IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 17259/2008

In this matter between:

HUGH GLENISTER	Applicant
And	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
THE REGISTRAR, JOINT COMMITTEE ON ETHICS & MEMBERS' INTERESTS	Third Respondent
THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON SAFETY & SECURITY	Fourth Respondent
THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON JUSTICE & CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Sixth Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Seventh Respondent
THE CHAIRPERSON, JOINT COMMITTEE ON ETHICS & MEMBERS' INTERESTS	Eighth Respondent
THE MINISTER OF SAFETY & SECURITY	Ninth Respondent
THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	Tenth Respondent

JUDGMENT DELIVERED ON 13 JANUARY 2009

YEKISO, J

[1]On the 22nd October 2008 I granted an order dismissing with costs the applicant's application instituted out of this Court on an urgent basis. I held that no case had been made out for the relief sought in terms of the notice of motion. I did not then give reasons for the order I gave but I pointed it out to the parties that reasons therefore would be furnished on request.

[2]The applicant, who describes himself as a businessman residing at 18 Kitui Road, Sunninghill, Ext 2, Gauteng, instituted proceedings out of this Court, on notice of motion, seeking relief on two basis, these being:

[2.1.] In part A of the notice of motion the applicant sought an order, on an urgent basis, interdicting and restraining the Speaker of the National Assembly (the first respondent) from calling, permitting or recording any vote in the National Assembly on the National Prosecuting Authority Amendment Bill (which was being processed in the legislative process in the National Assembly under reference [B23-2008]), and the South African Police Services Amendment Bill (processed in the legislative process under reference [B30-2008]), pending the determination of the relief which the

applicant would seek, on a date to be arranged with the Registrar of this Court, in Part B of its notice of motion.

[2.2.]In part B of the notice of motion the applicant, on a date to be arranged with the Registrar of this Court, which presumably would have been on the same papers, would seek an order in the following terms:

[2.2.1.]Permanently interdicting the first respondent from calling, permitting or recording a vote in the National Assembly on the bills referred to in paragraph [2.1] until:

[2.2.1.1.]The Joint Committee on Ethics & Members' Interests would have been duly convened, pursuant to item 17 of the Code of Conduct for Assembly & Permanent Council Members ("the Code"), and would have elicited the Members' disclosures as required under the Code, and properly heard the applicant with respect to his complaint, as lodged on 5 September 2008, which complaint alleged that Members of Parliament implicated in the so-called "Travelgate" matter, involving the fraudulent obtaining and utilisation of Members' parliamentary travel vouchers, must, in terms of the Code, withdraw from all proceedings in which the aforementioned bills were considered; or

[2.2.1.2.]In the event of the Chairperson, Joint Committee on Ethics & Members' Interests (the eighth respondent) or anyone acting in his or her stead and on his or her behalf, refusing or failing to decide to convene the said Committee for the said purpose, and in the further event that applicant, within five(5) days of any such refusal, institutes proceedings to set aside such refusal, or seeking other appropriate relief, pending the final determination of such proceedings.

[3]In effect, what I was being asked to determine, in terms of submissions on behalf of the applicant, was whether, under the standards established in Parliament's own Code of Conduct, and the fundamental principles of constitutional democracy, the vote on the bills in the National Assembly should have been permitted to proceed without the Joint Committee having applied its mind as to whether the Members implicated in the so-called "Travelgate" matter should have been compelled to withdraw from further consideration of, and indeed, voting on the said bills.

[4]The matter was argued before me on Wednesday, 22 October 2008. After hearing argument, which lasted somewhat four and a half hours (4hr 30min), I dismissed the application with costs and, as regards the eighth, ninth and tenth respondents, I ordered that such costs would include costs consequent upon employment of two counsel. As has already been pointed out I did not

give reasons for the order I gave but did point out to the parties that the reasons for the order I gave would be furnished on request provided that such request would be filed with the Registrar within the time limits as provided for in the Rules of Court. A request for such reasons has since been filed on behalf of the applicant. In the judgment which follows is included reasons for the order I gave.

THE PARTIES

[5]Apart from The Speaker of the National Assembly, who has been cited as the first respondent, and apart from The Chairperson, Joint Committee on Ethics & Members Interests, who has been cited as the eighth respondent, eight other State organs have been cited as respondents, and these are: The Chairperson of the National Council of Provinces, who has been cited as the second respondent; the Registrar, Joint Committee on Ethics & Members Interests, who has been cited as the third respondent; the Chairperson of the Portfolio Committee on Safety & Security, cited as the fourth respondent; the Chairperson of the Portfolio Committee on Justice & Constitutional Development, cited as the fifth respondent; the National Director of Public Prosecutions, cited as the sixth respondent; the Head of the Directorate of Special Operations, cited as the seventh respondent; the Minister of Safety & Security, cited as the ninth respondent; and the Minister of Justice & Constitutional Development, who has been cited as the tenth respondent.

The first, second, third, fourth, fifth, eighth and the tenth respondent opposed the relief sought whilst the rest of the respondents filed notices to abide.

