CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/12
[2012] ZACC 27

In the matter between:

MARIO GASPARE ORIANI-AMBROSINI, MP Applicant

and

MAXWELL VUYISILE SISULU, MP SPEAKER OF THE NATIONAL ASSEMBLY Respondent

Heard on : 7 August 2012

Decided on : 9 October 2012

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] The question that arises from this application for leave to appeal is whether the National Assembly may regulate its business in a manner that may deny its members the

opportunity of introducing a Bill in the Assembly, in terms of section 73(2) of the Constitution.[1]

[2] The matter first served before Allie J,[2] in the Western Cape High Court, Cape Town (High Court). It was a challenge to the constitutional validity of those Rules of the National Assembly[3] (Rules) that require a member of the Assembly to secure "permission" from it before she may "introduce" a Bill in terms of section 73(2). That application was dismissed on the ground that the impugned Rules are not in breach of a member's constitutional power to introduce a Bill. It is that unfavourable outcome that moved the applicant to launch the application.

[3] The relief sought then and now is essentially—

(a) a decision reviewing and setting aside the refusal by the Speaker of the National Assembly (Speaker) to introduce the applicant's proposed National Credit Act Amendment Bill in the Assembly;

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[1] Section 73 provides, in relevant part:

> "(1) Any Bill may be introduced in the National Assembly.
>
> (2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
>
> (a) a money Bill; or
>
> (b) a Bill which provides for legislation envisaged in section 214."

[2] *Oriani-Ambrosini v Sisulu* [2011] ZAWCHC 501.

[3] The applicant challenged the 6th edition of the Rules in the High Court proceedings. These Rules have since been replaced by a 7th edition. The Speaker does not raise this as an issue and is happy to have the merits of this matter decided on the basis of the current edition.

(b) an order directing the Speaker to have the applicant's Bill introduced in the Assembly in terms of the same procedures and under the same conditions that apply to a Cabinet member or a Deputy Minister; and

(c) a declarator that any Rule which prevents a member of the Assembly from introducing a Bill in the Assembly is constitutionally invalid.[4]

Parties

[4] The applicant is Mr Mario Gaspare Oriani-Ambrosini, a member of the Inkatha Freedom Party,[5] who is also a member of the National Assembly.[6] The respondent is Mr Maxwell Vuyisile Sisulu, MP, who is cited in his capacity as the Speaker.

Background

[5] A brief account of the Rules will help put the constitutional challenge in a proper context. The Rules provide that a member of the National Assembly may introduce a Bill in the Assembly, in accordance with section 73(2), only if the Assembly has given her "permission" to initiate legislation.[7] For the purpose of obtaining that permission, she must submit a memorandum to the Speaker setting out the particulars of the proposed

[4] See below n 74 for the particular Rules which the applicant alleges to be constitutionally invalid.

[5] The Inkatha Freedom Party is a minority party in the National Assembly.

[6] As contemplated by sections 42 and 47 of the Constitution.

[7] Rule 230.

legislation; explaining its objects; and stating whether it will have financial implications for the State.[8]

[6] The Speaker must then refer the memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions (Private Members' Committee), which may in turn consult a portfolio committee that deals with the subject matter of the proposal. After considering the memorandum the Private Members' Committee then recommends to the Assembly that permission to proceed with the legislation either be given or refused. A positive recommendation may be accompanied by an indication of the proposal's desirability, a recommendation that the proposal be approved by the Assembly in principle, or that permission be given subject to certain conditions.[9]

[7] The Private Members' Committee must table a member's memorandum and its recommendation, along with the views of a portfolio committee on the financial or other implications of the proposal, in the Assembly.[10] The Speaker then places these documents on the Order Paper for decision.[11] If the Assembly votes to give permission for the proposal to be proceeded with,[12] the member is free to prepare a draft Bill in the

[8] Rule 234.

[9] Rule 235.

[10] Rule 236(1).

[11] Rule 236(2).

[12] Rule 236(3) and (4).

manner and form prescribed by the Rules.[13] Why and how aspects of these Rules led to the application before us follows in the next three paragraphs.

[8] The applicant became a member of the National Assembly on 6 May 2009. He had several concerns about the procedures of the Assembly, in particular the requirement that a member needs the Assembly's permission before she may introduce a Bill in the Assembly. In his view, any Rule that stipulates permission as a requirement in this regard is constitutionally invalid.

[9] To have this matter addressed, the applicant directed complaints to the Speaker in a letter dated 15 May 2009. The response was that the applicant was mistaken because the Rules are in conformity with the Constitution. On 10 June 2009, the applicant raised a point of order on this matter during a sitting of the National Assembly. This was rejected by the Speaker. During the course of the next few months, the applicant wrote more letters to the Speaker and one to the chairperson of the Sub-Committee on the Review of the National Assembly Rules. None of these letters drew a response.

[10] Having not achieved a satisfactory outcome through the internal procedures of the National Assembly, the applicant challenged the constitutional validity of the Rules in the High Court.

[13] Rule 237(1).

In the High Court

[11] The High Court held that individual members do not have the power to initiate or prepare legislation, as these powers vest in the Assembly. Further, it held that the institution vested with the authority to permit or refuse the further progression of an individual member's legislative proposal, to the stage of being introduced as a Bill, is the National Assembly, not the Private Members' Committee. The latter makes non-binding recommendations to the Assembly only. It held that the possibility of a legislative proposal not being allowed by the majority party in the Assembly to go beyond the initiation or preparation stage is not inimical to democracy. In this regard, the Court cited the decisions of this Court[14] and the Supreme Court of Appeal,[15] which upheld the constitutionality of majority decision-making as a legitimate democratic principle.

[12] As a result, the application was dismissed with costs. This was followed by an unsuccessful application for leave to appeal to the Supreme Court of Appeal.[16] The applicant then approached this Court for leave to appeal.

Issues

[13] These are the preliminary issues:

[14] *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) (*Masondo*) at para 22.

[15] *MEC KZN for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and Others* [2011] 1 ALL SA 401 (SCA) at para 17.

[16] *Oriani-Ambrosini v Sisulu* [2012] ZAWCHC 41.

(a) Condonation for the late filing of the Speaker's notice of opposition and answering affidavit.

(b) Leave to file a replying affidavit.

(c) Condonation for the late filing of the record.

(d) Condonation for the late filing of the applicant's written submissions.

(e) Leave to appeal.

[14] The central issue is whether it is open to the National Assembly, in the exercise of its power in terms of section 57 of the Constitution,[17] to impose a permission requirement that may prevent a member of the National Assembly from exercising her power to introduce a Bill in terms of section 73(2) of the Constitution. To decide this issue, these matters must be considered:

(a) Whether the power created by section 55(1)(b) of the Constitution also vests in individual members of the National Assembly.

(b) The scope and meaning of section 73(2) of the Constitution.

[17] Section 57 provides, in relevant part:

"(1) The National Assembly may—

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

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

(2) The rules and orders of the National Assembly must provide for—

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy".

(c) The scope and meaning of section 57 of the Constitution.

(d) Remedy.

Condonation: notice to oppose and answering affidavit

[15] The Speaker filed his notice of opposition and an answering affidavit after the dies had expired. The delay was short and the applicant concedes that condonation is in the interests of justice. Condonation should, therefore, be granted.

Leave to file a replying affidavit

[16] The Rules of this Court make no provision for a replying affidavit to be filed. Yet the applicant seeks leave to do so. He submits that his affidavit will clarify certain issues and obviate a consideration of irrelevant matters and he is correct. There is no opposition and the affidavit will not prejudice the Speaker. It is in the interests of justice to grant leave and I am inclined to do so.

Condonation: record

[17] On 4 May 2012, this Court issued directions in terms of which the applicant was required to file the relevant portions of the record in the High Court on or before 31 May 2012. He failed to do so and only filed the record along with an application for condonation on 4 June 2012.

[18] The delay is relatively short and the Speaker has suffered no prejudice since the applicant delivered a copy of the record to the Speaker's attorneys on 31 May 2012. I am inclined, therefore, to grant condonation.

Condonation: written submissions

[19] The directions also required of the applicant to file his written submissions on or before 15 June 2012. Again, the applicant did not file his submissions on time. He only filed them, along with an application for condonation, on 19 June 2012. The principal explanation tendered is that unforeseen circumstances were the cause of the failure to file timeously. The applicant delivered a copy of the submissions to the Speaker's attorneys on 15 June 2012. The delay is relatively short and the Speaker suffered no prejudice because he received the submissions on time. Condonation should thus be granted.

Leave to appeal

[20] This matter raises important constitutional issues. They concern the power to introduce a Bill in the National Assembly,[18] the power to initiate or prepare legislation,[19] the interpretation of the National Assembly's power to make rules in terms of which its business is governed,[20] and the values that underpin our democracy.[21]

[18] Section 73(2) of the Constitution.

[19] Section 55(1)(b) of the Constitution (cited below n 22).

[20] Section 57 of the Constitution.

[21] Sections 1(d), 57(1)(b), 57(2)(b) and 195(1) of the Constitution.

[21] The National Assembly, its individual members and the public have a keen interest in the guidance to be provided by this Court on the constitutional validity of elements of the existing regulatory framework of the Assembly. Reasonable prospects of success also exist. The interests of justice therefore dictate that leave be granted to appeal to this Court.

Submissions

[22] The applicant grounds his challenge on the values of democracy, transparency, accountability and openness, as well as the importance of protecting individual members of minority parties in the National Assembly. These values are, in his view, undermined by the permission requirement. This, he says, has the effect of stifling debate on important issues that a member of the Assembly may wish to have the Assembly consider properly, by first introducing a Bill.

[23] He argues that section 55(1)(b),[22] which confers the power to initiate or prepare legislation, forms part of several provisions of the Constitution that provide for the composition and functions of the Assembly. He contends, however, that the process by which this "generally accorded legislative power is exercised is described elsewhere in the Constitution." In this regard, he points to section 73(2), which he argues vests in a

[22] Section 55(1) provides:

> "In exercising its legislative power, the National Assembly may—
>
> (a) consider, pass, amend or reject any legislation before the Assembly; and
>
> (b) initiate or prepare legislation, except money Bills."

member of the Assembly the power to introduce "[a]ny Bill"[23] in the Assembly. And this power is, in his view, negated by the permission requirement in the Rules. Further, the applicant accepts that section 57 of the Constitution gives the Assembly the power to determine and regulate its own proceedings and procedures. He contends, however, that this does not entitle the Assembly to impose substantive limitations on the exercise of the constitutional powers of its members, or make their exercise of those powers subject to the discretion of another body.[24] Rather, the section contemplates rules that are procedural in nature.

