



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Coram: Steyn, J *et* Henney, J

CASE NO: 14667/2015

In the matter between:

ECONOMIC FREEDOM FIGHTERS

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

Respondent

CASE NO: 17666/2015

In the matter between:

JULIUS SELLO MALEMA

First Applicant

ECONOMIC FREEDOM FIGHTERS

Second Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

Respondent

OF THE REPUBLIC OF SOUTH AFRICA

JUDGMENT: 14 DECEMBER 2016

HENNEY, J:

Introduction

[1] There are two cases before this court for adjudication. In case number 14667/2015, the Applicant is the Economic Freedom Fighters ("the EFF") and the Respondent is the Speaker of the National Assembly of the Republic of South Africa ("the Speaker"). In case number 17666/2015, the Applicants are Mr Julius Sello Malema ("Mr Malema") and the EFF, and the Respondent is once again the Speaker. Mr Malema is the president of the EFF and serves in the National Assembly as an elected representative of the EFF. The EFF is the third largest political party represented in the National Assembly of the Republic of South Africa. It secured 6.35% of the national vote and acquired 25 seats in the National Assembly during the last general elections in April 2014. Mr Ngcukaitobi appeared for the Applicants, while Mr Duminy SC and Ms R Williams SC appeared for the Respondent.

[2] On 30 July 2015, all parties in the National Assembly, except the EFF, adopted what was then known as Rule 53A. This Rule deals with the removal and suspension of a member of the National Assembly who refuses to leave the Chamber when ordered to do so in terms of Rule 70. I will at a later stage deal with the Speaker's reasons for the adoption of the Rule.

[3] On 26 May 2016, the National Assembly approved a revised set of Rules and the previous Rule 53A is now known as Rule 73 (I will henceforth for the sake of

convenience and to prevent any misunderstanding refer to it as Rule 73). The Rule, which is entitled "*Removal of members from Chamber and precincts*", states:

- "1) *If a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of Rule 70 or 71, the presiding officer must instruct the Sergeant-at-Arms to remove the member from the Chamber and the precincts of Parliament forthwith.*
- 2) *If the Sergeant-at-Arms is unable in person to effect the removal of the member, the presiding officer may call upon the Parliamentary Protection Services to assist in removing the member from the Chamber and the precincts of Parliament.*
- 3) *Unless already suspended in terms of Rule 71, a member who is removed from the Chamber in terms of Subrule (2) is thereby immediately automatically suspended for the period applicable as provided for in Rule 74, and may not enter the Chamber or the precincts for the duration of the suspension.*
- 4) *If a member resists attempts to be removed from the Chamber in terms of Subrule (1) or (2), the Sergeant-at-Arms and the Parliamentary Protection Services may use such force as may be reasonably necessary to overcome any resistance.*
- 5) *No member may, in any manner whatsoever, physically intervene in, prevent, obstruct or hinder the removal of a member from the Chamber in terms of these Rules.*

- 6) *Any member or members who contravene Subrule (5) may, on the instruction of the presiding officer, also be removed from the Chamber and the precincts of Parliament forthwith.*
- 7) *If proceedings are suspended for the purposes of removing a member or members, all other members must remain seated or resume their seats, unless otherwise directed by the presiding officer.*
- 8) *When entering the Chamber on the instruction of the relevant presiding officer-*
 - (a) members of the Parliamentary Protection Services may not be armed; and*
 - (b) members of the security services may not be armed, except in extraordinary circumstances in terms of security policy.*
- 9) *Members who have been removed from the Chamber will be escorted off the precincts by Parliamentary Protection Services personnel and will not be allowed to enter the House or precincts of Parliament as the Rules prescribe.*
- 10) *If, after having been removed from the Chamber, a member(s) offers resistance to being removed from the precincts, members of the security services may be called upon to assist such removal.*
- 11) *In the event of violence ensuing in the Chamber as a result of a member(s) resisting removal, the presiding officer may suspend proceedings, and members of the security services may be called upon by the Speaker during such period of suspended proceedings to assist with the removal of members from the Chamber and the precincts of Parliament forthwith in terms of Section 4 (1) of the Powers and Privileges Act; provided that the security*

services may intervene directly anywhere in the precincts and in the Chamber in terms of Section 4 (2) of the Act when there is immediate danger to the life or safety of any person or damage to any property.

- 12) *Whenever a member is physically removed from the Chamber in terms of this Rule, the circumstances of such removal must be referred by the Speaker, within 24 hours, for consideration to a subcommittee of the Rules Committee appointed for that purpose.*
- 13) *The House may approve standard operating procedures, recommended by the Rules Committee, for the exercise of this function, in particular in relation to the use of the Parliamentary Protection Services and members of the security services.*
- 14) *For the purposes of this Rule, "precincts" excludes the Chamber.*

[4] On 5 August 2015, the EFF under case number 14667/2015 instituted proceedings in this court in which the following relief is claimed in relation to the then Rule 53A (now Rule 73):

- 1) An order declaring that Rule 73 of the Rules of the National Assembly is unlawful, unconstitutional, invalid and of no force or effect.
- 2) In the alternative to the relief sought above:

2.1 An order declaring that no person employed by the South African Police Service or the National Defence Force shall qualify to be appointed into the Parliamentary Protection Services.

2.2 An order declaring that Rule 73 (3) be severed from the provisions of Rule 73.

[5] This application was brought by the Deputy President of the EFF, Mr Floyd Shivambo, who is also the Chief Whip of the party in the National Assembly.

[6] After these proceedings were instituted, a debate on the report of the Marikana Commission of Inquiry was held in the National Assembly, on 13 August 2015, during which Mr Malema made certain utterances to the effect that Mr Cyril Ramaphosa, the Deputy President of the Republic of South Africa, with others, *"premeditated the killing of mine workers in Marikana"* and that *"they engaged in what is known in law as conspiracy to commit murder"*. Furthermore, that *"Mr Cyril 'Worker Murderer' Ramaphosa played a central role in influencing the police."*

[7] When Mr Malema made the remarks there was an objection by one of the members of the House as to whether or not these remarks were unparliamentary. The Chairperson at that stage, Miss M G Boroto, deferred her ruling, which she later made on 9 September 2015. According to her ruling, the remarks made by Mr

Malema reflects on the integrity of a member of the House and imputed improper or unworthy motives or action to that member.

[8] According to her ruling, a member can only bring improper conduct on the part of another member to the attention of the House by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge. As such, the remarks made by Mr Malema in relation to Mr Ramaphosa were unparliamentary. Mr Malema was required to withdraw the remarks. He refused and rather replied "*Cyril is a murderer ... and Cyril participated in the conspiracy to murder workers*".

[9] At that stage, numerous interjections and points of order were raised by other members in the House. Miss Boroto, notwithstanding these interruptions, once again requested Mr Malema to withdraw his remarks. To which Mr Malema once again replied "*Cyril is a murderer ... and Cyril participated in the conspiracy to kill the workers in Marikana*". The Chairperson then inquired from him whether he was not prepared to withdraw these remarks, to which he replied "*You can take me to jail for that. Cyril has got blood of innocent people ... (sic)*". He further said, "*I will never withdraw that. I will never apologise to Cyril. Cyril must rot in jail.*"

[10] When he uttered these statements, there was a reply from some members saying "*Yes*". He further proceeded to say, "*He is a murderer! He killed our people!*" The Chairperson once again asked him to withdraw. Mr Malema's microphone was switched off and he requested that it be switched back on. The Chairperson refused

and he stated that he would not listen to her either. The Chairperson thereupon requested Mr Malema to leave the House. To this he replied "*I'm not leaving. I'm not leaving*". The Chairperson tried to speak to him several times and requested him to leave. While trying to do so, Mr Malema said "*call those people, to come and remove me ... to come and kill us here in the same way you killed the people in Marikana!*", which I suspect is a reference to the Parliamentary Protection Services.

