

[REPORTABLE]



Republic of South Africa

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

Case No.s: 7186/2022 & 21574/2022

Coram: Le Grange, Binns-Ward et Thulare JJ
Hearing: 13-14 February 2023
Judgment: 26 April 2023

In the matters 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

INKHATA 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 CHRISTIAN DEMOCRATIC PARTY

Thirteenth Respondent

AL- JAM-AH

Fourteenth Respondent

JUDGMENT: 26 APRIL 2023**THE COURT:**

[1] The two applications before the Court concern very similar questions. The commonality of the parties and issues made it convenient to hear them together.

[2] The first application (in case no. 7186/2022) concerns a motion of no confidence in the President first tabled by the African Transformation Movement ('ATM') in the National Assembly on 11 February 2020. It was scheduled to be debated and voted on only on 3 December 2020. Shortly before the scheduled debate, and after the Speaker had declined its request for a secret ballot, the ATM applied urgently to court for an order setting aside the Speaker's decision and for certain consequential relief. The application could be heard only in February 2021 and the ATM requested the Speaker to remove the motion from the order paper until its application to court had been adjudicated. The application was dismissed in March 2021 but leave to appeal to the Supreme Court of Appeal ("SCA") was granted.

[3] The issue that crystalised for determination in the SCA was whether the Speaker had been correct in approaching the ATM's request for a secret ballot on the basis that the ATM bore an onus to establish that a secret ballot would be appropriate. In a

judgment delivered on 2 December 2021, the SCA held that the Speaker had laboured under a misconception that a party requesting a secret ballot bore an onus. It reversed the judgment at first instance and set aside the Speaker's decision; see *African Transformation Movement v Speaker of the National Assembly and Others* [2021] ZASCA 164 (2 December 2021); [2022] 1 All SA 615 (SCA); 2022 (4) SA 409 (SCA), to which we shall hereinafter refer, where convenient as "the *ATM* judgment" or "the *ATM* case".

[4] The SCA substituted the order made in the High Court with an order whose substantive terms provided as follows:

- "1 The decision by the first respondent [the Speaker] to decline the applicant's request for the motion of no confidence in the President to be conducted by secret ballot is reviewed and set aside.
- 2 The applicant's request for such motion to be conducted by secret ballot is remitted to the first respondent for a fresh decision."

[5] The ATM then reinstated its motion of no confidence, which was rescheduled to be debated and voted upon on 30 March 2022. The Speaker duly reconsidered the ATM's renewed request for the vote to be conducted by secret ballot but again decided to decline it.

[6] The Speaker set out the reasons for her decision in a letter to the ATM dated 16 February 2022, which in material part went as follows:

I believe that the question in hand is still what public good would be served or undermined, in employing either secret ballot or open mechanism for the

Assembly in deciding on your motion. To this end, I have had regard to the guidelines as previously set out in the Constitutional Court judgment in the case of UDM v Speaker of the National Assembly and Others (2017),^[1] to guide me in exercising the discretionary power with strict adherence to the Court's guidance..... In assessing the prevailing atmosphere, I took into account the fact that the country successfully voted in free and fair local government elections a mere month before the re-submission of your party's request for a vote of no confidence in the President. In the same vein, we have listened to the President deliver his State of the Nation address to the country on 10 February 2022, in an atmosphere that allowed all political parties to freely debate matters of national importance over the last two days. Robust debate does not point to a toxic environment, but actually confirms that members are free to express themselves without fear or favour. Your party's request is coming at a time when the President has received and immediately shared with the public the first two reports of the State Capture Commission allowing for processes to unfold to deal with the findings and recommendations set forth therein.

In further considering the political environment, I specifically reflected on the suspension of Mr. Dirks, MP, and have come to the conclusion that Mr. Dirks will have the full benefit of the law in defending his rights. The other factor that I had regard to, is the contestation amongst candidates leading up to the electoral conference of the governing party in December. I find nothing that suggests that violence or any other threat prevails at this time in respect of any of these circumstances, beyond what are normal tensions in a democracy. These factors do not lead me to conclude that openness and transparency should not prevail, as they are in my view events that do not point to a toxified and highly charged atmosphere, but rather events that can only take place if all systems are generally functioning within our constitutional democracy.

¹ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 (22 June 2017); 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC).

In this prevailing environment I have had to decide whether a secret ballot procedure is appropriate in light of other constitutional imperatives, including the foundational Constitutional principle of "openness", as set out in section 1(d) of the Constitution, 1996, as a guide to our democratic order. I am equally cognisant of the Constitutional requirement as set out in section 59(1)(b) that the National Assembly must conduct its proceedings in an open manner. This is the manner in which we conduct our business and the NA Rules are crafted to give effect to these principles unless required otherwise by the constitution, and now indeed the courts.

Thus the Constitutional imperatives set out above, balanced with my objective consideration of the prevailing political circumstances in the country right now, suggest that it is more compelling for the Assembly to exercise this important and consequential decision as contained in your motion, in a manner that will engender public trust and confidence in the Assembly and in our elected officials. I reiterate, that no political environment will be entirely free of political tensions, either between or within parties. This has been the most important consideration. I am aware that political contestation exists within the governing party, of which the President is the national leader. It is not unusual for such tensions to exist in political parties. However, the court has emphasised that whether an open or secret voting mechanism is used, remains at the discretion of the Speaker. It stressed that the circumstances will dictate the decision, which suggests that both mechanisms are permissible. To give effect to this responsibility, I have had regard to all the objective or discernible information and considered that the prevailing atmosphere is not so toxified or so highly charged that members of the Assembly would be prevented from exercising their vote on such a motion in accordance with their conscience in an open voting procedure."

[7] In response to a further request by the ATM based on additional representations, the Speaker confirmed her earlier decision in a letter dated 9 March 2022, in which she stated -

*"In this letter I will not repeat the contents of my letter dated 16 February 2022, except to state that openness remains the default position and guiding principle that informs how the National Assembly must conduct its proceedings and that since my last letter to you there has been no change in this substantive legal and Constitutional framework to compel a deviation from this position.....
...[T]he numerous reasons that I put forward in support of an open voting procedure in my previous letter dated 16 February 2022 still stand, and do not need to be repeated here. Accordingly, I am not persuaded that circumstances have changed to warrant the use of a secret ballot voting procedure when the motion is considered by the Assembly"*

[8] The scheduling of the motion for debate on 30 March 2022 occurred on 10 March.