FACTUAL BACKGROUND

[6]In setting out the background of material facts relied upon by the applicant for the relief sought, I shall always be mindful of the fact that this application was brought on extremely urgent basis. Initially, it was anticipated that the application would be heard on Tuesday, 21 October 2008 at 15h00 or soon thereafter. The founding papers, consisting as they are of the notice of motion, the founding affidavit together with annexures thereto, and the supporting affidavit are fairly voluminous, consisting of somewhat 271 pages. Answering affidavits in respect of those respondents who opposed the relief sought, were filed in the mid-afternoon on 22 October 2008, some two hours before the hearing of the matter commenced. Voting on the bills, which the applicant sought to prevent from occurring, was scheduled for Thursday, 23 October 2008 at 14h00. It therefore came as no surprise, because of time constraints, that those of the respondents who opposed the relief sought, confined themselves to taking issue with the basic elements of the relief sought rather than responding to each and every factual background material relied upon by the applicant for the relief it sought.

[7]The applicant relies on the following background material for the relief it sought in terms of Part A and, ultimately, and presumably on the same papers duly supplemented, if the need would have arisen, which the applicant would seek in terms of Part B of its notice of motion: The starting point is the Directorate of Special Operations (DSO) which was established in the office of the National Director of Public Prosecutions to investigate and prosecute offences committed in an organised fashion. The objectives of the Directorate of Special Operations, commonly known as the Scorpions, are set out in section 7(1) of the National Prosecution Authority Act[1]. Amongst others, these are to investigate and to carry out functions incidental to investigations; to gather, keep and analyse information; and, where appropriate, to institute criminal proceedings relating to offences or any criminal or unlawful activities committed in an organised fashion or such other offences or category of offences as determined by the President by proclamation in the Government Gazette from time to time[2].

[8]The DSO was established within the office of the National Director of Public Prosecutions in 2001. Since its establishment the DSO has undertaken a number of high profile investigations some of which have involved prominent members of the African National Congress (ANC). The applicant sets out in his founding affidavit what he terms an extremely

[1] The National Prosecution Authority Act, 32 of 1998.
[2] Evidence derived from para 29 of the founding affidavit.

successful record in combating organised crime. He proceeds to set out the conviction rate achieved by the Scorpions as follows:

[8.1.]For the period 2004/2005 the conviction rate was 88%; for the period 2005/2005 the conviction rate was 82%; for the period 2006/2007 the conviction rate was 85%; and for the period 2007/2008 the conviction rate was similarly 85%.

[8.2.]The number of investigations finalised by the Scorpions for the period 2004/2005 was 325; for the period 2005/2006 the number of investigations finalised was 318; for the period 2006/2007 the number was 267; and for the period 2007/2008 the number of investigations finalised was 122.

[8.3.]In as far as the number of successful prosecutions is concerned, the applicant sets out the following success record: for the period 2004/2005 the number was 234; for the period 2005/2006 the number was 243; for the period 2006/2007 the number was 214; and for the period 2007/2008 the number was 122[3].

[8.4.]The applicant goes on to record that the former President recognised that organised crime presented a threat to national security, and that the DSO

[3] Evidence derived from para 26 of the founding affidavit.

had been effective in dealing with organised crime as is evident in a letter by the former President addressed to the National Director of Public Prosecutions, Advocate Vusi Pikoli, dated 23 September 2007.

[9]Of a number of high profile investigations undertaken by DSO the applicant mentions high profile investigations involving Members of Parliament and of various political parties including the ANC in the so-called "Travelgate" matter. With regards to the so-called "Travelgate" matter the applicant refers to the investigation of various Members of Parliament who were alleged to have defrauded Parliament with regard to their travel voucher expenditure. In this regard, the applicant annexes to his founding affidavit, as annexure "HG7", a list of Members of Parliament who, so the applicant alleges, were prosecuted, investigated and/or implicated in the so-called "Travelgate" matter. Included in this list is the former Speaker of Parliament, Ms Baleka Mbethe; the Registrar, Joint Committee on Ethics & Members Interests and who is cited as the third respondent in these proceedings; and at least two members of the Cabinet.

[10]The investigations into the so-called "Travelgate" matter was initially undertaken by the Commercial Branch of the SA Police Service. The investigations were ultimately undertaken by the DSO per of approval of the then Speaker of Parliament; the then Chairperson of the National Council of

Provinces; and the Secretary of Parliament as it was felt the matter merited investigations by a specialised crime busting unit in the form of the Scorpions. The applicant goes on to mention prominent members of the current National Executive of the ANC as being amongst those individuals who have been investigated by DSO in relation to criminal activities citing such names as Tony Yengeni; Bathabile Dlamini; Ruth Bhengu; Nyami Booi; Thaba Mafumadi; Nosiviwe Mapisa-Nqakula; Ndleleni Duma; and Ngoako Ramathlodi. He goes on to mention such other prominent members of the ANC such as the former Speaker of Parliament, Baleka Mbethe; the former ANC Chief Whip, Mr Mbulelo Goniwe and the current Minister of Safety & Security, Mr Nathi Mthethwa as some of the persons who were investigated by the DSO.

THE DECISION TO DISBAND THE DSO

[11]The ANC held its 52nd national conference at Polokwane in the province of Limpopo from 16 to 20 December 2007. Amongst other resolutions taken at conference, is the resolution that was aimed at disbanding the DSO. The resolution reads:

[11.1.]The constitutional imperative that there be a single police service, should be implemented.

[11.2.]The municipal, metro and traffic police be placed under the command and control of the National Commissioner of the SA Police Service, as a force multiplier.