[11] According to the Hansard records, several interjections were made by other members during this encounter between the Chairperson and Mr Malema.

[12] At this stage the Chairperson informed the House that she would be requesting the Sergeant-at-Arms to come into the House to remove Mr Malema from the Chamber. There were further interjections after she made this decision and she requested from members that order be restored in the House. She was continuously interrupted and was constrained to remark that there was no order in the House. She requested members to allow her to deal with the issue at hand, whereafter she informed the House, that she had been informed by the Sergeant-at-Arms that Mr Malema would not leave the House.

[13] The Chairperson once again informed Mr Malema that she had given him an opportunity to comply with her directive to leave the House with the assistance of the Sergeant-at-Arms, and that his conduct was interfering with the ability of the

House to conduct its business. She then informed the House that she would call upon the Parliamentary Protection Services to assist the Sergeant-at-Arms to remove Mr Malema from the Chamber so that the House could proceed with its business. As a result of his removal from the House, Mr Malema was also automatically suspended.

[14] As a result of this decision, Mr Malema instituted the proceedings under case number 17666/2015 in this court on 11 September 2015. He requested the following relief:

- 1) An order declaring that the decision of the Respondent on 9 September 2015 to suspend him and to prevent him from carrying out his responsibilities as an elected member of the National Assembly is unconstitutional, invalid and of no force or effect.
- 2) An order declaring that Rule 73 is unlawful, unconstitutional, invalid and of no force or effect.

It will be convenient to firstly deal with the EFF and Mr Malema's case against the adoption of Rule 73 as raised in both cases.

The EFF and Mr Malema's arguments regarding the constitutionality of Rule 73

[15] The arguments of the EFF and Mr Malema, as contained in their respective founding affidavits, are exactly the same. They argue that in an attempt to silence the EFF, the ANC's representation in Parliament pushed for an amendment to the Rules in order to grant the Speaker greater powers than she originally had in order to stifle the ability of the EFF to ensure that there is accountability of the executive.

[16] According to them, the Respondent is clearly not neutral and is motivated by improper political consideration in protecting the ANC rather than promoting the Constitution of the Republic of South Africa. They further argued that the Rule was devised - and intended for application - by members representing the majority political party in the National Assembly against members representing minority political parties, especially the EFF. Also that the removal Rule was devised specifically to prohibit and inhibit EFF members participating in the National Assembly the way they did when dealing with the so-called Nkandla and Marikana reports.

[17] According to the Applicants, they objected to these Rules on the basis that the it would infringe upon section 58 of the Constitution and that it was simply an attempt to divert from the real issue, which is the political pressure resulting from the failure of the National Assembly to call upon the President to give effect to the findings and determinations of the Public Protector. They do, however, accept that

section 57 of the Constitution permits the National Assembly to pass Rules with respect to its internal arrangements, proceedings and procedures.

[18] A further argument is that the removal of a member of the National Assembly from the Chamber amounts to a violation of section 19 of the Constitution, since it limits the member's ability to represent the constituency. For this they rely on a decision of this court by *Davis J*¹, that conduct directed at members of the National Assembly may impugn upon the right of voters under section 19 of the Constitution. However, they do not submit that members of the National Assembly may not be punished for improper behaviour, including punishment by removal from the National Assembly.

[19] Any removal from the National Assembly must, however, take place in accordance with section 36 of the Constitution, and under that section the right may only be limited by a law of general application. A law of general application exists in the form of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act, 4 of 2004 ("PPI"). The Rules, more especially Rule 73, do not constitute a law of general application and any removal of a member from the National Assembly must comply with the PPI. While the PPI is indeed a law of general application, Rule 73 was not adopted in terms of that act and is in direct conflict with it. Section 12 (3)² of that act, clearly entitles members accused of

¹ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (21471/2014) [2014] ZAWCHC (23 December 2014).

² See *infra* at para 82.

contempt to a prior disciplinary enquiry before a standing committee in accordance with the procedure as set out therein, that is reasonable and procedurally fair, followed by resolution of the House.

[20] This argument was later abandoned during the hearing of this matter, although persisted with in the heads of argument as well as the supplementary heads filed on the day of the hearing. I suspect that this cause of action was embarked upon in light of the majority judgement of *Madlanga J*, in **Democratic Alliance v Speaker, National Assembly and Others**³ ('the DA case'), where it was held at para [47], that in terms of the provisions of section 58 (1) (a) only "*Rules and orders of Parliament may limit freedom of speech in Parliament and nothing else. Limiting this freedom by means of an Act of Parliament is at variance with this Constitutional stipulation.*"

[21] Mr Ngcukaitobi, as a result of this changed tack, submitted that while the applicants conceded that there may be occasions when the removal of a member is necessary, any Rule of Parliament adopted pursuant to section 58 (1) (a) permitting the removal of a member, should be in line with the threshold as set out by *Madlanga J* in the *DA* case. Specifically where it was held that, "*Interference and disruption that may be sufficient for the removal of a member must be of a nature*

³ 2016 (3) SA 487 (CC).

that hamstrings and incapacitates Parliament from conducting its business. Even so, there must be no anticipation of resumption of business within a reasonable time."⁴

[22] According to Mr Ngcukaitobi, Rule 73 does not meet this threshold. He maintains that the Rule must further appreciate what Parliament is about and it must appreciate the role of the Speaker, which is to mediate different political views. He further argued that when a member who refuses to leave but does nothing further, and he or she also does not interfere with the business of the House, there would be no justification for his or her removal. In such an instance a member can be charged. He argued that there may well be instances where there is a disruption, but such disruption would not incapacitate the House. In such an instance, there would be no need for the Rule. Even then, as *Madlanga J* held, there must be no anticipation of resumption of business within a reasonable time.

[23] He further argued that all members have freedom of speech in the National Assembly in terms of section 58 of the Constitution. A member cannot therefore be removed from the National Assembly for conduct which is protected by section 58 of the Constitution. This court, as well as the Constitutional court, in the **DA case** (supra), ruled section 11 of the PPI to be unconstitutional where it holds that a person referred to in the section would also include a member of the National Assembly, who creates a disturbance in Parliament, and that such a person may also

⁴ *Ibid* para 45.

be arrested and removed from the precincts of Parliament on the order of the Speaker.

[24] Rule 73 (3) allows the automatic suspension of a member pursuant to Rule 74 which, according to applicants, is unlawful for the following reasons:

- 1) It is not rational, because it does not permit the procedural fairness due to the affected member prior to the imposition of drastic penalties, as contemplated in Rule 74.
- 2) It further serves no legitimate purpose because if the purpose of the Rule, as contemplated by Rule 73 (1) and (2), is to ensure that the business of the Chamber may continue uninterrupted, there is simply no point in imposing punishment on a member who has in any event been removed from the Chamber.
- 3) Any sanction of suspension must comply with the provisions of section 12⁵ of the PPI. That section entrenches the right of any member to procedural fairness under the auspices of the Standing Committee in the event of any alleged misconduct and suspension is to be weighed as one of the possible sanctions after a member has been permitted the right to a hearing. The Applicants contend that the use of such power, to suspend without any hearing, is arbitrary.

⁵ See infra at para 82.

