IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 21990/2012

DATE: 22 NOVEMBER 2012

In the matter between:

LINDIWE MAZIBUKO, LEADER OF THE OPPOSITION IN THE NATIONAL ASSEMBLY Applicant

and

MAXWELL VUYISILE SISULU, MP SPEAKER FOR THE NATIONAL ASSEMBLY 1st Respondent

DR MATHOLE SEROFO MOTSHEKGA, MP 2nd Respondent

THE CHIEF WHIP, NATIONAL ASSEMBLY 3rd Respondent

J U D G M E N T

DAVIS, J:

The applicant seeks an order, on an urgent basis, directing first respondent to take whatever steps are necessary to ensure that a motion of no confidence in the President of the Republic of South Africa, which motion appears to have been dated 8 November 2012, should be scheduled for debate and a vote before the National Assembly on or before 22 November 2012.

The core question which has been raised, is in effect whether the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') recognises that a motion of no confidence is of such importance that the relief being sought must, in the circumstances of this case, be granted.

The brief description of the dispute indicates the considerable constitutional weight which is involved in the determination thereof . I had hoped that a full bench of this Court would hear the matter, which would have been more appropriate, but the matter was launched as a matter of urgency, given the timetable, as I understand it, of the National Assembly. Therefore, it was not possible to compose such a Bench within the time limits which followed from the relief sought . Accordingly I was constrained to hear the matter as a single judge presiding over the urgent court.

Significant constitutional issues are involved in this case. I received no heads of argument from the second respondent. I received heads of argument from the first respondent, but, for reasons that will become apparent, many of the issues which are canvassed therein, are irrelevant to the disposition of this case. I received heads of argument from the applicant, which were of assistance and I am indebted to counsel. I raise this problem , not in order to be difficult nor in order to cast any aspersions on counsel who ably presented oral argument to

this court on Tuesday. I do this in order to explain the difficulty which a duly judge has to determine a case of this importance with so little assistance and in so short a period of time. It is, in short, an undesirable situation. Be that as it made, this court is obliged to determine this dispute.

The motion was initiated by the applicant, as the leader of the opposition. According to the papers she gave notice of her intention to move a motion of no confidence on the President on 8 November 2012 on behalf of eight opposition parties in the National Assembly, who represent approximately one-third of the South African electorate.

According to first respondent's version, which was not placed in issue, the National Assembly did not sit on Friday, 9 November 2012 nor on 12 November 2012. The motion was then published in the Order Paper on Tuesday, 13 November 2012 According to first respondent, that having happened, the motion was ready for consideration by the National Assembly, subject to scheduling by the Programme Committee, of which more presently. In accordance with National Assembly practice and Rules , first respondent avers that the matter was first discussed in the Chief Whip's forum, established in terms of Rule 217 of the Rules of the National Assembly. This forum is responsible for political consultation amongst parties in the

National Assembly, including whether and when a motion should be scheduled for consideration.

First respondent informed the court that in the ordinary course, motions proceed to the Programme Committee for scheduling after the Whip's forum has arrived at an agreement in this regard. It appears that the Whip's forum was unable to reach an agreement at its meeting on Wednesday, 14 November 2012. Accordingly, the matter was referred to the Programme Committee for consideration at a meeting on 15 November 2012 without any recommendation as to whether and when it should be put on the Order Paper. First respondent then states in his answering affidavit:

> "I concluded that, in the absence of a decision by the Programme Committee in this regard, the matter could not be scheduled for debate by the Programme Committee since it had not made a determination as to when it should be so scheduled. However, since the Programme Committee is a mere structure of the National Assembly, the latter can still decide to debate the motion of no confidence and vote upon."

These were the key facts which confronted this court when the

issue was argued on Tuesday, 20 November 2012. I was informed by applicant that the last possible opportunity for the motion, which had been tabled on behalf of the applicant, to be debated and voted upon, was 22 November 2012. Applicant contended that there was every indication that the majority party, The African National Congress ,together first and second respondents, were intent on frustrating the conducting of this debate. According to applicant as the motion lapses on 22 November 2012, which is the last sitting day of the 2012 annual sitting of the National Assembly. Respondents have set up, what amounts, in her view, to a series of insurmountable hurdles to a debate on a motion of no confidence in the President, which is contemplated by section 102(2) of the Constitution.

Applicant's case can, therefore, be summarised thus: the use of procedural machinations to frustrate an important means of Parliament, holding the President to account, is inconsistent with the Constitution and is invalid in terms of section 2 thereof. When opposition parties, in this case representing a third of those who voted in the last general election, propose a motion in the light of the gravity which is inherent in such a motion, the National Assembly must debate and decide the motion as a matter of urgency. Applicant contends that this case concerns fundamental values of democracy,

transparency, accountability and openness. In particular, it implicates the principle of protecting minority parties and individual members of minority parties in the National Assembly.

In the light of these weighty averments, it is important to emphasise with what this application is concerned and not concerned:

1. This case raises the question of whether the National Assembly has an constitutional obligation to ensure that a motion of no confidence be debated in the House when so tabled, and in this particular case where it is initiated by a minority party or parties.

