IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 89/2017

In the matter between:

UNITED DEMOCRATIC MOVEMENT	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB ZUMA	Second Respondent
AFRICAN NATIONAL CONGRESS	Third Respondent
DEMOCRATIC ALLIANCE	Fourth Respondent
ECONOMIC FREEDOM FIGHTERS	Fifth Respondent
INKATHA FREEDOM PARTY	Sixth Respondent
NATIONAL FREEDOM PARTY	Seventh Respondent
CONGRESS OF THE PEOPLE	Eighth Respondent
FREEDOM FRONT	Ninth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Tenth Respondent
AFRICAN INDEPENDENT PARTY	Eleventh Respondent
AGANG SOUTH AFRICA	Twelfth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Thirteenth Respondent
AFRICAN PEOPLE'S CONVENTION	Fourteenth Respondent

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

INTRODUCTION

1. The applicant, together with the Democratic Alliance ("the DA") and the Economic Freedom Fighters ("the EFF"), requested the Speaker of Parliament to convene Parliament before the scheduled date of 9 May 2017, in order for them to move a motion of no confidence in the President of the Republic of South Africa ("the President") in terms of section 102 (2) of the Constitution.

2. The applicant further requested the Speaker to have the voting on the motion of no confidence conducted by way of secret ballot. The Speaker declined to have the motion of no confidence conducted by way of secret ballot, but agreed to convene Parliament before its scheduled date. She scheduled the requested session for 18 April 2017.

3. It is on this basis that the applicant launched this application on an urgent basis. After receiving this Court's directives in respect of this application, the applicant then requested the Speaker to postpone the scheduled session it had requested. Again, the Speaker agreed and postponed the session indefinitely.

4. The relief sought in this application is directed principally against the Speaker of Parliament. Essentially, the applicant contends that a secret ballot is constitutionally required when conducting motions of no confidence.[1] In the alternative, the applicant contends that the Speaker has a discretion to determine whether or not a motion of no confidence is to take place by secret ballot. It also contends that the Rules of the National Assembly do not preclude a secret ballot.[2]

5. The President confines his submissions to the legal issues other than those that pertain to the Speaker. In this regard, the President submits that this application is, at best a misconception of the relevant provisions of the Constitution, and at worst, proffers a self-serving interpretation of the Constitution and constitutes an abuse of process. For the reasons that follow, we submit that this application should be dismissed with costs.

6. It suffices at this stage to mention that section 102 (2) simply provides that:

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

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[1] Founding Affidavit, para 13
[2] Founding Affidavit, para 13.2 and 13.3

Structure of these submissions

7. In these submissions we deal with the following topics:

7.1. the requirements for the relief sought;

7.2. exclusive jurisdiction;

7.3. direct access;

7.4. the appointment and removal of Cabinet Ministers;

7.5. the system of government in South Africa;

7.6. secret ballot and motions of no confidence; and

7.7. separation of powers

7.8. party discipline; and

7.9. urgency.

8. To the extent necessary, we also deal with the allegations contained in the applicant's replying affidavit.

The requirements for the relief sought

9. The relief sought by the applicant in this application does not fall within the ambit of the powers of the court to determine. Dealing with the power of the court to determine a constitutional matter, section 172 (1) (a) of the Constitution provides that:

"*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*."

10. It is submitted that there is nothing in the conduct of voting, either by secret ballot or otherwise that constitutes conduct that is inconsistent with the Constitution.

11. In substance, the applicant seeks to impugn as unconstitutional voting by Parliament on motion of no confidence on the President done by way other than that of a secret ballot. It is that conduct which the applicant contends is inconsistent with the Constitution and stands therefore to be so declared by the Court.

12. In other words, the applicant invokes the constitutional jurisdiction of the Court in relation to a constitutional matter. The constitutional matter is the

voting by Parliament on a motion of no confidence on the President.

13. In order for this relief to be competent the applicant must establish that a vote of no confidence in the President by way other than a secret ballot is inconsistent with the Constitution.

14. The applicant does not point to any provision of the Constitution, which makes an open vote on a motion of no confidence in the President to be in conflict with the provisions of the Constitution.

15. The provision of the Constitution which the applicant seeks to invoke relates to a vote of no confidence in the President and does not prescribe how that vote is to be cast. To this extent, the applicant appears to concede that the Constitution is silent on whether such a vote should be open or secret. This concession already admits that a secret vote is not inconsistent with the relevant provision of the Constitution.

16. For that reason alone, the relief sought by the applicant is not competent and further legal argument will be addressed at the hearing of this application.

17. The applicant is not challenging the lawfulness or otherwise of the President's decision to re-shuffle the Cabinet as he is entitled to do in terms of section 91 of the Constitution. What the applicant's contention

really is, is that, having lawfully exercised his powers in terms of section 91 of the Constitution the consequence (the reaction by the rating agencies on the investment status of South Africa being sub-investment), opens him to a vote of no confidence. No other basis is given.

