IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **21471 /2014**

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS	First Applicant
JULIUS SELLO MALEMA	Second Applicant
FLOYD SHIVAMBU	Third Applicant
PAUL RAMAKATSA	Fourth Applicant
GODRICH GARDEE	Fifth Applicant
MBUYISEN NDLOZI	Sixth Applicant
LITCHFIELD KHANYISILE TSHABALALA	Seventh Applicant
JOHN ANDILE MNGXITAME	Eighth Applicant
NTHAKO MATIASE	Ninth Applicant
HLENGIWE OCTAVIA MAXON	Tenth Applicant
ELSABE NATASHA LOUW	Eleventh Applicant

MAGDALENE MOONSAMY	Twelfth Applicant
NGWAJAMAKWETLE RENIOLEO MASHABELA	Thirteenth Applicant
ASANDA MATSHOBENI	Fourteenth Applicant
NOKULUNGA PRIMROSE SONTI	Fifteenth Applicant
MAKOTI SIBONGILE KHAWULA	Sixteenth Applicant
NTOMBOVUYO MENTE-NGWENISO	Seventeenth Applicant
PUMZA NTOBONGWANA	Eighteenth Applicant
KGOTSO ZACHARIAH MORAPELA	Nineteenth Applicant
DANIEL JOSEPH	Twentieth Applicant
MOSES SIPHO MBATHA	Twenty-First Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY	
REPUBLIC OF SOUTH AFRICA	First Respondent
BALEKA MBETE N.O.	Second Respondent
BUAONG LAMIS MASHILE N.O.	Third Respondent
JACOB GEDLEYIHLEKISA ZUMA N.O.	Fourth Respondent

Coram: ***Bozalek J et Dlodlo J et Mantame J***

Date of Hearing: **30 and 31 October 2017**

Date of Judgment:

JUDGMENT

DLODLO, J

INTRODUCTION

[1] This matter arose from the well-publicised chanting during the appearance in Parliament by the fourth respondent ('the President of the Republic') on 21 August 2014, that he must *'[p]ay back the money'*. The President appeared in Parliament in order to answer questions in terms of his constitutional responsibility to account to Parliament. The questions he was to answer appeared in a Parliamentary Paper annexed in the papers as 'BM9'. The sequence of events leading to (and including the chanting) is best appreciated when one has regard to both the unrevised Hansard for the proceedings on 21 August 2014 and the two DVD's of the proceedings of the day.

[2] This is the return day of a two-pronged application brought by the applicants on 14 December 2014. Part A was an application for urgent interim relief to interdict the Speaker of the National Assembly ('the Speaker') or anyone acting under her authority from implementing a decision taken by the National Assembly ('Parliament') on 27 November 2014 to impose a sanction of suspension without remuneration on the applicants. It is common cause that the relief in Part A was sought pending the outcome of the application in Part B. My brother, Davis J, granted the urgent application in respect of Part A in a judgment dated 23 December 2014. What is before us is the determination of the relief sought in Part B.

[3] The first to third respondents delivered the record in terms of Rule 53 (1) (b) of the Uniform Rules of Court on 20 March 2015. When no steps were reportedly taken by the applicants to bring the matter to finality despite invitations to do so, the first to third respondents delivered further answering affidavits on 23 December 2016 and 23 March 2017, respectively. Noticeably, no replying

affidavit has been delivered by the applicants in response to the further affidavits mentioned.

[4] It is of importance that it be mentioned that the applicants seek final relief in Part B, namely: (a) A declaratory order that the decision taken by the National Assembly on 27 November 2014 to adopt the report of the Powers and Privileges Committee ('the Committee') suspending the applicants without remuneration is constitutionally invalid and unlawful and is of no force or effect ('the first prayer'). (b) The proceedings in terms of which the second to twenty first applicants were charged and found guilty ('the disciplinary proceedings') of misconduct are reviewed and set aside ('the second prayer'). (c) The report of the Committee is reviewed and set aside ('the third prayer'). (d) A declaratory order that the National Assembly has failed to carry out or fulfil its obligations in accordance with the provisions of Section 55 (2) of the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution') to ensure that all executive organs of state in the national sphere of government are accountable to it, and to maintain oversight of the exercise of National Executive authority, in that it has failed to ensure that the President of the Republic of

South Africa (Mr JG Zuma), has accounted in relation to the steps that he is required to take in order to comply with the findings in the report by the Public Protector dated March 2014, under the heading: 'Secure in comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Zuma at Nkandla in the Kwa-Zulu Natal province ('the Public Protector's Report') ('the fourth prayer'). (e) A declaratory order that the first respondent has failed, in her capacity as the Speaker of the National Assembly to ensure that the National Assembly complies with its obligations and exercises its powers in accordance with Section 55 (2) of the Constitution to ensure that the President (as head of the National Executive), is held accountable to it in relation to giving effect to the findings in the Public Protector's Report ('the fifth prayer'). (f) A declaratory order that Ms Mbete as Speaker of the National Assembly, forthwith ('the seventh prayer').

[5] In passing it must be mentioned that there are a number of other prayers contained in Part B (set out *supra*) which relate to the

President as well as the Speaker. Some of the relief in Part B falls within the exclusive jurisdiction of the Constitutional Court in terms of Section 167 (4) (e) of the Constitution. The latter provision states that only the Constitutional Court can decide whether Parliament or the President have failed to fulfil a constitutional obligation.

THE FACTUAL BACKGROUND

[6] It is no exaggeration to say that the proceedings of Parliament on 21 August 2014 descended into chaos due to the conduct of the applicants. The conduct of the applicants was considered by the Speaker to constitute a deliberate contravention of the Rules of Parliament ('the Rules'), disruptive, contemptuous of Parliament and that it amounted to gross disorder. The behaviour was such that it was described by the Chief WHIP of the Official Opposition Party (the Democratic Alliance) as *'unacceptable'* and *'unprecedented'*. Mr Steenhuisen corroborating the evidence of the Deputy Chief Whip of the Majority said that some members expressed disdain in regard to the behaviour of the affected members and at what happened in the House and that their behaviour was unacceptable. He went on and stated that what had happened in the House on that day was a new experience for

members who had been in Parliament before. According to Steenhuisen this was unprecedented and that parliamentary officials were '*in confusion about what actually need(ed) to take place, probably because this has not really happened in Parliament before'*. He went on to explain that *'I don't think its anything we were prepared for'*. As a result, the Speaker suspended the proceedings. The Speaker thereafter referred the incident to the Committee in terms of Rule 194 of the Rules, for investigation into whether the conduct of the applicants constituted contempt in terms of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ('the Powers, Privileges and Immunities Act').

[7] In the founding papers, the applicants aver that the reason they were ultimately disciplined for the events of 21 August 2014 is simply that they were demanding that the National Assembly should play its proper constitutional function of holding the National Executive to account. According to the applicants they are being victimised for carrying out their lawful constitutional duties. In this regard it is significant to quote Mr Julius Sello Malema, the leader of the Economic Freedom Fighters ('EFF') and the deponent to the founding affidavit: *'……..the charges against the applicants emanate from the demand of the EFF that the National Assembly should play its proper constitutional function of holding the National Executive to account. Parliament*

should not be reduced to a mere a lapdog (sic) of the ruling party. I contend that the applicants are being victimised for carrying out their lawful constitutional duties, and deny that members of the EFF have committed any misconduct. Specifically the EFF is being victimised for making a legitimate demand in calling upon the National Assembly to require the President to explain the steps that he intends taking to carry out the recommendations of the Public Protector in the report aforementioned…….that the proceedings of the Powers and Privileges Committee, its report and the decision of the National Assembly to adopt the report violate the constitutionally protected rights of the members of the EFF who serve in Parliament on its behalf. Furthermore, the decision is a violation of the rights of the voters and supporters of the EFF, which are protected by Section 19 of the Constitution. The voters, who have elected the EFF to serve in Parliament, are entitled to be represented by the EFF until the end of the term. They cannot be deprived of such rights and entitlements by the unlawful conduct of the National Assembly.'

[8] However, contrary to the above, for the first to third respondents, the case raises important questions regarding the dignity and decorum of proceedings of the National Assembly. It is the manner in which the applicants behaved - and neither the questions to the President, nor his answers – that are at issue in this application. As a result, this case hardly concerns the status of the Public Protector's Report. Of course that issue has been determined by the Constitutional Court and does not directly arise in this case.

CONTENTIONS AND SUBMISSIONS

ON APPLICANTS' BEHALF

[9] Dealing with the disciplinary proceedings against the applicants, Mr Ntsebeza on behalf of the applicants, contended that the full history is now recorded in the Constitutional Court judgment. In his contention, the genesis lies in improvements made to the President's home after the latter's election as President in 2009. He referred rather extensively to the content of the Public Protector's Report in the above regard. The applicants contended that the conduct of the President did not only violate his own responsibility as the President but undermined the independence and effectiveness of the Public Protector. The National Assembly is said to have failed to hold the President accountable in relation to the flagrant breaches of the constitution. In Mr Ntsebeza's contention, the EFF's original position was fully vindicated by the findings of the Constitutional Court in the Nkandla judgment. He specifically referred to the fact that the Constitutional Court held that the President's failure to comply with the Public Protector's remedial action constituted a violation of his obligations in terms of Section 83 (b) of the Constitution, read with Sections 181 (3) and 182 (1) of the Constitution. Mr Ntsebeza enumerated various findings made by the Constitutional Court against the President in

the Nkandla matter and contended that these constitute a background that the disciplinary action taken against the applicants must be viewed. In his view, when the applicants demanded payment of the money in compliance with the Public Protector's report, they were acting in the discharge of their functions as members of the National Assembly. He referred this Court to **United Democratic Movement v Speaker of the National Assembly and Others** 2017 (8) BCLR 1061 (CC) where the Constitutional Court held of the members of the National Assembly individually and collectively as follows:

'Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution.

[10] Mr Ntsebeza maintained that when the members of the First Applicant demanded the payment of the money by the President, not only were they were fulfilling a duty. In his submission, when the Speaker refused to ensure compliance with the remedial

action, she was violating her Oath of Office, and by extension the obligations of the National Assembly. The following assertion by Mr Ntsebeza must be quoted:

'……the disciplinary inquiry against the applicants did not meet the requirement of reasonableness and fairness that are contained in the applicable legislation. But they have been challenged here in part because their ultimate goal was to serve an unconstitutional purpose: the goal of disciplining the applicants was to suppress the fulfilment of their constitutional obligations. This simply could never be a lawful and legitimate purpose for a disciplinary inquiry. Members of the National Assembly should not be required to act in pursuit of party loyalty, at the expense of the Constitution'.

In Mr Ntsebeza's contention members can only be disciplined if the conduct is not a reaction to a legitimate demand for constitutional compliance. He maintained that what actually happened was that the Speaker in pursuit of party loyalty was attempting to supress the EFF and its members from carrying out their obligations and, in turn, insisting that the National Assembly must carry out its obligations. I do not necessarily agree with these submissions but it is necessary to set them out in order to deal with them fully in the discussion that is to follow.

[11] On behalf of the applicants it is contended that the Speaker was wrong in referring allegations of gross disorder to the Powers and

Privileges Committee only against members of the EFF because members of other political parties were also party (participated) to the disorderliness that took place in the House. Importantly, the complaint is made in the founding papers that the Committee concerned constitutes of 11 members, six of whom being members of the ANC, two of the Democratic Alliance, one EFF member, one IFP member and one United Democratic Movement member. The complaint is that the committee was dominated by members of the ANC pursuant to its majority status in Parliament. The contention is further that while there is no obligation on the committee to sit or be constituted differently, there is a clear legislative requirement that it must act reasonably and procedurally fair. The EFF contended that it could not reasonably expect to receive a fair hearing in front of the political opponents who were *'clearly partisan to the President'*. Mr Ntsebeza was at pains in pointing out that the case of the EFF is that in view of the fact that there is no legislative injunction that the committee must conduct the disciplinary inquiry itself, it was within its power to ask a different body to conduct the fact-finding stage of the inquiry. Mr Ntsebeza in the above regard continued contending as follows:

'That those facts would subsequently be presented to the Committee for decision-making would be unavoidable. But, that the requirement of reasonableness and procedural fairness would have been satisfied.'