[25] He also argued that the use of force as sanctioned by Rule 73 is in direct violation of section 58 of the Constitution, which provides for freedom of speech in the Assembly. According to the Constitution, members of the Assembly may not be arrested and are immune from civil liability for any statement made in the Assembly. The right to freedom of speech is essential to protect the foundational values of the Constitution, which includes multi-party democracy, and so as to permit members of the Assembly to execute their responsibilities effectively. Therefore, any threat of force to be deployed on members of the Assembly, threatens the right to freedom of speech, which is guaranteed by the Constitution.

[26] Regarding the Speaker's reliance on the fact that other Parliaments have comparable Rules for the removal of members from the House, as attached to the secretary of Parliament's affidavit⁶, the Applicants argued that neither of them (secretary of Parliament and the Speaker) discussed these Rules in any detail nor did they mention which jurisdiction they emanate from, nor why and in what respects they are comparable to our Rules. It is also difficult to understand, particularly given the history of this country, how the Rules applied in other countries can be of any assistance to this court.

[27] The Applicants further submit that this Rule breaches the separation of powers doctrine by permitting the newly formed Parliamentary Protection Services to assist in forcibly removing a member. The Parliamentary security service includes the

⁶ MX1 page 512 – 563 record case 1766/2015

police and army, which are under the control of the executive. The Constitution expressly prohibits members of the security forces and the police from acting on partisan instructions. The EFF understands that members of the Parliamentary Protection Services are recruited from the ranks of the police. If so, this constitutes a breach of the separation of powers.

Removal and suspension of Mr Malema

[28] Mr Malema argued that when he made remarks to the effect that Mr Cyril Ramaphosa is a murderer, his opinion was informed by the fact that Mr Ramaphosa participated in the conspiracy to commit the murder of 34 workers at Marikana in August 2012. It was further based on the common knowledge that Mr Ramaphosa was a shareholder and director of Lonmin, the company that had employed the workers who were killed, and on publicly available material which had been disclosed during the Marikana Commission of Enquiry.

[29] His conclusions were also based on the fact that Mr Ramaphosa: 1) described the workers who were employed by Lonmin and had been involved in the 2012 strike as “criminals,” and their conduct as “dastardly criminal”; 2) called for “concomitant action” to be taken against the workers; 3) was in a unique position to influence political and state actors, being a member of the National Executive Committee of the African National Congress and also the National Chairperson of the National Appeals Committee on disciplinary matters; 4) enjoyed sufficient proximity of power but, also in fact, used his power to exert pressure on politicians to act in a

pointed way; 5) called for the deployment of the army in the context of a strike, and that such a call for the militarisation of the situation was tantamount to calling for the killing of more employees; 5) advised the Minister of Police on 12 August 2012 that more police were needed on the ground; 6) advised the Minister of Minerals and Energy that her silence and inaction, about what was happening in Marikana, was bad for her and the government; 7) advised the Minister of Police that what was transpiring at Marikana was a criminal act when he knew that in fact it was a strike about wages; 8) on 15 August 2012 advised the Minister of Minerals and Energy that she should "correct" the characterisation of the labour dispute into one of a "criminal act" and to "get" the Minister of Police to act in a "more pointed way."

[30] Mr Malema alleged that, in his opinion, based on these facts which are public knowledge, this amounts to conspiracy to commit murder and that Mr Ramaphosa is therefore a murderer. He states that Mr Ramaphosa must clearly have foreseen that there would be an escalation of violence resulting from the deployment of security measures. According to him it was further established at the Marikana Commission, that two commissioners of the South African Police Service had taken into account improper political considerations when they made a decision to escalate the use of force at Marikana. The Commission has also referred the matter to the National Prosecuting Authority, for an investigation into the allegations of murder.

[31] According to Mr Malema, and the EFF, one of the persons who must be charged for murder is Mr Ramaphosa and to this end he laid a criminal charge

against him at the Marikana police station. Therefore, in his view, there is an on-going investigation into the murder charges against Mr Ramaphosa. He contends that it was based on these considerations that he made his remarks, all of which are based on publicly available information. It is also for these reasons that he refused to withdraw his remarks. In his view, he was entitled to refuse to withdraw the remarks and was also entitled to refuse to leave the House because the decisions affecting him were unlawful and unconstitutional.

[32] Furthermore, he argues that his refusal to withdraw his comments while debating in the House did not cause any disturbance of the proceedings, or any threat to any person's life or property. According to him, the decision to call him to withdraw the remarks in relation to Mr Ramaphosa, as well as the decision to eject him from the House, was invalid and of no force and effect for the following reasons:

- 1) His comments were protected by freedom of speech, in terms of section 58 of the Constitution.
- 2) He made the comments in the context of a discussion about a matter of immense public interest.
- 3) Mr Ramaphosa's role in the Marikina tragedy is widely known and according to Mr Malema he is entitled to hold and express an opinion on the matter, particularly bearing in mind the high political office which Mr Ramaphosa occupies.

- 4) There was no rational basis for his ejection at the time, as he was not disrupting the proceedings. And if his conduct constituted misconduct, he should have been subjected to a proper disciplinary enquiry under the PPI Act. He submits that the sanction imposed on him, without the procedures of the PPI having been followed, was improper, because in terms of section 11 (2) of that act members can only be suspended after lawful due process had been followed.
- 5) The ejection was motivated by political considerations to silence the EFF and to protect high-ranking officials of the ANC from any criticism.
- 6) There was no procedural fairness observed in the decision and it was in breach of the requirements of legality and the Promotion of Administrative Justice Act, 3 of 2000.
- 7) There was no reason to eject him from the House as there was no threat to life or property, and there was no disruption to the proceedings which could have justified such a drastic measure.

The Speaker's Case

[33] According to the Speaker the National Assembly approved a revised set of Rules. The Rules which are relevant to this application are Rule 66, which deals with order in public meetings and rules of debate, and the revised Rule 73, which deals with the removal and suspension of a member who refuses to leave the Chamber when ordered to do so. The manner in which the Rules are to be implemented is set

out in the Standard Operating Procedure in appendix C to the Rules.⁷ According to her understanding, the Applicants' objection is not to the wording of the Rules, but to the notion that the National Assembly Rules provide for the removal of a member, and that member's suspension, which is dealt with in Rule 73.

[34] The Speaker denies that this Rule is unconstitutional, unlawful or invalid. According to section 57 of the Constitution, the National Assembly may determine its own internal arrangements, proceedings and procedures, and make Rules and orders concerning its business with due regard to representative and participatory democracy, accountability, transparency and public involvement. Rule 73 was adopted in July 2014, some 8½ months before the Constitutional Court delivered judgement in the **DA case**, (supra) and it was referred to by the court, without criticism. In relying on the PPI, the Applicants overlooked the following:

- 1) that section 12 (13), which provides for the powers of the person presiding at the meeting of the House, or a committee or joint committee, is not affected by section 12; and
- 2) the inter-relationship between section 57 of the Constitution, which permits the National Assembly to determine its own internal arrangements, proceedings and procedures.

⁷ BM 3 record page 130.

[35] The allegation by Mr Malema that the Speaker is cynically undermining the principle of separation of powers by using the police to eject members from the National Assembly, "*by simply renaming them*" (meaning the police) as Parliamentary Protection Services, is untrue and the contention is without merit for the following reasons:

- 1) The PPI defines security services to mean those referred to in section 199 of the Constitution, and the presence of security services in the Parliamentary precinct, including the Chamber in which the proceedings of the House are conducted, is expressly permitted in the PPI (section 4, read with sections 2, 3 and 11).
- 2) In terms of section 199 (1) of the Constitution, the security services of the Republic consist inter alia, of a single Police Service established in terms of the Constitution. The objects of the Police Service are set forth in section 205 (3), which include "*to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law*".
- 3) The Security Policy of Parliament ("the policy") established the Parliamentary Protection Services to render protection and security in Parliament. The policy, amongst others, provides that members of the Parliamentary Protection Services will take action inside the Chamber only when requested to do so by the presiding officer concerned or when emergency circumstances so demand.