18. We submit that the applicant's argument has no merit or legal basis. All the law requires of organs of state, including the President, is that the exercise of public power must be authorised by law. What the Constitution does not require is that the consequences of such a lawfully taken decision must have particular positive or negative responses to it. Furthermore, if we were to accept the applicant's contention then the South African state is less of a sovereign state –as demanded by section 1 of the Constitution.

19. The other facet to the applicant's case rests on a spurious premise that publicly elected officials would be compromised, intimidated or that it would be career limiting for them to vote openly. No evidence is offered for this speculation. In any event, this cannot be a basis to impugn a parliamentary process.

Exclusive Jurisdiction

20. The Court has exclusive jurisdiction to decide that Parliament has failed to fulfil a constitutional obligation. The relief sought by the applicant is

predicated on the basis that Parliament has failed fulfil its constitutional obligation. However, the applicant fails to spell out clearly how this is so.

21. The high watermark of the applicant's case is that the Speaker, by declining its request for a secret ballot, has failed to fulfil a constitutional obligation[3].

22. Its case is framed merely as that , *"In the present case, the question that arises is whether the Speaker, on behalf of the National Assembly, is obliged by the Constitution to allow for a secret ballot on a no-confidence motion, either in all cases or at the very least in a case such as the present."*[4]

23. The purpose of exclusive jurisdiction in respect of cases where Parliament has failed to fulfil a constitutional obligation is to respect and preserve the comity between the judicial branch of government, on the one hand, and the legislative branch of government on the other, by granting only the Constitutional Court as the highest court in the land jurisdiction to intrude into the domain of the legislative and executive branches of government[5].

24. In order to satisfy this obvious requirement, the applicant must show that

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[3] Founding Affidavit, para 29
[4] Founding Affidavit, para 28
[5] President of the Republic of South Africa & Others v United Democratic Movement & Others 2003 (1) SA 472 (CC) at para 20

the Constitution requires a secret ballot to be cast in relation to a motion of no confidence in the President. This, the applicant has not established. Instead, the applicant's case is simply founded on the fact that the Constitution is silent on how that vote is to be cast. It is plain, even on the applicant's own version, that no case has been made out to invoke the exclusive jurisdiction of the Court. For that reason, the application stands to be struck off the roll.

25. In the *Tlouamma* matter[6], the High Court had full jurisdiction to determine the question of a vote cast in relation to a motion of no confidence in the President. This demonstrates that the issue in this application is not one falling within the exclusive province of the Constitutional Court.

26. Further legal argument will be advanced at the hearing of this application.

Direct Access

27. Alternative to the contention that the Constitutional Court has exclusive jurisdiction in terms of section 167 (4) of the Constitution, the applicant brings this application in terms of Rule 18 of the Rules of the Constitutional Court, seeking direct access on the ground that it is in the interests of justice.

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[6] Tlouamma & Others v Speaker of the National Assembly & Others 2016 (1) SA 534 (WCC)

28. This Court has held consistently that unless the interests of justice so require, it is undesirable for this Court to be a court of first and last instance.[7] Further, that it is prudent that this Court must have the benefit of the reasoning of the lower courts on the subject. In the case of *Gundwana v Steko Development and Others*[8] the Constitutional Court reiterated that the general rule is that direct access will granted only in exceptional circumstances.

29. The applicants appear to suggest that the Court would have had the benefit of the reasoning by the Western Cape High Court in the *Tlouamma* matter, but at the same time say this matter is distinguishable to the *Tlouamma* matter since the relief sought and the arguments presented for it are not identical to those in the *Tlouamma* matter.

30. It is submitted that this contention is incorrect. In the *Tlouamma* matter the court dealt, as a third point, with the manner in which a vote of no confidence is conducted and the discretion of the presiding officer to conduct such vote by secret ballot. Other than semantics, the relief in both these cases is identical.

31. There is therefore no case made out why it would be in the public interest

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[7] Zondi v MEC for Traditional and Local Government 2005 (3) SA 589 (CC) paras 12-14. See also Black Sash Trust v Minister of Social Development and Others (Freedom Under Law intervening) (CCT48/17) [2017] ZACC 8 (17 March 2017) at para 35

[8] 2011 (3) SA 608 (CC), para 27

for the applicant to have direct access to the Court. On this ground too, the application stands to be struck off the roll.

Appointment and removal of Cabinet Ministers

32. The question of the appointment of Ministers and Deputy Ministers is dealt with by the provision of section 91(2) of the Constitution which reads:

> *"Cabinet*
>
> *91(2) The President appoints the Deputy President and Ministers, assigns their powers and functions and may dismiss them"*

33. It stands to reason therefore that the Constitutional power to appoint and dismiss Ministers is that of the President, which power he or she exercises as head of the Cabinet. There are no constitutional constraints on the President on how that power is to be exercised or the process by which the power is to be exercised, as long as the exercise of such power is rational.

