

**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

HEADS OF ARGUMENT ON BEHALF OF THE SECOND RESPONDENT

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INTRODUCTION

1. This application raises four crisp constitutional questions regarding the proper interpretation of section 102(2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The first is whether section 102(2) of the Constitution creates a justiciable right of a member to sponsor a vote of no confidence in the President. The second relates to the procedure in terms of which a motion of no confidence in the President must be processed in the National Assembly. The third issue is the scope of judicial oversight on matters relating to the management and programming of Parliament. In this regard the question is whether or not a Court, under the doctrine of separation of powers, is entitled to prescribe how and when Parliament must process a motion of no confidence in terms of section 102(2) of the Constitution. This includes whether the Court is entitled to order Parliament to treat a motion of no confidence in the President as a motion of urgency. The fourth issue is whether or not Parliament has committed a constitutional breach in that it has failed to promulgate parliamentary rules and adopted appropriate processes to regulate motions of no confidence under section 102(2) of the Constitution.

2. From the onset, it is important to briefly summarize the position of the Second Respondent’s contention in respect of the above constitutional questions. The application and the relief sought are based on six central misconceptions. They are the following:
 - 2.1 The first misconception is that the Appellant was denied the opportunity to have her party’s motion of no confidence in the President scheduled and debated in

the National Assembly. This entire application is based on this fundamental factual and legal misconception. At the level of facts, it is common cause that the Appellant and her allies in the National Assembly refused the majority party's support for the scheduling and debate of their motion of no confidence in the President on 26 February 2013.¹ The Programme Committee went as far as placing the motion of no confidence on the order paper of the National Assembly for debate on 26 February 2013.² The Appellant and her allies rejected the scheduling of the debate and demanded for the motion of no confidence to be removed from the order paper. Rather than have the debate as scheduled, the Appellant and her allies preferred a ruling from this Court on what are essentially academic questions of law not borne out by the facts. To the extent that the Appellant's claim is based on the allegation that she was denied the right to have the motion scheduled and debated, the allegations are patently false and inconsistent with the common cause facts.

2.2 That being so, the only questions raised on the facts of this application then is whether the right of the Appellant and her allies, to the extent that such a rights exists, extends to scheduling and debating a motion of no confidence in the President at a time and date of the Appellant's choice. The answer to this question is clearly in the negative. The Appellant has no right in terms of section 102(2) of the Constitution to choose a date and time in terms of which a motion of no confidence should be debated. In fact section 102(2) of the

¹ Vol. 1, page 4; Vol. 3 page 277, para.107.

² Vol. 4, page 322 – where the motion of no confidence was provisionally scheduled for debate at 14h00 on Tuesday, 26 February 2013.

Constitution does not create a right of an individual to call for a motion of no confidence, but the duty of a collective majority in the National Assembly to remove the President on a motion of no confidence.

2.3 The second misconception is that the rules of the National Assembly do not provide for the scheduling of the motion of no confidence on an urgent basis, since such a motion is inherently urgent. All motions, including motions of no confidence in terms of section 102(2) of the Constitution are subject to the scheduling rules and procedures of the National Assembly. Chapter 7 of the Rules of the National Assembly deals with the right of a member to propose a motion for discussion, a draft resolution for approval as a resolution of the House. The Appellant relied on³ to propose a motion of no confidence in the President⁴, which regulates the procedure in terms of which a motion must be addressed to the House. The Appellant complied with rule 98 and having done so, the motion was subject to the scheduling rules of Parliament. At no point did the Appellant propose this motion to be considered as a matter of urgency and significant national importance in the terms similar to debates that are scheduled in terms of rule 103⁵ or 104⁶ of the National Assembly. She also did

³ rule 98(1)(a) of the National Assembly

⁴ Volume p17 para 35 of the record.