- 4) Although there has always been a police presence in Parliament, it is not permissible for members of the SAPS to function as a police force in the Parliamentary precinct, since this would be in conflict with section 199 (1) of the Constitution, read with section 205 thereof.
- 5) Furthermore, in terms of section 4 (1) of the PPI, policing functions performed by the security services of Parliament may occur with the permission and the authority of the Speaker or the Chairperson of the NCOP. Only in the limited circumstances defined in subsection (2) of the PPI, may members of the security services intervene without permission in terms of the Act, where there is immediate danger to the life or safety of any person or damage to any property.
- 6) According to the Speaker, there is nothing in the application that explains why members of the SAPS or the SANDF should not be eligible for employment as members of the PPS.

[36] The Speaker argues that the object of ordering a member to leave the Chamber is as a means of last resort or penultimate resort reserved for the most serious cases. It is only applied to preserve and restore the ability of the National Assembly and all members to fulfil their Constitutional functions and not to punish members for misbehaviour.

[37] The Applicants' argument that the removal of a member should only follow on an enquiry and report, followed by a resolution of the House, as contemplated in section 12 of the PPI, is wholly unrealistic and impractical. If that approach should be followed it would mean the National Assembly's proceedings can be brought to a standstill by any member intent on causing disruption (in a proscribed manner), and that Parliament can be stymied in this way until the committee and other processes under section 12 of the PPI have run their course.

[38] The Speaker states that experience has shown that those proceedings take time and are capable of being delayed and dragged out. The approach of the Applicants would put the implementation of parliamentary democracy under our Constitution at the mercy of an individual (or minority) that, according to the Applicants' hypothesis, is behaving improperly. The revised Rules, which are the result of a multi-party process and enjoy the support of all parties save for the Applicants, seek to prevent that result.

[39] Parliaments in other democracies have comparable Rules for the removal of members from the House. The procedure in the National Assembly is regulated by the Constitution, the National Assembly Rules ("NA Rules"), the National Assembly Guide to Procedure 2004 ("the Guide"), the PPI, rulings by presiding officers and conventions and practices. Rulings on procedure are made in accordance with the Parliamentary Rules, and the conventions and practices, some of which are contained in the Guide as well as in precedent. Presiding officers are required to act

impartially and in the interest of the National Assembly and Parliament, according to the Constitution and the PPI (where it applies). They seek to observe and apply the applicable NA Rules and follow the Guide.

[40] The NA Rules and the Guide provide, and explain, the framework within which the debates take place in the House, which has to be done in an orderly and decorous fashion. Order is necessary in the conduct of the debates which can sometimes be robust, to ensure that all members have fair opportunities to participate. And, as stated in the Guide, maintaining order in the House is one of the Speaker's vital functions while presiding in the National Assembly.

[41] In her Answering Affidavit she refers to the various Rules in terms of Chapter 5 that are applicable during public meetings, and the Rules of debate which are applicable, and which members needs to comply with. I will refer more fully to the Rules applicable in this case at a later stage.

[42] The Speaker in her Answering Affidavit highlights a series of events which led to the disruption of the proceedings in Parliament on different occasions, which demonstrated the need for a Rule to ensure that Parliament could continue to function efficiently and effectively, where members had been ordered to withdraw in terms of Rule 70 or 71 for proscribed behaviour, but refused to comply. These events illustrate the principle that the power to order a member to leave the

Chamber must be supported by the appropriate power to attain the removal of a member who refuses to comply. The debates around the Public Protector's report (which has become known as the Nkandla report), were severely disrupted on several occasions, resulting in the business of the House as a whole being suspended, and members being ordered to withdraw from the House.

[43] When members refused removal by the Sergeant-at-Arms, and where necessary, the Parliamentary Protection Services were called upon to assist with the removal. In the ordinary course, where a member is directed to withdraw a remark and refuses, such member would be ordered to withdraw from the Chamber. When a member withdraws there would be compliance with the order of the Chair. The Speaker cites, as a further example, that on 21 August 2015 the House met at 14h10 for the President's question time, however at 14h58 she had to suspend the business of the House due to grave disorder and the business only resumed after 16h15.

[44] In this regard, the Speaker made available real evidence in the form of video and audio recordings of these proceedings. According to her, when there is deliberate contravention of the Rules, grossly disorderly conduct and defiance of the authority of the Chair, it detracts from the rights of the other members whose participation in the proceedings and fulfilment of their Constitutional mandates, is hindered or denied.

[45] On 13 November 2014, once again the proceedings in the National Assembly were disrupted on a number of occasions, which is evident from the video footage taken in the National Assembly on that date, as well as a minute which was annexed.⁸ This occurred again during the State of the Nation address on 12 February 2015.⁹ On 11 March 2015¹⁰, there were disagreements among the members with numerous interjections and interruptions.

[46] On 18 June 2015¹¹ the parties, in terms of the agreed party sequence, were expected to put questions to the President for reply on that day, and 6 questions were put to the President. However, shortly after the session commenced, members of the EFF raised various points, said to be points of order, which resulted in the Speaker having to suspend the business of Parliament to afford the Chief Whips an opportunity to meet, consult and agree upon how to address the disruptions that had occurred up to that point.

[47] When the proceedings continued at 15h52, she was informed that all the parties, except the EFF, had agreed to continue with the proceedings scheduled for the session. The EFF's Chief Whip expressed the party's disagreement. The Speaker said that despite her attempts to enable the House to proceed on that day, members of the EFF continued to raise purported points of order, many of which she considered to be invalid. On the occasions that she recognised the President, one or

⁸ BM16 at page 271, record.

⁹ BM17.

¹⁰ BM18.

¹¹ BM20, 21, 22.

more of the members of the EFF would raise an alleged point of order, which effectively prevented the purpose of the question session being achieved, namely holding the executive to account. She was therefore constrained to adjourn the House due to the gravely disorderly conduct and continued disruptions.

[48] According to her these events are illustrative of the necessity for a Rule such as Rule 73, which can be used in extreme cases, to maintain order. According to her such a Rule is necessary to ensure that Parliament can execute its Constitutional mandate, which includes holding the executive to account. As a result of this, the multi-party subcommittee, which was in the process of reviewing the Rules of the National Assembly, was mandated to review the National Assembly Rules to consider measures to address the disruptions in the House.

[49] Regarding the allegations made by Mr Malema, the Speaker argues that the Applicants have no reason to fear that Rule 73 will be used to their detriment, since it will only be invoked if a member acts in the proscribed manner to such a degree that it justifies its invocation. According to her, it has become evident that the power to remove members in the circumstances as contemplated in Rule 73, is necessary to support the proper functioning of the National Assembly.

[50] The allegation by the Applicants that the new Rules will be abused by the Speaker, to the detriment of the EFF, is without foundation. Contrary to their

assertion, it will however advance multi-party democracy and the right of free speech to all members of the National Assembly. The Speaker further denies that Mr Malema was arbitrarily suspended without any regard to the provisions of the Rules or the Constitution.

[51] He was suspended lawfully and validly and with due regard to the Rules of the National Assembly and the Constitution. The proceedings on 9 September 2015 were severely disrupted by Mr Malema, and the disruptions would in all probability have continued had Rule 73 not been applied. According to her, Mr Malema was not exercising his right to free speech, but if anything he detracted from the rights of others to do so. This is evident from Hansard and the video footage relevant to this event. She states that his behaviour was not only gravely disorderly, but he also treated the presiding officer with contemptuous disrespect.