34. On 31 March 2017 the President took the decision to effect certain changes to the National Executive. The extent of these changes is set out in annexure "UDM3" to the founding papers.

35. The applicant states that it, amongst other parties, reacted to the President's decision to re-shuffle the cabinet and expressed a desire to table motions of no confidence in Parliament, in him as President, as a result of his decision. In its replying affidavit, the applicant concedes that it is not its case that the decision to reshuffle was unlawful.[9]

36. Section 91(2) of the Constitution of the Republic of South Africa ("the Constitution") confers upon the President of the country, the constitutional power to appoint members of Cabinet. As a corollary to this special power to appoint ministers, is a corresponding power to remove them as members of cabinet.

37. The President's choice of cabinet may be undermined only by the procedure of a vote of no confidence prescribed by section 102(1) of the Constitution. In such event, the President is constitutionally obligated to reconstitute the Cabinet.

38. It is worth noting that the applicant does not allege that the decision was unconstitutional or in any manner unlawful. At the heart of the applicant's case is that the Court must direct that a vote on the motion of no confidence in the President must be done through a secret ballot to protect the careers of parliamentarians –who are not joined or at least mentioned. This cannot be a lawful basis to invoke the jurisdiction of the

[9] Replying Affidavit; para 48.3

Court. This is simply an abuse of Court process.

39. The applicant further cites as its basis the reaction of certain rating agencies. It is common cause that subsequent to the President's decision three rating agencies, S+P Global, Moody's, and Flitch took decisions, respectively, to, *inter alia,* lower their long-term and short-term foreign currency sovereign credit rating of the Republic. It is apposite to have regard to the declared rationale on which these agencies based their decisions as appear in annexures "UDM5" to "UDM7" to the founding papers. This is not the appropriate forum to engage with the declared rationale and nothing really turns on the reaction of the rating agencies or the applicant's on the possible consequences of the President's decision. The ratings agencies recorded their views in the following terms:

39.1. ***S+P Global*** *– "In our opinion, the executive changes initiated by President Zuma have put at risk fiscal and growth outcomes"*

"The negative outlook reflects our view that the political risks will remain elevated this year, and that the policy shifts are likely, which could undermine fiscal and economic growth outcomes more than we currently project."

39.2. ***Moody's*** *– "On 30 March, the President of South Africa announced wide-ranging changes to the country's government, changing top*

leadership in 10 ministries, including in key portfolios such as finance and energy.

Changes within a government do not generally signal material changes in a country's credit profile. Here, however the timing and scope of the reshuffle raises questions over the signal they send regarding the prospects for ongoing reforms, the underlying strength of South Africa's institutional framework, and the fragile recovery in the country's economic and fiscal position".

39.3. ***Fitch*** *– "In Fitch's view, the cabinet reshuffle, which involved the replacement of the finance minister, Pravin Gordhan, and the deputy finance minister, Mcebisi Jonas, is likely to result in a change in the direction of the economic policy.*

Differences over the country's expensive nuclear programme preceded the dismissal of a previous finance minister, Nhlanhla Nene in December 2015 and in Fitch's view may have also contributed to the decision for the recent reshuffle."

40. The factors that inform the risk assessment by rating agencies have nothing to do with whether the President, or government has taken decisions lawfully or not. Even decisions that are lawfully taken may be considered by such agencies to impact on the risk profile of a particular country. What the law requires of public functionaries is that they exercise

their powers only when so authorised by law and within the ambit of such authorisation. One may ask what the applicant's case would have been if the rating agencies had responded by upgrading South Africa. Would such a reaction make lawful a decision that is otherwise unlawful? We submit not.

41. Section 85(1) of the Constitution vests the executive authority of the Republic in the President. Section (2)(b) prescribes that the President must exercise this executive power together with the other members of the cabinet in the development and implementation of national policy. The Constitution thus requires that the cabinet, as a collective and of which the President is a member, develops policy, including economic policy.

42. The apprehension expressed by Fitch therefore that the cabinet reshuffle, which involved the replacement of the finance minister and the deputy finance minister is likely to result in a change in the direction of the economic policy is clearly informed by a misconception of what the Constitution prescribes.

43. The possibility of a shift in policy arising out of a Cabinet re-shuffle is not founded on any fact. It is the applicant's own speculation which is not based on any facts or evidence –and none is provided.

44. The lawful exercise of the President's constitutional power cannot found the basis for the relief sought by the applicant in prayers 3 and 4 of the notice of motion.