⁵ 103. **Matter of public importance**

1. A private member may request the Speaker to place a matter of public importance on the Order Paper for discussion.
2. The member shall make the request to the Speaker before the adjournment of this House on the previous sitting day.
3. Such a discussion shall not exceed the time allocated for it by the Speaker after consultation with the Leader of the House.

not contend it was urgent or state the basis why it should be debated at her nominated time.

“NOTICE OF MOTION

(1) When giving notice of a motion a member shall:

(a) read it aloud and deliver at the table a signed copy of the notice,...

2.4 The third misconception is that the deadlock outcome in the Programme Committee of the National Assembly required the positive intervention of the Speaker to override such an outcome by scheduling a motion of no confidence for debate. This appears to be the approach of the High Court, in terms of which it decried the absence of a deadlock breaking mechanism in favour of scheduling a motion of no confidence. There are three possible outcomes of any deliberations in the Committees involving the work of the National Assembly. Committees may agree, disagree or deadlock. The three outcomes are legitimate outcomes of any parliamentary committee system and are consistent

4. If 15 minutes before the expiration of the allocated time a member other than the responsible Minister is speaking, the presiding officer shall interrupt such member and shall ascertain from the Minister where or not he or she wishes to reply.
5.
 - (a) Questions of privilege may not be discussed under this Rule.
 - (b) Matters already discussed by this House during the same session may not be discussed under this Rule

⁶ 104. **Matters of urgent public important**

- (1) A private member may on any sitting day request the Speaker in writing to allow a matter of urgent public importance to be discussed by this House.
- (2) The request shall be made to the Speaker before 12:00 on days on which this House sits at 14:15 or at least one hour prior to an earlier or later time appointed for a sitting.
- (3) If the Speaker grants the request, the presiding officer shall announce it in this House, and debate on the matter shall stand over until the time appointed by the presiding officer.
- (4) Such a discussion shall not exceed the time allocated for it by the Speaker after consultation with the Leader of the House.
- (5)

with the democratic principles of our Constitution. Where the Programme Committee has either disagreed or deadlocked over whether a motion should be scheduled for debate, that outcome is lawful and does not require the intervention of the Courts or of the Speaker.

2.5 In addition to the above, the scheduling for debate of any motion in the National Assembly is subject to political negotiations, lobbying, bargaining and agreement between the parties of the National Assembly. That being so, where parties do not reach political agreement on the scheduling of any motion in the National Assembly, irrespective of its origins, the motion would not be scheduled for debate. Where that happens, a party that wishes to advance its motion, and believes its motion to be in the national interest, (as opposed to party interest) it must lobby and negotiate with other parties in the National Assembly who may ultimately agree or disagree.

2.6 A motion of no confidence is adopted typically as a political strategy in which opposition political parties do not simply express displeasure at the leadership of the President, the constitutional consequences for a successful vote of no confidence is that the President may be forced out of office and early elections. The Courts should not come to the assistance of a political party' strategy intended for political gain. Political interests should not be pursued via the Courts but the proper political platforms. In this case, it is clear that the motion of no confidence was adopted as a political strategy of the DA and the minority political parties who wished to influence the outcome of the ANC Elective conference, which was to take place in December 2012. That is why the

Appellant rejected the scheduling of the debate on the motion anytime after December 2012 and in the new parliamentary session. A Court should not concern itself with political strategies and machinations but engage legal contentions that evidence a live controversy.

- 2.7 The fifth misconception relates to the role of the Speaker. The DA appears to have believed that the Speaker has the power to intervene in terms of rule 2(1)⁷ of the National Assembly in favour of scheduling their motion of no confidence – essentially overriding the deadlock or political disagreement over the motion.
- 2.8 This misconception is based on another misconception, which is that there are no rules in the National Assembly for the urgent scheduling and debate of a motion of no confidence. If there were no rules, then the argument based on Rule 2(1) of the National Assembly would be worth engaging with. But there are rules to deal with urgent and important matters in terms of rule 103 and 104 of the National Assembly.
- 2.9 The role of the Speaker on matters that involve political contestations must always be that of a neutral facilitator. It would be illegal for the Speaker to intervene to advance the political interests or strategy of one party against another. To require that the Speaker should intervene in order to break the deadlock in the scheduling of a motion would be undemocratic and inconsistent with the normal parliamentary practices. The role of the Speaker is to ensure

