



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

Case No: 17989/2020

In the matter between:

AFRICAN TRANSFORMATION MOVEMENT

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Second Respondent

AFRICAN NATIONAL CONGRESS

Third Respondent

DEMOCRATIC ALLIANCE

Fourth Respondent

ECONOMIC FREEDOM FIGHTERS

Fifth Respondent

INKATHA FREEDOM PARTY

Sixth Respondent

FREEDOM FRONT PLUS

Seventh Respondent

UNITED DEMOCRATIC MOVEMENT

Eighth Respondent

AFRICAN INDEPENDENT CONGRESS

Ninth Respondent

CONGRESS OF THE PEOPLE

Tenth Respondent

GOOD PARTY

Eleventh Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY

Twelfth Respondent

PAN AFRICANIST CONGRESS OF AZANIA

Thirteenth Respondent

J-JAMA-AH

Fourteenth Respondent

Date of Hearing : 2 February 2021

Date of Judgment : 26 March 2021

JUDGMENT

LEKHULENI AJ

A INTRODUCTION

[1] This is a review application. Initially, on 3 December 2020, the applicant sought an urgent interdict with a rule nisi when the matter served before this Court. The question for determination was whether the Speaker of the National Assembly acted lawfully in ordering an open ballot in a motion of no confidence against the President of the Republic of South Africa, the Honourable Mr Cyril Ramaphosa, (*“the President”*). However, this application did not proceed on the said day. Instead, the parties agreed on a timetable which regulated further filing of papers and the hearing was postponed to 3 and 4 February 2021 for hearing on the opposed roll.

[2] In these proceedings, the applicant seeks to review and set aside the decision of the first respondent (*“the Speaker”*) who declined its request to hold voting in a motion of no confidence against the President by secret ballot. The Speaker opposed this application and further raised a *point in limine*. Mr Katz appeared for the applicant and Mr Premhid appeared for the respondent.

PRELIMINARY ISSUE

Jurisdictional point

[3] The Speaker asserted upfront that this Court has no jurisdiction to hear this application. As a consequence thereof, this *point in lime* is dispositive of the

applicant's claim. The Speaker contended that this case is about whether the National Assembly, as one of the two Houses of Parliament, is fulfilling its constitutional obligation to hold the President to account. In the Speaker's view, this case is also about whether the National Assembly has achieved its direct obligations to allow members of Parliament to exercise their rights in terms of section 102 of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*) which states that:

"102. (1) if the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) if the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

It was the Speaker's submission that the Speaker is a constitutionally recognized head of the National Assembly. Her powers and functions are conferred to her by Section 90 of the Constitution and the performance and procedure of her mandate by the Rules of the National Assembly. Essentially, the Speaker's mandate is both constitutionally and institutionally. Attached to her powers is her discretion to determine the method of voting by the Members of Parliament.

[4] It was the Speaker's assertion that, if the Speaker's decision not to hold the secret ballot is under attack, in truth, the applicant is attacking the National Assembly, as a Chamber of Parliament, for failing to fulfill its constitutional obligations to permit members of parliament to vote in a way, that on their version, will ensure that the

President is held accountable. Notwithstanding, it was submitted that in *United Democratic Movement v Speaker, National Assembly and Others*¹, the Constitutional Court held that the choice of the mechanism of voting rests firmly in the hands of the Speaker. The interpretation in UDM (*supra*) delegates the choice of how the National Assembly votes to the Speaker. When she decides on open or secret ballot, she exercises a power on behalf of the National Assembly.

[5] In essence, when the National Assembly engages in this constitutional obligation, that perfectly demonstrates that it is the Constitutional Court that has exclusive jurisdiction to hear this matter. Put differently, Mr Premhid for the Speaker, argued that this is classically a case that falls within the exclusive jurisdiction of the Constitutional Court as envisaged in Section 167(4)(e) of the Constitution which states as follows:

“(4) Only the Constitutional Court may-

...

(e) decide that Parliament or the President has failed to fulfill a constitutional obligation.”

According to Counsel, although the applicant was entitled to approach this court for an interim relief, this Court however does not have jurisdiction in respect of the merits. This review application focuses on a decision regarding Parliament’s constitutional obligations and it thus triggers the Constitutional Court’s exclusive jurisdiction. Accordingly, so ran the argument, this Court does not have jurisdiction and that the applicant’s application should be dismissed.