The system of government in South Africa

45. Our democracy is founded on a multi-party system of government based on a system of proportional representation.

46. *Section 46(1) of the Constitution provides, in part:*

> *'The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—*
>
> *(d) results, in general, in proportional representation."*

47. This system of proportional representation means that a political party is entitled to representation in Parliament in proportion to the number of votes it obtains in an election relative to the total number of votes cast.

48. In the seminal case of *Ex parte Chairperson of the Constitutional Assembly*: *In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) (the First Certification judgment) this

Honourable Court noted that '(u)nder a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate'. This means that anyone who votes in national elections does not vote for a candidate but votes for a political party, which has been duly registered for the purpose of contesting the elections. The registered party in turn nominates candidates for the election on a national party list.

49. Neither the President, nor any members of the National Assembly, are directly elected. Under our current electoral system, in the words of Cameron J in *My Vote Counts Npc V Speaker Of The National Assembly And Others*[10] *'it is political parties, and parties alone, that determine who is allocated to legislative bodies and to the executive'.* Such that if a member of Parliament ceases to be a member of the party that nominated him/her, he loses his/her membership of the legislature.

50. In South Africa's current democratic dispensation, it is the political parties that are the main constitutive element of the democratic process, the Legislature and the Executive, and not the members allocated by parties to the legislative bodies.[11]

51. The applicant relies on the utterances attributed to the Secretary General

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[10] 2016 (1) SA 132 (CC) para 33. See also Ramakatsa and Others v Magashule and Others 2013 (2) BCLR 202 (CC) paras 67-68

[11] Ramakatsa and Others v Magashule and Others at para 68

of the ANC, Mr. Gwede Mantashe, and the Deputy President, Mr. Cyril Ramaphosa regarding a perceived failure by the President to consult with ANC leaders and/or officials about changes to cabinet. These utterances were in their capacity as ANC officials. In any event these utterances cannot be relied on as the two subsequently publicly apologised for making them. The applicant persists in its replying affidavit to rely on the views of persons that have expressed their views on various media platforms. With respect, the views of these individuals do not constitute evidence that warrants any judicial notice. Nor are they experts in the field of government systems. There is no reason why this Court should take judicial notice of their utterances.

52. What the President does as the President of the ruling party are political matters. What he does as the President of the Republic requires compliance with the Constitution and the law. As a political party there are wide political and ideological considerations that inform what is done. On the other hand, public office requires the exercise of public power to be done within the specific constitutional constraints, least of which is rationality. The decision to reshuffle the Cabinet was done for rational purposes.

Secret Ballot and motions of no confidence

53. The applicant claims, at paragraph 72 of its founding papers, that the Constitution expressly requires the use of a secret ballot when the President is elected by the National Assembly and contends that by parity of reasoning the same procedure must be adopted when a President is to be forced to resign.

54. Clearly, the applicant misconstrues the provisions of the Constitution. The provisions of Item 6(a) of Part A of Schedule 3, read with Item 1 of Part A of Schedule 3, provide that where more than one candidate is nominated for the positions of the President, or the Speaker or Deputy Speaker of the Assembly, Chairperson or a Deputy Chairperson of the National Council of Provinces, or the Premier of the province or the Speaker or Deputy Speaker of the legislature, as the case may be, a vote must be taken by a secret ballot. [12]

55. This must mean that the Constitution impels a secret vote only in instances where the nomination to identified positions attracts more than one candidate. This present case involves the vote of no confidence in the President and therefore does not trigger the provisions of Item 6(a) of Part A of Schedule 3.

56. As a general principle, a vote by secret ballot is a mechanism to ensure

[12] See also the Canadian Parliament Act R.S.C., 1985 –section 49.4. See further Standing Orders of the House of Commons (of Canada) November 2016 particularly in relation to the election of the speaker

free and fair elections. It seeks to guarantee the freedom to participate in an electoral process and for political parties to compete on equal terms[13].

57. The Constitution prescribes how the President, the Speaker, the Deputy Speaker of the Assembly, the Chairperson and Deputy Chairperson of the National Council of Provinces, the Premier of the province and the Speaker or Deputy Speaker of a provincial legislature having been elected by secret ballot are to be removed from office.

57.1. Section 52(4) of the Constitution provides that -

> "*The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted*".

57.2. Section 64(6) provides as follows:

> *"The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office."*

57.3. Section 111(4) provides that -

> *"A provincial legislature may remove its Speaker or Deputy*

[13] Kham v Electoral Commission and Another 2016 (2) SA 338 (CC), para 86

Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted".

57.4. In terms of section 89 (1)-

"The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of-

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office."

58. Only the members of the National and Provincial Executives are subject to motions of no confidence.

58.1. Section 102 stipulates that

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

(2) If the National Assembly, by a vote supported by a majority of

its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign."

