

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(CONSTITUTIONAL HILL, BRAAMFONTEIN)**

CASE NO:

In the matter between:

**LINDIWE MAZIBUKO, MP, LEADER OF THE
OPPOSITION IN THE NATIONAL ASSEMBLY**

Appellant/Applicant

and

**MAXWELL VUYISILE SISULU, MP, SPEAKER
OF THE NATIONAL ASSEMBLY**

First Respondent

**DR MATHOLE SEROFO MOTSHEKA, MP, CHIEF
WHIP, NATIONAL ASSEMBLY**

Second

Respondent

ANSWERING AFFIDAVIT

I, the undersigned;

MATHOLE SEROFO MOTSHEKA MP

do hereby state under oath

1. I am the Chief Whip of the majority party in the National Assembly. I deposed to a preliminary affidavit in application by applicant dismissed by Davis J. That affidavit is included in the papers that applicant has filed in the application for leave to appeal.
2. The application was brought urgently and at great haste and was dealt with speedily by Davis J. There was not sufficient time to prepare and do a more

complete comprehensive answering affidavit. The application for leave to appeal too has been brought urgently. There has not been much time within which to file an answering affidavit to oppose the application for leave to appeal directly to the Constitutional Court. I would have liked to have more time to prepare a more comprehensive affidavit. I do wish to file this affidavit because there is information additional to the information contained in my preliminary answering affidavit that should be brought to the attention of the Constitutional Court when considering whether it is in the interests of justice to grant leave to appeal.

3. The facts deposed to in this affidavit are within my personal knowledge and belief.

Summary of opposition

4. I oppose the application for leave because it is not in the interests of justice to do so on the following main grounds:

- 4.1. Davis J was correct in finding that the Constitution and more particularly the Rules of the National Assembly do not empower the Speaker to schedule a time for debate and vote on a motion introduced by any party or any member.

- 4.2. The National Assembly did not fail in its constitutional obligation imposed by s102(s) of the Constitution.

4.3. As is apparent from my affidavit below, the National Assembly has not unreasonably delayed the scheduling of a debate and vote on the motion.

A chronology of the application

5. On Thursday 8 November 2012 applicant gave notice in the National Assembly (NA) in terms of NA Rule 98(1)(a) of a motion of no confidence in the President of the RSA in terms of s102(2) of the Constitution.
6. The motion was read out at the Programme Committee of the NA. Under NA Rule 190 is the PC is the Committee responsible for determining matters to be place on the agenda for consideration by the National Assembly.
7. The NA did not sit on 9 November 2012. On Tuesday 13 November 2012 notice of the motion was placed on the Order Paper of the NA.
8. On Wednesday 14 November 2012 the Chief Whips' Forum (CWF) was unable to agree on a date for the scheduling of the debate and vote on the motion of no confidence.
9. On Thursday 15 November 2012, the Programme Committee of the NA could not reach consensus to schedule a debate on the motion in the NA.
10. The dispute over the scheduling of a date for the debate of the motion was not referred to the CWF in accordance with a convention to allow the Chief Whips

of the various parties to reach political agreement on a date because they had already failed to agree on a date.

11. By letter dated 15 November 2012 applicant demanded that the Speaker confirm that he would take whatever steps were appropriate or necessary to ensure that the motion was scheduled for debate and vote in the NA before 22 November 2012.
12. On Friday 16 November 2012 applicant launched an urgent application in the Western Cape High Court. She sought an urgent order directing the Speaker to take the necessary steps to ensure that the motion of no confidence was scheduled for debate and vote in the NA before 22 November 2012.
13. On 20 November 2012 –
 - 13.1. Davis J heard the application;
 - 13.2. The NA refused to decide the question of the scheduling of the motion of debate and vote because of the High Court application;
 - 13.3. The Chief Whip undertook to impress upon the NA to schedule the debate and vote on the motion for 26 February 2013 – the first day of the first sitting of the NA in 2013.
14. Judgment was delivered ex tempore on Thursday 22 November 2012. The written judgment is dated 22 November 2012.
15. 22 November 2012 was the last sitting of the NA for 2012. It rose on that day. The first sitting of the NA in 2013 will be 26 February 2013.

16. Applicant filed an application for leave to appeal directly to the Constitutional Court (CC) on 23 November 2012. The Chief Whip received the signed written judgment on Monday 26 November 2012. The CJ issued directions as to the filing of answering affidavits on 26 November 2012. According to the directions, answering affidavits must be filed by Wednesday 28 November 2012.

The question before Davis J

17. Applicant's complaint before Davis J was the following:
 - 17.1. The failure by the NA to schedule a debate and vote on the motion before 22 November 2012, is a failure by the NA to comply with its constitutional obligation imposed by s102(2) of the Constitution;
 - 17.2. Section 102(2) provides that if the NA by majority vote passes a motion of no confidence in the President, he and the other members of his Cabinet and Deputy Ministers must resign;
 - 17.3. According to applicant, a motion of no confidence is inherently urgent and should be scheduled for debate and vote by the Speaker within 6 days of being published in the order paper, even if those 6 days fall in the last week of the NA's annual sitting.

The findings of Davis J

18. Minority parties have a constitutional right to move a vote of no confidence in the President.¹
19. The majority party cannot decide the timing and scheduling of a motion of no

¹ Judgment/17/4-14

confidence.²

20. A motion of no confidence in the President is inherently urgent because it is in the national interest. That means that the timing and scheduling of the motion cannot be delayed unreasonably. Steps must be taken to ensure it is scheduled expeditiously. However, the Rules do not provide for the scheduling of urgent motions. There is a lacuna in the Rules.³
21. Honorable Davis J correctly pointed out in his judgment “Courts exist to police the constitutional boundaries... Where the constitutional boundaries are breached or transgressed, courts have a clear and express role. And must then act without fear or favour. There is a danger in South Africa however of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with a political impasse relating to policy, or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of this dispute, judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business. What courts can do, however, is to say to Parliament: you must operate within a constitutionally compatible framework; you must give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence. However, how you allow that right to be vindicated is for you to do, not for the courts to so determine”.
22. The lack of a provision in the Rules providing for the urgent scheduling of a debate and vote on a motion of no confidence is a failure by the NA to give effect to the right of minority parties to table such a motion.
23. The Speaker does not have residual power to schedule a motion of no confidence in the President to be debated and voted on urgently. Consequently, applicant failed to make out a case for the relief and the application was

² Judgment/28/16-24

³ Judgment/29-30

dismissed.