¹ 2017 (5) SA 300 (CC) para [94]

[6] Mr Katz on behalf of the applicant argued that, the applicant has not averred that Parliament has failed to fulfil a constitutional obligation as section 167(4)(e) of the Constitution requires. The Speaker, in deciding whether or not to order an open or secret ballot is not acting *qua* Parliament. She makes her own decision and her decision is not that of Parliament. It was contended on behalf of the applicant that this is not a review of a decision of Parliament but that of the Speaker. Mr Katz contended that it could hardly be suggested that whenever the Speaker commits an irregularity in deciding how Parliament is to conduct itself in a particular matter that can be regarded as Parliament failing to fulfil a constitutional obligation.

[7] The Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa and Others*², stated that:

“[11] This Court has previously held that the words “fulfil a constitutional obligation” in section 167(4)(e) must be given a narrow meaning. ...”

and

“[12] ... On the one hand, the phrase “failed to fulfil a constitutional obligation” in section 167(4)(e) must be narrowly construed. ...”

According to the applicant, an unlawful decision not to hold voting by secret ballot by the Speaker does not fall into the class of narrow circumstances. Its review cannot trigger an exclusive jurisdiction of Section 167(4)(e). In such circumstances, the court should dismiss the Speaker's preliminary point.

² 2009 (6) SA 94 (CC) (22 July 2009).

[8] The question of whether the requirements for a motion of no confidence in terms of section 102(2) of the Constitution creates a constitutional obligation on the National Assembly within the meaning of section 167(4)(e) of the Constitution has been part of the legal discourse for a long time. So far, it has not yet been determined whether the High Court lacks jurisdiction in cases arising from section 102(2) of the Constitution (motion of no confidence) or whether the High Court would have the power to grant relief in circumstances where Parliament or the President has failed to fulfil a constitutional obligation as envisaged in section 167(4)(e) of the Constitution. In my view, the latter two issues are distinguishable.

[9] In *National Gaming Board v Premier of KwaZulu-Natal and Others*,³ the Constitutional Court stated as follows:

“It should be emphasized that we express no view in this case whether a High Court has jurisdiction to grant interim relief in relation to those other matters in section 167(4) in respect of which exclusive jurisdiction is conferred upon this court. In particular, we do not decide whether a high court would have the power to grant interim relief... in circumstances where Parliament or the President has failed to fulfill a constitutional obligation (section 167(4)(e)).”⁴

[10] In *Mazibuko NO v Sisulu and Others NNO*,⁵ the Constitutional Court was seized with a dispute relating to a motion of no confidence against the President of the Republic of South Africa. Among others, the court had to consider whether the Speaker of the National Assembly had the power to schedule a motion of no confidence on his own authority; whether the Rules were inconsistent with the

³ 2002 (2) BCLR 156(CC).

⁴ At para 54.

⁵ 2013 (6) SA 249 (CC).

Constitution to the extent that they did not provide for motions of no confidence in the President as envisaged in Section 102(2) of the Constitution. Importantly for present purposes, the court had also to consider whether Parliament had failed to fulfil a constitutional obligation in terms of Section 167(4)(e) of the Constitution.⁶ The application came before the Constitutional Court in the form of a direct appeal against the decision of the Western Cape High Court dismissing the applicant's application on the grounds that the Speaker lacked the power to schedule a motion of no confidence in the President for debate in the Assembly and consequently a court may not order him to do so, and / or *alternatively* the applicant sought direct access to the Constitutional Court for a declaratory order that the Rules are inconsistent with the constitution. In considering the application for leave to appeal, the Constitutional Court observed that the question when and how a member of the National Assembly may vindicate the power to initiate a motion of no confidence under section 102 and have it debated by and voted on in the assembly, deserved its attention.⁷

[11] The court considered the primary purpose of the motion of no confidence and other various factors and concluded that it was in the interest of justice that direct appeal be granted. As regard the application for an order declaring that the Constitutional Court has exclusive jurisdiction for claims arising from section 102(2) of the Constitution, the court stated:

"[73] The applicant sought a declaratory order in terms of s 167(4)(e) of the Constitution, that parliament has failed to fulfil a constitutional obligation by not providing rules necessary for tabling, debating and voting on the motion of no

⁶ At para 3.

⁷ At para 20.

confidence in the Assembly so as to vindicate a member of parliament's right under section 102(2) of the Constitution. For purposes of the declaratory order sought under s 167(4)(e), the applicant does not need leave to approach this Court because her claim has been brought on the footing that this Court has original and exclusive jurisdiction. Whether that is in fact so is quite another matter.

[74] Given the outcome of the direct access application, we expressly refrain from deciding whether the requirements of section 102(2) create an obligation on the Assembly within the meaning of section 167(4)(e). Resolving that dispute must wait for another day" (my underlining)."

