

# Key Points Act a flimsy cover for Nkandla

THE LAW

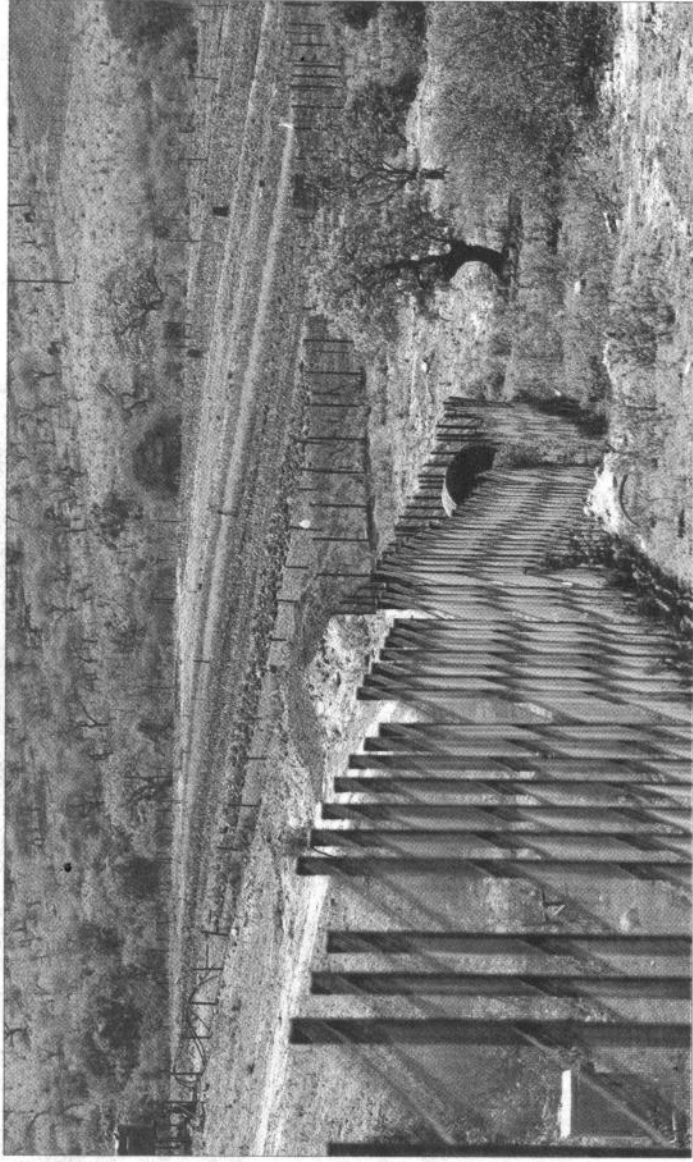
Dario Milo &amp; Ben Winks

One of the foremost academic architects of our Constitution, the late Professor Etienne Mureinik, described our Bill of Rights as "a compendium of values empowering citizens affected by laws or decisions to demand justification".

In response to revelations over the past few months that more than R200-million of public funds would be spent on security upgrades to the private residence of President Jacob Zuma at Nkandla, many South Africans have indeed demanded justification. In a country blighted by the apartheid legacies of inequality, indignity and deprivation, the reasons for the state spending such a staggering sum on one home are clearly of profound public interest.

In refusing to furnish a full explanation of why, on what and to whom so much money was paid out of the public purse, the executive – principally Public Works Minister Thulas Nxesi, whose department is funding the project – has repeatedly relied on the National Key Points Act of 1980. This Act was passed in the aftermath of the notorious Information Scandal, which implicated senior officials of the then information department in a scheme to misappropriate defence funds to wage an apartheid propaganda war.

The Act provides, among other things, that any place may be declared a national key point if, in the "opinion" of the defence minister, it "is so important that its loss, damage, disruption or immobilisation may prejudice the republic" or it is "necessary or expedient for the safety of the republic or in the public interest".



The huge spending on Jacob Zuma's Nkandla home flouted the parameters of the Act. Photo: Madelene Cronjé

The defence minister may require the owner of such a place to take steps, at the owner's own expense, to improve its security (on pain of a five-year imprisonment or a fine), or the defence minister may, "on behalf of and with the consent of the owner", take those steps on his own and may determine to what extent the owner will bear the cost.

A special account is created for this purpose and it is envisaged that the funds appropriated for a specific key point must be deposited in this account, with the concurrence of the finance minister. The defence minister has discretion to render "financial assistance, including loans" to an owner from this account.

Nxesi denied that the president had ever approved, or was even aware of, these public works at Nkandla. This is curious, because the Act requires the owner not only to consent to security measures but to pay for them, potentially with "financial assistance, including loans" from the special account. It is also alarming that the "irregularities" (mentioned in the vaguest of terms by Nxesi) were not detected or deterred much earlier, given the scrutiny the statute requires to be exercised over security measures at any national key point, let alone what appears to be the nation's most valuable one.

So it seems that the very same statute invoked by Nxesi to withhold the report, as well as any other information about Nkandla, may already have been breached in several respects, namely the requirements

team on the expenditure at Nkandla. Instead, he offered the public a nine-point summary of the task team's findings, among them that the state had spent more than R200-million at Nkandla to date (about R70-million on "security upgrades" and R135-million on "operational needs for state departments") and that "there were a number of irregularities" in the procurement process.

Now, even assuming that the publication ban in the Act would survive constitutional scrutiny, on its own terms, the ban cannot be used to keep the entire Nkandla report secret. Only those aspects of the report that relate to "security measures" can be kept from public view. Yet, in Nxesi's own version, more than 65% of the public spending related to "operational needs for state departments" and not "security upgrades" and the report also contains details of irregularities relating to service providers.

There can be no justification whatsoever for keeping this information from the public.

Perhaps more glaring than Nxesi's secrecy is that of the defence minister (previously Lindiwe Sisulu, now Nosiviwe Mapisa-Nqakula). It is she who decides whether to declare

a place a national key point, what security steps will be taken, to what extent the state will subsidise those steps and what information may be made public. But she has yet to account for the exercise of her sweeping powers under the Act in relation to Nkandla.

The view that the Act exempts the executive from accounting for public funds is as outdated as the Act itself.

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