The issue in the application for leave to appeal

24. Has the NA failed to fulfill its constitutional obligation under s102(2) of the Constitution, by failing to schedule the motion of no confidence before its final sitting on 22 November 2012?
25. Should the CC order the Speaker to take the necessary steps to ensure that the NA schedule a motion of no confidence for debate and voting on or before 7 December 2012?

Why it is not in the interests of justice to grant leave

26. The answer to both questions (as will appear below) is no. The answer is expanded upon below.
27. The parliamentary right of a member of the National Assembly to call for a motion of no confidence in the President in terms of section 102(2) must be interpreted in context of the following constitutional principles.
28. Section 1 of the Constitution that provides for democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms:
 - 28.1. Multi-party system of democratic government to ensure accountability, responsiveness and openness;
 - 28.2. Supremacy of the Constitution and the principle that law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.
29. Section 42(3) of the Constitution, which provides that the National Assembly is elected to represent the people and to ensure government by the people under

the Constitution. It does so by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

30. Section 58 of the Constitution gives Cabinet members, Deputy Ministers and members of the National Assembly the right to freedom of speech in the Assembly, and its committees, subject to its rules and orders.
31. Section 55(2) imposes an obligation on the National Assembly with the obligation to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it and to maintain oversight of the exercise of national executive authority, including the implementation of legislation and any organ of state.
32. Section 57(1) of the Constitution provides that the National Assembly is exclusively responsible for determining and controlling its internal arrangements, proceedings and procedures; and to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
33. The concept of parliament's autonomy protected under Section 57 is also known as "exclusive cognisance" in the United Kingdom. Exclusive cognisance is the right of each House of Parliament to regulate its own proceedings and internal affairs without interference from any outside body, including the judiciary. This includes the conduct of its Members, and of other participants such as witnesses before select committees. If the Houses did not have such rights, any person might be able (to take one example) to question in the courts the decision-making processes behind the passage of legislation. This would undermine the independence of a sovereign Parliament, and in particular of the democratically elected House of Commons. Rt. Hon. Beverly

McLachlin, Chief Justice of Canada, elaborates on this concept in “**Reflections on the Autonomy of Parliament**”⁴ as follows:

“...– parliamentary autonomy. Today, it is accepted without question that the courts cannot interfere in proceedings before Parliament. The process of parliamentary decision-making must proceed free from judicial oversight. Where constitutionally permissible, courts may review the product of parliamentary decision-making – for example, how a particular law is to be interpreted or whether a particular law is constitutional. However, judicial interference in the process by which elected representatives come to their collective decision is tantamount to interference in the democratic process itself, and under our constitutional tradition is unacceptable. To operate effectively, the decision-making process of legislative assemblies must be free from interference – whether judicial or executive – and must remain firmly in the hands of speakers and Parliament itself. In a democracy it cannot be otherwise. Parliament, as the representative of the ultimate sovereign – the people – must be free to set its own agenda and govern its own proceedings.”

34. The rules and orders of the National Assembly provide for:
 - 34.1. The establishment, composition, powers, functions, procedures and duration of its committees;
 - 34.2. The participation in the proceedings of the National Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
 - 34.3. Financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the National Assembly effectively;
 - 34.4. The recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

⁴ <http://www.revparl.ca/english/issue.asp?art=34¶m=61>

35. Parliament has complied with its obligations set out above in that:
- 35.1. It has established the rules that regulate parliamentary businesses;
 - 35.2. It has established multiparty committees that perform the function of oversight;
 - 35.3. All its parliamentary processes and deliberations are conducted in an inclusive manner to cater for the interests of minority political parties in a manner consistent with democracy;
 - 35.4. The recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.
 - 35.5. The rules as established a Chief Whip forum to ensure consensus on matters appearing on Nation Assembly with minority views considered.
36. Davis J with respect paid insufficient regard to the constitutional status of the office of Speaker of the National Assembly and the conventions regarding the powers, functions and discharge of the duties of speaker. The Speaker's mandate is twofold. It is constitutional and institutional. This mandate is furthermore dual at the National Assembly and Parliamentary level. Section 52 of the Constitution governs the election and removal of Speaker and Deputy Speaker. Section 90 (1)(d) of the Constitution provides that in the event of the unavailability of the President the Speaker of the National Assembly must act as the President until the National Assembly designates one of its other members. Section 90 generally provides for the appointment of the Acting president but Ss(d) is the only one that goes on to say "until the NA designates

one of its other members". The section can be interpreted to mean that the Speaker is the only one who must act when the post of the President is vacant. Further, the use of the phrase "its other members" means that the person occupying the position of the Speaker cannot be designated as the President. It therefore makes sense that the Constitution dictates that this person as somebody who has no interest in this position therefore objective must act as the President.

37. A Speaker presented with a motion of no confidence in the President and faced with the prospect that he may become President and the ultimate beneficiary if the motion is successful must be circumspect and exercise utmost objectivity when considering such a motion. If he or she engages in an unseemly rush to give such a motion priority and claims it is "urgent" as the DA in this matter claims and as accepted by Davis J, then he may be accused of coveting the position and using the motion to hasten the downfall of the incumbent President. Such a prospect can only bring the office of Speaker and the National Assembly into disrepute.

38. Having regard to the applicable constitutional provisions and to the facts set out below and in the chronology, I dispute that the NA has failed to fulfill its constitutional obligations under section 102(2) of the Constitution.