[52] Mr Malema's suspension was reported to a multi-party committee within 24 hours, and he could have used this opportunity to state his case to the committee regarding his suspension when the matter was considered. The Speaker further denies that the invocation of the Rule was a punishment, but it was rather aimed at addressing disruptions in the National Assembly. Mr Malema fails to distinguish between members' rights in terms of section 58 of the Constitution, and disorderly and otherwise proscribed behaviour in the National Assembly.

[53] There is no basis for Mr Malema's assertion that the Rule was motivated by an ulterior motive to protect the President. The Rule was unanimously adopted by all the other parties. The language used by Mr Malema was manifestly unparliamentary and he was required to withdraw his remarks. The Chairperson, according to her, was clearly entitled (and obliged) to require him to do so.

[54] She further argues that he admits that he refused to do so and did not endeavour to express himself in a manner which complied with the requirements of parliamentary decorum. In addition, Mr Malema further admits that he refused to comply with any of the directions of the presiding officer and defied her authority.

[55] The Speaker submits that when Mr Malema made these remarks it was not a question of whether he was right or wrong, but rather whether his behaviour fell within the scope of the conduct proscribed at the time.

[56] Whether Mr Malema's utterances were protected in terms of section 58 of the Constitution is not the issue, but that the freedom of speech afforded by section 58 is subject to the Rules and orders of the National Assembly. According to Chapter 11 of the Guide,¹² it is not for the Chair to judge the accuracy or otherwise of statements made in the House and it would be inappropriate, therefore, for her to comment on the correctness or otherwise of the allegations Mr Malema made in the House, which he repeated in his affidavit.

¹² BM 10 page 149 of the record

[57] The language used by him on 9 September 2015 was plainly unparliamentary and contravened the old Rule 63 (now Rule 68). The Rule at that stage, prior to the Rules being revised in May 2016, was that where a member wished to bring alleged improper conduct of another member to the attention of the House, or impute improper motives to others, or cast personal reflections on their integrity as members, it should be done in a clearly formulated and properly substantiated substantive motion in accordance with the standing order that regulated such procedure at the time.

[58] Mr Malema's contentions that there had been no threat to life or property is correct as far as he mistakenly seems to contend that those are the only circumstances under which Rule 73 can be invoked. The Speaker denies that the Rule was adopted to silence the EFF. She contends that it does not deal with silencing any member of any party. The contention that it was adopted to stifle the ability of the applicants to deal with the decisions of the Public Protector is also incorrect. The Rule was not adopted to give greater powers to the Speaker, because the Speaker is not the only person who presides over the proceedings in the National Assembly. His references to and reliance on Section 12 (3) of the PPI overlooks Section 12 (13)¹³ of that act.

¹³ Sec 12(13) reads as follows: "This section does not affect the power of a person presiding at a meeting of a House or a committee, or a joint meeting of the Houses, to maintain order and discipline in the meeting".

[59] The Speaker contends that only a member who behaves in a proscribed manner, and then refuses to comply with an order to withdraw, faces possible removal from the House.

[60] She further denies that the Rule breaches the separation of powers doctrine. The removal of a member from the Chamber does not constitute a violation of section 58 of the Constitution. Members who are removed are neither arrested nor held civilly liable. She contends that at any stage when Rule 70 is employed, a member can withdraw voluntarily. In such cases, there is no suspension. The manner in which the Rules are framed means that removal only takes place where there has been a further refusal to obey the order to withdraw, and a refusal to leave when approached by the Sergeant-at-Arms as directed by the presiding officer.

[61] According to the Speaker a period of suspension may be discharged or reduced under Rule 75 on a member's written and approved expression of regret. She denies that when members are removed from the chamber, they are assaulted. In this regard, she refers to the operating procedure¹⁴ adopted by the National Assembly and the relevant video footage of this incident.

[62] She further denies the allegation that any mere disruption justifies invocation of Rule 73 and refers to the provisions of Rules 69 and 70. Any removal, and consequent suspension, is in any event considered by a multi-party committee.

¹⁴ BM3 page 328 record.

[63] Issues for consideration

- 1) Whether Rule 73 is unlawful, unconstitutional, invalid and of no force or effect due to the fact that it infringes a member of Parliament's right to freedom of speech in the National Assembly;
- 2) And if not, whether Miss Boroto on 9 September 2015, could have ordered the Sergeant-at-Arms to remove Mr Malema when he refused to withdraw from the House;
- 3) And whether she was justified in calling on the Parliamentary Protection Services to forcibly remove Mr Malema from the House.

Evaluation

[64] I do not agree that the amendment of the Rules seeks to grant the Speaker greater powers than she originally had, in order to stifle the ability of the EFF to hold the executive accountable, for the simple reason that the EFF does not argue that the amended Rules are only applicable to them and not to other parties in the National Assembly. There is therefore no merit in this argument and it needs no further discussion. There is also no merit in the argument that the amended Rule was devised, and intended for application, by members representing the majority political party in the National Assembly against members representing minority political parties, and especially the EFF. It is common cause that all the political

parties, including other minority parties of which some are smaller than the EFF, agreed to the adoption of these amended Rules¹⁵ – the EFF being the exception.

[65] The critical question for serious consideration is whether Rule 73 can be constitutionally justified in terms of the provisions of section 58 of the Constitution. Freedom of speech in the National Assembly and its committees is guaranteed by the Constitution in terms of the provisions of section 58 (1) (a)¹⁶. As *Madlanga J* held in **DA case** (supra) at paragraph [38]: *"the privilege contained in ss 58 (1) (a)¹⁷ and 71 (1) (a) can never go so far as to give members a licence so to disrupt the proceedings of Parliament that it may be hamstrung and incapacitated from conducting its business. This would detract from the very raison d'être of Parliament. Section 57 of the Constitution provides that the National Assembly may determine and control internal arrangements, proceedings and procedures and make Rules and orders concerning its business. Of this power, Mahomed CJ tells us in De Lille: 'There can be no doubt that this authority [contained in s 57 (1)] is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose. This would, for example, include the*

¹⁵ At page 603 of the record, Mrs C. Dudley remarks: "The ACDP has committed to holding the President and his executive accountable, but we are committed to doing so within the rules of Parliament and the processes. We do object to being held to ransom by one party. We do object to the attack on multi-party democracy coming from one party in the opposition, which we stop all the other body from having any say or doing what we need to in terms of holding the President and his Executive to account".

¹⁶ Section 58 (1) provides:

"Cabinet members, Deputy Ministers and members of the National Assembly-

- (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
- (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-
 - (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
 - (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees."

¹⁷ The provisions of section 71, are similar to section 58 which is applicable to delegates of the National Council of Provinces (NCOP)

power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates.”¹⁸

[66] *Madlanga J* at paragraph [39] states: “More pertinently, ss 58 (1) (a) and 71 (1) (a) of the Constitution make freedom of speech in the two Houses subject to ‘the Rules and orders’ envisaged in ss 57 and 70. That must mean Rules and orders may – within bounds that do not denude the privilege of its essential content – limit parliamentary free speech.” In ***De Lille and Another v Speaker of The National Assembly***¹⁹, *Hlophe J* (as he then was) at para [35] expressed the view that freedom of speech conferred by section 58 (1) of the Constitution is an absolute freedom in the sense that it is subject only to the Rules and orders of the Assembly. It is not subject to the limitations clause contained in section 36.