59. Section 141 (1) and (2) provide for motions of no confidence in the provinces Executive Council and Premier respectively in similar terms.

60. The provisions of Item 6(a) of Part A of Schedule 3 must be read with section 52(4), 64(6), 89 (1) and 111(4) as the case may be.

61. The applicant suggests that the Constitution prescribes that a President, under all conditions, must be appointed by means of a secret ballot. The position is not quite so. Nothing in the Constitution suggests that a President must be elected or removed by way of a secret ballot. On the contrary, section 86 of the Constitution provides that:

"(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President."

62. Part A of Schedule 3 provides the election procedure as follows:

> *"6. <u>If more than one candidate</u> is nominated-*
>
> (a) *a vote must be taken at the meeting by secret ballot;*
>
> (b) *each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and*
>
> (c) *the person presiding must declare elected the candidate who receives a majority of the votes."*

63. The voting by secret ballot is prescribed in the election procedure where there is more than one candidate. In relevant part, dealing with a single candidate, Schedule 3 provides that:

> *"5. If only one candidate is nominated, the person presiding must declare that candidate elected."*

64. Section 89 of the Constitution prescribes a procedure for the removal from office of the President. It prescribes that such removal shall be achieved <u>by a resolution</u> adopted by members of the National Assembly with a supporting vote of at least two thirds of its members.

65. As stated above, Item 5 of Part A of Schedule 3 provides that if only one candidate is nominated, the person presiding must declare such candidate to be elected. In such circumstances, the National Assembly does not undertake elections.

66. On the reasoning advanced for the invocation of the secret ballot prescribed by Item 6, an anomalous situation would prevail – as such a President would not have been elected in terms of Item 6, a vote of no confidence in him and/or his Cabinet would not be subject to secret vote. A motion of no confidence by way of a secret vote would only be applicable to Presidents elected in terms of Item 6. Such an interpretation would be absurd.

67. Motions of no confidence contemplated in sections 102 and 141 of the Constitution are a mechanism that may be employed by Parliament to hold the executive to account and may have as their object the dissolution of the Cabinet and the Provincial Executive Council, respectively. Once a motion of no confidence is passed by majority vote, the Cabinet and/or Provincial Executive must be reconstituted – whether by the current President or Premier in terms of section s 102(1) or 141(1) or by a newly elected President or Premier following their resignations in terms of section 102(2) and 141(2) respectively. The Cabinet and the Provincial Executive Council may be dissolved only by a vote.

68. The appointment of members of Cabinet and Provincial Executive Councils is not subject to the procedure prescribed by Item 6(a) of Part A of Schedule 3. Their removal from office is however, subject to a vote in terms of sections 102 and 141.

69. This supports the interpretation that the provisions of Item 6(a) of Part A of Schedule 3 have no bearing on section 102 of the Constitution. There is nothing anomalous in this as the applicant asserts. This is so because the procedure for the removal of the President elected in terms of the procedure prescribed by Item 6(a) of Part A of Schedule 3 is constitutionally provided for in section 89.

70. There is no implied or express constitutional requirement for voting by secret ballot for a motion of no confidence. Item 6(a) of Part A of Schedule 3 is no basis to infer such a procedure.

71. The applicant further asserts that the absence of a secret ballot undermines the purpose of the no confidence motion. This is simply unfounded.

72. This Court has had occasion to consider similar contentions. In *Mazibuko No V Sisulu and Others* 2013 (6) SA 249 (CC), this Court held at paragraphs [43] and [44]

"In the first instance, the assembly 'is elected to represent the people and to ensure government by the people under the Constitution'. A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the assembly a vital power and duty to scrutinise and oversee executive action".

73. There is no basis for the contention that the effective exercise of this parliamentary power to scrutinise and oversee executive action requires that a vote on a motion of no confidence must be a secret.

74. Contrary to these constitutional principles, the applicant propagates for a secretive legislature. This offends the principle of section 41 of the Constitution, which enjoins all spheres of government and all organs of State within each sphere to provide effective, transparent, accountable and coherent government for the Republic as a whole. What the applicant contends for, is inconsistent *'with a society that embraces openness over secrecy, and transparency over concealment, and that where there is doubt about whether a dispute should be resolved in favour of secrecy or openness, the scale will tip in favour of transparency'* as our courts have consistently held.

75. The Supreme Court of the United States has had occasion to offer some opinion in this regard in matters that are similar to the present case. In the case of John Doe#1. Et Al., Petitioners v. Sam Reed, Washington

Secretary of State, et al, the Supreme Court opined in favour of transparency and accountability as follows:

> *"Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiff's argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral system."*[14]

76. The applicant asserts that without a secret ballot there is no realistic possibility that the motion of confidence will succeed, unless the majority party decrees that it must. In effect, the applicant suggests that unless the ruling party agrees to a motion of no confidence, it is unlikely to succeed in Parliament. As a matter of fact, that is the advantage of enjoying a majority in Parliament and that is how the mandate of the majority is carried out by the majority party.