[11.3.]The Directorate of Special Operations (Scorpions) be dissolved.

[11.4.]Members of the DSO performing policing functions must fall under the SA Police Service.

[11.5.]The relevant legislative changes be effected as a matter of urgency to give effect to the aforegoing resolution.

[12]On 1 April 2005 the former President appointed Judge Sisi Khampepe to chair a commission of enquiry (Khampepe Commission) to investigate and report on certain aspects of the DSO. The Khampepe Commission report was signed on 3 February 2006. It was presented to the former President on 22 May 2006. The report of the commissions, which preceded the adoption of the resolution to disband the DSO, recommended that the DSO be retained within the National Prosecution Authority. In the report Judge Khampepe observed that "the rationale for the establishment of the DSO is as valid today as it was at conception" and that *"the DSO should continue to be located within the NPA"*. The conclusion of the Khampepe Report was expressed in forthright terms (at 103 of 144) where it reads: "Until such time as there is cogent evidence that the mandate of the Legislature (to create a specialised instrument with limited investigative capacity to prosecute serious criminal or unlawful conduct committed in an organised fashion) is demonstrably fulfilled I hold the view that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO."

THE INITIATION OF THE BILLS TO DISBAND THE DSO

[13]On 30 April 2008, the Cabinet approved the initiation of two Bills that would have an effect of disestablishing the DSO in the form of the General Law Amendment Bill (which was subsequently renamed the SA Police Service Amendment Bill ("SAPSA Bill") and the National Prosecution Authority Amendment Bill ("NPA Bill"). On 9 May 2008 both Bills were published in the Government Gazette. The preamble to the SAPSA Bill specifically states that the purpose of the Bill is to transfer the investigative capacity and operational powers of the DSO to the SA Police Service.

[14]The SAPSA Bill was submitted to the National Assembly by the former Minister of Safety & Security on 12 May 2008 whereafter it was referred to the Portfolio Committee on Safety & Security, the Select Committee on Security & Constitutional Affairs and to the Portfolio Committee on Justice & Constitutional Development. Although the SAPSA and the NPA Bills are section 75 Bills, the Committees resolved that, in view of the importance of the public interest in the Bills, public hearings be held not only in the National Assembly, but in the provinces as well in co-operation with the Security and Constitutional Affairs Select Committee in the National Council of Provinces. Written submissions were invited from persons and entities having an interest in the processing of the Bills. In the course of this process both the Chairpersons of the Portfolio Committees on Safety & Security and of Justice

& Constitutional Development, in the persons of Ms M Sotyu and Mr Y Carrim respectively, had made it known through media briefings that the ultimate aim of the SAPSA Bill was to bring about the disestablishment of the DSO. Public hearings were held at Parliament on 5, 6 and 7 August 2008 and in the provinces during the course of September 2008.

[15]At about the same time the Bills were being debated in the respective Portfolio Committees, the applicant, through its attorneys of record, had engaged the Speaker of Parliament seeking an assurance that those Members who were either investigated, implicated or prosecuted by the DSO in relation to the fraudulent obtaining and utilisation of Members' parliamentary travel vouchers be withdrawn from participating, in whatever shape of form, in the legislative process involving the SAPSA and the NPA Bills on both Committee level and in plenary sessions. Included in the correspondent between the applicant and the Speaker was a request by the applicant that the Speaker furnishes him with a copy of the report by the Multi-Party Disciplinary Committee submitted to her. The applicant is unaware when the report was submitted to the Speaker, but believes it could have been on a date sometime during the middle of 2007. When the required assurance was not forthcoming, the applicant resorted to the complaint mechanism provided for in article 17 of the Code of Conduct for Assembly and Permanent Council Members ("The Code of Conduct").

COMPLAINT WITH THE JOINT COMMITTEE

[16]Sections 57 and 70 of The Constitution of the Republic of South Africa, 1996 make provision for Parliament to determine and control its internal arrangements, proceedings and procedures. The sections further provide that Parliament may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and involvement. As envisaged in these sections of the Constitution, Parliament developed Joint Rules of Parliament which provide a Code of Conduct for Assembly and Permanent Council Members ("The Code of Conduct").

[17]Item 12 of Part 2 of the schedule to the Joint Rules which deals with ethical conduct on the part of members of Parliament provides that:

> "A member must –
>
> (a) declare any personal or private financial or business interest that the member may have in a matter before a Joint Committee, Committee or other Parliamentary Forum of which that member is a member; and
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> (b) withdraw from the proceedings of that Committee or Forum when that matter is considered, unless that Committee or Forum decides that the member's interest is trivial or not relevant."

[18]Item 17 of the Code of Conduct, on the other hand, provides as follows under the heading "Investigations by Committee":

> "Investigations by Committee
>
> 17(1) The Committee, acting on its own or on a complaint by any person through the office of the Registrar may investigate any alleged breach by a member of this Code.
>
> (2) The Committee may determine its own procedure when investigating any alleged breach but must at least hear the complainant and the member against whom the complaint is lodged."