[24] The Speaker concedes that members are entitled to introduce a Bill in the Assembly in terms of section 73(2). But, he submits that they are not entitled to initiate or prepare legislation, in terms of either section 55(1)(b) or section 73(2), on their own. This is, in his view, a collective power that vests in the Assembly and not individual members.[25] It is the exercise of this power to which the Rules correctly attach the permission requirement. The Speaker argues that it is open to the Assembly to impose a permission requirement on members who wish to exercise the power of the Assembly to initiate or prepare legislation, precisely because it is only the Assembly, as the sole repository of the power, which may delegate it.

[23] Section 73(1) of the Constitution.

[24] By this he means the Private Members' Committee. The applicant relied on *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA) (*De Lille*).

[25] The Speaker points to *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 32, which he argues recognises the distinction between the initiation and preparation stage of law-making and the process of introducing a Bill in the Assembly.

[25] He also contends that majority decision-making by the National Assembly is a recognised constitutional principle, which is consistent with section 53 of the Constitution,[26] and that the process provided for in the Rules involves the participation of minority parties and is therefore consistent with section 57(2)(b) of the Constitution.

[26] The applicant seeks to refute the Speaker's construction of section 73(2) on the basis that it trivialises the importance and role of the power to introduce Bills in the Assembly and impermissibly relegates it to the level of merely listing those persons who may exercise it. This, he says, renders the section all but nugatory.

Initiation or preparation of legislation

i. Textual meaning

[27] As I accord meaning to section 55(1)(b), I keep in mind the established principle of interpretation that where the same words are used in the same statute, they should be given the same meaning, unless the context indicates otherwise.[27] The converse is also true.

[26] Section 53 is set out in full at [34] below.

[27] See *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* [2007] ZACC 25; 2008 (2) SA 319 (CC); 2008 (4) BCLR 417 (CC) at para 33; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 47; and *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (AD) at 949F.

[28] The power of the National Assembly to initiate or prepare legislation is set out in section 55(1) in these terms:

> "In exercising its legislative power, the National Assembly may—
>
> (a) consider, pass, amend or reject any legislation before the Assembly; and
>
> (b) initiate or prepare legislation, except money Bills."

[29] The *Shorter Oxford English Dictionary* defines the word "initiate" as: "Begin, introduce, set going, originate."[28] It defines "prepare" as: "Put beforehand into a suitable condition for some action; bring into a proper state for use; get or make ready; fit out, equip."[29]

[30] Initiation, on the one hand, contemplates the making of a decision or taking of action by an individual, which kick-starts the process of having legislation passed by the Assembly. It implies the conceptualisation, envisioning and incubation of legislation. Preparation, on the other, envisages progressively working on a legislative proposal to bring it into a suitable state for some future action; the concretisation or giving shape and life to a legislative idea. This is the process of drafting legislation, for the purpose of getting it ready to be placed before the Assembly as a Bill, in terms of section 73(2).[30]

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[28] *Shorter Oxford English Dictionary: On Historical Principles* 6 ed Vol 1: A-M (Oxford University Press), under "initiate", verb at 2.

[29] *Shorter Oxford English Dictionary: On Historical Principles* 6 ed Vol 2: N-Z (Oxford University Press), under "prepare", verb at 1a.

[30] The meaning that I have attributed to these words finds support from a contrast with the word "introduce" in section 73(2). Although the definition of "initiate" includes the word "introduce", the rule of statutory interpretation referred to in [27] above dictates that they be given different meanings, unless the context indicates otherwise. For the reasons traversed in [52]-[56] below, the context does not provide a contrary indication.

[31] On its face, section 55(1)(b) deals with nothing but the collective exercise of power by the National Assembly. So construed, the authority to "initiate or prepare legislation" would repose exclusively in the Assembly. Section 55(1)(b) is capable of being interpreted as vesting this power in the Assembly as a collective, or in members of the Assembly, acting as individuals or as part of larger groups, be they committees, political parties or otherwise. This is to be contrasted with the language of section 85(2), which provides in relevant part:

> "The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> . . .
>
> (d) preparing and initiating legislation".

[32] As the language indicates, the executive power to initiate and prepare legislation is not one that is to be exercised by a single member of Cabinet. It is a power vested in the President "together with" other members of Cabinet and is, therefore, a responsibility to be discharged collectively. This means that although a Cabinet member is in terms of section 73(2) entitled to introduce a Bill in the Assembly, she does not have the individual power to initiate or prepare legislation and introduce a Bill without prior consultation with and approval of Cabinet.[31] In order for a legislative proposal to be

[31] A Deputy Minister is not a member of Cabinet (section 91(1) of the Constitution provides that "[t]he Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers"). She is thus not part of the collective that has the power to initiate and prepare legislation. The purpose of her appointment is to "assist" a member of Cabinet (section 93(1) of the Constitution). The possibility she has to introduce a Bill in the Assembly would arise in circumstances where a Cabinet member is not able to introduce a Bill herself. Importantly, the

shaped into a Bill that may be introduced, it is imperative that Cabinet be consulted for the endorsement of the proposal, at some stage. Had it been the purpose of the Constitution to confer an exclusively collective power through section 55(1)(b), it could have indicated that preference explicitly, in the terms similar to those of section 85(2)(d).

[33] A textual analysis of the words "initiate or prepare", within the context of section 55(1)(b), suggests that this is a power that may also be exercised by an individual member. But, this interpretation is not necessarily conclusive. It must be considered in a broader context.

ii. Nature of the section 55(1)(b) power and the workings of the Assembly

[34] Section 53(1) of the Constitution puts the section 55(1)(b) power in a proper perspective:

> "Except where the Constitution provides otherwise—
>
> (a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
>
> (b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and
>
> (c) all questions before the Assembly are decided by a majority of the votes cast."

initiation and preparation would probably have been done by or with the permission of Cabinet and the introduction of a Bill by a Deputy Minister would have to carry the approval of a Minister that she was appointed to assist.

[35] This section regulates the decision-making process of the National Assembly. Subparagraphs (a) and (b) provide for votes on a "Bill or an amendment to a Bill" and votes on "any other question before the Assembly". Except where the Constitution provides otherwise, a majority of votes will decide any question before the Assembly. Thus, a Bill that is before the Assembly in terms of section 55(1)(a) requires a majority vote for it to be passed into law. But, the amendment of sections 1 and 74(1) of the Constitution may, for example, only be effected by a supporting vote of at least 75 per cent of its members.[32]

[36] Other sections of the Constitution that require a vote are those that provide for the adoption of a resolution;[33] the determination of the time and duration of the sittings of the Assembly;[34] the election of a Speaker and a Deputy Speaker;[35] the election of officers to assist the Speaker;[36] the removal of a Speaker;[37] and the Assembly's power to determine its processes through the making of rules.[38]

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[32] Section 74(1) provides:

> "Section 1 and this subsection may be amended by a Bill passed by—
>
> (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
>
> (b) the National Council of Provinces, with a supporting vote of at least six provinces."

[33] Section 50(1)(a).

[34] Section 51(1).

[35] Section 52(1).

[36] Section 52(5).

[37] Section 52(4).

[38] Section 57(1)(a) and (b).

[37] The language used in all these sections contemplates the making of a decision in relation to an unresolved question. Naturally, because members may disagree on whether laws should be passed or amended, Speakers elected or removed, rules made or resolutions adopted, there is a need for some voting mechanism to resolve these questions. This is the purpose served by section 53. Except where the Constitution provides otherwise, section 53 regulates the manner in which members of the Assembly exercise power collectively, which is by making decisions through a voting process.

[38] Section 55(1)(b) does not, however, use language that can only be associated with decision-making. It does not use words like "resolution", "determine" or "decide", to indicate that the Assembly must always vote in terms of section 53 before legislation may be initiated or prepared. It simply says that one of the powers of the National Assembly is to "initiate or prepare legislation". This ought to come as no surprise because neither initiation nor preparation yields a definitive outcome. It does not have any substantial consequence and nothing needs to be done as a result of the exercise of this power. No decision necessarily has to be taken in relation to or has to flow from the initiation or preparation of legislation. For this reason, the National Assembly does not necessarily have to act as a collective in this regard.

[39] Ordinarily, it takes only an individual to imagine the need for a particular legislative amendment or intervention. Whether she would also prepare or flesh out the idea alone, or with the help of others as the word "or" between "initiate" and "prepare"

suggests, is another option that would be open to her. More importantly, the very nature of initiation or preparation seems to defy the notion that this power always has to be exercised collectively. Practically speaking, these roles will naturally be played by individuals or groups of individuals.

[40] Further, this construction follows from a proper understanding of the term "National Assembly". Section 46(1) of the Constitution provides that "[t]he National Assembly consists of no fewer than 350 and no more than 400 women and men". This is much like the term "Parliament", which "consists" of the National Assembly and the National Council of Provinces;[39] and the term National Council of Provinces, which is "composed" of a single delegation from each Province.[40] The term "National Assembly", when used in the context of section 55(1), is thus meant only to identify the elected members by whom it is constituted. It is these members who, in terms of section 55(1)(b), have the power to initiate or prepare legislation. This must, however, not be understood to mean that a collective body may never exercise this power through its individual members, leadership or structures that it may have authorised to act on its behalf. It is only an added indication that the power to initiate or prepare legislation may not be exclusively institutional.

[39] Section 42(1) of the Constitution.

[40] Section 60(1) of the Constitution.

[41] What this resolves itself to is that the Assembly as a collective may, for example, vote only once, to put in place a mechanism that would guide or regulate its exercise of the power to initiate or prepare. This it may agree to do through identified committees or members. This also explains why it would be unduly cumbersome for the Assembly to vote on the initiation or preparation of each legislative proposal when it could instead be left to committees or individuals, like the Speaker, to act on its behalf. Thereafter, its business in this connection would be disposed of in line with that agreed structure or set of guiding principles. No rule created by the Assembly may preclude individuals from initiating and preparing legislation, which the Constitution gives them power to do, and is itself subject to the requirements of section 57, to which I return later.