2. If there is an obligation, is the debate to be treated as a matter of sufficient urgency so that it cannot be postponed for an unreasonably lengthy period.

3. If so, do the Rules of the National Assembly provide for the vindication of this right enjoined by the party proposing the motion?

4. If not, does the first respondent have a residual power to schedule the debate, no matter the views of the majority

party?

By contrast, this dispute does not concern the merits of the motion ; that is whether the President has violated the Constitution or any law, committed any serious misconduct or has an inability to perform the functions of office. or is guilty of any of the assertions contained in the motion .

The motion of no confidence tabled by the applicant reads thus:

"(1) That the House, one notes, that under the leadership of President Jacob G Zuma:

(a) The justice system has been politicised and weakened.

(b) Corruption has spiralled out of control.

(c) Unemployment continues to increase.

(d) The economy is weakening.

(e) The right of access to quality education has been violated and, therefore;

(ii) in terms of section 102(2) of the Constitution of The Republic of South Africa 1996, pass a motion of no confidence in President Zuma. :

. None of these issues can possibly be considered by this

court, nor are they relevant to the present dispute. These are matters which must be debated in the National Assembly, not in courts of law.

2. The prospects of success of a motion of no confidence in the President is irrelevant to the present dispute.

3. Whether, in the view of the majority party or any other member of the National Assembly, this motion of no confidence in the President is frivolous or vexatious, is irrelevant to the determination of the case, for reasons that will become apparent later in the judgment.

Constitutional Framework

I turn to deal with the constitutional issues which are involved. Section 102 of the Constitution is entitled 'motions of no confidence':

> "(i) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the cabinet, excluding the President, the President must reconstitute the cabinet.
>
> (ii) 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."

This provision presupposes that a motion of no confidence may be brought in the National Assembly. Only in this way, could either of the two consequences as set out in the provision, come to fruition, that is either the President reconstitutes the cabinet (subsection (1)) or the President, and together with the cabinet, resigns(subsection (2)). It follows that the Constitution envisages that this motion could be brought, not only by a majority party, but also by a minority party, which seeks to garner support for the motion from members across the floor of the House. For reasons that will become presently apparent, this is the very stuff of deliberative democracy. For this reason alone, this is not a case about the merits of the debate , but about the principle of holding such a debate.

In this context, it is necessary to examine, in some detail, the approach which was adopted by the Constitutional Court in the case of Ambrosini v Sisulu [2012] ZACC 27 (CC). The applicant, who was a member of the National Assembly, had voiced, on numerous occasions, concerns about the

procedures of the National Assembly, and in particular the requirement that a member required the Assembly's permission before he or she could introduce a bill into the House. The applicant contended that any rule that stipulated permission as a requirement in this regard, was constitutionally invalid.

The central issue of the case was whether it was open to the National Assembly, pursuant to powers granted in terms of section 57 of the Constitution, to impose a requirement that permission be granted, which could prevent a member of the National Assembly from exercising his or her power to introduce a bill in terms of section 73(2) of the Constitution.

To the extent that it is relevant to this dispute, section 55(1) of the Constitution provides:

> "In exercising its legislative power, the National Assembly may:
> (a) consider pass, amend or reject any legislation before the Assembly, and;
> (b) initiate or prepare legislation except money bills."

The respondent contended that members of the National Assembly are entitled to introduce a Bill in the Assembly

pursuant to section 73(2) of the Constitution. However, in his view, a member was not entitled to initiate or prepare legislation, either in terms of section 55(1)(b) or section 73(2), because, in his view, a collective power vested in the Assembly and not in individual members.

Respondent, contended that it was open to the Assembly to impose a requirement of permission on members who wish to exercise the power of the Assembly to initiate or prepare legislation, because only the Assembly, as the sole repository of the power, could delegate it. He further contended that a majority decision making procedure by the National Assembly was a recognised constitutional principle consistent with our constitutional system. The key question for determination, insofar as the present dispute is concerned was whether section 55 bore the weight of first respondent's contentions, namely that a majoritarian principle applied to the initiation of Bills to be placed before parliament.

The Court was required to interpret section 55 . Mogoeng. CJ, in a seminal judgment, said the following at para 45:

> "The purpose and ambit of section 55(1)(b) should thus be considered, bearing in mind the need to breathe life into the foregoing constitutional vision.

Preliminary work needs to be done before a bill could be ready for introduction in the Assembly. As will be seen later in this judgment, section 73(2) is silent on how a Bill, comes into being and who has the power to engineer and mould a legislative proposal into a Bill. Section 55(1)(b) however provides that the National Assembly has the legislative power to initiate and prepare legislation. The question is whether it accords with the purpose of section 55(1)(b) to confine the exercise of this power to the collective membership of the Assembly, or its duly authorised structures or functions.