⁷ The Speaker may give a ruling or frame a Rule in respect of any eventuality for which these Rules do not provide.

that the work of Parliament is conducted lawfully and in a manner that advances the democratic principles of the Constitution. To require the Speaker to intervene in a manner that overrides the lawful outcome of a Programme Committee, following open and frank deliberations of that Committee would be anti-democratic and an unwarranted interference with the legitimate outcomes of Committee debates.

2.10 The limited role of the Speaker is set out in the affidavit of the Speaker and it was to report the outcome of the deliberations in the Programme Committee and create a further opportunity for the parties to engage each other on the issues in order to reach political agreement. The Speaker's role was to report and bring the deadlock to the House for the House to debate and possibly agree on the scheduling of the debate. On the facts of this case, the Speaker was prevented from reporting the deadlock to the National Assembly by the Appellant's precipitous application to Court.

2.11 The sixth misconception relates to the separation of powers and it is that a Court may order Parliament to schedule a debate on a motion of no confidence because such a motion is inherently urgent and of national importance. Our Court has delineated the acceptance parameters of judicial intervention. Political questions do not belong to the Courts and courts should refuse to be reduced to political platforms. Courts must reject the idea that political parties may use them as forums for resolving typical political questions. Whether a motion is urgent or not is a matter that belongs exclusively to the National Assembly in as much as whether an application for relief in Court is urgent or

not is a matter exclusively within the domain of the Courts. Courts are in no position to say which motions in the National Assembly should be regarded as urgent in as much as the National Assembly cannot be in a position to tell the Courts what application should be regarded as urgent.

2.12 The above misconception is particularly egregious because at no point has the DA or any of the political parties in the National Assembly called for a review or amendment of rules to create a special motion procedure for motions brought to achieve the consequences of section 102(2) of the Constitution. In other words, until this motion of no confidence, there has never been, either by the Appellant or the allies of the Appellant, an attempt to refer the rules of motion for a review in terms of the rules. Rule 59 of the National Assembly provides for the Rules Committee and Rule 65 provides for the establishment of a sub-committee on Review of the National Assembly Rules. These are the correct institutions to which a complaint about absence of rules to regulate any matter in Parliament should have been directed.

2.13 Having regards to the above, it follows that the contention that the National Assembly has committed a constitutional breach in that it has failed to promulgate rules of procedure for the scheduling of motions of no confidence in the President is inaccurate and based on false contentions of law and fact. We deal with this further in these submissions.

3. The following factual background is necessary in order to appreciate the contentions advanced above on behalf of the Second Respondent.

BACKGROUND FACTS

4. The genesis of this application was the initiation of a motion of no confidence in the President by the Applicant on 8 November 2012. The Appellant acted in her capacity as leader of the official opposition and on behalf of minority parties⁸ represented in the National Assembly.⁹ The motion was initiated in terms of Rule 98(1)(a) of the National Assembly and was intended to trigger a debate on the leadership of the President and to test whether he still enjoyed the confidence of the House. If successful, the President would have been compelled to resign in terms of section 102(2) of the Constitution. The notice of motion was placed on the National Assembly's Order Paper on Tuesday, 13 November 2012. The terms of the motion as set out in the Order Paper¹⁰ read as follows:

“Draft resolution (Ms LD Mazibuko): That the House-

- (1) *Noted that under the leadership of President Jacob G Zuma-*
 - (a) *the justice system has been politicized and weakened;*
 - (b) *corruption has spiraled out of control;*
 - (c) *unemployment continues to increase;*
 - (d) *the economy is weakening;*
 - (e) *the right of access to quality education has been violated and therefore*
- (2) *in terms of Section 102(2) of the Constitution of the Republic of South Africa, 1996, pass a motion of no confidence in President Zuma.”*

5. That having happened, the motion was ready for consideration by the National Assembly subject to the scheduling by the Programme Committee.