[19]On the strength of annexure "HG7" annexed to the applicant's founding affidavit; and on the strength of the approval by the then Speaker of Parliament; the Chairperson of the National Council of Provinces and the Secretary to Parliament that the investigation into the members' alleged fraudulent conduct relating to travel vouchers and expenditure be undertaken by the DSO, the applicant submits that a significant number of members of Parliament and/or such members or their spouses, permanent companions or business partners have a "personal or private financial or business interest" as contemplated in item 12 of the Code of Conduct in the SAPSA and the NPA Bills. The applicant says so by virtue of such members being, or having been investigated, prosecuted and/or implicated in various DSO investigations. That being so, so alleges the applicant in his founding affidavit, those members who had been investigated, prosecuted and/or

implicated in various DSO investigations, must, firstly, make full disclosure and, secondly, recuse themselves from any and all parliamentary processes, whether at committee or plenary levels, where the SAPSA and NPA Bills are considered. Such members include, so the allegation further goes, the third respondent, the current Minister of Safety & Security, the current Minister of Defence, the Minister of Public Enterprises and the current Deputy President.

[20]The complaint lodged by the applicant on 5 September 2008 was preceded by an exchange of correspondence between the applicant, through its attorneys of record, and the former Speaker of Parliament. In the correspondence to the Speaker the applicant recorded that a large number of current Members of Parliament were being investigated, prosecuted or were implicated in the "Travelgate" matter and called upon the Speaker to furnish a written undertaking that she would ensure that all Members of Parliament implicated in the "Travelgate" matter make the necessary disclosure and further ensure that such members withdraw from deliberations, consideration and voting on the SAPSA and NPA Bills. As has already been pointed out in paragraph [15] of this judgment, no such undertaking was forthcoming.

[21]Once no written undertaking was forthcoming to ensure that no members of Parliament who were either investigated, prosecuted or implicated in the "Travelgate" matter would not participate in the consideration, deliberations

and, ultimately, in voting on the Bills, the applicant, through its attorneys of record, any by way of a letter dated 5 September 2008, opted to lodge a formal complaint with the third respondent. In its letter of complaint, the applicant reiterated that the Joint Committee was obliged to investigate his complaint; pointed out that in terms of item 17(2) of the Code of Conduct the Joint Committee is obliged to hear the applicant as the complainant; requested the third respondent to contact him to discuss a date for the hearing of his complaint and that he be afforded an opportunity to make written submissions; the applicant pointed out that, in order to properly prepare for the hearing, both the applicant and the Committee would need to have access to the copy of the report prepared by the Multi-Party Disciplinary Committee which, to the best of his knowledge, the Speaker was furnished with a copy; the applicant further pointed out that he had requested a copy of the report by the Multi-Party Disciplinary Committee from the Speaker and requested the third respondent to use the influence of her good offices to obtain the report from the office of the Speaker of Parliament for the purpose of the proposed hearing.

[22]On 15 October 2008, the third respondent, through the person of Luwellyn Landers, who is the Chair of the Joint Committee on Ethics & Members' Interests responded to the applicant's complaint. In his letter of response Mr Landers asserted that the Joint Committee was not mandated to pro-actively

investigate Members; he requested details regarding individual Members suspected of having breached the Code of Conduct; stated that international practice was such that, to operate as a disqualification, a member's interest must be immediate and present; and requested the applicant to contact the office of the Registrar of the Joint Committee to arrange times and dates for a meeting to discuss the matter.

[23]The applicant, once again through the offices of his attorneys of record, responded per a letter dated 16 October 2008 proposing a meeting at 10h00 on Monday, 20 October 2008. In this letter, the applicant requested an assurance that no vote would be called in the National Assembly on the two Bills until such time as his complaint had been dealt with; attached yet another list of individual members who, to the applicant's knowledge, had been prosecuted in connection with the "Travelgate" matter; re-iterated his request for a copy of the report prepared by a Multi-Party Disciplinary Committee, which was submitted to the Speaker; and furthermore stated that the Joint Committee should, pursuant to its obligations under the Code of Conduct, call upon any and all Members of Parliament who were implicated in the "Travelgate" matter to make a full disclosure.

[24]In a letter dated 17 October 2008, Mr Landers suggested a meeting on Tuesday, 21 October 2008. Mr Landers had indicated in the letter that due

to time constraints it was not possible to arrange for a meeting on the date and time as suggested by the applicant. Mr Landers had not positively responded to the applicant's request that the National Assembly's vote on the Bills be deferred until after the Joint Committee's consideration of his complaint. Thus, the applicant stated it expressly in his response to this latest letter from Mr Landers that in the absence of the requested assurance, the proposed meeting for Tuesday, 21 October 2008 would be of little utility and would expose the applicant to a *fait accompli,* particularly in the light of the fact that the Committees on Safety & Security and of Justice & Constitutional Development had voted on the Bills at Committees at 18h00 on Monday, 20 October 2008. After the Committees had voted on the Bills, these were then referred to the National Assembly for plenary deliberations, and possibly, a vote thereon. The vote on the Bills in the National Assembly was scheduled for Thursday, 23 October 2008 at 14h00. It was under these circumstances that the applicant felt he had no alternative but to instruct his attorneys of record to prepare and institute these proceedings out of this Court as matter of urgency.