[12] In *United Democratic Movement v Speaker of the National Assembly and Others (supra)*, the Constitutional Court had to consider among others whether the Speaker of Parliament had the authority in terms of the Constitution and the Rules of the National Assembly to direct that a motion of no confidence against the President may be held by secret ballot. In considering the question of exclusive jurisdiction of the Constitutional Court to deal with the matter, the Chief Justice writing for the unanimous court referred to the above *dicta* in *Mazibuko* and stated as follows:

"We would do well to leave the resolution of the question whether this court has exclusive jurisdiction in this matter for another day. Here too, we embrace and reiterate the observations relating to the importance of a motion of no confidence in our constitutional democracy, its primary objective as an effective consequence enforcement tool and the likelihood of the dispute ending up in this court even if we were to direct that it be heard by the High Court first."⁸

⁸ At para 27.

[13] As discussed above, in this case, the Speaker argued that this matter is classically a case falling within the exclusive jurisdiction of the Constitutional Court in terms of section 167(4)(e) of the Constitution and that this court does not have jurisdiction to hear it. The specific term 'jurisdiction' has been defined as the power or competence of a Court to hear and determine an issue between the parties.⁹ Jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case.¹⁰ In *Gcaba v Minister of Safety and Security*,¹¹ the Constitutional Court stated that in the event of the court's jurisdiction being challenged at the outset (*in limine*), as is the case in this application, the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. The Court stated:

"While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If, however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction"

[14] In my view, a determination on whether this court has jurisdiction to consider this matter lies in the proper interpretation of section 102(2) and section 167(4)(e) vis-à-vis the facts of this case as pleaded by the applicant. These two provisions must be

⁹ *Gcaba v Minister of Safety and Security* 2009 30 (ILJ) 2623 (CC) at para 75; *Veneta Mineraria Spa v Carolina Colliers (Pty) Ltd* 1987 (4) SA 883 (A) at 886D.

¹⁰ *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 40.

¹¹ 2009 (ILJ) 2641 at para 74.

interpreted purposively and in tandem. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,¹² the Constitutional Court held that the words “fulfil a constitutional obligation” in section 167(4)(e) must be given a narrow meaning. The court observed that it was not necessary in that matter to decide what that narrow meaning should be, stating that it may depend on the facts and the precise nature of the challenges to the conduct of the President. This *dictum* was reinforced in *Women’s Legal Centre Trust (supra)*.

[15] As stated, in *Women’s Legal Center Trust (supra)*, the Court noted that the reasons why these words should be given a narrow interpretation is because they are part of a broader distribution of jurisdictional competence in the Constitution. The court held that if the words pertained to all the President’s constitutional duties, the section would run right across section 172(2)(a) of the Constitution, which gives other courts jurisdiction over conduct of the President.¹³ More importantly, the court noted that Section 172(2)(a) grants other courts jurisdiction over the validity of Acts of Parliament (albeit subject to confirmation by the Constitutional Court)¹⁴ and that if all this were subsumed within the Constitutional Court’s exclusive power to pronounce on whether Parliament has failed to fulfil “a constitutional obligation”, there would be nothing left for section 172(2)(a), and this would make no sense.

¹² 1999 (2) SA 14 (CC) (1999 (2) BCLR 175; [1998] ZACC 21) at para 25

¹³ At para 11.

¹⁴ Section 172(2)(a) of the Constitution provides that ‘(t)he Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court’.

[16] In *King v Attorneys' Fidelity Fund Board of Control*,¹⁵ and *Doctors for Life International v Speaker of the National Assembly and Others*,¹⁶ the Supreme Court of Appeal and the Constitutional Court respectively, stressed the fact that the purpose of granting the Constitutional Court exclusive jurisdiction in terms of Section 167(4) of the Constitution, is to preserve the comity between the judiciary and the other branches of government, by ensuring that only the highest court in Constitutional matters intrudes into the domain of the other branches of government.¹⁷ While section 172 of the Constitution vests the judiciary with the power to declare Acts of Parliament and conduct of the highest organs of state invalid to the extent that such Acts or conduct are in conflict with the Constitution, however the jurisdiction to determine disputes that relate to the sensitive areas of the separation of powers must be decided by the Constitutional Court in terms of section 167(4) of the Constitution.¹⁸

[17] It is trite that the right to approach the Constitutional Court does not depend on the mere say-so of a litigant that its claim falls within the exclusive jurisdiction of the Constitutional Court.¹⁹ It must truly in law be a claim that falls within the ambit of the Constitutional Court.²⁰ In addition, it is incumbent upon the party invoking the jurisdictional exclusivity in terms of Section 167(4)(e) of the Constitution to establish that there was a failure on Parliament to fulfil a constitutional obligation.