77. The applicant further contends that a secret ballot would enable each member to exercise their right in a manner that reflects his or her conscience.

78. This Honourable Court rejected this proposition in the case of *United*

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[14] 561 U.S -2010

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) 2003 (1) SA 495 (CC) at paragraph [56] on the basis that such an argument *"equates purpose with motive. Courts are not, however, concerned with the motives of the Members of the Legislature who vote in favour of particular legislation, nor with the consequences of legislation unless it infringes rights protected by the Constitution, or is otherwise inconsistent with the Constitution".*

79. The applicant cannot resort to judicial intervention where the majority party legitimately exercises its rights and powers. The fact that a particular system, such as a requirement for a vote of no confidence to have the support of the majority of the members of Parliament in order to succeed, operates to the disadvantage of particular parties does not mean that it is unconstitutional. The applicant in effect requires this Honourable Court to subvert the rights of the majority party in Parliament deny the ruling party the benefit of its majority status. This is nothing but a self-serving interpretation, and if permitted, would undermine the will of the electorate that elected such party into Parliament and would be unconstitutional.

Separation of Powers

80. The doctrine of separation of powers entails that each sphere of

government is constitutionally protected from intrusion by another sphere of government unless authorised by the Constitution. Where the Constitution therefore confers on Parliament the power to determine and control its internal arrangement, proceedings and procedures it means that a procedure on matters such as voting on motions is a power falling within the province of the legislature.

81. This Court has reiterated the importance of separation of powers in our constitutional democracy. Recently in *South African National Roads Agency Ltd v City of Cape Town*[15], this Court held:

> *"It is necessary to state, right at the outset, that this case is not about the power of the legislative and executive arms of government to formulate policy, fund state projects and allocate state resources. It is eminently within their power and prerogative to formulate and implement policy on how to embark on, and finance, public projects. It is no different when decisions are to be made concerning how national roads ought to be constructed and financed. Such issues inevitably call for policy-laden and polycentric decision-making. The Constitutional Court, in National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) (2012 (11) BCLR 1148; [2012] ZACC 18) (OUTA), in*

[15] 2017 (1) SA 468 para 7. See also Ex Parte Chairperson Of The Constitutional Assembly: In Re Certification Of The Constitution Of The Republic Of South Africa, 1996 1996 (4) SA 744 (CC)

dealing with the legality of the tolling of national roads, reiterated the importance of courts recognizing the rightful and exclusive terrain of the executive or legislative branches of government. The Constitutional Court has repeatedly reminded us that the doctrine of the separation of powers must be honoured."

82. However, this does not mean that the exercise of public power by the other branches of government is beyond judicial review. If that power is exercised in a manner inconsistent with the Constitution, courts of law may interrogate the exercise using the principle of legality.[16]

83. Section 8 (1) of the Constitution identifies three branches of government to which the Constitution applies. It provides that:

"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

84. The principle of separation of powers is clearly part of South Africa's constitutional scheme. Accordingly, the National Assembly is responsible for the business of Parliament of the Republic of South Africa. The Constitution permits it to develop its own rules in order to run its own affairs.

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[16] South African National Roads Agency Ltd v City of Cape Town at para 8

85. Section 70(1)(c) of the Constitution clearly confers on Parliament the power to determine and control its internal arrangements, proceedings and procedures. On 26 May 2016 the National Assembly, in exercise of this power, adopted the 9th Edition of the Rules of the National Assembly ("the Rules").

86. Rules 103 and 104 provide for voting in the National Assembly. Rule 103 provides for voting by electronic vote, unless the Speaker directs otherwise and Rule 104 provides for manual voting where there is no electronic system. Names of parliamentarians are recoded in the minute.

87. The EFF's contention in its affidavit supporting the application demonstrates its misconception about the importance of the separation of powers as a doctrine of our constitutional order. In paragraph 15 of its affidavit, the EFF submits that *"Arguments about the separation of powers need not detain the court. At stake is an important question of constitutional law that engages the correct construction of the Constitution."*

88. This submission of the EFF is absurd. It is a flagrant disregard of a constitutional principle. There is no authority for such a far reaching suggestion. We submit that this contention cannot be taken seriously. It should be rejected by this Court.

THE PARTY DISCIPLINE PRINCIPLE

89. The applicant's case pivots on the mistaken notion that party discipline as a concept constitutes intimidation and asks this Court to consider it as such in making its determination. No party disciplinary procedures are the subject of this application, nor is there any suggestion that the ANC's disciplinary procedures are in any way unlawful. The South African political landscape is full of examples of political parties lawfully applying their disciplinary processes in cases of internal breaches.

