IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 21471/2014

DATE: 23 DECEMBER 2014

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS Applicants

AND 20 OTHERS

And

THE SPEAKER OF THE NATIONAL Respondents

ASSEMBLY AND 3 OTHERS

J U D G M E N T

DAVIS, J:

INTRODUCTION:

This is an urgent application in which the applicants seek an interdict directed at preventing the Speaker of the National Assembly ('the first respondent') from implementing or enforcing the decision of the National Assembly of 27 November 2014, which interdict would prevent the imposition of the sanction of suspension of membership without remuneration or a fine in respect of the 2nd to the 21st

applicants respectively. This relief is sought pending the outcome of a final order which the applicants seek and which is set out in part B of this application.

There are a number of other prayers which are contained in part B and which relate, *inter alia,* to President JG Zuma, as well as Speaker Mbete ("the second respondent"). These issues are not before this Court. This Court is only concerned with the application for interim relief. I should add that some of the relief in part B falls within the exclusive jurisdiction of the Constitutional Court in terms of section 167(4)(e) of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution').

This provision states that only the Constitutional Court can decide whether Parliament or the President have failed to fulfil a constitutional obligation. It is for this reason that I do not propose to set out any time table for the manner in which part B should be litigated and to which Court the application should be directed. These are matters which the parties will have to decide for themselves.

I should add further that this application came to this Court in recess duty and as a matter of urgency. I was given to understand that by the time the application reached me as a

senior duty Judge, an application had been made for direct access to the Constitutional Court.

Upon ascertaining that I was obliged to hear this urgent application, as is always the case when judges are on duty (they obviously have to determine whether the matter passes the test of urgency), the Constitutional Court indicated that the preferred course was that this application be heard by this Court. Although this application is only for interim relief, the modesty of the relief should not disguise the broader democratic principles which are raised pursuant to this dispute.

It is probably understandable, given our long authoritarian, racist and sexist history, that twenty years of democracy is a relatively short time to have developed a certainty concerning the contours of constitutional democracy. It is not surprising therefore that in this period of constitutional adolescence the boundaries of constitutionalism had been increasingly tested in recent times by a plethora of litigation, a move from political warfare to lawfare. For a luminous exposition of these concepts, see John and Jean Comaroff **Law and Disorder in the Postcolony** (2006) particularly Chapter1 . Judges find that their institution is now in the front lines and must, under considerable pressure, construct a working theory to guide

their institution as to whether to accede or refuse the demands for what often appears to be heavy political lifting.

The limits of the judicial function in these highly contested cases often prove difficult to determine. This is such a case, for Parliament is surely best placed to decide upon the framework for the conduct of its own business. For this reason, I commence this judgment by setting out the guidelines that I must follow in order to develop my own working theory As is the case with the judiciary, these guidelines must be sourced in the only document which can guide a Court, that is the Constitution.

Parliament is the legislative arm of government. Its work is conducted by representatives of the people. Parliamentary representatives participate in the key processes of producing legislation in their capacity as representatives of the people. The principle of representative government is weakened and ultimately denied if Parliamentary representatives are precluded from such participation. As Ngcobo, J (as he then was) reminds us in Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) at para 36 of his magisterial judgment:

"Parliament has a very special role to play in our

> constitutional democracy – it is the principal legislative organ of the State. With due regard to that role it must be free to carry out its functions without interference. To this extent it has the power to "determine and control its internal arrangements proceedings and procedures". The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the Courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the Courts. This would undermine one of the essential features of our democracy: the separation of powers.
>
> The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion. It is reflected in the very structure of our government."

However, there is another principle that is equally at work in cases such as the present application. This principle was best articulated by Mohomed, CJ in Speaker of the National Assembly v De Lille And Another 1999 (4) SA 863 (SCA) at

para 14:

> "This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. It is Supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well-meaning can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances."

These are the critical principles which must guide adjudication in this case Armed therewith, I now turn to the facts.

MATERIAL FACTS:

I propose to deal with common cause facts and those which are not denied by respondents .First applicant is a political party. It is the third largest party represented in the National Assembly. The second to twenty first applicants are public representatives, representing the EFF as members of Parliament in the National Assembly. On 27 November 2014 these applicants were found guilty of certain transgressions by the National Assembly and a decision was taken regarding their suspension from office. Sanctions were imposed as follows:

(1) A withdrawal of benefits equal to 14 days salary (Category C).

(2) Suspension from membership of the National Assembly without pay for a period of 14 days (Category B).

(3) Suspension without pay as a member of the National Assembly for a period of 30 days (Category A).

The following members were in category A: second, third, fourth, fifth, sixth and seventh applicants. The following members were in category B: eighth, ninth, tenth, eleventh,

twelfth and thirteenth applicants. The following members were in category C: fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty first. Category B suspensions lapsed on 15 December 2014. Category A suspensions will lapse on 28 December 2014.