¹⁵ 2006 (1) SA 474 (SCA).

¹⁶ 2006 (6) SA 416 (CC).

¹⁷ See *Glenister Hugh v The President of the Republic of South Africa and Others* Unreported Case number 7798/09 at para 5.

¹⁸ See *Glenister Hugh v The President of the Republic of South Africa and Others* Unreported Case number 7798/09 at para 5.

¹⁹ See *Fraser v Absa Bank Ltd (National Director of Public Prosecution as Amicus Curiae)* 2007 (3) SA 484 (CC at para 40).

²⁰ *A party and Another v Minister of Home Affairs and Others; Moloko and Others v Minister of Home Affairs and Another* 2009 (3) SA 649 (CC).

[18] Thus, in *casu*, in order to determine whether Parliament or the President has failed to fulfil a constitutional obligation as envisaged in section 167(4)(e), it is imperative for this Court to consider the nature and the basis of the applicant's application so as to determine if indeed it falls within the exclusive jurisdiction of the Constitutional Court.

[19] What appears to be contentious and a reason for the Speaker to raise a jurisdictional point is her allegation that the applicant's complaint falls within the purview of Section 167(4)(e) of the Constitution. In fact, the Speaker has misconceived the applicant's complaint. The applicant took issue with the fact that the Speaker failed to order a secret ballot system. In applicant's view, given the prevailing circumstances in Parliament, that is the only "option" and / or "acceptable voting procedure" that would give effect to the fact that the President has failed to rise to the occasion in order to fulfil his constitutional obligations. In my view, the procedural path to be undertaken is nowhere near the President's constitutional obligations.

[20] Notably, the applicant's case is that the Speaker did not bring her mind to bear when she declined its request for a secret ballot. The applicant's case is also that the Speaker did not consider the guidelines set out by the Constitutional Court in the *United Democratic Movement (supra)* when she made her decision to order an open ballot. As a way of illustration, in its founding affidavit, the applicant avers that the Members of Parliament are currently unable to vote independently according to their individual consciousness and that their faithfulness can best be achieved when testing their personal conscience rather than when they act on the mandate of their political party.

[21] Simply put, a review application based on an alleged unlawful decision by the Speaker of the National Assembly to refuse a secret ballot vote does not fall into the class of narrow circumstances as envisaged in *Women's Legal Centre Trust (supra)*.

[22] In my judgment, the cause for complaint by the applicant is procedural in nature. It is abundantly clear that the applicant's case is not that Parliament or the President has failed to fulfil a constitutional obligation as envisaged in section 167(4)(e) of the Constitution. It is the procedure leading to that end that is impugned – a means to an end. To suggest otherwise would be tantamount to putting the cart before the horse. In my opinion, the decision that was taken by the Speaker on behalf of Parliament was within the exercise of her constitutional mandate. The argument by the respondent's Counsel that when the applicant attacks the Speaker's decision, in truth, it is attacking the National Assembly for failing to fulfil its constitutional obligation is, with respect, misplaced.

[23] More importantly, it could hardly be suggested that when the Speaker commits an alleged irregularity as was argued by Mr Katz, in deciding how Parliament is to conduct proceedings in a motion of no confidence against the President, that such a decision amounts to Parliament having failed to fulfil a constitutional obligation. It cannot be suggested that when the Speaker acts irrationally or in an unreasonable manner in the exercise of her discretion in deciding on the voting procedure that such decision amounts to Parliament having failed to fulfil its constitutional obligation. Such interpretation in my view leads to an absurdity and cannot be sustainable. In my judgment, in such circumstances the High Court would have jurisdiction to review that decision as a guardian of the Constitution. In *Mazibuko NO v Sisulu (supra)*, it was

said that in matters falling within the heartland of Parliament, our Constitution contemplates a restrained approach to intervention in those matters by the courts. However, such intervention is permissible if it is undertaken to uphold the Constitution because our courts are the ultimate guardians of the Constitution.²¹

[24] In the same vein, I am of the view that Section 102(2) of the Constitution does not endow members of Parliament with a constitutional obligation envisaged in section 167(4)(e) of the Constitution to perform a specific act or function and thus triggering the jurisdictional exclusivity of the Constitutional Court. In my opinion, Section 102(2) only confers on members of the National Assembly the entitlement to vote having been supported by a majority of its members, to pass a motion of no confidence in the President.