THE RELIEF SOUGHT BY THE APPLICANT

[25]What the applicant sought me to do was to grant an order interdicting and restraining the Speaker of Parliament from calling, permitting or recording any vote in the National Assembly on the NPA and the SAPSA Bills, pending the

part of the applicant's application set forth in Part B of its notice of Motion. The relief sought in Part B of the notice of motion envisages a permanent interdict until the convening of the Joint Committee on Ethics & Members' Interests to hear the applicant's complaint pursuant to item 17 of the Code of Conduct; that the Joint Committee would elicit disclosures on the part of Members of Parliament and permanent Council Members and, arising from such disclosures, Members of Parliament and permanent Council Members implicated in the so-called "Travelgate" matter withdraw from all proceedings in which the Bills are considered. No indication is given how long this process would last. What in effect I was asked to do was to bring about to a halt, albeit temporarily, a legislative process that was already in the legislative system, pending the relief envisaged in Part B of the notice of motion.

[26]As pointed out by Langa CJ in *Hugh Glenister v President of the Republic of South Africa & Others*[4] at [29] that the doctrine of separation of powers is part of our constitutional design. Langa CJ goes further to say at [30] that there is no express mention of the doctrine of separation of powers in the text of the 1996 Constitution, citing para [108] of the First Certification[5] judgment of the Constitutional Court, *In re: Certification of the Constitution of the*

[4] An as yet unreported judgment of the Constitutional Court delivered on 22 October 2008. Case No CCT 41/2008 [2008] ZACC 19.
[5] 1996(10) BCLR 1253 (CC).

Republic of South Africa, 1996, where the Court, in holding that the text of the 1996 Constitution did comply with the Constitutional Principles VI[6], stated:

> "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."[7]

The Constitutional Court continued at para [109] of the First Certification judgment:

> "the principle of separation of powers, on the one hand, recognizes 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 another. In this sense it anticipates the necessary and 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."[8]

[27]It is within the principle and doctrine of separation of powers that the National Assembly, as a legislative organ of government, determines and control its internal arrangements, proceedings and procedure; and make rules

[6] See schedule 4 to the Constitution of the Republic of South Africa, Act 200 of 1993.
[7] In re: Certification of the Constitution of the Republic of South Africa at [109].
[8] *Ibid* at [109].

and orders concerning its business, with due regard to the representative and participatory democracy, transparency and public involvement[9].

[28]And then, of course, there is a matter of the provision of section 167(4) of the Constitution of the Republic of South Africa, 1996 which provides as follows in relevant parts:

> "167(4) Only the Constitutional Court may –
>
> … … …
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 and 121;
>
> … … …
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation;"

Sections 79 and 121 referred to in paragraph (b) of subsection (4) deal with the power of the President or the Premier of a province to refer a Bill to the Constitutional Court for a decision on its constitutionality, in each case, before assenting to and signing such a Bill. In terms of this section no party, other than the President or the Premier of a province, may challenge the constitutionality of a Bill which has not as yet been passed into legislation.

[29]The Courts in this country have consistently held that the provisions of section 167(4) should be interpreted restrictively. In *Doctors for Life*

[9] Section 57 of the Constitution of the Republic of South Africa, 1996.

International v Speaker of the National Assembly & Others[10] Ngcobo J held that a wide meaning of the phrase "constitutional obligation" would undermine the role of other courts. Moreover, Ngcobo J considered that such an interpretation to be contrary to the provisions of section 172(2)(a) of the Constitution which confers jurisdiction on the Supreme Court of Appeal and the High Courts to consider the constitutional validity of an Act of Parliament or conduct of the President[11]. Ngcobo J drew a distinction between "constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other"[12].

[30]In the case of those obligations that are readily ascertainable Ngcobo J asserts that a determination of whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. This would be the case, by way of an example, of an instance of a provision which would require a statute to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity[13]. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of

[10] 2006(6) SA 416 (CC).
[11] Doctors for Life, *ibid,* at [17].
[12] Doctors for Life, *ibid* at [25].
[13] At [25].

separation of powers. It simply decides a formal question whether there was, for an example, a specified majority.

[31]In *King v Attorneys Fidelity Fund Board of Control*[14] the Supreme Court of Appeal drew a distinction between the constitutional obligations envisaged in section 167(4)(e) of the Constitution and the concept of limitation on legislative authority. At para [17] the Court said the following with regards/pertaining to section 167(4)(e):

> "Procedural requirements that are prerequisites to validity do not impose obligations. This is because constitutional limitations on legislative authority generally – albeit not invariably – are derived from disabilities contained in rules that qualify the way in which the Legislature may act, and it is a mistake to confuse legal limitations that arise from procedural prerequites and from other limitations of legislative power into those that derive from the imposition of duties.
>
> A constitution which effectively restricts the legislative of the supreme Legislature in the system does not do so by imposing (or at any rate need to impose) duties on the Legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties, but legal disabilities."[15]

[32]The applicant correctly accepts in his submissions that courts, both in this country and abroad, defer, out of regard for the principle of comity that arise

[14] 2008(1) SA 474 (SCA)
[15] King v Attorneys Fidelity Fund Board of Control *ibid* at para [17].

from the doctrine of separation of powers, to elected legislatures, but that such deference is not absolute. If deference were to be absolute, that in itself would be unconstitutional. Ngcobo J puts the position thus in *Doctors for Life* at para [67]:

> "On the one hand, it raises the question of the competence of this Court to interfere with the autonomy of Parliament to regulate its internal proceedings and, on the other, it raises the question of this Court to enforce the Constitution, in particular, to ensure that the law-making process conforms to the Constitution."