The background to these events began on 21 August 2014. President Zuma was scheduled to answer questions at the National Assembly pursuant to the provisions of Rule 111 of the Rules of the National Assembly. One of the questions pertained to the implementation of the findings of the remedial action prescribed by the Public Protector in a report of March 2014 into the so-called Nkandla issue. The President answered the question posed as follows:

> "Honourable Speaker, as the Honourable members are aware my response to all the reports on the security upgrades of my private residence were submitted to the Speaker on Thursday last week, 14 August 2014. I thank you."

According to Mr Ntzebeza, who appeared together with Mr Ngcukaitobi on behalf of the applicants, the President's answer was "unintelligible". In Mr Ntzebeza's view the consequences

were therefore unavoidable. Second applicant, as the leader of the first applicant, was, in counsel's view, compelled to raise a follow-up question. According to the record of the debate as contained in Hansard, second applicant said the following:

> "Mr President, we are asking this question precisely because you have not provided the answer. Firstly, you failed to meet the 14 days of the Public Protector and secondly, when you responded you were telling us that the Minister of Police must still decide who must pay. In our view the report of the Public Protector supersedes any other formal report which you might be expecting somewhere else, so the question we're asking you today and we're not going to leave here before we get an answer .. is when are you paying the money because the Public Protector has instructed you that you must pay the money and we want the date of when you are paying the money?"

The President then gave the following answer:

> "The issue for example that the Honourable

> member is referring to is a matter that arises in the recommendations of the Public Protector and I am saying the people who did the upgrades at the Nkandla, they are the ones who always determine who pays, when to pay. It is the government that decides and the matter is referred to people who are legally authorised to make that determination."

Mr Ntzebeza was equally critical of this reply. He said that this reply was "meaningless". Mr Ntzebeza contended that second respondent was then required to obtain a proper or meaningful response from the President. Mr Ntzebeza submitted further that instead of so proceeding, she purportedly proceeded to recognise another member of the National Assembly, in this case Mr Bantu Holomisa and asked him to address the House. An unidentified member of the ANC then interjected, followed by Mr Floyd Shivambu, the third applicant, who raised a point of order.

At this point the Speaker signalled to the President that he had the floor if he wished to add anything to his reply. The President said:

> "I have answered, I have answered the question."

The record in Hansard then reflects a number of attempts by members of the first applicant to draw the attention of second respondent to what they considered to be the inadequacy of the reply given by the President. In their view, second respondent refused to recognise them. At one point, third applicant said the following:

> "And he has not answered the question of when he is paying the money. That is what ... for him."

The Speaker:

> "Honourable Shivambu, I will throw you out of the House. I will throw you out of the House if you don't listen. Honourable Holomisa, please."

Further objections then followed. The following passage is significant:

> "Mr GA Gardie: Honourable Speaker the issue here is about the money.
>
> The Speaker: Take your seats Honourable members. Take your seats, take your seats. I will have to ask the sergeant at arms to take out members who are not serious about this sitting."

Mr Ndlozi, the sixth applicant, attempted to speak. He was instructed by second respondent to take his seat. At this point the second respondent, according to Hansard, instructed the sergeant at arms to:

> "Please assist me with relieving the members of the House who are not serious about this sitting to take their leave."

Security was called. The business of the House was suspended. The applicants, in their founding affidavit, allege that the banging on the tables and the chanting and the exortation on the President to "pay back the money" occurred after the Speaker had adjourned the House and suspended its business for the day. Specifically, they allege that the suspension of the National Assembly and therefore of the business of the day, did not result from the chanting and singing by members of the first applicant demanding that the President should 'pay back the money'.

Significantly, in her answering affidavit, second respondent makes no mention thereof, that is she does not deal with the allegation that the banging of the tables and the chanting that happened occurred after the House had been suspended. It

must follow that, given that these specific averments in the founding affidavit were not gainsaid, they should form part of the factual matrix that I am obliged to consider.

I should add that second respondent referred to a video recording (annexure B to a letter of referral) but I was not provided with a copy thereof. I cannot therefore take cognisance of exactly what occurred because I do not have the video to which second respondent refers. It was not made part of my record.

I am therefore obliged to accept applicant's version in respect of when "the banging on the tables" took place.

On 26 August 2014 the second respondent referred an allegation of "gross disorder" to the Powers and Privileges Committee ("the committee) for investigation. The allegations were all brought against the second to the twenty first applicants.

The committee is a standing committee of Parliament. It is constituted on the basis of proportional representation. It comprises 11 members, six from the ANC, two from the Democratic Alliance, one from first applicant, one from the Inkatha Freedom Party and one from the United Democratic

Movement. It appears that, since the member of the first applicant, who sits on the committee, was also charged with misconduct, the first applicant was not represented at the committee. A total of 7 charges were preferred against the applicants.