[42] After considering the textual meaning, a purposive interpretation is a decisive aid in the resolution of this issue.

iii. Purposive interpretation

[43] Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.[41]

[41] *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13 at para 61.

[44] One must have regard to the broader scheme of the Constitution, Chapter 4 of the Constitution, and the purpose of section 55(1)(b) itself to appreciate whether a member of the Assembly has the power to initiate or prepare legislation. This Chapter deals with Parliament, its composition, powers and how it ought to function. It affords even an individual member of the National Assembly the possibility to introduce a Bill in the Assembly. This power extends to all and must not, therefore, inadvertently or deliberately, be rendered hollow and inconsequential for those individual members of the Assembly who may wish to exercise it.

[45] The purpose and ambit of section 55(1)(b) should thus be considered bearing in mind the need to breathe life into the foregoing constitutional vision. Preliminary work needs to be done before a Bill could be ready for introduction in the Assembly. As will be seen later in this judgment, section 73(2) is silent on how a Bill comes into being and who has the power to engineer and mould a legislative proposal into a Bill. Section 55(1)(b), however, provides that the National Assembly has the legislative power to initiate or prepare legislation. The question is whether it accords with the purpose of section 55(1)(b) to confine the exercise of this power to the collective membership of the Assembly or its duly authorised structures or functionaries.

[46] A construction that also recognises an individual competence to initiate or prepare legislation not only accords with the textual meaning of the section but also with the

principles of multi-party democracy,[42] representative and participatory democracy,[43] responsiveness, accountability[44] and openness.[45] The very nature and composition of the National Assembly renders it preeminently suited to fulfill the role of a national forum at which even individual members may initiate, prepare and present legislative proposals to be considered publicly by all the representatives of the people present in the Assembly.[46]

[47] This Court has previously discussed the nature of some of the constitutional principles that undergird our democracy.[47] It has also paid particular attention to the deliberative nature of the National Assembly and stressed the importance of deliberation

[42] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at paras 24 and 26.

[43] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 110-7.

[44] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 74-6.

[45] Sections 1(d), 57(1), 57(2)(b) and 195(1) of the Constitution. See *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 110, where Sachs J held that "[i]n our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness" and *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at para 1, where it was held that "[o]pen and transparent government . . . concerning the affairs of the State is the lifeblood of democracy."

[46] Section 42(3) of the Constitution provides:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action."

[47] In *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 160, the following was said:

> "One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the State is." (Footnote omitted.)

in the legislative process.[48] Elaborating on this and the kind of democracy we have opted for, Sachs J said:

> "[T]he Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. . . .
>
> The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it . . .'."[49]

[48] The "rights of all to be heard and have their views considered", within the context of the legislative process, dictate that individual members ought to have the power to initiate or prepare legislation. In this way, an opportunity would be availed to them to promote their legislative proposals so that they could be considered properly. It is a collective responsibility of both the majority and minority parties and their individual members to deliberate critically and seriously on legislative proposals and other matters

[48] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 73; *Doctors for Life International* above n 43 at para 40; and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at paras 111-3.

[49] *Masondo* above n 14 at paras 42-3.

of national importance. And this should also apply to legislative proposals initiated or prepared by individual members. This approach would give meaning to and enrich our representative and participatory democracy, and will probably yield results that are in the best interests of all our people.

[49] The need to recognise the inherent value of representative and participatory democracy and dissenting opinions was largely inspired by this nation's evil past and our unwavering commitment to make a decisive break from that dark history.[50] South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it. And it is in this context that the section 55(1)(b) power to initiate or prepare legislation must be understood.[51]

[50] This purposive interpretation of section 55(1)(b) does not undermine the power of the National Assembly to determine how best to run its affairs, nor does it work against the significance of being the majority party in the Assembly. It also does not disregard

[50] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.

[51] *Shabalala and Others v Attorney-General, Transvaal, and Another* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26.

the views of other minority parties that may not be interested in, or supportive of, an individual member's legislative proposal. This is so because, even after a member would have caused the Assembly to reflect properly on the potential benefits of her proposal to the nation, the majority voice would still prevail.[52]

[51] Section 55(1)(b) thus empowers an individual member, even from a minority party, to sponsor or pilot a legislative proposal as her own. It is always open to her, though, to seek the National Assembly's adoption of her initiatives as its own. This meaning of section 55(1)(b) finds support in its textual and purposive interpretation, the nature of the power conferred by section 55(1)(b), and the manner in which the National Assembly operates. This then leads me to the interplay between the initiation and preparation powers and the power to introduce a Bill.

Scope and meaning of section 73(2)

[52] Section 73 of the Constitution provides, in relevant part:

> "(1) Any Bill may be introduced in the National Assembly.
>
> (2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
>
> (a) a money Bill; or

[52] *Masondo* above n 14 at para 78. The following words in Sen *The Idea of Justice* (The Belknap Press of Harvard University Press, Cambridge 2009) at 337 are instructive in this regard: "If a majority is ready to support the rights of minorities, and even of dissenting or discordant individuals, then liberty can be guaranteed without having to restrain majority rule."

(b) a Bill which provides for legislation envisaged in section 214."

[53] The *Shorter Oxford English Dictionary* defines the word "introduce" as: "Bring, put, or lead into or in".[53] It may also be construed to mean "announce"[54] or "[b]ring to the notice or cognizance of a person or group; bring a bill or proposal before Parliament".[55]

[54] Bills are introduced in the National Assembly as a precursor to the process that culminates in the possible passing of legislation, by way of voting. What section 73(2) seeks to achieve is to identify those who may carry out the function of introducing a Bill. And a member of the National Assembly is one of them.

[55] The applicant contends that the power to introduce a Bill in the Assembly should be understood to include such preparatory work as might be necessary to embark upon before the proposed legislation takes the shape of what qualifies to be described as a Bill. I think not. It is not the purpose of the Constitution to give the word "introduce" a meaning that is so broad as to accommodate the initiation or preparation process that must ordinarily precede the unveiling of the Bill in the Assembly. Had this been so, provision would not have been made in sections 55 and 85 for the power to handle these preliminary stages of the legislative process, by even some of those functionaries who are

[53] *Shorter Oxford English Dictionary* above n 28, under "introduce" at 1b.

[54] Id at 6.

[55] Id at 8.

already empowered by section 73(2) to introduce a Bill.[56] Besides, "initiate" or "prepare" in section 55(1)(b) should be given the same meaning as in section 85(2)(d) and "introduce" in section 73(2) should be construed differently.[57] As noted by this Court in a different context, "[t]hese are not idle words randomly inserted into the Constitution. They must be given meaning."[58]

[56] Section 73(2) provides for a more advanced stage in the law-making process, whereas sections 55(1)(b) and 85(2)(d) provide for the groundwork that must be done prior to the exercise of the power to introduce a Bill in the National Assembly. It is only after a legislative concept has been given expression to that it culminates in a Bill that can then be introduced.

[57] The power of an individual member of the Assembly to introduce a Bill, particularly those from the ranks of opposition parties, is more than ceremonial in its significance. It gives them the opportunity to go beyond merely opposing, to proposing constructively, in a national forum, another way of doing things. It serves as an avenue for articulating positions, through public debate and consideration of alternative

[56] See also sections 59(1) and 60(3) of the interim Constitution, where a distinction was made between the act of introduction of a Bill in the Assembly and the prior act of initiation by the Minister responsible for national financial matters.

[57] See [27] above.

[58] *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) at para 118.

proposals, on how a particular issue can be addressed or regulated differently and arguably better.[59]

[58] This noble objective finds further support from the consequences that flow from the introduction of a Bill. Once introduced, a Bill forms part of the permanent and searchable records of the Assembly, like the parliamentary Order Paper, the Announcements, Tablings and Committee Reports, and Hansard. This material can then be accessed by members of the public, to do with as they think fit. Also, once introduced, a Bill is published in the official *Gazette* and goes to the relevant portfolio committee, with expertise on the subject matter of the Bill, for deliberation. This all promotes the values of participatory democracy, openness, accountability and transparency.

[59] Even if a Bill does not result in an Act of Parliament, the power to introduce it is vital to the type of democracy envisaged by our Constitution. This is so because it

[59] John Stuart Mill's *cri de coeur* in his essay "On the Liberty of Thought and Discussion" in Gray (ed) *On Liberty and Other Essays* (Oxford University Press Inc, New York 2008) at 59, in which he advocated the individual and social value of freedom of thought and expression, is apposite here:

> "[I]f any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. . . . [T]hough the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. . . . [E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but . . . the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience."

facilitates meaningful deliberations on the significance and potential benefits of the proposed legislation. It is therefore an important power and should not be restricted without good reason.

The Assembly's power to make rules

[60] The heading of section 57 of the Constitution reads: "Internal arrangements, proceedings and procedures of National Assembly." In relevant part, the section provides:

> "(1) The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
>
> (2) The rules and orders of the National Assembly must provide for—
>
> (a) the establishment, composition, powers, functions, procedures and duration of its committees;
>
> (b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy".

[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.

[62] Of further importance is that the power of the National Assembly to "make rules . . . concerning its business" must be exercised "with due regard to representative and participatory democracy, accountability, transparency and public involvement."[60] Equally significant is the need for the rules to cater for "the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy". The rules may only provide for the initiation or preparation of legislation and the introduction of a Bill in a manner that facilitates the exercise of these powers by individual members of the Assembly. They must pave the way and smooth the path for this purpose.[61]

[63] Comparable democracies have imposed less drastic restrictions on an individual member's power to marshal legislation through Parliament.[62] There are exceptions of course.[63] But it is apparent from an overview of these jurisdictions that greater freedom

[60] On the scope and meaning of "public involvement" in the legislative process, see *Doctors for Life International* above n 43 at paras 118-29; and on its informative value, see the dictum in *King and Others v Attorneys Fidelity Fund Board of Control and Another* [2006] 1 All SA 458 (SCA) at para 22 (which dictum was approved in *Doctors for Life International* above n 43 at para 140).

[61] Although it was said in a different context, the words of Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 46 are apposite in this regard:

> "The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct." (Footnote omitted.)