[12] Mr Ntsebeza argued that what transpired in Parliament was actually an exercise of free speech which remains a bulwark against tyranny. He placed reliance on the **Democratic Alliance v Speaker of the National Assembly and Others** 2016 (3) SA 487 (CC) at paras 11 and 17 reading, *inter alia*:

'South Africa is a constitutional democracy. Hard-won democracy that came at a huge cost to many; a cost that included arrest, detention, torture and – above all – death at the hands of the apartheid regime. The importance of our democracy, therefore, cannot be overstated. It is the duty of all – in particular the three arms of state – jealously to safeguard that democracy. Focussing on Parliament, the pluralistic nature of our parliamentary system must be given true meaning. It must not start and end with the election to Parliament of the various political parties. Each party and each member of Parliament have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making. By its very nature, Parliament is a deliberative body. Debate is key to the performance of its functions. For deliberation to be meaningful, and members effectively to carry out those functions, it is necessary for debate not to be stifled. Unless all enjoy the right to full and meaningful contribution, the very notion of constitutional democracy is warped.

…

Parliament is also entrusted with the onerous task of overseeing the Executive. Tyrannical rule is usually at the hands of the Executive, not least

because it exercises control over the police and army, two instruments often used to prop up the tyrant through means like arrest, detention, torture and even execution. Even in a democracy, one cannot discount the temptation of the improper use of state organs to further the interests of some within the Executive. Needless to say, for Parliament properly to exercise its oversight function over the Executive, it must operate in an environment that guarantees members freedom from arrest, detention, prosecution or harassment of whatever nature. Absent this freedom, Parliament may be cowed, with the result that oversight over the Executive may be illusory'.

In Mr Ntsebeza's submission, Section 58 of the Constitution is implicated in this matter because the applicants were merely performing their constitutional duty and exercising their freedom of speech in the House. In his contention the rules and the Act under which the applicants are charged are subservient to the Constitution. Mr Ntsebeza emphasised that in interpreting the rules and the Act, effect must be given to the rights of the members of the Assembly to freedom of expression. In Mr Ntsebeza's submission, the decision to charge the EFF members was but a violation of freedom of speech in that (in his view) the true issue is that the EFF was punished for speaking. *'It complained about the matter of burning national importance that continues to bedevil our constitutional democracy. It is quite improper for the National Assembly to in essence charge the EFF for misconduct, when in reality the misconduct flows from what has been said in Parliament'* – so argued Mr Ntsebeza.

[13] In Mr Ntsebeza's submission, there is simply no evidence that the specified members improperly interfered or impeded the exercise of the authority of the Assembly. He continued and stated that when members rise to speak on a point of order, it is illogical to equate that with impeding the business of the House. He cautioned, *'it does not matter if there has or has not been prior recognition by the Speaker. The fact is that a point of order is recognised under the Rules. Similarly, when members rise to speak, it is upon the Speaker to give them due recognition to express their views and to make a ruling in relation to what has been said.'* Another point made by Mr Ntsebeza is that the business of accounting to the House is imperative and that the Speaker cannot simply allow the President to answer questions posed by members of the National Assembly in any manner that he deems appropriate. In this regard Mr Ntsebeza referred to paragraph 85 of the **Nkandla** judgment where the following appears:

'The National Assembly's attitude is that it was not required to act on or facilitate compliance with the report since the Public Protector cannot prescribe to it what to do or what not to do. For this reason, so it says, it took steps in terms of section 42(3) of the Constitution after receipt of the report.

Those steps were intended to ascertain the correctness of the conclusion reached and the remedial action taken by the Public Protector, since more was required of the National Assembly than merely rubber-stamp her report. Broadly-speaking, this is correct because 'scrutinise' means subject to scrutiny. And 'scrutiny' implies a careful and thorough examination or a penetrating or searching reflection. The Public Protector's report relates to executive action or conduct that had to be subjected to scrutiny, so understood.'

In Mr Ntsebeza's contention, the Committee acted procedurally unfairly and unreasonably when it excluded from its deliberations the statement by Mr Malema.

DISCUSSION OF THE MERITS OF THESE REVIEW PROCEEDINGS

[14] As already shown in the introductory portion of this judgment and in the submissions made on behalf of the applicants, it is of importance to focus intently on the complaints made by the applicants. As to the first prayer the complaint is that the merits of the Committee's Report were not properly debated in the National Assembly; that there were sharp disputes of facts between members of the ANC and members of opposition parties who were in the Committee. Another complaint is that copies of the charge sheets; written submissions of the EFF; a copy of the Hansard

recording the deliberations of 21 August 2014, video footage should have been made available to the National Assembly on 27 November 2014 in order for the National Assembly to properly apply itself to the Committee's Report. However, the reading of the answering papers paint a different picture. The Deputy Speaker of the National Aseembly, one Solomon Lechesa Tsenoli (he presided over the proceedings of 27 November 2014 when the Committee's Report was tabled, debated and adopted in the National Assembly) denies the allegation that the merits of the Report were not debated. He states that the Committee's Report had appeared in the 'Announcements, Tablings and Committee Reports of Parliament' on 11 November 2014 to enable members to engage in debate when the opportunity arose. It is important to mention that the Deputy Speaker's evidence in this regard is not challenged at all. We gather from the answering papers that on 27 November 2014 various inputs were made by different political parties engaging in debate. These included the Democratic Alliance, the NFP, the UDM, the VF Plus, Cope, the ACDP, the AIC and Agang. It remains Mr Tsenoli's unchallenged evidence that after the debate on the Committee's Report, the third applicant moved to amend the Report. However, the third applicant repeatedly failed to cooperate and comply with the Rules of the

National Assembly. He specifically would not adhere to the time allocated to him and he created disorder in the House and he was eventually disallowed from proceeding with his motion. According to the evidence by Mr Tsenoli, Mr Waters of the DA also moved to amend the Report. The DA called for division of the House and indeed the House divided and the matter was put to a vote. The result was that the proposed amendment was not passed. The motion to adopt the Report was put to a vote and that resulted in the adoption of the Report.

[15] It is accordingly incorrect to say that there was no debate on the Committee's Report. The answering papers reveal that the matter was discussed and debated for more than 5 hours. We gather that there were no complaints on that date that certain information which should have been supplied was not supplied. The adoption of the Committee's Report was indeed by majority, in accordance with Section 53 of the Constitution. The latter section provides that all questions put before the Assembly are decided by a majority of the votes cast. That there were disagreements between members of different parties is to be expected in the business of Parliament. It needs to be borne in mind that the Constitutional Court stated in

Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC) para [37] that the purpose served by Section 53 is that it contemplates the making of a decision in relation to an unresolved question, naturally, because members may disagree on the decision to be made.

[16] As foreshadowed, *supra* the applicants allege that the disciplinary proceedings should be nullified on the ground of non-compliance with the requirements of procedural fairness and unreasonableness. It is alleged that there is no factual foundation for the charges against the applicants. It has been mentioned that the applicants alleged that the composition of the Committee rendered the disciplinary proceedings unreasonable and procedurally unfair in that the Committee could have been reconstituted to ensure political balance and fairness. In the alternative it was argued that the matter could have been chaired by an impartial, outside person such as a retired judge. The failure to take the written representations into account constituted a material irregularity that tainted the entire process. Another complaint is that certain witnesses were not called to give evidence.

REASONABLE AND PROCEDURALLY FAIR HEARING

[17] Section 12 (3) of the Powers, Privileges and Immunities Act requires that before any disciplinary action is taken against a member, the Committee must enquire into the matter in accordance with a procedure that is reasonable and procedurally fair. On the other hand, Rule 138 entitles the Committee to determine its own procedure which must comply with Section 12 (3). Rule 194 (2) (a) states that upon receipt of a matter relating to contempt or misconduct by a member, the Committee must deal with the matter in accordance with the procedure contained in the Schedule to the Rules. The Schedule to the Rules sets out the procedure to be followed in the investigation and determination of allegation of misconduct and contempt of Parliament.

[18] The decisions taken by the Committee regarding process were taken on 1 September 2014 and this appears in the minutes of that

date. See Annexure 'BLM3' and Mashile further affidavit paras 11-17. According to Mashile's further affidavit at paras 21 – 21.2 despite the resolutions of 1 September 2014, procedural queries arose throughout the proceedings of the Committee, mainly regarding the content and manner of bringing the preferred charges against the applicants; the status of, and approach to the written representations; and what witnesses should be called. Understandably often, opinion was divided across party lines. The evidence shows that when these issues arose, discussions would be held, and/or opinion sought from the parliamentary legal advisors. Mr Duminy, on behalf of the respondents, is of course correct in submitting that the above approach of dealing with procedural issues was reasonable and fair. A mention must be made that Section 3 (2) (a) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') recognises and reaffirms what had long been axiomatic in common law, namely that a *'fair administrative procedure'* depends on the circumstances of each case. What procedural fairness requires depends on the particular circumstances of each case.

THE COMMITTEE ESTABLISHED IN TERMS OF

RULE 191 AND SECTION 12 (2) OF THE POWERS,

PRIVILEGES AND IMMUNITIES ACT

[19] The committee was established in terms of the relevant Rule and Section as set out above. As contemplated in subsection 12 (1) read with subsection (2), it is a standing committee mandated to enquire into any act or matter declared in Section 13 to be contempt of Parliament and which is referred to it by the House. The Committee in question was constituted in accordance with Rules 192 read with Rules 121 and 125. The latter Rule (Rule 125) provides that parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly. It is thus axiomatic that in accordance with Section 46 of the Constitution every Committee, unless otherwise specified, is constituted according to the constitutionally enshrined principle of proportional representation. Of course decisions in the Committee are made by majority vote. In the instant matter the papers make it apparent that the EFF participated in this process and it submitted the name of the third applicant as a member of the Committee with the seventh applicant as the alternate member.

[20] According to Mashile's further affidavit at paragraph 8 thereof, because the third applicant was one of the members charged with misconduct, as was the alternate member (the seventh applicant), the EFF was requested to nominate someone who was not one of those who had been charged to serve on the Committee for purposes of the proceedings. Indeed the EFF nominated Mr Matlhoko whom, I am told, was later replaced by one Mr D L Twala. The latter had been observing the proceedings before replacing Mr Matlhoko. The aforegoing has not been disputed by the applicants. In accordance with the provision of Rule 194 (2), the Committee must elect a chairperson. It may elect an acting chairperson when the chairperson is not available. The answering papers reveal that the chairperson of the Committee at the time of the events relating to the matter at hand was elected in accordance with the latter Rule.

[21] It is provided by Rule 12 (3) of the Powers, Privileges and Immunities Act that the standing committee must enquire into the matter and table a report on its findings and recommendations in the House. Needless to mention that these functions are delegated (as it were) to the Committee by the statute. There is clearly no

room for a further delegation of these powers to yet another body (as suggested by the applicants). Accordingly, the Committee is by law required to sit as the disciplinary Committee itself. I am of the view that if the Committee had the power to delegate its functions, this would have been further stated in Rule 138 of the Rules of the National Assembly dealing with the General Powers of the Committees. The point is that there is no such provision. Importantly, Part 7 of the Rules of the National Assembly dealing particularly with Powers and Privileges Committee does not contain any provision permitting delegation of these functions to any other Committee, subcommittee or some other body.