[67] Both the Supreme Court of Appeal and the Constitutional Court have recognised that the National Assembly undoubtedly has the ability and powers to maintain internal order and discipline in its proceedings, including the power to exclude from the Assembly, temporarily, any member(s) who is disrupting or

¹⁸ *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA) para 16.

¹⁹ 1998 (3) SA 430 (C).

obstructing its proceedings, or impairing unreasonably its ability to conduct its business, in terms of section 57 (1). The Rules dealing with public meetings and Rules of debate is dealt with in Chapter 5 of the National Assembly Rules and can be regarded as the internal mechanisms of control and discipline in the Assembly. I referred to these Rules earlier on in the judgment, but I will deal with them in more detail hereunder. Rule 73 is one such mechanism, together with other Rules, dealing especially with the conduct of members in the House.

[68] A member of the National Assembly therefore has freedom of speech in the Assembly and its committees, subject to these Rules and orders adopted in terms of section 57 (1). These Rules not only include Rule 73, but also Rules 69, 70, 71 and 74. These Rules are interrelated and have a sequential effect. Rule 69 deals with gross disorderly conduct and states that members may not engage in grossly disorderly conduct in the House, which includes: a) deliberately creating serious disorder or disruption; b) in any manner whatsoever, physically intervening, preventing, obstructing or hindering the removal of a member from the House who has been ordered to leave the House; c) repeatedly undermining the authority of the presiding officer, or repeatedly refusing to obey rulings of the presiding officer or repeatedly disrespecting and interrupting the presiding officer while the latter is addressing the House; d) persisting in making serious allegations against a member without adequate substantiation or following the correct procedure; e) using or threatening violence against a member or other person; or f) acting in any other

way to the serious detriment of the dignity, decorum or orderly procedure of the House.

[69] In terms of Rule 70 (1) the presiding officer may, if he or she is of the opinion that a member is deliberately contravening a provision of these Rules (under chapter 5), or that a member is disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, order the member to leave the Chamber immediately for the remainder of the day's sitting. Under Sub-Rule 2 of Rule 70, a member who is ordered to leave the Chamber must immediately withdraw from the precincts of Parliament.

[70] Rule 71 provides for the naming or suspension of a member. It reads:

"If a presiding officer is of the opinion that a contravention committed in terms of Rule 70 by a member of the House is of so serious a nature that an order to leave the Chamber for the remainder of the day's sitting is inadequate, the presiding officer may -

(a) if he or she is the Speaker, suspend the member for a period provided for in Rule 74 and order him or her to leave the Chamber immediately; or

(b) if he or she is not the Speaker, name the member and order him or her to leave the Chamber immediately and not participate in any parliamentary activities until the Speaker, after consultation with the presiding officer, has announced what action is to be taken against the member in terms of these

Rules, including whether such member will be suspended for a period provided for in Rule 74; provided that the Speaker's decision must be announced within two working days after the member has been named."

[71] The Applicants in this matter do not attack the validity and/or the constitutionality of any of these Rules mentioned above. They also do not attack any of the other Rules dealing with order in public meetings and Rules of debate, except Rule 73 and more specifically 73 (3) of Chapter 5. It would seem that the manner in which the Rules are structured is such that Rule 73 only finds application when a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of Rule 70 or 71. This will only happen in the case when the presiding officer, in terms of Rule 70, is of the opinion that a member is "*deliberately contravening a provision of these Rules, or that a member is disregarding the authority of the chair, or that a member's conduct is grossly disorderly as described in Rule 69*" and the member is ordered to leave the Chamber immediately for the remainder of the day's sitting, and refuses to leave the Chamber. Should the member leave the Chamber as instructed to by the presiding officer there would be no need for the presiding officer to exercise his or her powers in terms of Rule 73.

[72] Should this not happen the presiding officer must instruct the Sergeant-at-Arms to remove the member from the Chamber and precincts of Parliament. Parliament has adopted Standard Operating Procedures²⁰ that have to be complied

²⁰ BM3 record page 328, in terms of sub-rule 13 of rule 73.

with when a member is removed from the Chamber and precincts in terms of Rule 73. In terms of the Standard Operating Procedure, the Sergeant-at-Arms approaches the member(s) to explain in a respectful manner that the instruction of the presiding officer must be complied with and that failure to do so can constitute a grave offence and have serious implications, including that the member(s) may need to be physically removed from the Chamber.

[73] Should the Sergeant-at-Arms be successful in removing the member from the Chamber then there would be no need for the presiding officer to call on the Parliamentary Protection Services to assist in removing the member from the Chamber and the precincts of Parliament. In terms of Sub-Rule 2 of 73, if the Sergeant-at-Arms is unable, in person, to effect the removal of the member, the presiding officer may call upon the Parliamentary Protection Services to assist in removing the member from the Chamber and the precincts of Parliament. Before that happens, however, in terms of the Standard Operating Procedure the Sergeant-at-Arms indicates to the presiding officer that the member(s) refuses to comply, where after the presiding officer would then inform the House that the Parliamentary Protection Services are to be called upon to assist. Furthermore, in terms of the Standard Operating Procedure, the Parliamentary Protection Services personnel enter the Chamber upon the instruction of the presiding officer and proceed to remove the member(s) under the direction of the Sergeant-at-Arms.

[74] What Rule 73 clearly indicates is that the removal from the Chamber by force is a measure of last resort against a recalcitrant member(s), following measures which include a voluntary request to leave the Chamber, as well as a request by the Sergeant-at-Arms to leave the Chamber with his or her assistance. If regard is to be had to the structure of the Rules there is a progression from a voluntary manner in which a member is required to leave the Chamber when requested to do so by the presiding officer, to a less forceful and unrestrained manner, where such a request is made by the Sergeant-at-Arms, to a more forceful removal, as a last resort, by the Parliamentary Protection Services.

[75] Clearly before a member is forcefully removed, non-forceful means are first exhausted. Then only is this forceful removal of a member embarked upon, and only under circumstances where such member resists removal from the Chamber by the Sergeant-at-Arms. The forceful removal of a member, in my view, is not resorted to in an arbitrary and capricious manner. I also agree with the Speaker that it would be wholly unrealistic and impractical to apply the provisions of section 12 (3) of the PPI under circumstances where the conduct of a member(s) is such that it hamstring and incapacitates Parliament from conducting its business and where order and discipline needs to be summarily restored in order for Parliament to proceed with its business after it had been disrupted. Should the proceedings, as contemplated in section 12 (3), first be embarked upon Parliament can be stymied in this way until the committee and other processes under section 12 of the PPI have run their course. The Speaker has clearly made out a case given the circumstances

she has highlighted and the evidence that she has presented in this application. It is not disputed by the Applicants that there is indeed a dire need and necessity for such a Rule.

[76] The Speaker, in my view, has shown beyond any doubt that there are instances of interference and disruption that justify the removal of a member who hamstrings and incapacitates Parliament from conducting its business. She has also shown in the evidence that has been presented by means of Hansard, as well as real evidence (video and audio recordings), that such incidents of disruption would make it impossible for the House to resume with the business of Parliament in the ordinary course. It is accepted, as stated in **Democratic Alliance v African National Congress and Another**²¹ that: "*Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.*"

[77] However, it can surely not be the exercise of political free speech and activity, as contemplated by section 58 (1) of the Constitution, to deliberately contravene the Rules of Parliament, behave in a grossly disorderly manner, to defy the authority of the Chairperson, to show contempt to a Chairperson or presiding officer, or to deliberately and without legitimate reason raise purported points of order, to stifle

²¹ 2015 (2) SA 232 (CC) para 133.

political free speech of another member even when you have utter disregard or contempt for such a member. It also cannot be that when a member(s) acts in a grossly disorderly manner as defined and set out in Rule 69 that such conduct can be characterised as free political speech and activity

[78] Such incidents and conduct can surely not be "*within the boundaries which the Constitution sets*". None of this is disputed by the Applicants. On the contrary, such conduct is rather shameful, disgraceful and irresponsible, not befitting the holders of the office of a member of Parliament, who are the guardians of democracy, who should set an example for society and the electorate who voted them into power. It is conduct that is at odds with the noble values of our Constitution.