[62] See Mattson "Private Members' Initiatives and Amendments" in Döring (ed) *Parliaments and Majority Rule in Western Europe* (accessed at http://www.uni-potsdam.de/db/vergleich/Publikationen/Parliaments/PMR-W-Europe.pdf on 2 October 2012) at 458-66.

[63] Germany, for example, is cited by Mattson id at 458 as having "[t]he most severe numerical limit", with a Bill requiring the support of a party, or at least 5 per cent of the individual members of the Bundestag. This illustrates the excessive nature of the permission requirement in the Rules, which requires a majority vote before legislation may be initiated or prepared. See also the discussion of Austria, Italy, Spain and Belgium (at 458), all of whom impose varying degrees of numerical limits on the power to initiate legislation.

to initiate and introduce legislation is the norm.[64] By its very nature, representative and participatory democracy requires that a genuine platform be created, even for members of minority parties in the Assembly, to give practical expression to the aspirations of their constituencies by playing a more meaningful role in the law-making processes.[65] One way of achieving that objective would be by ensuring that minority parties are properly represented in committees and that they are allocated some time to present their views on any matter of importance that serves before the Assembly. But this is not all.

[64] Within the context of a law-making process, transparency would be enhanced optimally by rules that generally allow for a legislative proposal to be debated properly and in a manner that is open to the public,[66] before its fate is decided. Further, public participation, so as to cultivate an "active, informed and engaged citizenry",[67] is also facilitated by rules that allow even minority party members, who are not ordinarily represented in Cabinet, to initiate or prepare legislation and introduce a Bill. This is because the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues before the Assembly. This is

[64] Id at 448-84.

[65] *Masondo* above n 14 at para 18.

[66] The Preamble to the Constitution provides that one of the aims in adopting the Constitution was to "[l]ay the foundations for a democratic and open society in which government is based on the will of the people". See generally Chapter 3 of Gutmann and Thompson *Democracy and Disagreement* (The Belknap Press of Harvard University Press, Cambridge 1996). The authors, at 97, say the following on the value of publicity, or openness, to the democratic process: "Publicity is valuable first and foremost because it is a friend of democratic accountability. It motivates public officials to do their duty. It also encourages citizens to deliberate about public policy and enables officials to learn about and from public opinion." (Footnote omitted.)

[67] Roux "Democracy" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2011) at 10–25.

achievable by, amongst other things, interpreting section 57 as empowering the Assembly to make rules that do not constitute an inadvertent deployment of invincible giants in a member's path to exercising her section 55(1)(b) or section 73(2) power.

[65] Given the centrality of transparency, public involvement and representative and participatory democracy to the Assembly's power to make rules, it would be inappropriate to interpret section 57 in a way that allows the Assembly to make rules that undermine or vitiate the power of an individual member to initiate or prepare legislation and introduce a Bill.[68] The Constitution, therefore, does not entitle the Assembly to impose substantive or content-based limitations on the exercise of the constitutional powers of its members, but rather contemplates rules that are procedural in nature.

Validity of the Rules

[66] The validity of the Rules depends on whether they recognise and facilitate the exercise of the individual member's powers in sections 55(1)(b) and 73(2). Alternatively, whether they create a high risk of those powers being paralysed by placing the section 55(1)(b) power exclusively in the hands of the National Assembly, functioning as a collective body, thus inhibiting the exercise of the section 73(2) power by extension.

[68] See *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 100, for an analogous example regarding the scope of the power of the Assembly to regulate the internal proceedings of its committees.

[67] The notice of motion filed in this Court singles out certain Rules for attack.[69] Central to the constitutional challenge is the permission requirement they impose on individual members of the Assembly seeking to initiate, prepare or introduce legislation. Potentially, the permission requirement will negate the exercise of the power to initiate, prepare and introduce legislation in the National Assembly. And this does not bode well for our democracy. Common sense suggests that any majority party in the Assembly is likely to support its own legislative projects and not those of minority parties or any individual member.[70] For this reason, a permission requirement boils down to a mechanism that is inescapably prone to denying individual members and minority parties the power to initiate, prepare and introduce legislation, however well-meaning those who drafted the Rules might have been.

[68] Based on the discussion above, any Rule that empowers the National Assembly to impose the permission requirement, or reinforces this requirement, would fly in the face of the meaning and purpose of section 57, read with sections 55(1)(b) and 73(2). It would therefore be constitutionally invalid, to the extent of that inconsistency.

i. Failure to attack Rules 235A and 243(3)

[69] A legitimate concern does arise from the manner in which the applicant pleaded his case. Although he has always been concerned with removing the hindrances to the

[69] See below n 74 for the scope of the challenge.

[70] See Malan "Faction rule, (natural) justice and democracy" (2006) 21(1) *SAPR/PL* 142 at 154-7.

free exercise of his power to introduce a Bill in the Assembly, he does not in his pleadings deal with all the Rules that concern the introduction of a Bill. He does not challenge the constitutionality of Rules 235A[71] and 243(3)[72] directly, despite their relevance to the matter.

[70] Rules 235A and 243(3) are inextricably linked to and reinforce the permission requirement in relation to the introduction of a Bill. Their omission might arguably be a critical deficiency in the challenge, which should result in the dismissal of the application. Several factors, however, militate against that approach and outcome.

[71] The applicant has always hoisted the permission requirement high, as an impediment to the exercise of his power to introduce a Bill. This requirement is thus a dominant feature in the case he made out, and is central to the determination of the issues. A challenge to the Rules that regulate the initiation and preparation of legislation was launched on the apparent understanding that they are a critical and foundational step to the exercise of the power to introduce a Bill. For this reason, the applicant's approach to the matter has been to clear all potential barriers to the enjoyment of the power vested in him by section 73(2). Further, the Speaker has, to his credit, correctly conceded that if the permission requirement is declared unconstitutional, Rule 243(3) would also have to

[71] Quoted in full in [79] below.

[72] Quoted in full in [82] below.

be declared unconstitutional. This should extend to Rule 235A, although it is an amendment that was only effected after the application was brought in the High Court.

[72] Rule 230 sheds light on this issue and reads:

> "(1) The Assembly initiates legislation through its committees and members acting with the permission of the Assembly in terms of these Rules.
> (2) Any committee or member of the Assembly may in terms of section 73(2) of the Constitution introduce a Bill in the Assembly that has been initiated in terms of Subrule (1)."

[73] Rule 230, which has also been challenged by the applicant, is a vital factor in the determination of the issue. Its content captures the thrust of the applicant's attack on the constitutional validity of all the other Rules. Subrule (1) stipulates that a member will only initiate legislation "acting with the permission of the Assembly in terms of these Rules." More importantly, Rule 230(2) puts beyond doubt the inextricable connection between the exercise of the power to introduce a Bill in terms of section 73(2), and the member's incapacity to initiate legislation without the Assembly's permission. Rule 230 is thus at the intersection of the interplay between initiation and preparation, on the one hand, and introduction, on the other.

[74] I am satisfied therefore that the Rules relating to the introduction of a Bill have been cumulatively covered by: (i) the constitutional challenge to the permission requirement; (ii) the specific mention of section 73(2) in the applicant's papers; (iii) the

inseparability of the chain of events from initiation and preparation of legislation to the introduction of a Bill; (iv) the parties' attitudes and submissions; and (v) the very nature and scope of Rule 230 and its substantial connectedness to Rules 235A and 243(3).

ii. The impugned Rules

[75] Rule 230 distinguishes between, on the one hand, legislation that is initiated through the committees and members of the Assembly and, on the other, the introduction of a Bill by a committee or a member of the Assembly. The Rule, therefore, recognises the power of members of the Assembly to initiate legislation, but subjects the exercise of this power to the Assembly's permission, in line with the Speaker's contention that the Assembly is the sole repository of the power to initiate or prepare legislation. This permission requirement has great potential to hamstring the exercise of that power. A reading of Rule 230(2) suggests that the requirement extends to the exercise of the section 73(2) power. Those words that impose the permission requirement on individual members are therefore unconstitutional.

[76] Other Rules that are linked to and reinforce the permission requirement are 234, 235, 235A, 236, 237(1) and 243(3). It is necessary to reproduce them in full.

[77] Rule 234 provides:

> "(1) An Assembly member intending to introduce a Bill in the Assembly in an individual capacity (other than as a Cabinet member or Deputy Minister) must, for the purpose of obtaining the Assembly's permission in terms of Rule 230(1), submit to the Speaker a memorandum which—
>
> (a) sets out particulars of the proposed legislation;
>
> (b) explains the objects of the proposed legislation; and
>
> (c) states whether the proposed legislation will have financial implications for the State and, if so, whether those implications may be a determining factor when the proposed legislation is considered.
>
> (2) The Speaker must table the member's memorandum in the Assembly."

This Rule stands to be declared constitutionally invalid in its entirety because the portion that imposes the permission requirement cannot be severed from the Rule and still leave the rest capable of practical implementation.[73] The process provided for in this Rule is meant only to facilitate the requirement that a member obtain permission before initiating or preparing legislation. This is elaborated on by Rules 235 and 236.

[78] Rule 235 deals with the referral of a legislative proposal to the Private Members' Committee in these terms:

> "(1) The Speaker must refer the member's memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions.
>
> (2) The Committee may consult the portfolio committee within whose portfolio the proposal falls.
>
> (3) After considering the member's memorandum, the Committee must recommend that permission either be—

[73] It is not, so to speak, possible to separate the good from the bad, in a manner that is consistent with the Constitution (see *Coetzee* above n 61 at para 16 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 74).

(a) given to the member to proceed with the proposed legislation; or

(b) refused.

(4) If the Committee recommends that the proposed legislation be proceeded with, it may—

(a) express itself on the desirability of the principle of the proposal;

(b) recommend that the Assembly approve the member's proposal in principle; or

(c) recommend that permission be given subject to conditions."

This Rule is so intertwined with the permission requirement that the deletion of only the reference to the permission requirement would denude it of any substance and meaning. It is therefore unconstitutional in its entirety and invalid.