90. It is incorrect to suggest as the applicant does that the President is confusing his role as the President of the ANC and his role as the President of the Republic of South Africa. It is trite that the legal effect of our Constitutionally determined political system is that members elected on party lists who are allocated to legislative bodies under a system a list system of proportional representation are accountable to their respective parties and Parliament. The party is accountable to the electorate[17].

91. This obliges members of a party, who are elected by virtue of the inclusion of their names on a party's list, to remain loyal to such party consonant with the expectations of voters who gave their support to the party. The obligation of loyalty to party is not inimical to the notion of an accountable,

[17] My Vote Counts NPC v Speaker Of The National Assembly And Others 2016 (1) SA 132 (CC) at paras 32 to 35

responsive, open and democratic government. The ANC, as a political party, is in no different a position.

92. The principle espoused by this honourable Court in *Ex Parte Chairperson of The Constitutional Assembly: In Re Certification Of The Constitution Of The Republic Of South Africa, 1996* 1996 (4) SA 744 (CC), in the context of floor crossing, that parties are entitled to ensure that their members continue to support the party under whose aegis they were elected is of equal application in the issue that is a subject matter of this application.

93. Such entitlement does not offend the Constitution. The constitutions of various political parties may include how they deal with internal disciplinary matters. To anticipate, without any evidence on oath, that members of the ANC will face intimidation is, with respect, highly speculative.

94. The ANC is a voluntary political organisation, which is governed by a constitution, standing orders, rules, regulations, resolutions and policies adopted or made in terms of the Constitution.

95. The Constitution of the ANC sets out the standard conditions of membership that are found in majority of constitutions of voluntary association. Thus section 5.2.7 of the Constitution of the party proscribes that all members *'must observe discipline, behave honestly and carry out*

loyally the decisions of the majority and decisions of higher bodies'.

96. As with any voluntary association, the applicant included, the ANC's power to punish offending members must be exercised in conformity with the terms of its constitution. The constitution of the ANC determines what violations of the rules by members warrant disciplinary action being taken against them. Section 25.3 provides that 'any member, office bearer or public representative who fails, refuses and/or neglects to abide by the provisions of the Constitution of the ANC, its Standing Orders, Rules, Regulations, Resolutions and policies adopted or made in terms of the Constitution shall be liable to be disciplined in terms of this Constitution'.

97. Similar provisions are found in the constitutions of the Democratic Alliance[18], the Economic Freedom Front[19] and the Inkatha Freedom Party[20]. The applicant's own constitution deems the contravention of the party's Code of Conduct, Ethics and Obligations for Public Representatives an offence for which the representative's membership of the party may be suspended or terminated[21]. Unfortunately, the applicant's

[18] DA Constitution sections 2.5.1, 2.5.4.6, 2.5.4.7 and 2.5.4.9
[19] Section 33 of the Constitution which impels members to follow the instruction and direction of the leadership during house or council sittings and prohibits members from acting in silos without a mandate. Section B makes it an offence to defy the party's decisions and or its resolutions.
[20] IFP Constitution section 9 and 11 enjoins members to conduct themselves in a manner that is not prejudicial to the interests of the party. Section 20 grants the party's National Council the power to develop policy informing and controlling the party's representatives in the National Assembly and the Cabinet.
[21] Section 6.4.1.6

Code of Conduct is not publicly available.

98. Under normal circumstances, a court would not normally intervene in the internal domestic affairs of a voluntary association duly constituted and operating in terms of its constitution and rules.

99. And yet it is the very intervention that the applicant seeks, contending that any member of Parliament who acts contrary to the decisions of the ANC National Working Committee will inevitably be expelled from the ANC and consequently lose his/her membership of the National Assembly.

100. The court cannot preclude a political party, including the applicant, from taking disciplinary steps against a member who has committed a violation of the constitution and rules that warrant disciplinary action being taken against them. This is not to suggest that conduct that is contrary to the decision of the ANC's National Committee will of necessity result in expulsion. It serves to illustrate the point that in terms of its Constitution the ANC provides is entitled to take disciplinary action against any member who fails, refuses and/or neglects to abide by the provisions of the Constitution of the ANC, its Standing Orders, Rules, Regulations, Resolutions and policies adopted or made in terms of the Constitution.

101. It is settled law that members elected on party lists are subject to party discipline and are liable to be expelled from their party for breaches of

discipline which warrant such sanction. To dismiss this as intimidation as the applicant does, is simply incorrect.

102. The applicant appears to be more interested in members of Parliament who serve on the basis of an ANC list retaining their 'jobs' even where they have breached the provisions of the ANC constitution and in effect seeks to subvert the party's constitution through the relief sought. This is an abuse of process and the Constitution of the Republic and cannot be countenanced.