[79] It is for these very reasons that the Constitution empowers Parliament, in terms of section 57, to control its internal arrangements, proceedings and procedures which would include the power to exclude from the Chamber any member disrupting or obstructing its proceedings, or unreasonably impairing its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. It is also for this very reason that section 58 (1) of the Constitution provides that members of the National Assembly have freedom of speech in the Assembly and its committees, **subject to its Rules and orders.** (emphasis added)

[80] The reasons advanced, based on the evidence for the adoption of the Rules, are eminently reasonable and rational. The fact that it was adopted by all other political parties, even those smaller than the EFF endorses this view. Also given that such disruptions and the incidents of disorderly conduct, went far beyond exercising Parliamentary free speech. The means adopted therefore, which is the forceful removal of a member for proscribed behaviour that would *only* disrupt and incapacitate the business of Parliament, would be proportionate to achieve order and discipline in Parliament to proceed and conduct its business in an orderly or regular manner acceptable in a democratic society.

[81] I do not think that there is any merit in the argument that if a member of the South African Police Service or the National Defence Force is appointed into the Parliamentary Protection Services, that it will offend against the doctrine of separation of powers. When appointed to the Parliamentary Protection Services, such persons will render protection and security services in Parliament in terms of the security policy for Parliament, and not function independently from the authority of Parliament. Furthermore in terms of section 4 (1) of the PPI, members of the security services may enter upon and remain in the precincts for the purpose of performing any policing function, only with the permission and under the authority of the Speaker or the Chairperson. Any function performed not in accordance with section 4 (1) of the PPI will therefore be unlawful. The Applicants have not made out a case that the security services, by being part of the Parliamentary Protection Services, will usurp the functions - and undermine the authority - of Parliament.

[82] The next question to consider is the rationality of the automatic suspension of a member, in terms of Rule 73 (3), who has been removed in terms of Rule 73 (2) for the period provided for in terms of Rule 74, and its interrelationship with section 12 (3) of the PPI. In terms of chapter 4 of the PPI, section 12 states the following:

Disciplinary action against members for contempt-

12(1) Subject to this Act, a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared by or under section 13²² to be contempt of Parliament by a member, and taking disciplinary action provided therefore.

(2) A 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 a procedure that is reasonable and procedurally fair; and

(b) table a report on its findings and recommendations in the House.

[83] A series of sanctions is set out in subsection 5 of section 12 of the PPI, which can be imposed on a member when a House finds a member guilty of contempt, ranging from a formal warning, reprimand, order to apologise to Parliament or the

²² Conduct constituting contempt is set out in section 13 of the PPI, which includes various contraventions of the PPI and is also applicable where a member wilfully fails or refuses to obey any order or resolution of a House or Houses; commits an act which in terms of the standing rules constitute contempt of Parliament or breach of Parliamentary privilege.

House or any other person, the removal or suspension of a member for a specified period from any parliamentary position occupied by the member, a fine not exceeding the equivalent of one month's salary and allowances payable to the member and the suspension of the member with or without remuneration for a period not exceeding 30 days.

[84] I agree with the argument of the Applicants that if the purpose of removing a member from the Chamber is to prevent disruptions and to restore discipline, so that Parliament can continue with its business in an orderly or regular manner acceptable in a democratic society, and further to prevent undisciplined members from disrupting its proceedings, then once that member has been removed, an automatic suspension without hearing is unnecessary.

[85] Such automatic suspension is for the period provided for in Rule 74 and as such a member may not enter the Chamber or the precincts for the duration of the suspension. This sanction is clearly imposed without affording such member the opportunity to state his or her case before such suspension takes place, which in my view would be procedurally unfair. **Hoexter: Administrative Law in South Africa (2ed)** at 363 says: "*Procedural fairness in the form of audi alteram partem is concerned with giving people opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the*

dignity and worth of the participants but is also likely to improve the quality and the rationality of administrative decision-making and to enhance its legitimacy.”²³

[86] It seems that the sanction comes into operation almost immediately, which is an immediate punishment as a result of a member being forcibly removed from the chamber. This, in my view, is arbitrary and irrational. Nothing prevents the Chairperson or Speaker, or an appropriate committee, from instituting further disciplinary proceedings in the manner contemplated in section 12 (3) of the PPI, which provides for such a procedure before such sanction is imposed. If there is a real need to impose a further sanction.

[87] I am of the view that when a member disrupts the proceedings in Parliament, or makes themselves guilty of grossly disorderly conduct, or disregards the authority of the chair, that such conduct would clearly fall within what constitutes contempt of Parliament in terms of section 13, and as such the provisions of section 12 (3) of the PPI would be applicable.

[88] The Speaker, in my view, has failed to make out a case as to why a member should be suspended without giving him or her a hearing in terms of the provisions of section 12 (3) of the PPI.

²³ Hoexter refers to the Rt Hon The Lord Woolf, Jeffrey Jowell QC & Andrew Le Sueur *De Smith's Judicial Review* 6ed (2007) 318 – 9.

[89] I am therefore in agreement with the Applicants that Rule 73 (3) which allows for the automatic suspension of a member pursuant to Rule 74, is unlawful and unconstitutional, and falls to be set aside.

The Constitutionality of the decision to remove Mr Malema from the National Assembly

[90] Mr Malema seeks an order declaring that the Chairperson, Miss Boroto's, decision taken on 9 September 2015, to suspend him and to prevent him from carrying out his responsibilities as an elected member of the National Assembly is unconstitutional, invalid and of no force or effect. It is clear from the evidence presented, and it is also common cause, that it was not the Speaker that made the contentious decision on 9 September 2015, but Miss Boroto. He clearly failed to cite Miss Boroto as the appropriate person who made the decision. There is no explanation why this was not done. On this ground alone, I agree with the Respondent that this prayer should be dismissed. I will nevertheless deal with the application of Mr Malema due to the fact that the Speaker has a real and substantial interest in the outcome regarding the validity and constitutionality of the removal of Mr Malema from Parliament in terms of Rule 73. She was also correctly cited for the similar relief he seeks, with the EFF, in terms of Rule 73 and Rule 73(3).

[91] Mr Malema's utterances were ruled to be unparliamentary due to the fact that he made an unsubstantiated allegation against the integrity of a member, and imputed improper or unworthy motives to such member, or cast personal reflections on the integrity of such a member, without doing so by way of a separate substantive motion. This standing order, which follows a ruling made by a former speaker of the National Assembly, Dr F N Ginwala on 17 September 1996, forms part of the Rules and orders of the National Assembly, which it is empowered to adopt in terms of section 57 (1) (a) of the Constitution. All members of the National Assembly are therefore bound to comply with these Rules and standing orders.

[92] Mr Malema's case, if it is correctly understood, is not an attack against the validity or constitutionality of the standing order. It is rather against the decision of the Chairperson that his conduct, when he made the remarks, was unparliamentary for his failure to comply with the standing order. Absent any constitutional challenge to the standing order, the Speaker or appropriate Chairperson exercises a discretion to implement the standing order, which discretion is to be exercised lawfully, i.e. in a manner consistent with the Constitution and the rights and values for which it provides. See in this regard, the decision of a full bench of this court of **Lekota and Another v Speaker, National Assembly and Another**.²⁴

[93] In my view, that is also exactly what the Chairperson did on 9 September 2015, as stated on page 582-583 of the record. She also did not Rule that Mr

²⁴ 2015 (4) SA 133 (WCC).