[25] To this end, I agree with the views expressed by Jafta J, in his dissenting judgment in *Mazibuko NO v Sisulu and Others NNO (supra)*,²² where he stated that section 102(2) of the Constitution does not impose a duty on the assembly to perform a specific act or function. Instead, it confers power on the assembly to pass a motion of no confidence in the President if the majority of its members supports the motion. The learned Justice found in that case that the alleged failure to make rules which specifically regulate the exercise of section 102(2) power does not give rise to a claim falling within the exclusive jurisdiction of the Constitutional Court.

[26] I conclude therefore that this Court has jurisdiction to grant orders in terms of section 102(2) of the Constitution. The refusal by the Speaker to order a secret ballot

²¹ At para 135.

²² At para 125.

in a motion of no confidence proceedings against the President and a challenge that arose as a result thereof does not have to be determined exclusively by the Constitutional Court. In fact, this matter falls squarely within the jurisdiction of this Court as envisaged in terms of Section 172(2) of the Constitution.

FACTUAL BACKGROUND

[27] On 11 February 2020 the applicant tabled through the Office of the Speaker a motion of no confidence against the President. The motivation for the applicant's motion of no confidence in the President is set out in seven paragraphs constituting the motion. The motion of no confidence in the President was motivated as follows:

"1. since he took the reins, irregular expenditure in government and state-owned entities (SOEs) increased to R61, 35 billion in the 2018/19 audit period from R50.1 billion in the previous year and SOEs continue to collapse, without anyone being held accountable for this gross behavior;

2. the President misled the nation when he announced in December 2019 that there would be no load-shedding until 13 January 2020, and failed to take action against those responsible for advising him;

3. There has been loss of confidence by local and international investors in South Africa due to the indecisiveness of the President and his poor to non-existent leadership. South African business confidence slumped to the lowest in 34 years in 2019;

4. The President has grossly mismanaged the economy, resulting in poor economic growth and the country's debt to GDP ratio expected to trend around 60% in 2020;

5. *under the watch of president Ramaphosa, there has been an increase in levels of corruption, inequality and unemployment which stands nearly 30 %;*
6. *the president has failed to ensure that the borders of South Africa are secured, thus enabling the influx of illegal and undocumented foreign nationals into the country; and*
7. *the President has failed to adequately respond to the increase in incidences of gender-based violence and to attend to the national outcry for a victim centric justice system where retribution through the death penalty is tested in a referendum.”*

[28] On 24 February 2020 the applicant submitted to the Speaker a written request to hold the vote of no confidence in the President by secret ballot. The applicant drew the attention of the Speaker to the decision of the Constitutional Court in *United Democratic Movement (supra)* which provided guidance on how the Speaker is to exercise her discretion in determining whether the voting after the debate should be done on open or secret ballot. To this end, the applicant submitted to the Speaker that in order to hold the executive accountable, the Speaker should exercise her discretion and direct that the voting on the said motion should be conducted by a secret ballot.

[29] It appears that due to the National Lockdown as a result of the Covid-19 pandemic, there was no activity on the matter, hence the non-adherence to the Rules of the National Assembly that governs the procedure as such on the tabling of the motion for debate.

[30] On 26 November 2020 the Speaker advised the applicant that the motion tabled by the applicant was scheduled for debate on Thursday the 03 December 2020. This was done after the Speaker consulted with the Chief Whip of the majority party and the leader of Government Business in Parliament. On the same day, the applicant telephonically requested from the Office of the Speaker a response to its request on the motion to be voted for by a secret ballot. The Office of the Speaker responded through a letter dated 05 March 2020 in which the Speaker declined the request of the applicant to have the motion voted through a secret ballot. In this correspondence, the Speaker contended that in her view, central to the freedom of members is the fact that all members took an oath of faithfulness to the Republic and obedience to the Constitution and laws, and that there is no constitutional obligation for a member to swear allegiance to his or her party line. To this end, the Speaker informed the applicant that it has not proffered concrete evidence that members would deviate from this constitutional requirement.

[31] The applicant in its response, alleged that it did not receive the letter dated 5 March 2020 but only received it on 26 November 2020. On 27 November 2020 the applicant requested the Speaker in writing to review her decision of declining the applicant's request to allow a secret ballot on the motion of no confidence against the President. In her correspondence of 30 November 2020, the Speaker affirmed her decision in writing and further informed the applicant that she has considered all the factors that the applicant alluded to as well as what the best procedure (open or secret) was to ensure that the Members of Parliament are able to demonstrate to the electorate that they are upholding the constitutional values above party loyalty. In the Speaker's view, the prevailing atmosphere in Parliament was not as toxic and highly charged as alleged, so as to warrant dispensing with the constitutional values of

openness and transparency. On the same date (30 November 2020), the applicant through its attorneys wrote to the Speaker requesting her once again to review or reconsider her decision. In support of its request, it was asserted in the said correspondence that voting in a motion of no confidence against the President needs individual consciousness other than the party mandate the voter may have. It was submitted that in the secret ballot voting, freeness and fairness in respect of individual voting will be achieved. The Speaker responded through her Chief Legal Advisor and again affirmed her decision declining the applicant's request for a secret ballot.