[22] In any event (as gathered from the answering papers) at no stage did anybody object to the chairperson (Mr Mashile) presiding over the disciplinary proceedings or even suggest that the Committee should obtain the services of someone from outside Parliament to preside. I am told that the issue never arose at the meeting of 1 September 2014 where (reportedly) the procedural aspects of the proceedings were discussed. This is clearly set out in Mashile's first answering affidavit and it has not been denied by the applicants. I am told that the meeting of 1 September 2014 was

attended by the third and the seventh applicants as well as Mr Madisha of COPE (who came to observe).

[23] Before concluding on this aspect, it is perhaps of some importance that one mentions the following happening. Before the commencement of the disciplinary proceedings, the first and second applicants brought an application in this court under case number 17269/2014 for an interdict restraining the Committee from conducting the disciplinary proceedings. In that particular case the present second applicant made allegations similar to the ones made in the present application concerning the composition of the Committee. Even in the interdict application, the present second applicant claimed that the composition of Committee was a basis for perceiving bias against the members of the first applicant. The interdict applicant was dismissed by this Court. I can perceive no basis for the claim that the composition of the Committee is biased, unfair or unreasonable. I remain unpersuaded in this regard. The fact is that Parliament works with Committees. It cannot be that each time the Committee is given work to do, it passes such responsibility to some other outside body. That would be illegal and untenable.

[24] In my view, it is completely unnecessary to consider individual charges preferred against applicants either individually or collectively. It suffices to mention in passing that the ANC members who rose to address the House were recognised by the Speaker. The allegations of inconsistency and bias appear to be unfounded. As to the second charge the applicants allege that no reasonable basis existed to find them guilty because Rule 51 imposes no obligation on members and that it is only Rule 53 (1) that does impose an obligation. They claim that the Hansard shows that no member was ordered to withdraw from the chambers or was suspended or named. Rule 51 (1) provides that *'A member ordered to withdraw from the Chamber or suspended or named, shall, subject to subrule 2, forthwith withdraw from the precincts of Parliament'.* The latter Rule therefore contemplates a withdrawal which is ordered in terms of Rule 51. The undisputed evidence of the Sergeant-at-Arms (Ms Regina Mohloni), was that the Speaker requested her assistance in removing the applicants from the chamber – she approached the second and the third applicants requesting them to leave the Chamber and they refused. That

much can also be seen and heard when viewing the DVD recordings.

[25] The applicants claim with regard to the third charge that it is unfounded in that Mr Holomisa did not give evidence at the disciplinary enquiry. The fact is that the Speaker recognised Mr Holomisa to address the House on numerous occasions, but, on all those occasions, the latter was interrupted by the applicants. The Hansard has it that at one stage Mr Holomisa exclaimed *'Haibo'* as a result of the interruptions. There is more than enough evidence from the recordings that Mr Holomisa was prevented from asking a question. It is not speculation that other members of Parliament might have wished to ask the President further questions. Annexure *'BM9',* the Question Paper for the day, indicates that there were 6 questions set down for reply by the President. Chaos developed during the third question and the proceedings of Parliament were suspended for the remainder of the day. In fact, according to the evidence of Mr Xaso, the business of the day was suspended due to grave disorder. The applicants deny the fourth charge and they allege that ANC members are also guilty of the same offence but were not charged with any misconduct. The court

was accorded an opportunity to view the DVD recordings of the events in Parliament on the day in question. The DVD recordings shows the applicants continuing to shout and disrupt the proceedings even as the Speaker attempted to suspend the proceedings. It is not specified by the applicants which members of the ANC *'are also guilty of the same offence'*.

[26] In terms of the Guide to the Rules, Chapter 11, paragraph 55 thereof, a member raising a point of order *'must direct attention to the point complained of, and submit it to the decision of the Chair. It is for the Chair to decide whether and to what extent a point of order may be discussed, and when the Chair is prepared to rule, no further discussion will be allowed'*. In the instant matter though, the applicants repeatedly refused to accept the rulings of the Speaker on their point of order, wanting more discussion and claiming they had further points of order. However, these were not points of order. It was nightmare for the Speaker to steer the ship forward. As to the 6th charge, the applicants deny the charge on the basis that they only started chanting and banging tables after the House had been adjourned. The applicants also allege that members of the ANC were rowdy but they were not charged.

However, the evidence shows that the chanting and banging of tables was not the only disturbance that day. According to the Speaker the chanting (but not the shouting) occurred after the sitting was suspended. The applicants clearly disrupted the proceedings and they behaved in such a gravely disorderly manner that the proceedings were suspended. In the Speaker's own words *'the suspension of the Assembly was due to the unruly behaviour of the EFF members, nothing else.'* Notably, the seventh charge was against all the applicants for remaining in the Chamber after the sitting had been temporarily suspended so that they could leave or be removed from the Chamber in order for the House to continue with the business of the day. It is so that the applicants contend that it was not only members of the EFF that did not leave the Chamber, but that there were also members of the public and members of the ANC. The fact of the matter though, is that the applicants refused to leave the chamber when they were asked to do so by the Sergeant-at-Arms and by the Speaker. This is indeed more evident when the DVD recording is viewed. As far as it is alleged that members of the public remained in the House, one must merely point out that the Rules of Parliament apply to members of Parliament and not to the public. The members of the public are merely spectators in Parliament. Thus, the alleged

members of the public could not be charged on similar terms as the EFF members. I have come across no evidence that members of the ANC refused to vacate the Chamber when asked to do so.

THE WRITTEN REPRESENTATIONS

[27] Item 4 of the Schedule to the Rules provides as follows:

> *'4. Explanation by member. If the member wishes to give an explanation after receiving the notice, he or she may do so either verbally or in writing. Such explanation may also be presented at the hearing.'*

The Chairperson of the Committee explained that the notices to attend the hearing notified the charged members in terms of Item 4 of the Schedule that if they wished to give an explanation after receiving the notices they could do so either verbally or in writing. They could present such oral explanation at the hearing. If, however, they opted for a written explanation, they should submit the explanation to the Chairperson before the hearing for the Committee's consideration. We are told that despite that notification, there was no prior submission of a written statement from the applicants. And immediately after reading the written statement, the second applicant announced that the applicants would not be participating in the disciplinary proceedings.

[28] Mashile testifies in the further affidavit at paragraphs 38 to 39 that the legal advice obtained from the Parliamentary legal advisor was that the written representations should be accommodated in terms of item 4 of the Schedule to the Rules which permits a member to make a written or verbal explanation after receiving notice of a charge. The legal advice was (reportedly) further that the written representations did not constitute evidence given under oath which could be questioned by members of the Committee. Given the fact that after the second applicant read the written representations, the applicants had abandoned the proceedings and expressed that they would not be participating, the advice was reasonable.

[29] The issues raised in the written statement were taken into account by the Committee. Importantly, (a) The legal advice obtained by the Committee was that the High Court had already pronounced on the legality of the proceedings in the urgent application, and had pronounced that the disciplinary proceedings were in terms of the Act, and were in terms of the law. (b) Regarding the alleged bias by ANC Committee members and because of certain statements alleged to have been made by the ANC General Secretary, it was advised that in terms of the case law, one must look at what

happened in the hearing rather than prejudge it. (c) Regarding the composition of the Committee, the legal advice obtained was that the Committee was constituted in accordance with the Rules of the National Assembly and that a challenge to the composition should challenge the Rules. This issue was aligned to the allegation that the Speaker had considerable power over the majority of members of the Committee because of her position as ANC Chairperson. (d) The issue of charges was discussed and the legal advice was solicited. It was explained that the task of the Committee was to decide on whether the applicants were guilty or not. In those circumstances, it was considered fair to leave the task of formulating the charges to the initiator, so as to avoid perceptions of bias, political interference and procedural unfairness. See Mashile further affidavit. (e) In the latter's further affidavit at paragraph 43 it is pertinently made clear that the applicants' version of what happened on 21 August 2014 and the evidence to be considered was indeed considered by the Committee when considering other witnesses' evidence. That was in accordance with the resolution of the Committee to do so (this assertion was not disputed in reply). (f) The fact that the Speaker had invited the applicants to justify why they should not be suspended was certainly in accordance with the item 10 and 11 of the Schedule

and was indeed within the powers of the Speaker. (g) According to the undisputed evidence by Mashile, the view that the Speaker should be called as a witness was debated by the Committee and after deliberations the Committee resolved not to call the Speaker. The appropriate sanctions to be awarded were fully discussed by the Committee. Lastly, according to undisputed evidence by Mashile, the Committee was unanimous in rejecting the first two recommendations made in the written representations that the entire process be stopped and that the Committee should table a report recording a decision to withdraw charges against the affected members. We are told the Committee held the view that, having received a reference from the Speaker, it was obliged to enquire into the matter and report its findings and recommendations to the National Assembly. In this regard the Committee was correct. Similarly, the third recommendation contained in applicants' written representations, is patently beyond the powers of the Committee in the context of a referral under Section 12 of the Act. The respondents, therefore correctly denied that the issues raised in the written representations were not taken into account by the Committee.

[30] The applicants allege that the President, the Speaker and Mr Holomisa should have been called as vital witnesses. Perhaps, one only needs to point out that the applicants give no reasons why these individual officials were necessary witnesses. In this regard the applicants have failed to make out a case. They state that the President should have been called as the *'principal complainant'*. Obviously, the applicants are mistaken in this regard and hardly have basis for such an assertion. It is trite that the complainant was in fact the Speaker in terms of her powers under Rule 194. Importantly, the view that the Speaker should have been called as a witness was debated and after deliberations on 14 October 2014 the Committee resolved not to call the Speaker. Clearly, in the light of all the witness evidence before the Committee, the Committee did not consider the Speaker a necessary witness. The same applied to Mr Holomisa. It is alleged by the applicants that the Committee did not consider the evidence before it. In response to this, this Court can do no better than merely referring to the undisputed evidence tendered by Mashile. Mashile stated, *inter alia*, the following: *'On 21 October 2014 after hearing the evidence of the last witness, the Committee agreed to reconvene on 28 October 2014 for the initiator to deal with the evidence. On 28 October 2014 the initiator submitted his "principal*

Submissions in Relation to Allegations of contempt of Parliament." It ran into 172 pages…...The initiator went through the entire set of submissions before the Committee. There were no queries regarding the initiator's submissions…….The deliberations of the Committee on the evidence are reflected at pages 15 to 40 of the Committee's Report. I emphasised to the Committee its duty to consider all the evidence available before it and to recommend findings on a balance of probabilities. The votes of the various Committee members on each charge levelled against each affected member are reflected in the Committee's Report…….The Committee deliberated and voted on each charge against each member separately'. It suffices to state that it is clear (when regard is had to the Committee's Report) that the Committee members applied themselves to the evidence led at the disciplinary proceedings.

REVIEW OF THE COMMITTEE'S REPORT AND

SECTION 55 (2) OF THE CONSTITUTION

[31] It is of significant importance to bear in mind that the Committee's Report was compiled pursuant to Section 12 (3) of the Powers, Privileges and Immunities Act and Rules 194 (2) (b) and (c). These provide as follows:

'(b) The Committee must table a report in the Assembly on its findings and recommendations in respect of any alleged contempt of Parliament, as defined in section 13 of the Act, or misconduct.

(c) If it is found that a member is guilty of contempt or misconduct, the Committee must recommend an appropriate penalty from those contained in section 12 (5) of the Act'.

A point must be made that the Committee's Report is not at all an administrative action as defined in PAJA. The Report has no legal effect, whether internal or external. It is and remains preparatory to a decision by the House. It only has an effect if it is adopted by the National Assembly. It is pertinently clear from Section 12 (1) of the Act under discussion that it is the House itself that takes disciplinary action against a member and not the Committee. In short, because the Committee's Report is not in law susceptible to review under PAJA, there is obviously no merit to prayer 3 of Part B in these proceedings.

[32] Section 55 (2) of the Constitution provides in express terms:

'The National Assembly must provide for mechanisms-

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of-

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state.'