A construction that also recognises individual competence to initiate or prepare legislation, not only accords with the textural meaning of the section, but also with the principles of multi party democracy, representative and participatory democracy, responsiveness, accountability and openness. The very nature and composition in the National Assembly renders it pre-eminently suited to fulfil the role of a national forum, at which even individual members may initiate, prepare and present legislative proposals to be considered publicly by all the representatives of the people

presented in the House." (paras 45-46)

The Chief Justice, then continues:

"The rights of all to be heard, and have their rights considered within the context of the legislative process, dictate that individual members ought to have the power to initiate or prepare legislation. In this way, an opportunity will be available to them to promote their legislative proposals so that they could be considered properly. It is a collective responsibility of both the majority and minority parties, and their individual members, to deliberate critically and seriously on legislative proposals and other matters of national importance. And this should also apply to legislative proposals initiated or prepared by individual members. This approach would give meaning to and enrich our representative and participatory democracy and will probably yield results that are in the best interests of all our people...Section 55(1)(b) thus empowers an individual member, even from a minority party, to sponsor or pilot a legislative proposal as her own. It is always open to her, though, to seek the National Assembly's adoption of her initiatives as

its own. This meaning of section 55(1)(b) finds support in its textual and purposive of interpretation, the nature of the power conferred by section 55(1)(b) and the manner in which the National Assembly operates." (paras 48 & 51)

There is one further passage which merits consideration. At para 57, the Chief Justice said:

"The power of an individual member of the Assembly to introduce a bill, particularly those from the ranks of opposition parties, is more than ceremonial in its significance. It gives them the opportunity to go beyond merely opposing, to proposing constructively in a national forum, another way of doing things. It serves as an avenue for articulating positions through public debate and consideration of alternative proposals on how a particular issue can be addressed, or regulated differently and arguably better."

The implications of this judgment by the Chief Justice, are both clear and powerful . In 1994 South Africa boldly began its journey from a society based on authority to one predicated upon justification, from diktat to deliberation,

arbitrary assertion to rational consideration. While this journey was never expected to be easy, given our fraught and divided past, the ambition of the Constitution was to exercise guidance to the nation, so that it be kept on the indicated path, when intolerance or the temptation to abuse power to suppress the dignity of even a single voice expressing a different perspective, prompted movement from the constitutionally indicated journey.

Within the express context of this dispute, the right of an elected representative to bring a motion, whether in the form of a Bill or of a motion of no confidence in the President is envisaged in section 102 of the Constitution captures the animating spirit of our democracy which is not to be reduced to the view of a transient majority, and perhaps even more important, where the temporary majority may appear to be relatively permanent.

This represents , in my view, a majestic ambition, one that was fought for by generations of people in this country through 300 years of racist rule. As a nation we need to remind ourselves that this is our national vision which applies to any dispute, including this one.

Professor Roux captures this model of democracy as follows

in Stu Woolman et al, Constitutional Law in South Africa, Volume 1 at page 10-68:

"(1) Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections in which adult people are entitled to participate, exert sufficient control over their elected representatives to ensure that:

(a) representatives are held to account for their actions;

(b) government listens and responds to the needs of the people in appropriate cases directly;

(c) collective decisions are taken by majority vote, after due consideration of the views of minority parties, and;

(c) the reasons for all collective decisions are publicly explained.

(2) The rights necessary to maintain such a form of government, must be enshrined in a supreme law or Bill of Rights, enforced by an independent judiciary, which task it shall be to ensure that whenever the will of the majority expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that

> tension promotes the values of human dignity, equality and freedom."

Applied directly to the present dispute, there is manifestly a constitutional right to move a motion of no confidence in the President. That right is to be enjoyed by both majority and minority parties sit in the Assembly. That much is clear, not only from the vision of the Constitution as I have set it out, but from the judgment of the Chief Justice in Ambrosini, supra, which is, as I have already suggested, is now critical to his area of our jurisprudence.

Section 102 cannot be read to discriminate against a minority party. Significantly it appears that the approach finally adopted by respondents in oral argument, was to accept this position, even though second respondent had initially taken the view that the motion tabled by applicant, was frivolous and hence not worthy of debate. In the papers as presented to me, a minute of the Programme Committee reflects this view:

> "The Chief Whip of the majority party argued that the motion was not new and substantively the same as the motion of impeachment, tabled by Mr Lekota and contravention of rules and procedures. Mr Lekota could not provide the evidence he needed

and, therefore, turned to the DA, who then invoked another section of the Constitution. He argued that the motion is frivolous and not supported by facts. By way of example, he suggested that opposition parties would not be able to produce evidence on the Marikana tragedy, because of a judicial commission of inquiry into the matter. In terms of the economy, South Africa was like other nations, confronted with economic problems. The country was in fact doing well under the guidance of the President, who had produced a national development plan. The government had also produced a credible plan to address employment."