[32] Aggrieved by the Speaker's decision, on 03 December 2020 the applicant brought an urgent application coupled with a rule nisi in which it sought an interim order setting aside the decision of the speaker declining its request to decide the motion of no confidence against the President by secret ballot. The urgent application was not pursued and the applicant eventually abandoned the same in favour of an expedited review hearing. The motion of no confidence which was scheduled for 03 December 2020 was postponed by the Speaker at the requested of the applicant pending the outcome of the expedited review hearing.

ISSUES TO BE DECIDED

[33] The balance of the issues, having disposed of the jurisdictional point is whether the Speaker's decision to refuse the vote by way of a secret ballot was unlawful and whether such decision falls to be reviewed and set aside.

ANALYSIS OF THE PARTIES' SUBMISSIONS AND APPLICABLE LEGAL PRINCIPLES

[34] The applicant seeks an order setting aside the decision of the Speaker declining its request for a secret ballot. The main reasons advanced by the applicant are that a motion of no confidence in the head of the state is in its nature a very important matter. It is closely connected to the foundational values of accountability and responsiveness to the need of the people. The applicant holds the view that the President has failed to carry out his constitutional mandate especially when considering the reasons advanced for the motion. The applicant avers that the removal of the President is an important tool in our country and that the appointment of the President is as a result of votes by citizens of the Republic of South Africa by secret ballot and the subsequent nomination by members of the National Assembly. The applicant is therefore of the view that the removal of the President may be achieved through the cast of vote by secret ballot.

[35] It is trite that the discretion whether to vote by secret or open ballot lies with the Speaker. The Speaker occupies an important and crucial position in achieving and sustaining a robust and healthy system of a vibrant parliamentary democracy. The Speaker is required to act fairly and impartially and ensure that the rights of all parties, including minority parties such as the applicant in this matter, are protected - *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another*²³.

²³ (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC) (7 October 2015) at para 77.

[36] In *Tlouamma (supra)*, the court found that 'the Speaker represents the National Assembly in its interactions with the President, other organs of State, judiciary, public, media and international bodies or States. While members of Parliament represent their individual constituencies, the Speaker represents the full authority of the House itself. The Speaker therefore speaks for the House as a whole and must make decisions that are in the best interest of the National Assembly as a whole.

[37] It must be stressed that as a guardian of Parliamentary democracy the Speaker has a duty to exercise her discretion objectively and dispassionately taking into account all the relevant and surrounding circumstances when she decides on the voting procedure in a motion of no confidence against the President. She has to act even-handedly without fear or favor to ensure that the voting process is credible and reflects the Constitutional obligations vested on members of parliament. In *United Democratic Movement (supra)*, the Constitutional Court expressed the view that the power that vests with the Speaker to determine the voting procedure in a motion of no confidence belongs to the people and must not be exercised arbitrarily or whimsically. This discretion is not open ended or unguided. It is exercisable subject to limitations or constraints. The Court stated that the primary constraint being that it must be used for the purpose it was given to the Speaker, which is the facilitation of the effectiveness of Parliament's accountability mechanisms. The court noted that the other constraints include the need to allow members to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the constitution and the laws require of them, for the common good of all South Africans.²⁴

²⁴ At para 86.

[38] Mr Katz argued that the Speaker was mistaken in imputing an onus upon the applicant before the Speaker could allow a secret ballot. He argued that the Speaker was obligated to consider the guidelines set out by the Constitutional Court in the *United Democratic Movement (supra)* when deciding whether it should be a closed or an open ballot vote. It was broadly submitted on behalf of the applicant that when the Speaker exercised her discretion, she has to take into account the nature of the motion and that the motion dealt with corruption and wasteful expenditure. In Counsel's view, a motion of no confidence against the President involving issues of corruption is a highly charged and a toxic environment that called for a secret ballot. A vote by secret ballot would ensure that members of Parliament are protected to vote on their conscience.

[39] It was also contended that this was not a vote about issues relating to health or education which could be done through an open ballot. Mr Katz asserted that the court should take judicial notice of the fact that our country is ravaged by corruption and that it was instructive that the Speaker should have ordered a vote by secret ballot. He contended that the Speaker did not set out reasons at all for her decision other than to regurgitate certain dicta in the *United Democratic Movement (supra)*, without placing them in context.