[9] On 14 March 2022, the ATM instituted the first application which, in terms of the notice of motion, was set down for hearing on 28 March 2022. It sought the following relief as a matter of urgency:

"orders –

1. Directing that this matter be dealt with as an urgent application and that the applicant's non-compliance with the ordinary rules for service and time periods set out in the Uniform Rules be condoned as contemplated by Uniform Rule 6(12).

2. Declaring the decision taken by the first respondent on 16 February 2022 and 9 March 2022 rejecting the applicant's request for [?a] closed/secret ballot in respect of the motion of no confidence in the second respondent in terms of section 102 of the Constitution of the Republic of South Africa 1996, as inconsistent with the Constitution and invalid.
3. Reviewing and setting aside the decision taken by the first respondent on 16 February 2022 and 9 March 2022.
4. Substituting the decision of the first respondent taken on 16 February 2022 and 9 March 2022 [?with] the following
The African Transformation Movement's motion of no confidence, in terms of section 102 of the Constitution of the Republic of South Africa, 1996, in the President of the Republic of South Africa in the National Assembly on 30 March 2022 shall be conducted by a closed ballot procedure.
5. Directing that the costs of this application be paid by the first respondent and all those respondents who oppose the relief sought herein.
6. Further and/or alternative relief."

[10] The ATM contended that the Speaker, on reconsideration, had made the same error that caused the SCA to initially review and set aside her decision.

[11] The second application (in case no. 21574/2022) concerns the lawfulness of the Speaker's decision to decline the ATM's request for a secret ballot procedure in respect of the National Assembly's consideration of a report by an independent panel

established in terms of rule 129D of the National Assembly's rules regarding a motion initiated by the ATM for the removal of the President from office in terms of s 89 of the Constitution.

[12] The second application was launched on 20 December 2022, with a self-set timetable in the notice of motion directed at rendering it ripe for hearing as an opposed application on 25 January 2023. The matter was, however, struck from the roll for lack of urgency on that date. It was then re-enrolled by arrangement with the Acting Judge President for hearing on the semi-urgent roll together with the first application.

[13] The factual context of the second application was the following. On 18 July 2022, the leader of the ATM initiated proceedings in the National Assembly for the removal of the President from office. An independent panel was appointed in terms of the applicable rules of the National Assembly to investigate whether there was sufficient evidence to support the allegations upon which the proceedings had been initiated. The panel furnished its report on 30 November 2022. The panel concluded that there was prima facie evidence to substantiate the complaint concerning the President's alleged misconduct. The rules of the National Assembly required the report of the independent panel to be tabled for consideration by the Assembly. Only if the report were accepted by the Assembly would a parliamentary impeachment committee then be constituted to investigate the President's alleged misconduct.

[14] On 1 December 2022 the leader of the ATM, Mr Zungula, requested the Speaker to determine that the Assembly's resolution whether to accept the report should be

voted on by a secret or closed ballot procedure. In support of the request, the leader of the ATM stated the following:

- "9. *It cannot be denied that the current political environment is clearly toxic on a range of levels. We draw the attention of the Speaker to death threats in the public domain that Honourable Dirks is living under which are being investigated by Crime Intelligence, OB 1260=02-2022.*
10. *With the ruling party leading to its national leadership conference, there are already very serious tensions within the party with accusations and counter accusation amongst party members playing out in the public domain. There is evidence of killings in branches of the ruling party and what could amount to bribery of members of parliament. Madam Speaker is reminded that President Ramaphosa confessed in Parliament that he gave money to EFF members prior to his election as President of the Republic. Those members were subsequently removed from Parliament because the EFF rightfully so did not approve of this unethical conduct. In response to a further question as to how many other members of Parliament he gave money to, President Ramaphosa made another confession and said that he had given money to 'a number of other members as well'. It remains a mystery even today particularly with the sealing of CR 17 Bank statements to establish the extent of compromised members of Parliament who would not be able to openly vote against President Ramaphosa.*

11. *It therefore follows that opened voting will not be according to each member's conscience as required [?by] the oath of office but would be according to the party loyalty, party line factionalism and influenced by the money received from the person who deserves to be voted out.*
12. *In the result, Madam speaker is urged to grant secret ballot to give effect to the directive of the Constitution."*

[15] In her letter of reply, dated 4 December 2022, the Speaker acknowledged that the Constitutional Court jurisprudence in *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 (22 June 2017); 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC), hereinafter referred to simply as "*UDM*",² established that it was within the power of the Speaker to determine in appropriate circumstances that there should be a secret vote. The Speaker recorded that she had been guided by the principles and considerations identified in the judgment and explained her decision to decline the request as follows:

² In this case the Speaker of the National Assembly refused a request by the UDM, a political party, to direct that the voting in a scheduled motion of no confidence in the President of South Africa be conducted by secret ballot. The Speaker's reasons for the refusal were that neither the Constitution nor the Rules of the National Assembly (the Rules) gave her that power. According to the Speaker she was further prevented from doing so by the High Court's finding in *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC). The Constitutional Court held at para 58-59, 64, 67-68 and 91, that the National Assembly under its powers in terms of s 57 of the Constitution to determine its own procedures and which procedure would best advance the Constitution. The Court held that the National Assembly therefore had the power to determine whether voting on a motion of no confidence in the President would be open or secret ballot. It was further held that it is for the National Assembly to determine which voting procedure was necessary for the efficiency and effectiveness of the institution in holding the Executive accountable. Furthermore, the Rules effectively empowers the Speaker to have a motion of no confidence in the President voted on by secret ballot. It was also held that to the extent that *Tlouamma* may be understood as having held that secret –ballot procedure was not at all constitutionally permissible, that was incorrect. The Speaker's decision was accordingly held to be invalid and was set aside.

"Guided by the principles provided by the Constitutional Court, I have had to balance your reasons for a secret ballot procedure against other imperatives, including the foundational constitutional principle of 'openness', as set out in Section 1(d) of the Constitution which guides our democratic order. The constitutional requirement as set out in Section 59(1)(b), that the National Assembly must conduct its proceedings in an open manner, is also an important consideration in this case as at all times.

I believe that the constitutional imperatives sit out above are equally compelling for the Assembly to uphold, when considered against my assessment of the prevailing political atmosphere in the country at present. An open and transparent procedure followed by the Assembly to exercise this important decision on the Section 89 Independent Panel report, can only bring about public trust and confidence in the Assembly and our democratic dispensation.

