REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 14641/12

In the matter between:

MOSIUOA LEKOTA First Applicant

CONGRESS OF THE PEOPLE Second Applicant

and

THE SPEAKER, NATIONAL ASSEMBLY First Respondent

THE DEPUTY SPEAKER, NATIONAL ASSEMBLY Second Respondent

JUDGMENT DELIVERED: 11 DECEMBER 2012

FOURIE, J:

INTRODUCTION

[1] The legislative authority of the national sphere of government in the Republic of South Africa is vested in Parliament, which consists of the National Assembly and the National Council of Provinces. This application involves a dispute about the lawfulness of rulings made by the presiding Speaker in the course of a debate in the National Assembly.

[2] First Applicant is a member of the National Assembly and the President of a political party known as the Congress of the People (second applicant). First applicant is also the leader of second applicant in the National Assembly.

[3] First and second respondents are the duly elected Speaker and Deputy Speaker, respectively, of the National Assembly.

[4] Applicants seek an order that certain rulings handed down by second respondent, during a debate in the National Assembly on 12 June 2012, be declared unlawful and inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and that same be reviewed and set aside. The rulings concerned are:

a) That first applicant's statements in the National Assembly on 30 May 2012, regarding certain conduct and omissions of the President of the Republic of South Africa ("the President"), were out of order under the rules of Parliament.

b) That first applicant had to leave the House, having elected not to withdraw the statements.

BACKGROUND

[5] To appreciate the context in which the rulings were made, it is necessary to have regard to certain events that occurred during May 2012, which caused much controversy in South Africa and abroad.

[6] On 10 May 2012, an exhibition of paintings by the artist, Brett Murray, opened at the Goodman Gallery in Johannesburg. One of the paintings exhibited, named *The Spear*, depicts a man bearing a facial resemblance to the President, with exposed genitalia. The painting caused outrage, especially amongst members of the ruling African National Congress ("the ANC"), the political party of which the President is a member as well as its President.

[7] An urgent application was launched by the President in the South Gauteng High Court, to prohibit the continuing display of the painting by the Goodman Gallery and to prevent the City Press newspaper from displaying the painting in its publications. However, before the application could be heard, the Goodman Gallery and the City Press newspaper backed down, allegedly under pressure brought to bear upon them by members of the ANC, and agreed not to continue displaying the painting or other images thereof.

[8] On 30 May 2012, when the budget vote of the Presidency was debated in the National Assembly, first applicant was afforded the opportunity to address the National Assembly on behalf of second applicant. First applicant took the opportunity to raise his concern regarding the silence and inaction of the President in the light of the conduct of the ANC, which, according to first applicant, constituted a violation of the constitutional rights of the artist, Brett Murray, the Goodman Gallery and the City Press newspaper. First applicant further expressed the view that the conduct of the ANC resulted in the undermining of the judiciary of the country. He then remarked, on three separate occasions during the debate, that the silence and inaction of the President constituted a violation of his oath of office by the President.

[9] Second respondent, who was the presiding Speaker in the National Assembly during this debate, was then requested by a member of the ANC to make a ruling as to whether a member of the House *"can stand up and make a very serious thing* (sic) *to say the President has violated his oath of office"*. Second respondent noted the request for a ruling, whereafter the debate continued for the rest of the day, as well as the following day. As the National Assembly did not, after 31 May 2012, sit again until 12 June 2012, second respondent only made her ruling on the latter date.

[10] The relevant part of second respondent's ruling of 12 June 2012, is recorded as follows in Hansard:

"Hon. members, as regards the duty of members towards their fellow members, members should appreciate that their freedom of speech must, of necessity, be subject to the principle that they may not impute improper or unworthy motives or conduct on the part of other members, or cast personal reflections on their integrity, or verbally abuse them in any other way….This is not to say that if a member has good reason to believe that another member may have acted improperly, such matter should not be brought to the attention of the House. However, there are proper ways of doing that. In such circumstances, it is sound practice to require that a member does this by way of a separate, clearly formulated and properly motivated substantive motion, which requires a distinct decision of the House…Hon. members as we all know, when the President takes office, he takes the oath of office, in which he commits, amongst other things, to obey, observe, uphold and maintain the Constitution. As members will be

aware, one of the grounds for removal of the President, in terms of section 89 of the Constitution, is a serious violation of the Constitution or the law. Therefore, to accuse the President of the violation of the oath of office is a serious charge, indeed which, if proven correct, could have serious consequences. The remarks that the President has violated the oath of office are, in no doubt, a reflection on the integrity and competence of the President. Except upon a properly motivated, substantive motion, as indicated above, such allegation cannot be allowed in this House. Hon. Lekota, your remarks that the President has violated his oath of office are out of order, and I now ask you to please withdraw them."