[40] In cases such as this, the courts have cautioned against judicial overreach. The decision to order a voting procedure rests with the Speaker. In such circumstances, the Courts can only interfere with the decision of the Speaker if she did not apply her mind properly to her decision. However, if her discretion has not been exercised capriciously and or arbitrarily, the courts have no business in usurping the powers of

the executive. It has been repeatedly stated that it is important for the Courts to defer to the decisions of the functionary unless it can be established that the decision maker has not brought his unbiased judgment to bear in making the impugned decision. I repeat, in considering the decision of the Speaker, the Court can only interfere therewith if the Speaker exercised her discretion frivolously or in an unreasonable manner. In my view, in order to succeed, the applicant must demonstrate that the Speaker failed to take into account facts which, if they had been taken into account, would have materially influenced her decision.

[41] In *casu*, the Speaker was unequivocal in her response that she had considered all the reasons advanced by the applicant and that she had also considered the guidelines set out by the Constitutional Court. In my view, the correspondences exchanged between the applicant and the Speaker clearly show that the Speaker applied her mind to the reasons placed before her by the applicant. She explicitly made it clear to the applicant that the prevailing atmosphere is not as toxic and highly charged to warrant dispensing with the constitutional values of openness and transparency. She drew the attention of the applicant to section 1(d) of the Constitution which sets out openness as a foundational principle of the Constitution and our Democracy and said:

“The Constitution further instructs that the National Assembly must conduct its business in an open manner. In finding the balance between the constitutional imperative of “transparency and openness” on the one hand, and ensuring that the voting process is not a fear and money-inspired sham but a genuine motion for effective enforcement of accountability” on the other, I consider that an open ballot will best achieve this imperative.”

[42] It is therefore evident and observable that the Speaker considered all the surrounding circumstances and the concerns raised by the applicant when she ordered an open ballot. The fact that the applicant is dissatisfied with the reasons and the decision of the Speaker does not render the decision wrongful and is therefore not a ground for the review of her decision. More importantly, the mere fact that the applicant alleges corruption against the President does not in itself automatically warrant a secret ballot. Some of the reasons advanced by the applicant for a secret ballot were, in my view, based on speculations and conjectures hence Mr Katz simply pleaded with this Court to take judicial notice of the fact that there is corruption in a number of government departments without advancing any concrete and tangible facts to support his submissions. I find that there is no evidence supporting the argument that an open ballot will subject the Members of Parliament to reprisals by their parties.

[43] Furthermore, the suggestion that there is an onus upon a party requesting a motion by secret ballot to meet before same can be granted is with respect inaccurate and erroneous. In my view, the Speaker is expected to consider the motion and the reasons thereof and to examine the surrounding circumstances and after deliberations decide whether a secret or a closed ballot is preferable. There is no duty upon the person tabling the motion to prove that an open or a secret ballot is preferable. In the same vain, the applicant cannot direct that the Speaker to only consider a vote by secret ballot without taking into account the relevant prevailing circumstances on the issue. However, it is my considered view that the Speaker retains the power to call for additional information where it is necessary from a member or a political party within the National Assembly which tabled a motion of no confidence in accordance with the

Rules as she did in this case. This is to enable her to make an informed decision based on facts whether to order a secret or a closed ballot.

[44] It is noticeable from the array of correspondences between the Speaker and the applicant that the Speaker, in addition to the information that was at her disposal, engaged the applicant to elaborate on its request for a secret ballot. She requested the applicant to provide her with additional information in order to make an informed decision in the exercise of her discretion. In response, the applicant alleged that 'without being exhaustive, it is public record that two public opposition party members of parliament were removed from parliament by their own party because it was found that they were beneficiaries of the CR17 campaign funds.' The applicant also informed the Speaker that this alone is reason enough to corroborate a legitimate suspicion that perhaps more Members of Parliament are beneficiaries of the CR17 campaign funds and might find it difficult to vote against the President. The Speaker considered this additional information and gave the applicant reasons why she took the decision to order an open ballot. In my view, the reasons given are properly informative and offered the applicant an explanation why its request was refused.

[45] In addition, the applicant's response to the request for further information from the Speaker was speculative, contrived and based on unsupported suppositions. In fact, it is ironic that the applicant even suggested that if the Speaker allowed a secret ballot this would allow Members of Parliament who are allegedly captured by the President to vote against him. This, with respect does not make sense. If the suggestion of the applicant is correct, in my view, it goes without saying that the alleged captured Members of Parliament would vote in favour of the President. It suffices to say that this argument is ill-conceived and unfounded.