South African society is by its nature very politically robust and engaged. A parliamentary environment is always a highly politicised space, and can never be entirely free of political tensions, either between or even within parties. I am alive to what I consider to be serious political contestation within the governing party, to which the President of the Republic belongs and is the national leader. However, I do not believe that the atmosphere is so generally toxified or so highly charged that members of the Assembly would be prevented from exercising their vote on this question in accordance with their conscience using

an open voting procedure. This is borne out by the various views that have been freely and publicly expressed over the last couple of days.

On the contrary, I believe that it closed voting procedure will deprive the citizens of identifying the positions of their representatives across party lines and it may facilitate the possibility of corruption aimed at influencing members to vote in a manner where they will be shielded from accountability to the people they represent for the exercise of their constitutional duty.

Accordingly, I cannot accede to your request for the use of a secret ballot voting procedure when the assembly votes on the section 89 independent panel report."

[16] It was determined at a meeting of the Assembly's programming committee on 5 December 2022 that the independent panel's report would be considered by the Assembly at a sitting on 13 December 2022. At that meeting, which Mr Zungula attended, the Speaker was recorded as having said the following:

"Firstly, we all agree to the 13th. I don't hear any dissenting voice, and that from now onwards, your office will start organising or arranging for a venue where we will all be physical. That's number two.

The third issue is that this will be a manual roll call. Is that agreed? Those are three critical issues which we seem to be agreeing to.

Honourable Members, it's not as though the issue of secret ballot as Honourable Zungula referred to earlier was not raised. It was raised. However, Honourable Zungula, the reasons given, right, did not assist us, did not enable us, to take an informed decision in a sense. You know that once you say secret ballot, it has to be extraordinary circumstances, and that is the only reason why you were not

granted a secret ballot. For now ... there's loadshedding ... my God ... for now, we are agreeing honourable members, we will proceed in the manner I've outlined ..."

The Speaker, immediately after making those utterances also stated that she had: *"..considered the request for a vote by secret ballot and have communicated my decision and the reasons for my decision in this regard"*.

[17] The applicant placed emphasis on the sentence in the Speaker's utterances, that has been underlined in the passage quoted above. It contended that it was at odds with the Speaker's written reasons for declining its request for a secret ballot. It also argued that the Speaker's utterance demonstrated an approach at odds with the import of the SCA's judgment in the *ATM* case.

[18] On 6 December 2022, the ATM wrote to the Speaker asking her to reconsider her decision. The letter, which was written by Mr Zungula, recorded that the ATM accepted that the Speaker had acted in good faith in making her initial decision. It did not refer to or in any way rely on the aforementioned utterances of the Speaker at the previous day's meeting of the Programming Committee.

[19] In support of its request for a reconsideration of the Speaker's decision, the ATM drew attention to a statement published on Twitter at @ANC that the national executive committee of the ANC had resolved that the ANC would vote against the adoption of the independent panel's report *"given the fact that it [the report] is being taken on [judicial] review"*. It also referred to a statement by the acting secretary-general of the ANC at a related press briefing that although there were differing views on the matter

within the party it would be instructing its members to vote in accordance with the determination made by its national executive committee. The ATM pointed out that between national conferences the NEC was the highest decision-making body of the ANC and proceeded as follows, *"noting the ANC subscribes to Democratic Centralism where the decision of the higher structure is binding to all members of the organisation, it is impossible and irrational to the extreme to expect disciplined members of the ANC who differ with the position of the organisation to defy their line of march and vote according to their conscience as envisaged by the Speaker ... The ANC NEC directive means the citizens will only be exposed to the party position instead of individual representatives and thus the stated contention of the speaker is heavily contradicted and defeated"*. The letter also drew attention to a statement by the ANC chief whip that ANC members would be expected *"to toe the party line"*.

[20] The Speaker responded by letter dated 12 December 2022, in which she confirmed her initial decision and stood by the reasons that she had provided for making it.

[21] The ATM again addressed the Speaker by letter on 12 December 2022, in which it contended that her refusal to accede to its entreaties for a secret ballot was irrational and unlawful for being at odds with the judgment of the Constitutional Court in *UDM supra*.

[22] On 13 December 2022, shortly before the debate and vote on the independent panel's report, the Speaker wrote to Mr Zungula as follows:

"Your letter dated 12 December 2022, bears reference.

I have noted your arguments about the ANC NEC directive and the threatened expulsion of members, as I did in my last correspondence to you. In the final analysis the decision to determine whether the prevailing circumstances generally are such that members would be prevented from acting in line with their conscience when voting openly, is that of the Speaker. There is no specific evidence members of the ANC would not vote in line with their constitutional obligation, in spite of the factors you have mentioned.

In UDM at paragraph 80, the Court said: 'Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non compliance with the parties instructions. The electorate is at times entitled to know are their representatives carry out even some of their most sensitive publications, such as passing a motion of no confidence. They are not supposed to always operate under the cover of secrecy.'

I believe that Members as leaders in their own right must be given the platform and opportunity to demonstrate their irrevocable commitment to do what the Constitution and the laws require of them. As I have previously indicated, as Speaker I have exercised my constitutional responsibility to consider all prevailing factors, and have determined that an open roll call voting mechanism would be appropriate under the circumstances."

[23] Voting took place by open ballot on 13 December 2013. According to the Speaker, 149 Members of the National Assembly, including 5 Members of the ANC voted

to accept the report of the independent panel, whilst 214 Members voted against accepting it.

[24] It bears noting that a Forum comprised of a number of opposition parties in the National Assembly, including the ATM, issued a public statement prior to the Assembly's consideration of the independent panel's report announcing that their representatives in the Assembly would be voting in favour of the acceptance of the panel's report and the consequent establishment in terms of the Assembly's rules of an impeachment committee to investigate the President's alleged misconduct.

[25] The ATM sought the following relief in the second application:

"orders –

1. Directing that this application be heard as an urgent application and that the applicants non compliance with the ordinary rules for service and time periods set out in the Uniform Rules of Court be condoned as contemplated by Uniform Rule 6(12), and that this application be heard together with the application pending before this Court under case number 7186/2022.
2. Reviewing and setting aside, and declaring as unconstitutional and invalid, the decision of the first respondent, rejecting the applicant's request for a closed ballot procedure in respect of the proceedings contemplated by rule 129I of the section 89 Impeachment Rules of the National Assembly, at the Fourth Session of the Sixth Parliament, on 13 December 2022.