Clearly, the duty placed in Section 55 (2) is upon the National Assembly and not the Speaker. The Rules of the National Assembly are ordinarily the mechanisms envisaged by Section 55 (2). In the latter regard See **Mazibuko NNO v Sisulu NNO** 2013 (6) SA 249 (CC) para [148] where the Constitutional Court stated it categorically as follows:

'[148] Central to the applicant's contention that the rules are inconsistent with the Constitution is a simple proposition that they fail to provide for a deadlock-breaking mechanism. The error in the edifice which the applicant sought to construct is in its foundation. The premise from which she proceeds is unsound. Section 102 (2) of the Constitution does not require the assembly specifically to make rules regulating the passing of a motion of no confidence in the President. It merely confers the power to pass such motion on the assembly. The process to be followed by the assembly in exercising that power is left to the assembly's discretion. This is in line with the general power in s 57 (1). Exercising this power the assembly made rules regulating the scheduling of motions, including motions of no confidence in the President. As stated earlier, these rules

prescribe the process followed when motions are introduced in the assembly.'

Similarly in **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) para [123], the Constitutional Court made the following observation of importance:

[123] It is apparent that the Constitution contemplates that Parliament and the provincial legislatures would have considerable discretion to determine how best to fulfil their duty to facilitate public involvement. Save in relation to the specific duty to allow the public and the media to attend the sittings of the committees, the Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to 'determine and control [their] internal arrangements, proceedings and procedures' and to make their own rules and orders concerning their business.

I fully associate myself with above observations and statement of law by the Constitutional Court. The truth is that the applicants have not made out any case to support the alleged failure by Parliament to comply with Section 55 (2) of the Constitution.

[33] In any event, as pointed out in the introductory portion of this judgment in terms of Section 167 (4) (e) of the Constitution only the

Constitutional Court may decide that Parliament has failed to fulfil a constitutional obligation. This Court has no power to grant the fourth and the fifth prayers sought by the applicants. I mention that in advancing their case in terms of Section 55 (2) of the Constitution, the principal submission of the applicants is that the Speaker should have insisted on more meaningful answers from the President on 21 August 2014. I demonstrate hereunder that this submission is totally unsustainable.

MEANINGFUL ANSWERS FROM THE PRESIDENT

[34] The Speaker is not at all constitutionally obliged to ensure that answers given by the President are *'meaningful'*. In this regard the Speaker has absolutely no power to determine how questions put to the President are to be answered. As envisaged by Section 55 (2) of the Constitution, the Rules provide for the President and the rest of the executive to answer questions from Parliament. It is Rule III which provides for the process of putting questions to the President. Neither Parliament nor Speaker has power to determine how questions are to be answered. This is made perfectly clear from Chapter 13 of the Guide. This Chapter provides as follows:

"8. REPLIES TO QUESTIONS

Members of the Executive have discretion as to the answers they provide to a questions. When a member complained that a Minister had not answered his question, the Deputy Speaker responded by reminding members that –

> *'the Chair regulates the proceedings in the House, (but) it is not possible for the Chair to dictate to Ministers how they should reply to questions. If members are dissatisfied, there are political processes available to them be critical of the manner in which Ministers deal with questions."*

[35] Members of the Executive therefore have discretion as to the answers they provide. It is not possible for the Speaker to dictate how members of the Executive should reply to questions put to them. It is important to bear in mind that the Constitutional Court has stated that Parliament's power to make its own arrangements, proceedings and procedures in terms of Section 57 (1) of the Constitution is limited to the regulation of process and form as opposed to the content and substance. See **Oriani – Ambrosini v Sisulu, Speaker of the National Assembly** *supra* para [61] where the following is stated:

'[61] The words 'arrangements , proceedings and procedures' indicate that the Assembly's power to make rules is limited to the regulation of process and form as opposed to content and substance'. The latter principle is

undeniably equally applicable in relation to Section 55 (2) of the Constitution.

ORDER IN THE HOUSE

[36] It must be noted that in answer to the applicants' case based on Section 55 (2) of the Constitution, the first respondent places emphasis on order that must be maintained during proceedings in the National Assembly. She is not wrong. That remains her primary obligation. The Rules and the Guide provide and explain the framework within which debates take place in an orderly and decorous fashion. In the present instance Chapter 5 ('Order in Public Meetings and Rules of Debate') and 10 ('Questions') of the Rules and Chapters 2 ('Presiding Officers and Other Office-bearers') 11 ('Rules of Debate and Maintenance of Order') and 13 ('Questions to the Executive') of the Guide are pertinent. These have usefully been made available to the Court as Annexures 'BM1 to BM5' in the papers.

[37] It is common cause that order is necessary in the conduct of debates. Debates can sometimes be robust. Order ensures that all members participating in the debates have fair opportunities to

participate. Chapter 11 of the Rules (which contains the rules of the debate and Maintenance of Order), states that *'[t]he Rules relating to order and debate are aimed not at limiting freedom of speech, and guiding debates in the context of that freedom so as to allow reasoned and open consideration of controversial issues. The rules also seek to promote the responsible exercise of the privilege of freedom of speech. This privilege, regarded as essential to parliaments across the world entitles a member to strongly express sentiments and opinions that may be deeply offensive to other members, and indeed detrimental to groups and individuals. The procedures imposed by the Rules are designed to allow this to be done in an orderly fashion.'*

It is recorded in Chapter 2 and 11 of the National Assembly Guide to Procedure, 2004 (the Guide) that one of the Speaker's vital functions is to Maintain Order in the House. One needs to emphasise that even when debate is robust, members should always act with dignity and decorum and in an orderly manner. The truth is that if they do not, it is one of the important tasks of the Speaker to enforce order in order to ensure that the House is at all times able to function in terms of its constitutional mandate.

[38] It is pertinently stated in Chapter 13 of the Guide that if members are dissatisfied with a reply there are processes available to them

to obtain further information or clarification. Such processes include putting supplementary questions or submitting further written questions. I understand, in this matter indeed members did put supplementary questions. It is no solution at all to descend into chaos as the applicants did this case. Perhaps it may be necessary for completeness sake to set out even in this judgment the procedure regarding supplementary questions. The procedure in that regard is as follows: (a) According to practice, at the start of every Question Session members are reminded to press the 'talk' button at their desks if they wish to ask a supplementary question. I am told this was done in this case. (b) In terms of Rule 113 (4) and (6) four supplementary questions, arising from the reply to a question are taken for one minute per question. Rule 113 (5) states that the member in whose name the question stands has the first opportunity to ask a supplementary question. (c) The names of the members who have pushed their buttons to indicate their wish to put supplementary questions, appear on a computer screen at the Presiding Officer's (the Speaker) desk. The Presiding Officer decides who is called upon to pose the remaining three supplementary questions. The Presiding Officer considers the list of names of members who indicated that they wish to ask a supplementary question. The Speaker has stated

that, for the sake of fairness, only members whose names appear on the list are recognised. I mention in passing that it would appear that one feature characterising the proceedings of 21 August 2014 in the National Parliament was the use and abuse of points of order by the applicants. That, perhaps, necessitates a discussion specifically on points of order.

POINTS OF ORDER

[39] The Guide annexed in the papers as Annexure 'BM4' states that points of order must be approached with care, because they restrict a member's right not to be interrupted. The exchanges about points of order being abused in the record of the proceedings of 21 August 2014 perfectly illustrate this point. Rules 47 provides that no member shall interrupt another member whilst speaking, except to call attention to a point of order or a question of privilege.

[40] It is the Guide that regulates the use of a point of order. One must look at the following extracts from Chapter 11:

'3 POINTS OF ORDER

Raising a point of order: A point of order may be raised when a member is of the opinion that a Rule or accepted parliamentary practice is being transgressed. The member may bring this transgression to the attention of the presiding officer by taking a 'point of order'.

…

The member must direct attention to the point complained of, and submit it to the decision of the Chair. It is for the Chair to decide whether and to what extent a point of order may be discussed, and when the Chair is prepared to rule, no further discussion will be allowed.

***Must relate to a point of procedure or order**: a valid point of order restricts a member's right not to be interrupted. Accordingly, such an interruption is only allowed if it calls attention to a point of order or a point of privilege. In other words, it must relate to the Rules or to parliamentary practice.*

One of the functions of the Chair is to protect rights of members. Therefore, the Chair will not allow members to raise what are clearly not valid points of order. For example, points of order should not be used to respond to matters raised by the member speaking or to dispute facts.'

It is part of the Speaker's powers and duties in maintaining order during debates under Rule 51 that she or he may order members to withdraw if they are considered to be deliberately contravening the Rules, being in contempt, disregarding the Speaker's authority, or behaving in a grossly disorderly way.

[41] On 21 August 2014 the Speaker formed the view that the behaviour of the applicants was in deliberate contravention of the

Rules, in contempt, was disregarding the Speaker's authority and was grossly disorderly. Having read the Hansard and having viewed the DVD recordings for that day, I accept that the Speaker's view in this regard was correct. The Speaker furthermore perceived that the applicants would not withdraw if she ordered them to do so and that they were intent upon disrupting the business of the day. In the circumstances, she correctly deemed it necessary to call on the Sergeant-at-Arms for assistance. Mr Duminy correctly submitted that the Speaker must be given wide latitude in the exercise of her duties. He referred this Court to **Lekota and Another v Speaker, National Assembly and Another** 2015 (4) SA 133 (WCC) where the Court held that –

'(T)he task of controlling debates in Parliament requires particular skills and is best dealt with by the presiding officers who are appointed for this purpose ….A court should be loath to encroach on their territory and only do so on the strength of compelling evidence of a constitutional transgression.'

It is so that the applicants alleged that the Speaker invited members of the South African Police Services to eject members of the EFF from the House and contended that this was unconstitutional. The Speaker, however, denies inviting police to eject members of the EFF or calling *'amaphoyisa'*. The denial buried the assertion of the applicants.

THE SPEAKER NOT SUITABLE AND THE

NATIONAL ASSEMBLY MUST REMOVE HER

[42] The applicants seek a declaratory order that Ms Baleka Mbete is not suitable to hold the position of Speaker of the National Assembly. The basis for the latter relief is the applicants' complaint that she is a senior office-bearer of the ruling party. It is submitted that it is *'legally untenable'* for her to hold the position of Speaker for that reason. It is also alleged that in failing to hold the President to account to Parliament and in her handling of the National Assembly's session of 21 August 2014, Ms Mbete exhibited bias along party-political lines. Even though this prayer was conceded on behalf of the applicants to be incompetent and was no longer insisted on, it will suffice to state that in terms of Section 52 (1) of the Constitution the Speaker is elected by the National Assembly from amongst its members. The only constitutional requirement are that the Speaker must be a member of the National Assembly and be elected in accordance with the prescribed procedure. See **Section 55 (2) and (3)** of the Constitution. In any event this issue was put to rest by this Court in **Tlouamma and Others v Speaker**

of the National Assembly and Others 2016 (1) SA 534 (WCC) where the following was held:

'The Constitution is the ultimate source for all legal authority in the Republic. Notably the Constitution does not prescribe that a person be fit and proper in order to be a member of the National Assembly. Had the Constitution sought to impose further requirements, it would have done so explicitly. Any declaration to the effect that the Speaker is not fit and proper would automatically create a fixed requirement for continuation of an incumbent holding the office of Speaker. The practical effect of the relief sought in para 4.5 of the notice of motion will be the removal of the Speaker from office. The court cannot of its own accord create and impose such a condition, nor can the court usurp the functions of the National Assembly in the removal of the Speaker by the introduction of new requirements. The Constitution provides for the office of the Speaker, for the election to office of the Speaker, including eligibility for election, and for removal of the Speaker. In conclusion, s 52 of the Constitution does not provide expressly or by necessary implication that a candidate must be fit and proper to be eligible to be elected Speaker by the National Assembly, or, once elected, to remain as Speaker. Consequently, being a fit and proper person is not a constitutional condition precedent to becoming, or holding office as, Speaker. Absent such prerequisite in law, the question of the Speaker's fitness and propriety does not present a dispute capable of resolution through the application of the law. It therefore follows that the issue of the fitness and propriety of the Speaker is not justiciable.'

