in our view, that Parliament has enacted legislation dealing with employment of, amongst others, Directors General, Deputy Directors General, and Heads of Department, which includes, Employment Equity Act[40], EEA, Promotion of Equality and Prevention of Unfair Discrimination Act[41], PEPUDA, Promotion of Administrative Justice Act[42], PAJA, Promotion of Access to Information Act[43], PAIA, Labour Relations Act[44], LRA, Basic Conditions of Employment Act[45], BCEA, and the Public Service Regulations[46], PSR. Any person who has been adversely affected by a decision or conduct of the Minister or public official, in the context of employment relations, has sufficient protection in the form of the statutes and may rely on them for recourse, submits the Minister. The respondents conclude that the applicant has failed to observe the principle of subsidiarity and on that basis, its attack cannot succeed.

52. In *My Vote Counts NPC* v *Speaker of the National Assembly and Others,* Cameron J, writing for the minority, traces the background to the principle and explains as follows, (which was consistent with the majority decision) :

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[40] 55 1988
[41] 4 of 2000
[42] (Act No 3 of 2000)
[43] Act No. 2 of 2000
[44] Act 66 of 1995
[45] 75 of 1997
[46] 2 of Jan 2001

'These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right... Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role....'[47]

The majority judgment captures the rationale behind the principle:
"...First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, "would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation." Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, "allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of 'two parallel systems of law.'[48]

(ii) The Public Service Relief - The Policy is inconsistent with the PSA

53. The applicant recites the provisions of the PSA, to *wit*, sections 9, 10 and 11. Section 9 deals with who may appoint, while Section 10 deals with qualifications for appointment. Section 11 deals with appointments and filling of posts. Thereafter, the applicant records that the PSA makes appointments on the basis of political connection and affiliation unlawful. It concludes that the policy is inconsistent with sections 9, 10, and 11 of the PSA. The Minister says the policy is not government policy formulated by the Executive Authority in terms of section 85 (2) (b) of the Constitution. Neither the Minister nor the Executive Authority have either threatened

[47] [2015] ZACC 31, paragraph 53.
[48] note 44, paragraph 160.

to implement, have implemented or are obliged to implement the policy when making appointment decisions into public service.

54. The DA makes no case as to why a policy of a voluntary association must comply with the PSA. It does not even make a case to demonstrate that the government is bound to comply with the policy when making senior appointments to public service. It lays no factual predicate to demonstrate the infringement of the sections of the PSA. Early on, we mentioned various clauses in the policy which provide for training and development of a strategy for the organisation. The DA makes no case of unconstitutionality against those clauses of the policy[49]. It follows that this particular challenge too cannot succeed.

(iii) In the alternative, Chapter IV of the PSA is unconstitutional

55. As an alternative to the relief sought on the basis that the policy is contravention of the PSA, the DA seeks an order that the PSA is unconstitutional to the extent it does not sufficiently insulate appointments in the public service from political interference. The Minister submits that that section 172 (1) (a) finds application only where law or conduct which offends the Constitution has been identified, where the facts and circumstances underlying the infringement are clearly set out, and the manner and extent of the constitutional infringement is properly articulated. The applicant has not met any of these requirements. We agree. On the authority of *De Beer* and *Garvas*[50],

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[49] refer to paragraph 43 of this judgment
[50] See paragraphs 39 and 40 of this judgment.

this is not a valid constitutional attack. This element of the applicant's case must therefore be rejected.

Political party influence on government decisions, including appointments of senior personnel to public service

56. The applicant argues strongly in its heads or argument that it is impermissible of the ANC or any political party to influence appointments to public service. It will be remembered that both the ANC and the President argue that there is nothing impermissible in that regard and that deployment of senior personnel by political parties to public administration is not unique to South Africa. It is practised by many countries all over the world. The respondents refer to *Public Protector and Others* v *President of the Republic of South Africa and Others*, where the point was made:

> 'But in this Court the EFF argued that as a ruling political party, the ANC "undoubtedly influences the direction of the State". While this is true, it does not mean that the ruling party and the state become one entity. Ordinarily, political parties win elections on the basis of their policies and manifestos. This occurs worldwide. And once they assume power, they promote the policies that won them the elections. But the bright line separating the party from the state remains intact. This is clear from the provisions of the Constitution...'[51]

57. The President refers to a study carried out the by the OECD[52] in 2007 which led to a report titled, 'Study on the Political Involvement in Senior Staffing and a Delineation of Responsibilities between Senior Civil Servants.' In short, the study found that political involvement in public administration is essential for the proper functioning of

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[51] (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021), paragraph 103.
[52] The Organisation for Economic Cooperation and Development: The report is found on Caselines 002-834 South Africa, including three other fellow BRICS countries is a partner to the OECD.

democracy. Without it, an incoming political administration would find itself unable to change policy direction, as long as public service is protected against being misused for partisan purposes. Importantly, the study found that more political influence in staff matters may work well if there are checks and balances. It would be supererogatory to add anything more to the words of the court as expressed in *Public Protector*[53]. It follows that there is nothing unconstitutional about a political party influencing the policy direction of a government, including the appointment of senior personnel to public service, so long as the public service is protected against being misused for partisan purposes.