3. Reviewing and setting aside the proceedings of the National Assembly on 13 December 2022, pursuant to rule 129I of the impeachment rules of the National Assembly and declaring it (*sic*) to be invalid.
4. Substituting the decision of the first respondent by directing that the voting procedure to be followed by the National Assembly in conducting the rule 129I impeachment proceedings, be conducted by a closed ballot procedure.
5. Directing that the costs of the application be paid by those respondents who oppose the relief sought herein.
6. Further and/or alternative relief.”

[26] The applications were opposed by the Speaker and the ANC, which was the Third Respondent in both matters.

[27] The Economic Freedom Fighters (“EFF”), which was cited as the fifth respondent in both matters, did not oppose the application; instead, somewhat unconventionally, it filed a substantive affidavit in support of the ATM’s application in case no. 21574/22. The ANC filed an objection to the EFF’s affidavit on the grounds that it was an irregular step.

[28] At the commencement of the hearing, however, in response to a query from the Court, counsel for the third respondent indicated that the objection was not being pursued. The ANC did, at that stage, nonetheless reserve its position in respect of costs concerning the EFF’s participation in support of the application. It ultimately let that issue also go by the way. We shall nevertheless have something to say later in this

judgment about the way the EFF engaged in the case because it raised procedural questions that might usefully be clarified for the benefit of parties in comparable situations in future.

[29] Assuming that this court is able to entertain these applications, a matter we shall come to shortly, there are two main issues for determination in both applications. The first is whether the Speaker decisions stand to be vitiated on account of procedural and/or substantive irrationality. The second is, if they were, whether this Court ought to substitute her decision with an order requiring a secret ballot for both the motion of no confidence and the rule 129I impeachment proceedings against the President.

[30] It seemed to us, however, that the first issue might be moot, and if it was, we would not reach the consequential question. It was incumbent on us to raise the question of mootness in view of the determination by the SCA in *Minister of Justice and Correctional*

*Services and Others v Estate Late James Stransham-Ford and Others*³ that the High Court does not have jurisdiction to decide matters that no longer present an existing or live controversy. In *Stransham-Ford*, the applicant, who was terminally ill, had sought an order granting a medical practitioner authority to assist his suicide by administering him a lethal agent. The matter was characterised as moot because the applicant died very shortly before the court of first instance was able to deliver judgment.

³ [2016] ZASCA 197 (6 December 2016); [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA).

[31] In the current case the relief sought by the ATM bore only on the voting methods of the National Assembly on the ATM's motion of no confidence in the President scheduled for 30 March 2022 and in respect of the resolution to be taken pursuant to the Assembly's consideration on 13 December 2022 of the report of independent panel established to conduct a preliminary enquiry into the merits of a motion, initiated in terms of s 89 of the Constitution, for the removal of the President. For reasons that will soon become apparent, it had no wider import despite there being a prayer in the second application for the setting aside of the resolution adopted by the National Assembly on 13 December 2022.

[32] In respect of the first application, mootness was an issue because the ATM's motion of no confidence tabled for decision at a sitting at the end of March 2022 was not moved by the ATM because the vote would be an open one. A determination at this stage, one year later, whether the Speaker's decision that the vote should be an open one would in the circumstances be of no practical effect. The position seems to us to be closely comparable to that which obtained in *Mazibuko v Sisulu and Another* [2013] ZACC 28 (27 August 2013); 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC), where the proceedings concerned a claim by the Democratic Alliance for the enforcement of its demand that the Speaker schedule a motion of no confidence for 22 November 2012. When that date passed without the DA's claim having been acceded to, the matter was regarded as moot; see *Mazibuko* at para 23-24.

[33] The Constitutional Court confirmed in *UDM* that decisions whether a vote of no confidence should be by open or secret ballot fall to be made with regard to the

surrounding circumstances immediately prevailing when the National Assembly is scheduled to vote on the motion. Consequently, if a court is called upon to pronounce on the legality of the decision determining the method of voting, that must be done urgently. If it is not done, the circumstances to be taken into account will have changed. If the motion is to be revisited months later, even on the same facts, a fresh decision would be required irrespective of the merit or lack thereof of the one taken earlier in different circumstances. The prior impugned decision will be redundant. Setting it aside will be of no practical effect.⁴

[34] It is one thing to acknowledge that a court would be duty bound, if it found in deciding a matter heard by it that the Speaker acted unconstitutionally, to make a declaratory order to that effect. It is a different matter whether a court should entertain a challenge in circumstances in which its decision in respect of the impugned decision would be academic.

[35] If the ATM were to have their motion reinstated one year after it was first scheduled to be debated and to request the Speaker to determine on a secret vote, she would have to consider the request in the light of current circumstances, not those that prevailed when she made the impugned decision. Even if we were to consider the declaratory relief sought by the ATM in the first application, no purpose would be served by exercising whatever discretion this Court has in such matters to grant

⁴ There is more than just a grain of truth in the observation attributed to the former UK Prime Minister, Harold Wilson, that *"A week is a long time in politics"*.

declarators. The case does not raise any issue of principle that has not already been declared by the Constitutional Court in *UDM* and by the SCA in the *ATM* case.

[36] It seems clear to us, if regard is had to Rules 102 to 104 of the National Assembly and the Constitutional Court's judgment in *UDM*, that - except where the Constitution prescribes a secret vote - any decision by the Speaker that a vote should be by secret ballot would have to be "predetermined"; in other words, members would be informed of the decision ahead of the debate. Rule 129, which pertains to motions of no confidence, requires the Speaker to engage with various organs of the Assembly in respect of the scheduling of such motions. It is evident from the cases in which the matter of whether a vote on a no confidence motion should be secret have been litigated that the issue is not one that has ever been sprung on members as a surprise on the day of the debate. It should therefore always be possible for a party or member that is aggrieved by the Speaker's decision to approach the court for appropriate relief urgently, if so advised, before the motion is put to a vote. That way they can pre-empt any question of mootness.

[37] In respect of the first application, it is evident that the ATM did endeavour to have its application entertained as an urgent matter. It is not clear to us why the application was not heard on that basis. But the fact that the ATM did not succeed in obtaining a timeous hearing does not detract from the reality that the issue of whether the Speaker should have determined the vote scheduled for 30 March 2022 should be by secret ballot became moot when the motion was not put to the vote then. As happened in *Mazibuko* supra, the world has since moved on.