[11] First applicant responded to this ruling, by saying that he is unable to withdraw what he had said, whereupon second respondent ruled that he had to withdraw from the House. Some debate followed this ruling, but eventually first applicant withdrew from the National Assembly for the remainder of the day.

APPLICABLE LEGAL PRINCIPLES

[12] The trite principle is that the Speaker, although affiliated to a political party, is required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament. When presiding over sittings of the National Assembly, the Speaker has to maintain order and apply and interpret its rules, conventions, practices and precedents. In so doing, the Speaker should jealously guard and protect the members' rights of political

expression entrenched in the Constitution. (See the National Assembly's Guide to Procedure, 2004).

[13] In determining whether second respondent had the lawful authority to make the impugned rulings, the starting point is the Constitution, as it is the ultimate source of all lawful authority in the country.

[14] Section 58 (1) of the Constitution declares that all Cabinet members, Deputy Ministers and members of the National Assembly, have freedom of speech in the Assembly and in its committees, subject to its rules and orders (my emphasis). This qualification should be read with section 57 (1) of the Constitution, which provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures, and, to this end, make rules and orders concerning its business.

[15] The constitutional guarantee of the right to freedom of speech and debate in the National Assembly, is echoed in Rule 44 of the rules of the National Assembly, which states that:

"...there shall be freedom of speech and debate in or before this House and any joint committee of parliament, subject only to the restrictions placed on such freedom in terms of or under the Constitution, any other law or these Rules."

[16] The rules of the National Assembly are codified in a seventh edition (June 2011), comprising no less than 331 rules. These rules deal with every conceivable facet of the National Assembly's business and procedures. Detailed provisions regarding the Speaker's powers in controlling debates and exercising rights and functions in the National Assembly, are included in the rules.

[17] It is common cause that these rules may be augmented by occasional orders and resolutions adopted by the National Assembly. Such occasional orders and resolutions endure beyond the session during which they were adopted and accordingly have the status of so-called "standing orders". They continue to apply until repealed or amended. A standing order, which is relevant for purposes of the present application, was adopted by the National Assembly on 16 September 1997 ("the standing order") and continues to apply.

[18] The standing order follows a ruling made by a former Speaker of the National Assembly, Dr. F N Ginwala, on 17 September 1996, and reads as follows:

"1. A member who wishes to bring any improper conduct on the part of another member to the attention of the House, should do so by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge; and

2. Except upon such a substantive motion, members should not be allowed to impute improper motives to other members, or cast personal reflections on the integrity of members, or verbally abuse them in any other way."

[19] I should mention that Rule 5 of the rules of the National Assembly, provides that when the President takes his or her seat in the National Assembly, the rules shall apply to him or her as they apply to a Minister (or, it may be added, as they apply to every member of the National Assembly).

[20] The paramountcy of the Constitution, also with regard to proceedings in Parliament and the judicial scrutiny of such proceedings, was emphasised as follows by Mahomed CJ in **Speaker of the National Assembly v De Lille and Another** 1999 (4) SA 863 (SCA) at para. 14:

"No parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act, which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the

obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution, is entitled to the protection of the courts. No parliament, no official and no institution is immune from judicial scrutiny in such circumstances".

[21] Section 172 (1) of the Constitution obliges a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution, invalid to the extent of its inconsistency. As explained earlier, applicants seek the setting aside of second respondent's rulings on the basis that same unlawfully violated first applicant's constitutional right to freedom of political speech in Parliament.

[22] In exercising the constitutional authority that it has to subject Parliament, including officials such as the Speaker, to judicial scrutiny, a court should, however, be careful not to attribute to itself superior wisdom in relation to matters entrusted to Parliament as the legislative branch of government. It has often been said that a court should treat the decisions of the other branches of government with the appropriate respect, thereby recognising the proper role of such other branches within the Constitution. See **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (SCA) at para. 48.