As I have indicated, second respondent is entitled to this view. It may well be correct. It may also be the view held by the majority of South Africans, but that is scarcely the point that I have been seeking to make in trying to assess the importance and scope of section 102. It seems to me, after a careful analysis of the relevant jurisprudence, and in fairness the latest arguments of respondents, and in particular a further letter that was made available to me by the second respondent, which accepts these considerations and to which I shall make reference later, that the dispute turned upon the remaining three points that I have outlined, namely the

urgency in which to hold the debate, the position as set out in the Rules of the National Assembly and finally, the powers of the Speaker.

I turn then to deal with the question of the Rules:

Rules of The National Assembly:

Rule 2(1) of the Rules provides that the Speaker may give a ruling, or frame a rule, in respect of any eventuality for which the rules do not provide. The list of committees of the National Assembly is set out in Rule 1(2)(i) and includes the Programme Committee, which is established in terms of Rule 187. Rule 188 determines the composition of the Programme Committee in terms of which the minority parties appear to enjoy a majority. Rule 190 provides that the functions and powers of the Programme Committee include that it must prepare and, from time to time, adjust the annual programme of the Assembly, it must monitor and oversee the implementation of Parliament's annual programme and must implement the Rules regarding the scheduling or programming of the business of the Assembly and the functioning of Assembly committees and subcommittees.

Rule 217 establishes the Chief Whip's forum, to which reference has been made. The National Assembly Guide to

Procedure, provides that the Chief Whip "arranges business on the Order Paper, subject to the rules and directives of the Programme Committee".

In this case the Programme Committee, as I have already indicated, reached a deadlock and first respondent assessed that a reference back to the Chief Whip's forum would not take the matter any further. Accordingly, in his view, the matter had to be referred to the National Assembly. Ruling 115B in the Digest of Rulings provides:

> "As have been stated previously in this House, presiding officers do not make up the orders of the day or what comes before us. We merely go by what appears before us and what is decided by the chief whips and the Programme Committee (Debates: The National Assembly 1988, COL 6598)."

Mr Heunis, who appeared together with Ms Smit on behalf of first respondent, contended that no lacuna arose from these Rules, as they clearly made provision for the Speaker to report the deadlock of the Programme Committee to the National Assembly, which was exactly what he did in this case, as he sets out in his answering affidavit:

"I was advised that on Wednesday, 20 November, the day after the court hearing, the National Assembly would deal with the referral by the Speaker."

Much of Mr Heunis' argument, which turned on ripeness, appeared to be predicated, as was Mr Cassiem's, that the National Assembly would deliberate on the matter on Wednesday, 20 November, and accordingly no decision should be taken by this Court, because the matter was not yet ripe for hearing. It was for this reason that I deferred judgment to today in order to give the National Assembly an opportunity to consider the matter as urged upon me by respondents.

I then received the following letter from attorneys acting for the first respondent:

"We are instructed that the motion appeared on item 5 of the Order Paper for today's meeting of the National Assembly, we attached a copy of the Order Paper, together with the announcements, tabling's and committee's report, dated 20 November 2012, where in the Speaker's report to the National Assembly appears. Our instructions are that the

> Speaker's report would not be discussed in the National Assembly in light of the above pending litigation. Our further instructions are that the motion was tabled under further business, however, was not scheduled for debate during the sitting of the National Assembly today. Our instructions are to enable to the motion to be scheduled for debate, the Chief Whip of the majority party would have to move for it to be debated (sic). The Speaker has received the attached letter from the Chief Whip (second respondent) dated 21 November 2012, in which the Chief Whip has undertaken to impress upon parliament to have the motion scheduled for debate in the National Assembly during the week of 26 February 2013."

This letter is relevant to these proceedings and, given the initial approach which had been adopted by the second respondent, assumes considerable importance. The letter reads, insofar as it is relevant to these proceedings:

> "Consistent with our longstanding view, which also forms part of our argument in the Western Cape High Court, we have no misgivings about debating motions in the House, including a motion of no

confidence in the President, which is a matter that is provided for in the Constitution. There is no question as to whether or not this matter has to be scheduled. However, it should be scheduled in conjunction with other important items that the National Assembly has to deal with. The parliamentary programme of 26 November to 7 December, entails committee meetings, oversight visits across South Africa and international study tours by MP's. Cancelling these commitments or summoning back all MP's for a special sitting, would place a significant administrative, logistical and financial burden on the institution. This type of motion is also serious in nature, and could have far reaching implications for Parliament, this country and our democracy and, therefore, cannot be arranged hastily or impulsively. Members also need to adequately prepare to enable them to meaningful engage in this matter. In this regard, we will impress upon parliament that this motion be scheduled for debate by the National Assembly on the week of 26 February 2013. We believe this is a reasonable timeframe for which a motion of such magnitude should be considered by parliament."

The principle of the exhaustion of domestic remedies and/or ripeness(both argued by first respondent), no longer is of relevance to this particular case, in the light of the way in which matters have now unfolded. In short, for reasons that I now set out, there is now no internal remedy left to the applicant to vindicate her constitutional rights in terms of section 102(2), save to wait until 22 February 2013.