[79] Rule 235A lists the factors that must be taken into account by the Private Members' Committee when it considers a legislative proposal:

"(1) The Committee will confine its consideration of the legislative proposal to whether it—

(a) goes against the spirit, purport and object of the Constitution;

(b) seeks to initiate legislation beyond the legislative competence of the Assembly;

(c) duplicates existing legislation or legislation awaiting consideration by the Assembly or Council;

(d) pre-empts similar legislation soon to be introduced by the national executive;

(e) will result in a money bill; or

(f) is frivolous or vexatious."

This Rule is to be severed only because it is meaningless in the absence of Rule 235, to which it owes its existence. This must, however, not be understood as a pronouncement on the constitutional validity of its substance, for that issue does not arise.

[80] Like Rule 235, Rule 236 has no significance and meaning without its permission aspect. It is only about the procedure to be followed in order for the Assembly to consider granting or refusing permission for a legislative proposal to be proceeded with, and be developed into a Bill. And it reads:

> "(1) The Committee on Private Members' Legislative Proposals and Special Petitions must table in the Assembly the member's memorandum and the Committee's recommendation, including any views of a portfolio committee on the financial *or other* implications of the proposal.
>
> (2) The Speaker must place the Committee's report together with the member's proposal on the Order Paper for a decision.
>
> (3) The Assembly may—
>
> (a) give permission that the proposal be proceeded with;
>
> (b) refer the proposal back to the Committee or the portfolio committee concerned for a further report; or
>
> (c) refuse permission.
>
> (4) If the Assembly gives permission that the proposal be proceeded with, it may, if it so chooses—
>
> (a) express itself on the desirability of the proposal; or
>
> (b) subject its permission to conditions."

This Rule is constitutionally invalid in its entirety. It is an embodiment of the permission requirement.

[81] Rule 237(1) reinforces the permission requirement created by Rule 230, by subjecting the process through which a member prepares a draft Bill to the prior permission of the Assembly. The Rule subjects the power of individual members to prepare a Bill, with a view to introducing it in the Assembly, to the Assembly's veto. It provides:

> "If the Assembly gives permission that the proposal be proceeded with, the member concerned must—
>
> (a) prepare a draft Bill, and a memorandum setting out the objects of the Bill, in a form and style that complies with any prescribed requirements;
>
> (b) consult the JTM for advice on the classification of the Bill; and
>
> (c) comply with Rule 241 or, if it is a proposed constitutional amendment, with Rule 258."

This is plainly unconstitutional.

[82] Rule 243(3) further reinforces the permission requirement with regard to the introduction of a Bill:

> "A Bill introduced by an Assembly member or committee with the Assembly's permission in terms of Rule 236(3) or 238(3) must—
>
> (a) be accompanied by a statement to that effect; and
>
> (b) contain on its cover page a reference to the name of the member or the committee as the member or committee introducing the Bill."

The offending words in this Rule are unconstitutional only insofar as they apply to individual members.

Remedy

[83] The applicant essentially seeks three orders from this Court. First, a review and setting aside of the Speaker's refusal to introduce the applicant's proposed Bill. This is adequately addressed by the order declaring the permission requirement constitutionally invalid.

[84] Second, an order compelling the Speaker to process the applicant's proposed Bill in the same manner as a Cabinet member's Bill. A declaration of invalidity in respect of those Rules that impede the exercise of the applicant's power to initiate, prepare or introduce legislation is sufficient to address the consequences of the barriers imposed by the permission requirement. In any event, a mandamus would not be appropriate. The power to determine what processes ought to be followed falls within the constitutional domain of the National Assembly. It is not for this Court to dictate to the Assembly how it should go about regulating its own business.

[85] Third, the applicant seeks a wide-ranging order, in terms of which various parts of the Rules are declared unconstitutional.[74] The Rules that prescribe the permission requirement have been found to be invalid.

[74] In his notice of motion, the applicant prays that the following portions of the Rules be declared unconstitutional:

i) the words "Private Member's Legislative Proposals and" in Rule 121(1)(h);

ii) the words "with the permission of the Assembly" in Rule 230(1);

[86] Initially, the applicant also sought to have those provisions of the Rules that require a committee of the Assembly to obtain permission from the Assembly before initiating or preparing legislation declared unconstitutional. It later became clear from his written submissions, oral argument and post-hearing submissions[75] that his case is now limited to the permission requirement insofar as it applies to individual members. The Rules that provide for the permission requirement in relation to Assembly committees will, therefore, be left intact.

[87] At the request of this Court, both the applicant and the Speaker filed further submissions dealing with the remedy. The applicant proposes some severances and insertions in the impugned Rules. The Speaker, on the other hand, proposes that a

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iii) the words "for the purpose of obtaining the Assembly's permission in terms of Rule 230(1)" in Rule 234(1);

iv) Rules 235 and 236;

v) the words "If the Assembly gives permission that the proposal be proceeded with" and "draft" in Rule 237;

vi) Rule 237(2);

vii) the words "for the purpose of obtaining the Assembly's permission in terms of Rule 230(1)" in Rule 238(1);

viii) Rules 238(3) and (4); and

ix) the words "If the Assembly gives permission that the proposal be proceeded with" and "draft" in Rule 239.

In the alternative, he prays that the following be declared unconstitutional:

i) Rule 233 to the extent that the words "Cabinet Member or Deputy Minister" do not include the words "a Member of the Assembly and a committee";

ii) the words "with the permission of the Assembly" in Rule 230(1); and

iii) Rules 234 to 240.

[75] See [87] below.

declaration of invalidity of the impugned Rules be suspended to allow the Assembly time to remedy the constitutional defects and that, in the interim, a prescribed procedure be followed by members who wish to introduce a Bill. He also proposes that this Court limit a declaration of invalidity, to apply only prospectively.

[88] The four principal reasons advanced by him in support of this relief are: (i) the need for a pre-screening procedure to ensure form and style compliance; (ii) to avoid a waste of resources accompanied by the Assembly's obligation to reimburse expenses incurred by members when preparing Bills; (iii) to allow time to consult with the National Council of Provinces on the necessary amendments; and (iv) to ensure the observance of the doctrine of separation of powers.

[89] The form and style requirements apply to the drafting of Bills, which is governed by Rule 237(1). This Rule is unconstitutional only to the extent that it subjects the preparation phase of a member's draft Bill to the permission requirement. The rest remains intact and the Speaker's concerns are therefore suitably accommodated. Further, the Assembly's obligation to reimburse a member's expenses is governed by Rule 237(2),[76] which remains unaffected by our findings.

[76] Rule 237(2) provides: "The Secretary must reimburse a member for any reasonable expenses incurred by the member in giving effect to Subrule (1), provided that those expenses were approved by the Speaker before they were incurred."

[90] Lastly, I have alluded before to the need to observe the doctrine of separation of powers by respecting the Assembly's authority to make its own rules. However, some Rules and portions of others must be excised from the Rules of the Assembly. And this is so to the extent that they leave individual members bereft of any possibility to exercise their constitutional rights. There is thus nothing constitutionally appropriate to keep alive for any period of suspension. As stated earlier, I make no pronouncement on the constitutional validity of any screening mechanism. I deal only with the permission requirement as provided for in the impugned Rules.

[91] The order of invalidity will therefore not be suspended and no prospective order needs to be made. Each case will be dealt with on its own merits.

[92] Whilst the applicant's proposals, together with the notice of motion, go some way to remedying the constitutional defects in the Rules, it appears that they would trench on the Assembly's constitutional domain unduly, by effecting in some instances changes that are not necessary.[77] All we need to do is sever those parts of the Rules that are inconsistent with the Constitution, and leave it up to the Assembly to decide how best to

[77] Whilst the limits of the Constitution constrain even the inner-workings of Parliament (see *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) and *De Lille* above n 24 at para 14), there is nonetheless a need for courts to show appropriate deference to the affairs of the legislative branch of government. This approach gives proper recognition to the principle of Parliamentary immunity, a basic democratic principle, which now finds its home in the constitutional principle of separation of powers (see Budlender "National Legislative Authority" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2011) at 17–36 to 17–37 and 17–91 to 17–96).

deal with the rest of the issues. I will thus confine myself to those proposals I consider helpful for the determination of the issues.

[93] The test for severance was articulated by this Court in *Coetzee* as follows:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?"[78] (Footnote omitted.)

It is on the strength of these principles that total or partial severance of the impugned Rules will be done.[79]

[94] The matter is thus to be resolved as set out below:

(a) Rules 234, 235, 235A and 236 are to be declared constitutionally invalid and severed in their entirety.

(b) The underlined words in Rules 230(1), 230(2), 237(1) and 243(3) are to be declared constitutionally invalid and severed from the remainder of the Rules:

[78] *Coetzee* above n 61 at para 16.

[79] Section 172(1)(a) and (b) of the Constitution. Although the remedy that I propose has the effect of expunging from the Rules the constitutionally invalid permission requirement, the Rules will still give effect to the purpose of section 57, by promoting the values of democracy, transparency, accountability and openness, as well as giving protection to individual members and minority parties in the Assembly (see Bishop "Remedies" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2011) at 9–100).

(i) Rule 230(1): "The Assembly initiates legislation through its committees and members acting with the permission of the Assembly in terms of these Rules."

(ii) Rule 230(2): "Any committee or member of the Assembly may in terms of section 73(2) of the Constitution introduce a Bill in the Assembly that has been initiated in terms of Subrule (1)."

(iii) Rule 237(1): "If the Assembly gives permission that the proposal be proceeded with, the member concerned must—".

(iv) Rule 243(3):

> "A Bill introduced by an Assembly member or committee with the Assembly's permission in terms of Rule 236(3) or 238(3) must—
>
> (a) be accompanied by a statement to that effect; and
>
> (b) contain on its cover page a reference to the name of the member or the committee as the member or committee introducing the Bill."

Costs

[95] The parties agree that each party should bear his costs in this Court. It was correctly conceded during the course of oral argument that the costs order granted against the applicant in the High Court should be set aside.