Malema or any member may not make such allegations but said “*Such allegations can only be brought to the attention of the House by way of a properly substantiated motion, supported by evidence.*” She clearly did not make a ruling that Mr Malema may not exercise his right to free political speech in the manner he did. Such exercise of free political speech must be made within the bounds of the Rules and orders of Parliament as stated in terms of section 58 (1) (a) of the Constitution.

[94] She also did not make a decision as to whether the remarks made by Mr Malema are correct, truthful or accurate. She ruled it to be unparliamentary within the confines and boundaries of the standing order. What Mr Malema did, was to fail to comply with the provisions of the standing order. When he uttered the words that Mr Ramaphosa, ‘*premeditated the killing of mine workers in Marikana; Cyril is a murderer...Cyril participated in the conspiracy to murder workers*’ it was clearly an attempt to bring improper conduct to the attention of the National Assembly, to impute improper or unworthy motives on the part of Mr Ramaphosa (a member) and clearly an attempt to cast personal reflections on his integrity.

[95] In **Chairperson of the National Council of Provinces v Malema**²⁵ it was held at para [18] that: “*The purpose of the standing order is to ensure the parliamentary debates are not clouded by personal insults. Ad hominem attacks do not contribute to democratic discourse, hence they are not protected. But the standing order does not – constitutionally cannot – go as far as impeding political*

²⁵ 2016 JDR 0914 (SCA).

speech. It does not censor criticism of the government or its ruling party". I respectfully agree with the sentiments expressed by *Ponnan JA*. The difference between that case and this case was that in the present matter the remarks were directed at a member of the House, Mr Ramaphosa, personally, whereas in the mentioned case it was not directed at a member, for the standing order to find application. (own emphasis).

[96] It can hardly be argued that, without substantive proof and without having been found by a court of law to be implicated in a murder, a person may be accused of being a *murderer*, under the guise of protected parliamentary speech. This is a very serious allegation against any person including and especially a person holding the office of Deputy President of the country. It may well be as Mr Malema claims, that Mr Ramaphosa may have used his political influence to place pressure on the police to act against the mine workers, which may be capable of being regarded as a legitimate criticism against Mr Ramaphosa, but by going so far as to say that he had planned and premeditated the murder of the workers of Marikana and that he is a murderer, is a very serious allegation which cannot be categorised as free political speech protected by the Constitution.

[97] In terms of section 58 (2), members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the Assembly or any of its

committees, or anything revealed as a result of anything that they have said, produced or submitted to the National Assembly or any of its committees.

[98] In the **DA case** (supra) at para [56] *Madlanga J* said: “*The text of the Constitution is plain. Sections 58 (1) and 71 (1) do not provide that both free speech and immunities contained in para (b) of each of the two sections are subject to the Rules of the two Houses. Only parliamentary free speech under ss 58 (1) (a) and 71 (1) (a) is subject to the Rules of the two Houses. On the other hand, the immunities in ss 58 (1) (b) and 71 (1) (b) are **absolute**. This appears to be crafted with care and deliberateness. Yes, the privileges in ss 58 (1) (a) and 71 (1) (a) and the immunities in ss 58 (1) (b) and 71 (1) (b) are interrelated. [...] But – at the same time – the immunities are distinct.*”(emphasis added)

[99] In my view it is exactly for this reason that the immunities that deal with the consequence of free speech, as contained in section 58 (1) (b), are a necessity for the standing order, which does not impede or limit free speech, but sets out the circumstances under which such free speech should be exercised when a member who wishes to bring any improper conduct on the part of another member to the attention of the House or impute improper motives, or cast personal reflections on the integrity of other members or verbally abuse them in any other way, may do so.

[100] A member, therefore, due to the provisions of section 58 (1) (b) would have no recourse against another member who personally insults, imputes improper motives, casts personal reflections on his or her integrity or verbally abuses him or her. That is exactly what the standing order seeks to manage and regulate. In my view Miss Boroto exercised her discretion in a reasonable and rational manner when she concluded that the remarks made by Mr Malema were unparliamentary. She was therefore entitled to request Mr Malema to withdraw the remarks which he refused to do.

[101] Furthermore in terms of Rule 70, Miss Boroto was entitled to request Mr Malema to leave the chamber, which he once again refused to do. He thereafter repeatedly undermined the authority of the presiding officer and repeatedly refused to obey her orders. He further persisted in making the serious allegations against Mr Ramaphosa. As a result of this, he made himself guilty of grossly disorderly conduct and the Chairperson was justified in ordering his removal from the House in terms of the provisions of Rule 73. As found earlier, in my view, the automatic suspension as a consequence of the forced removal of Mr Malema was unlawful and unconstitutional and falls to be set aside.

Costs

[102] The application was mostly unsuccessful, except for the prayer that Rule 73 (3), which permits the automatic suspension of a member who was forcibly removed

from the Assembly, be declared unlawful and unconstitutional. The Respondent submitted that in the event of the application being unsuccessful, the Applicants should be liable for costs. It is trite that the making of a costs order falls within the exclusive discretion of the court. It has also been accepted as far as constitutional litigation is concerned that a more flexible approach is followed, which may have as a consequence that costs should not follow the result, as would be in any other ordinary case. The rationale for this Rule is that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights. If an application is, however, frivolous or vexatious or in any other way manifestly inappropriate, the court may, notwithstanding the fact that the parties are involved in constitutional litigation, grant a costs order against the unsuccessful applicant. See in this regard **Affordable Medicines Trust and Others v Minister of Health and Others** at para 139²⁶ and **Biowatch Trust v Registrar, Genetic Resources, and Others**²⁷ at paras 57-58.

[103] In the present matter the Applicants have raised important constitutional points regarding the right to freedom of speech in Parliament as well as the impact of the new Rules of Parliament on such a right. These are important matters of national importance not only to members of Parliament, but also to ordinary citizens and the electorate. Litigants should in future not be dissuaded from doing so by virtue of adverse costs orders being made against them. The Applicants in this case however, should be held liable for the wasted costs occasioned by the

²⁶ 2006 (3) SA 247 (CC).

²⁷ 2009 (6) SA 232 (CC).

postponements for their failure to comply with the Rules of Court, more especially, their failure to file a Notice in terms of Rule 16A of the Uniform Rules of Court.

[104] Order

In the result, I make the following order:

In cases 14667/2015 and 17666/2015

- 1) That the application for an order declaring that Rule 73 of the Rules of the National Assembly be declared unlawful, unconstitutional, invalid and of no force or effect, is dismissed.
- 2) That Rule 73(3), to the extent that it has as a consequence the automatic suspension of a member subsequent to his or her removal from the parliamentary chamber, is declared unlawful, unconstitutional and invalid and of no force or effect.

In case no 17666/2015 only in respect of Mr Malema

- 3) That the application for the setting aside of the decision of the Chairperson taken on 9 September 2015 to remove the First Applicant from the precincts of the National Assembly, is dismissed.
- 4) That the suspension in terms of Rule 73 (3) of the First Applicant pursuant to his removal is set aside.

[5] Costs

In respect of both cases 14667/2015 and 17666/2015, no order as to costs is made except that the costs as a result of the postponement of the matter occasioned by the Applicants' failure to comply with the Rules of court, be paid by the Applicants.

HENNEY, J

Judge of the High Court

I agree and it is so ordered.

STEYN, J

Judge of the High Court