[33]Ngcobo J continues thus at para [69]:

> "[69] The basic position appears to be that, as a general matter, where the flaw in the lawmaking process will result in the resulting law being invalid, Courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or 'settled practice'. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where the aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object."

[34]It is submitted on behalf of the applicant, and correctly in my view, that the Joint Rules of Parliament, and in particular, item 12 of the Code of Conduct, constitute constraints on the legislative authority of Parliament. This is

because Parliament, as the supreme legislative authority, subject only to the Constitution and the rule of law, should be vigilant in preventing circumstances from arising that would have an effect of contaminating its legislative process. What I was thus called upon to determine at the hearing of this matter was whether there had been compliance with such legislative constraints: the issue to be determined not being one that falls within the sole jurisdiction of the Constitutional Court by virtue of the provisions of section 167(4)(e) of the Constitution but rather whether Parliament has fulfilled its obligation in compliance with its legislative constraint. In the determination of this question it should always be borne in mind that the applicant's primary duty is to establish a basis upon which intervention in the legislative process is justified. The determination of this issue will invariably involve the evaluation of available evidence.

EVALUATION OF EVIDENCE

[35]In evaluating the available evidence to determine whether a proper case has been made to justify the grant of the relief sought, I shall always be mindful of those principles and values to which all organs of state and branches of government are subject to, these being the supremacy of the constitution and the rule of law, accountability, responsiveness and openness. Apart from the general allegation of fraudulent conduct on the

part of an unspecified number of Members of Parliament and permanent Members of the National Council of Provinces, the applicant's complaint appears to be premised, to a considerable degree, to annexure "HG7" annexed to the applicant's founding affidavit; what ought to be contained in a report by the Multi-Party Disciplinary committee, purportedly forwarded to the office of the Speaker of Parliament sometime during the middle of June 2007 and annexure "A" to a letter dated 16 October 2008 addressed to the third respondent by the applicant's attorneys of record. I shall, in turn, deal with these three basis of complaint with a view to determining whether these basis of complaint, either individually or cumulatively, did constitute a sufficient basis to intervene in the legislative process as the applicant sought me to do. But before dealing with these issues, in turn, I need to make some observation about the alleged urgency of the matter.

URGENCY

[36]The applicant had threatened to institute these proceedings on no less than two occasions prior to institution of these proceedings. The first such occasion was per a letter by the applicant's attorneys of record dated 22 August 2008 in which letter the applicant threatened to institute proceedings, on an urgent basis, unless an undertaking that Members of Parliament implicated in the "Travelgate" matter would not participate in the deliberation,

consideration and voting on the SAPSA and the NPA Bills would have been given by no later than Monday, 25 August 2008. No such undertaking was given as demanded and no action was taken by the applicant.

[37]It appears that on 28 August 2008 the applicant's attorneys of record addressed a further letter to the Speaker of Parliament requesting for permission to serve on the precincts of Parliament an urgent application in the matter of Hugh Glenister vs The President of the Republic of South Africa. Such permission was granted per a letter by the Parliamentary Legal Advisor addressed to the applicant's attorneys of record dated 2 September 2008. Once again the applicant did not take any action until on or about 20 October 2008 when these proceedings were instituted. On or about the time the permission sought was granted, the applicant elected to pursue an item 17 complaint mechanism.

[38]The relief sought by the applicant was fiercely resisted on the basis that whatever urgency of the matter there could have been, the applicant was the author of such urgency and that the application needed to be dismissed solely on that basis. However, *ex aequo et bono,* I resisted this persuasion because of the importance of the matter to the applicant and the enormous public interest the matter had attracted and opted, rather, to determine the matter on the merits.

MULTI-PARTY DISCIPLINARY REPORT

[39]It would appear that there was a report compiled arising from disciplinary proceedings which ought to have been held against some Members of Parliament and permanent Council Members pertaining to the "Travelgate" matter under the auspices of a Multi-Party Disciplinary Committee. It would further appear that a copy of such a report was forwarded to the Speaker of Parliament, according to the applicant, sometime during the middle of 2007. What shape or form did such disciplinary proceedings take is unknown in as much as the contents of the Multi-Party Disciplinary report is unknown. Which Members of Parliament, and the number thereof, are implicated in such a report remains a mystery. The applicant had, on no less then three occasions, requested for a copy of such a report from the office of the Speaker of Parliament without success or response as regards the existence or otherwise of the requested report. It is completely unacceptable for the head of a Parliamentary institution to have treated the request by the applicant in this fashion. Parliament, as the legislative arm of government, is bound by those values of openness, responsiveness and accountability so aptly espoused in section 1 of the Constitution. The conduct of the Speaker, in no doubt, seems to have fallen foul of those values. Perhaps the applicant, in the light of what appears to have been reluctance on the part of

the office of the Speaker to furnish him with a copy of such a report, should seriously have considered *mandamus* as a remedy.

[40]In the nature of things I could not, in the absence of such a report, make a determination whether any conflict on the part of any Member of Parliament could have arisen, and, if conflict could have arisen, whether such conflict would have been irrelevant or trivial. In short, and in the light of the absence of such a report, I cannot, in the nature of thing, determine if the contents of such a report would have been helpful.