103. As pointed out by this Court in the *First Certification* judgment at [185] *"[I]f members wish to be re-elected they need to bear in mind party discipline*".

104. This Court has reiterated the view that the constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party. It is apposite to point out that the constitution of the ANC is not under attack and it has not been found to be inconsistent with the Constitution of the Republic.

105. Section 19 of the Constitution guarantees everyone the right to participate in the activities of a political party. The section protects the exercise of the right not only against external interference but also against interference arising from within the party. Members therefore enjoy a constitutionally entrenched right, which if infringed would be entitled to redress from the

courts of law of the land.

106. In *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) this Honourable Court held that -

> *"Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities*".

107. The right enshrined in section 19 of the Constitution obliges every political party to act lawfully and in accordance with its own constitution. The applicant has not advanced any facts to support a conclusion that the ANC has failed in its obligation in this regard and/or in disciplining members who contravene its Constitution, it would be acting unlawfully.

108. It is submitted therefore that any conduct by the ANC that is consonant with its constitution, which constitution has not been impugned, cannot warrant censure.

URGENCY

109. The applicant predicates its claim of urgency, inter alia, on the basis that the motion of no confidence is scheduled for 18 April 2017. The motion of no confidence that was scheduled from 18 April 2017 has since been postponed and the matter is no longer urgent.

110. In the light of the above, it is submitted that the contention for urgency can no longer be sustained. The applicant persists in its replying affidavit that the motion of no confidence is extremely urgent, but offers no basis for this. The applicant makes an obvious point in its replying affidavit when it says that it makes sense that this application must be determined before the motion of no confidence. That much is correct, but there is no suggestion that the motion of no confidence will be tabled before this Court can determine the issues raised in this application. The Speaker has postponed the motion of no confidence indefinitely. Accordingly, there is no suggestion that it will be tabled before this Court determines the issues raised by the applicant.

REPLYING AFFIDAVIT TAKES THE MATTER NO FURTHER

111. The applicant's replying affidavit truly reveals the real motive of this application and the extent to which it is an abuse of court process for political ends. It is replete with irrelevant political sarcasm that does not address the legal issues to be determined in this application.

112. The majority of the allegations in the replying affidavit are directed at the

issues raised by the Speaker.

113. It is telling that in reply, the applicants continues to seek refuge in statements made in social media platforms to make the unfounded allegation of intimidation. There is no need for the Court to take judicial notice of what ANC MP Dr M. Khoza and former President Thabo Mbeki say or write in the media. It is neither factual or expert evidence.[22]

114. Former President Thabo Mbeki is no expert on systems of government. Even if he was, his utterances cannot be turned into evidence for this Court to consider. To rely on these utterances is a desperate measure by the applicant to make a political case rather than a legal one.

115. It is equally inappropriate for the applicant to stoop so low as to suggest that in explaining the role of party discipline, the President is *"lecturing*" the Court[23]. To resort to this is a transparent inappropriate attempt to seek the Court's favour. The applicant does not deal with the issue of party discipline as part of a system of government.

116. There is equally no basis for the personal attacks on the President. To suggest that the President condones intimidation is merely political mischief and has no place in these proceedings. It is also incorrect to state without any shred of evidence that the President *"…is plainly and*

[22] Replying Affidavit para 11
[23] Replying Affidavit, para 53.3

impermissibly pursuing his private interests…"[24]

117. It is simply untrue to suggest that the President is using the Court to delay and obstruct Parliament.[25]

118. The applicant has clearly misunderstood the legal issues raised in the answering affidavit. This is evident in its characterisation of the answer where it says: *"the issue of party discipline seems to be the main reason for the opposition mounted"*[26]. This is simply incorrect.

119. The applicant clearly seeks the explanation about party discipline or the ANC Constitution as *"an attempt to engage in self-serving intimidation and scare-mongering*[27]*."* There is no justification for all this feeble attempt at political speech. It has not place in legal proceedings. We submit that the Court must disregard it as irrelevant to the determination of the legal issues before it. Like the entire case, it is an attempt to draw the Court into the political space in which the applicant seeks to make some impact. There is nothing wrong with political mobilisation. However, it is inappropriate to drag the Court into that arena.

120. On the matter of costs, there is no basis for the contention that the President must pay the costs in his personal capacity. On the contrary, it is

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[24] Replying Affidavit para 53.1
[25] Replying Affidavit, para 53.1
[26] Replying Affidavit, para 53.4
[27] Replying Affidavit, para 53.5

the applicant that must pay the costs on a punitive scale for dragging this Court into this well-calculated political stratagem parading as a legal case.

CONCLUSION

121. In the circumstances we submit that the application falls to be dismissed.

IAM SEMENYA SC

M SIKHAKHANE SC

M SELLO

CHAMBERS

21 APRIL 2017