Charge one:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of section 13(a) of the Powers, Privileges and Immunities of Parliament and Provincial Legislative Act 4 of 2004 ("The Act") and that as a member of Parliament and "during question to the President" in the NA on 21 August 2014 you contravened section 7(a) of the Act by improperly interfering with or impeding the exercise or performance by the National Assembly ("The House") of its authority or functions when you refused to obey the instructions of the Speaker that you take your seat. This conduct impeded the House from performing its function of exercising oversight over the executive by posing questions the President and continuing with its business for the day".

In this connection, the charges were levelled against third applicant, fourth applicant, fifth applicant, sixth applicant and seventh applicant.

Charge two was levelled against second third, fourth, fifth, sixth, seventh applicants:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of section 13(c) of the Act in that as a member of Parliament and during "Questions to the President" in the National Assembly on 21 August 2014 you wilfully failed and / or refused to obey Rule 51 and Rule 53(1), read together of the Rules of the National Assembly in that you refused to withdraw immediately from the chamber for the remainder of the day's sitting when you were ordered to do so by the Speaker."

Charge three: brought against third, fourth and seventh applicants read as follows:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of

> section 13(a) of the Act in that as a member of Parliament and during "questions to the President" in the National Assembly on 21 August 2014, you contravened section 7(b) of the Act by improperly interfering with or impeding the performance by a member of his or her functions, as a member in the following manner: when the Speaker requested Mr B H Holomisa (a member of Parliament) to pose a question (i.e. a supplementary question) to the President, your conduct prevented Mr Holomisa and others members of Parliament who might have wished to ask the President further questions from asking their question / s, thereby preventing them from performing one of their functions as a member of Parliament (namely, to hold the Executive to account by asking the President questions)."

Charge four which was levelled against third and fourth applicants reads:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of section 13(c) of the Act in that as a member of Parliament and during "Questions to the

> President" in the National Assembly on 21 August 2014, you wilfully failed and / or refused to obey Rule 49 of the Rules of the NA by failing to resume your seat when the Speaker rose while you were speaking or offering to speak and thereby preventing the Speaker from being heard without interruption."

Charge five, levelled against seventh, third, fourth, fifth and second applicants, reads:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of section 13(c) of the Act in that as a member of Parliament and during "Questions to the President" in the National Assembly on 21 August 2014, you wilfully failed and / or refused to obey Rule 72 of the Rules of the NA by speaking when you were not called upon to do so by the presiding officer (i.e. the Speaker) and / or without the Speaker recognising you."

Charge six, which was levelled against second, third, fourth, fifth, sixth, ninth, eighth, seventh, eleventh, thirteenth, tenth and twelfth applicants, reads:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of section 13(a) of the Act in that as a member of Parliament and during "Questions to the President" in the National Assembly on 21 August 2014, you contravened section 7(e) of the Act by creating or taking part in disturbance within the precincts of Parliament while the House was meeting by *inter alia* shouting and / or banging on the tables and / or refusing to obey the Speaker's instructions and / or generally conducting yourself in a grossly disorderly manner, thereby interfering with or disrupting the proceedings of the House, forcing the Speaker to suspend proceedings temporarily and ultimately to adjourn the sitting for the day."

Charge seven, which was brought against all of the affected members read thus:

> "It is alleged that you are guilty of conduct constituting contempt of Parliament in terms of section 13(a) of the Act in that as a member of Parliament during "Questions to the President" in

> the National Assembly on 21 August 2014, you contravened section 7(a) of the Act by improperly interfering with or impeding the exercise or performance by the National Assembly (the House) of its authority or functions by remaining in the chamber after the sitting of the House had been temporarily suspended by the Speaker, so that you could leave alternatively to be removed from the chamber in order for the House to continue with its business of the day. Your refusal to leave the Chamber resulted in the House being adjourned for the day."

The first sitting of the committee took place on 7 October 2014. On that day second applicant appeared before the committee. Second applicant made representations on behalf of the applicants. In summarising these representations, suffice to observe that they were directed to the following effect:

(1) First applicant denied guilt on the charge of the misconduct. Specifically it stated its members were denied an opportunity to gain a meaningful reply from the President on the question which had been posed. Members of first applicant were never identified

individually with the instruction to leave the premises of the House.

(2) The composition of the committee was also attacked. In this regard it was submitted that an announcement had been made publically by the Secretary General of the ANC, Mr Gwede Mantashe, on the need for Parliament to act harshly towards first applicant .In the view of the first applicant ,this announcement by so senior a member of the ruling party could have improperly influenced members of the committee.