ANNEXURE "HG7"

[41]In paragraph 38.1 of the founding affidavit, the applicant annexes annexure "HG7" which he alleges is a list of Members of Parliament that were prosecuted, investigated and/or implicated in the "Travelgate" matter. On the other hand, in paragraph 64 of the founding affidavit the applicant contradicts himself by stating that "…… it is at this point impossible to specify with precision which members are subject to recusal. It is precisely for purposes of allowing the joint committee to make such a determination that full disclosure must be made by each member".

[42]Shortly before the commencement of the hearing of this matter there was filed from bar an affidavit by Kevin Anthony Louis of the applicant's attorneys

of record, who states that he is the author of annexure "HG7" to the applicant's founding affidavit which, according to him, represents an amalgamation of documents obtained from the Secretary to Parliament and document filed in another matter ostensibly instituted out of this Court under case no: 8313/08. The affidavit was deposed to on 22 October 2008, the same day that this matter was to be heard. It purports to be a supplementary affidavit, presumably supplementing the founding affidavit but was not included in the founding papers to which the applicant deposed to on 20 October 2008.

[43]The handing in from bar of this affidavit was resisted by those of the respondents who opposed the relief sought on the basis that it's status is questionable: it neither is a supporting affidavit to the founding affidavit; no reference is made to it in the founding papers and, in view thereof, the respondents were deprived of an opportunity to answer the allegations contained therein; nor is it a supplement to any affidavit filed in reply and, in any event, in the instance of this matter, no such replying affidavit had been filed. I did not at that stage rule on the admission thereof, but considering the fact that the affidavit in part refers to the core allegation of fraudulent activities on the part of members mentioned therein, and to which the respondents were not afforded an opportunity to respond, its admission at

that stage of the proceedings would clearly have been prejudicial to those of the respondents who are opposing the relief sought.

ANSWER BY SPEAKER OF PARLIAMENT

[44]In paragraph 24 of her answering affidavit, the Speaker of Parliament does acknowledge that the DSO did investigate the "Travelgate" matter involving Members of the National Assembly and the National Council of Provinces. The Speaker annexes to her affidavit annexure "GN2", it being an extract of a report ostensibly prepared by the DSO and submitted to Parliament. The report appears to have been transmitted to Parliament at 4.49pm on 31 October 2006. In terms of this report certain members were identified as having allegedly utilised their travel vouchers for vehicle hire in contravention of Parliamentary rules and regulations. The report recommends that Parliament and/or the respective political parties consider instituting disciplinary action against the thirteen (13) Members identified in the report.

[45]Apart from the thirteen (13) Members in respect of whom disciplinary action is recommended, the Speaker refers to thirty (30) other Members of the National Assembly and of the National Council of Provinces in respect of whom the DSO recommended criminal prosecution. Of the thirty (30) Members, twenty nine (29) had pleaded guilty and criminal prosecutions

against them thus finalised. Only against one member are criminal proceedings currently pending. Evidence seems to suggest that the Member against whom criminal proceedings are pending, and out of his own volition, does not participate in the considerations and the deliberations of the SAPSA and the NPA Bills. According to the Speaker of Parliament and on basis of evidence available to her, at the most, only forty three (43) Members could very well be said to fall foul of item 12 of the Disciplinary Code. The National Assembly has four hundred (400) Members. The quorum for passing Bills such as the SAPSA and the NPA Bills is, in terms of Rule 25 of the Rules of the National Assembly, a simple majority.

[46]The Speaker goes on to say in her affidavit, and assuming at best for the applicant that the Ethics Committee were to find that the forty three (43) Members had violated item 12 of the Code and recommended that they recuse themselves from participating in voting on the SAPSA and the NPA Bills, such recusal would have no impact on the quorum required for the passing of the Bills by the National Assembly. Any interdict which might possibly be issued would thus be ineffective as regards the harm it seeks to cure.

[47]The applicant obviously believes that more Members are implicated in the “Travelgate” matter, hence his desire that each and every Member of the

National Assembly and the National Council of Provinces make a declaration of conflict of interest. The problem that the applicant had is that he could not produce cogent evidence of other Members who could have been implicated in the investigations by the DSO apart from those mentioned in the founding affidavit. He thus desired the Joint Committee on Ethics & Members' Interest to investigate each Member's involvement in the "Travelgate" matter. In effect, what the applicant sought me to do was to arrest the legislative process in order that further Members be investigated. This is analogous to arresting a suspect in order to complete one's investigation. In the light of the available evidence, the granting of the other sought, under these circumstances, would not have been commensurate to the interest sought to be protected.

ANNEXURE A

[48]In paragraph 87.3 of his affidavit, the applicant refers to a list of individual members who, to the best of his knowledge, had been prosecuted in connection with the "Travelgate" matter. The list is annexed as annexure "A" to a letter dated 16 October 2008 addressed to the eighth respondent by the applicant's attorneys of record.

[49]The Speaker, on the other hand, denies that annexure "A", contains the names of the individual Members who were prosecuted by the DSO in the

"Travelgate" matter. The Speaker goes on to say that she understands, and verily believes that the list contains names of Members who were indebted in various amounts to various travel agents, these being Bathong, B & E Business and Executive, Ilitha and Star Travel. A perusal of the list clearly shows lists of names under such travel agents as Batho, B & E, Bathong and Ilitha. Thus, the applicant's claim that the list pertains to individual Members who had been prosecuted in connection with the "Travelgate" matter does not seem to have substance.