⁸ Vol. 1, page 51, para 5 of the Record.

⁹ Vol. 1, page 53, and 56; para. 22 of the Record.

¹⁰ Vol. 1 page 56, para 23 of the Record.

6. The Programme Committee is established in terms of Rule 187 of the NA. It consists of the Speaker, the Deputy Speaker, the Leader of Government Business, the House Chairpersons, the Chief Whip, the Deputy Chief Whip of the majority party in the Assembly, the whip of the majority party responsible for programming, another two whips of the majority party designated by that party, one whip and two additional representatives of the largest minority party in the Assembly designated by that party, one whip and one additional representative of the second largest party in the Assembly designated by that party and one whip of each of the other minority parties in the Assembly designated by the party concerned.

7. The functions of the Programme Committee are set out in Rule 190 and include the following:
 - 7.1 Monitoring and overseeing the implementation of Parliament's annual programme in the Assembly including the legislative programme;

 - 7.2 Implementing the Rules regarding scheduling or programming of the business of the Assembly, and functioning of the Assembly committees and sub-committees;

 - 7.3 Taking decisions and issuing directives and guidelines to prioritize or postpone any business of the Assembly, but when the Committee prioritizes or postpones any government business in the Assembly, it must act with the concurrence of the Leader of Government Business.

8. In accordance with the National Assembly practice, the scheduling of the motion was first discussed in the Chief Whip's Forum, established in terms of Rule 217 of the Rules. The Chief Whip's Forum is a forum for discussion and co-ordination of matters for which the whips are responsible. It is a forum for political agreement on the issues that whips are responsible for. The Speaker may consult the Chief Whip's Forum on any matter when appropriate.
9. The scheduling of the motion of no confidence was raised by the DA Whip and considered on 14 November 2012 in the Chief Whip's Forum. The Forum failed to reach political agreement on the scheduling of the motion of no confidence in the President. The matter was referred to the Programme Committee.
10. On 15 November 2012, the Programme Committee met to determine the programme of the National Assembly for the following week. The Chief Whip of the DA requested that the scheduling of the motion of no confidence to be discussed by the Programme Committee, with a view to having the motion debated in the National Assembly in the following week. The Programme Committee could not reach political consensus on whether or not the DA's motion of no confidence in the President should be scheduled for debate in the National Assembly as requested.
11. That being so, the Speaker decided that the motion of no confidence could not be scheduled as requested by the DA. The Speaker informed the parties that he would be submitting a report to the National Assembly on the issue in terms of Rule 137 of the Rules and took the view that since the Programme Committee was a committee of the

National Assembly; the National Assembly could still decide to debate the motion of confidence and vote upon it. Rule 137(1) (c) supported the Speaker's position.

12. On the same day that the Programme Committee had failed to reach consensus on the scheduling of the motion of no confidence, the Chief Whips of some of the opposition political parties, met with the Speaker to try to persuade him to intervene by overriding the deadlock in favour of scheduling the debate on the motion of no confidence. The Speaker's view was that he could not override the deadlock by scheduling the debate on the motion if there was no political agreement on the issue. He stated that he would report the deadlock outcome to the National Assembly and it was up to the House to override the decision of the Programme Committee. He then informed the Whips that he in any event wanted to obtain legal advice on issues raised with him before acting.

13. Despite the Speaker's position, in the evening of 15 November 2012, the DA's legal representative addressed a letter to the Chief Legal Advisor in Parliament setting out certain concerns about the handling of its motion of no confidence.¹¹ In the letter the position taken by the DA was that where there is a deadlock in the Programme Committee, the Speaker, in terms of Rule 2(1) of the National Assembly, which reads, "*the Speaker may give a ruling or frame a Rule in respect of any eventuality for which these Rules do not provide*", must make a ruling. If, however, the Speaker had been advised that Rule 2(1) of the National Assembly was not applicable, then the Speaker was entitled to "*take whatever steps are appropriate and necessary to ensure that our clients' Notice contemplated under s 102 of the Constitution will be placed on the*

¹¹ Record: page 58, para 32.