I turn to deal with the mechanism set out in the rules for dealing with such a motion which reveals the lack of such a remedy. The mechanism for introducing a motion of no confidence is to be found in Rule 94, which enables a member to give notice of a draft resolution for approval of the resolution. In terms of Rule 98:

> "(1) When giving notice of a motion, a member shall:
>
> (a) read it aloud and deliver at the table a signed copy of the notice; or
>
> (b) deliver to the secretary a signed copy of the notice on any parliamentary working day for placing on the Order Paper.
>
> (2) Written notices of motion delivered to the secretary after 12:00 on any parliamentary working day, may be placed on the Order

Paper of the second sitting day thereafter, not earlier, unless in a particular case the Speaker determines otherwise.

(3) Except with the unanimous concurrence of all the members present, no motion shall be moved in the day on which notice thereof is given."

In terms of this Rule, on 8 November 2012, the applicant launched her motion of no confidence. Rule 100 provides:

"Any notice of motion which offends against the practice of these rules, may be amended or otherwise dealt with as the Speaker may decide."

Clearly first respondent can make some formal adjustments to a request and screen out frivolous or vexatious motions. In this case, however, this did not happen , as indeed it could not , given its nature . The motion appeared on the Order Paper on 13 November 2012, as I have mentioned, in terms of Rule 37(1):

"A committee must report to the Assembly on a matter referred to the committee;

(a) when the Assembly is to decide the matter in

terms of these rules, the joint rules, the resolution of the Assembly or legislation.

(b) if the committee has taken a decision on the matter, whether or not the Assembly is to decide the matter as contemplated in paragraph (a); or

(c) if the committee is unable to decide a matter referred to it for a report."

In terms of Rule 188(1), the Programme Committee, as I have already indicated, plays the central role in these proceedings. That committee consists of the Speaker, the deputy Speaker, the leader of government business, the house chairpersons, the chief whip, the deputy chief whip for the majority party in the assembly, the whip of the majority party responsible for programming, another two whips of the majority party designated by that party, one whip and two additional representatives of the largest minority party in the assembly, designated by that party, one whip and another additional representative of the second largest minority party in the assembly, designated by that party and one whip of each of the other minority parties in the assembly, designated by the party concerned.

Rule 189 provides that:

"The Speaker is the chairperson of the Programme Committee, but if the speaker is not available, the deputy speaker then presides."

In terms of Rule 190E:

"The committee may take decisions and issue directives and guidelines to prioritise or postpone any business in the assembly, but when the committee prioritises or postpones any government business in assembly, it must act with the concurrence with the leader of government business."

Rule 129(2) is also of relevance. It provides that:

"The chairperson of the committee, subject to the other provisions of these rules and directions of the committee, presides at meetings of the committee and in terms of;

(b) In the event of an equality of votes on any question before the committee, must exercise a casting vote in addition to the chairperson's vote as a member."

I am informed that the Programme Committee approaches its business on the basis of consensus. This claim requires further interrogation which I shall undertake later in this judgment

Suffice at this stage to say: according to the parties ,unless a motion, on the basis of consensus, is tabled and supported by the majority party, in practice, as matters stand, it cannot be debated. For the reasons outlined in relation to our Constitution, this position is incompatible with the Constitution, in that the majority cannot subvert the right of the majority to have a debate as envisaged in terms of section 102 of the Constitution.

It appears, in fairness to the position of second respondent, that this latter position is now accepted by him. However, the passage in the letter of the second respondent which suggests that the majority party "will impress" upon Parliament that the debate be scheduled in the week of 22 February 2013, proceeds from an incorrect premise. It cannot be within the gift of the majority party to decide upon the issue of the timing of this kind of motion, yet this appears to be the position adopted given the way in which the letter was couched.

This leads to the next point ,namely the question of urgency

and the Rules.

In my view, a motion of no confidence in the President of the Republic of South Africa must contain the idea of inherent urgency. I have already referred to the present resolution. It raises matters of profound national interest and importance. Members of the majority party may well consider that all of these claims are unjustified, indeed outrageous or frivolous.

Mr Cassiem, on behalf of the second respondent, argued that all of these allegations have been known for a very long time and that any attempt by the applicant to introduce this motion at the proverbial eleventh hour in the annual programme of the National Assembly, was a politically opportunistic move. That, sentiment , of course, is the right of the majority to so articulate. In a deliberative democracy ,anyone can articulate their views including their attitude to a minority position.

But when political parties, who represent approximately a third of the electorate decide to initiate a motion, and to seek wider support for the motion on matters of such importance, that too is their right. The public are entitled to hear the debate. The public, in effect, own the national forum, Parliament. It is the body of the citizens of South Africa in that it is comprised of the peoples representatives , and the people are entitled, as

citizens of South Africa, to hear what our national representatives have to say about a matter of such pressing importance. Of course, once the debate takes place and reasoned voices across the floor are heard, the majority may well vote the matter down and that would be the end of it. But what cannot be justified is that the debate should not be allowed to take place. If a third of the National Assembly claim to have lost confidence in the President, the initiation surely cannot be kicked into political touch for a time which is unreasonable, because the time does not suit the calculation of the majority party. Again the Rules do not provide for a determination of what constitutes 'urgency'.