THE APPLICANT'S SUBMISSION

[50]*Mr Jamie,* SC (with him *Michael Osbourne* and *Louise Ferreira)* seems to suggest in his submissions and, indeed in argument in Court during the hearing of the matter that, on basis of available evidence, a sufficient basis had been established for the granting of the relief sought in terms of Part A of the notice of motion. He makes this submission despite a concession that, as at the time of the hearing of the matter, it was impossible for the applicant to specify with precision which and how many Members would be subject to compulsory recusal. Once the order would have been granted, the Joint Committee would then have to call all 400 members of the National Assembly and all 54 permanent members of the National Council of Provinces to make full disclosure. How many of the total of four hundred and fifty four (454) members of the National Assembly and of the National Council of Provinces

would be implicated arising from the anticipated full disclosure will forever remain a matter of speculation and sheer conjecture.

[51]Furthermore, any possible vote on the Bills on 23 October 2008 that the applicant was concerned about, would not have resulted in the Bills being enacted into law. If an objection would have been raised to the adoption of the Bills in the National Assembly, and a vote is called for and same is carried by a simple majority, the Bills would still not have been enacted into law as the National Council of Provinces would still have to consider and vote on the Bills. Even if the National Council of Provinces would have voted in favour of the Bills, the Bills would still not have been enacted into law as same would have to be referred back to the National Assembly to consider any amendments thereto. It would only have been after the completion of this process that the Bills would be placed before the President for his assent. Even after the Bills have been placed before the President for his assent, it would still be open to applicant to make representations to the President for referral of the Bills to the Constitutional Court for the determination of their constitutional validity. So many options were open to the applicant such that I could not comprehend the assertion that the applicant had no alternative remedy other than the granting of the interdict, albeit on temporary basis. I thus could not find that the applicant had shown that the resultant harm which he was likely to suffer would have been material and irreversible as

contemplated in *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong & Another*[16].

CONCLUSION

[52]What appeared to have been the position at the time of the hearing of this matter was that the applicant, as a law abiding citizen, was concerned that Members of the National Assembly who otherwise would have been implicated in the "Travelgate" matter, would have deliberated and possibly voted on the Bills, and, in so doing, compromise the integrity of the legislative process. However, the problem that the applicant had was that he was unable to specify with precision which and how many members were implicated in the DSO investigation, hence the desire for the investigation by the Joint Committee. But, when you seek an interdict with a view to conducting an investigation, you cannot, by any stretch of imagination, claim to have a right which is threatened. You can only establish if your right is threatened when such an investigation is completed.

[53]When a litigant seeks relief, in a matter such as the one before me, which would have an effect of bringing to a halt a parliamentary legislative process, albeit temporarily, such a litigant will have to adduce cogent evidence justifying the granting of such a relief. The relief, such as the one sought by the applicant in a matter such as the one before me, can only be granted on

[16] 1970[2] WLR 1264.

clear *prima facie* evidence of a likelihood that the legitimacy of a parliamentary legislative process will be significantly contaminated if the legislative process were to be allowed to proceed. No such evidence has been adduced in the instance of this matter. When I granted the order I did on 22 October 2008, I held the view, and I am still holding that view, that no cogent evidence had been adduced to indicate that parliament had, in any significant measure, failed to comply with its legislative constraint as contemplated in item 12 of the Code of Conduct to justify the granting of the relief sought.

[54]It is for the reasons stated in this judgment that I, on 22 October 2008, held that the applicant failed to make out a case for the relief sought and dismissed the application with costs and, in the case of the eighth, the ninth and the tenth respondents, such costs to include costs consequent upon employment of two counsel.

……..
N J Yekiso, J

Coram: Yekiso J

Heard: 22 October 2008

Delivered: 13 January 2009

Summary:

Interdict – Restraining National Assembly from further processing parliamentary legislative process – quantum of evidence to be adduced for the granting of interim relief sought – such a litigant will have to adduce cogent evidence justifying the granting of such a relief – can only be granted on clear *prima facie* evidence of a likelihood that the legitimacy of a parliamentary legislative process will be significantly contaminated if the legislative process were to be allowed to proceed.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Before the Hon Mr Justice NJ Yekiso

CASE NO: 17259/2008

In this matter between:

HUGH GLENISTER	Applicant
And	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
THE REGISTRAR, JOINT COMMITTEE ON ETHICS & MEMBERS' INTERESTS	Third Respondent
THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON SAFETY & SECURITY	Fourth Respondent
THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON JUSTICE & CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Sixth Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Seventh Respondent
THE CHAIRPERSON, JOINT COMMITTEE ON ETHICS & MEMBERS' INTERESTS	Eighth Respondent
THE MINISTER OF SAFETY & SECURITY	Ninth Respondent
THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	Tenth Respondent

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Counsel for Applicant:	**Adv I Jamie (SC)**
	Adv M Osborne
	Adv L Ferrreira
Attorneys for Applicant:	**Wertheim Becker Attorneys**

Counsel for 1st - 5th Respondents:	**Adv MA Albertus (SC)**
Counsel for 8th - 10th Respondents:	**Adv W Duminy (SC)**
	G Malindi
	D Borgström
Attorneys for Respondent:	**The State Attorney**
Date of Hearing:	**22 October 2008**
Date of Judgment:	**13 January 2009**