Order

[96] In the result, the following order is made:

1. The applicant is granted condonation for the late filing of the record and written submissions.
2. The respondent is granted condonation for the late filing of the notice of opposition and answering affidavit.
3. Leave to file the replying affidavit is granted.
4. Leave to appeal is granted.
5. The appeal is upheld and the order of the Western Cape High Court, Cape Town is set aside.
6. Rules 234, 235, 235A and 236 of the Rules of the National Assembly are declared inconsistent with the Constitution and are severed in their entirety.
7. The words "and members" are declared inconsistent with the Constitution and are severed from Rule 230(1).
8. The words "or member" are declared inconsistent with the Constitution and are severed from Rule 230(2).
9. The words "If the Assembly gives permission that the proposal be proceeded with," are declared inconsistent with the Constitution and are severed from Rule 237(1).
10. The words "member or", "236(3) or" and "member or the" are declared inconsistent with the Constitution and are severed from Rule 243(3).
11. There is no order as to costs.

JAFTA J (Yacoob J concurring):

[97] I have read the judgment prepared by the Chief Justice. I agree that condonation, leave to file a replying affidavit and leave to appeal should be granted. But I respectfully disagree that the impugned Rules of the Assembly are inconsistent with the Constitution. The first reason that drives me to a different conclusion is that the Rules targeted by the applicant do not regulate the exercise of the power to introduce Bills in the National Assembly. The focus of these Rules is the initiation and preparation of legislation. Yet, the complaint by the applicant is that these Rules prevent him from introducing Bills in the Assembly.

[98] The second reason that leads me to the conclusion I reach is that, properly construed, the impugned Rules including Rule 243 do not prevent a member of the Assembly, acting in an individual capacity, from introducing a Bill. In other words, the Rules are capable of an interpretation that is consistent with the Constitution.

Factual background

[99] The applicant became a member of the Assembly in May 2009. Shortly after assuming office, he "detected" an inconsistency between the Rules of the Assembly and the Constitution. He raised this concern in the Assembly, requesting that certain Rules be deleted on the basis that they were unconstitutional. This request was declined. The applicant submitted the request, together with a legal opinion obtained from senior

counsel, to the Committee charged with reviewing the Rules of the Assembly. His request elicited no response.

[100] Having adopted the stance that the Rules were unconstitutional, the applicant wrote to the Speaker on 14 February 2010, attaching a draft Bill to his letter. Because this letter encapsulates the nub of the applicant's complaint it is necessary to quote it in detail. In relevant part it reads:

> "I am attaching for tabling the National Credit Act Amendment Bill of 2010, a Private Member's Bill of mine (the Bill). In terms of section 73 of the Constitution I hereby table the Bill in the National Assembly and/or its relevant Portfolio Committee, the Trade and Industry Portfolio Committee, and request you do so.
>
> I further request that you dis-apply and/or disregard these Rules of the National Assembly which require the majority of the members of Private Members' Committee to give their permission on a proposal before such proposal can be transformed into a Private Member's Bill to be tabled in the National Assembly, including without limitation Rules 230(1) and 234 to 237. In fact, such Rules are null and void because they are unconstitutional, as more fully set out in Adv. Anton Katz, SC's legal opinion previously sent to you and attached hereto for easier reference.
>
> . . .
>
> The application of the aforesaid unconstitutional, null and void Rules, with the consequent non-application of the Constitution, would cause the obliteration of the Members' constitutional right to introduce legislation in the National Assembly unless so authorised by a parliamentary majority. This would undermine the very tenets of parliamentary democracy placing the right of legislative initiative in the exclusive hands of the majority. I respectfully submit that you, as the Speaker of the House, bear the paramount responsibility to protect the Members' constitutionality rights in the House

> and uphold the functioning of parliamentary democracy. It is for this reason that I am confident in the alternative confronting you, you will not opt to dis-apply and disregard the Constitution."

[101] I interpose the outline of the facts by pointing out at this early stage that this letter reveals an incorrect reading of the relevant Rules. As will be evident later, none of the Rules referred to in the letter empower the "Private Members' Committee to give their permission on a proposal before such proposal can be transformed into a Private Member's Bill to be tabled in the National Assembly". Nor do they place the power to initiate legislation in the "exclusive hands of the majority."

[102] The applicant's request for the introduction of his Bill too elicited no response. After three months, the applicant launched an application in the Western Cape High Court. Although the notice of motion listed a number of challenged Rules and specified objectionable parts of those Rules,[80] a narrower case was pleaded in the founding affidavit. It reads:

> "29. I now set out, in brief, the scheme of the Rules and the basis of my submission that they are unconstitutional insofar as they prevent individual Members from introducing Bills in the National Assembly.
>
> 30. I attach hereto as annexure 'MGOA9' a copy of the Rules. Large portions of the Rules are irrelevant for the purposes of this application; I deal with what is relevant below.

[80] Prayer 2 in the notice of motion reads: "Ordering the Respondent to introduce the Bill in the National Assembly on the basis of the same procedures and under the same conditions applicable to Bills introduced by a Cabinet member or a Deputy Minister."

31. In terms of Rules 234 to 237, a Member of the National Assembly may not introduce a Bill in the National Assembly unless he receives prior 'permission' to do so by the National Assembly itself, in which the ANC, as the majority party, has a preponderance of seats and votes.

32. This is obtained in the following manner:

    32.1. first, in terms of Rule 234(1), the Member seeking to introduce a Bill must produce a memorandum on the Bill;

    32.2. this memorandum goes to the Committee on Private Members' Legislative Proposals and Special Petitions ('the Private Members' Committee') in terms of Rule 235(1);

    32.3. after various consultations, the Private Members' Committee must recommend to the National Assembly that permission to introduce the Bill either be granted or refused;

    32.4. the Assembly, in terms of Rule 236, must consider the recommendation of the Private Members' Committee and the memorandum and either grant or refuse permission to introduce the Bill; and

    32.5. as a matter of constant practice, Private Members' Committee's reports are 'below the line' in the Order Paper of the National Assembly, which means that they are not deliberated upon by the Assembly and that effectively the Private Members' Committee has final say on the matters before it.

33. This means that a Member of the National Assembly may not introduce a Bill unless previously authorized to do so by the Private Members' Committee, which in turn is dominated by the majority party. However, Cabinet members and Deputy Ministers are, in terms of Rule 233, excepted from complying with the above process.

34. The requirements listed above expressly violate the right and indeed the duty, as contained in section 73(2) of the Constitution, of every member of the National Assembly to introduce Bills in the National Assembly.

35. The only proviso contained in 73(2) is that it is only the Cabinet member responsible for financial matters who may introduce money Bills. This clearly means that a Member of the Assembly has an unfettered constitutional power to introduce any other Bill."

[103] It is apparent from the founding affidavit that Rules 121(1)(h) and 230(1) are excluded from the challenge, even though the notice of motion refers to them. Instead, the attack is confined to Rules 234 to 237. The applicant claims it is the requirements laid down by the latter Rules that "violate the right and indeed the duty, as contained in section 73(2) of the Constitution, of every member of the National Assembly to introduce Bills".

[104] The relief sought by the applicant was: (a) the review and setting aside of the Speaker's refusal to introduce the applicant's Bill in the Assembly; (b) an order directing the Speaker to introduce the Bill on the basis of procedures and conditions applicable to Bills introduced by Ministers and Deputy Ministers; and (c) an order declaring any Rule of the Assembly, which prevents members from introducing Bills, to be unconstitutional and invalid. The application was opposed by the Speaker.

[105] After interpreting the relevant Rules and sections of the Constitution, the High Court held that the impugned Rules were not inconsistent with the Constitution and dismissed the application with costs.

In this Court

[106] The singular issue in this matter is whether the impugned Rules prevent members of the Assembly from exercising the power to introduce Bills in the Assembly. It is not disputed that section 73(2) of the Constitution confers upon every member of the

Assembly, the power to introduce Bills. Although the section is quoted in the judgment of the Chief Justice, for ease of reference I quote it here. It reads:

> "Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
>
> a) a money Bill; or
> b) a Bill which provides for legislation envisaged in section 214."

[107] The section lists four categories of persons who may introduce a Bill in the Assembly. They are members of Cabinet, Deputy Ministers, members of the Assembly and committees of the Assembly. Members of Cabinet, who are also members of the Assembly, may exercise the power to introduce Bills in two capacities, depending on the origins of the Bill to be introduced. The Bills initiated and prepared by Cabinet may be introduced by members of Cabinet or Deputy Ministers only in their capacity as Ministers or Deputy Ministers. But the same officials may introduce Bills initiated and prepared in the Assembly, acting in their capacity as members of the Assembly if they are members. Members of the Assembly too may introduce Bills acting on behalf of the Assembly or in their individual capacity. It seems that committees can only introduce Bills on behalf of the Assembly.

The challenge

[108] Before interpreting each of the impugned Rules, it is necessary to determine the scope of the present challenge. As stated earlier, the challenge is that the targeted Rules prevent members of the Assembly from introducing Bills in the Assembly. The Rules targeted in the founding affidavit are Rules 234 to 237. The applicant contends that Rule 234(1) obliges a member of the Assembly to obtain permission from the Assembly before she can introduce a Bill. As appears below when I interpret the Rule, this construction of Rule 234(1) by the applicant is wrong.

[109] Proceeding from this incorrect premise, the applicant states that the Rule requires that a member should forward a memorandum to the Committee on Private Member's Legislative Proposals and Special Petitions in terms of Rule 235(1). He then says that this Committee recommends to the Assembly that permission to introduce the Bill be granted or refused. Again, this is an incorrect interpretation of Rule 235. This Rule does not at all deal with the question of introducing Bills. Instead, as appears below, it deals with the permission to initiate or prepare legislation, something that falls outside the scope of the complaint. The applicant does not complain that the Rules prevent members from initiating and preparing legislation. His sole complaint is that they prevent members of the Assembly from introducing Bills.

[110] The applicant continues on the same premise to state that "the Assembly, in terms of Rule 236, must consider the recommendation of the Private Members' Committee and

the memorandum and either grant or refuse permission to introduce the Bill". Once more, this is incorrect. Rule 236 does not authorise the introduction of Bills but empowers the Assembly to grant permission that a proposal for preparing legislation be taken forward.

[111] Although the applicant claims that "[i]n terms of Rules 234 to 237, a Member of the National Assembly may not introduce a Bill in the National Assembly unless he receives prior 'permission' to do so by the National Assembly itself, in which the ANC, as the majority party, has a preponderance of seats and votes", the scheme he outlines to underscore the complaint omitted Rule 237. But this Rule too does not deal with the issue of introducing Bills.