That raises the next issue, which directly concerns the relief sought by the applicants: the power of first respondent. The notice of motion requires this court to direct that the first respondent take whatever steps are necessary to ensure that a notice of motion by the applicant, dated 8 November 2012, in the President of the Republic of South Africa in terms of section 102(2) of the Constitution of the Republic of South Africa 1996, be scheduled for debate and a vote in the National Assembly on or before Thursday 22 November 2012.

It is clear that the Rules, as I have outlined them, do not provide the necessary deadlock breaking mechanism to ensure

what should occur when an impasse occurs in this regard. That is presumably the reason why the applicant suggested that it is the first respondent who should make the determination.

Applicant's argument is, notwithstanding the Rules of the National Assembly, as I have set them out, the first respondent has a residual power to break the deadlock and order the scheduling of the debate. In the first place, the debate can obviously not take place on Thursday 22 November, which is today when judgment is being delivered. It was surely the height of forensic optimism to have launched tis application to be heard on 20 November 2012, ask for a postponement until after lunch on that day before being heard and then expect an order to be given which would ensure that the Speaker conducts the debate on Thursday.

That observation connects to another aspect, namely the remedy. In Ambrosini's case, the Chief Justice said the following about a remedy:

> "A declaration of invalidity in respect of those Rules that impede the exercise of the applicant's power to initiate, prepare or introduce legislation, is sufficient to address the consequences of the

barriers imposed by the permission requirement. In any event, a mandamus would not be appropriate. The power to determine what processes ought to be followed, falls within the constitutional domain of the National Assembly. It is not for this court to dictate to the Assembly how to go about regulating its own business." (para 84)

It is necessary to say something in this regard about this particular application. Courts do not run the country, nor were they intended to govern the country. Courts exists to police the constitutional boundaries, as I have sketched them. Where the constitutional boundaries are breached or transgressed, courts have a clear and express role. And must then act without fear or favour. There is a danger in South Africa however of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, 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 .In the context of this dispute , judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business. matters. What courts can do, however, is to say to Parliament: you must operate within a constitutionally compatible framework; you must give content to section 102 of

the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence . However, how you allow that right to be vindicated, is for you to do, not for the courts to so determine.

I regret the need to emphasise this point, but it appears to me to be vital to the future integrity of the judicial institution. An overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state to deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model.

I now return to whether first respondent has a residual power to make the requested decision in this case. That leads to the final question, the role of the Speaker. The problem, which now must be resolved, in the light of my analysis of the Rules of the National Assembly, which clearly, appear ,at least on these papers, save for comments I shall make presently, to make it very difficult, at the least, and at the highest, impossible to enjoy the rights under section 102of the Constitution, remains whether the first respondent has a

discretion to order the scheduling of this debate within a reasonable time period, notwithstanding the views of the majority party.

The Speaker's Authority:

Mr Katz, who appeared together with Mr Osborne, on behalf of the applicants, referred to Rule 2(1), to which I have already made reference which provides that the first respondent may give a ruling or frame a rule in respect of any eventuality for which these rules do not provide. In Mr Katz' view, this provision invests first respondent with a residual power, consistent with inherent power of the Speaker in common law. In this connection he cited the judgment of Van Zyl, AJP in Leon v Sanders 1972 (4) SA 637 (C) at 644F:

> "The power to rule upon the irregularity of regularity of the business before an assembly, is inherent to the officer presiding over the assembly, and this accounts probably for the lack of any reference to this function, the standing orders of the House of Assembly."

He also referred to Gauteng Provincial Legislation v Kilian & Others 2001 (2) SA 68 (SCA). Here the court held that the Speaker was empowered to give an undertaking to a third

party, that Parliament cover his legal costs. In this regard the court referred as follows:

> "Kilpin Parliamentary Procedure in South Africa, 3rd Ed (1955) 153, refers to Sir Erskine May's, 9th Edition of his treatise: The Law of Privileges, Procedures and Uses of Parliament, where the point is made that the duties of a Speaker of the House of Commons "are as various as they are important". Kilpin concludes his discussion of the Speaker's duties by referring to a letter of 6 December 1905 by a Mr Speaker Lowther, in which it stated that the speaker is interpreter and custodian of the rights and privileges of the House. Kilpin then states that "the plain fact is that Mr Speaker's duties are too numerous to set out in detail. In the Union of South Africa they are specifically referred to in the South Africa Act, the Powers and Privileges of Parliament Act, the Electorate Act and Standing Rules and Orders of the House of Assembly, but they depend so much on a tradition, that no better summary could be given to that which May originally wrote." (para 78)

Mr Katz also referred to the India, in which the Indian Speaker

enjoys a residual authority, which is well established in the Lower House of the Indian Parliament:

> "The Speaker ... has certain residual powers under the rules of procedures. All matters which are not specifically provided under the rules and all questions relating to the working of the rules, are regulated by her. In exercise of this power and under inherent powers, the Speaker issues, from time to time, directions which are generally treated as sacrosanct as rules of procedure." (Office of the Speaker Lok Sabha accessed on internet webpage of Speaker Lok Sabha)

In the present case, the Speaker's powers appear to have been set out in some detail the Rules of the National Assembly. I was not referred to any authority which suggests that beyond these Rules , which now run into a 7th edition and which have been approved by Parliament , lies a series of residual powers which I can divine from some convention that was never presented to this court.