39. Applicant has misconstrued the scope of the right in s102(2) as follows:

39.1. She takes the view that her right to have a motion of no confidence

debated in the NA exists without any limitation. Her view is wrong. Her right is subject to the rules and procedures of Parliament.

39.2. Her right to have the motion of no confidence debated and voted on in the NA includes the right to schedule it at her choice of time and date and not subject to the scheduling and programming rules of the National Assembly. This too is a misconception. Her right is subject to the rules and orders of the NA. The Applicant is not entitled to schedule and program on its own any Motion outside this scope of the Rules of the NA.

40. Davis J found that the NA had failed to fulfill its obligation to have a motion by minority parties scheduled for debate and voting on or before 22 November 2012. The basis for that finding is that a motion is always urgent because it is in the national interest.

41. I submit that the NA did not fail to fulfill its constitutional obligation for the following reasons:

41.1. All the work of the NA is in the national interest. That does not mean all motions must be scheduled for debate and voting urgently.

41.2. A motion of no confidence in the President should be heard within a reasonable time subject to the work of the NA and subject to practicality.

41.3. What applicant in effect claims is that minority parties have the right

to have a motion of no confidence debated and voted on within 6 days after it is published on the Order Paper and within 6 days before the final sitting of the NA for 2012.

- 41.4. That is unreasonable. It is a demand that the NA virtually stops what it is doing and what it has planned, to debate a motion that has been called unreasonably late. The reason for the motion has ostensibly existed for some time now. Yet applicant has called for it 9 working days before the last sitting of the NA, and it was published in the Order Paper a mere 6 days before the last sitting. By calling for a debate on the motion so late, she ran the risk that it might not be heard before the end of the year.
- 41.5. Applicant does not say why it is so essential that the motion should have been debated before 22 November or indeed 7 December 2012. She does not say what would happen that would make debating and voting on the motion after 22 November (or 7 December 2012) irrelevant. The reasons for the debate have ostensibly existed for some time now. It is unlikely that the reasons for the debate will not exist on 26 February 2012. That is the date that I have undertaken to ask the NA to schedule and reserve for debate and vote on the motion. If the reasons no longer exist by that date, then it there would be no reason for the debate then.
- 41.6. I attach a copy of the programme of the NA agreed to by the Programme Committee (PC) for the fourth term of 2012 and first term of 2013 (**MSM1**).
- 41.7. The programme shows the work of the NA. In particular it shows that minority parties had been allocated at least 4 slots and used them for a debate on topics other than the motion of no confidence.

- 41.8. On 30 October there was a debate on a topic introduced and led by Mr van der Merwe of the IFP. On 1 November there was a debate on a topic introduced and led by Mr Rabie of the DA. On 8 November there was a debate on a topic introduced and led by Mr Koornhof of COPE. In 13 November there was a debate on a topic led and introduced by Ms Dudley of the ACDP.
- 41.9. Minority parties could have used any of these slots for the debate and voting of the motion of no confidence. I deny that the NA has failed to fulfill its obligation to provide minority parties with the opportunity to present the motion for debate and voting in the NA.
- 41.10. The period between the end of the sitting of the NA in one year and the start of the sitting of the NA in the next is used by the various committees of the NA to carry out their constitutional mandates, including their oversight work.
- 41.11. I attach a schedule (**MSM2**) of approved oversight visits and international study tours and the actual cost for the period November 2012 – February 2013. The amount is – R 8608897.91.
- 41.12. I also attach a schedule (**MSM3**) of pending applications for oversight visits and international tours and the estimated costs for the period November 2013 – February 2013. The amount is R 619.866.00.
- 41.13. A no confidence debate is sufficiently important to require the

attendance of all members of the NA. It is particularly important to have the attendance of those members who are active in the various committees and work outside the NA at the debate. This is not possible now. Or it will only be possible by disrupting the work of members who will be performing other important work of the NA outside of the NA during this period. That would mean incurring unnecessary and wasteful costs. It could easily have been avoided had applicant used the slots reserved for the introduction and debate of topics by minority parties. It will also mean recalling the NA during a period when it has risen and does not normally sit, at great cost. Members of the NA will have to be flown to Cape Town from the rest of the country and the World. It is estimated that especial sitting of Parliament if convened the presiding officer will incur an estimated cost of twelve million rand.

41.14. I deny that there is a gap in the rules that results in the NA failing to fulfill its constitutional obligation to allow minority parties to introduce a no confidence motion for debate and voting.

41.15. The current position is that the Rules and convention make provision for the scheduling of a motion within a reasonable time. Scheduling is done by the CWF. If the Whips cannot agree, the dispute over scheduling may be referred to the PC. If the PC cannot agree the dispute may be referred to the NA itself to decide when to schedule the debate and voting.

41.16. The Speaker does not have the power to schedule a debate and voting of a motion. That is because it is a matter that by convention and in the rules is done by the CWF and the PC and then in the NA. Scheduling

is not done by the Speaker because it depends on the work and programme of the NA planned by agreement in the PC.

41.17. That convention and the rules providing for this method of scheduling debate and voting and the work of the NA is consistent with constitutional rights and obligations of the NA.

41.18. According to s57 the NA may make determine and control its internal arrangements proceedings and procedures. For that purpose it may make rules and orders with due regard for representative and participatory democracy. Rules and orders must provide for participation in the NA and in its Committees of minority parties in a manner consistent with democracy.

41.19. The current system of rules and orders providing for the way that motions are scheduled for debate and voting comply with s57 of the Constitution. That is the constitutional provision expressly regulating how debates and voting must be scheduled.

41.20. There is a Sub Committee and the Task team on the Review of Rules. It is a Sub Committee of Rules Committee in the NA. Its members are drawn for all parties. I attach a list (**MSM4**) of the members for 2012. The purpose of the Committee is to review and propose amendments to existing Rules or new Rules. The Sub Committee and Task team

makes provision for minority parties to raise proposals about fixing gaps in their Rules. (In so far as there are any identified by the Rule Committee) The dispute before this Court as it relates to the Lacuna in the Rules should be dealt with by this Sub Committee.