The Court in the above matter also talked to the assertion regarding her alleged partisanship and said the following:

'there is no constitutional or statutory impediment to the Speaker occupying any leadership position within her political party, or participating in the activities of the political party. The Speaker is entitled to remain as an office bearer of a political party, participate in its activities and campaign for political rights. Affiliation to a political party cannot in itself point to a lack of objectivity

and impartiality. The Speaker's membership of the NEC does not render her incapable or biased in performing her duties as Speaker…Consequently, there is no legal basis to find that the Speaker cannot continue to hold the position of Chairperson of the National Executive Committee of the ANC, as well as that of Speaker.'

As to the Speaker it suffices to state that the power to remove her vested in the National Assembly. Section 52 (4) of the Constitution provides for the National Assembly to remove the Speaker or Deputy Speaker from office by resolution and only by a majority of the members of the Assembly. It is not an issue that concerns this Court. In accordance with the principle of separation of powers, it would not be appropriate or competent for the Court to direct the National Assembly to remove the Speaker. In **South African Association of Personal Injury Lawyers v Heath and Others** 2001 (1) SA 883 (CC) the Constitutional Court held, *inter alia*:

'[25] The separation of the Judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has a wide power to delegate legislative authority to the Executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

[26] The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.'

Courts are indeed duty-bound to respect and uphold the separation of powers, a doctrine constituting an important pillar on which our Constitution stands. In conclusion, one must point out that this remains an opposed motion for final relief and as such the approach set out in **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634E – 635D-G applies. It is surprising that the applicants disregard the facts set out in the answering affidavits contrary to the correct approach in opposed motions. Stated categorically, given that a final order is sought by the applicants on motion, on facts as alleged by the respondents considered together with those facts averred in the applicants' affidavits that have been admitted by the respondents, no such

order sought is justified. See **Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd** *supra*.

[43] When counsel for the applicants was addressing the Court in reply, my brother presiding, Bozalek J raised with him concerns regarding the sanctions imposed on the applicants. The crux of Bozalek J's concerns was essentially whether the suspension sanctions imposed were in accordance with section 12 (9) of the Powers, Privileges and Immunities Act. On 27 November 2017 I received a document styled supplementary heads of argument from the applicants addressing the very issue raised by my brother, Bozalek J. The first contention advanced on the applicants' behalf is that there are jurisdictional facts for the imposition of suspension without pay. These are that (a) the gravity of the charge by reference to its seriousness or repetition; (b) the question whether the other penalties prescribed in Section 12 (5) is sufficient. In Mr Ntsebeza's supplementary heads of argument, the requirements of Section 12 (5) (g) are objectively determinable jurisdictional facts. The criticism is that the report that was presented before the National Assembly contains no explanation consistent with Section 12 (5) (g) why the sanction of suspension without pay was

considered to be appropriate. Mr Ntsebeza argues further in the supplementary heads that *'…it contains no explanation relating to why the other sanctions in Section 12 (5) were not considered to be appropriate'*. He concludes that *'it is clear that the Committee and by extension the National Assembly could not have applied its mind to a legislatively prescribed requirement when it imposed the sanction of suspension without pay and that invalidates the sanction it its entirety'*.

[44] A mere look at the sanction imposed on the Category C, reveals that the sanction imposed was not suspension. The relevant applicants were ordered to apologise to the House and fined an equivalent of 14 days' salary and allowance. Of course Section 12 (9) of the Powers, Privileges and Immunities Act (dealing with suspension) is not applicable to the Category C applicants. I can find no evidence or submission indicating how any conceivable relief predicated on Section 12 (9) can possibly apply to applicants who were not suspended. The argument about jurisdictional facts is to me beyond what one is capable of comprehending. I am of the view that the characterisation is not correct. The point is that Section 12 (9) (a) deals with the degree of seriousness of the

transgression while Section 12 (9) (b) with the sufficiency of the other penalties. Both these sections raise matters of opinion and judgment. I would hardly describe them as raising objective facts. As Mr Duminy correctly pointed out Section 12 (9) refers to circumstances that are to be 'found' by the House. Evidently 350 to 400 members of the National Assembly do not sit as a court of law. The National Assembly as the House cannot practically or procedurally make or define findings of fact in the same way as a court of law does or would be expected to do. It is unfair and contrary to reality to expect that the National Assembly should have gone about and documented findings relative to sanctions in the manner that a court of law would. I have demonstrated earlier in this judgment that in accordance with Section 53 (1) (e) of the Constitution *'all questions before the Assembly are decided by a majority of the votes cast.'* This is and remains the mechanism for deciding all unresolved questions before the House. There is obviously no provision for qualifications to vote, nor for reasons. See **Oriani-Ambrosini v Sisulu, Speaker of the National Assembly** *supra*.

1. [45] The above does not at all purport to mean that every sub-component of a resolution or decision must be voted upon separately. The National Assembly takes decisions by majority vote and that includes amongst others the adoption of legislation. The fact is that each one of the majority may vote in favour for a different reason. What matters for purposes of Section 53 of the Constitution is the fact that the majority voted in a particular way. It is important that the Committee's report, in fact the last eight pages thereof were devoted to *'relevant considerations in respect of possible sanction'*. The provisions of the Act were quoted. *'Relevant considerations'* in respect of possible penalty or penalties were listed in paragraph 14.3 and addressed in paragraphs 14.5 to 14.7 of the report. *'Further considerations'* were raised and the *'conclusion'* proposed. To suggest that the sanction was a mere *'thumb suck'* is totally wrong and unsustainable. On the presumption *omnia praesumuntur rite esse acta* it must be assumed that all members of the National Assembly read the report (which had been distributed on 11 November 2014 in anticipation of a debate on 27 November), and were fully aware of the requirements of the Act, and the recommendations the report contained. No evidence exists to displace the above

presumption. On the contrary, the evidence in the papers and the unrevised Hansard of the National Assembly proceedings demonstrate as thorough a ventilation of the report as one could expect. Notably, the second applicant even spoke during the debate expressing the attitude of the party he leads as follow: *'So, we do not have a problem with the outcomes of the Committee'*. Dr Groenewald of the Freedom Front Plus said that *'the offences must be halved'*. What is pertinently clear is that there was no objection in principle to suspension of the Category A and B applicants. There were of course disagreement with the length of the suspension. I hold a firm view that it is not the function of this Court to second-guess the National Assembly as to the appropriateness of the sanctions(s) imposed. Imposing sanction is as a difficult task as imposing a sentence on the guilty person in a criminal matter. The fact is the offences were regarded by the House as serious. The report states that much. In my view one cannot fault the finding that these are serious transgressions. They are indeed serious. Such behaviour in the National Parliament shall not be curbed if those involved are not appropriately punished.

[46] The truth is, ultimately, the National Assembly adopted the Committee's report in whole, including the Section dealing with sanction, by a majority vote. Importantly, none of those who voted against its adoption motivated their stance by reference to either of the considerations in Sections 12 (9) of the Powers, Privileges and Immunities Act. In my judgment, on a proper reading of the evidence as a whole, it has been demonstrated that the National Assembly did consider the provisions of the Powers, Privileges and Immunities Act. It found that the necessary pre- requisites for the imposition of sanctions of suspension on the Category A and B applicants were present.

[47] In passing, I must agree with Mr Duminy that the new formulation (apparent in the new prayer 4 seeking to be an amended version of prayer 5 in the Notice of Motion) seeks to shift the focus from a failure by the Speaker to ensure that the National Assembly complied with its obligations in terms of Section 55 (2) (to hold the President accountable in relation to giving effect to the Nkandla report), to a declaration that the Speaker failed to ensure that the President fulfilled his obligations towards the National Assembly. However, reliance is again placed on Section 55 (2) of the Constitution. The truth is that Section 55 (2) of the Constitution deals with the obligations of the National Assembly and not the

Speaker. It requires the provision of mechanisms for accountability and oversight. It does not encompass *'a constitutional mandate'* imposed on the Speaker to require better answers to questions if she/he considers an answer to be inadequate or *'meaningless'*.

COSTS

[48] As to the costs, the submission on behalf of the respondents is the following:

'To the extent that it has been argued that the applicants should be immune from adverse costs orders because they raised important constitutional issues, it is submitted that this application was in reality not about those issues, but about parliamentary decorum and behaviour. The substantive constitutional issues do not arise for decision in this case, and were dealt with in the various decisions of the SCA and the Constitutional Court referred to during argument. In addition, the applicants have conducted the present litigation in an unacceptably haphazard and costly manner. It is submitted that they should not be afforded any protection from an adverse costs order.'

In the final analysis this court is clothed with a discretion to be exercised judiciously and reasonably when it considers the question of costs. There is a host of considerations that the court must take into account in the exercise of its discretion in this regard. It is unnecessary to set out such considerations because any conceivable listed factors can never purport to be exhaustive.

CLOSING REMARKS

[49] The applicants' reliance on **EFF v Speaker, National Assembly** 2016 (3) SA 580 (CC) is misplaced. It is seemingly overlooked that the events in issue in the present proceedings occurred in December 2014. At the latter time, the reports of the ad hoc committees were awaited. Sight must not be lost of the fact that the internal evaluation process undertaken by the National Assembly is indeed consistent with the exposition set out at paragraphs [85] to [87] and [93] and [96] of the **Nkandla** judgment. A firm statement must be made that the Constitutional Court in the **Nkandla** judgment criticised the conduct of the National Assembly upon receipt of the report by the Minister of Police, but recognised that it was proper for the National Assembly to have taken steps to study and evaluate the report of the Public Protector.

[50] This case is not concerned with the merits of the arguments around the Public Protector's Report. The present case has of course everything to do with the manner in which the second and further applicants conducted themselves in the National Assembly on 21 August 2014 and the consequences thereof. The end does not always justify the means in real life. I referred to the freedom of

speech dealt with in the **Democratic Alliance v Speaker, National Assembly and Others** case *supra*. This is documented in Section 58 of the Constitution. But it is important that the proviso to Section 58 (1) (a) of the Constitution and the jurisprudence developed around this proviso, is not lost sight of. It is hardly helpful to raise arguments about the interpretation of the Rules of the National Assembly. The implicit premise is that unspecified parts of the Rules are inconsistent with the Constitution. The difficulty though is that the Rules or part thereof in question have not been identified and no case has been made out or advanced in the Notice of Motion concerning this assertion.

[51] Each and every institution has rules constituting a cornerstone on which such institution is built. Such rules regulate the process and functioning of such an institution. Rules may not be wished away or ignored because they govern the functioning of an institution. Once rules are transgressed or overlooked the proceedings underway in any institution descend into chaos. Chaos having taken over, it becomes impossible for the process intended to be proceeded with to advance. Parliament in its wisdom designed and promulgated these rules. The least expected of members of Parliament is to

adhere to them in order to enable Parliament as an institution to function and achieve whatever is scheduled for the session. Even this Court has rules governing its own processes. It cannot function if such rules are not adhered to. Parties may challenge the rules but that must be done properly and in an orderly fashion in courts. Parliamentary debates on issues for the session can and do remain robust and uncompromising without proceedings descending into chaos and disorderliness. That is made possible by adherence to the rules and Parliamentary practice. Ill-discipline, chaos and disorderliness are the very antithesis of good Parliamentary practice and the decorum with which the House is clothed.

ORDER

[52] In the circumstances the following order is made:

(a) The Rule Nisi granted by Davis J on 23 December 2014 is hereby discharged.

(b) The application (Part B) is dismissed.

(c) There shall be no order as to costs.

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D V DLODLO

Judge of the High Court

I agree.