[38] In respect of the second application, it is evident that an open ballot vote took place in the ordinary course because the Speaker had declined the ATM's request for a secret ballot – the decision the party now seeks to impugn. It appeared to us that unless the resolution adopted by the National Assembly by that voting process was void and legally ineffectual because of the Speaker having declined the ATM's request, it would be academic for the court at this stage to pronounce on the Speaker's decision. The ATM's prayer for the setting aside of the resolution was predicated solely on the alleged illegality of the Speaker's determination that it be voted on by open ballot. The deponent to ATM's founding affidavit averred in this regard: "*the proceedings of the Assembly are only irregular and unlawful because it was straightjacketed to the Speaker's unlawful decision on the voting procedure*".

[39] We required the parties to address argument on the issue of mootness. We heard some argument on the question during the hearing of the oral arguments and afforded counsel the opportunity to make additional submissions in writing after judgment was reserved. The Speaker and the ANC contended that National Assembly's resolutions were validly adopted and that the question of whether the ATM's request for a secret ballot should have been granted was accordingly moot. It was contended that if the ATM wanted to obtain an effective remedy from the court it behoved it to have applied urgently for an interdict prohibiting the National Assembly from voting on the resolutions until its challenge to the legality of the Speaker's procedural decision had been determined.

[40] The contention that the Assembly was “straightjacketed” by the Speaker’s determination appears to us to be unfounded. The National Assembly’s rules are silent on the issue of whether a vote on any question related on a motion in terms of s 89 of the Constitution to remove the President from office should be by open or secret ballot. The Constitutional Court has found that the Speaker has the power to determine that they should be secret if that appears to her necessary for the Assembly to be able to fulfil its constitutional obligations, but the Court also emphasised that, as provided in s 57(1)(a) of the Constitution, the Assembly is itself the ultimate master of its internal arrangements, proceedings and procedures. It is inconceivable that if the Speaker made a determination on voting procedure that was unacceptable to the Assembly, it could not overrule her. The Speaker could not force the Assembly to vote on the resolution. By proceeding with the vote all the participating members of the Assembly submitted to the Speaker’s determination.

[41] The validity of the Assembly’s resolutions has to be determined with due regard to its original powers and functions. It is elected to represent the people and to ensure government by the people under the Constitution. It does that by choosing the President (which the Constitution directs it must do by secret vote), by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action; see s 42(3) of the Constitution. Its members are subject to an oath of office that binds them to be faithful to the Republic and to obey, respect and uphold the Constitution and includes a promise to perform their functions as members of the Assembly to the best of their ability.

[42] The “public consideration” of issues includes not only debating them but also taking any resolutions that are required in respect of them. The obligation on members to respect and uphold the Constitution demands of them to conduct themselves mindful of their collective duty, in terms of s 59 of the Constitution, to ensure that the National Assembly conducts its business in an open manner and holds its sittings and those of committees in public save when there is good reason to exclude public access. Their role as representatives of the people is intrinsically bound up with the fourth of the values, set out in s 1(d) of the Constitution, on which the post-Constitutional State is founded, viz. “*Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness*”.

[43] In a constitutional system such as ours based on a separation of powers between the legislative, executive and judicial branches of the state, the courts’ power to overturn a decision by the duly elected legislature acting within its constitutional powers, if it exists at all, must be exercised in a way that is reconcilable with an acknowledgement of and respect for the separation of powers. Even when a competent court exercises the expressly given power to determine the constitutional validity of an Act of Parliament or any conduct of the President an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.⁵ In support of the proposition that only in instances of substantial breaches of the constitutional order would a court set aside a decision of the National Assembly that on

⁵ Section 172(2) of the Constitution.

its face was made within its constitutional powers, counsel for the ANC, in our view appositely, drew an analogy with the qualified acknowledgement by the Constitutional Court in *Kham and Others v Electoral Commission and Another* [2015] ZACC 37 (30 November 2015); 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) that “*overturning an election is a serious business*”.⁶

[44] It does not seem to us to follow that a resolution adopted in an open vote by the members of the National Assembly on a motion that the members have debated in public proceedings as required by s 59 of the Constitution should be susceptible to being set aside by a court merely because before the event a case could have been made out that the Speaker should have directed that the vote be secret one. The appropriateness of the Speaker’s decision as to how the voting should be conducted depends on what she should reasonably have perceived and anticipated the situation would probably be when voting took place. The validity of the voting depends not on whether the vote was conducted by open or secret ballot but whether members voted without undue or dishonest influence.

[45] To impugn a resolution of the National Assembly adopted in an open vote it would have to be demonstrated that the members’ voting rights were not exercised in the manner contemplated by the Constitution. The validity of the votes exercised by the members of the National Assembly is not dependent on the Speaker’s decision whether the ballot should be open or secret. As noted by the Constitutional Court in

⁶ At para 98, citing (in n75) *Opitz v Wrzesnewkyj* [2013] 3 SCR 76 (SCC) at para 87 and certain other North American authority.

UDM, in an apparently approving reference to an observation of the President's counsel in that case, "*the Constitution neither requires nor prohibits but in reality permits a secret ballot*".⁷

[46] A decision by the Speaker that a vote should be conducted by secret ballot may in certain circumstances be appropriate in order to promote the effectiveness and efficiency of Parliament, but if she makes the wrong call and a vote by open ballot then proceeds without any demonstrable illegality it cannot be suggested that the members have cast their votes invalidly, for an open vote is not only permissible, it is also consistent with the injunction in s 59(1)(b) of the Constitution and the founding principles of openness and accountability in s 1(d). (We are not called upon in this case to determine whether the same principle would apply if a secret vote took place pursuant to an unlawful choice by the Speaker.)

[47] Rather like the position in respect of the validity of elections, the validity of a vote of the National Assembly falls to be determined with reference to the circumstances of the specific case; cf. *Kham* supra, at para 34. If, for example, the evidence showed that the result of a vote in the Assembly had been materially affected by corruption or unlawful threats the validity of the Assembly's decision would be susceptible to being impugned in court proceedings. A relevant breach of the overarching constitutional principle of legality would have been demonstrated, and it would not be offensive to the separation of powers for a competent court to intervene. That would be so irrespective of whether the ballot had been open or closed.

⁷ In para xx, see also para 64.

