In the High Court of South Africa
Western Cape Division, Cape Town

In the matter between: CASE: A 3236/15

ANDRIES MOLAPI TLOUAMMA	**FIRST APPLICANT**
AGANG – SOUTH AFRICA	**SECOND APPLICANT**
MOSIUOA GERARD PATRICK LEKOTA	**THIRD APPLICANT**
CONGRESS OF THE PEOPLE	**FOURTH APPLICANT**
BANTUBONKE HARRINGTON HOLOMISA	**FIFTH APPLICANT**
UNITED DEMOCRATIC MOVEMENT	**SIXTH APPLICANT**

and

BALEKA MMAKOTA MBETE, SPEAKER OF THE NATIONAL ASSEMBLY OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT**
JACOB GEDLEYIHLEKISA ZUMA, PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT**

JUDGMENT DELIVERED ON 7 OCTOBER 2015

GOLIATH, J:

Introduction

[1] This is a three-pronged application brought by three minority opposition parties, Agang, Cope and United Democratic Movement, firstly, to have the First Respondent ("the Speaker") removed from Office. It is alleged by the applicants that the Speaker had acted contrary to the "*law, norms, conventions and practices that*

require a legislative Speaker to maintain scrupulous neutrality, and keep an impeccable reputation for fairness and neutrality" and is no longer fit and proper to hold the position of Speaker. In the second place, the application also concerns the rules and procedures of the National Assembly ("NA") relating to the tabling of a vote of no confidence in the President of South Africa ("the President") in terms of s 102(2) of the Constitution of the Republic of South Africa, 1996. The applicants contend that notwithstanding the amendments made following the decision of the Constitutional Court in **Mazibuko NO v Sisulu and Others**[1], the new National Assembly Rule ("NA Rule") 102A does not adequately address the defects identified by the Constitutional Court and that it is inconsistent with s 102(2) of the Constitution, to the extent that it does not provide for a political party represented in, or a member of, the National Assembly to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for a debate and voted upon in the National Assembly within a reasonable time or at all. Thirdly, the applicants seek declaratory relief pertaining to the manner in which a vote of no confidence is conducted, and the discretion of the presiding officer to conduct such vote by secret ballot.

[2] On 4 November 2014 the First Applicant, Andries Molapi Tlouamma (Agang), gave notice of a motion of no confidence in the President in the National Assembly. Agang requested the Speaker to allow for voting by secret ballot. On 13 November 2014 the motion was placed on the National Assembly's Order Paper. On 19 November 2014 Agang was advised that the motion of no confidence could not reasonably be scheduled before the National Assembly went into recess on 27 November 2014 and same would be scheduled pursuant to Rule 102A(7) at the

[1] Mazibuko NO v Sisulu and Others 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) hereinafter referred to as "Mazibuko".

earliest opportunity after the President's State of the Nation Address ("SONA"). The motion of no confidence was eventually scheduled for debate on 3 March 2015. On 22 December 2014 applicants launched an urgent application to the Constitutional Court for direct access. On 18 February 2015 the Constitutional Court dismissed the application for direct access on the basis that direct access was not in the interests of justice. On 23 February 2015 the applicants launched this application seeking to interdict the Speaker from causing the debate and voting in respect of the vote of no confidence in second respondent to take place on 3 March 2015 pending finalization of this matter. The application was dismissed by Binns-Ward J on 27 February 2015. On 3 March 2015 Agang addressed the House and requested that the Speaker recuse herself as the presiding officer and that the voting on the motion of no confidence take place by secret ballot. The Speaker refused to accede to the request. First applicant thereupon withdrew the motion.

The Parties

[3] The First, Third and Fifth Applicants are members of the National Assembly and leaders of minority political parties Agang, Congress of the People and the United Democratic Movement (Second, Fourth and Sixth Applicants) respectively.

[4] The First Respondent is the Chairperson of the African National Congress and the Speaker of the National Assembly. The Second Respondent is the President of the Republic of South Africa who is cited in his official capacity and by virtue of his interest in the outcome of the application. No relief is sought against the President.

The Relief sought

[5] The relief sought by the Applicants is couched as follows:

"4.1 An order declaring that National Assembly Rule 102A does not adequately correct the defects identified by the Constitutional Court in **Mazibuko NO v Sisulu and Another** 2013(6) SA 249 (CC) ('**Mazibuko**'), in that Chapter 12 of the Rules of the National Assembly is inconsistent with section 102(2) of the Constitution to the extent that it does not provide for a political party represented in, or a member of, the National Assembly to enforce the right to exercise the power to have a motion of no confidence in the Second Respondent ('*the President*') scheduled for a debate and voted upon in the National Assembly within a reasonable time or at all.

4.2 An order directing the National Assembly to amend Rule 102A of the National Assembly Rules to correct the defect adequately and to that end to submit a draft amendment to this Court for certification of adequacy within a prescribed timeframe.

4.3 An order declaring that the failure of the First Respondent ('*the Speaker*') to ensure that the First Applicant's (*Mr Tlouamma's*) motion of no confidence in the President was scheduled, debated and voted on before the National Assembly went into recess on 28 November 2014, was inconsistent with section 102(2) of the Constitution and/or National Assembly Rule 102A.

4.4 An order directing the Speaker to ensure that a motion of no confidence to be given by Mr Tlouamma following the adjudication of this matter is scheduled, debated and voted on within a specified period, as determined by this Court.

4.5 An order declaring that the Speaker is not a fit and proper person to hold office as Speaker.

4.6 In the alternative to the order described in the preceding subparagraph, an order declaring that the Speaker cannot continue to hold the position of Chairperson of the National Executive Council ('NEC') of the African National Congress ('ANC') as well as that of Speaker since it leads to a perception of bias in favour of the ANC and against other political parties represented in the National Assembly.

4.7 An order interdicting the Speaker from presiding over the debate of and vote on Mr Tlouamma's motion of no confidence and directing that the Deputy Speaker or any of the other presiding officers in the National Assembly preside over that debate.

4.8 An order directing the Presiding Officer who presides over the debate to ensure that the vote is taken by secret ballot.

4.9 In the alternative to the order described in the preceding subparagraph, an order:

4.9.1 Declaring that the Speaker (and other Presiding Officers) has the authority to rule that a vote on a motion of no confidence in the President shall take place by way of secret ballot;

4.9.2 Ordering that the presiding officer allow an opportunity for debate as to whether or not he or she should rule that the debate on the motion of no confidence in the President take place by way of secret ballot; and

4.9.3 Ordering the Presiding Officer to take a decision as to whether or not the aforesaid voting should take place by way of a secret ballot, bearing in mind that he or she has the authority to do so and with regard to the reasons why it is requested."

[6] The Speaker opposes all aspects of the relief sought in these proceedings. At the hearing of the matter the applicants abandoned the certification relief in terms of prayer 4.2 of the notice of motion. At the commencement of the hearing the respondents raised two preliminary issues namely non-joinder and an application to strike out. I deal with these issues at the end of the judgment since it is more expedient to do so in light of the conclusion reached.

Relief as to National Assembly Rule 102A

[7] The dispute relating to the above is a sequel to an order granted by the Constitutional Court in **Mazibuko** where the following order was made at paragraph [82]:

> **"It is declared that ch 12 of the rules of the National Assembly is inconsistent with s102(2) of the Constitution to the extent that it does not provide for a political party represented in, or a member of, the National Assembly to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for a debate and voted upon in the National Assembly within a reasonable time, or at all".**

[8] In compliance with the Constitutional Court's decision NA Rule 102A was adopted as follows:

> **"102A. Motions of no confidence in terms of section 102 of the Constitution:**
>
> **(1) A member may propose that a motion of no confidence in the Cabinet or the President in terms of section 102 be placed on the Order Paper.**
>
> **(2) The Speaker must accord such motion of no confidence due priority and before scheduling it must consult with the Leader of**

Government Business and the Chief Whip of the Majority Party.

(3) The motion must comply, to the satisfaction of the Speaker, with the prescripts of any relevant law or any relevant rules and orders of the House and directives and guidelines recommended by the Rules Committee and approved by the House, before being placed on the Order Paper, and must include the grounds on which the proposed vote of no confidence is based.

(4) The Speaker may request an amendment of or in any other manner deal with a notice of no confidence motion which contravenes the law, rules and orders of the House or directives and guidelines approved by the House.

(5) After proper consultation and once the Speaker is satisfied that the motion of no confidence complies with the aforementioned prescribed law, rules, orders, directives or guidelines of the House, the Speaker must ensure that the motion of no confidence is scheduled, debated and voted on within a reasonable period of time given the programme of the Assembly.

(6) The debate on a motion of no confidence may not exceed the time allocated for it by the Speaker, after aforesaid consultation process.

(7) If a motion of no confidence cannot reasonably be scheduled by the last sitting day of an annual session, it must be scheduled for consideration as soon as possible in the next annual session.

(8) Rules 95, 97 and 101 do not apply to motions of no confidence in terms of this Rule."

Applicants' Submissions

[9] The applicants are aggrieved by the procedures followed by the Speaker following Agang's tabling of a motion of no confidence in the President on 4 November 2014. Applicants contend that there is no cogent reason why the Speaker could not have scheduled a debate and a vote within the eighteen day period between the initial request and the end of the parliamentary session. Eight days were set aside for plenary sessions and various items of business scheduled during this period lacked the requisite urgency or importance so as to justify priority over the motion of no confidence.

[10] According to the applicants the motion could have been scheduled after the House adjourned before 19h00 on 5, 6, 11 and 12 November 2014, or on 20 November 2014 when business of the House was suspended between 14h42 to 20h47. The submission was made that it is not unusual for the NA to sit late at night when business of the House demands extended hours of sitting. The Speaker is empowered to convene special sittings of the NA on Parliamentary working days originally reserved for other purposes. Reference was made to a special sitting of the House on 27 November 2014 which was adjourned at 22h02 that evening.

[11] The applicants broadly submitted that NA Rule 102A does not comply with the **Mazibuko** ruling in that the rule does not provide for such motion to '*be accorded priority over other motions and business'*, nor does it provide for '*prompt and reasonable steps'* to be taken by the National Assembly '*to ensure that the motion is scheduled, debated and voted on without undue delay'.* It is submitted that the provision in subrule (2) that the Speaker has to accord such motion of no confidence '*due priority'* and the requirement in subrule (5) that the Speaker has to '*ensure that*

the motion of no confidence is scheduled, debated and voted on within a reasonable period of time given the programme of the Assembly' do not adequately respond to the Constitutional Court's directives that it has to '*be accorded priority over other motions and business'* and that the National Assembly has to '*take prompt and reasonable steps to ensure that [it] is scheduled, debated and voted on without undue delay'.*

[12] The applicants contend that the requirement in subrule (2) that the Speaker has to accord such motion '*due priority'* without reference to '*other motions and business*' is so vague as to be virtually meaningless, particularly in the absence of any provision for a timeframe within which a motion of no confidence has to be debated and voted upon. The requirement in subrule (5) that a Speaker has to ensure that the motion of no confidence is scheduled, debated and voted on '*within a reasonable period of time given the programme of the Assembly'* is unacceptably vague and fails to provide criteria with reference to which a determination has to be made regarding the importance of a motion of no confidence relative to other National Assembly business. The rule also fails to provide criteria with reference to which the tabling of such motion can adequately be prioritized. In the absence of clear guidelines in this regard s102A(2) and (5) remain inconsistent with the Constitutional Court's directive that such motion has to be accorded priority over other motions and business.

[13] It is further contended that subrules (3), (4) and (5) are also inconsistent with the **Mazibuko** ruling in as much as they provide too much scope for manipulation and procrastination and are unnecessarily restrictive, more specifically the requirement that the specific grounds on which the motion of no confidence is based

must be included in the motion, which is not a requirement for other motions. The rule, the submission continued, also creates too much scope for the Speaker finding fault with the motion of no confidence and is unnecessarily onerous in terms of the requirements laid down for such a motion and does not contain sufficient guidelines to inform the Speaker's decision. In addition the '*as soon as possible'* requirement in subrule (7) is similarly too vague and it should at least be provided that if a motion of no confidence cannot reasonably be scheduled by the last sitting of any session, not an annual session, it has to be scheduled for consideration within a pre-determined timeframe in the next session, not the next annual session.

[14] It was further submitted that the fact that the Speaker, a member of the majority party, has to consult two other members of the National Assembly, namely, the Leader of Government Business and the Chief Whip, who are both senior representatives of the majority party, leaves the scheduling of motions of no confidence within the gift of the majority party. Consequently, the scheduling of a motion of no confidence in terms of NA Rule 102A is contrary to the founding constitutional provision of a multi-party democratic government and contrary to the core values of accountability, openness and responsiveness. The Rule is also contrary to the spirit of s 57(2)(b) of the Constitution which provides that the rules and orders of the National Assembly must provide for the participation of minority parties in the proceedings of the National Assembly and its committees, in a manner consistent with democracy, the urging went. The Applicants therefore contend that the Speaker's failure to ensure that the motion of no confidence was scheduled, debated and voted for on or before the National Assembly went into recess was inconsistent with NA Rule 102A in that it was not afforded due priority and was not scheduled within a reasonable time with regard to the programme of the National

Assembly. Applicants also contend that the rule is deficient in that it does not contain an express requirement that a vote on a motion of no confidence in the President must be taken by secret ballot.

The Speaker's Submissions

[15] The Speaker submits that NA Rule 102A is compliant with the reasoning and order of the Constitutional Court in **Mazibuko** regarding the time within which a motion of no confidence in the President must be scheduled for debate and voting in the National Assembly. The motion was received in early November 2014. At that stage the Joint Programme Committee ("the JPC") had agreed to a timetable of business scheduled for completion by the last sitting in late November 2014. Eight plenary sessions were scheduled in the National Assembly during this period, which included a large volume of important work. Given the importance and time required for a proper debate on Agang's motion, the rescheduling of some of the work would not have created sufficient time for members to consider and prepare for a proper debate on the motion. The Speaker describes the sequence of events as follows:

15.1 On 3 November 2014 Agang notified her in writing that it had circulated its motion and requested that voting on the motion be conducted by secret ballot. She responded on 4 November 2014 requesting the party to remedy certain defects in the motion. On 4 November 2014 at 10h21 Agang read out its motion in the National Assembly and delivered a signed copy of its draft resolution to the secretary of the National Assembly. On 4 November 2014 at 10h21 the motion was sent to the parliamentary translators. The translated versions were prepared by 15h03 on the same day.

15.2 On 5 November 2014 Parliament's Procedural Officers prepared written advice regarding the procedural status of the motion and on 6

November 2014 that advice was checked by Parliament's Procedural Advisors. On 7 November 2014 the advice was submitted by the secretary to the National Assembly for approval and subsequently transmitted the Speaker.

15.3 On 11 and 12 November 2014 the Speaker consulted the Leader of Government Business and the Chief Whip of the Majority Party about the scheduling of the motion. On 12 November 2014 the secretary of the National Assembly was instructed to publish the motion on the next Order Paper of 13 November 2014 which was duly attended to.

15.4 On 14 November 2014 Agang requested in writing that the voting on the motion be conducted by way of secret ballot. On 17 November 2014 the party again communicated in writing and sought an assurance that the Speaker would not preside over the National Assembly debate of the motion.