_____

B P MANTAME

Judge of the High Court

MINORITY JUDGMENT

BOZALEK J

Introduction

[1] I have read the comprehensive judgment of my brother Dlodlo J and find myself in agreement with the findings he makes and the conclusions he has reached save in one important respect. I agree that the applicants have failed to make out a case that the National Assembly ('the NA') or its Speaker failed to carry out their duties to ensure that the Executive is accountable to the Assembly in relation to the question posed to President Zuma or that the present Speaker (the second respondent) is not a suitable person for that position. I agree further that the applicants have failed to establish that the findings of guilt made by the Powers and Privileges Committee ('the PPC') in relation to the charges of contempt brought against them were unfounded or unlawful.

[2] Where I find myself in respectful disagreement with Dlodlo J is on the question of the lawfulness of the penalties imposed on those members comprising groups A and B all of whom were subjected to the penalty of suspension from the House in terms of sec 12(5)(g) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 4 of 2004 ('the PPI Act').

[3] My reasons for disagreeing and for proposing appropriate relief follow.

Penalty

[4] An important component of the applicants' challenge to the disciplinary action taken against them by the PPC and the NA related to the penalties which were imposed on the 20 members of the Economic Freedom Fighters ('the EFF'), who were so disciplined. The challenge to the penalties imposed was principally contained in prayer 1 of Part B of the notice of motion which sought a declaratory order that the decision taken on 27 November 2014 by the NA to adopt the report of the PPC *'to suspend the applicants without remuneration'* was constitutionally invalid, unlawful and of no force and effect.

[5] The applicants' case in this regard was made out in paras 111 to 113 of the second applicant's founding affidavit which read as follows:

> *'Improper Application of Sanction*
>
> *111. In terms of section 12(5)(g) of the Act, a member may be suspended without remuneration for a period of up to 30 days consequent upon a finding of misconduct or contempt of Parliament. This provision is qualified by sec 12(9), which provides:*
>
> > *'A member may not be suspended under subsection (5)(g) unless the House has found that –*
> >
> > *(a) the member is guilty of a serious or repeated contempt; and*
> >
> > *(b) none of the other penalties set out in subsection (5) will be sufficient.' (Emphasis added).*
>
> *112. Thus, (sic) any decision to suspend a member of National Assembly without remuneration is considered, two peremptory factors must be taken into account. First, the gravity of the charge by reference to seriousness and its repetition. Second, whether or not the other penalties in subsection (5) are sufficient. These are jurisdictional facts for the imposition of the sanction of suspension without pay, if they*

are not present the suspension without pay is unlawful. In this case, as explained below, neither the committee nor the National Assembly applied themselves to these jurisdictional facts.

113. The report of the Committee makes no reference to why the sanctions in section 12(5) are not sufficient. It also makes no reference to the gravity of the office (sic) or its repetition. The inescapable inference is that the Committee did not apply its mind to the mandatory provisions of the legislation. This vitiates the entire proceedings or alternatively the sanctions imposed. The National Assembly did not debate whether or not the other sanctions provided for in section 12(5) are sufficient. It simply adopted the flawed report of the Committee'.

[6] It is common cause that suspensions as provided for in terms of sec 12(5)(g) of the PPI Act were imposed on those applicants comprising groups A and B as identified by the PPC. The penalty recommended by the PPC and ultimately imposed on group A members was suspension for a period of 30 days without remuneration, and in respect of group B members, suspension for a period of 14 days without remuneration.

[7] In respect of the seven members of group C (all of whom were convicted of one charge of contempt only) the penalty was:

(a) An order for the members to apologise to the House in a manner determined by the House, in terms of sec 12(5)(c) of the Act; and

(b) A fine equivalent to 14 days salary and allowances payable to the member concerned by virtue of the Remuneration of Public Office Bearers Act, in terms of sec 12(5)(f) of the Act.

[8] In their heads of argument it was contended on behalf of the applicants that the requirements of sec 12(9)(a) and (b) are *'objectively determinable jurisdictional facts'* and reliance was placed on *Democratic Alliance v President of the Republic of South Africa and Others.*[1] It was further contended on their behalf that the report presented by the PPC and considered by the NA contained no explanation consistent with sec 12(9) as to why the penalty of suspension was considered to be appropriate and, in particular, why none of the other sanctions in sec 12(5) were not considered to be appropriate. From these premises it was argued that it was clear that the PPC, and by extension the NA, could not have applied its mind to a legislatively prescribed requirement when it imposed the suspensions and that this invalidated those penalties in their entirety.

[9] Determining this issue requires in the first place an examination of what the PPC said in its report in regard to the penalty of suspension. But before doing so it is necessary to address the question of whether the action complained of constitutes administrative action thus making it susceptible to a review challenge.

Is the PPC's report administrative action?

[10] On behalf of the respondents it was contended that the relief sought in prayer 3, namely, the review and setting aside of the PPC's report, was incompetent since the report is not administrative action, it having no internal or external legal effect until adopted by the NA. It should first be noted that

[1] 2013 (1) SA 248 (CC).

even if this argument is accepted it does not affect the relief sought by the applicants in regard to the suspension penalties since that is covered by the declaratory relief sought in prayer 1 in relation to the NA's resolution accepting the PPC's report.

[11] Be that as it may, in terms of sec 1 of PAJA in order to meet the definition of *'administrative action'* the challenged decision must be:

> *'by – (a) an organ of state, when – …*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation;…*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect...'*[2]

[12] There can be no doubt that the PPC, being a statutory committee appointed in terms of sec 12 of the PPI Act, is *'an organ of state'* as defined by sec 239 of the Constitution, more particularly an *'institution … exercising a public power or performing a public function in terms of any legislation … .'*

[13] The PPC took a decision, namely that its findings in respect of the guilt of the applicants and its recommended penalties be adopted. In my view that decision adversely affected the rights of the applicants and had a *'direct, external legal effect'* inasmuch as the way was then open for the NA to adopt the report's findings and recommendations.

[14] It is indeed so that until the findings of guilt and penalty recommendations in the PPC's report were adopted by the majority of the NA

[2] Section 1(i) of Promotion of Administrative Justice Act, 3 of 2000 ('PAJA').

following a vote, they had no binding force vis-à-vis the applicants. However, the PPC's findings and penalty recommendations were a necessary pre-condition to the NA debating and voting on the report. As such they exposed the applicants to the very real possibility of the findings and recommendations being adopted, as they were in the present matter.

[15] What is more, as was stated by Nugent JA in *Grey's Marine*,[3] the reference to rights in sec 1 of PAJA i.e. ought not to be taken literally:

> *'While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. … The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'*[4]

[16] In any event once the NA itself adopted the PPC's findings, and in particular its recommendations on sanctions, that report became reviewable administrative action if only because, whilst those recommendations stand, the PPC cannot reconsider them.

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[3] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Police Works and Others* 2005 (6) SA 313 (SCA).
[4] *Grey's Marine* n 3 para 23. See also C Hoexter *Administrative Law in South Africa* 2nd ed (2012) Juta at p 225.

[17] In the result I find that it is legally competent for the findings or recommendations of the PPC to be reviewed and/or set aside at this stage of events.

The report of the PPC and the justification for the suspensions

[18] The question of sanction was dealt with in paragraphs 15 to 17 and 18.2 of the PPC's report. They deal with *'mitigating, aggravating and other factors'*, the initiator's presentation on aggravating and other factors (which was inclusive of recommended sanctions) and '*(p)enalties recommended by the Committee'*. These sections of the PPC's report do not reflect, however, what reasoning informed its recommendation on penalties. Such reasons as exist are only found in the document, Annexure A, entitled *'Presentation by the initiator on mitigating and other factors'* ('the presentation').

[19] The following observations or submissions found in the presentation are relevant. Firstly, the initiator states that the charges are *'all of a serious nature'*. The provisions of sec 12 of the PPI Act are set out including those in sec 12(9) which set out the two pre-conditions to the imposition of a suspension in terms of sec 12(5)(g). In further paragraphs the seriousness of the charges are emphasised and adumbrated upon on a charge by charge basis and various aggravating factors are emphasised. In para 14.5 the very limited participation of the applicants in the disciplinary proceedings and their lack of remorse was recorded. It is further recorded, in para 14.6, that the applicants had not been involved in any previous incidents in the NA involving contempt.

[20] Assuming that the PPC considered that presentation, as I consider one must, the averment by the second applicant that the report of the PPC makes no reference to the gravity of the offence or its repetition, although strictly speaking correct, does not assist the applicants in their challenge. This is because the report refers to and attaches the presentation which deals at some length with the seriousness of the offences and presents the conclusion that the misconduct in question constituted serious contempt. Furthermore, if this latter conclusion is accepted then given the wording of sec 12 (9)(a) whether or not the applicants had previously been found guilty of contempt was not relevant to the question of whether a suspension could be imposed.

[21] That leaves the applicants' complaint that the PPC's report made no reference to why the penalties set out in sec 12(5), other than suspension, were not sufficient and that the NA did not debate this question either.

[22] It is correct that the PPC's report itself made no reference to that issue. Consideration, however, must also be given to the initiator's presentation in this regard. In paras 14.7 and 14.8 of the presentation the interests of Parliament and *'further considerations'* are canvassed. In para 14.9 the initiator purports to reach, and set out, his conclusion on possible penalties to be imposed on the applicants. The only portion of the presentation in which the initiator deals with the pre-conditions in sec 12(9) which must be satisfied before a suspension can be imposed is para 14.9.3. It reads as follows:

> *'14.9.3 Further, and in accordance with the provisions of clause 12(9) of the Act, the Committee may recommend the suspension of, and the House may impose the suspension of, any of the named Honourable Members in terms of clause 12(5)(g) of the Act as they have been found guilty of serious contempt by the committee and none of the other penalties set out in clause 12(5) of the Act would be sufficient. It is respectfully submitted that this course of action is appropriate in the circumstances.'* **[my underlining]**

[23] Thus, apart from what is quoted above, there is no discussion or process of reasoning either in the PPC's report or the presentation setting out why, to use the words of sec 12(9)(b): *'none of the other penalties set out in subsection 5 will be sufficient'*. Put differently, the high-water mark of the respondents' case justifying the suspensions is to be found in the initiator's presentation and comprises the bald submission that, the members having been found guilty of *'serious contempt',* none of the other penalties *'would be sufficient'*.

[24] Even on its own terms, moreover, the initiator's presentation makes no sense or is at best contradictory in regard to the penalty of suspension which it appeared to propose. This is because, ultimately, no specific sanction is recommended in the presentation. In the case of each of the three groups, notwithstanding the submission in para 14.9.3 that suspension would be the appropriate penalty, the initiator concludes as follows: *'It is submitted that a sufficient penalty in respect of these Honourable Members should be a serious penalty or penalties'*. This of course begs the question as to whether a suspension was the only appropriate penalty.

[25] This non-committal formulation in the initiator's presentation in effect forces one back to the PPC's report (specifically para 17) in search of its reasoning for the penalties recommended in respect of each of the three groups. However, as mentioned, no discussion or process of reasoning is to be found in the body of the report, merely the recommended sanction preceded, in each case, by the following sentence: *'(f)ollowing the findings by the Committee and the presentation by the initiator the Committee proceeded to deliberate on the appropriate penalties for the members found guilty on the charges'*. It is perhaps noteworthy that in the case of each of the three groups, two members of the PPC recommended a reprimand as a penalty.

[26] Thus, taken as a whole the PPC's report, beyond an implied acceptance of the initiator's initial submission in para 14.9.3 of his presentation that no penalty other than a suspension would be sufficient for the members of groups A and B, reflects no process of reasoning or the content of any deliberation relating to the appropriateness of the suspensions which it recommended.