[48] Establishing that members cast their votes in accordance with the directions of the political party to which they belonged would not be sufficient, by itself, to establish that their voting rights were not effectively exercised. Under the electoral system that currently prevails members of the Assembly derive their membership of the Assembly based on their deployment to Parliament by a political party.⁸ It was the party, rather than any individual, for which the citizens voted in the elections pursuant to which the National Assembly was constituted. It is well known, and only to be expected, that there will typically be a diversity of views and political philosophies in the membership of any political party, but that for electoral and governance purposes, if it is a party in government, and for electoral purposes, if it is in opposition, members' individual opinions must, for the sake of organisational coherence, generally be subordinated to those adopted by the party as a unit.

[49] It is not unacceptable in open and democratic constitutional dispensations for a parliamentary party to direct its representatives in a legislature to vote in accordance with the party's predetermined position on the motion concerned. That is where the role of party whips comes into play. The term apparently originates in foxhunting parlance, where a "*whipper-in*" is "*a huntsman's assistant who brings straying hounds back into the pack*".⁹ The use of party whips is a common feature in legislatures which

⁸ There have not yet been any elections for the National Assembly under the Electoral Amendment Act, 2023, which permits individuals to make themselves available for election as independent members of the Assembly.

⁹ Oxford Dictionary of the English Language.

replicate or are closely related to the so-called Westminster system.¹⁰ Equivalents to party whips are also found in other legislatures. In Italy and Spain, for example, political parties appoint representatives from their number to enforce party discipline in the legislatures.¹¹

[50] The system of whips does not, of course, mean that a member of the National assembly is obliged to vote in accordance with his or her party's direction. It cannot mean that because members cannot allow their party's directions to override their oath of office. It means only that if they do not follow party directions, they lay themselves open to party discipline, which might entail expulsion from the party and a consequent loss of their seat. That, however, is an inherent feature of a party-based electoral system; it does not expose members of the Assembly to what the Constitutional Court referred to as "illegitimate hardships"¹². The party-political landscape in South Africa has been a constantly evolving one since the beginning of parliamentary democracy based on universal adult suffrage in 1994. It is common knowledge that a number of party-political schisms and mergers during that period have given rise to a number of new parties.

¹⁰ In Australia, Canada, India and New Zealand, for example. Interestingly, the Constitution of India, like the SA Constitution, provides (in s 55(3)) for the election of the President of India by secret ballot. Votes by secret ballot are obviously not subject to control by party whips.

¹¹ In Spain, the equivalent of the party whip (known as the *portuvoz* or *portuvoz adjunto*) casts the party's votes on behalf of its members in the legislature; see article by the political scientist, Manuel Sánchez de Dios, "Parliamentary Discipline in Spain" on the Complutense University of Madrid website <https://www.ucm.es/data/cont/docs/862-2019-12-01-Snachez%20de%20Dios-%20Party%20discipline%20in%20Spain.pdf> (accessed 22 April 2023).

¹² Cf. *UDM* supra, at para 88, and see *Certification of the Constitution of Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 186.

[51] A death threat against a single member of a 400-member legislature also does not seem to us to provide a sufficient basis for a court to intervene by invalidating a resolution adopted by the legislature. As it was, the person in question, Mr Mervyn Dirks of the ANC, disregarded party instructions and voted in favour of accepting the independent panel's report.

[52] As mentioned, the only basis upon which the ATM sought to impugn the National Assembly's resolution not to accept the report of the independent panel was that the open ballot procedure used for the vote followed on the allegedly unlawful refusal by the Speaker of its request for a secret vote. It should be clear from the preceding paragraphs that we do not accept that is sufficient basis for this court, assuming it has the jurisdiction to do so,¹³ to set aside the resolution. The decision of the National Assembly consequently stands. In the face of that fact, the ATM's challenge to the Speaker's decision to refuse its request for a secret ballot is manifestly moot.

[53] Lest we be wrong in our conclusions concerning the mootness of the relief sought in the two applications in respect of the Speaker's decision, we nevertheless proceed to explain why we consider that the challenges were in any event bad.

[54] According to the ATM, the Speaker's decisions were unlawful for three separate and self-standing reasons: First, the Speaker made an error in law by applying an incorrect test when she took the decision to prescribe an open ballot procedure as the voting mechanism for the National Assembly's voting proceedings in both matters. She

¹³ It may be that a vitiating illegality in a vote in the context of Parliamentary proceedings in terms of s 89 of the Constitution would engage the exclusive jurisdiction of the Constitutional Court in terms of s 167(4)(e) of the Constitution.

regarded “*openness*” as the default position for the proceedings and, contrary to the SCA’s decision in the *ATM* case, required the ATM to discharge an onus demonstrating “*extraordinary circumstances*” to warrant the adoption of a closed ballot procedure; secondly, the Speaker’s decision was substantively and procedurally irrational as she ignored relevant considerations concerning the toxic political environment and failed to consider the instruction by the ANC to its members, under the threat of disciplinary action, to vote against establishing an impeachment committee - action which the ATM alleged undermined the Assembly’s duty to hold the President accountable; and, thirdly, the Speaker’s decision was taken in bad faith as she was determined to adopt an open ballot procedure regardless of the facts placed before her.

[55] One of the main arguments advanced by ATM’s counsel was that, despite the SCA decision in the *ATM case*, the Speaker on 16 February 2022 and 9 March 2022, applied a default position in favour of an open ballot and thus committed an error of law. In support of the latter argument, the underlined portions of the letter dated 16 February 2022 were relied upon, namely:

1. *These factors do not lead me to conclude that openness and transparency should not prevail,....*
2. *In this prevailing environment I have had to decide whether a secret ballot procedure is appropriate in light of other constitutional imperatives, including the foundational Constitutional principle of “openness”, as set out in section 1(d) of the Constitution, 1996, as a guide to our democratic order. I am equally cognisant of the Constitutional requirement as set out in section 59(1)(b) that the National Assembly must conduct its proceedings in an open manner. This is the manner in which we conduct our business and the NA Rules are crafted to*

give effect to these principles unless required otherwise by the constitution, and now indeed the courts.

[56] In the Speaker's letter of 9 March 2022, the following underlined portions were relied upon:

"In this letter I will not repeat the contents of my letter dated 16 February 2022, except to state that openness remains the default position and guiding principle that informs how the National Assembly must conduct its proceedings and that since my last letter to you there has been no change in this substantive legal and Constitutional framework to compel a deviation from this position....."