The DA's impugning of the President

58. The President addresses his complaint with reference to two matters. The first is the criticism levelled by the DA based on the President's opposition to this case. The DA says that the President's filing of a full-blown defence instead of filing a notice to abide is inappropriate in light of the office he occupies. It conflates state and party. The President says he has been cited as a respondent and was thus obliged to provide information to assist the Court. On the principle espoused in *Matatiele Municipality and Others* v *President of the Republic of South Africa and Others*[54], we cannot fault the President. Levelling serious accusations against the person of the President while

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[53] Paragraph 50 of this judgment.

[54] (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006), paragraph 107, it was said:

'In this respect, the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open.'

expecting him to file a notice to abide instead of playing open cards, as the President has done, is mischievous of the DA.

The President had misled the Commission

59. The DA made the point that the President had either lied and or misled the Commission. This is with regard to the question whether the Committee makes recommendations in relation to judicial officers. The President points out that the Commission made no finding that he had misled it or that he had stated something he knew was untrue. We have considered the circumstances of this complaint, including the relevant parts of the record of the Commission.

60. Our approach to this issue is informed by the words of the Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*:

> 'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character...'[55]

61. Alive to the rules of cross examination, the Commission correctly made no finding that the President had either lied or misled it. It was not for the DA to draw such a conclusion.

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[55] (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999), paragraph 61; *S v Boesak* (105/99) [2000] ZASCA 24 (12 May 2000), paragraph 51

E. Concluding remarks and discussion on costs

62. In conclusion, we call to aid the remarks of the court in *De Beer*:

> 'There was no case to answer. The respondents ignored the fundamental principle that an applicant's case must be set out with sufficient specificity, clarity and supporting admissible evidence so that the functionary or repository of power knows the case that has to be met. The dicta of the Constitutional Court on how a constitutional challenge should be couched were ignored...'[56]

63. For all the reasons set out in this judgement, the application must be dismissed.

64. There remains the issue of costs. The approach to costs proceeds from two basic principles. They are captured in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others*:

> 'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first...'[57]

65. Further considerations are expressed in *Biowatch Trust* v *Registrar Genetic Resources and Others*:

> '...[L]itigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.'[58]

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[56] Note 30 paragraph 100.
[57] (CT5/95) [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) (19 March 1996), paragraph 3
[58] (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009), paragraph 17

66. The question then is whether in launching these proceedings the DA sought to vindicate a discernible constitutional right?[59] In answering this question, our focus must move away from the lack of precision and the sweeping character of the DA's application. We must consider carefully the issues raised by the DA and ask whether the application raises genuine and substantive constitutional issues. The answer is no. In *Biowatch Trust*, it was said:

> '[24]...If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award....[25] Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in Affordable Medicines. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication...'[60]

67. We are compelled to address the references to corruption mentioned in the DA's papers, in case we are misunderstood. We underscore with reference to the Constitutional Court's comments that corruption:

> "... is a very serious offence and is regarded as such not only in South Africa but internationally. Indeed, the World Bank estimates that corrupt governments and their business partners take over $1 trillion in bribes each year. It is hard to assess the effect of corruption on the political and economic life of a nation, yet it is clearly very harmful..."
> [I]n *South African Association of Personal Injury Lawyers v Heath and Others*:
> ' "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution..." '[61]

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[59] Helen Suzman Foundation v Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574 (5 October 2020), paragraph 115
[60] note 58, paragraphs 24 - 25.
[61] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7; 2008 (5) SA 354 (CC) ; 2008 (2) SACR 165 (CC) ; 2008 (8) BCLR 834 (CC) (29 May 2008), paragraph 72.

68. Our reasoning for the conclusion we have reached is set out fully in this judgment. The DA came to court with a case built on speculation and conjecture. Corruption knows no boundaries. It inflicts grave harm to society. For that reason, it ought not to be used by political parties to pursue political objectives. We are not persuaded that costs be granted against the Amicus Curiae.

F. Order

69. The application is dismissed with costs.

(i) The costs include, in respect of the first to the third respondents, the costs of five counsel with one senior;

(ii) In respect of the fourth to the fifth respondents, the costs of two counsel including one senior; and

(iii) In respect of the sixth respondents, two counsel with one senior.

LEDWABA A.P DJP

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT, GAUTENG, PRETORIA

BAM N.N J (Ms)

JUDGE OF THE HIGH COURT, GAUTENG, PRETORIA

MOJAPELO M AJ

ACTING JUDGE OF THE HIGH COURT, GAUTENG, PRETORIA

Date of Hearing:	23 – 24 January 2023
Date of Judgment:	21 February 2024
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