- 41.21. I attach a copy of a draft report on the review of the Rules of the NA dated 18 April 2012 (**MSM5**). That report was for submission to the Sub Committee at its meeting on 31 May 2012. It is apparent from that report that the NA has decided to undergo a comprehensive review of its Rules.
- 41.22. The Sub Committee has been engaged in that review since May 2012. It is contemplated that the Sub Committee will make proposals and recommendations to the NA about the review of existing Rules. It is contemplated that the review will be completed in June 2013.
- 41.23. The review has reached the stage at which the Sub Committee has established a Task Team to carry out intensive and comprehensive work on the review of the Rules. I attach a minute of the decision of the Sub Committee of 18 November 2012 (**MSM6**). It is apparent from the minute that the Sub Committee set up a Task Team and that the Team is comprised of members of the minority parties.
- 41.24. The Sub Committee and the Task Team are where minority parties can make proposals about fixing gaps in the Rules (in so far as there are any) relating to the scheduling of motions of no confidence. That is being done. Changes that are necessary or desirable can and should be brought about in and by the Task Team.

42. I now deal with the allegations of the Applicant *ad seriatum*:

AD PARAGRAPH 1

43. The allegations in this paragraph are admitted.

AD PARAGRAPH 2

44. The allegations in this paragraph are noted.

AD PARAGRAPH 3

45. The allegations in this paragraph are admitted.

AD PARAGRAPH 4

46. Although there are no confirmatory affidavits filed on behalf of the political parties that are listed in paragraph 4, I do not dispute that the Applicant represents them in this application on their mandate.

AD PARAGRAPH 5

47. The allegations in this paragraph are admitted.

AD PARAGRAPH 6

48. The allegations in this paragraph are admitted.

AD PARAGRAPH 7

49. The allegations in this paragraph are admitted.

AD PARAGRAPH 8

50. The allegations in this paragraph are admitted. It is pointed out that the order sought was vague and unspecific. This was an indication that the Applicant cannot rely on a specific provision of the Rules of the NA in terms of which such an order could be granted.

AD PARAGRAPH 9

51. The Programme Committee deadlocked on the scheduling of this motion of no confidence. The Programme Committee is not under any constitutional duty to agree on scheduling of motions. As is the case with all democratic institutions, Committees work on the principle of consensus and where there is no consensus then no decision can be forced out of the Committee.

52. The motion of no confidence in the President is frivolous and constitutes political posturing by the opposition political parties represented in Parliament.

I am entitled to hold that opinion or belief and to act in accordance with the view in Parliament.

AD PARAGRAPH 10

53. The allegations overstate the area of disagreement with the Applicant. I have never said that the Applicant has no right to file a motion of no confidence. I have and maintain that such a right must be exercised and dealt with in terms of the Rules of Parliament. The mistake of the Applicant is to argue that they have a right to have the motion debated on their call and not the call of the rules and the relevant committees. I have also questioned the motives of the Applicant to move a motion of no confidence prior to the elective conference of the ANC in Mangaung in December 2012, where the Applicant has expressed his leadership preferences for the ANC. I do not believe that a motion of no confidence should be used as a tool to influence the outcome of the ANC elective conference in Mangaung. A motion of no confidence is a serious constitutional device that is aimed at seriously testing the confidence of the House in the President and Cabinet. In this case I know that the Applicant and the Opposition's clients have political interests in influencing the outcome of the ANC's elective conference. This is evident as record would show that the applicant during a questioning session in the NA to President she said the President should consider not accepting the nomination by his organization branches.

AD PARAGRAPH 11

54. The allegations in this paragraph are correct save that the Court should have ordered costs against the Applicants.

AD PARAGRAPH 12

55. The summary of Davis J's judgment is accepted subject to receiving a copy of the written judgment. I merely add that the question before the Court was never about whether the right of Applicant to move the motion of no confidence. The issue has always been whether the Applicant has a right to have the motion debated in Parliament at the time of her choosing and urgently.
(emphasis added)

56. I have dealt with whether or not the Court erred in ruling that a motion of no confidence is inherently urgent and should take precedence over other business in the National Assembly. The idea that even a frivolous motion of no confidence by a minority party should take precedence over other parliamentary business is difficult to reconcile with the constitutional business of Parliament.

AD PARAGRAPH 12.5

57. The finding that the constitutional obligation to debate and vote upon the motion of no confidence rests ultimately with the National Assembly was correct and the Court should have referred the matter back to the National

Assembly to deal with the matter in accordance with its procedures and processes without deciding on whether the motion was urgent or not.

58. It is correct that the Constitutional Court has the exclusive jurisdiction in terms of section 167(4)(e) of the Constitution to determine whether or not Parliament had failed in its constitutional duties. The issue though was never whether or not Parliament had failed in its duty. Let me add that there is no provision in the Constitution that the Applicant can refer the Honorable Court to which places a constitutional duty on Parliament to pass rules that deal a motion of no confidence on the basis of urgency. There is no such duty in section 102 of the Constitution and correctly so because such a motion may either be urgent or not but that is for Parliament to determine. Parliament utilized its Committees and rules to deal with the matter. When the Programme Committees and Forum of Chief Whips deadlocked over the scheduling of the motion of no confidence, it cannot be seriously contended that Parliament was in breach as a consequence of a deadlock.

AD PARAGRAPH 13

59. I agree that a motion of no confidence in the President is important but I deny that it is so urgent that the Applicant's motion must be debated this year or that a special sitting of Parliament must be convened at an enormous cost to the public for a debate to be conducted. I also believe that the fact that the majority party does not support the motion means that it cannot be seriously intended to remove the President but to influence the elective conference in Mangaung. I

ask rhetorically - why is this debate so urgent that it cannot be conducted in February 2013 when Parliament resumes its normal parliamentary business? Surely the issues on which the motion of no confidence has been sketched will still be relevant in February 2013.