[23] In his recent judgment in **Mazibuko v The Speaker of the National Assembly and Others** (case no. 21990/2012) ZAWCHC 22 November 2012, Davis J, with customary clarity, said the following at 32-33:

"Courts do not run the country, nor were they intended to govern the country. Courts exist to police the constitutional boundaries…Where the constitutional boundaries are breached or transgressed, courts have a clear and express role. And must then act without fear or favour. There is a danger in South Africa however of the politicisation of the judiciary, drawing the judiciary into every and all political disputes…judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business. What courts can do, however, is to say to Parliament: you must operate within a constitutionally compatible framework…However how you allow that right to be vindicated, is for you to do, not for the courts to so determine…An overreach of the power of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the State deal with these matters, can only result in jeopardy for our constitutional democracy."

These are certainly strong words, but I fully agree with the underlying principle therein expressed.

DISCUSSION

[24] At the outset, it should be borne in mind that applicants have not placed the constitutional validity of any of the rules of the National Assembly in issue,

nor have they suggested that the standing order is unconstitutional in any respect. The procedure whereby a substantive motion is required if a member wishes to bring any improper conduct on the part of another member to the attention of the National Assembly, or wishes to cast personal reflections on the integrity of other members, is accordingly not under attack. Nor is the validity of the rules and practice prescribing the consequences of failing to abide a ruling of the Speaker, in issue.

[25] Absent any constitutional challenge, as mentioned above, applicants contend that, in deciding whether or not statements made by members in a debate, are out of order, the Speaker exercises a discretion, which discretion has to be exercised lawfully, i.e. in a manner consistent with the Constitution and the rights and values for which it provides. Their submission is that second respondent failed to exercise her discretion at all, as her assumption that the remarks made by first applicant concerning the President, fell within the ambit of the standing order, was wrong. Therefore, applicants submit, second respondent's ruling that first applicant's remarks concerning the President were out of order and had to be withdrawn, constituted an unlawful infringement of first applicant's constitutional rights of free expression and political participation.

[26] Applicants further contend that first applicant's exclusion from the National Assembly, constituted a disproportionate sanction, thereby perpetuating the violation of his constitutional rights.

[27] Respondents, on the other hand, maintain that second respondent's ruling was based squarely on the provisions of the standing order, which found application in this instance, with the result that such ruling is beyond reproach. Furthermore, respondents submit that first applicant's refusal to withdraw the offending remarks, constituted a serious violation which justified the usual sanction for such conduct, i.e. a withdrawal from the House for the remainder of the day's sitting.

[28] I believe that it is important to bear in mind that this is not a case where second respondent is accused of any improper behaviour or a failure to act impartially. On the contrary, there is no dispute that she acted *bona fide* at all relevant times. The question therefore arises what criteria the court should apply in these circumstances, when requested to exercise its oversight responsibility in respect of the actions of an official attached to one of the other branches of government.

[29] There is no dispute that second respondent, when exercising her discretion to decide whether or not statements made by members in a debate, are out of order, has to act in a manner consistent with the Constitution and the rights and values for which it provides. Put differently, she has to perform her functions in accordance with the constitutional principle of legality which requires her to act within the powers conferred upon her by the law and, in particular, the Constitution. In **Democratic Alliance v President of the Republic of South Africa and Others**, CCT 122-11 (2012) ZACC 24, Yacoob ADCJ (speaking for the court) put it as follows at para. 27:

"The Minister and Mr. Simelane accept that the executive is constrained by the principle that (it) may exercise no power and perform no function beyond that conferred…by law and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise, the exercise of the power would be arbitrary and at odds with the Constitution. I agree."

[30] What it effectively boils down to, is that applicants are required to show that, in making her rulings, second respondent exercised a power which she did not legally have or that she materially misconstrued the power afforded to her. Put differently, it requires proof that second respondent acted unlawfully or irrationally to the extent that her rulings should be set aside.

[31] As explained earlier, second respondent, as Speaker, has a duty to maintain order during debates of the National Assembly. To this end she has to apply the applicable rules and standing orders of the National Assembly. In the instant matter the relevant remarks were made by first applicant and second respondent was called upon to make a ruling whether or not the remarks were out of order. In so doing, she had to be guided by the rules and standing orders of the National Assembly. As emphasised by respondents, it should be borne in mind that this is a review, not an appeal. That being the case, the question is not whether second respondent was right or wrong or whether the court would have come to a different conclusion. Ultimately the question remains whether second respondent misconstrued her discretion to the extent that the court should interfere by setting her rulings aside.

[32] If one has regard to the express terms of second respondent's ruling that first applicant's remarks were out of order, it is clear that same was based on the provisions of the standing order. There is no doubt on the papers before the court, that second respondent applied her mind and came to the conclusion that the remarks fell within the ambit of the standing order. It therefore cannot be said that she acted arbitrarily or capriciously in reaching this conclusion. What remains, is to consider whether she had misconstrued her discretion by wrongly concluding that the remarks fell within the ambit of the standing order.