(3) At stake, according to the first applicant, was the issue of executive accountability. An objection was taken to implement the disciplinary measures which , in applicants view , were effectively being used to settle a political matter pertaining to executive accountability. First applicant also expressed its concern with regard to selective prosecution. It alleged that members of the ANC who could potentially have also been found guilty of the same offences together with members of the first applicant, were not charged and were therefore “let off the hook”. The conduct of the second respondent, the Speaker, it was averred by the first applicant, should also have formed part of the investigation. In support thereof first applicant cited two instances. Firstly, second

> respondent had been responsible for the interruption in the proceedings on 21 August 2014 by failing to recognise members of the first applicant who wished to raise points of order. First applicant averred that she showed favouritism towards ANC members when no legitimate points of argument were raised by them. Secondly, first applicant averred that second respondent had "lied to the National Assembly" in claiming that she had not called the police when the facts showed that she in fact had invited the police into the National Assembly and instructed them to eject members of the first applicant.

In addition the following significant passage appears from these representations made by the second applicant:

> "We want to remind you that in terms of section 13(5)(g) of the Powers and Privileges Act, the harshest sentence you can impose on us is suspension for 30 days without pay and further, section 13(9) provides that such can only be considered after all other sentences in subsection 5(a) to (e) have been considered. The other sentences are as follows:
>
> (a) A formal warning.

(b) A reprimand.

(c) An order to apologise to Parliament or the House or any person in a manner determined by the House.

(d) The withholding for a specified period of the members' rights to use or enjoyment of any specified facility provided to members of Parliament.

(e) A fine not exceeding the equivalent of one month's salary and allowances."

According to the report of the committee, the committee considered and accepted the legal opinion of the parliamentary legal adviser that these submissions did not constitute evidence in terms of items 7 and 8 of the Schedule which deal with the hearing. It was claimed that "these representations were not made under oath and thus could not be questioned by the members of the committee, the chairperson, the initiator and the charged member, whether directly or through their legal representatives."

A report titled "The Report of the Powers and Privileges Committee of the National Assembly on the hearing into allegation of misconduct constituting contempt of Parliament by members of the National Assembly" was then prepared by

the committee. The report made the following findings: category A members were found guilty of between four to seven charges and suspended for 30 days without pay; that is second to seventh applicants. Category B members were found guilty on two charges and were suspended to 14 days without pay; that is eighth to thirteenth applicants. Category C members were found guilty of one charge and fined an equivalent of 14 days salary. That is fourteenth to twenty first applicants.

The report was then adopted by the National Assembly on 27 November 2014 by a majority vote. The decision of the committee was then conveyed to the individual applicants on 28 November 2014. It is these decisions which are the subject matter of this challenge.

It is important to emphasise at this stage as to what this case does not concern. It does not require the Court to determine whether the conduct of the applicants was deserving of the sanctions that were imposed. That is for another Court which may have the benefit of a far more comprehensive affidavit from the second respondent, including the benefit of the video .An affidavit of less than fourteen pages much of which deals with the conduct of the Speaker clearly needed amplification .

This case does concern the complaints raised by the applicants to whether President Zuma should have been required by second respondent to provide an answer that was, in the view of the applicants, more satisfactory and comprehensive. This Court is not required to make any determination on these questions. Its sole role is to examine the facts by way of the affidavits submitted and then apply the requirements for interim relief .Accordingly, this judgment can only be construed within this specific context. With this in mind, I now turn to the law relating to interim relief.

GENERAL PRINCIPLES:

The test for granting interim relief has recently been set out in National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at para 4 in which the Constitutional Court recorded the established test thus :

> "The test requires that an applicant that claims an interim relief must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must

favour the grant of the interdict and; (d) the applicant must have no other remedy."

In this judgment, the Court held, when weighing the balance of convenience requirement, that:

"A Court must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of government (para 47)."

However, it noted that different considerations apply where:

"The harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights (para 47)."

The Constitutional Court has provided further guidance in the case of South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others 2014 (4) SA 371 (CC) at para 20 where Moseneke, DCJ confirmed the position that a *prima facie* right may be established by demonstrating prospects of success on review.

When granting interim relief, the following dicta of Du Plessis J as they were set out in Peconi v President of the Republic of the South Africa and Others 2010 (1) SA 400 (GNP) at 403 should also be taken into account:

> "When considering whether to grant or refuse an interim interdict, the Court seeks to protect the integrity of the proceedings in the main case. The Court seeks to ensure as far as is reasonably possible that the party who is ultimately successful will receive adequate and effective relief. The Court itself has an interest to ensure that it will ultimately be in a position to grant effective relief to the successful party."

I turn therefore to deal with the first requirement, the *prima facie* right and intertwined therewith the question of prospects of success on review.

Returning to the guidelines to be employed, the starting point for any such enquiry must be the Constitution and in particular section 1. Section 1 provides that the Republic of South Africa is one sovereign, democratic state founded on the following values.... (d) universal adult suffrage, a national common voters' role, regular elections and a multi-party system of

democratic government to ensure accountability, responsiveness and openness.