15.5 On 18 November 2014 the Speaker met with the leader of Government Business and the Chief Whip of the Majority Party to discuss the scheduling of the motion as published in the Order Paper of 13 November 2014. It became clear that the motion could not reasonably be scheduled before the last sitting day of 27 November 2014. The secretary of the National Assembly was informed accordingly. The secretary advised Agang of the decision, which was accepted without any reservation. On 20 November 2014 Agang notified the Speaker in writing that it was inclined to accede to her request to delay the debate on two conditions, namely; that she not preside over the proceedings, and that voting be conducted by secret ballot. This request was followed by another letter in which Agang demanded a response. On 24 November 2014 an urgent memorandum was prepared by the National Assembly's Table Division regarding Agang's requests. It was recommended that the Speaker advise the party in writing, which was duly done on 25 November 2014, that the motion could not reasonably be scheduled and that in terms of NA Rule 102A(7) it would be scheduled for consideration at the earliest opportunity after the State of

> the Nation address. Furthermore, that the request for a secret ballot was rejected, specifying the reasons therefore. On 26 November 2014 the National Assembly's Programme Committee met and finalized the programme for the last plenary session of the National Assembly on 27 November 2014. Agang was entitled to attend this meeting and could have raised any objections to the proposed scheduling of the motion pursuant to NA Rule 102A (7). However, first respondent failed to attend the meeting, the Speaker stated.

[16] The Speaker contends that NA Rule 102A contemplates that a motion of no confidence in the President may be scheduled for debate and voting if it has been placed on the Order Paper and certain procedural steps had been finalized. The motion could only reasonably be scheduled at least ten working days after the tabling of the motion. Agang's motion was not ripe for scheduling until it had been published on the order paper which occurred on 13 November 2014. Having complied with all procedural aspects relating to the notice of motion it could not reasonably be scheduled due to the full programme of the National Assembly and insufficient time to prepare for debate. The Speaker therefore decided to schedule the motion of no confidence early in 2015 after the President's State of the Nation address. Agang's suggestion, in the circumstances, that it could have been scheduled earlier was incorrect. On 19 and 20 November 2014 Agang accepted that the motion could not be scheduled, but changed its position the following day. There was clearly not sufficient time to prepare for debate. With regard to the time period within which to schedule the motion the Speaker submits that the applicants are wrong in their assertion that the rule has to specify a timeframe within which such motion should be debated since such assertion is not consistent with **Mazibuko**.

[17] The Speaker further contends that applicants are incorrect in their assertion that the requirement in NA Rule 102A (2) that the Speaker consult with the Leader of

Government Business and the Chief Whip of the Majority Party before scheduling a motion of no confidence in the President leaves the scheduling of a motion of no confidence within the gift of the majority party and is consequently at odds with the **Mazibuko** judgment. Both the Leader of Government Business and the Chief Whip play an indispensable role in the scheduling of Parliamentary Business, the attendance of Cabinet members thereat and specifically in the prioritisation of government business. The requirement of consultation in NA Rule 102A is in recognition of the importance of motions of no confidence and the serious consequences for the President, Cabinet and ruling party. There must be the requisite quorums and to the extent necessary, Cabinet members must be in attendance. Furthermore, in giving "*due priority*" to a motion of no confidence the Parliamentary schedule needs to be adapted or an extended sitting period may be required. The Chief Whip assumes a key role in this regard. Furthermore, that there is no merit in the applicants' submission in respect of subrules (3), (4) and (5) regarding the requisite requirements for the motion.

[18] The Speaker maintains that she had acted lawfully and constitutionally in scheduling the motion as soon as practically possible in terms of NA Rule 102A(7) and that her scheduling decision was therefore rational. Furthermore, she submits that any intervention by the Court regarding her decision on the scheduling and prioritisation of parliamentary business would infringe upon the principle of separation of powers.

[19] In reply Agang contends that the Order Paper should have been published on 6 November 2014 and the consultation process had to be embarked upon concurrently with the Speaker's duty under NA Rule 102A (3) to ensure compliance with relevant formal and substantive requirements and had to be attended to without

delay. The Speaker was reasonably capable of concluding proper consultation with the Chief Whip and Leader of Government Business after being duly notified of the motion on 4 November 2014 and scheduling the motion of no confidence, and could have convened a further plenary session. The fact that consultation takes place with the Chief Whip of the ruling party and the Leader of Government Business is inconsistent with the letter and spirit of the **Mazibuko** decision. The Leader of Government business, insofar as he holds high political office, will have to vacate his office in the event of a successful motion of no confidence in the President. Therefore he has a real interest in frustrating or unduly deferring the motion, or even preventing it from being debated and voted upon. The deficiencies in NA Rule 102A and how prone it is to abuse were manifested in the manner in which Agang's motion of no confidence was deferred to the following year.

[20] Applicants contend that the Speaker failed to provide any explanation why the "*committee oversight*" work scheduled for 25, 26 and 27 November 2014 was more important than the motion of no confidence or could not be rescheduled. The Speaker failed to demonstrate that the scheduled business was more important than the motion of no confidence, thus precluding rescheduling in order to accommodate the motion. The applicants argue that the Speaker offers vague statements to the effect that the National Assembly programme was "*very full with business*", declines to deal with the importance of each motion, and speculates that the rescheduling of work would not have created sufficient time for a debate and vote on the motion and states that the Joint Programme Committee agreed to an updated timetable as at 31 October 2014. However, this does not constitute a rational basis for not scheduling the motion by 28 November 2014. It was incumbent upon the Speaker to demonstrate that the specific scheduled items of business were more important than

the motion of no confidence in the President. The decision as to the scheduling of a motion of no confidence in the President is entirely that of "*loyal ANC cadres*", the accusation went; and that this was inconsistent with the multi-party system of democratic government in South Africa to ensure accountability, responsiveness and openness. The Speaker, they said, seeks to hide behind the doctrine of separation of powers by alluding to the Court second guessing her decision to schedule the motion.

Secret Ballot Relief

The Principal Submissions

[21] The applicants stated that the President is elected by the National Assembly under a secret ballot as ordained by the Constitution and should also, where he has lost the confidence of the majority of the National Assembly, be removed by secret ballot. They referred to various other jurisdictions where this is done. According to them there are cogent reasons why ANC members of the National Assembly will be frustrated in acting in accordance with their oaths of office and consciences since they genuinely fear expulsion from the party if they publicly support the motion of no confidence, which many ANC members would be inclined to do. The right to make and express democratic political choices can only be meaningful if persons can vote by way of secret ballot as expressly provided for in s 19(3) (a) of the Constitution[2] since this ensures that they can exercise their choice without fear of retribution. These provisions give effect to the Constitutional imperatives and international human rights law and norms relating to secrecy. It cannot conceivably be argued that they inhibit openness and transparency. By the same token a secret vote in respect

[2] Section 19 (3) (a) of the Constitution of the Republic of South Africa, Act No. 108 of 1996 provides that "Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret."

of a motion of no confidence in the President cannot be said to compromise openness and transparency. Furthermore NA Rules 77 to 93 do not make provision for a secret ballot. Any request for voting by secret ballot involves an eventuality which the Rules do not provide for and, that being the case, the Speaker would have the discretion in terms of NA Rule 2(1) to give a ruling and, if need be, frame a Rule.

[22] The Speaker submits that there is no legal basis for the applicants' declaratory order sought that the vote occurs by way of secret ballot. It is argued that neither the Constitution nor the NA Rules 77 to 93 which deal extensively with voting processes provide for voting by secret ballot. It is therefore argued that NA Rule 2(1) is not applicable and that the Speaker has no discretion to rule how voting should be undertaken in respect of a vote of no confidence in the President. Furthermore, any such requirement would be inconsistent with the requirements of transparency and openness in the functioning of the National Assembly.[3]

[23] In reply the applicants stated that they do not rely on the provisions of the Constitution or the Rules of the National Assembly with regard to secret ballot voting but on the overall structure of the system of democratic representation provided for in the Constitution. The principles of the Constitution and the Rules of the National Assembly must always be applied in such a manner as to render the mechanisms of accountability meaningful rather than nugatory. If mechanisms for effectuating the accountability of the President are implemented in such a fashion that, by all accounts, the outcome is a foregone conclusion, it runs contrary to democratic principles.

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[3] Sections 57(1)(b) and 59(1)(b) of the Constitution of the Republic of South Africa.

[24] Applicants concede that a secret ballot is not necessarily always mandatory, but the Speaker should on a case by case basis or on request be in a position to apply her mind and exercise a discretion as to whether a particular motion must be decided upon by secret ballot. NA Rule 2(1) covers matters not dealt with in the Rules, which would include whether or not voting in respect of a particular motion can be conducted by secret ballot.

[25] The Speaker can and must give a ruling by virtue of the authority vested in her by NA Rule 2(1). The Speaker's implicit denial that she has any discretion in this regard manifests her misapprehension of her powers. The presiding officer would be able to make a determination, after hearing the motivation for such a request, in terms of NA Rule 2(1) precisely because a secret ballot is not provided for in the Constitution or the Rules. The same applies for a request of recusal of the Speaker. Members should be allowed to present argument in support of or against such requests and the Speaker must then proceed to make an informed decision.

The Speaker's conduct

Applicants' submissions

[26] The applicants aver that the Speaker has lost the confidence of all opposition parties in the National Assembly due to perceived bias and partisanship towards the ruling party. It is alleged that the Speaker is ill-equipped to comply with the demanding standards associated with the high office of Speaker, and had acted contrary to the laws, norms, conventions and practices that require a legislature Speaker to maintain scrupulous neutrality, and keep an impeccable reputation for fairness and neutrality. The applicants contend that core aspects of the Speaker's

functioning are regulated by the so-called *lex parliamenti* which prescribes that the chairperson be completely impartial, unbiased and non-partisan, both inside and outside the Council Chamber. Applicants referred to the Westminster tradition where the chief characteristics attaching to the Speaker in the House of Commons are authority and impartiality. With reference to **Erskine May**[4] the applicants contend that confidence in the impartiality of the Speaker "*is an indispensable condition for the successful working of procedure"*. In the Westminster tradition the Speaker takes no part in debate and plays no active part in party politics. Applicants also referred to the requirements of impartiality in other jurisdictions such as India and Canada.

[27] The Applicants referred to **Brummer**, **NO v Mvimbi and Others**[5], an unreported judgment in this Division where the following was stated:

> **"The second is that core aspects of the Speaker's functioning are regulated by the common law which demands that the Speaker be completely impartial and non-partisan, both inside and outside the Council Chamber."**

[28] Reference was also made to the Supreme Court of Appeal's statement in **Gauteng Provincial Legislature v Kilian and Others**[6] where it was held that the Speaker "*is required by the duties of his office to exercise, and display, the impartiality of a Judge*". In paragraph 26 of the judgment Zulman JA stated:

> **"Referring to Redlich's Procedure of the House of Commons, Holdsworth comments that the position of the Speaker in relation to the law 'is strikingly similar to the relation of a Judge to the common law and to the rules of his Court'; ... these orders 'cover almost the whole field of the regulation of its business' ... Kiplin then states that: 'The**

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4 Erskine May, Parliamentary Practice (2004) 24 ed p.6
5 Brummer, NO v Mvimbi and Others 13535/2011 [2011] ZAWCHC 385 at para 48.
6 Gauteng Provincial Legislature v Kilian and Others 2001 (2) SA 68 (SCA) at 79 D.

plain fact is that Mr Speaker's duties are too numerous to set out in detail ... but they depend so much on tradition that no better summary can be given that that which May originally wrote'."

[29] Applicants therefore contend that these views expressed by the Courts are still operational after the commencement of the new constitutional dispensation. Reference was also made to a leading text, authored by George Bergougnous, titled **Presiding officers of National Parliamentary Assemblies**: **A World Comparative Study**[7], where he writes that '*the office of the Speaker calls for the utmost impartiality and implies that the holder of the office is capable of relinquishing his political affiliation to any party*' and even if the Speaker is involved in politics, he '*never appears as the sectarian and extreme representative of a party*" regardless of the nature of the political system. However, the Speaker admitted that she had projected herself as an '*unabashed protagonist of the ruling party'* and has shown herself to be manifestly unfit to hold the position she does.

[30] Applicants argued that the common law lives on in the new constitutional era and remains an important source of law as confirmed in **Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Another**[8] . The so-called common law of Parliament remains a source of law. Given the facts of this matter and the conventions which apply to the position of Speaker the present incumbent is clearly unfit to hold her position.

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7 G Bergougnous; 'Presiding officers of National Parliamentary Assemblies: A World Comparative Study' (1997) (Inter-Parliamentary Union, Geneva) at 97, 99.

8 Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Another 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 45.

[31] It was contended that the Speaker had issued a series of patently biased and unfair rulings within the National Assembly, she lacks the actual or perceived impartiality required of the Office of the Speaker by actively participating in political matters, attending meetings of her political party and actively canvassing voters on behalf of her party during election campaigns. The Speaker failed to place appropriate distance between herself and her political party after assuming office by remaining in position as Chairperson of the NEC of the ruling party. Furthermore, the Speaker had made public pronouncements unbecoming of the Office of the Speaker, including disparaging remarks about members of the National Assembly representing minority parties. The incumbent exercised her duties as Speaker in a partisan manner, thereby advancing the interests and political agenda of the majority party, more particularly by shielding the President and senior cabinet members from parliamentary oversight. It is therefore alleged that she violated the independence of the legislature by failing to hold the executive to account.

[32] Lastly on this aspect, it was submitted that the Speaker violated the principle of separation of powers by frustrating the legislature's constitutionally mandated function of providing checks and balances to ensure executive accountability; allowing the executive to unduly interfere with public access to and involvement in the National Assembly as enshrined in s 59 of the Constitution; directing the removal of opposition MP's from the House at the hands of the South African Police Services (SAPS), and failing to prevent the removal of others whose removal she had not ordered.

[33] In substantiation of the aforementioned the applicants referred to numerous events which transpired in the House; that on 21 August 2014 the Speaker shielded the President from answering questions in the House, disallowed follow-up questions

and ignored points of order, but permitted ANC members to address parliament. This resulted in disciplinary proceedings against 20 Economic Freedom Fighters (‘EFF”) MP’s which culminated in a decision of the National Assembly to suspend them without pay for 14-30 days.

[34] On 16 September 2014 during a sitting on a motion of no confidence in the Speaker, the incumbent remained in the House and sat next to Deputy President Ramaphosa while observing the proceedings. She also addressed supporters outside Parliament prior to the debate. On 13 November 2014 during a debate on the *ad hoc* committee report on Nkandla the Speaker unilaterally decided to change the programme due to alleged time constraints. Proceedings descended into chaos when the Speaker ignored objections and refused to acknowledge some MP’s and was insolent towards MP’s who expressed their views.

[35] The Speaker also failed to restrain herself on 26 November 2014 and pointed her finger at an EFF member indicating her displeasure when she was addressed by her first name. In January 2015 the Speaker attended the ANC’s 103rd birthday celebration and on 14 February 2015 she addressed the ANC North West Provincial Conference. In October 2014 and 14 February 2015 the Speaker made disparaging remarks of the EFF, and later withdrew one of the remarks for which she apologized on 18 February 2015 in a media statement. Applicants also expressed their dissatisfaction with the extra-parliamentary media statements made by the Speaker criticizing opposition parties and supporting the ruling party.

[36] Reference was also made to two events at the President’s State of the Nation Address (‘SONA’) on 12 February 2015. The first incident relates to the forceful removal of all EFF MP’s from the House by security officers. It is alleged that the

Speaker was complicit in their forced removal and expressed delight at the manner in which they were removed. The second incident involved a signal jamming device incident during SONA which prevented journalists from reporting due to lack of cell phone signals and which consequently censored media broadcasting of the event. The Speaker could not offer any satisfactory explanation as to who called for the jamming, who approved it and why the signal was jammed. The Speaker allowed members of the National Assembly to be forcibly removed from the House and provided an inadequate explanation for SONA events.