[57] As mentioned, the ATM also argued the real reason for declining the ATM's request for a secret ballot in respect of the vote on the independent panel's report was made known by the Speaker on 5 December 2022, at the programming committee of the National Assembly when she said the following *"You know that once you say secret ballot, it has to be extraordinary circumstances, and that is the only reason why you were not granted a secret ballot."*

[58] According to the ATM, the Speaker had with that statement let slip that the real reason for her decision was the failure of the ATM to demonstrate the existence of *"extraordinary circumstances"*- a reason not disclosed in her abovementioned letter of 4 December 2022. It was further argued that the Speaker deliberately ignored the SCA judgment in the *ATM* case and was determined to exercise her power with a default position in mind.

[59] The legal principles applicable to the exercise of the Speaker's discretion were settled in *UDM*.¹⁴ The National Assembly has made rules in terms of s 57 of the Constitution.¹⁵ The rules make provision for the determination of the voting procedure for a motion of no confidence tabled at a particular time. Rule 102 says that "[u]nless the Constitution provides otherwise voting takes place in accordance with Rules 103 or 104". Rule 103 provides:

"(1) At a sitting of the House held in a Chamber where an electronic voting system is in operation, unless the presiding officer directs otherwise, questions are decided by the utilisation of such system in accordance with a procedure predetermined by the Speaker and directives as announced by the presiding officer.

(2) Members may vote only from the seats allocated to them individually in the Chamber.

(3) Members vote by pressing the 'Yes', 'No' or 'Abstain' button on the electronic consoles at their seats when directed by the presiding officer to cast their votes.

(4) A member who is unable to cast his or her vote, must draw this to the attention of the Chair and may in person or through a whip of his or her party inform the Secretary at the Table of his or her vote.

(5) When all members have cast their votes, the presiding officer must immediately announce the result of the division.

¹⁴ UDM para 67-68

¹⁵ Section 57(1) provides that: "The National Assembly may—

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

(6) Members' names and votes must be printed in the Minutes of Proceedings."

[60] And rule 104 reads:

"(1) Where no electronic voting system is in operation, a manual voting system may be used in accordance with a procedure predetermined by the Speaker and directives to be announced by the presiding officer.

(2) When members' votes have been counted, the presiding officer must immediately announce the result of the division.

(3) If the manual voting procedure *permits*, members' names and votes must be printed in the Minutes of Proceedings."

[61] Sub-rules (1) and (3) of rule 104 permit the Speaker to have "*[e]ven a motion of no confidence in the President voted on by secret ballot. But, when a secret ballot would be appropriate, is an eventuality that has not been expressly provided for and which then falls on the Speaker to determine. That is her judgement call to make, having due regard to what would be the best procedure to ensure that Members exercise their oversight powers most effectively. And that is something she may 'predetermine' as envisaged in rule 104(1).*"¹⁶

[62] In making a decision whether a vote should be by secret rather than open ballot, the Speaker exercises a discretion that is situation-specific and involves taking into account all the prevailing circumstances. Furthermore, as stated in *UDM*, *'the power that vests in the Speaker to determine the voting procedure in a motion of no confidence, belongs to the people and must thus not be exercised arbitrarily or*

¹⁶ *UDM* at para 68.

*whimsically. Nor is it open-ended and unguided. It is exercisable subject to constraints. The primary constraint being that it must be used for the purpose it was given to the Speaker – facilitation of the effectiveness of Parliament’s accountability mechanisms’.*¹⁷

[63] The Constitutional Court, in explaining the various potential advantages for accountability a secret ballot procedure may have, also pointed out the potential disadvantages, stating:

"When the risk that inheres in voting in defiance of the instructions of one’s party is evaluated, it must be counter-balanced with the apparent difficulty of being removed from the Assembly. Openness is one of our foundational values. And the Assembly’s internal arrangements, proceedings and procedures must have due regard to the need to uphold the value of transparency in carrying out the business of the Assembly. The electorate is at times entitled to know how their representatives carry out even some of their most sensitive obligations, such as passing a motion of no confidence. They are not supposed to always operate under the cover of secrecy. Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party’s instructions. These factors must also be reflected upon by the Speaker when considering whether voting is to be by secret or open ballot.

Some consequences are adverse or injurious not so much to individuals, as they are to our constitutional democracy. Crass dishonesty, in the form of bribe-taking or other illegitimate methods of gaining undeserved majorities, must not be discounted from the Speaker’s decision-making process. Anybody, including

¹⁷ Id. para 86.

Members of Parliament or of the Judiciary anywhere in the world, could potentially be "bought". When that happens in a motion of no confidence, the outcome could betray the people's best interests. This possibility must not be lightly or naively taken out of the equation as a necessarily far removed and negligible possibility when the stakes are too high. For, when money or oiled hands determine the voting outcome, particularly in a matter of such monumental importance, then no conscience or oath finds expression.

*The correct exercise of Parliament's powers in relation to a motion of no confidence in the President, must therefore have the effect of ensuring that the voting process is not a fear or money-inspired sham but a genuine motion for the effective enforcement of accountability. When that is so, the distant but real possibility of being removed from office for good reason would serve the original and essential purpose of encouraging public office-bearers to be accountable and fulfil their constitutional obligations.'*¹⁸

[64] It is against that backdrop that the ATM's complaints must be considered. The courts have stressed repeatedly that a rationality review does not provide an opportunity for a party or the court to substitute their preferred views for that of the empowered decision maker. Furthermore, a level of deference by the court is appropriate when it assesses the integrity of a decision that has been taken on judicial review. This is especially so where matters involve polycentric decision-making falling within the special expertise of a decision making body.¹⁹ In our view it is also so where there is a danger of the judiciary trenching on the constitutional domain of another arm

¹⁸ UDM paras 80-82.

¹⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15 (12 March 2004); 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 45-49 and *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36 (15 December 2014); 2015 (3) BCLR 268 (CC), majority judgment at para 78-79. The judgments were concerned with a review of administrative action, but the rule logically also applies when courts assess the rationality of decisions in legality reviews.

of government.²⁰ The sensitivity of involvement by the courts in respect of challenges mounted in the parliamentary context to decisions that are heavily political in character was recognized in the Constitutional Court's judgment in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 (31 March 2016); 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

[65] The ATM's attacks on the Speaker's decisions appear to us to be premised on a cherry-picking analysis of the Speaker's letters and statements. The Speaker's reasons, considered holistically, do not support the ATM's contention that she failed to appreciate 'how' to go about making her decision or that she acted irrationally in making it.