Section 1 is a majestic proclamation of that which we hold to be best for our society. It proclaims the foundation of South African society to be constructed from the plans of the Constitution, that is a democracy which is informed by core values of human dignity, equality, freedom, universal suffrage, multi-party democracy, accountability, openness and transparency of government. These are not values upon which we should give up lightly. These are values for which generations of South Africans fought and died. As a nation they are our autobiography .They must be considered with the utmost seriousness by all South Africans, no matter their political persuasion. They call on all who live in this country to see these values as trumps over any and all political affiliations.

The next component in the analysis is section 19 of the Constitution. Section 19(1) provides:

> (1) Every citizen is free to make political choices which include the right to:
>
> (a) To form a political party.
>
> (b) To participate in the activities of or recruit

members for a political party and;

(c) To campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has a right to:

(a) To vote in elections for any legislative body established in terms of the Constitution and to do so in secret and;

(b) To stand for public office and if elected to hold office.

This section enshrines the entitlement of every adult citizen to vote in elections. It also enshrines the right for anyone to stand for public office and, if elected, to hold office. The right to hold office does not mean the right to hold office as and when any party so permits. It enshrines the right to hold office, notwithstanding what any majority may construe to be the politically preferred position. The right to hold office is to hold office on behalf of those who voted for this office bearer.

The office bearers, that is the parliamentarians who are sent to Parliament, are dispatched to that august House to articulate the needs, views, political and economic attitudes of their constituency ,that is the people who voted for them. That is

what democracy concerns. In Ramaktsa and Others v Magashule and Others 2013 (2) BCLR 202 (CC) Moseneke, DCJ in his characteristically perceptive way provided the historical context for the meaning of section 19 to which I have made reference:

> "Differently put, they were not only disenfranchised but also excluded from all decision-making processes undertaken by the government of the day, including those affecting them. Many organisations whose objectives were to advance the rights and interests of black people were banned. These organisations included the present ANC. Participation in the activities of these organisations constituted a serious criminal offence that carried a heavy penalty. The purpose of section 19 is to prevent the wholesale denial of political rights to citizens of the country from ever happening again".
>
> Read within this historical and therefore interpretive prism, the purpose of section 19 is to enable people to exercise their right to vote in the context of the existing political institutions, at the heart of which are political parties. Political parties elected to serve in the National Assembly

cannot be subservient to the whims of any party

Speaking, albeit in a different factual context I must concede, Moseneke, DCJ said at paras 66 to 67of **Ramakatsa**:

> "In the main, elections are contested by political parties. It is these parties which determine lists of candidates who get elected to legislative bodies. Even the number of seats in the National Assembly in provincial legislatures are determined 'by taking into account available scientifically based data and representations by interested parties.
>
> It cannot be gainsaid that successful political parties in elections lies in the policies they adopt and put forward as a plan for addressing challenges and problems facing communities. Participation in the activities of a political party is critical to obtaining all of this. To enhance multi-party democracy the Constitution has enjoined Parliament to enact national legislation that provides for funding of political parties, represented in national and provincial legislatures. Public resources are directed at political parties for the very reason they are the

veritable vehicles the Constitution has chosen for facilitating and entrenching democracy."

For this reason it appears to me that when a sanction of suspension is imposed on public representatives, the National Assembly must have very careful regard to the impact of this decision on the rights of those people who are represented by the members, that is the voters. In this case, the National Assembly was surely required to take into consideration that the suspension of twelve members out of twenty five from the third largest political party in South Africa would weaken the party's ability to represent those citizens who voted for them, albeit for a short period.

It cannot be denied that these voters have the right to be represented in Parliament by the representatives that they have so chosen. To take away this right, albeit for a short period, requires careful analysis. With this core democratic value in play, it follows that Courts are required to scrutinise these decisions with great care.

The third important provision which is relevant to this case is section 58(1)(a) of the Constitution which provides that cabinet ministers, deputy ministers and members of the National Assembly (a) have freedom of speech in the Assembly and its

committees subject to its rules and orders.

In De Lille's case supra, at para 29 Mahomed, CJ said the following about section 58:

> "The right of free speech in the Assembly protected by section 58(1) is a fundamental right, crucial to representative government in a democratic society. Its tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament."

There are further provisions which require analysis, that is the empowering provisions which enable second respondent and, in turn, the National Assembly, to exercise the necessary discipline to ensure that, however robust parliamentary debates may be, they must take place in a manner which permits the business of Parliament to be conducted deliberatively and fairly. In this regard, the relevant legislation is the Powers, Privileges and Immunities of Parliament and Provincial Legislative Act 4 of 2004. In particular section 12 provides as follows:

> (1) Subject to this Act, the House has all the powers

which are necessary for enquiring into and pronouncing upon any act or matter declared by or under section 13 to be contempt of Parliament by a member and taking the disciplinary action provided therefore.

(2) The House must appoint a standing committee to deal with all enquiries referred to in subsection (1).