[37] Despite the criticism of the Speaker, applicants made it clear that they do not seek any relief in respect of specific rulings, statements and conduct of the Speaker, but believe such conduct, statements and rulings cumulatively demonstrate actual bias and partisanship. It is argued that the Speaker is reluctant to act with the necessary independence and impartiality in holding the executive to account. Furthermore, the conduct of the Speaker is inimical to the requirements of the Office of the Speaker. There is a well-grounded perception of bias, and applicants call into question her ability to apply the National Assembly Rules fairly and impartially, insofar as all opposition MP's are concerned. The applicants submit that the exercise of public power such as that conferred on the Speaker is only legitimate where lawful. The Courts have an oversight responsibility in respect of the actions of office bearers and officials attached to other branches of government. The doctrine of separation of powers is not a bar to the judiciary assessing, with reference to the relevant facts, whether or not the conduct of the Speaker complained of violated the legal rules which dictate what that conduct may or may not entail, and to make definitive judgments in that regard.

The Speaker's Response

[38] The Speaker contends that her eligibility for Office is derived from the Constitution itself. The South African political system is different from the Westminster tradition that requires that the incumbent must be fit and proper to hold Office as Speaker.

[39] The case of **Brummer**, **NO v Mvimbi and Others**[9] referred to by the applicants is correct in describing the Speaker as being an "*impartial moderator*" under a duty "*to apply standing orders fairly and equally at all times*". The Speaker maintains that the case of **Gauteng Provincial Legislature v Kilian and Others**[10] referred to by the applicants is correct to the extent that it requires the Speaker to discharge her functions impartially. However, **Kilian** overstates the position when it says the Speaker must "*exercise and display, the impartiality of a Judge".* The Office of Speaker is dissimilar to that of a Judge. The independence of the judiciary is constitutionally mandated. The Speaker, unlike a Judge, is required by the Constitution to be and remain a member of his or her political party represented in the National Assembly. The Speaker may also cast a deciding vote when needed. The same standard of impartiality of a Judge cannot apply equally to a Speaker, we were sought to be persuaded.

[40] It was submitted that any member who is dissatisfied with the conduct of the Speaker may challenge a ruling by taking the matter up with the Speaker privately or to refer the principle of the ruling to the Rules Committee for consideration. It is also possible for specific conduct of the Speaker to be taken on judicial review. The only

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9 Brummer, NO v Mvimbi and Others above n5 para 50, 52.
10 Gauteng Provincial Legislature v Kilian and Others above n6.

manner in which to challenge a perceived lack of impartiality on the part of the Speaker is authorized by the Constitution in terms of s 52(4) i.e. by tabling a motion of no confidence in the Speaker for resolution by the National Assembly. The corollary is that the incumbency of the Speaker may not be challenged in the Courts, except by way of proceedings for judicial review, on a legally cognisable basis, namely, an infringement of the implied constitutional requirements of legality or rationality of a decision by the National Assembly.

[41] The case for the Speaker was further that to be eligible for election as a Speaker, a candidate must be a Member of the National Assembly. The Speaker in South Africa is not required to sever her or his political ties and the position is thus not inherently non-partisan. The Speaker's right to participate in political affairs of a political party is guaranteed in s 19(1)(b) and (c) of the Constitution, which right vest in every citizen, including the Speaker.

[42] The following distinction was sought to be drawn on behalf of the Speaker between her political office as National Chairperson and as presiding officer of the National Assembly. The functions of Chairperson of the NEC are distinct from those of the Speaker. There is no constitutional or legal impediment to the Speaker attending meetings of the ANC, participating in activities and programmes of the ANC, campaigning during election campaigns and addressing meetings of the ANC to advance its interests. The applicants failed to address the separate and distinct functions and duties required of her as Chairperson of the NEC on the one hand, and Speaker on the other. The first respondent does not participate in ANC political events in her capacity as Speaker. The fact that the Speaker is not distancing herself from the ANC outside Parliament does not constitute a basis on which to render her not fit and proper to be Speaker.

[43] The Speaker disputed allegations made against her with regards to her conduct in the House on various occasions. According to her on 21 August 2014 the EFF members engaged in disruptive conduct and hampered the effective parliamentary business. The Rules of the House and her rulings were ignored and the Speaker eventually suspended the proceedings, as she was entitled to do in terms of NA Rule 56. The Speaker confirmed that on the same day she exercised her power in terms of NA Rule 113 (4) to limit the number of supplementary questions to the President which was a regular occurrence. There is no merit in the averment that it was done in an attempt to hamper effective parliamentary oversight or to shield the President from answering questions. There is no factual basis on which to find that the Speaker did not act impartially, fairly, equitably and without bias.

[44] The Speaker admits that she addressed a crowd outside Parliament on 16 September 2014 prior to its sitting. Groups of women gathered outside Parliament on their own accord to show support for her. She believed it would have been ungracious of her not to have acknowledged their presence. There was nothing improper about her conduct.

[45] The Speaker also admits taking up a seat in the National Assembly next to the Deputy President during the debate on 16 September 2014 on the motion of no-confidence in her. She had elected to remain in the House since there is no specific requirement that she absent herself from the National Assembly Chamber during the debate. All members of the National Assembly, including the Speaker, are allocated seats in the House. Her seat happens to be next to that of the Deputy President.

[46] On 13 November 2014 the Programme Committee scheduled 38 Committee Reports and more than 200 motions which were not appropriate for the effective and proper running of the business of the House. The Speaker sought to make a ruling at the commencement of the proceedings to limit the time in which the motions were to be given, and proposed that some of the Committee Reports be deferred to a later occasion. There was opposition to her ruling but it is an overstatement to say that the proceedings descended into chaos. She concedes that she had made certain remarks but claims they were in jest and not intended to insult. The Speaker also confirmed that an EFF member was removed by the House Chair in circumstances which warranted such intervention due to her refusal to obey certain rulings.

[47] The Speaker furthermore admits that on 26 November 2014 she responded to an EFF member in a firm and authoritative manner. The member referred to her by her first name which was improper, disrespectful and unparliamentary in the circumstances. There is no basis to impugn the Speaker for rebuking the member.

[48] With regard to the two incidents at SONA on 12 February 2015 the Speaker contends that she cannot be sanctioned for her handling of the difficult series of events. She disputes the allegations made against her and insists that she was not aware of the imposition of the signal jammer. As soon as the issue was raised she took action and the signal was eventually restored. She reiterated that she considers the use of the signal jammer to be a breach of the right to freedom of expression and open access to Parliament.

[49] Furthermore, certain members of the EFF became disruptive in Parliament and were ordered to leave the Chamber, but they refused and resisted attempts to be removed by the Sergeant-at-Arms. Consequently, the Usher of the Black Rod and

Parliamentary Protection officers were called to assist. When the EFF members put up forceful resistance the security services were called to assist in terms of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004. The Speaker did not observe any guards attacking EFF members from behind. Her general impression was that the struggles that ensued were precipitated by the intransigence of the EFF members.

[50] The Speaker admits that she made a disparaging remark concerning Mr Malema of the EFF. However, on 18 February 2015 she unreservedly apologized for her extra-parliamentary conduct. The apology was accepted by Mr Malema. The Speaker therefore contends that the prompt apology and one error do not demonstrate incompetence or disqualify her as a Speaker. The Speaker further denies that she made inappropriate media statements which created the perception of lack of impartiality.

[51] The Speaker in addition disputes allegations of improper conduct on 3 March 2015 when Agang withdrew the motion. There was initially confusion on the status of the motion since Agang had not delivered a written notice of withdrawal to the secretary in order to withdraw the motion. It was accepted that Agang had not formally moved the motion. Consequently the Speaker allowed the Whips of the largest parties in the National Assembly to consult among themselves. The Speaker concedes that she refused to allow Agang to raise a point of order since she was seeking advice at the time. A ruling was made in Agang's favour and it was permitted to withdraw the motion. Agang belatedly withdrew the motion due to the Speaker's refusal to accede to his requests that she recuse herself and allow voting by secret ballot. The Speaker says she acted reasonably and cannot be castigated for criticizing Agang for wasting the National Assembly's time. The Speaker submits

that she accepts that her incumbency of the Office of the Speaker entails neutrality and non-partisanship and contends that at all times she executed her duties as Speaker in accordance with her oath of Office, applicable legislation of the Republic of South Africa, Rules and Orders of Parliament and the Constitution.

[52] The Speaker highlighted the fact that parliamentary oversight over the executive is an integral part of the parliamentary system and it is entrenched in the Constitution and given effect to in the Rules of the National Assembly. With regard to the President's obligation to attend Parliament to answer questions, the Speaker contends that she had at all times acted in accordance with the Rules and her approach had been reasonable and sound.

[53] In reply the applicants contend that the Speaker's party-political affiliation and extra-parliamentary activities and statements necessarily inform her conduct in the House, which in turn informs the way she is viewed by Members of Parliament, the electorate, the media and the public at large. The Speaker's prominent participation in political party activities outside the National Assembly cannot be considered in isolation from party political battles as they unfold in the National Assembly. Consequently whatever transpires in the National Assembly will colour the Speaker's conduct and statements in the public arena.

[54] Applicants do not hold the view that the Speaker must sever all ties with her political party. It is conceded that she may remain a member of her party. However, her party-political activity must not be such as to create the impression that she is unlikely to preside fairly and impartially in the National Assembly. This has always been the position and has remained the position in the new political dispensation.

[55] It was further argued that the common law remains an important source of law in the new Constitutional era. The Speaker cannot dismiss references to the history of the Office of the Speaker as unhelpful. The position of Speaker in South Africa was modelled on that of the United Kingdom hence the Speaker wrongly maintains that the new dispensation entirely abolished the Westminster system in South Africa, more particularly the functions of the Speaker. The requirements of fairness and impartiality attaching to the Office of the Speaker are indispensable to the principles of a transparent representative democracy and executive accountability that lie at the heart of the Constitution. The Constitutional Court, in **Mazibuko,** pertinently considered the manner in which a motion of no confidence is handled in England, France and Australia.

[56] The Speaker is disingenuous, it was contended, in invoking the provisions of s 19(1) (b) of the Constitution to justify her right to participate in political activity. A Speaker's rights become limited upon being elected to occupy that position. The Speaker does not discern that her office demands different standards and her contention that no Court of law can declare her unfit for office flies in the face of the doctrine of legality. Furthermore, the doctrine of separation of powers is not an absolute bar to judicial intervention, the applicants argued.

The submissions by Second Respondent (the President)

[57] The President argued broadly on salient issues regarding the relief sought and aligned his argument with those of the Speaker. He reminded the Court that declaratory relief is discretionary and granted in very limited circumstances. He submitted, furthermore, that the court should not sanction a vote by secret ballot

since it would go beyond the intra-parliamentary procedures for debate on the issues. With reference to s 59(1)(b) of the Constitution it was contended that the National Assembly should conduct its affairs openly as compared to a secret ballot order which is aimed at undermining a constitutionally ordained electoral system based on the political party list system of proportional representation provided for in s 47(3)(c) of the Constitution, as well as s 57A read with schedule 1A to the Electoral Act, 73 of 1998. It was submitted that it is undesirable for the courts to regulate the processes of the National Assembly and that the order seeking intervention by the court to sanction a secret balloting procedure will impermissibly trench upon the doctrine of separation of powers not envisaged by the Constitution.

[58] The President further contends that the applicants misconstrue the role and Office of the Speaker by relying on pre-constitutional authorities. Such pre-constitutional common law judicial determinations must be viewed against the backdrop of their constitutional settings which are broadly different from the norms our new Constitution order posits. Furthermore, any foreign law references should be dealt with cautiously. It was also contended that the orders proposed in relation to the scheduling of the motion of no confidence have become moot due to the withdrawal of the motion by Agang. Lastly, it was submitted that the Speaker has no power to Rule that a motion of no confidence in the President should be held by secret ballot.

Overview of Constitutional and Legislative Framework

[59] South Africa is founded on the principles of Constitutional supremacy, the rule of law, the doctrine of separation of powers between the legislature, the executive

and the judiciary, protection of human rights as well as an independent judiciary.[11] According to **Seedorf and Sibanda[12]** separation of powers means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence and jurisdiction. They continue as follows:

> **"Separation of public powers is, in short, separation of public institutions (legislature, executive and judiciary) and of public functions, ie the making of law, law application and execution, and dispute resolution.[13]**

[60] The doctrine of separation of powers system originates from Constitutional Principle VI of the Interim Constitution of 1993 which provided that *'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*' The final Constitution adopted in 1996 had to give effect to this principle. The separation of powers is premised on the principle that each branch of government is independent, has a separate function and unique powers that the others cannot infringe upon. The doctrine therefore recognizes the functional independence of the three branches of government, namely, the legislature, the executive and the judiciary. In other words it recognizes that there is a division of tasks between those institutions which make the law, those which implement the law and those which enforce the law. One should not usurp the functions and responsibilities of the other. The three branches are not hermetically sealed from each other and exhibit a degree of overlap.[14]

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[11] The Constitution of the Republic of South Africa, Act 108 of 1996: Chapter 1 (the founding values).
[12] Sebastian Seedorf & Sanele Sibanda "Separation of Powers" in Woolman et al (eds) Constitutional Law of South Africa, revision service 6: April 2014, Vol 1, Chapter 12, p.12-1.
[13] Id at p.12-2.
[14] O' Reagan K, "Checks and Balances: Reflections on the Development of the doctrine of separation of powers under the South African Constitution" PER 2005 (8) 1 at 125/150.

[61] The limitations on the doctrine of separation of powers emerge clearly from the First Certification Judgment[15], particularly where the Constitutional Court stated as follows:

> **"There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute ...**
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> **The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."**

[62] The Constitution does not explicitly mention the principle of '*separation of powers',* but the constitutional design clearly embraces and entrenches it. In early accounts such as **Montesquieu's** *The Spirit of the Laws*[16] the separation of powers or "*trias politica"* was intended to guard against tyranny and preserve liberty. The objective of separation of powers is to '*secure the freedom of every citizen by seeking to avoid an excessive concentration of power, which can lead to abuse, in one person or body'*.[17] The doctrine of separation of powers may be violated if one branch interferes impermissibly with another's performance of its constitutionally mandated functions or when one branch assumes a function that is entrusted to another. Section 165 of the Constitution vests judicial authority in the courts and

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[15] *Ex Parte* Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC); 1996(10) BCLR 1253 (CC) para 108 – 109.

[16] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws 1748.*

[17] Pius Langa, "The separation of powers in the South African Constitution" (2006) 22 SAJHR 2 at 4.

renders them "*independent and subject only to the Constitution and the law*". Section 172 grants the judiciary the power to scrutinize the conduct of the other two branches of government and declare any law or conduct inconsistent with the Constitution invalid. Judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of power among the three branches of government.

[63] The principle of separation of powers has been traversed in a '*steady trickle'* of judgments and is '*part of our constitutional architecture'*.[18] In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others**, Moseneke DCJ emphasized this doctrine as a vital tenet of our constitutional democracy.[19] The paramountcy of the Constitution, also with regard to proceedings in Parliament and judicial oversight of such proceedings, was emphasised by Mahomed CJ in **Speaker of the National Assembly v De Lille and Another,[20]** as follows:

> **"This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. *It* is Supreme – not Parliament. It is the ultimate source of all lawful authority in the country. 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 Court. No**

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[18] International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 91.

[19] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 at para 44.

[20] Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA) at para 14.

Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

[64] In **South African Association of Personal Injury Lawyers v Heath and Others,**[21] the Constitutional Court stated that the courts do not only have the right to intervene in order to prevent the violation of the Constitution, but also have a duty to do so. At para 25 it was stated as follows:

"The separation of the Judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures ... Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent." (my emphasis).

[65] An independent judiciary is an essential part of the separation of powers and the independence of the courts is protected by the Constitution which acts as a safeguard against interference with its functioning.[22] In **Minister of Health and Others v Treatment Action Campaign and Others,**[23] the court held that:

"The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the State to 'respect, protect, promote, and fulfill the rights in the Bill of Rights'. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in

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[21] South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).

[22] Section 165 (4) of the Constitution. Also see Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 38.

[23] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721(CC); 2002 (10) BCLR 1033 (CC) at para 99.

formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself."

[66] In **Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)**[24] the Court stated that:

"In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the Judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the Judiciary, in its comments about the other arms of the State, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the Judiciary and one another."

[67] In **Doctors for Life International v Speaker of the National Assembly and Others**[25] in considering parliament's primary function, the Constitutional Court held that Parliament has a very special role to play in our constitutional democracy because it is the principle legislative organ of State. With regard to its role, it must be free to carry out its functions without interference. The Court made these points at para [37] and [38]:

"[37] The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in

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[24] Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 48.

[25] Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

[38] But under our Constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution' ... This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'."

[68] In **Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others**[26] and **Carmichele v Minister of Safety and Security and Minister of Justice and Constitutional Development** [27] the Constitutional Court established that there is no executive, administrative, parliamentary or judicial conduct, and no law whatsoever, including amendments to the Constitution (which are, at the very least, subject to procedural review), that escape constitutional scrutiny.[28] The Court in **Glenister v President of the Republic of South Africa and Others**[29] at para [33] and [44] held that:

"[33] … It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within

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[26] Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[27] Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

[28] Sebastian Seedorf and Sanele Sibanda above n12 at p.12 -51.

[29] Glenister v President of the Republic of South Africa and Others 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.

[44] ... While duty-bound to safeguard the Constitution, [the Courts] are also required not to encroach on the powers of the executive and legislature."

[69] In our constitutional democracy all public power is subject to constitutional control.[30] The exercise of public power is only legitimate where it is lawful and this principle of legality is generally understood to be a fundamental principle of constitutional law.[31] Further, Chaskalson CJ in **Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa**[32] held that:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[70] In **Affordable Medicines Trust and Others v Minister of Health and Others**[33] the Constitutional Court succinctly summarized the doctrine of legality at para [48], [49] and [86]:

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[30] Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Another 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 19-20; Doctors for Life International v Speaker of the National Assembly and Others above n25 at para 38.

[31] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[32] Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa n30 para 85; Also see: Democratic Alliance v Ethekwini Municipality 2012 (2) SA 151 (SCA) at para 21.

[33] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

"[48] ... This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.

[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality ... is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.' In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

[86] ... The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society ... "

[71] As far as the application of the doctrine of separation of powers and the rule of law is concerned, the Constitutional Court has confirmed in **Democratic Alliance v President of the Republic of South Africa and Others**[34] at para [41] and [42] that:

"[41] …The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large ...

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[34] Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

> **[42] It is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions: It has been described by this Court as the 'minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.' And the rationale for this test is 'to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'."**

[72] Parliament's power and privilege to determine its own proceedings and procedures is derived from s 57 of the Constitution. Section 57(1)(a) and (b) of the Constitution provides that the National Assembly may determine and control its own internal arrangements, proceedings and procedures and may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.[35] In **Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development**[36] the court stated the following with regard to the provisions of s 57:

> **"It is clear that this provision confers a power upon the National Assembly to regulate its internal proceedings, business and working committees. However, that power must be read in the context of the other provisions of the Constitution regulating the National Assembly, such as the regulation of the election and removal of the Speaker and Deputy-Speaker, the regulation of the voting procedures and quorums in the National Assembly and the regulation of public access to the National Assembly. In addition, it should be noted that in the case of the national Legislature, the election, appointment and functioning of what**

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[35] See also: Oriani-Ambrosini v Sisulu, The Speaker of the National Assembly 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at paras 60- 65; Doctors for Life International v Speaker of the National Assembly and Others above n25 at para 123.

[36] Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council, Kwazulu Natal v President of the Republic of South Africa and Others 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 100.

is, in effect, its executive committee, the President and Cabinet, is fully regulated by s 83 - 102."

[73] The provisions of s 57 which make the National Assembly the master of its internal processes was interpreted by the Constitutional Court in **Oriani- Ambrosini v Sisulu, The Speaker of the National Assembly**[37] at para [61] and [62] as follows:

"[61] The words 'arrangements, proceedings and procedures' indicate that the Assembly's power to make rules is limited to the regulation of process and form, as opposed to content and substance.

[62] Of further importance is that the power of the National Assembly to 'make rules ... concerning its business' must be exercised 'with due regard to representative and participatory democracy, accountability, transparency and public involvement'. Equally significant is the need for the rules to cater for 'the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy'…"

[74] The Court in **De Lille and Another v Speaker of the National Assembly,**[38] held that all acts and decisions of Parliament are subject to the Constitution and therefore subject to review by the courts. The court emphasized that while section 57(1) permits Parliament to determine and control its internal arrangements, '*It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution'.* The Court went further to say that, '*It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.'*

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[37] Oriani-Ambrosini v Sisulu, The Speaker of the National Assembly above n35.
[38] De Lille and Another v Speaker of the National Assembly 1998 (3) SA 430 (C) at para 25.

The Office of the Speaker of Parliament in South Africa

[75] The Office of the Speaker occupies a pivotal position in achieving and sustaining a vigorous and healthy system of a vibrant parliamentary democracy. The Speaker's powers, functions and duties are traditional and ceremonial, statutory, procedural and administrative. In regulating the conduct and debate in the National Assembly the Speaker is guided by the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No. 4 of 2004, as well as the Constitution, the Rules of the National Assembly and the Joint Rules of Parliament and Standing Orders. These powers and duties are set out in detail in the National Assembly Guide to Procedure 2004 and essentially fall into three main categories:

75.1 Presiding over sittings of the National Assembly, maintaining order and applying and interpreting its Rules, Orders, precedents, conventions and practices;

75.2 Acting as a representative and spokesperson for the National Assembly with the Chairperson of the National Council of Provinces ('NCOP') for Parliament; and

75.3 As the Leader of the National Assembly, acting as the administrative head and serving as the executive authority of Parliament.

[76] The task of the Speaker to chair plenary meetings of the National Assembly entails maintaining order, interpreting and ensuring compliance with the rules and practices of the National Assembly, and in general ensuring the smooth conduct of proceedings. The Speaker interprets and applies the Rules, responds to members' points of order and gives rulings where necessary. In giving a ruling on procedure either at his or her own initiative or in response to a point of order the Speaker is guided by the Rules, conventions, practices as well as precedent. The Speaker may

also give a ruling or frame a rule to cover a situation for which the Rules of the National Assembly do not provide and such a rule remains in force until considered by the Rules Committee. In the performance of his or her duties, he or she is required to show complete impartiality and give a completely objective interpretation of the rules and practice. The Speaker has final authority in enforcing and interpreting the rules of the National Assembly.

[77] One of the Speaker's vital functions is to maintain order in the National Assembly. It is the Speaker's responsibility to enforce rules for preserving order in parliamentary proceedings. The Rules provide the Speaker with disciplinary powers of varying severity to enable him or her to deal with various situations appropriately. It is customary, however, for such powers to be used sparingly. The Speaker is required to act fairly and impartially and ensure that the rights of all parties, including minority parties, are protected. When presiding over sittings of the National Assembly the Speaker should guard and protect the members' rights of political expression entrenched in the Constitution.

[78] The Speaker represents the National Assembly in its interactions with the President, other organs of State, judiciary, public, media and international bodies or States. While members of Parliament represent their individual constituencies, the Speaker represents the full authority of the House itself. The Speaker therefore speaks for the House as a whole and must make decisions that are in the best interest of the National Assembly as a whole. By common consent the Speaker's judgment is normally unquestioned and the Speaker is looked upon as the guardian of parliamentary democracy.

[79] The legal system of South Africa has developed a strong set of traditions concerning the Speaker of Parliament which were retained from the Westminster system of government. According to these traditions the Speaker of Parliament must maintain the neutrality of the office, must act with fairness, without favouritism and with impartiality. The 2004 Guide to National Assembly Procedure states explicitly that the role of the Speaker must be executed in a manner that displays fairness, impartiality, protects the rights of all parties and advances the interests of Parliament.

[80] Section 52(1) read with subsection 4 of the Constitution of the Republic of South Africa[39] provides that the National Assembly must elect a Speaker from among its members and that the Speaker may be removed from the office by a resolution of the House, provided a majority of the members of the National Assembly are present. The Speaker holds office for the duration of the term of an Assembly, and ceases to hold office when he or she ceases to be a member of the Assembly.

[81] There are clear indications in the Rules, Constitution and court judgments that the Speaker is required to be independent, impartial and fair. The Supreme Court of Appeal in **Gauteng Provincial Legislature v Kilian**[40] explained that the Speaker '*should not submit to [political pressure]. He is required by the duties of his office to exercise, and display, the impartiality of a judge*'. In **Lekota and Another v Speaker, National Assembly and Another**[41] the court held 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'.*

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[39] The Constitution of the Republic of South Africa, Act No. 108 of 1996. See also the Rules of the National Assembly, 8th ed, February 2014.

[40] Gauteng Provincial Legislature v Kilian above n6 para 30.

[41] Lekota and Another v Speaker, National Assembly and Another 2015 (4) SA 133 (WCC) at para 11.

[82] The South African Constitution and Rules of Parliament do not give clear guidelines regarding the most appropriate manner to protect the Speaker's impartiality and do not require the Speaker to resign from a political party. There are no provisions in the Constitution which specifically deal with the role and powers of the Speaker. However, as administrative leader of the National Assembly, the Speaker has an implicit duty to uphold the dignity and authority of the Assembly, thereby enhancing its ability to fulfill its constitutional mandate to pass legislation in a manner that promotes a participatory and representative democracy, and to hold the executive to account.

Does Rule 102A adequately address the defects identified in Mazibuko

[83] Section 102(2) of the Constitution provides for parliamentary control over the executive and provides for a vote of no confidence directed against the President in the following terms:

> **'If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.'**

[84] The Constitution does not prescribe the procedure or any substantive requirements for a motion of no confidence in the President. Section 102(2) must be read in conjunction with s 57(1)(a) of the Constitution which provides that *"The National Assembly may determine and control its internal arrangements, proceedings and procedures".* It follows from s 57(1) of the Constitution that it is the National Assembly which must determine and control the "*arrangements, proceedings and*

procedures" for a motion of no confidence in the President and further that it may do so in its "*rules and orders concerning its business."*

[85] In **Mazibuko** a constitutional challenge arose out of the fact that Chapter 12 of the National Assembly Rules conferred on the Programme Committee the power to decide whether a motion of no confidence should be scheduled for debate before the National Assembly[42]; provided that any question before the Committee must be decided by majority vote[43]; and consequently allowed a majority in the Committee to block an effort to schedule a motion of no confidence for debate in the National Assembly[44]. The Constitutional Court found it is inimical to the vital purpose of s 102(2) of the Constitution that a motion of no confidence in the President will reach the National Assembly only if the majority in the Programme Committee agree to its scheduling[45]. The Constitutional Court found that Chapter 12 of the Rules of the National Assembly was inconsistent with the Constitution to the extent that it did not fully provide for the considerations of motions of no confidence by the National Assembly envisaged in s 102 (2). The rules did not properly allow for a member or political party represented in the Assembly to vindicate the right to have a motion of no confidence in the President scheduled for debate and voted upon in the National Assembly within a reasonable time, or at all.[46]

[86] The Constitutional Court held that a motion of no confidence is a "*vital tool to advance our democratic hygiene"*[47] and emphasized the vital purpose of motions of no confidence, which ensure that the President and executive are accountable to the

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42 Mazibuko above n1 at para 28 and 48.
43 Mazibuko above n1 at para 50.
44 Mazibuko above n1 at para 51.
45 Mazibuko above n1 at para 57.
46 Mazibuko above n1 at para 61 and 82.4.
47 Mazibuko n1 at para 43.

Assembly made up of elected representatives.[48] The Court stated that a vital constitutional entitlement to move a motion of no confidence in the President cannot be left to the whim or discretion of the majority or minority of members serving on the programme committee or any other committee of the National Assembly. The Court held that a vote of no confidence in the President must occur in the National Assembly itself[49] and that:

86.1 Any member of the National Assembly has the right to formulate and request to have a motion of no confidence serve before and voted for in the National Assembly.[50]

86.2 The Constitution requires that the National Assembly must have a procedure or process which would permit its members to deliberate and vote on a motion of no confidence in the President.[51]

86.3 In order for members of the National Assembly to vote on a motion, the rules of the National Assembly must permit a motion of no confidence in the President to be formulated, brought to the notice of members of the Assembly, tabled for discussion and voted for in the Assembly.[52]

[87] The National Assembly therefore introduced NA Rule 102A(1) to give effect to the **Mazibuko** directives. The rule provides that any member may formulate and request to have a motion of no confidence served before and voted for in the National Assembly. This rule also provides for the motion to be brought to the notice of members of the National Assembly. This is clearly in compliance with the Constitutional Court's directives in **Mazibuko.**

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48 Mazibuko n1 at para 43.
49 Mazibuko n1 at para 58.
50 Mazibuko n1 at para 41.
51 Mazibuko n1 at para 41.
52 Mazibuko n1 at para 41

[88] NA Rule 102A(2) makes provision for consultation with the Leader of Government Business and the Chief Whip of the Majority Party. The Constitutional Court was mindful of the serious consequences of a vote of no confidence for the President, cabinet ministers and the ruling party. If the motion is adopted this usually entails that the President and his cabinet ministers have to resign, since the executive needs the support of the majority of members in Parliament to remain in power. Consequently, it was observed by the Constitutional Court that all concerned in the National Assembly must be afforded the space to consider and prepare for the pending debate on the motion.[53]

[89] In terms of the Rules of the National Assembly, the Chief Whip (a term which is defined as the Chief Whip of the majority party) is accorded a specific role in respect of the arrangement of business on the Order Paper. NA Rule 222 provides:

> *"222. Arrangement of business on Order Paper*
> *The Chief Whip must arrange the business of the Assembly on the Order Paper, subject to these Rules, the directives of the Programme Committee and the concurrence of the Leader of Government Business when any government business is prioritised*."

[90] The Office of the Leader of Government Business is established by the Joint Rules, namely Joint Rule 149. The incumbent must be a Cabinet member designated by the President (currently Deputy President Ramaphosa). The Joint Rules provide that the Leader of Government Business in Parliament is responsible for:

90.1 The affairs of the National Executive in Parliament (which includes the President);

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[53] Mazibuko above n1 at para 65

90.2 The programming of Parliamentary business initiated by the National Executive, within the time allocated for that purpose;

90.3 Arranging the attendance of Cabinet members, as appropriate, in respect of parliamentary business generally; and

90.4 Performing any other function provided for by the Rules or a resolution of the National Assembly or the Council or resolutions adopted in both Houses.

[91] NA Rule 190 provides that the Programme Committee may take decisions and issue directives and guidelines to prioritise or postpone any business of the National Assembly, but when the Committee prioritises or postpones any government business in the National Assembly it must act with the concurrence of the Leader of Government Business. It can therefore not be disputed that both the Leader of Government Business and the Chief Whip play an indispensable part in the scheduling of Parliamentary business and specifically in the prioritization of Government Business.