[27] Also noteworthy is the fact that, although a penalty <u>not</u> involving a suspension was imposed on the members of group C, the reasoning behind this recommendation cannot be found in either the PPC's report or the initiator's presentation. Compounding the absence of any reasoning process by the PPC in relation to the penalties imposed is the unexplained discrepancy in para 17.3 of its report between the penalty recommended for

the members of group C – an apology and a fine of two weeks salary and allowances – and the proposal which the majority of the PPC's members apparently concurred in – an apology '*and that the members be <u>suspended</u> for a period of 14 days without remuneration'*. **[my underlining].**

[28] It also bears emphasis that the initiator's presentation, insofar as it related to appropriate penalties, comprised his submissions and did not necessarily represent the views of the PPC itself or a majority of its members. Furthermore, the PPC did not explicitly accept any submission made by the initiator in his presentation.

[29] In considering whether the applicants made out their case in regard to the penalties imposed, regard must also be had to how the respondents responded to the applicants' challenge to the suspension penalties as set out in paras 111 – 113 of the second applicant's founding affidavit.

[30] The first possible response was that of the Speaker in the interdict proceedings but she chose not to deal with the contents of the said paragraphs. The Speaker later filed a more substantive answering affidavit pointing out that due to time constraints it had not initially been possible for her to deal more comprehensively with the allegations in the founding papers. Again, the Speaker elected not to deal with those specific allegations but this is understandable, however, since she played no active role in the disciplinary proceedings.

[31] The third respondent and chair of the PPC, Mr BC Mashile, also filed answering affidavits both in the interdict and the review proceedings. In his first affidavit Mr Mashile did not deal with the contents of paras 111 – 113 of the second applicant's founding affidavit. He denied that the PPC had acted in any way that was procedurally unfair or that rendered its proceedings liable to be reviewed or set aside. In his second affidavit, filed in more leisurely circumstances, despite dealing with a wide range of issues relating to the disciplinary proceedings including *'penalties and mitigating factors'*, Mr Mashile did not specifically deal with the contents of paras 111 – 113 of the founding affidavit.

[32] Mr Mashile did record that the PPC had been presented with the initiator's written submissions, Annexure A to the PPC's report, and that the initiator had taken the PPC through them. He set out the provisions of sec 12 of the PPI Act, including those in subsection 12(5) and 12(9). He explained that various considerations were taken into account in regard to the penalties the PPC recommended including the seriousness of the charges, the extent of acknowledgement of wrongdoing and remorse; cooperation with the work of the PPC; any previous incidents involving the applicants (of which there was none); the interests of Parliament and further considerations which included the defiant attitude of the third applicant towards the Speaker on the day in question.

[33] Mr Mashile stated (in para 17) that at the start of this part of the PPC's deliberations some members had requested information on previous

incidents involving similar offences and specifically what penalties had been imposed. They were advised by the PPC's legal advisors, however, that this was the *'first time that misconduct charges had been referred to the Committee'* and that there was therefore '*no direct precedent'*. He referred to an incident some years previously when two members of the party had been involved in a bout of fisticuffs in the chamber of the NA after it had adjourned. Those members had settled their differences and issued a joint statement in which they apologised unconditionally to the House for their role and in addition one member had been suspended for five days and the other for one day.

[34] Mr Mashile explained that in the discussions on the penalty he commenced by calling for recommendations in each case. He then set out the PPC's eventual recommendations as well as the (minority) recommendations for a reprimand in each case. The only explanation which Mr Mashile gives for the penalties reads as follows: *'(t)he recommended penalties were not the most severe, despite the seriousness of the matters. The approach was to recommend sanctions that will indicate the seriousness of the behaviour and seek to correct it, rather than to punish'*. It is worth pointing out that this statement is not entirely correct since the penalty imposed on group A i.e. suspension for 30 days without pay, is the most severe provided for by sec 12(5) of the PPI Act.

[35] Transcripts of the deliberations of the PPC were available since a portion thereof was annexed by Mr Mashile to his affidavit but it does not

include the deliberations of the PPC on the question of penalties. This does indicate, however, that any deliberations by the PPC on the appropriateness of the suspension sanctions could have been produced.

[36] Looked at overall, therefore, notwithstanding the unambiguous nature of the challenge by the applicants to the appropriateness of the suspension penalties as set out in paras 111 – 113 of the second applicant's founding affidavit, Mr Mashile, the chairman of the PPC chose not to deal directly with the subject in his two answering affidavits.

[37] Finally, one must have regard to the manner in which, if at all, the NA addressed the question of whether the penalties imposed on the members of groups A and B met the requirements of sec 12(9) of the PPI Act and in particular the requirement that none of the other penalties in subsection 12(5) should be sufficient. This aspect was addressed in the answering affidavit of Mr SC Tsenoli, the Deputy Speaker of the NA, who presided over its proceedings on 27 November 2014 when the report of the PPC into the findings of contempt by the applicants was tabled, debated and adopted.

[38] The Deputy Speaker annexed a copy of the unrevised Hansard of the NA reflecting those proceedings. He stated, in short, that the merits of the report were debated, that Mr Shivambu (the third applicant) had sought to move an amendment to the report but, through non-compliance with the NA's rules he had eventually been disallowed from proceeding therewith. He advised further that a representative of the Democratic Alliance had also

moved an amendment and, after a division of the House was called for, the matter was put to a vote and the amendment was defeated. Thereafter the motion to adopt the report was put to a vote and was passed.

[39] The Hansard transcript of the proceedings runs to some 250 pages. Although the PPC's report was debated the question of whether the recommended penalties were appropriate, and specifically the question of whether the provisions of sec 12(9) had been met, were not, as far as I can see, addressed by any speaker.

[40] The question of sanction was, at best, directly addressed by only one speaker, Mrs C Dudley who, noting that the applicants were *'first time offenders'* some of whom had the *'maximum sentence'* imposed upon them, expressed the view that the penalties should have been suspended to give the applicants a second but final chance and *'an opportunity to learn from the experience along with the rest of us'*.

[41] It may also be material to record that the PPC's report had appeared in the *'Announcements, tablings and committee reports of Parliament'* on 11 November 2014. Presumably members of the NA were able to access the report from that date onwards for the purposes of preparing to debate it.

Discussion

[42] Section 12 of the PPI Act, insofar as it is relevant, provides as follows:

> '*12(3) Before a House may take any disciplinary action against a member in terms of subsection (1), the standing committee must-*

(a) enquire into the matter in accordance with a procedure that is reasonable and procedurally fair; and

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

…

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

(a) a formal warning;

(b) a reprimand;

(c) an order to apologise to Parliament or the House or any person, in a manner determined by the House;

(d) the withholding, for a specified period, of the member's right to the use or enjoyment of any specified facility provided to members by Parliament;

(e) the removal, or the suspension for a specified period, of the member from any parliamentary position occupied by the member;

(f) a fine not exceeding the equivalent of one month's salary and allowances payable to the member concerned by virtue of the Remuneration of Public Office Bearers Act, 1998 (Act 20 of 1998);

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

…

(9) A member may not be suspended under subsection (5) (g) unless the House has found that-

(a) the member is guilty of a serious or repeated contempt; and

(b) none of the other penalties set out in subsection (5) will be sufficient.'

[43] Section 12(5) thus embodies a range of penalties of increasing severity commencing with a formal warning and concluding with the suspension of the member for a period not exceeding 30 days, with or without remuneration. It is clear that in making these provisions the legislature was aware that a suspension of a member should be a last resort. Section 12(9) explicitly recognises this by establishing the two pre-conditions for such a finding, namely, serious or repeated contempt and that none of the other penalties would be sufficient.

[44] It was contended on behalf of the applicants that a suspension was correctly recognised as a last resort by the legislature since it has the effect of barring the member from carrying out his/her essential function and duty as a member of the NA, namely, to participate in the business of the NA either through attendance in the NA or in its committees. Any suspension would prejudice not only the member but the constituency that he/she represents in Parliament since his/her voice would be silenced in the NA for its duration. This might also occur at a time when the NA was sitting to hear a vital debate, to vote on an important motion or when a Parliamentary committee on which the member sat was meeting. If imposed without due consideration a suspension penalty could remove or weaken the leadership of a party or its members at a critical time.

[45] The structure of sec 12(9) of the PPI Act read with 12(5) makes it clear that the suspension penalty is not one to be imposed lightly and certainly not

without the members of the PPC (and thereafter the NA) giving serious consideration to whether the less drastic penalties might not be appropriate.

[46] As previously mentioned, counsel for the applicants contend that the two requirements set out in sec 12(9) for the imposition of the suspension penalties were objective jurisdictional requirements and that, despite the pointed nature of the applicants' challenge, there was no evidence that the second of these jurisdictional requirements had been met. As such the suspension penalties imposed on groups A and B were unlawful and unconstitutional and, at least to that extent, the proceedings of the PPC and the resolution of the NA fall to be set aside.

[47] I did not understand respondent's counsel to take issue with the contention that the two pre-conditions to the imposition of a suspension sanction were objective jurisdictional requirements. The respondents' argument was, as I understood it, that both such pre-conditions had been met.

[48] In my view the requirements that before a member found to have committed contempt can be suspended he/she must have been found guilty of serious or repeated contempt and that no lesser penalty would be sufficient, are indeed objective jurisdictional facts.

[49] There are several reasons for this conclusion. In the first place there is the constitutional importance of sec 12(9) of the PPI Act for all the reasons discussed above. A second reason is the language used in sec 12(9) which

refers to findings by the House (*'unless the House has found …'*). It does not state, for example, that a suspension can be imposed where *'in the opinion of the House'* or *'if the House is satisfied that'* the pre-conditions are met. The PPI Act could easily have done so had it been the intention of the legislature to leave this issue in the complete discretion of the PPC or the House. Finally, although to a lesser or greater extent both requirements of sec 12(9) involve value judgments, it does not follow that they are not objective jurisdictional facts.

[50] In *Democratic Alliance v President of the Republic of South Africa and Others* the Court was concerned with the requirement in sec 9 of the National Prosecuting Authority Act, 32 of 1998 that the National Director of Public Prosecutions had to *'be a fit and proper person, …'.* The Court held that this requirement was an objective jurisdictional fact, Yacoob ADCJ stating in this regard:

> *'… it is correct that the determination whether a candidate does fulfil a fit and proper requirement stipulated by the Act involves a value judgment. But it does not follow from this that the decision and evaluation lie within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.'*[5]

[5] *Democratic Alliance* n 1 para 23.

[51] Even if sec 12(9) had required no more than that the NA (following the PPC's report) held the subjective view that the two pre-conditions were met the requisite jurisdictional facts would not exist where, in forming that opinion, those bodies had not applied their mind to the matter.

[52] This was explained in the following terms by Brand JA in *Kimberley Junior School and Another v Head Northern Cape Education Department and Others*:[6]

> *'[12] … As was pointed out by the Constitutional Court in* President of the Republic of South Africa and Others v South African Rugby Football Union and Others *(supra) para 168 n 132, the judgment of Corbett J in* South African Defence and Aid Fund and Another v Minister of Justice *1967 (1) SA 31 (C) remains the leading authority on jurisdictional facts in our law. In that judgment Corbett J (at 34 in fine - 35C) identified two categories of jurisdictional facts that can be encountered in empowering legislation. The first category, described as "objective jurisdictional facts", includes the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the objective existence of the fact or state of affairs is justiciable in a court of law. If the court finds that objectively the fact or state of affairs did not exist, it will declare invalid the purported exercise of the power.*
>
> *[13] In the second category, that of subjective jurisdictional facts, the empowering statute has entrusted the repository of the power itself with the function to determine whether in its subjective view the prerequisite fact or state of affairs existed or not… The court can only interfere where it is shown that the repository of the power, in forming the opinion that the fact or state of affairs existed, had failed to apply its mind to the matter. Whether a particular jurisdictional fact can be*

[6] 2010 (1) SA 217 (SCA) paras 12 - 13.