AD PARAGRAPH 14

60. It is incorrect that Davis J found that Parliament had failed to fulfill its constitutional duty. Such a finding would not, in any event, be within the competence of the High Court in light of section 167(4)(e) of the Constitution and would be wrong. There is no constitutional obligation on Parliament to pass rules that relate to the urgent scheduling of a motion of no confidence. The relief that Applicant wants cannot arise from the peripheral remarks of Davis J on the issue of whether Parliament should schedule a debate on a motion of no confidence in the President. The High Court simply has no jurisdiction to decide the issue.

AD PARAGRAPH 15

61. The allegations in this paragraph are noted. I deny that there is a basis for an urgent application for direct appeal to the Constitutional Court on the question of whether the Speaker lacks the power to schedule a motion of no confidence in the President for debate in the National Assembly. Even if the Applicant were to be right that the Speaker has the power, such a finding is not urgent, since the Speaker cannot be compelled to schedule a motion for debate in the

National Assembly according to the demand of the Applicant. The Speaker would be required to apply his mind the issue and to determine the appropriate time for such a debate to take place.

AD PARAGRAPH 16

62. The alternative relief sought by the Applicant is fatally defective since the issue has never been raised by the Applicant in Parliament and within any of its committees. The Applicant must first raise the issue of the Rules within the Parliament and its Committees, permit the issue to be properly dealt with by the relevant Committees and the proper processes to be followed. It is premature for the Applicant to be asking for such relief even before properly raising it in Parliament. The correct forum to raise this question is Parliament and only when Parliament has failed to deal with the question can the Applicant rush to Court for relief as this one.

AD PARAGRAPH 17

63. Davis J correctly dismissed the relief sought by the Applicant in this paragraph. In any event, scheduling a debate of this nature at this time is not only difficult; it is also impractical and extremely costly. Most members of the ANC in Parliament are already expected to carry out their political work in constituencies and to prepare for the elective conference of the ANC, which is in December.

AD PARAGRAPH 18

64. I attach a letter that I, as Chief Whip of the Majority party, the ANC undertake to support that the scheduling of the debate on the motion of no confidence in February 2013. The Applicants have not said why this offer is not made in good faith and what prejudice they will suffer if the motion is not debated in December 2012 as opposed to February 2013. My support as the Chief Whip of the ANC would essentially keep the motion alive until it is scheduled for debate in February 2013.
65. In any event, on what basis would a Court keep alive a parliamentary motion that has lapsed alive? The Courts should not be asked to micro manage the running of parliament and the scheduling of debates and motions.

AD PARAGRAPH 19

66. I deny that there is any urgency in debating the motion of no confidence in the President. I have explained why I believe that such a question is not for the Courts to decide but Parliament acting in terms of its constitutional powers.
67. In any event, the entire record of the proceedings in the Western Cape High Court does not advance the case that the Applicant seeks to make in respect of the declaratory orders.

AD PARAGRAPH 20

68. The allegations in this paragraph are noted.

AD PARAGRAPH 21

69. The allegations in this paragraph are admitted save to deny that such a right extends to the motion of no confidence being scheduled within the timeframes demanded by the Applicant.

AD PARAGRAPH 22

70. I deny that a debate in the motion of no confidence in the President is inherently urgent and must be urgently debated. I further add that it is not for the Courts to decide whether or not a motion of no confidence is urgent and should be urgently debated by Parliament.

AD PARAGRAPH 23 & 24

71. I deny that internationally, a motion of no confidence takes precedence over other business in Parliament. I deny in particular, that the UK Parliament treats motions of no confidence as preferential motions. These motions are generally unscheduled and are referred to as early day motions.

72. In any event, I deny that the references relied on in these paragraph are support for the scheduling of the Applicant's motion of no confidence for debate on or

before 7 December 2012 as opposed to February 2013. The motions are important and serve as a democratic device to remove the President without impeaching him or her and therefore require that MPs apply their minds to the issues.

AD PARAGRAPH 26

73. The comparison is far-fetched and not apt. The debate on a motion of no confidence cannot be compared with the duties of Parliament set out in section 83(3) and section 203 of the Constitution. A motion of no confidence in the President does no more than provide the National Assembly with an opportunity for a debate and a vote. That can hardly be equated with filing a vacancy in the Presidency or summoning of Parliament to a special sitting when the President declares a state of national defence.

AD PARAGRAPH 27

74. The allegations in this paragraph demonstrate why it cannot be right for the Courts to be asked to compel the National Assembly to debate a motion of no confidence on the basis of urgency or consideration of the merits. Courts must and should extricate themselves from political debates that the Applicant wishes to draw them in.

AD PARAGRAPH 28

75. The deliberative, multiparty democracy envisaged by the Constitution does not require that a motion of no confidence in the President be debated before December 2012 as opposed to February 2013. In any event, the question is not about whether or not to schedule a motion for debate, it is whether the demands of deliberative, multi-party democracy require that the motion of no confidence be scheduled in December 2012 and not February 2013. Clearly the Applicant appear to view the issues from the wrong premise, which is that the entire edifice of deliberative democracy would be subverted if the debate is scheduled in February 2013 and not December 2012. That approach is inconsistent with deliberative democracy and appears fairly dictatorial. But again I reasonably believe that the Opposition believes that this motion of confidence should be debated before the ANC elective conference because it may help their political agenda.

AD PARAGRAPH 29

76. The issue, which Davis laid emphasis on, was not in contention. The parties have always accepted the right of a Member of Parliament to raise whatever motions they have within the rules and processes of Parliament. In any event, the reliance on the decision of **Ambrosini** is misguided if it is intended to support the Applicant's contention that the right implicated in section 102 includes when the motion is debated. Such a practice would frustrate the programmes of Parliament since every time a motion of no confidence is filed, all programmes must be stopped to debate that motion. Nothing stops the

Opposition political parties bringing endless vote of no confidence motions to frustrate the programme of parliament on matters that they do not like.