[92] The requirement that the Speaker must consult with the Chief Whip and the Leader of Government Business does not mean their concurrence is necessary. The Courts have held as follows in regard to the meaning of the act of consultation:

92.1 The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice.[54] It would normally be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered.[55]

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[54] Maqoma v Sebe NO and Another 1987 (1) SA 483 (Ck) at 491 E.
[55] Hayes and Another v Minister of Housing, Planning and Administration, Western Cape, and Others 1999 (4) SA 1229 (C) at 1242 H.

92.2 Consultation entails a process in which more than one person confers in the sense of applying their minds together to consider the pros and cons of a matter. It may be formal or informal or oral or in writing. The essence of consultation is a communication of ideas on a reciprocal basis. The procedure is in the discretion of the person who has to consult. The procedure must, however, allow reasonable opportunity to both sides (the consulting and the consulted parties) to communicate effectively and achieve the purpose for which prior consultation is prescribed.[56]

92.3 The form of consultation is usually not important as long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another.[57]

[93] NA Rule 102A(2) merely means that the Speaker must consult and give serious consideration to the views of the Chief Whip and the Leader of Government Business. The fact that the Speaker is required to consult with the Chief Whip and the Leader of Government Business does not detract from her obligation to schedule the motion with "*due priority*" irrespective of whether or not they support its scheduling. The consultation procedure does not grant the Speaker, the Chief Whip or the Leader of Government Business a discretion to deny the scheduling of the motion. On a proper interpretation of NA Rule 102A the Speaker is obliged to accord a motion of no confidence priority notwithstanding the consultation process and must ensure that the motion is scheduled, debated and voted on within a reasonable period. Considering the relevant roles of the Chief Whip and the Leader of government business in the National Assembly, I am of the view that the Speaker's obligation to consult with both of them is considerably reasonable and rational. There is no substance in the allegation that the NA Rule 102A(2) is vulnerable to

[56] Maqoma above n54 as summarized in S v Smit 2008 (1) SA 135 (T) at 152.
[57] Hayes above n55 at 1242 J to 1243 A.

manipulation and procrastination. There is no evidence that the consultation procedure is designed to unreasonably delay, postpone, or frustrate the tabling and scheduling of a motion of no confidence.[58] These are bald and unsubstantiated averments.

[94] It was contended by the applicants that NA Rule 102A makes no provision for minority participation in deciding when a vote of no confidence should be scheduled. According to applicants there must be room for minority participation in the enrolment of a motion of no confidence. The Programme Committee on which minorities are represented was effectively ousted and only those affected by the vote are now to be consulted, and consequently the prioritisation of a motion of no confidence is within the gift of the majority. I am mindful of the views expressed by Moegoeng CJ in **Oriani-Ambrosini v Sisulu**, **The Speaker of the National Assembly**[59] regarding the participation of minority parties represented in the National Assembly in decision-making processes. I am therefore aware that our democracy values fair and equal participation in the processes that lead to the decisions that are ultimately taken in Parliament. While the majority ultimately decides what the decision is, the minority must have a fair opportunity to take part in the deliberation that leads to the decision. As stated by Sachs J in **Democratic Alliance v Masondo,**[60] *"It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but minority groups as well. ... Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding."*

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58 Mazibuko above n1 at para 4.7
59 Oriani-Ambrosini v Sisulu, The Speaker of the National Assembly above n35.
60 Democratic Alliance and Another v Masondo NO and Another 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at p.140I-141 B para 43.

[95] On a proper construction of NA Rule 102A, it is the Speaker that is responsible for the scheduling of the motion of no confidence. The consensus requirement which previously benefited the majority within the Programme Committee has effectively been removed.[61] The Rule provides that the motion **must** be scheduled for debate and it **must** be done within a reasonable time. The decision-making process for the tabling and scheduling of a vote of no confidence is no longer at the discretion of the majority or minority since the provisions of NA Rule 102A(5) are peremptory. The applicants' contention that the scheduling of a motion of no confidence is effectively left in the hands of the ruling party is therefore unfounded. I am satisfied that the exclusion of minority parties in the consultation process with regard to the scheduling decision does not undermine the rights of minority parties. The Speaker is obliged as administrative head of the National Assembly to schedule the motion upon compliance with relevant prescripts of NA Rule 102A. In the event of the Speaker failing to comply with her scheduling obligations in terms of NA Rule 102A her conduct may be subjected to judicial review.

[96] NA Rule 102A (3) to (5) require that the Speaker be satisfied that the motion of no confidence in the President complies with certain prescripts, and further that the motion must include the grounds on which the motion is based. It is alleged that these subrules are also inconsistent with **Mazibuko** in that they provide too much scope for manipulation and procrastination. Furthermore they are alleged to be unnecessarily restrictive in as much as they require grounds on which the motion of no confidence is based to be included in the motion. In my view these requirements are indeed necessary for the purposes of preparing adequately for debate on the motion. The inclusion of the grounds as required by Rule 102A(3) promotes an open and transparent process where all members can discern the precise nature and

[61] Mazibuko above n1 at para 62.

reasons for the motion. These provisions did not pose any problems for Agang and the motion tabled on 4 November 2014 was not rendered deficient and did not require any amendment as contemplated in NA Rule 102A(4).

[97] Furthermore, none of the standards and measures provided for in the sub rules exceed the proper bounds of the regulation of the exercise of the right of any member of the National Assembly to formulate a motion of no confidence and have it debated and determined by the National Assembly. These elements of NA Rule 102A significantly constrain and condition the exercise of the discretion conferred on the Speaker. In my view none of the requirements outlining the necessary standards to be complied with before consideration for scheduling the motion are unnecessarily restrictive. Applicants' contentions with regard to the relevant prescripts of the rules cannot be sustained. I am satisfied that members will be able to discern with reasonable certainty what is required by them so that they may regulate their conduct accordingly.[62] I am therefore satisfied that subparagraphs (3), (4) and (5) are compliant with **Mazibuko** and withstand scrutiny.

[98] The Constitutional Court did not prescribe preconditions or a predetermined time within which a motion of no confidence should be scheduled and voted on by the National Assembly. It appears that the Constitutional Court specifically refrained from imposing a specific time requirement. In **Mazibuko** the Constitutional Court deemed it unnecessary to go as far as the High Court where it was held that a vote of no confidence in the President "*is inherently urgent*", but rather found it sufficient to say that the motion must be accorded priority.[63] The Court noted that the Constitution does not set a time or preconditions for when the National Assembly may vote on a

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[62] Affordable Medicines Trust and Others v Minister of Health and Others above n33 at para 108.
[63] Mazibuko above n1 at para 66.

motion of no confidence in the President.[64] The Court also stated that when a member or a political party within the National Assembly, acting alone or in concert with other members of the National Assembly, tables a motion of no confidence in terms of s 102(2) in accordance with the rules, the motion deserves the serious and prompt attention of the responsible committee or committees of the National Assembly and, in the last resort, of the National Assembly itself.[65] The Court also reasoned that the urgency of a motion of no confidence in the President must be coloured by the consideration that the National Assembly has the constitutional authority to "*determine and control its internal arrangements, proceedings and procedures*"[66]. The Court found that it is sufficient that the motion be accorded priority over other motions and business by being scheduled, debated and voted on within a reasonable time given the programme of the National Assembly.[67]

[99] The Constitutional Court specifically refrained from imposing a specific time requirement within which such a motion has to be scheduled, debated and voted on. If this Court were to prescribe a specific period within which to schedule a debate on a motion of no confidence it would be unduly prescriptive to the Speaker and the National Assembly as to how and when to schedule its own business. It is not competent for this Court to dictate specific time periods to the National Assembly and interfere with the business of the National Assembly in such a manner. In doing so the Court would be overstepping the boundaries of separation of powers. This Court will be guided by the approach adopted by the Constitutional Court and similarly not be prescriptive to the National Assembly in this regard. In my view NA Rule 102A is compliant with the reasoning and order of the Constitutional Court in **Mazibuko**

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64 Mazibuko above n1 at para 43.
65 Mazibuko above n1 at para 47.
66 Mazibuko above n1 at para 66.
67 Mazibuko above n1 at para 66.

regarding the time within which a motion of no confidence in the President must be scheduled for debate and voting in the National Assembly.

[100] I am accordingly satisfied that Rule 102A is in compliance with the Constitutional Court's directives in **Mazibuko** in that Parliament's internal rules now provide for a political party represented in, or any member of, the National Assembly to table a motion of no confidence in the President, and have it scheduled for debate and voted upon in the National Assembly within a reasonable time. In terms of the Rules of the National Assembly there are various structures in place to deal with the Rules of the National Assembly. It has a Rules committee, the Subcommittee on Review of the National Assembly Rules and the Subcommittee on Powers and Privileges of Parliament. These structures of the National Assembly were established to deal with the development of rules and policies concerning the business of the National Assembly and to make recommendations to the Rules Committee. NA Rule 102A came into operation on 25 February 2014 and has not been subjected to any challenge until now, in these proceedings. It is unfortunate that these proceedings have been instituted without parliamentary structures having considered and debated the applicants' complaints.

Mootness of Relief sought in 4.3

[101] Section 21(1)(c) of the Superior Courts Act No. 10 of 2013, provides that a Division of the High Court has the power "*in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".* The question of mootness is relevant to a court in exercising its discretion to grant a declaratory order. In the exercise of its

discretion the applicable legal principles are as follows: Mootness is not an absolute bar in deciding an issue, and the question is whether the interests of justice require that it be decided. The general principle is that a court may decline to issue a declaratory order for the purpose of answering a hypothetical, abstract or academic question. Furthermore, a relevant consideration is whether the order that the court may make will have any practical effect on the parties or others.[68]

[102] The respondents contend that the relief sought by applicants regarding the scheduling of first applicant's motion has been rendered moot by the withdrawal of the motion on 3 March 2015. The applicants on the other hand contend that they are entitled to the declaratory order sought in paragraph 4.3 because it is "*a matter of great public importance, fundamental constitutional principles are at stake, and the alleged violation is prone to recurrence*". Innes CJ stated in **Geldenhuys and Neethling v Beuthin[69]** at 441:

> **"[C]ourts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."**

In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others[70]** the court stated that a case is moot and therefore not justiciable if there is no live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.

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[68] JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15; Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29. See also: Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32.

[69] Geldenhuys and Neethling v Beuthin 1918 AD 426 at 441.

[70] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21, footnote 18.

[103] In **Legal Aid South Africa v Magidiwana and Others**[71] Ponnan JA examined case law authorities on the subject and stated that, broadly, the court will decline granting a declarator if the matter has become moot in the sense that there are no live disputes, if doing so will amount to giving parties advice gratuitously, if doing so will effectively amount to pronouncement on abstract, academic and hypothetical questions and the order will have no practical effect and if the issue is of no future public importance. The proper limits of the court's discretion were summarized by Wallis JA in **Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others**[72] at para 5:

> **"The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the Court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose".**

[104] The doctrine of mootness is well developed in American constitutional law jurisprudence. Accordingly a case is moot if it:

> *'seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy'.*[73]

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71 Legal Aid South Africa v Magidiwana and Others 2015 (2) SA 568 (SCA).
72 Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA) at para 5.
73 Diamond S "Federal jurisdiction to decide moot cases" 1946 U Pa L Rev 125-147.

[105] The motion of Agang was duly scheduled for debate on 3 March 2015. Instead of proceeding with the motion, the party decided to withdraw same on the basis that its request for the recusal of the Speaker and voting by secret ballot was denied. All indications are that the Agang had agreed to the scheduling of the motion being postponed to the next sitting subject to certain conditions. I am therefore satisfied that the real issue in contention was not the actual scheduling of the motion, but the conditions attached thereto. The Speaker had given a clear indication on 25 November 2014 that Agang's request for her recusal and a secret ballot would not be acceded to. It is incomprehensible for Agang to now contend that the Speaker's failure to ensure that its motion was scheduled, debated on and voted for on or before the National Assembly went into recess on 28 November 2014 was inconsistent with s 102(2) of the Constitution and NA Rule 102A, in circumstances where Agang had no intention to proceed with the motion in the absence of compliance with its conditions. In any event the Speaker had given an unequivocal undertaking during interim proceedings in this matter that should Agang withdraw its motion and then seek to re-enlist it at a later stage after the determination of this application, she would re-enlist it as soon as practically possible but without unreasonable delay.

[106] The Court is now asked to determine whether or not the delay in the scheduling of the motion was reasonable or unreasonable in circumstances where the motion had been withdrawn. In my view the scheduling of the withdrawn motion is now a matter of historical importance or academic interest only. Any pronouncement and analysis on the sequence of events leading to the scheduling of the motion would be purely hypothetical and a futile exercise. Furthermore, pronouncements on previous conduct relating to the reasonableness of the time

period within which the motion should have been scheduled and voted on will serve no future practical importance. The motion in respect of the relief sought in terms of 4.3 was withdrawn and there is no live issue between the parties in this regard. In any event the relief sought in 4.3 had been overtaken by events when a vote of no confidence in the President was debated in the Assembly on 17 March 2015. As such, I find the relief sought in terms of 4.3 to be moot.

Was the Speaker's scheduling decision consistent with Mazibuko

[107] In the event that this Court is found to have erred in finding that the relief sought in 4.3 of the Notice of Motion is moot, it is necessary to consider the merits of the scheduling decision. The applicants contend that the Speaker's decision not to schedule first applicant's motion of no confidence before the end of the last term of the Fifth Parliament in 2014 did not comply with the **Mazibuko** directives in that it was not accorded due priority over other motions, given the programme of the National Assembly. The Speaker contends that she has complied with NA Rule 102A.

[108] The Speaker explained the extent of the business schedule of the National Assembly during the period when the motion was tabled by Agang. She also explained the indispensable role played by the Chief Whip and Leader of Government Business which necessitated consultation with them. Her overall assessment at the time was that there would not be sufficient time for members to consider and prepare for a proper debate on the first applicant's motion given the importance thereof. The motion was therefore scheduled for consideration as soon as possible in the next annual sitting in terms of the provisions of NA Rule 102A(7). The Speaker expressed the view that the motion was afforded due priority, and was

scheduled within a reasonable time having regard to the programme of the National Assembly.

[109] The Courts' appreciation for the constitutional role of other branches of government in accordance with the doctrine of separation of powers is often inextricably linked to the question of the appropriate level of "deference" the Court must show to other branches of government. **Hoexter** defined judicial deference as:

> "(*A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."*[74]

[110] In **Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd**[75] Schutz JA held that judicial deference "*manifests the recognition that the law itself places certain administrative actions in the hands of the Executive, not the Judiciary".* In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**[76] O' Reagan J held at paragraph [46] that the need for courts to show deference to decision makers did not flow from "*judicial courtesy or etiquette*" but "*from the fundamental constitutional principle of the separation of powers itself".* The Court stated further at para 48:

> **"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to**

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74 C Hoexter 'The future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-2.

75 Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at para 50.

76 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

> **itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts."**

[111] Generally, the courts are more prepared to defer on matters of fact or policy rather than law or constitutional interpretation. In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**[77], Ackerman J, stated that:

> **"The other consideration a court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."**

[112] In **International Trade Administration Commission v SCAW South Africa (Pty) Ltd**[78] at paras 91 and 92 the court stated that our '*[c]ourts are carving out a distinctly South African design of separation of powers*' and "*all public power is subject to constitutional control*". The Court continued at para 95:

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[77] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others above n70 at para 66.

[78] International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC).