[112] There is also a misalignment between the relief sought in the notice of motion and the case pleaded in the founding affidavit. Apart from Rules 235 and 236, the notice of motion targets specified words in Rules 121(1)(h), 230(1), 234(1), 237, 238 and 239, as well as entire subrules in respect of some. The alternative remedy sought in the notice of motion is to declare invalid in Rule 233 the words "Cabinet Member or Deputy Minister" to the extent that they do not include the words "a member of the Assembly and a committee". Also to declare invalid specified words in Rule 230(1) and Rules 234 to 240 in their entirety.

[113] The case pleaded in the founding affidavit does not refer to Rules 238 to 240 at all. Nor does it refer to the Rules that regulate the introduction of Bills in the Assembly. A proper interpretation of the applicant's challenge must therefore be confined to Rules 234 to 237 which form the basis of the scheme postulated by the applicant in support of the complaint that these Rules prevent members of the Assembly from introducing Bills without permission granted by the Assembly.

[114] In a number of cases, this Court has in the past cautioned litigants to plead constitutional challenges concisely and accurately.[81] The particularity of a constitutional challenge does not serve only the purpose of informing parties to the particular litigation of the issues they are called upon to meet but also defines the issues the court is expected to adjudicate. Declaring Rules of the Assembly to be invalid is a serious constitutional issue because it constitutes an invasion by one arm of the State into the terrain of another. As the Chief Justice correctly points out, the Assembly is empowered by the Constitution to determine and control its internal procedures and make rules concerning its business.[82]

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[81] *Phillips and Another v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at paras 24-5; *Prince v President, Cape Law Society, and Others* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC); and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 7.

[82] Section 57(1) of the Constitution provides:

> "The National Assembly may—
>
> (a) determine and control its internal arrangements, proceedings and procedures; and
>
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

[115] The intrusion by the Courts into the sphere of Parliament is permissible only in instances sanctioned by the Constitution.[83] Rules of the National Assembly made in the exercise of a constitutional power may be declared invalid only if it is established that they are inconsistent with the Constitution. However, the declaration of invalidity should extend to the degree of the inconsistency and no further. With this in mind, I consider whether each of the impugned Rules is inconsistent with section 73(2) of the Constitution.

Interpretation of impugned Rules

[116] Although Rule 230(1) is not covered by the applicant's founding affidavit, I am willing to consider it because it is mentioned in the notice of motion. However, this does not mean that the applicant has accurately pleaded his challenge in relation to Rule 230(1). The Rule reads as follows:

> "230. **Initiation of legislation by Assembly**
>
> (1) The Assembly initiates legislation through its committees and members acting with the permission of the Assembly in terms of these Rules.

[83] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

> (2) Any committee or member of the Assembly may in terms of section 73(2) of the Constitution introduce a bill in the Assembly that has been initiated in terms of Subrule (1)."

[117] This Rule regulates the exercise of the power to initiate and prepare legislation conferred upon the National Assembly by section 55 of the Constitution.[84] As its heading indicates, the Rule tells us how the Assembly exercises the power. It declares that the Assembly initiates legislation through its committees and members who act with its permission. If a committee or member of the Assembly sets about initiating legislation on behalf of the Assembly, it or she must have the Assembly's permission. The requirement for permission applies in cases where a member acts on behalf of the Assembly and not where members act in their individual capacity. This is apparent from Rule 230(1) which refers to committees and members in the same context. It is not open to committees of the Assembly to exercise any power on their own behalf. This is so because they are committees of the Assembly and can only act on behalf of the Assembly. Therefore, reference to members of the Assembly in the context of the Rule that refers to committees in the same breath, must mean that members also would be acting on behalf of the Assembly.

[84] Section 55(1) provides:

> "In exercising its legislative power, the National Assembly may—
>
> (a) consider, pass, amend or reject any legislation before the Assembly; and
>
> (b) initiate or prepare legislation, except money Bills."

[118] It is in that context that a committee or a member may introduce a Bill in terms of section 73(2) of the Constitution, acting on behalf of the Assembly and not in an individual or private capacity. The Bill to be introduced would have been initiated with the Assembly's permission in compliance with Rule 230(1). This Rule has nothing to do with Bills initiated and prepared by members of the Assembly in their individual capacity and at their own expense with a view to exercising their power to introduce Bills in terms of section 73(2). The Rule does not in any way prevent members acting in an individual capacity from introducing Bills in the Assembly.

Rule 234

[119] This is the only Rule among those impugned which requires members of the Assembly to submit proposals to the Speaker, when acting in an individual capacity. This Rule is not a model of clarity. In short, it is badly drafted. It reads:

> "**Submission of legislative proposals to Speaker**
>
> (1) An Assembly member intending to introduce a bill in the Assembly in an individual capacity (other than as a Cabinet member or Deputy Minister) must, for the purpose of obtaining the Assembly's permission in terms of Rule 230(1), submit to the Speaker a memorandum which—
>
> (a) sets out particulars of the proposed legislation;
>
> (b) explains the objects of the proposed legislation; and
>
> (c) states whether the proposed legislation will have financial implications for the State and, if so, whether those implications may be a determining factor when the proposed legislation is considered.
>
> (2) The Speaker must table the member's memorandum in the Assembly."

[120] The following emerges from the interpretation of this Rule. Although the Rule refers to the introduction of Bills, it does not regulate the introduction of Bills in the Assembly. Instead, it governs a step preceding introduction. It requires a member who intends in future to introduce a Bill in her individual capacity, to submit her proposal to the Speaker who is obliged to table it in the Assembly. It is important to note that a proposal of this kind does not go to committees. All that is required by the Rule is that a member submits a proposal to the Speaker for tabling in the Assembly. This demonstrates that the applicant's reading of the Rules is wrong. He contends that the proposal goes to a committee dominated by members of the ruling party. The text of Rule 234(2) indicates plainly that the Speaker is obliged to table a Rule 234 proposal in the Assembly for a decision whether to grant or refuse permission.

[121] The applicant's reading of the Rules confuses proposals by committees or members acting on behalf of the Assembly with proposals of members acting in an individual capacity. A Rule 234 proposal must be in the form of a memorandum which—

(a) sets out particulars of the proposed legislation;

(b) explains the objects of the proposed legislation; and

(c) states whether the proposed legislation will have financial implications for the State and, if so, whether those implications may be a determining factor when the proposed legislation is considered.

[122] The sole purpose of submitting a proposal is to obtain the Assembly's permission in terms of Rule 230(1). But this permission relates to authority to prepare legislation on behalf of the Assembly. To require a member who acts in an individual capacity to obtain a Rule 230 permission is confusing and conflates different capacities under which members of the Assembly may act when introducing Bills. There is therefore no reason why Rule 234 should oblige members acting in their individual capacity to seek permission in terms of Rule 230(1), which is concerned with members representing the Assembly.

[123] Despite the inelegant language, what is clear is that Rule 234 does not prevent a member from introducing a Bill in the Assembly. It merely obliges members to submit memoranda for the purpose of obtaining permission in terms of Rule 230. It does not say that members cannot introduce Bills without having first obtained permission. Even if this Rule is read with Rules 235 to 237, which are also impugned, it does not preclude members from introducing Bills in the Assembly.

[124] However, there is a fundamental discord between Rule 234 and the other impugned Rules which renders improper an approach of reading it in the context of those Rules. For example, Rule 235 obliges the Speaker to submit a member's memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions,

which makes a recommendation to the Assembly.[85] This is not in line with Rule 234(2) which obliges the Speaker to table a member's memorandum in the Assembly. Rule 236 too is inconsistent with Rule 234.[86] It speaks of a process that goes first to the Private Members' Legislative Committee for a recommendation before tabling in the Assembly. This procedure differs to the one outlined in Rule 234 which deals with proposals by

[85] Rule 235 provides:

"**Referral of proposals to committee**

(1) The Speaker must refer the member's memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions.

(2) The Committee may consult the portfolio committee within whose portfolio the proposal falls.

(3) After considering the member's memorandum, the Committee must recommend that permission either be—

(a) given to the member to proceed with the proposed legislation; or

(b) refused.

(4) If the Committee recommends that the proposed legislation be proceeded with, it may—

(a) express itself on the desirability of the principle of the proposal;

(b) recommend that the Assembly approve the member's proposal in principle; or

(c) recommend that permission be given subject to conditions."

[86] Rule 236 provides:

"**Consideration of legislative proposal by Assembly**

(1) The Committee on Private Members' Legislative Proposals and Special Petitions must table in the Assembly the member's memorandum and the Committee's recommendation, including any views of a portfolio committee on the financial *or other* implications of the proposal.

(2) The Speaker must place the Committee's report together with the member's proposal on the Order Paper for a decision.

(3) The Assembly may—

(a) give permission that the proposal be proceeded with;

(b) refer the proposal back to the Committee or the portfolio committee concerned for a further report; or

(c) refuse permission.

(4) If the Assembly gives permission that the proposal be proceeded with, it may, if it so chooses—

(a) express itself on the desirability of the proposal; or

(b) subject its permission to conditions."

members in their individual capacity. For these reasons, Rules 235 and 236 are irrelevant to a legislative process pursued by members of the Assembly acting in an individual capacity.

[125] Rule 237 too does not regulate the introduction of Bills in the Assembly, even if it is read together with Rule 234. Rule 237 tells us about the process followed once permission for a proposal to be taken further is given by the Assembly. But more importantly, it provides that members should be reimbursed for reasonable expenses incurred in taking the authorised proposal further. Reimbursement may be the only explanation for requiring that proposals by members of the Assembly first be approved, even where they are acting in their individual capacity. But the requirement makes no sense where members prepare legislation at their own expense. The absurdity in Rule 234 notwithstanding, the impugned Rules do not prevent members from introducing Bills in the Assembly.