> *said to fall within the one category or the other, will depend on the interpretation of the empowering statute.'*

[53] In *Walele v City of Cape Town and Others*,[7] although an *'is satisfied'* clause was in issue, the Constitutional Court nonetheless held as follows:

> *'In the past, when reasonableness was not taken as a self-standing ground for review, the [decision-maker's]* ipse dixit *could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective pre-condition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds.'*

[54] In regard to the first requirement in sec 12(9) during argument both parties approached the concept of *'repeated contempt'* as being conduct on a prior occasion, a situation which did not apply to any of the applicants. However, the parties appeared to be *ad idem* that the requirement or pre-condition in sec 12(9)(a) was met by reason of the fact that the members in question were guilty of *'serious'* contempt. In my view, for the reasons set out by Dlodlo J, this approach was correct and what the PPC had to deal with was serious contempt, at least as regards groups A and B, and thus the first requirement for the imposition of a suspension penalty was met.

[55] As regards the second requirement respondents' counsel placed reliance on the PPC's report, more specifically paras 14.9.3 of the initiator's presentation. Counsel relied, further, on the submission that, even if any reasoning process or explicit finding that no other penalty was sufficient was

[7] 2008 (6) SA 129 (CC) para 60.

absent from the report (or elsewhere), this did not on its own mean that this issue had not been considered by the PPC or the NA.

[56] On the written record the high-water mark of the respondents' case is the submission in para 14.9.3 of the initiator's presentation that *'as they have been found guilty of serious contempt by the Committee and none of the other penalties set out in clause 12(5) of the Act would be sufficient … this course of action is appropriate in the circumstances'*. However, as previously noted, this was no more than a submission made by the initiator in his presentation. Even then when he went on to make a penalty recommendation in his presentation it was not specific but merely that *'a sufficient penalty … should be a serious penalty or penalties'*. Furthermore, the initiator's submission that*'…none of the other penalties would be sufficient'* was simply a conclusion, unsupported by any explicit reasoning process. Lastly, the initiator's submission, whatever its worth, was not expressly adopted by the PPC in its report which says no more than that the PPC *'proceeded to hear the initiator's presentation'*.

[57] Taken together with the failure of the PPC's chairman to address, in his answering affidavits, the pointed challenge by the applicants relating to the second jurisdictional requirement, this lack of reasoning or explanation as to why the other penalties in subsection 12(5) were insufficient, serves only to strengthen the impression that this requirement was not given proper consideration by the PPC and by the NA prior to their adoption of the report.

[58] The ground of review relied upon by the applicants was expressed as being a failure on the part of the PPC and the NA to apply their minds. Under the common law this ground of review had no precise meaning and could include many instances of bad decision-making. The expression is not used in PAJA but, according to Professor Hoexter,[8] on one interpretation means *'failure to exercise the power properly'*.[9]

[59] The ground of failing to take into account relevant considerations (sec 6(2)(e)(iii) of PAJA) would seem to encompass the case made out by the applicants but equally they would be entitled to rely on the grounds set out in sec 6(2)(b) (a mandatory procedure or condition prescribed by an empowering provision was not complied with) or sec 6(2)(i) (the action is otherwise unconstitutional or unlawful).

[60] Whatever ground is ultimately relied upon the key issue is, in my view, the paucity of evidence indicating that the decision makers did in fact apply their minds to the critical requirement in sec 12(9)(b) of the PPI Act. This failure to apply their mind can in turn be inferred from the absence of reasons from the respondents for the apparent conclusion that no penalty other than a suspension would be sufficient for the members of group A and B. This has been discussed at some length above. In summary little can be gleaned from the respondents' answering affidavits since they fail to directly address the issue notwithstanding that it was pertinently raised by the applicants. Nor

[8] Hoexter *Administrative Law in South Africa* n 5.
[9] Citing *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd.*

does the contemporaneous record cast much further light on the issue. The PPC's report gives no direct indication of the thinking behind its recommendations. At most it indicates that the PPC's members received a presentation from the initiator relating to sanction and after deliberation decided to recommend the suspension penalties. The implication the respondents appear to contend for is that the majority of the members of the PPC accepted the submission of the initiator in relation to the penalty of suspension. However, the presentation does not directly or indirectly address the question of why all the possible penalties other than suspension set out in sec 12(5) were insufficient and thus casts no light on the PPC's reasoning in regard to this aspect.

[61] Compounding the opaqueness of the initiator's submissions, which clearly played a critical role in the PPC's deliberations on sanction, is the further factor that the initiator's initial submission is contradicted by his final submission which, in the case of each group, goes no further than stating that a *'sufficient penalty … should be a serious penalty or penalties'.*

[62] Given this confusion and contradiction, and in the absence of any meaningful clarification from the respondents in their answering affidavits, the only conclusion which can be drawn is that the PPC, and thereafter the NA, failed to appreciate the nature of, or to apply their mind to, the discretion which they were required to exercise viz that the penalty of suspension could only be recommended (and ultimately imposed) as a last resort i.e. if all other available penalties were insufficient. Bearing in mind that the PPC failed to

apply its mind to the second of the requirements in sec 12(9) and did not deal with it in its report to the NA it is not surprising that the NA would fail to appreciate that the question of penalty had not been dealt with according to the prescripts of the PPI Act and would also fail to apply its mind to this critical aspect.

[63] It is not for this Court to express a view on what constitutes an appropriate penalty following the contempt findings made by the PPC and endorsed by the NA since that is a function which has been assigned to the PPC and NA by the PPI Act and by the Constitution. The boundaries separating the powers and functions of the legislature from those of the judiciary and the executive must, in this and other respects, be adhered to and respected. It is, however, the function and the duty of the Courts to be the arbiter as to whether, in exercising its powers and in performing its statutory and constitutional functions, Parliament has abided by the prescripts of the law. In my view the PPC and the NA failed to do so when they recommended and then imposed the penalty of suspension upon the members of group A and B inasmuch there is no satisfactory proof that in doing so the PPC (and the NA to the extent that it adopted the PPC's report) applied their minds to the question of whether a lesser penalty than suspension would suffice.

Conclusion and remedy

[64] It follows from the above that, in my view, the penalties imposed on these applicants who are members of group A and B are unlawful and fall to be reviewed and set aside.

[65] The question arises as to the most appropriate remedy in those circumstances. Prayer 1 of the notice of motion seeks a declaration that the adoption of the PPC's report *'to suspend the applicants without remuneration'* is constitutionally invalid. The context and nature of the matter is such that it clearly engages constitutional issues. At the level of basic rights the action taken against the applicants compromises their political rights. These are protected by sec 19 of the Bill of Rights which provides, inter alia, for the right, if elected, to hold public office (sec 19(3)(b)). Other basic rights potentially compromised by the suspensions are the rights to the freedom of expression (sec 16), freedom of profession (sec 21) and just administrative action (sec 33).

[66] This brings into operation sec 172 of the Constitution which confers wide powers on any court deciding a constitutional matter. It obliges such a court to declare any law (or conduct) that is inconsistent with the Constitution invalid to that extent and further provides that in addition a court may *'make any order that is just and equitable'*. At the same time the applicants are also asserting their right to review administrative action and thus principles of administrative law, insofar as they affect the remedy sought, must also be taken into account. In circumstances such as the present these principle dictate that the court will generally remit the matter back to the original

decision-maker rather than substitute the reviewed decision with its own. This principle is fortified in the present matter by the Court's deference to the legislature which, through the NA (acting in concert with the PPC), was assigned the power to discipline its members for contempt.

[67] It is appropriate in my view to distinguish between the guilt findings and the penalty recommendations. For the reasons set out in the judgment of Dlodlo J, with which I respectfully concur, the findings on guilt must stand both at the level of the PPC's report and the resolution of the NA.

[68] Accordingly, in my view, to meet the requirements of sec 172 of the Constitution any order would have to set aside the PPC's penalty recommendations in relation to groups A and B as well as the NA's resolution adopting those recommendations. At the same time the question of the appropriate penalty to be imposed should be remitted back to the PPC and the NA for consideration afresh in the light of the Court's reasons for its order.

[69] Such orders could, of course, ultimately result in different penalties being imposed on the members of group A and B which raises the question of the inter-relationship between the penalties imposed on the three groups. Should different penalties be imposed on the members of group A and B this might render the penalties imposed upon the members of group C inappropriate, unjust or disproportionate. On the other hand, if left standing, the penalty imposed on the members of group C, inasmuch as it imposed a

benchmark penalty for one charge of contempt, could fetter the discretion of the decision-makers in considering fresh penalties for the members of groups A and B.

[70] As counsel for the respondents contended, however, the difficulty is that the terms of prayer 1 appear to preclude the possibility of granting relief in relation to the members of group C. The prayer asks only that the decision taken by the NA in adopting the report of the PPC *'to suspend the applicants without remuneration'* be declared unconstitutional, invalid, unlawful and of no force and effect, thereby apparently excluding the members of group C.

[71] Nonetheless, I do not see this as a bar to granting relief which will allow the PPC and the NA to impose penalties on all three groups after a fresh consideration of all the relevant factors. In effect those applicants who are members of group C already seek, in prayer 2 and 3, that the entire disciplinary proceedings as well as the report of the PPC be reviewed and set aside. Prayer 9 sought such further and/or alternative relief as the Court may deem appropriate. What is more, the relief to which the members of group A and B are entitled – consideration afresh of their penalty – could, for the reasons already stated, be rendered nugatory if the penalties in respect of the members of group C are allowed to stand. It is important to bear in mind in this regard that the PPC and the NA approached the imposition of penalties on a group basis and to this extent did not individuate the penalties.

[72] Having regard to the provisions of sec 172 I consider that it would be just and equitable to set aside the penalties in respect of the members of group C as well. In this way the PPC and the NA will start with a clean slate and a full and unfettered discretion to impose penalties on all of the members found guilty of contempt without being hamstrung by the penalties previously imposed. I can see no prejudice to the respondents if such an order is made since nothing will prevent both the PPC and the NA from recommending or imposing the previous penalty on group C should this be their ultimate decision. Such an order will also ensure that the question of penalty is not dealt with on a piecemeal basis.

Costs

[73] The applicants have enjoyed some measure of success insofar as the penalties imposed on groups A and B. However, this falls well short of the relief initially sought since the contempt findings remain standing and the applicants have obtained none of the relief sought in prayers 4 – 7 in relation to the duties and powers of the Speaker and the NA arising from the question which was initially put to the President on 14 August 2014. In my view the costs order should reflect the fact that much of the applicants' challenge has been unsuccessful. Having regard to all the circumstances I consider that it would be appropriate that the applicants should only be awarded a portion of their costs. In my view an appropriate portion would be half thereof.

[74] In the result I would make the following order:

1. *It is declared that the decision taken on 27 November 2014 by the National Assembly to adopt that part of the report of the Powers and Privileges Committee dealing with the recommended penalties for the second to fourteenth applicants and suspending them, is constitutionally invalid and unlawful and is of no force and effect.*

2. *The penalties imposed on the second to twenty-first applicants on 27 November 2014 by the National Assembly are set aside;*

3. *The matter is remitted back to the Powers and Privileges Committee and the National Assembly to consider the issue of sanction afresh, in the light of the contents of this judgment and the provisions of sec 12(9) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 4 of 2004*

4. *The provisional order made on 23 December 2014 interdicting the imposition of the penalties in respect of the second to twenty-first applicants is made final;*

5. *Prayers 4 – 7 in Part B of the application are dismissed;*

6. *The first, second and third respondents, jointly and severally, the one paying the others to be absolved, are ordered to pay half of the applicants' costs in the proceedings pursuant to Part B of this application including the costs of two counsel where so employed.*

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BOZALEK J

APPEARANCES:

For the Applicants: Adv. D Ntsebeza SC
Adv. Ngcukaitobi
Instructed by Godla & Partners

For the Respondents: Adv. W Duminy SC
Adv. N Mangcu-Lockwood
Instructed by the State Attorney
L Manuel