> **"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government [the National Assembly], courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."**

[113] In terms of the National Assembly Guide to Procedure 2004 the Speaker and the Chairperson of the Council (NCOP) are the political heads of the Parliamentary administration. In terms of the Rules of Parliament the Speaker is entrusted with specific powers and functions in respect of a particular branch of government, and the courts may not usurp that power or function by making a decision of their preference. NA Rule 102A essentially imposes an obligation on the Speaker in connection with the internal arrangements and processes of Parliament. It provides the Speaker with a political discretion to schedule the motion within a reasonable time given the Programme of the Assembly.

[114] The Speaker, being an experienced politician, is elected by the National Assembly and is specially placed to interpret the rules, and execute her functions in accordance with the Rules. The Speaker as administrative head is best placed to fulfil the obligation to schedule the motion, which clearly involves polycentric decision-making. The Court recognizes her expertise in fulfilling her function in the House. In exercising its designated judicial control over the actions of other branches of government the Court should always be mindful to show due deference to the autonomy of Parliament and Presiding Officers in respect of the deliberations of

Houses of Parliament. In my view the Speaker is entitled to a high degree of deference by the Courts. There are sufficient safeguards in the form of review mechanisms in the event that the Speaker exercises her powers in an arbitrary or irrational manner or in violation of the Constitution.

[115] The Court is satisfied that considering the timing of the motion, and the business schedule of Parliament, the procedural process the motion had to go through and the consultation requirements, the reasons advanced by the Speaker as to why the scheduling was moved to the new term are reasonable and rational. Even if the applicants' proposal with regard to the scheduling would appear to be more acceptable, it would not be open to the Court to adopt it for the reason stated by Chaskalson CJ in **Bel Porto School Governing Body v Premier, Western Cape** [79] at para [45] at 282F-G.

> **"The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."**

[116] It is well established that the rationality standard does not have a high threshold. The Court is satisfied that it would be inappropriate for the court to analyse all the minute details concerning factors taken into account by the Speaker in arriving at her decision. Any attempt by the court to substitute the decision of the Speaker would be tantamount to an intrusion on the doctrine of separation of powers. In any event final relief is being sought on motion and the Speaker's version of events must

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[79] Bel Porto School Governing Body and Others v Premier, Western Cape and Another 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 45 at 282 F-G.

be accepted unless it is far-fetched, implausible and clearly untenable, which is not the case here.[80]

Secret Ballot relief

[117] The applicants seek an order directing the presiding officer over the debate to ensure that Agang's motion of no confidence in the President be voted on by way of secret ballot. In the alternative they contend that it is within the authority of the Speaker, there being no rule in this regard, to determine upon request that a vote of no confidence in the President should be taken by way of secret ballot. It is also submitted that NA Rule 2(1) is applicable since the issue of secret ballots are not dealt within the Rules. It is argued that the court would exercise a purely judicial function by granting such secret ballot relief.

[118] Rule 2 of the NA's Rules provides as follows:

> "2. Unforeseen eventualities.
>
> (1) The Speaker may give a ruling or frame a Rule in respect of any eventuality for which these Rules do not provide.
>
> (2) A Rule framed by the Speaker shall remain in force until a meeting of the Rules Committee has decided thereon."

[119] The Rules of the National Assembly indeed do not provide for voting by secret ballot. Provision is made for voting procedures in Chapter 6 of the NA Rules and NA Rules 75 and 77 to 93 extensively deal with voting. The rules provide for voting electronically, by voice or by the Westminster tradition of division. Both the Western Cape High Court and the Constitutional Court in **Mazibuko** considered the application of NA Rule 2(1) and confirmed that the Rule is meant to cover matters not

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[80] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H – 635 C.

dealt with in the rules. The Constitutional Court further remarked as follows at para 29:

> **"What is more, Rule 2(1) is permissive and not peremptory. Therefore even if it were applicable, the speaker is not obliged to give a ruling or make a rule."**

[120] Given the specific provisions in the Rules dealing with voting, it cannot be said that NA Rule 2(1) applies since it deals with rulings which cover matters not contemplated in the Rules. NA Rules 77 to 93 deal with voting processes, yet no provision is made for voting by secret ballot. In the circumstances, Rule 2(1) can provide no recourse to the applicants. In his comparative study **Bergougnous** noted that it is rare for a Speaker to be totally free to determine voting procedures. In most cases voting occurs as prescribed in the rules which define precise circumstances in which a secret ballot or public ballot must be held.[81]

[121] The Constitution provides for voting by secret ballot in electing the President, Speaker and Deputy Speaker.[82] There is no implied or express constitutional requirement for voting by secret ballot in respect of a motion of no confidence in the President. Applicants contended that it is imperative that members of the National Assembly be given the opportunity to vote according to their consciences by way of secret ballot, thereby creating a better opportunity for a truly democratic outcome. The applicants contend that any vote on a motion of no confidence would be rendered nugatory, and incapable of vindicating the crucial function of holding the President accountable to Parliament, unless the vote is by secret ballot. It was argued that members of the ruling party would be more inclined to vote according to

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[81] G Bergougnous; 'Presiding Officers of National Parliamentary Assemblies: A World Comparative Study' (1997) (Inter-Parliamentary Union, Geneva) at p.78

[82] Section 52 3) and Section 86 (2).

their consciences should voting occur by secret ballot. However, it was stated in **United Democratic Movement v President of the Republic of South Africa and Others**[83] that '*Courts are not ... concerned with the motives of the Members of the Legislature who vote in favour of particular legislation...'* In **Glenister v President of the Republic of South Africa and Others** [84] at para 54 the Court stated:

> **"... It suggests further that the Executive followed the dictates of the ruling party rather than its responsibilities in terms of the Constitution. In my view, there is nothing wrong, in our multiparty democracy, with Cabinet seeking to give effect to the policy of the ruling party. Quite clearly, in doing so, Cabinet must observe its constitutional obligations and may not breach the Constitution."**

[122] In **Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others**,[85] Chaskalson P stated that it is not for the courts to be concerned with political questions but the function of the courts is instead to ensure that the implementation of political decisions conform to the Constitution. Furthermore, '*In a democratic society the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.*'[86]

[123] The applicants conceded that they do not rely on any single provision in the Constitution or the rules of the National Assembly in respect of the relief sought regarding voting by secret ballot. Section 57 of the Constitution determines that the

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83 United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 56.

84 Glenister v President of the Republic of South Africa and Others above n29.

85 Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para 180.

86 Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others above n85 at para 183.

National Assembly is the master of its own internal arrangements, proceedings and procedures. As stated above, the National Assembly's power to make rules is limited to the regulation of processes and form as opposed to content and substance. It is within the power and privilege of the National Assembly to amend the Rules of the National Assembly to provide for voting by secret ballot. The absence of a specific rule providing for voting by secret ballot appears to be a deliberate choice and not an omission or oversight in the formulation of the Rules. The approach adopted by the Constitutional Court in **Mazibuko** was that while the court will not prescribe to the Assembly how to formulate its rules, it will give effect to the duties placed on Parliament by the Constitution. The Constitutional Court was specifically mindful of its judicial limits not to impose specific rules on the National Assembly. I am satisfied that a Court should not lightly impose a Rule to regulate parliamentary procedures unless it is required to fulfil a constitutional requirement. It is not within the authority of this Court to introduce the element of a secret ballot in instances other than those prescribed by the Constitution. The Court is not mandated to prescribe to the National Assembly on how to conduct its voting procedures. In my view the effect of granting the relief sought in respect of voting by secret ballot would offend against the provisions of s 57 of the Constitution as well as the doctrine of separation of powers in that it would in effect amount to the court formulating rules for the National Assembly. Consequently all the various permutations of the challenge in respect of voting by secret ballot on a motion of no confidence fall to be dismissed.

Fitness and propriety of Speaker

[124] The applicants seek a declarator that the Speaker is not fit and proper to hold the Office of the Speaker. The tradition of an impartial Speaker in Parliament dates back to the 14th century in England and is prevalent where parliaments developed

from the Westminster System.[87] However, the tradition of impartiality is neither a legal imperative nor a universally applied principle. During the pre-constitutional era the Office of the Speaker closely followed the Westminster system. The applicants rely on the role of the Speaker in the Westminster tradition and assert that the incumbent must be fit and proper to hold that office. It appears they are asserting the existence of a rule or principle of South African common law laying down such requirement. The respondents expressed the view that there is no rule of common law or English parliamentary law which requires that to be elected and remain as Speaker you must be fit and proper.

[125] The Constitutional Court has defined 'fit and proper' as follows in **Helen Suzman Foundation v President of the Republic of South Africa and Others[88]** at para [63]:

> **"[B]roadly speaking, [*fit and proper*] means that the candidate must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee's suitability 'to be entrusted with the responsibilities of the office concerned'."**

[126] In **Democratic Alliance v President of the Republic of South Africa and Others[89] (Simelane)** the Constitutional Court held that the requirement of "*fit and proper*" was an objective jurisdictional fact and involves a value judgment.

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87 Philip Laundy, The Office of Speaker in the Parliaments of the Commonwealth, (London: Quiller Press, 1984), pp. 12-13. Also see: House of Commons Procedure and Practice Second Edition, 2009 Edited by A. O'Brien and M. Bosc.

88 Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA (1) (CC); 2015 (1) BCLR 1 (CC).

89 Democratic Alliance v President of the Republic of South Africa and Others 2013(1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 20-26.

[127] The Speaker must be a member of the National Assembly, consequently the conditions that attach to membership of the Assembly must also apply to the Speaker. These criteria for membership of this institution are stipulated in s 47 of the Constitution in the form of a list of exclusions. The general position is that any citizen, who is qualified to vote and retains membership of his or her political party, is eligible to be a member of the National Assembly, unless he or she:

127.1 Is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, but, subject to any legislation, excludes the President, Deputy President, Minister, Deputy Ministers and any office-bearer, whose functions have been declared by National legislation to be compatible with those of a Member of the National Assembly.

127.2 Is a permanent delegate of the NCOP, a member of a provincial legislature or of a Municipal Council, unless provided otherwise by legislation.

127.3 Is an unrehabilitated insolvent.

127.4 Is declared to be of unsound mind by a court of the Republic; or

127.5 Has been convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine either in the Republic or elsewhere, if the conduct would have been an offence if committed in the Republic, provided that this ground of disqualification will not apply after five years of having served the full sentence.

[128] Notably, the Constitution does not prescribe that a person be '*fit and proper'* in order to be a Member of the National Assembly. A candidate for Speaker thus need do no more than be a member of the National Assembly, for which he or she must satisfy the prerequisites listed in s 47(1) to hold that position. On this textual approach, s 52 of the Constitution plainly does not, either expressly or by necessary

implication, require that a candidate be '*fit and proper'* to be eligible to be elected by the National Assembly as Speaker or, once elected, to remain as Speaker. An examination of other parts of the Constitution supports this conclusion. This is especially so because where the Constitution does require particular persons to be '*fit and proper'* to hold certain public office, it says so in specific terms:

128.1 Section 174(1) requires that an appropriately qualified person must in addition be fit and proper to be appointed as a Judge.

128.2 Section 193(1) requires that the Public Protector and the members of any Commission established in terms of Chapter 9 of the Constitution be fit and proper.

128.3 Section 193(3) requires that the Auditor-General, among other things, be fit and proper.

128.4 Section 196(10)(b) requires that all commissioners of the Public Service Commission be fit and proper.

[129] In **Simelane** the Constitutional Court noted that s 179(1) of the Constitution did not expressly state that the National Director of Public Prosecutions had to be appropriately qualified but held that it was necessarily implied that he had to be.[90] However, National legislation, namely, the National Prosecuting Authority Act 32 of 1998 did create as an objective jurisdictional fact for the appointment of the National Director of Public Prosecutions ('NDPP') a requirement that he or she be fit and proper. This was the basis for the decision of the Constitutional Court in **Simelane**. The differentiating factor in the present case is that, unlike the appointment of the NDPP, the election of the Speaker is not governed by an Act of Parliament, but by s 52 and Part A of Schedule 3 to the Constitution alone, and comprehensively so. Accordingly, the Constitution does not provide for legislation to impose additional requirements in order to be eligible for election as Speaker, including the condition of

[90] Democratic Alliance v President of the Republic of South Africa and Others above n89 at para 13.

fitness and propriety. In any event, the position of the Speaker differs markedly from that of the incumbents who are required to be fit and proper to hold office. The most glaring difference is that the incumbents are appointed, while the Speaker is elected.

[130] The only possible sources from which such condition might arise, apart from the Constitution and legislation, would be the Rules and orders of the National Assembly or the common law. However, neither the Rules of the National Assembly, \its orders nor the common law can validly impose their own conditions that do not accord with an exhaustive list of conditions under the Constitution. That is a function of the supremacy of the Constitution above all other law.

[131] The applicants rely on pre-constitutional jurisprudence for the proposition that English law is relevant and persuasive authority for the requirements attached to the Office of a Speaker. They also relied on two South African authorities namely, **Kilian** and **Brummer**, in support of their arguments that the Westminster model, through the common law, is indeed relevant to the Office of the Speaker in the current dispensation. **Kilian**[91] is not authority for the proposition that English common law regarding the fitness of the Speaker of the House of Commons is part of South African law. Similarly in **Brummer,**[92] the Court did not definitively decide whether English common law regarding the Speaker of the House of Commons formed part of South African law, so as to apply to the Speaker of the National Assembly. I agree with the notion though, that the Speaker is required to discharge her functions impartially, fairly and rationally as stated in **Kilian**. The description of the Speaker in **Brummer** as an "*impartial moderator*" under a duty to "*apply standing orders fairly and equally at all times*" is applicable law.

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91 Gauteng Provincial Legislature v Kilian and Others above n6.
92 Brummer, NO v Mvimbi and Others above n5. at para 50, 52.

[132] With regard to the application of common law in our democratic system the Court stated the following in **Pharmaceutical Manufacturers Association of South Africa and Another:** In **Re Ex Parte President of the Republic of South Africa and Others**[93] at para [44] and [45]:

> **"[44] I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.**
>
> **[45] ... That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed ... Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control."**

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93 Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Another 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44-45.

[133] The Supreme Court of Appeal has recently cautioned against the uncritical reliance on legal doctrines from foreign jurisdictions that bear constitutionally dissimilar features as our own.[94] Although s 39(1) of the Constitution allows a court to consider foreign law when interpreting the Constitution, the court stated in **H v Fetal Assessment Centre[95]** that "*foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values*". The court further stated at para 31(c) as follows:

> "**31(c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours."**

[134] The Speaker's eligibility for office is derived from the Constitution, and not the common law or foreign law. Our Constitutional system is uniquely South African and our Parliament is subject to the Constitution, while in respect of the classic Westminster system, Parliament is supreme. The Constitutional Court has remarked on the distinctiveness of our Constitutional design as compared to the Westminster model.[96] In any event, despite their misplaced emphasis on the English common law, the applicants have not alleged that under the Westminster system fitness and propriety are legal preconditions to becoming the Speaker or remaining in office as a Speaker.

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94 City of Cape Town v South African National Roads Authority Limited and Others 2015 (3) SA 386 (SCA) at para 31.
95 H v Fetal Assessment Centre 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 31.
96 Mansingh v General Council of the Bar and Others 2014 (2) SA 26 (CC); 2014 (1) BCLR 85 (CC).