Introduction of Bills

[126] Rule 243 is the Rule that regulates the introduction of Bills in the Assembly. It provides that a Bill is introduced by submitting to the Speaker the following documents—

(a) a copy of the Bill or, if the Bill to be introduced was published in terms of Rule 241(1)(c), a copy of the *Gazette* concerned;

(b) if the Bill was not published, the explanatory summary referred to in Rule 241(1)(c); and

(c) a supporting memorandum: stating whether the Bill is a section 75 or section 76(1) Bill, explaining its objects, setting out financial implications of the Bill to the state, and listing persons and institutions consulted in preparing the Bill.[87]

[87] Rule 243, in relevant part, provides:

"**Introduction of bills in Assembly**

(1) A Cabinet member or Deputy Minister or an Assembly member or committee introduces a Bill (other than a Bill mentioned in Subrule (4)) by submitting to the Speaker—

(a) a copy of the Bill or, if the Bill as it is introduced was published in terms of Rule 241(1)(c), a copy of the *Gazette* concerned;

(b) the explanatory summary referred to in Rule 241(1)(c), if the Bill itself was not published; and

(c) a supporting memorandum which must—

(i) state whether the Bill is introduced as a section 75 Bill, a section 76(1) Bill, a money Bill or a mixed section 75/76 Bill;

(ii) explain the objects of the Bill;

(iii) give an account of the financial implications of the Bill for the state;

(iv) contain a list of all persons and institutions that have been consulted in preparing the Bill; and

(v) if the Bill is introduced by a Cabinet member or a Deputy Minister, include a legal opinion by a State law adviser, or a law adviser of the State department concerned, on the classification of the Bill and any other question in respect of which the JTM is required to make a finding in terms of Joint Rule 160.

(1A) A Bill introduced by a Cabinet member or Deputy Minister must be certified by the Chief State Law Adviser or a state law adviser designated by him/her as being—

(a) consistent with the Constitution; and

(b) properly drafted in the form and style which conforms to legislative practice.

(1B) If a Bill is not certified as contemplated in subrule (1A), the Bill must be accompanied by a report or legal opinion by a state law adviser mentioned in subrule (1A) on why it has not been so certified."

[127] Barring subrule (3), Rule 243 does not require prior permission of the Assembly if a member desires to introduce a Bill. Rule 243(3) provides:

> "(3) A Bill introduced by an Assembly member or committee with the Assembly's permission in terms of Rule 236(3) or 238(3) must—
>
> (a) be accompanied by a statement to that effect; and
>
> (b) contain on its cover page a reference to the name of the member or the committee as the member or committee introducing the Bill."

[128] The challenge directed at the Rules regulating initiation and preparation of legislation was ill-conceived. As illustrated earlier, Rule 234 cannot be linked to Rules 235 and 236 because they are incompatible. The only link that exists within the impugned Rules themselves is between Rules 234 and 230. Rule 243(3) refers back to Rules 236(3) and 238(3). It will be recalled that Rule 236 regulates a process different from the one catered for in Rule 234. Therefore, the reference to Rule 236(3) in Rule 243(3) does not speak to the process followed by members in an individual capacity when they desire to introduce Bills. That process is governed by Rule 234. There is no connection whatsoever between Rule 234 and Rule 243(3).

[129] Rule 238(3) is not relevant because that Rule applies to proposals submitted to the Speaker by the Committees of the Assembly. The complaint is against Rules which prevent members in their individual capacity from introducing Bills.

[130] Assuming that Rule 243(3) formed part of the impugned Rules, I would still not declare it invalid because it is capable of a reasonable interpretation which is consistent with the Constitution.[88] Rule 243(3) must be read in the context of the entire Rule 243. When read in this way, it merely adds to information required by 243(1). In addition to the copy of the Bill, an explanatory summary and a supporting memorandum, Rule 243(3) requires that the cover page must reflect the name of the member or committee which will introduce the Bill and proof that the Assembly's permission in terms of Rule 236(3) or 238(3) was granted. But, proof of permission must be attached only in cases where the Bill to be introduced had followed the process in Rule 236 or 238. It is apparent from the text of Rule 243(3) that it does not demand proof of permission if a process regulated by a different Rule was followed during the preparatory stage before introduction. A reading of Rule 243(3) which goes beyond Rules 236 and 238 is not warranted.

Conclusion on the interpretation

[131] Based on the preceding interpretation of the impugned Rules, none of them prevent a member of the Assembly, acting in an individual capacity, from introducing Bills. The construction preferred in this judgment illustrates that not all of the impugned Rules

[88] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*: *In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-4. This principle was applied in *Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC); *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC); and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

regulate a process followed when members of the Assembly act in an individual capacity. Rules 235 and 236 do not play any role at all in this process. These Rules cover the process followed by members when acting on behalf of the Assembly. Therefore, they cannot be included in an attack the basis of which is that the Rules prevent members of the Assembly, acting in an individual capacity, from exercising the power conferred by section 73(2) of the Constitution.

[132] Moreover Rule 243, which is the only Rule that regulates the introduction of Bills in the Assembly, does not require that a member who introduces a Bill in an individual capacity must first obtain the Assembly's permission. This Rule is silent on a process followed by members acting in an individual capacity. Proof of the Assembly's permission is required where members and committees act on behalf of the Assembly and the procedure in Rule 236 or Rule 238 was followed. Both these Rules bear no relevance to the position of members acting in an individual capacity.

[133] Accordingly, the requirement stipulated in Rule 234 to the effect that a member of the Assembly desiring to introduce a Bill in an individual capacity must seek permission in terms of Rule 230, is not an obstacle that prevents members from introducing Bills. This is so because Rule 243 does not refer to this process. Therefore, I conclude that the applicant has failed to establish any inconsistency between the impugned Rules and section 73(2) of the Constitution.

The scheme

[134] As I see it, the scheme of the Rules is this: in the case of committees and members of the Assembly desiring to initiate or prepare legislation on behalf of the Assembly, they must first obtain permission from the Assembly.[89] The Assembly's permission is obtained through a process of submitting a proposal in the form of a memorandum to the Speaker. In the case of members acting on behalf of the Assembly, this process is regulated by Rule 235. The memorandum is submitted to the Speaker who is obliged to refer it to the Committee on Private Members' Legislative Proposals and Special Petitions. Following consultation with a relevant portfolio committee, this Committee recommends to the Assembly that the proposal be approved or declined. Thereafter the Committee tables in the Assembly the member's memorandum and its recommendation, which may incorporate the views of the portfolio committee on finance, relating to the proposed legislation's financial implications. The Speaker then places the Committee's recommendation together with the member's proposal on the Order Paper for the Assembly's decision.[90]

[135] The next step is the consideration of the recommendation by the Assembly which may either refuse or grant permission. If permission is granted, the member concerned must prepare a draft Bill and a memorandum setting out the objects of the Bill, consult with the Joint Tagging Mechanism for advice on the classification of the Bill and comply

[89] See Rule 230(1).

[90] Rule 236 above n 86.

with Rule 241 or Rule 258 if it is a proposed constitutional amendment. The Assembly's Secretary must reimburse the member for reasonable expenses incurred in the preparation of the Bill.[91]

[136] The process outlined above must be contrasted with the one followed if a member intends to introduce a Bill in an individual capacity. This process is governed by Rule 234. As a preliminary step, the member is obliged to submit a memorandum to the Speaker. The memorandum must set out particulars of the proposed legislation, explain its objects and state whether it will have financial implications. Once the Speaker receives the memorandum, he must table it in the Assembly for its decision whether to grant permission or not.[92] In this instance, the memorandum does not go to any committee and the Assembly does not require a committee's recommendation before deciding to grant or refuse permission. As stated earlier, the value of this preliminary step is not clear, as Rule 243(3) does not refer to this process in requiring additional information when a Bill is introduced by a member of the Assembly.

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[91] Rule 237 provides:

> "(1) If the Assembly gives permission that the proposal be proceeded with, the member concerned must —
>
> (a) prepare a draft bill, and a memorandum setting out the objects of the bill, in a form and style that complies with any prescribed requirements;
>
> (b) consult the JTM for advice on the classification of the bill; and
>
> (c) comply with Rule 241 or, if it is a proposed constitutional amendment, with Rule 258.
>
> (2) The Secretary must reimburse a member for any reasonable expenses incurred by the member in giving effect to Subrule (1), provided that those expenses were approved by the Speaker before they were incurred."

[92] Rule 234(2).

[137] However, two options are available to a member of the Assembly who intends to introduce a Bill in an individual capacity. She may submit a proposal to the Assembly for permission to initiate and prepare. If permission is granted, the expenses incurred in the preparation of the Bill are paid by the Assembly. But if the Assembly refuses to grant permission, it is still open to the member concerned to prepare the Bill at her own expense and introduce it in terms of the relevant Rule.

[138] Excluded from this scheme is the process followed when Bills are initiated or prepared by a committee of the Assembly. Suffice it to say that this process is regulated by Rule 238. It is also not necessary to include in the scheme the process followed in respect of Bills initiated or prepared by Cabinet.

[139] Regardless of its origins, once a Bill is ready to be introduced in the Assembly, the process in Rule 243 must be followed. The committee or person who carries the responsibility of introducing the Bill must submit to the Speaker the documents referred to in paragraph 126. In the case of Bills introduced by Cabinet members or Deputy Ministers, some additional information different to the one contained in Rule 243(3) is required. The detail of such information is not necessary for present purposes. Upon introduction in the Assembly, the Bill is referred by the Assembly's Secretary to the Joint Tagging Mechanism, for classification. The classification of the Bill and the findings of

the Joint Tagging Mechanism must be conveyed to the committee considering the Bill and must also be tabled in the Assembly.[93]

[140] For these reasons I would decline to declare invalid any of the impugned Rules. And because the process followed by the applicant in this case does not meet all the requirements of Rule 243(1), I would also not direct the Speaker to table the Bill in the Assembly. Given that this is a minority judgment, it is unnecessary to consider what relief, if any, would have been appropriate in the light of the Speaker's reading of the Rules.

[93] Rule 244 provides:

> "(1) When a Bill is introduced in the Assembly in terms of Rule 243 or 260, the Secretary must refer the Bill to the JTM for classification of the Bill in terms of Joint Rule 160.
>
> (2) The classification of the Bill and all findings of the JTM must be—
>
> (a) conveyed to the portfolio or other committee considering the Bill; and
>
> (b) tabled in the Assembly."

For the Applicant:	Advocate D Unterhalter SC and Advocate S Pudifin-Jones instructed by Thomson Wilks, Inc.
For the Respondent:	Advocate IV Maleka SC and Advocate NH Maenetje SC instructed by the State Attorney.