AD PARAGRAPH 30

77. The arguments are acceptable subject to the rules and processes of Parliament. The right to express views and opinions cannot support the position contended for by the Applicant- that the motion of no confidence must be debated at the time and date that is chosen by the party proposing it.

AD PARAGRAPH 31

78. Parliamentary matters are not scheduled to support the interests of only the minority interests. Majority interests are also taken into account and cannot be discounted in favor of the minority. The suggestion that the Courts should come to the assistance of the minority parties to advance their political agenda against the majority is not only dangerous but also inimical to the very elementary principles of democracy. It is unfair for the Courts to be asked to come to the assistance of the minority parties in undermining the will of the majority party through preferential motions of no confidence. Without the support of the majority, a motion of no confidence in Parliament cannot succeed and it makes sense that the interests of such a critical component of democratic space are taken into account. The Applicant seeks a ruling that true participatory Democracy is only served when the interest of minority takes precedence over the majority.

AD PARAGRAPH 32

79. Although Davis J emphasized that the application does not concern the merits of the application, he went on to decide on those merits when he ruled that a motion of no confidence is inherently urgent and Parliament must deal with such a matter urgently.

AD PARAGRAPH 34 to 50

80. Save as stated above, these paragraphs are admitted.

81. I add that the application was not urgent and should have simply been dismissed on that basis alone.

AD PARAGRAPH 51

82. The contentions advanced in the Western Cape High Court are set out in the heads of arguments attached to the application. They were wrong to the following extent;

82.1. The right of the Applicant does not include the right to have the debate on the vote of no confidence in the President in December 2012 as opposed to February 2013;

82.2. The decision on whether the motion is urgent or not is for Parliament scheduling and not the Court;

82.3. The majority is entitled within the acceptable democratic processes and rules to resist the scheduling of a motion of no confidence. Without the support of the majority, a motion of no confidence has no chance and where that is inevitable, the majority members of the scheduling programme are entitled to refuse to schedule the motion for debate above other more pressing issues requiring the attention of the National Assembly.

82.4. The Speaker never acted illegally and did not refuse to schedule the debate on the motion. He was bound to act within the Rules that govern parliamentary motions.

82.5. What is also clear is that Parliament distinguishes between motions that are urgent and those that are not urgent. Rule 101 provides for urgent motions, which are those directly concerning the privileges of the National Assembly. The Rule provides that such motions shall take precedence of other motions and orders of the day. The motion of no confidence in the President has nothing to do with “privileges of the House” and therefore not treated as urgent.

82.6. While the Court described a motion as a matter of public importance, the Applicant did not utilize the rules of the NA that deal with matters of

public importance in Rule 103 and 104. Having adopted Rules governing motions, the Applicant's matter had to be dealt with by the responsible Committees. Had the Applicant relied on Rule 103 and 104 of the NA, it is possible for the Speaker to exercise his discretionary powers to allow a matter of public importance to be debated and a matter of urgent public importance to be debated.

82.7. Only Parliament can decide when a motion is urgent and when it is not. Motions of no confidence in the President aimed at influencing the outcome of a party political process during the elective conference in Mangaung should not be considered urgent and of national importance to warrant preferential allocation.

82.8. The rules do not provide for motions of no confidence to be debated urgently because such motions are not considered urgent in terms of the rules of parliament. In any event, even if they were to be considered urgent, such urgent is not as alleged by the Applicant.

AD PARAGRAPH 52

83. The contentions alleged in this paragraph were sound and should be endorsed by this Honorable Court if it should decide to hear this application.

AD PARAGRAPH 54

84. The allegations in this are admitted. I stand by the allegations and persist with the allegation that the only reason that this motion has been brought is to attempt to influence the ANC elective conference in December 2012 where new leaders of the ANC will be elected. What the Applicant seeks to do is to force by stealth a no confidence debate on the President so as to affect his chances of re-election as President of the ANC and the country for another four-year term. The Applicant has not denied these motives and in fact has gone as far as to plead with the President during a parliamentary debate that he does not avail himself when nominated for President of the ANC. The political interest of the opposition in the affairs of the ANC is obsessive and this motion is a device that they hope would enable them to influence how delegates in the ANC elective conference debate and vote on the question of leadership. The opposition also requested a secret ballot to enable ANC Members to vote with them against the President.

AD PARAGRAPH 55

85. I deny that the conduct of the majority party is inconsistent with the notion of participatory or deliberative democracy. John Jeffrey has a right to regard, as I do, the motion of no confidence as frivolous and to treat it as such. The Parliamentary activities are subject to either consensus or must be supported by a majority. If the majority votes against a motion or use its majority to settle a debate, that is consistent with our constitutional democracy.

AD PARAGRAPH 56

86. I share the same view as the Speaker except I believe that the motion of no confidence is frivolous and should not take up valuable parliamentary time. That is the view held by the majority party – that the motion has been raised to advance the political interests of the minority and not to in good faith test whether the President has the confidence of the House. The views of the majority will become known when the debate takes place in February 2013, assuming that the Applicant is still interested to have that debate.

AD PARAGRAPH 57

87. These allegations have been repeated many times by the Applicant. They are admitted. The Speaker reported to Parliament under the cloud of a Court judgment.

AD PARAGRAPH 58

88. The allegations in this paragraph are admitted.

AD PARAGRAPH 59

89. The memorandum is consistent with the belief of the majority party and cannot be regarded as being inconsistent with our brand democracy.

AD PARAGRAPH 60

90. The fact that the matter did not come before the National Assembly takes the matter no further. I issued the memorandum and stand by it.

AD PARAGRAPH 61

91. The allegations in this paragraph are admitted.

AD PARAGRAPH 62

92. The allegations in the paragraphs are noted save to the extent that they correctly reflect the judgment of Davis J.

93. I have dealt with those issues I consider wrong in the judgment, in particular the ruling that a motion of no confidence is inherently urgent. I do not consider that the judgment accepted the Applicant's contention that urgency means that the motion of no confidence cannot be scheduled for debate in February 2012. The judgment cannot be read to rule that urgent debate means that the motion should be debated before the end of December 2012 and not in February 2013.