[135] The Constitution is the ultimate source for all legal authority in the Republic. Notably, the Constitution does not prescribe that a person be fit and proper in order to be a member of the National Assembly. Had the Constitution sought to impose further requirements it would have done so explicitly. Any declaration to the effect that the Speaker is not fit and proper would automatically create a fixed requirement for continuation of an incumbent holding the Office of Speaker. The practical effect of the relief sought in para 4.5 of the Notice of Motion will be the removal of the Speaker from Office. The Court cannot on its own accord create and impose such a condition, nor can the court usurp the functions of the National Assembly in the removal of the Speaker by the introduction of new requirements. The Constitution provides for the Office of the Speaker, for the election to Office of the Speaker, including eligibility for election, and for removal of the Speaker. In conclusion, s 52 of the Constitution does not provide expressly or by necessary implication that a candidate must be fit and proper to be eligible to be elected Speaker by the National Assembly, or, once elected to remain as Speaker. Consequently, being a fit and proper person is not a constitutional condition precedent to becoming, or holding office as, Speaker. Absent such prerequisite in law, the question of the Speaker's fitness and propriety does not present a dispute capable of resolution through the application of the law. It therefore follows that the issue of the fitness and propriety of the Speaker is not justiciable.

Neutral Speaker vs Partisan Speaker

[136] In his study **Presiding Officers of National Parliamentary Assemblies: A World Comparative Study,** Georges Bergougnous described the "*typical*" Speaker as a person "*with long experience of parliamentary life, elected by the Assembly he presides for Parliament's term, with no possibility of dismissal,*

belonging to the majority but acting with impartiality, respecting and ensuring respect for the rights of the opposition. His role primarily focuses on the chairing of public sittings, a task he may temporarily hand over to a replacement, appointed or elected for this purpose. During the sitting, he maintains order and discipline, ensures respect for the rules of procedure by interpreting its provisions if need be, gives the floor or withdraws the right to speak, and initiates the voting procedure. On the other hand, he refrains from taking the floor during debates, gives up his right to propose legislation and only votes in exceptional circumstances'[97] **Bergougnous** acknowledges that the above description should not obscure the special features of each particular Parliament derived from its own traditions and Constitutional systems.[98]

[137] The Office of the Speaker worldwide generally comprises two models, namely, the "*neutral*" Speaker and the "*partisan*" Speaker.[99] The Westminster system of Government in England provides for the '*neutral*' Speaker model. Although elected from the majority among members of the House of Commons, the Speaker withdraws from politics once elected. The Speaker is expected to be a fully impartial official. The Speaker, once elected, is always re-elected until he or she resigns or retires.[100] In the House of Commons there is a practice that the Speaker will be re-elected, regardless of a changing government, under what is sometimes referred to as the continuity principle.[101] A Westminster Speaker runs uncontested by major political parties, allowing a Speaker not to be disadvantaged by the inability to engage in partisan politics. The opposition therefore does not oppose the serving

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97 G Bergougnous; 'Presiding Officers of National Parliamentary Assemblies: A World Comparative Study' above n7 at 115-116.

98 Id at p.116.

99 Stanley Bach, The Office of the Speaker in a Comparative Perspective (1999) 5, The Journal of Legislative Studies 209–254.

100 G Bergougnous; 'Presiding officers of National Parliamentary Assemblies: A World Comparative Study' (1997) (Inter-Parliamentary Union, Geneva) at p.13.

101 Philip Laundy, The Office of Speaker in the Parliaments of the Commonwealth, (London: Quiller Press, 1984) pp 68-71

Speaker at election time following a convention that the Speaker should not become involved in political debates and disputes. According to the Westminster convention there appears to be the assumption that one cannot be a member of a political party and at the same time be capable of impartiality in the House. Horace King, Speaker at Westminster from 1965 to 1971, eloquently stated it as follows:

> *"... after a long period of evolution, the impartiality of the modern Speaker has become almost mathematical – certainly beyond doubt or question.*
>
> *And this the British Parliament believes to be right – that, while the House of Commons is a place where, rightly, the fiercest controversy takes place, it shall take place within an ambit of mutual respect for each other's personal honour, for ordered and regular procedure, and for the protection of all opinions, even those of the smallest minority. And because this conception lies at the heart of parliamentary democracy, Parliament selects one of its Members, divests him of his political past, and hands over to him the dignity and authority to preserve this fundamental idea."*[102]

[138] Not all the elements of the Westminster tradition of neutrality and impartiality have been transposed to countries modelled on the Westminster parliamentary system. In Canada, Australia and the Indian Lok Sabha the Speaker is not required to resign from their political party and needs to contest his/her seat at election time unlike the British Speaker.[103] Consequently the principle of continuity which provides security of tenure is not applicable to their Office. It is therefore evident that the Westminster tradition of impartiality remains a cornerstone of the Speakership in any parliamentary democracy, but there are crucial differences in the privileges and status accorded to the Westminster Speaker.

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[102] Horace King, "The impartiality of the Speaker, "*The Parliamentarian*, Vol. 47 (1966), p.131.

[103] G Bergougnous; 'Presiding Officers of National Parliamentary Assemblies: A World Comparative Study' above n100 at p.12, 97, 98.

[139] The Speaker of the United States House of Representatives exemplifies the '*partisan model'*. The incumbent there is also the elected Leader of the Majority Party in the House of Representatives and is an openly partisan political officer. The Speaker's role is not limited to Parliamentary functions, but also represents a key political figure who plays an important part in the setting of the agenda of the majority party.[104] The Speaker is effectively both the Presiding Officer and the Chief Whip and has a direct influence over the legislative process. Notwithstanding this the United States Speaker is required to act impartially in the House. It is significant that both the British and United States parliamentary models find their origins in the Westminster tradition but conceive the Office of the Speaker differently.[105] It suggests that the Office of the Speaker is not designed in the abstract, but by the peculiarities of the historical and political influences as well as the Constitutional system applicable.

[140] **Bergougnous** also stated that in many parliaments the Speaker is both an active protagonist and an impartial arbitrator and a distinction has to be drawn between his activities as Speaker and as an ordinary parliamentarian.[106] It is not unusual for a Speaker to continue to be a member of a political group and still belong to the majority and at the same time act impartially while in Office. In his seminal work, '*The Office of Speaker in the Parliaments of the Commonwealth'*, **Philip Laundy[107]** expressed the view that the fact that the Speaker may have political attachments is "*not in itself important. What is important is that the Speaker be able to distinguish between a party allegiance and duty to Parliament*."

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[104] G Bergougnous; 'Presiding Officers of National Parliamentary Assemblies: A World Comparative Study' above n100 at p.62, 68.
[105] Id at p.2.
[106] Id at p.99.
[107] Philip Laundy, The Office of Speaker in the Parliaments of the Commonwealth, (London: Quiller Press, 1984) p.10

[141] Although some of the features of the Westminster system have been retained in our parliamentary system, it cannot be accepted that '*Parliamentary law and practice'* of Westminster is applicable in South Africa in all respects. Our parliamentary law and practice emanates from the Constitution, ancillary legislation (including our electoral legislation) and Rules and Orders of Parliament, which differ in material respects from the constitutional arrangements in countries that follow the "*Westminster model*". The differences include the doctrine of parliamentary sovereignty, which is not compatible with the supremacy of our Constitution and ancillary legislation.

[142] The South African electoral system is a close-list proportional representation system. Given the electoral system through which members of the National Assembly are elected it is inevitable that the Speaker must belong to one of the political parties represented in the National Assembly. The Rules do not prohibit a Speaker from caucusing and canvassing for her party outside the Assembly. While the position of Speaker of the National Assembly in South Africa is not inherently partisan such as the Speaker in the USA, election to the position of Speaker here does not entail the incumbent Speaker severing political-party ties. Section 46 of the Constitution read with the Electoral Act 73 of 1998, especially Schedule 1(A) thereof, provides in effect that the elections for the National Assembly are contested by political parties and only persons on successful parties' lists of candidates may be designated as members of the National Assembly. Furthermore, s 52(1) of the Constitution provides that the National Assembly must elect a Speaker from among its Members.

[143] It follows that to be elected and to remain as Speaker of the National Assembly, a person must be and remain a member of a political party represented in the National Assembly. The South African Parliamentary System allows for the Speaker to hold office in a political party represented in the National Assembly. Every Speaker of the National Assembly since 27 April 1994 has been a member of the ANC's National Executive Council ("NEC"). The fact that the Speaker is appointed from a closed list system, that she is a political appointee and can easily be removed from the National Assembly by the party could create fertile ground for a perception of bias. It is unavoidable that there will at times be tension as regards the Speaker's continued role as NEC Chair due to the difficulties in keeping a balance between the dual and conflicting roles.

[144] To sum up, there is no constitutional or statutory impediment to the Speaker occupying any leadership position within her political party, or participating in the activities of the political party. The Speaker is entitled to remain as an office bearer of a political party, participate in its activities and campaign for political rights. Affiliation to a political party cannot in itself point to a lack of objectivity and impartiality. The Speaker's membership of the NEC does not render her incapable or biased in performing her duties as Speaker. Similarly attending meetings of the ANC caucus does not translate into a failure to conduct duties impartially as the Speaker. Consequently there is no legal basis to find that the Speaker cannot continue to hold the position of Chairperson of the National Executive Committee of the ANC as well as that of Speaker.

The removal or dismissal of the Speaker

[145] The applicants contend that the demands of fairness and impartiality attaching to the Office of the Speaker are indispensable to the principles of transparent, representative democracy and executive accountability is central to our democratic dispensation. The applicants expressed the view that the country has been in the midst of a constitutional crisis for almost a year as a result of the Speaker's conduct. They contend that having regard to the conspectus of facts, and how the Speaker is conducting her responsibilities it is clear that she is partisan and biased. The applicants submit that the Court has to make an objective determination as to whether the Speaker should continue to hold office. The court is called upon to assist Parliament to extricate itself from a constitutional crisis since the Speaker cannot be ousted by ordinary procedures provided for in the Constitution.

[146] The applicants submit that with regard to relevant events, decisions and statements made by the Speaker, her conduct cumulatively shows that she has disqualified herself from holding office. The Speaker has a legal obligation to conduct the affairs of the National Assembly impartially. The applicants therefore contend that the Speaker should be removed from office by the Court.

[147] The Speaker's procedural role in the House involves many aspects. No doubt the duties in the Chair are the most challenging. Procedural incidents are bound to arise and the Speaker has to use all options available in the Rules of Procedure to resolve them. The Speaker has a delicate task of using her powers with circumspection and must show moderation in order to protect freedom of expression whilst at the same time protecting the dignity of the House. The Speaker must

remain impartial within the business of the National Assembly as prescribed by the Rules of Parliament.

[148] The Speaker had responded to all the allegations made against her regarding her conduct in the National Assembly, her failure to distance herself from the ANC and public pronouncements made by her which allegedly strengthened the perception of her bias and partisanship in the House. The Speaker disputed some of the allegations by giving a comprehensive factual account of her version of the events. She also justified her conduct in the House with specific reference to the relevant Rules of the National Assembly applied by her in specific incidents. Consequently, she justified her conduct in the House by referring to her interpretation of the Rules. The Speaker also relied on certain provisions in the Constitution to justify her conduct as a politician outside the House. The Speaker conceded that she had made disparaging remarks about Mr Malema of the EFF on 14 February 2015, but states that she publicly apologized promptly on 18 February 2015. The apology was accepted by the EFF and Mr Malema. The disparaging remarks made by the Speaker outside the House are unfortunate, but in my view it does not demonstrate incompetence and bias in the performance of her duties as Speaker. According to **Bergougnous** a distinction must be drawn between conduct inside and outside the House, [especially] where the partisan model operates.[108] In the latter instance the Speaker would understandably be more robust in terms of political issues. As explained by former Speaker Frene Ginwala:[109]

> *"The critical factor in considering the conduct of any Speaker ... is not a perceived conflict between parliamentary responsibility and party loyalty, but*

[108] G Bergougnous; 'Presiding Officers of National Parliamentary Assemblies: A World Comparative Study' above n100 at page 99.

[109] Address by Dr Frene Ginwala during the Parliamentary Vote 2001.

gauging specific actions in the context of the responsibility placed on the office-bearer by the Constitution and the Rules."

[149] On the Speaker's version, there is no factual basis on which to find that she did not act impartially, fairly, equitably and without bias. The members of Parliament or the Court may not agree with the Speaker's justification for her conduct but in the absence of any review challenge of any specific ruling or decision made by the Speaker there is a high threshold to negotiate to convince the Court that the Speaker is not impartial within the Business of the National Assembly. The Speaker must be given the greatest latitude by virtue of her role in Parliament. With regard to the complaints relating to alleged bias exhibited during debates in Parliament, it was stated in **Lekota and Another v Speaker, National Assembly and Another**[110]:

> **"[T]he task of controlling debates in Parliament requires particular skills and is best dealt with by the presiding officers who are appointed for this purpose ... A court should be loathe to encroach on their territory and only do so on the strength of compelling evidence of a constitutional transgression."**

[150] In Canada, a country with a supreme Constitution and a separation of powers between the legislature, the executive and the courts, the Supreme Court of Canada in **Canada (House of Commons) v Vaid**[111] emphasized the right of the Speaker of the Canadian Parliament to perform his or her functions without external interference:

> **"It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. ... The courts, for their part, are careful not to interfere with the workings of Parliament ... It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights**

[110] Lekota and Another v Speaker, National Assembly and Another above n43 2015 (4) SA 133 (WCC) at para 44.
[111] Canada (House of Commons) v Vaid [2006] 135 CRR (2d) 189 at para 20.

Commission with a complaint that the Speaker's choice of another member of the House discriminated on some ground prohibited by the Canadian Human Rights Act, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the Charter. These are truly matters 'internal to the House' to be resolved by its own procedures."

[151] Section 52(4) of the Constitution provides for the removal of the Speaker from office in the following terms:

> *"The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted."*

[152] The Constitution expressly states that the National Assembly is the competent authority to remove the Speaker. The manner in which it may do so is by passing a resolution. Nowhere else in the Constitution is the power to remove the Speaker mentioned or conferred upon any other person or institution. For that reason, it is impermissible for any other person or institution to assume that function. No other process is authorised. It is, therefore, impermissible for the National Assembly to remove the Speaker in any other manner, including by assigning that function to any other person or institution by legislation or otherwise. Equally, it is impermissible for any other person or institution to assume that function. The Speaker's authority is derived from the House, to whom her duty lies and to which she is answerable. Just as the Speaker is elected by the House, she may be removed from office by a vote of the House.

[153] The exercise by the National Assembly of the power in s 52(4) of the Constitution, as with all exercises of public power, is subject to the dictates of the Constitution and subject to review of the Courts as the final authority. However, if

properly seized with a review, a court will be confined to reviewable grounds in adjudicating the case. These will likely include determining whether the exercise of the power by the National Assembly in the manner prescribed was done in accordance with law, and any order granted will be appropriately calibrated in the light of the separation of powers doctrine.