(3) Before a House may take any disciplinary action against a member in terms of subsection (1), the standing committee must (a) enquire into the matter in accordance with the procedure that is reasonable and procedurally fair and; (b) table a report on its findings and recommendations in the House.

(4) When a committee finds a member guilty of contempt, the House may, in addition to any other penalty to which the member may be liable under the Act or any other law, impose any one of the following penalties:

a. A formal warning.

b. A reprimand.

c. An order to apologise to Parliament or the House or any person in the manner determined by the House.

d. The withholding for a specified period of the member's right to use or enjoyment of any specified facility provided to members of Parliament.

e. The removal or the suspension for a specified

period of the member from any parliamentary position occupied by the member.

f. A fine not exceeding the equivalent of one month's salary and allowances payable to the member concerned by virtue of the Remuneration of Public Office Bearers Act 1998.

g. A suspension of the member with or without remuneration for a period not exceeding 30 days, whether or not the House or any of its committees is scheduled to meet during the period.

Section 13 describes conduct which constitutes contempt. A member may be guilty of contempt, if the member contravenes section 7, 8, 10, 19, 21(1) or 26 of this Act. Section 7, which is relevant to this application, provides that a person may not:

(a) Improperly interfere with or impede the exercise or performance by Parliament or a House or committee of its authority or functions.

(b) Improperly interfere with the performance by a member of his or her functions as a member.

(c) Threaten or obstruct a member proceeding to or going from a meeting of Parliament or House or committee.

(d) While Parliament or a House or committee is meeting, create or take part in any disturbance within the precincts.

These provisions need to be interpreted to be congruent with the various sections of the Constitution to which I have made reference, namely sections 1, 19 and 58. This means, as I have already indicated, a high threshold is required to justify the suspension of members of Parliament. If this were no so, the following hypothetical could take place. I stress that it is but a hypothetical employed for explanatory purposes.

A governing party with a bare majority could use its majority to exclude a significant percentage of opponents from entering Parliament when it feared the latter may win a motion of no confidence on the basis that the opposition parties, together with a few dissenting voices within its own ranks, who may well abstain, could cause the governing party to lose a motion of no confidence. In this way democracy could be subverted on the pretext of enforcing discipline.

The values of section 1 of the Constitution demand careful scrutiny. In addition, the procedures to be adopted in such case, must in terms of section 12(2)(a), be conducted in accordance with a procedure that is reasonable and procedurally fair.

When a majority of the committee is comprised of members of

the majority party seeking to discipline its opponents, it appears to me that an even greater level of fairness, responsibility and concomitant transparency is required. Turning to the charges, it is difficult to ascertain on these papers (absent the video) whether all of category A applicants refused to take their seats upon so being ordered to do so. On the Hansard record it is difficult to know precisely what occurred. There is no mention of fourth applicant having to take his seat; only the other three applicants in category A are mentioned by name. Rule 51 of the Rules of the National Assembly provides that, if the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules or that a member is in contempt of or is disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, he or she may order the member to withdraw immediately from the Chamber for the remainder of the day's sitting. Rule 52 provides for the Speaker to suspend the member if, in her opinion, the conduct is of so serious a nature that an order to withdraw from the Chamber for the rest of the day is inadequate. Rule 53 obliges the member to withdraw not only from the Chamber but also the precincts of Parliament.

Charge two requires recourse to these same Rules. From the record in Hansard, no member was named by the second

respondent in terms of these Rules nor does second respondent deny the averments that she did not name any of the members. I accept her averment that the answering affidavit was compiled in haste but that is not a sufficient defence. There is nothing therein to gainsay these averments.

Applicants contended in respect of charge three that Mr Holomisa was not asked to testify even though it was he who was allegedly prevented from posing his question. His evidence may have given context to the nature of the charge and its importance with respect to the appropriate sanction that should then have been imposed.

Charge four appears to be a duplication of charge one. The applicants aver that the National Assembly had terminated when the events set out in charge seven occurred. Not only does the record in Hansard not support this charge because it is impossible to determine from Hansard as to whether the events took place before Parliament suspended (and indeed it appears on this reading that there is no such evidence), but the averments made by the second applicant in his founding affidavit are again not denied by second respondent The only point raised is that the National Assembly could not continue its work after suspending business because of the conduct of applicants .

However the short speech which the second respondent delivered upon the resumption of the House at 1615 after breaking at 1458 on the 21 August does not reveal whether the cause of the delay was the conduct of applicants after the House was suspended at 1458. For this reason, the ordinary treatment of evidence must therefore take its course.

Two further observations should be made. Second applicant drew the committee's attention to the scale of sanctions. There is no suggestion that any of the applicants were repeat offenders (that is that they had a previous parliamentary record).

> Turning to the reasons for the sanctions which were imposed, annexure A is the only relevant document but it does no more than summarize: "the instigators' presentation on mitigating and other factors."