[46] It must be stressed that the Speaker is expected to make a decision based on facts and not on conjectures or incomplete evidence. She is not expected to give automatic approval or authorization to a request for a secret ballot from Members of Parliament without giving proper consideration to that decision. In other words, she is not expected to rubber stamp the request of the Members of Parliament for a secret ballot. The Speaker is constitutionally encumbered to ensure that she takes all the relevant circumstances into account when deciding on whether the motion should be open or by secret ballot. Once she has considered all the information before her, her decision must be validated by proper and rational reasons. She has to exercise her discretion rationally and impartially and has to bring her unbiased judgment to bear for whatever choice she makes in determining the voting procedure.

[47] In the *United Democratic Movement (supra)*, the Constitutional Court found that on a proper interpretation of the relevant provisions of the Constitution and the Rules of Parliament, the Speaker does have the power to authorize a vote by a secret ballot in a motion of no confidence proceedings against the President, in appropriate circumstances.²⁵ From this decision, it is abundantly clear that the default position of a motion of no confidence against the President is an open ballot which the Speaker did in this case. However, in appropriate and relevant circumstances, the Speaker may order a secret ballot.

[48] Furthermore, other than the applicant's *ipse dixit* or suggestion that the environment in Parliament was as toxic as at the time when the *United Democratic Movement (supra)* case was decided, (vis-à-vis the former President in which the

²⁵ At para 91.

secret ballot was justified), there is nothing whatsoever advanced by the applicant to fortify that suggestion. In my view, there is no basis in law or fact to impeach the Speaker's refusal to order a secret ballot or to rescind her decision to order an open ballot. From the totality of evidence placed before this Court, I am satisfied that the Speaker was justified in rejecting the applicant's plea for a secret ballot.

[49] It must further be emphasized that if a decision of a functionary, viewed objectively, is rational, a court cannot interfere with it simply because it disagrees with it or it considers that the power was exercised inappropriately.²⁶ In such cases as in *casu*, a court would normally only be entitled to interfere with a decision if it is found that the exercise of a public power has been arbitrary with no rational basis.²⁷

[50] I do not agree with the submissions on behalf of the applicant that the Speaker did not apply her mind properly to the issue it raised and further that what she put forward as her reasons are in fact findings and conclusions. As discussed in the aforementioned paragraphs, the reasons advanced by the applicant for a request of a secret ballot are speculative and not based on sound reasons. It is for that reason that they were unassailable.

FINDING

[51] In conclusion, I find that the decision of the Speaker was based on sound reasons and not on illegitimate motives and considerations as averred. I also find that she also advanced the applicant with the reasons for her decision for ordering an open

²⁶ *Pharmaceutical Manufacturers of South Africa In re Ex parte President of the Republic of RSA* 2000 (2) SA 674 (CC).

²⁷ See *Bel Porto School Governing Body v Premiere Western Cape* 2002 (3) SA 265 (CC).

ballot and declining the application for a secret ballot. Her decision is therefore unimpeachable.

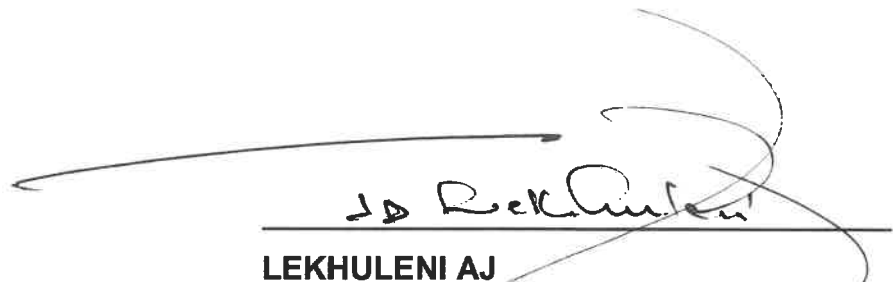
ORDER

[52] In the result, the following order is granted:

52.1 The High Court does have jurisdiction to consider matters arising from the provisions of section 102(2) of the Constitution.

52.2 The applicant's application for a review of the Speaker's decision to refuse the request for a motion of no confidence against the President to be held by secret ballot is dismissed.

52.3 The applicant is ordered to pay the costs including the costs attendant to the employment of Counsel and the costs of 03 December 2020.



LEKHULENI AJ
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE HIGH COURT

Appearances:

For the Applicant

Advocate A. Katz, SC
Advocate M. Mhambi

Instructed by

M. Magigaba Inc.
(ref: Mr C. Naiker)

For the 1st Respondent

Advocate K. Premhid

Instructed by

The State Attorneys
(ref: Ms M.G. Selowa)