AD PARAGRAPH 63

94. Davis J did not and could not in light of section 167(4)(e) of the Constitution make a ruling on whether Parliament had breached any constitutional duty.

AD PARAGRAPH 64

95. I deny that the matter was urgent and the Court should have dismissed the application simply on that basis. It is also inaccurate that first respondent or second respondent disputed the right of the minority to call for a vote of no confidence in the President. I considered the motion to be frivolous, which I do in light of the motives of minority parties in calling for such a motion to be debated.

AD PARAGRAPH 65

96. The arguments of Applicant's Counsel were considered by the Court but did not support the relief sought by the Applicant.

AD PARAGRAPH 66

97. I dispute the views of the Applicant on the reasonableness of the matter. I do not believe that the manner in which the Applicant's motion has been dealt with is inconsistent with our Constitution, rules of NA and parliamentary conventions. The Applicant may feel extremely aggrieved by the fact that we disagreed with her on when the motion can be debated, but such grief is no basis of this hysterical response.

AD PARAGRAPH 67 & 68

98. The matter is not urgent at all and should be scheduled for February 2013. Unless the Applicant and her clients wish to advance their political agenda of influencing the elective conference of the ANC, which I believe is the case, there is no other reason urgency is contended for in this matter. Parliament has now adjourned to 14 February 2013 and there will be considerable difficulty in organizing a special sitting of Parliament to debate a matter that can be debated in February 2013.
99. The meeting of Committees cannot be disrupted in order to convene a special sitting of Parliament over a motion that can be scheduled for debate in February 2013. The idea that the Committee meetings will be disrupted in order to force a special meeting of Parliament to debate a matter that is not going away soon, is too desperate. The incumbent President will still be the President of the country in February 2013 irrespective of what the ANC elective conference says. The ANC majority party does not see the urgency that the minority party sees – I mean the urgency in terms of which the debate must occur before the end of December 2012 as opposed to February 2013.

AD PARAGRAPH 69

100. The allegations in this paragraph are denied. The basis for this is set out above.

AD PARAGRAPH 70

101. The first respondent could not have referred to 22 November 2012, which has already gone past. There is no moment of necessity calling for such drastic and costly conduct to convene a debate on a motion of no confidence, which is not supported by the majority party that the minority would need to pass a vote of confidence.

102. The inconvenience that is referred to in the paragraph already exists. The costs of calling a special sitting of Parliament under the circumstances are difficult to justify. The inconvenience is so grave that some people would be unable to attend the special sitting of Parliament. Besides it would be an unprecedented use of judicial power if a Court, under these circumstances, ordered the special sitting of Parliament to debate a motion of no confidence.

AD PARAGRAPH 71

103. There is no basis for such an order to be made against the Speaker. Parliament, in terms of its autonomous rule of procedure is capable of dealing with the Applicant's motion, as it has done.

AD PARAGRAPH 72

104. I deny the allegations in this paragraph. I stand by those reasons including the costs and the inconvenience, which will be difficult to justify in the circumstances. I do not hide my view of the motion, which I regard as political attempt to influence a party political elective conference in December 2012.

This desperation defies logic because I cannot understand why a motion of no confidence must necessarily be debated this year as opposed to February 2013 when all the members in Parliament are present.

AD PARAGRAPH 73 & 74

105. The Court is in no position to determine whether this scheduling should be sacrificed to give effect to the Applicant's desire to have a debate this year. The activities that are referred to are legitimate and must be attended to. The respondents being the majority party does not support this motion and the Applicant and her clients will learn that when the matter is scheduled in accordance with the rules of Parliament. There is no urgency in debating this matter for a majority that does not support the motion. If the Applicant and her clients believe in the motion, they can wait a month or two to schedule this motion and debate it in the house properly and in accordance with the best traditions of our parliament. This desperate attempt to use of a motion of no confidence motion to influence the outcome of the ANC elective conference is an abuse of the no confidence motion.

AD PARAGRAPH 75

106. The allegations in this paragraph are denied. The administrative inconvenience is a factor and cannot be discarded with the consequences that public funds are wasted over a frivolous motion.

AD PARAGRAPH 76

107. The relief is moot to the extent that the Applicant seeks to force a debate this year as opposed to a reasonable time next year. I have indicated that I would as Chief Whip of the Majority Party, the ANC support the scheduling of a motion of no confidence in February 2013. That surely must cater for the ambitions of the Applicant and her client.

108. In any event, there is authority that a Court should not grant relief that cannot be given effect to, for example an order that a motion of no confidence be debated on 22 November 2012 or 7 December 2012 in circumstances where most of the Members of Parliament have gone to do other businesses outside Cape Town.

AD PARAGRAPH 77

109. I agree that the issue of a motion of no confidence can be revived for debate next year. The constitutional imperative contended for does not extend to scheduling the debate at great inconvenience and outside the normal rules of Parliament.

AD PARAGRAPH 78

110. Davis J wrongly held that the Applicant's right has been frustrated by Parliament failure to pass rules the enable the Speaker to order that a motion of

confidence be debated against the ruling of the Programme Committee. I deny that the National Assembly has violated any obligation under section 57(1)(b) of the Constitution.

AD PARAGRAPH 79

111. The case of the Applicant has now changed. It was not that Parliament or the National Assembly had breached a constitutional duty. It was that it had an urgent matter for the compelling of the Speaker to do whatever he can or possible to ensure that the motion of no confidence in the President is debated. This new cause of action is a misguided attempt to force the matter before this Court in circumstances that are not justified by fact and the law. The Applicant has never raised this issue in Parliament or the National Assembly or any of the Committees. She and her clients must first exhaust the remedies available in Parliament or the National Assembly or the Committees before launching this misguided application for a declaratory order.