> There is however, not even one line in the report as to why the committee accepted these submissions or why it failed to consider or reject the imposition of lesser sanctions which might have been appropriate. I

accept that members of Parliament cannot be expected to produce a report which is of the standard of a judgment, but when so grave a set of consequences follow for democracy, some set of reasons, albeit even if not complete, must surely be included in the report. MP's are not necessarily lawyers but it does appear that they did enjoy the benefit of the parliamentary legal advisor and possibly further legal advice On this point, it was never made clear why submissions made by second applicant on appropriate sanctions could not have been considered by the committee.

There is a set of allegations in the founding affidavit, not denied again, by the second respondent or by the Deputy Speaker Mr Tsenoli in his affidavit which only deals with the events of 27 November 2014, that ANC members also disrupted the business of Parliament. On these papers I cannot reject this particular argument without more.

Within the context of labour law admittedly, Nicholas, AJA in Numsa and Others v Henred Fruehof Traders (Pty) Ltd 1994 (15) IAJ 1257 (A) at 1264 said the following:

"Equity requires that the Court should have

> regard to the so-called parity principle. This has been described as a basic tenet of fairness which requires that like cases should be treated alike .. So it has been held by the English Court of Appeal that the word 'equity' as used in the United Kingdom statute dealing with the fairness of dismissal comprehends the concept that the employers who behave in much the same way should have meted out to them much the same punishment. The parity principle has been applied in numerous judgments in Industrial Court and the LAC and which has been held for example that unjustified, selective dismissal constitutes an unfair labour practice."

I would have thought, given the gravity of suspensions from Parliament, that a similar principle would be equally applicable. It may well be shown that this principle, upon a full evaluation of the conspectus of the facts, is equally applicable in this case. Adding to its importance is the consideration that the majority party controlled the disciplinary process. Although the debate of 27 November 2014, the full record of which is attached to the papers, is not strictly relevant, it is illuminating to canvass its contents.

An extract from Dr Lotriet of the Democratic Alliance reveals what may well be relevant to the decision for final relief. She says the following about the events of 21 November 2014:

> "The Speaker of the National Assembly, the Honourable Baleka Mbete, failed to maintain order in the House and in fact contributed to the breakdown of order in the House by referring to all EFF members as a collective instead of two individual members involved in the disruption. She furthermore lost control of her own emotions and allowed them to overtake her decision-making abilities. The Speaker herself has admitted that she 'lost it' on 21 August."

Dr Lotriet continued:

> "We have therefore come to the conclusion that the report produced by the Powers, Privileges and Immunities Committee is fundamentally flawed and procedurally compromised. We cannot support it for it is not the product of a fair investigation ... the following facts made it clear that the investigations were flawed and purposely manipulated to ensure a predetermined outcome. Firstly, the submission of the leader of the EFF

was disregarded by the committee and only considered after all findings were final. Now how can that then have an impact on the findings? The Honourable Malema raised a number of pertinent points that should have been addressed during the investigation and even before the investigations. This submission referred to important matters relating to natural justice and procedural fairness as required by the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act and its content was never addressed. We even wrote letters to the chairperson expressing our concern about this matter to no avail. Secondly, no formal legal opinion was produced to explain how a majority ANC committee could reasonably constitute an investigation that was free of a reasonable apprehension of bias. Here we had a situation where the person who referred the complaint to the committee was a member of the majority party and the majority of the members of the committee were members of the majority party. Now this clearly points to potential or reasonable apprehension of bias."

I accept that these are the statements from a member of an opposition party. I also accept that there exists the obvious incentive by opposition parties to reduce the reputation of the governing party in the eyes of the public. But the observations so made, if properly proved upon the full conspectus of the facts at a final review, could prove important in the determination thereof. They are important averments which reflect the facts as I have outlined from the affidavits which ,of course, are the only pieces of evidence that must be considered by a Court There is in my view therefore sufficient on these papers for the applicants to meet the requirement of a *prima facie* right. I consider that this must be so in the light of the provisions of s12 of the Act which requires that the matter be in accordance with a procedure that is reasonably and procedurally fair.

Significantly Mr Duminy, who appeared together with Ms Mangcu- Lockwood on behalf of the respondents, focused much of his address on applicants' failure to meet the requirement of irreparable harm as opposed to resisting many of the points that I have raised insofar as the *prima facie* right requirement is concerned. Mr Duminy submitted that the applicants' main claim turned on their loss of salary for the period of suspension will result in irreparable harm. Insofar as this is concerned, Mr Duminy contended there was no merit in

this particular claim because the salaries will be recoverable if the applicants succeed in their application for final relief. The loss of salary therefore did not constitute irreparable harm.