[33] Second respondent says that she carefully weighed first applicant's remarks against the constitutional value of freedom of political speech and concluded that they reflected adversely upon the conduct and integrity of the President. She therefore ruled that the remarks were out of order, as, in terms of the standing order, same could only be made by way of a separate substantive motion.

[34] Applicants maintain that first applicant's remarks were mere statements of misfeasance and not malfeasance. In their submission, only statements of malfeasance (and not misfeasance) are covered by the provisions of the standing order. Therefore, applicants submit that second respondent was wrong in concluding that the remarks fells within the ambit of the standing order, thereby misconstruing her discretion to the extent that she had failed to exercise her discretion at all.

[35] In my view, the correct approach is to firstly have regard to the contents of the President's oath of office, in an attempt to determine the impact of first applicant's remarks that the President had violated his oath of office. The oath appears in Item 1 of Schedule 2 to the Constitution and reads as follows:

"In the presence of everyone assembled here, and in full realisation of the high calling I assume as President of the Republic of South Africa, I, A.B. swear/solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always –

- *promote that which will advance, and oppose all that may harm, the Republic;*
- *protect and promote the rights of all South Africans;*
- *discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;*
- *do justice to all; and*
- *devote myself to the well-being of the Republic and all of its people."*

[36] The statements made by first applicant to the effect that the President has violated his oath of office, do not only point to a serious dereliction of duty on the part of the President, but convey that the President has failed to:

- Promote and advance the interests of the Republic of South Africa.
- Protect and promote the rights of all South Africans.
- Discharge his duties with all his strength and talents to the best of his knowledge and ability and true to the dictates of his conscience.
- Do justice to all.
- Devote himself to the well-being of the Republic and all of its people.

[37] I find it difficult to imagine a more serious attack upon the holder of the office of the President, than to accuse him or her of violating his or her oath of office. In my view, a remark of this nature clearly conveys to others that the President is not an honest person and that he does not have strong moral principles. As a matter of interest, the Oxford English Dictionary defines "integrity", *inter alia*, as the quality of being honest and having strong moral principles. I am accordingly driven to the conclusion that, to say of the President that he has violated his oath of office, not only suggests that the President is guilty of improper conduct, but also casts a serious reflection on his integrity as a member of the National Assembly.

[38] The serious nature of the remarks made by first applicant, is underscored by the provisions of section 89 of the Constitution. This section provides for the removal of the President by the National Assembly, upon a resolution adopted with the support of at least two-thirds of its members, in the event of the President committing a serious violation of the Constitution. If the President were to be shown to have violated his oath of office, it would probably constitute a serious violation of the Constitution, which could lead to steps being taken for his removal in terms of section 89 of the Constitution.

[39] I therefore conclude that applicants have not shown that second respondent exercised her discretion on a wrong assumption. On the contrary, I hold the view that the remarks of first applicant fall within the ambit of the standing order and that second respondent was correct in concluding that such remarks could only be made by way of a separate substantive motion.

[40] It is important to bear in mind that first applicant was not prohibited from saying what he said, but required to say so in the context of a debate on a substantive motion. The standing order expressly allows improper conduct on the part of another member to be brought to the attention of the House and allows personal reflections to be cast on the integrity of members, on condition that a substantive motion is moved. This, in my view, constitutes a lawful exercise of Parliament's right to control its own affairs internally.

[41] Rule 98 provides the procedure for the bringing of a substantive motion. In terms of Rule 98 (2) a member must deliver the notice of motion to the Speaker for placing on the Order Paper and, unless the Speaker determines otherwise, the motion will be placed on the Order Paper two days hence.

[42] It was submitted on behalf of applicants that, by insisting on a separate substantive motion in this instance, second respondent effectively prevented members from criticising the President, a right which members should be entitled to exercise freely during a debate on the budget vote of the Presidency. I do not agree with this submission. The relevant extracts from Hansard show that members seriously criticised the President during this debate. By way of example, reference can be made to the following remarks of the Leader of the Opposition:

"In these difficult days we look to the President to give the nation hope to overcome despair. Yet he has failed to match the power of his office with a sense of purpose…South Africa is left behind crying out for leadership and direction…Many other young lives could be similarly transformed if the President had the courage to put the needs of South Africa's people ahead of his own political advancement…The President's…own political needs are more important than service delivery and the rule of law…The President's failure to lead has paralysed his ability to govern….The President is forced to bow before an unelected Cosatu and others. He is unable to drive policy that runs counter to the interests of the disparate factions that brought him to power."