AD PARAGRAPH 80- 81

112. This approach by the Applicant is prejudicial since it makes it difficult for the Second Respondent to appreciate what the complaint is. I do not believe that the Applicant is entitled to appeal directly to the Constitutional Court against the decision of Davis J. This Honorable Court has emphasized in many cases the undesirability of appealing directly to it on matter as important to our constitutional system as the issues of parliamentary autonomy. There is no

justification for directly appealing to the Constitutional Court a judgment of a single delivered *ex tempore* and in which he clearly states that he would have preferred to sit with a full bench in this matter. The application for leave to appeal should be dismissed with costs.

AD PARAGRAPH 82-83

113. The allegations in this paragraph are matters of constitutional interpretation, which it is undesirable to appeal directly to the Constitutional Court on. There is no reason why the full bench or Supreme Court of Appeal should not be approached to hear this matter prior to approaching the Constitutional Court.

114. In any event, it is denied that the right has been frustrated due to the fact that it has not been scheduled at a time of the Applicant liking.

AD PARAGRAPH 84

115. The argument may well be acceptable but it does not point to a violation of a right claimed by the Applicant. As the rules stand, the conduct of the first respondent cannot be criticized.

AD PARAGRAPH 85

116. Davis J was correct in his approach on this issue as expressed in the Ambrosini judgment of the Constitutional Court.

AD PARAGRAPH 86

117. The Court must always defer to Parliament on matters involving the internal organization of parliamentary business. The Applicant is asking the Court to violate parliamentary autonomy on matters that are exclusively with the competence of parliament. That should be resisted.

AD PARAGRAPH 87

118. The **Ambrosini** decision is distinguishable from this matter. In any event there were reasonable prospects of success in that case than this one.

AD PARAGRAPH 88

119. The issues raised by the Applicant are clearly constitutional matters but not falling within the exclusive jurisdiction of the Constitutional Court. There is no reason why the Applicant would seek to escalate this dispute to the highest court in the land without first appealing to the Supreme Court of Appeal.

AD PARAGRAPH 90 TO 92

120. I deny that the alternative relief justifies an urgent direct access to the Constitutional Court. The relief sought is not urgent and even if the Court were to order that rules be developed, such rules would not be developed to

accommodate the complaint of the Applicant for an urgent hearing of her motion of no confidence.

AD PARAGRAPH 93

121. The decision referred is of no assistance to the Applicant and her clients.

AD PARAGRAPH 94

122. Davis J lamented not sitting with a full bench clearly demonstrating the need to have the matters properly considered by more than one judge. The Applicant has precipitously lodged this application without a written judgment of Davis J and on the basis of note made in the *ex tempore* judgment. Davis J also stated that he reserved the right to alter some of his opinions of his judgment. That can hardly qualify as sufficient to assist the Constitutional Court to determine issues without the benefit of the Supreme Court of Appeal or a full bench.

AD PARAGRAPH 95

123. The allegations in this paragraph are denied. If indeed the Applicant has a right to vindicate, why would that right be only capable of vindication in the Constitutional Court and not the Supreme Court of Appeal?

AD PARAGRAPH 96

124. The absence of a dispute of fact does not cloth the application with some unique feature justifying preferential treatment by the Constitutional Court. The question is whether it is justified to rush to the Constitutional Court for a ruling on the issues raised on an urgent basis and by way of direct access. Davis J expressed regrets that the application had been brought on the basis of extra-ordinary urgency without giving the Court the opportunity to organize a full bench. This rushing of matters to the Court on matters so weighty would deprive the Constitutional Court of valuable insights into these complex matters that are important to the proper functioning of our democratic institutions.

AD PARAGRAPH 97

125. Why should a crisp constitutional question as contended by the Applicant enjoy the preferential urgent hearing of the Constitutional Court? The Constitutional Court must be afforded the views of other Courts and not merely a single judge who himself lamented the absence of full bench to fully engage with the issues.

AD PARAGRAPH 98

126. There are no reasonable prospects of success as I have demonstrated elsewhere in this affidavit.

AD PARAGRAPH 99

127. That may well be the case but as I see it, the issue is a narrow one- it is whether the Applicant is entitled to have a motion of no confidence debated urgently and during December 2012 as opposed to February 2013.

AD PARAGRAPH 100

128. If the Applicant and her clients get their way, then parliamentary business will be flooded by motions of no confidence by minority parties simple to frustrate the programme of Parliament that they do not like and to advance the party political interests. This would divide Parliament and introduce into its activities an undesirable disrespect for parliamentary business.

AD PARAGRAPH 101

129. The Court cannot take into account the intensity of political debates to decide the legal questions that they must decide. The fact that the matter has enjoyed considerable public debate does not place it in a position of advantage over other cases before the Court.

AD PARAGRAPH 102

130. Such an order has no basis and cannot on the facts as alleged by the Applicant be made.

AD PARAGRAPH 103

131. The order will be undesirable for exactly what the Applicant states in this paragraph- the political implications as opposed to legal and constitutional implications. Courts must avoid controversies of a political nature.

AD PARAGRAPH 104

132. I deny that there are any exceptional factors that justify a leap to the Constitutional Court without the benefit of other courts.

AD PARAGRAPH 105 & 106

133. The relief sought against the First Respondent would violate parliamentary autonomy and constitute an intrusion into the affairs of parliament. It is neither just nor equitable to order the Speaker to convene a special sitting of Parliament on a motion not supported by the majority party in parliament.

AD PARAGRAPH 107

134. I deny that the Applicant is entitled to the relief claimed. Accordingly I pray for an order dismissing the application with costs including the costs occasioned by the employment of two Counsel.

MATHOLE SEROFO MOTSHEKGA

I certify that:

The deponent has acknowledged to me that:-

He knows and understands the contents of this affidavit;

He has no objection to taking the prescribed oath;

He considers the oath to be binding upon his conscience.

The deponent thereafter uttered the words "I swear the that the contents of this affidavit are true, so help me God"

The deponent signed this affidavit in my presence at the address set out hereunder at on the day of **2012.**

COMMISSIONER OF

OATHS