The applicants further claim that because of their suspension at least one category will not have access to parliamentary offices. Mr Duminy submitted that Parliament went into recess on 28 November 2014, the day of their suspension and the next term will resume on 27 January 2015. They are not required to attend their offices during this period and have not given any evidence as to why they may require access to their offices. He submitted further that there was no merit in the allegations that the suspension meant that Parliament would not pay for their flights. In this regard he referred to the affidavit of Ms Linda Harper, the acting section manager member support services, who stated clearly in her affidavit that sanctions against the affected members did not include members travel and communication facilities.

Mr Duminy noted that there was a hydraulic relationship between the strength of the applicants' case for final relief and the other requisites for an interim interdict. The stronger the applicants prospects of success, the less they needed to rely on prejudice. Conversely, the greater the element of doubt, the

greater the need for the other factors to favour applicants. Eriksen Motors v Protea Motors and Others 1973 (3) SA 685 (A) at 691.

He submitted that the applicants' case for irreparable harm and indeed in respect of the balance of convenience was very weak. Accordingly, they are required to show very strong prospects of success in order to bolster their weak case on the other requirements.

I am hesitant to weigh these competing concerns. The respondents papers are so skeletal in their denial of crucial averments made by the applicants. Suffice to say that, in my view, applicants have shown reasonable prospects of success for relief. That reduces their hurdle in respect of the requirement of irreparable harm but, in any event, the question of irreparable harm must be analysed within the context of the position of applicants. With respect that was not the manner in which Mr Duminy sought to argue his case.

These applicants are not aggrieved employees. They are public representatives who represent 6.35% of the elected; that is of those who cast their vote in the 2014 elections. They are paid to represent these constituents. Failing to pay them does not only mean hardship for themselves personally in

respect of their pension payments, mortgage bonds, vehicle finance and other costs that they must incur, but it weakens their financial ability for the period of the suspension to do the job for which they are paid. Similarly, a suspension which bars them from access to their offices can surely not be dependent on when the sanction was imposed. It prevents applicants to do what their political opponents are certainly able to do, that is to access their facilities, which they have of right as public representatives.

The problem with respondents' arguments in this regard is that they singularly omit to take account of the democratic imperatives which I have been at pains to emphasise throughout this case.

I turn then to deal with the balance of convenience. An applicant for an interim interdict must show that the balance of convenience favours the granting of an interim interdict. Mr Duminy submitted that the prejudice to the respondents, if interim relief is granted but the main application fails, is that in the interim it would undermine the established disciplinary mechanisms and structures of Parliament by creating unacceptable levels of uncertainty.

He referred to the **De Lille** case at para 16 to the effect that

without an internal mechanism of control and discipline, the National Assembly would be impotent to maintain effective discipline and order during the debates. What in his view must therefore be required to be weighed is short term reversible inconvenience to the applicants against potentially a long period of uncertainty in relation to essential functions and mechanisms of control of the National Assembly. But this is a misconceived argument, for given the existence of part B of the relief, there will inevitably be uncertainty with regard to the question of discipline raised by this dispute until the entire dispute is resolved.

To recapitulate, this judgment cannot and does not provide a definitive finding regarding the applicants conduct on 21 August 2014. On more comprehensive papers from respondents, a different picture may emerge. Hence this judgement should not and cannot be construed as seeking to undermine the clear right of Parliament to regulate its own proceedings and the conduct of its members. It does not, in any way, seek to sanction or approve of conduct that undermines the very purpose of Parliament, that is to be the deliberative chamber for the nation. However, I do find that on these particular facts, given the nature of the relief that is sought, the applicants have made out a case to justify the relief which they have claimed in part A

.For these reasons therefore the following order is made:

THE FIRST RESPONDENT OR ANYONE ACTING UNDER AUTHORITY OR DIRECTION FROM IN ANY MANNER WHATSOEVER, IS INTERDICTED FROM GIVING EFFECT TO OR IMPLEMENTING OR ENFORCING THE DECISION TAKEN BY THE NATIONAL ASSEMBLY ON 28 NOVEMBER 2014 AND CONVEYED IN WRITING TO THE APPLICANTS ON 28 NOVEMBER 2014 TO IMPOSE A SANCTION OF SUSPENSION OF MEMBERSHIP OF THE NATIONAL ASSEMBLY WITHOUT REMUNERATION IN RESPECT OF THE SECOND TO TWENTY FIRST APPLICANTS.

IT IS DIRECTED THAT PENDING THE OUTCOME OF THE APPLICATION IN PART B, THE APPLICANTS SHALL BE ALLOWED AND ADMITTED TO CARRY OUT THEIR FUNCTIONS AND ENJOY ALL PRIVILEGES AS ELECTED MEMBERS OF THE NATIONAL ASSEMBLY.

THESE ORDERS SHALL COME INTO EFFECT IMMEDIATELY AND SHALL OPERATE UNTIL THE FINAL DETERMINATION OF THE RELIEF AS SOUGHT OUT IN PART B.

THERE IS NO ORDER AS TO COSTS.

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DAVIS, J

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