[154] The National Assembly, over which the Speaker presides, is part of the legislative arm of State. Section 42(3) of the Constitution states that the National Assembly is elected to represent the people and ensure government by the people in a representative democracy. The functions of the National Assembly may not be intruded upon by another branch of government, unless specifically sanctioned by the Constitution. It is therefore inappropriate for the Speaker to be removed by the Courts, in which the Constitution has vested judicial authority. In **Mazibuko NO v Sisulu and Others NNO**[112] Davis J expressed a word of caution:

> **"There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. ... An overreach of the powers of judges – their intrusion into issues which are beyond their competence or intended jurisdiction – 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."**

[155] Dlodlo J, in **Primedia Broadcasting Ltd and Others v Speaker of the National Assembly and Others,**[113] warned that '*courts should guard against conduct which amounts to what can be described as an intrusion into the*

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[112] Mazibuko NO v Sisulu and Others NNO 2013 (4) SA 243 (WCC) at 256 E-F;H-I

[113] Primedia Broadcasting Ltd and Others v Speaker of the National Assembly and Others 2015 (4) SA 525 (WCC) at para 61.

constitutional domain of Parliament, which is not only unprecedented but which has obvious major constitutional implications'. In confronting the question whether the court may venture into the domain of other branches of government, the courts must observe the limits of their own power.[114] As pointed out by the Constitutional Court in **Doctors for Life**, "C*ourts must be conscious of the vital limits on judicial authority" [*and] *"should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."* [115]

[156] The Courts are not constitutionally mandated to remove the Speaker from Office. The removal of the Speaker on grounds other than those legal bases that would disqualify her to be a member of the National Assembly, is a political act. Judicial independence would be adversely affected should the courts become embroiled in what is quintessentially a political act, save for those limited instances where legality calls on them to do so. The Speaker is the Chairperson of the National Assembly and if conflicted whilst presiding, it is incumbent on her to recuse herself. In that event, the applicable rules will come into force. Any order granted in terms of prayers 4.5, 4.6 and 4.7 would offend against the doctrine of separation of powers which entails that the National Assembly, and not the Courts, must determine a person's suitability for election as Speaker and a person's suitability to remain in Office as Speaker.

[157] The unique position of the Speaker of Parliament was eloquently summarized by **Bergougnous**[116] as follows:

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[114] International Trade Administration Commission v SCAW South Africa (Pty) Ltd above n78.
[115] Doctors for Life International v Speaker of the National Assembly and Others 2006(12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).
[116] G Bergougnous; 'Presiding Officers of National Parliamentary Assemblies: A World Comparative Study' above n100 at p.6-7; p.34.

> **"*Irrespective of the political regime or the geographical situation of the country concerned, the political party system, the rules of procedure or the traditions of the Parliament, in short, whatever the actual role and status of the Assembly within the institutional structure, it retains control over the Speaker's appointment ...***
>
> ***Moreover, where a Speaker is elected by the Assembly he presides, he is elected by the house as a whole. He is elected directly, thereby reinforcing his legitimacy...***
>
> ***Quite a few countries have established a system that involves a motion of [no] confidence in the Speaker and his possible dismissal. In almost all cases, the House itself is responsible for the procedure."***

Non – Joinder

[158] The second respondent argued that insofar as the relief sought in prayers 4.6 and 4.8 are concerned, there has been a material non-joinder of a necessary party with a direct and substantive legal interest in the relief, namely the ANC. It was submitted that the relief pertaining to the declaratory that the Speaker is not entitled to hold office as the Chairperson of the National Executive Council of the ANC whilst at the same time holding the Office of the Speaker of the National Assembly necessitated the joining of the ANC. Furthermore, it was submitted that there is also a material non-joinder of the ANC insofar as the relief is sought with respect to a secret ballot. In **Rosebank Mall v Cradock Heights**[117] the following was stated:

> **"It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand, and joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to a misjoinder), on the other hand. In cases of joinder of necessity the Court may, even on appeal, *mero***

[117] Rosebank Mall (Pty) Ltd and Another v Cradock Heights 2004 (2) SA 353 (WLD) at para 11.

> ***motu* raise the question of joinder to safeguard the interests of third parties, and decline to hear the matter until such joinder has been effected or the court is satisfied that third parties have consented to be bound by the judgment of the court or had waived their right to be joined."**

[159] It is well established that the test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter which may be prejudicially affected by the judgment or the order.[118]

[160] In **Burger v Rand Water Board and Another[119]** the Supreme Court of Appeal, per Brand JA, summarized the principles applicable to joinder as follows:

> **"The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the Court might make."**

[161] In **The Judicial Service Commission and Another v The Cape Bar Council and Another[120]** Brand JA dealt with the question of non-joinder in the following terms:

> **"It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. *Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) par 21*). The mere fact that a party**

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[118] Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 168-170; Erasmus at B1-94; See also United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409(C) at 415 E-F.

[119] Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) at para 7.

[120] The Judicial Service Commission and Another v Cape Bar Council and Another 2012 (11) (BCLR) 1239 (SCA); 2013 (1) SA 170 (SCA) at para 12.

may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."

[162] It is difficult to see what "*direct and substantial interest*" of the ANC would be prejudicially affected were the Court to grant the relief sought. The ANC and other political parties may have a political interest in the outcome, but that is not a cognisable legal interest for the purposes of necessary joinder. At best for second respondent, the joinder of the ANC and other political parties represented in the National Assembly may be competent under Rule 10 on the grounds of convenience or equity. Moreover, where a party raises the issue of non-joinder, the standing of a respondent to demand joinder is limited.[121] This is especially the case where an applicant has not sought relief against the party the respondent demands to be joined.[122]

[163] It must be borne in mind that under the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004, the Speaker acts as the legal representative of Parliament in civil proceedings.[123] It is not disputed that the ANC was informed of the application and all indications are that they have waived any entitlement to be part of these proceedings. In any event, I am satisfied that no cognisable legal interest was established and no prejudice will be suffered by the ANC as a result of the order or judgment of this Court. In the result I find no substance in this point *in limine* and it is accordingly dismissed.

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[121] Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa (2009) (5th ed.) Vol 1 at 239; Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd 1979 (3) SA 1331(W) at 1336 H; Morgan v Salisbury Municipality 1935 AD 167; Sheshe v Vereeniging Municipality 1951 (3) SA 661(A) at 666 H; Segal v Segil 1992 (3) SA 136 (C) at 140 I.

[122] Fisheries Development Corporation of SA Ltd v Jorgensen 1979 (3) SA 1331 (W) at 1337 G.

[123] Section 23 (2)(a).

Striking out application

[164] On 31 July 2015 the Speaker served a voluminous application to strike out the entirety of applicants' replying affidavit on the basis that it is inadmissible hearsay and contained irrelevant matter. She subsequently abandoned the application on condition that applicants consent to the filing of her new supplementary answering affidavit. Applicants have agreed not to oppose the supplementary answering affidavit.

[165] What effectively remains of the application to strike out is the Speaker's challenge to those parts of applicants' affidavits alleged to be hearsay. The relevant hearsay allegations are contained in a limited number of paragraphs in the founding papers and replying papers. Most of the material sought to be struck out consists of media reports and various allegations considered by first respondent to be irrelevant, speculative and unsubstantiated. In the supplementary answering affidavit the Speaker dealt with all putatively hearsay evidence objected to. Only four paragraphs related to hearsay averments made in replying papers. The Speaker therefore had ample opportunity to digest the evidence and aptly dealt with all the allegations.[124] In my view this is a typical case where the hearsay evidence forms part of the background narrative of the case offering helpful context as explained by Van Heerden J in **Parow Municipality v Joyce & McGregor (Pty) Ltd[125]** at page 939:

> **"[I]nvariably, for the sake of presenting a complete picture to the court there are instances where hearsay evidence is tolerated. This is especially so when matters which have become public knowledge are referred to and the material issues are not affected by its inclusion."**

[124] Hewan v Kourie NO and Others 1993 (3) SA 233 (T) at 240 H-I.
[125] Parow Municipality v Joyce & McGregor (Pty) Ltd 1973 (1) SA 937 (C) page 939:

[166] The majority of the issues raised by the Speaker as hearsay were widely reported. She also referred to a YouTube clip and media clippings in the replying papers. I am satisfied that the Speaker was given adequate opportunity to respond to all the allegations and will suffer no prejudice if the allegedly hearsay material is not struck out. I am in agreement with the pragmatic approach adopted in **Gold Fields Ltd and Others v Motley Rice LLC** [126] which is applicable in this particular case, where the Court noted the need to "*place substance over form*" and held as follows:

> **"Although this court has read whatever was placed before it in evidence, the weight to be placed on what is in the affidavits depends on relevance and admissibility. ... The respondent has therefore not been prejudiced in this court's consideration of the case, and furthermore not much time was taken in argument dealing with the striking-out application".**

Concluding Remarks

[167] Agang gave a speech in the House with regard to the proceedings of a vote of no confidence in the Speaker on 16 September 2014. It condemned the motion of no confidence in the Speaker claiming that opposition parties supporting the motion resorted to meaningless acts of disruptive politics. It *inter alia* stated the following:

> **"Agang is not interested in settling personal vendettas of individual politicians at the expense of mature and responsible political engagement. Parties in Parliament should focus on the interest of the masses, not on petty politics. We should therefore ensure that the integrity of our constitutional institutions is protected through meaningful engagement.**
>
> **Lastly, I would like to say that the Speaker of Parliament is not the Presiding Officer now, but we have disorder. I want to emphasise that it is very clear that to be a Presiding Officer in this Fifth Parliament is a very dangerous job. Even if you remove the Speaker of Parliament,**

[126] Gold Fields Ltd and Others v Motley Rice LLC 2015 (4) SA 299 (GJ) at para 128.

> **whoever is going to replace her, is going to be a victim. The induction that we had in the beginning of our term was not enough for MPs. I propose that in future, when we do induction, we must also invite psychiatrists."[127]**

[168] The above statement made by Agang is a clear indication of the challenges facing the Speaker who presides over the Fifth Parliament. The Speaker is an experienced politician who had served as Deputy Speaker and Speaker cumulatively for a period of fifteen years. The Speaker was also the Deputy-President of the Republic from 2008 to 2009. An incumbent in this position, usually an experienced politician, is always mindful of Constitutional duties and the commitment to act impartially, equitably and without bias. It is remarkable that the allegations regarding the Speaker's conduct in the House manifested themselves only over a year ago. A reading of Hansard extracts provided by the parties clearly shows a history of conduct on the part of members of Parliament which is indicative of disobedience and defiance of the Chair, concerted irregular interjections, a refusal to accept rulings made by the Speaker, and disruptions of parliamentary sittings. The applicants stated that the turmoil in the National Assembly is attributable in part to '*shifting political winds'*. It is inconceivable how the Speaker is attributed blame for '*chaos*' in the National Assembly. The Speaker is obliged to conduct proceedings within confined boundaries set by Parliamentary rules and procedures. Consequently the Speaker cannot act on a whim and perform her functions in a manner that impinges on the dignity of the House and constitutionally protected rights of its members. The impartiality of the Speaker is entrenched in the Speaker's obligation to make rulings on the basis of established conventions, practices and Rules of Parliament.

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[127] First respondent's answering affidavit para 111, annexure "AA15".

[169] No doubt, Parliament is a vibrant and robust environment where debates are intense and sometimes contentious. The Constitutional Court so eloquently described it as follows in **Democratic Alliance v African National Congress and Another**[128] at para 133:

> **"Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is not a bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible."**

[170] In response to applicants' submission that the proceedings in the National Assembly have descended into '*utter chaos'* and, as a result, there now exists a constitutional crisis that justifies extraordinary intervention by the Court, the Speaker advised the Court of new NA Rule 53A recommended by the National Assembly. The National Assembly Rules Committee recently considered the introduction of new measures to control disruptions in the House. The new NA Rule 53A governing the removal of a member from the Chamber provides that the removal may be effected on the instruction of the Presiding Officer by the Sergeant-at-Arms, the Parliamentary Protection Services, or, in extraordinary circumstances, the security services. The National Assembly considered the amendment and a resolution was passed on 30 July 2015 by an overwhelming majority of members of the National Assembly to approve the recommendations. The recommendations were supported by the Third Applicant (Mr Lekota) on behalf of the Fourth Applicant (Congress of the People), and members of the Sixth Applicant (United Democratic Movement). The Rules of Parliament were therefore amended to deal with challenging issues in the House and I am satisfied that there is no constitutional crisis.

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[128] Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) at para 133:

[171] Although the applicants questioned some of the Speaker's rulings, they made it clear that they were not seeking judicial review in respect of any decision, statement or ruling made by the Speaker. By implication there is no argument that the Speaker has exercised her functions arbitrarily or made incorrect rulings or decisions. The complaints appear to be political. Understandably the Speaker's ability to make decisions based on procedural merits would at times be challenged and not all members will always be satisfied with a ruling made by the Speaker. However, rules which govern debating procedure, including the expected courtesies and decorum, must be observed, and the authority of the Speaker must be respected by all members. An important feature of the Speakership is that elected members choose one of their own from amongst themselves a member to preside impartially over the House. All the members of the National Assembly are responsible to uphold the dignity and authority of the House as a whole. In an excerpt from François Côté's paper on "**The Impartiality of the Chair**"[129] the following profound statement was made:

> **"It is nonetheless true, however, that the Chair is not infallible. Whatever errors may occasionally be committed, it is of the utmost importance for the integrity of the institution that the Chair continues to be treated with deference and that its impartiality is not called into question at every turn. As our Speaker said in his ruling on June 12, 2001 "such are the rules of the parliamentary game that we must all acknowledge that it is the Speaker who is to have the final word; otherwise nothing is possible."**

[129] François Côté, "The Impartiality of the Chair", paper presented at the 19th Canadian Presiding Officers Conference, St. John's, Newfoundland and Labrador, January 25, 2002 p12.

Costs

[172] The respondents submit that the applicants' conduct in relation to this application has been unreasonable. Not only have they applied for a wide range of unmeritorious relief and, after receipt of the Speaker's answering papers, persisted in seeking it, but they also delivered inordinately lengthy replying papers. It was therefore contended that, if unsuccessful, the applicants should be ordered to pay the costs of the Speaker and the President.

[173] In considering the general approach to costs awards, the Constitutional Court in **Ferreira v Levin NO and Others**[130] referred to numerous factors which were influential in the consideration by the Court as to whether or not to deprive a successful litigant of their costs. The Court stated at para (3) that:

> **"... [T]he principles which have developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation".**

[174] In **Affordable Medicines Trust v Minister of Health**[131] the Constitutional Court stated that as a general rule '*in constitutional litigation ... an unsuccessful litigant ought not to be ordered to pay the costs'*. The court stated further that:

> "**The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances**

[130] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3.
[131] Affordable Medicines Trust and Others v Minister of Health above n33.

that justify departure from this rule such as where the litigation is frivolous and vexatious ... The ultimate goal is to do what is just having regard to the facts and circumstances of the case".

[175] In **Biowatch Trust v The Registrar, Genetic Resources**[132] the Constitutional Court affirmed this approach to costs in constitutional litigation as follows:

"In litigation between the government and a private party seeking to assert a constitutional right, *Affordable Medicines* established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."

[176] The Constitutional Court has given three reasons for adopting the general approach to constitutional matters. First, this approach reduces the so-called '*chilling effect'* that an adverse costs order might have on parties contemplating asserting constitutional rights. Second, constitutional litigation, whatever the outcome, often bears not only on the interests of the litigants before court, but also on the rights of others in similar situations. Third, the State bears the primary responsibility for ensuring that law and State conduct are consistent with the Constitution.

[177] Most of the applicants are small political parties with limited financial resources, while the remaining applicants are individuals. The issues raised in this matter are of great constitutional import and "*indeed adds texture to what it means to be living in a constitutional democracy".*[133] Considering all the circumstances of this matter, I am satisfied that the appropriate order should be that each party pay his/her or its own costs.

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[132] Biowatch Trust v The Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC); 2009 10 BCLR 1014 (CC) at para 22. Also see Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another 2015 (4) BCLR 396 (CC).

[133] Biowatch Trust v The Registrar, Genetic Resources above n132 at para 23.

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

(a) The application is dismissed.
(b) Each of the parties in these proceedings shall pay his/her or its own costs.

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GOLIATH, J
Judge of the High Court

I agree.

_____

HENNEY, J
Judge of the High Court

I agree.

_____

MANTAME, J
Judge of the High Court