[66] The Speaker's reasons show that she considered the broad conspectus of prevailing circumstances and weighed them with the pertinent constitutional values and provisions in mind. The ATM's requests for secret ballots required of the Speaker in each instance to make a judgement call. Making a judgement call requires of a decision-maker to identify the relevant facts and to weigh their effect with reference to whatever objective considerations are applicable to the issue in hand. The weight to be given to any feature of the issue in arriving at a determination is a matter for the decision-maker. If it is apparent that the decision-maker has applied her mind to the relevant facts and considerations her decision cannot easily be characterised as arbitrary or whimsical. It could be described as irrational only if there were a material

²⁰ Cf. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18 (20 September 2012); 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 63-66

disconnection between the decision she made and the matters she took into account in making it.

[67] It is not open to the ATM to maintain that the decisions were unlawful merely because it disagrees with the Speaker's judgement. It has not identified anything material that the Speaker failed to take into account. We have explained why we do not consider that the Speaker was in any misdirected in not attaching the significance to the ANC's instruction to its members to vote against acceptance of the independent panel's report that the ATM considered she should have.

[68] We are also unpersuaded by the ATM's criticism of the Speaker's decisions because of the weight that she applied to the principle of openness in arriving at them. According to the arguments advanced, the Speaker thereby went against the SCA's judgment in the *ATM* case. We do not agree. The SCA in the *ATM* judgment held that no onus burdened a party requesting a secret ballot. The implication is that the Speaker must consider such requests with an open mind, judging the request inquisitorially rather accusatorially. We think it would be a startling proposition, however, to suggest that the SCA's judgment in the *ATM* case implies that the Speaker does not have to consider such requests mindful of the applicable constitutional values and principles. The SCA's judgment in the *ATM* case did not refer to sections 1(d) and 59(1)(b) of the Constitution, but it is clear that the SCA did not intend to differ from anything in the Constitutional Court's judgment in *UDM*, where (also without reference to s 59(1)(b)) it was acknowledged that in making the decision the Speaker would have to have appropriate regard to the founding value of openness.

[69] The SCA's reference to "the slate being clean" when the Speaker is called upon to make a judgment call as to whether there should be a secret ballot cannot be construed to mean that she must approach the matter with a vacuous mind. It means no more than that she must not approach it on the basis that as a matter of principle there should not be a secret ballot. That is not the same as saying that in making her determination she must not have in mind the relevant constitutional values and provisions. It also does amount to the SCA purporting to prescribe to the Speaker the weight she should attach to openness and accountability when deciding in a given case whether a ballot should be secret. To construe the ATM judgment to that effect would be to set it at odds with the Constitutional Court's judgment in *UDM*, on which the SCA, understandably, relied heavily in its reasoning. That would be counterintuitive.

[70] The evidence leaves us in no doubt that the Speaker placed great weight on the importance of the Assembly's proceedings generally being conducted in an open manner. It appears to us that it was in that context that she said that, save where expressly provided for in the Constitution, secret ballots were used in "extraordinary circumstances". "Extraordinary" connotes something "very unusual".²¹ We think this Court can take judicial notice that it is very unusually that decisions are made by secret ballot in the National Assembly except when prescribed by the Constitution. Having regard to the obvious importance of openness and accountability if the National Assembly is to effectively fulfil its representative role on behalf of the people and to the

²¹ See the definition of "*extraordinary*" in the *Oxford Dictionary of the English Language*.

express provisions of the Constitution that give voice to it, we find no basis to fault the Speaker's approach. It did not come down to placing an onus on the ATM.

[71] We consider that the ATM has read too much into the Speaker's statement in her letter dated 9 March 2022 that "*openness remains the default position*". It is clear to us, given the Speaker's earlier reference to s 59(1)(b) of the Constitution, that she was doing nothing more than reiterating in her own words the import of that provision. There was nothing untoward in that. The Constitution does enjoin the National Assembly to conduct its business in an open manner but does not exclude exceptions to the general rule when those are reasonable.

[72] In our judgment, nothing in the evidence supports the ATM's allegation that the Speaker acted in bad faith.

[73] For all of the foregoing reasons the applications will be dismissed. It needs to be mentioned that in this instance the Speaker did not seek a costs order against the ATM.

[74] Before concluding, however, as promised, we turn to discuss the manner in which the EFF participated in these proceedings.

[75] Civil proceedings in the High Court are governed by the Uniform Rules of Court. The EFF's participation did not occur in a manner provided for in the Uniform Rules.

[76] Rule 6 is the rule primarily regulating proceedings instituted by application. A party cited as a respondent in application proceedings has to be given an opportunity to oppose the application. The applicant is entitled to set an application down for hearing

as an unopposed matter if none of the respondents gives notice of an intention to oppose it. A respondent who wishes to oppose an application is required within a stipulated period after it has given notice of an intention to oppose to deliver its answering affidavits or if it intends to raise any question of law only to deliver a notice setting forth such question. The applicant can thereafter deliver replying affidavits within a stipulated period, whereafter the applicant, or failing that the respondent, can set the application down for hearing.

[77] There is no provision in the rules for a respondent in motion proceedings to deliver supporting papers thereby making itself in effect a co-applicant. If a respondent wishes to be a principal party in obtaining the relief sought by the applicant, it should apply to be joined as a co-applicant so that the other respondents in the matter can answer the case put up by it and so that the exchange of papers and subsequent hearing can proceed in the structured manner contemplated by the rules. On any approach, a respondent which chooses to act as if it were a co-applicant must expect to find itself treated as a co-applicant for costs purposes should any of the opposing respondents ask for a costs order against it.

[78] In the result following orders are issued:

In case no. 7186/2022:

(a) The application is dismissed.

(b) The applicant shall pay the costs of suit of third respondent including the fees of two counsel.

In case no. 21574/2022:

(a) The application is dismissed.

(b) The applicant shall pay the costs of suit of third respondent including the costs of two counsel.

LE GRANGE, J

BINNS-WARD, J

THULARE, J

Legal Representatives:

For the ATM:

Advocates Mr. Anton Katz, SC assisted by Messrs. MFundo Mhambi and Kessler Perumalsamy.

Instructed by Ashersons Attorneys.

For the Speaker:

Advocates Mr. Steven Budlender, SC assisted by Ms. Ncumiso Mayosi.

Instructed by the State Attorney.

For The ANC:

Advocates Mr. Tembeka Ngcukaitobi, SC assisted by Mesdames. Lerato Zikilala, Natali Chesi-Buthelezi and Mr. Ntokozo Qwabe.

Instructed by K N Attorneys.

For the EFF:

Advocate Mr. Mfesane- Sibito.

Instructed by Levitt Attorneys.