Given the specific rules dealing with programming, it cannot be said that Rule 2 applies in this case, in that there is a provision dealing with the setting and scheduling of debates in

the National Assembly, namely the Rules concerning the Programme Committee. Rule 2 deals with rulings which must cover matters never contemplated in the Rules.

That in turn raises a final issue, never debated before me. It is suggested that Rule 190 read with Rule 148 applies in this case , which on its own renders Rule 2 inapplicable . If there is no consensus under Rule 148, the matter is reported to the parent committee. I am informed that the parent committee is the National Assembly, but that cannot beso in this case, because the Rules apply to both subcommittees and committees. The Programme Committee is a committee, not a subcommittee; hence Rule 148 appears to be applicable soley to subcommittees.

It is possible that the Programme Committee could have taken a vote and the principle of consensus did not apply thereto. I have not been told as to whether a convention exists which trumps my reading of Rule 148 provision , the express wording of the Rule notwithstanding. I also do not know whether the Programme Committee voted in this case .From the papers all I have been told is that there was deadlock.

My reading of the Rule is that a majority vote prevails in such situations, because the Programme Committee is not a

subcommittee and accordingly Rule 148 does not apply. That leaves this court in a quandary and returns me to my earlier problem about having to decide a matter of enormous constitutional weight without the benefit of arguments or evidence on all relevant issues.

If the consensus formula does apply to the Programme Committee, then that position appears still to be incompatible with section 102 of the Constitution, because consensus could mean a subversion of the rights of a minority. If voting takes place in the Programme Committee, it may also be incompatible with s102 of the Constitution, because if one party or two parties seek to have a motion of no confidence, but not the balance, this may pose a problem for the exercise by the minority party of its s102 right.

In short, I cannot say on these papers that the first respondent enjoys a residual power to trump either the lack of consensus or a vote.

Rule 129, which provides for the powers of the chair, in this case first respondent, provides expressly that, in the event of equality of votes, he may exercise a casting vote. That itself is indicative that the Speaker does not have a trump, otherwise why would there be provision for a casting vote in such a

situation? It also appears to support the idea that a vote is possible in the Programme Committee. All in all these problems illustrate the difficulty of trying to parse these Rules in the context of this dispute.

Let me seek to summarise my findings: There is a constitutional right to hold a motion of no confidence. It follows, from my reading of section 102, buttressed by the approach adopted by the Chief Justice in the Ambrosini case, and further by the equal majestic judgment of Ngcobo, J, (as he then was) in the Doctors For Live International v Speaker of the National Assembly 2006 (6) SA 416 (CC), that minority parties have such a right. It follows that a debate should take place, and it is an inherently urgent matter because it is in the national interest. It follows that a majority party cannot subvert this right and that any attempt to so do, would be incompatible with section 102. See in general on the constitutional model in adopted in this judgment, S Choudhry 2009 (2) Constitutional Court Review 1.

However, the question which must be asked is the following : under the present system of Rules what provision allows for a vindication of a right to take place or the precise date when such a motion of no confidence should take place?

I have, consistently through this judgment, employed the notion that a motion of no confidence must take place within a reasonable period. I have come to this conclusion because I agree with the approach which Mr Katz urged upon me, namely that a motion of no confidence is a matter of urgency. In this connection, it is instructive at least to refer to Harris et al, House of Representatives Practice, which attempts to deal with the situation in Australia, where the following is stated at page 312:

> "Perhaps the most crucial motions considered by the House of Representatives are those which express a want of confidence in or censure of a Government, as it is an essential tenet of the Westminster system that the government possess the confidence of the lower (representative) House. By convention, loss of confidence of the House normally requires the government to resign in favour of an alternative government or to advise a dissolution of the House of Representatives. The importance of such motions or amendments is recognised by the rule that any motion of which notice has been given, or an amendment which expresses a censure of or want of confidence in the government and is accepted by a Minister as a want

of confidence or censure motion or amendment, takes precedence of all other business until disposed of."

This is an approach which commends itself. A motion of no confidence finds express provision in the Constitution. It raises matters of vital importance. It must take place, but it is not for this Court to dictate when exactly it should be held. Rules should deal with this problem, probably a specific rule to deal with a specific provision in the Constitution .

In this case, I am faced with the following problem: the Rules as I read them, provide no deadlock breaking mechanism, save for the possible interpretation that a majority vote may determine the issue in the Programme Committee. Even then, this may create problems for the vindication of the right under section 102. Absent an express provision, the only possibility is to have recourse to the first respondent. For reasons that I have already mentioned, there is no authority that I can find, particularly after a careful reading of the Rules, which suggested that first respondent can come to the aid of applicant in terms of residual powers so granted to him.