[43] The first applicant was also allowed substantial latitude in criticising the President with regard to the Spear incident and its aftermath. It was only when he made the remarks that the President has violated his oath of office, that a

ruling was sought as to whether or not this constituted unparliamentary language.

[44] Finally, in this regard, I wish to emphasise that the task of controlling debates in Parliament requires particular skills and is best dealt with by the presiding officers who are appointed for this purpose and have to do it on a daily basis. A court should be loathe to encroach on their territory and only do so on the strength of compelling evidence of a constitutional transgression. In my opinion, no such evidence has been produced in the instant matter, nor have applicants shown that second respondent acted irrationally or unlawfully.

[45] This brings me to the sanction imposed by second respondent. National Assembly rule 51 expressly provides that, where a member disregards the authority of the Chair, he or she may be ordered to withdraw from the Chamber for the remainder of the day's sitting. I agree with the submission made on behalf of respondents, that the refusal of a member to withdraw a remark which the Speaker has ruled out of order, certainly constitutes a serious disregard of the authority of the Speaker. We have been referred to a number of precedents where a similar sanction was imposed in circumstances where members refused to abide the ruling of the Speaker to withdraw unparliamentary remarks. In fact,

the usual sanction in such event appears to be an order to withdraw from the Chamber.

[46] Having regard to the nature of the remarks made by first applicant, and his continued refusal to withdraw same, I believe that the sanction imposed cannot be described as unreasonable. On the contrary, I believe that this usual sanction for such conduct, was justified.

[47] Another aspect which I should briefly deal with, is the submission made on behalf of applicants, that the rulings of second respondent are subject to review under the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA"). In my view, the short answer to this submission is found in section 1 of PAJA which, *inter alia*, provides that "administrative action" does not include the legislative functions of Parliament. The first applicant's remarks were made during the debate on the budget vote of the Presidency. When the second respondent made her rulings on 12 June 2012, it was during the first reading debate of the Appropriation Bill. On both days the National Assembly was in the process of exercising its legislative functions and the remarks were dealt with, and the rulings were made, in accordance with the rules and practices which govern the National Assembly when it is so occupied.

[48] In these circumstances, PAJA does not apply. Also, as submitted on behalf of respondents, the matter concerns the in-house workings of Parliament and accordingly does not have a direct external legal effect as required by PAJA's definition of the "administrative action" concept.

[49] For the reasons aforesaid, I conclude that the application falls to be dismissed.

AMICUS CURIAE

[50] Shortly before the hearing of the matter, Mr. M G Oriani-Ambrosini, a member of the National Assembly, applied to be admitted as *amicus curiae*. The applicants did not oppose the application, while respondents initially opposed same. However, at the hearing respondents withdrew their opposition and consented to the admission of the *amicus curiae*. Mr. Oriani-Ambrosini was represented by counsel, who motivated the application, whereupon the court granted same. During argument it transpired, particularly in view of the absence of any constitutional attacks by applicants, that the role to be played by the *amicus curiae* was rather limited. This notwithstanding, the submissions made on his behalf were helpful to the court.

COSTS

[51] Respondents submitted that, in the event of the application being unsuccessful, applicants, as well as the *amicus curiae*, should be liable for costs. It is trite that the making of a costs order falls within the discretion of the court. However, as far as constitutional litigation is concerned, a flexible approach is followed, which has resulted in the general rule that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights. However, 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.

See: **Affordable Medicines Trust and Others v Minister of Health and Others** 2006 (3) SA 247 (CC) at para 139; **Biowatch Trust v Registrar, Genetic Resources and Others** 2009 (6) SA 232 (CC) at paras 57/8.

[52] In the present matter applicants have raised important considerations impacting on the right to freedom of speech in Parliament and litigants should not in future be dissuaded from doing so by virtue of an adverse costs order being made against applicants. I should add that, in my opinion, there is no

room for a finding that the application was frivolous or vexatious or in any other way manifestly inappropriate.

[53] As far as the *amicus curiae* is concerned, I see no reason why he should be mulcted in costs.

ORDER

[54] In the result the following order is made:

1. The application is dismissed.

2. No order as to costs is made.

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P B Fourie, J

I agree.

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A Le Grange, J

I agree.

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R C A Henney, J