What then to do? The court is faced with the following difficulty: It has found:

1. That applicant had a right to bring a motion of no confidence.
2. That a motion of no confidence should be treated as a matter of urgency.
3. That time should have been found to ensure it takes place expeditiously.
4. Rules should be provided to ensure that the National Assembly rather than the courts, make the determination as to when this occurs.
5. A Rule is important in this regard, as a result of the express provision in the Constitution for such a motion to take place.

The question, therefore arises, and which flows directly from this difficulty, as to the powers of this court in these circumstances. There was a debate between counsel and the Bench with regard to the question of section 167(4)(e) of the Constitution, which provides that only the Constitutional Court can decide whether Parliament has failed a constitutional obligation. In Women's Legal Centre Trust v President of the Republic of South Africa 2009 (6) SA 94 (CC), this section was carefully examined by Cameron, J. Paragraphs 20 and 23 are instructive:

"By contrast with this broad assemblage of duty

bearing organs and institutions, section 167(4)(e) is precise in delineating the actors on whom it imposes obligations. They are the President or Parliament. 'The State' is not included. Constitutional duties, the State and its organs must perform collaboratively or jointly do not fall within its purview. The provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament, and on them alone. It does not embrace the President, when he or she acts as part of the National Executive, nor Parliament when it is required to act not alone, but as part of other constituent elements of the state. Were it to be otherwise, it would undermine the jurisdiction of the High Court ... The fact that the obligation on which the Women's Legal Centre relies, may encompass the President and parliament, amongst other state actors, (a matter which we do not decide now) is not sufficient to bring it within exclusive jurisdiction of this court. It must fall on the President and Parliament alone. Resisting the applicant's attempt to engage the court through section 167(4)(e), respondents pointed out correctly that in terms of section 85 of the Constitution, the President exercises executive

> authority in collaboration with other members of the National Executive. The responsibility for preparing and initiating legislation, falls on the National Executive as a whole and not exclusively on the President acting as a head of state."

In this case, on whom may one ask rhetorically is the obligation to vindicate the right which follows upon section 102 other than on the National Assembly itself? It follows, from this analysis, that given the lack of an adequate mechanism for a minority party to vindicate its right to table and have a debate of a motion of no confidence as envisaged in terms of section 102 of the Constitution, Parliament may well have failed its constitutional obligation by omitting to provide a Rule which is compatible with the analysis as I have set it out, which specifically deals with this express constitutional provision.

As Bishop and Raboshakga in Woolman et al, at para 17-97, have noted:

> "There are two explicit constraints in the House of individual rule making power in the Constitution. First, it has to be exercised with due regard to representative and participatory democracy,

accountability and transparency and public involvement. This limitation has not been tested, but it seems likely that a court will give Parliament a great deal of deference in deciding whether a rule runs contrary to these principles. The principles are vague, so there will always be some doubt whether the rule fails to respect transparency or public participation. In addition, the Constitution does not require that the rules promote or comply with the listed principles, merely that they are adopted with due regard to those principles. Even rules that may seem to inhibit, for example transparency, would pass constitutional muster if it was adopted with an attempt to limit the impact on transparency for some or other justifiable reason. Finally, as the rule making power concerns the inner working of the legislature, the judiciary will rightly be hesitant to intervene."

The Constitutional Court might decide that my analysis of the Constitution is correct, that the right to have a motion of no confidence cannot be subverted either by a refusal or by a delay which manifestly does not grasp the important cardinal principle of urgency and that the first respondent does not have a residual power. No authority has been given to

suggest that the relief which is sought could be granted. Hence the core issue, which has been raised by the present proceedings, is one of significant constitutional importance and which should be decided promptly, because in my view, a lacuna in the rules is an important deterrent against the exercise of the model of deliberative democracy as I have outlined it and subverts that which is envisaged by s102 of the Constitution: the conducting of a debate on a motion of no confidence in the President.

I come to this conclusion with some regret, manifestly as I have found that applicant has a right. My difficulty is that I do not consider on the basis as the law is set out by the applicant, the relief couched in the notice of motion is justifiable. I consider that the Constitutional Court has sole jurisdiction to determine whether the Rules do not meet the kind of constitutional compatibility as I have outlined it(more particularly that there is no Rule which caters for the deadlock) and furthermore, whether the matter should not be sent back to Parliament for a reconsideration of a Rule which would ensure that the difficulties that I have encountered in this case should never occur.

I express the hope that a rule be so crafted , because, in my view, there is a problem, although not one that this court can

fix by gerrymandering the law which would be unjustified , to find powers possessed by first respondent, which, in my view, cannot be so found and hence grant the relief as prayed.

I do not consider that this is a case where it would be appropriate to make any costs order, because in some significant way, the applicant was correct to bring this application, and has asserted a right which is now accepted by all, given the letter of second respondent which I set out. However, for the reasons that I have already set out, the application is dismissed.

DAVIS, J