Order Paper of the National Assembly for the sitting of Thursday, 22 November 2012, the most appropriate and indeed only, available time.”

14. The Speaker replied to the DA’s letter and indicated that he was in the process of obtaining legal advice from Senior Counsel and would be reverting with an answer on 19 November 2012.¹² The Speaker indicated that he considered the motion of no confidence in the President to be of utmost importance and his decision to obtain legal advice was taken to ensure that whatever decision he took in respect of this weighty matter, he was acting lawfully. Having taken legal advice, the Speaker decided that the appropriate course to follow was to report the deadlock over the scheduling of the motion of no confidence in the Programme Committee to the National Assembly. Prior to submitting his report to the National Assembly, the DA and its allies launched urgent interdictory proceedings in the High Court.

15. The DA filed and served the application for urgent relief on 16 November 2012. The urgent application was set down for hearing on 20 November 2012.

THE URGENT APPLICATION IN THE HIGH COURT

16. The relief sought by the DA was set out in the notice of motion as follows:

¹² Record: page 66.

- 16.1 Condoning non-compliance with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard as a matter of urgency in terms of Rule 6(12);
 - 16.2 Directing that the First Respondent take whatever steps are necessary to ensure that a motion of no confidence, by the Applicant, dated 8 November 2012 in the President of the Republic of South Africa in terms of section 102(2) of the Constitution of the Republic of South Africa, 1996, be scheduled for debate and a vote in the National Assembly on or before Thursday, 22 November 2012; and
 - 16.3 Directing that the First Respondent, and the Second Respondent only in the event of him opposing this application, to pay the costs of the application.
17. The Respondents were given on or before 10h00 on Monday, 19 November 2012 to consider the application and file a notice to oppose, if they were opposing the application and thereafter a mere two hours to file an answering affidavit.
 18. On 20 November 2012 Davis J heard the application and reserved judgment. He did so in order to give the Speaker an opportunity to give his report to the National Assembly on 21 November 2012. After the meeting of the National Assembly on 21 November 2012, the Speaker decided not to give his report but to await the outcome of the judgment. The Court may well have decided that the Speaker had a duty to schedule a motion of no confidence and it was therefore prudent for the Speaker to await its decision prior to giving his report to the National Assembly.

19. Davis J, upon inquiring, was informed of the decision of the Speaker to which he immediately indicated that he would be handing judgment in the early afternoon of 22 November 2012. Davis J was also informed of the decision of the majority party to support the scheduling of the motion of no confidence on the first week of the first term of Parliament in 2013, which would be on 26 February 2013. The DA and its allies rejected this offer, preferring to rely on the Court for its political strategy to force a debate on the motion of no confidence before ANC elective conference which was scheduled to take place in the middle of December 2012.
20. Judgment was delivered *ex tempore* on Thursday 22 November 2012. The 22nd of November 2012 was the last sitting of the National Assembly for the year 2012. It rose on that day and would be on recess until February 2013.
21. In essence, Davis J dismissed the application on a number of grounds which are discussed below.

THE JUDGMENT OF THE HIGH COURT

22. The High Court found the following:

- 22.1 Minority parties have a constitutional right to move a vote of no confidence in the President.¹³

¹³ Judgment/17/4-14.

- 22.2 The majority party cannot decide the timing and scheduling of a motion of no confidence in the President.¹⁴
- 22.3 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.¹⁵
- 22.4 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.
- 22.5 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 dismissed.
23. The High Court, however, dismissed the application on the basis that the relief sought by the DA was incompetent. The Court also commented on the political nature of the dispute and decried the manner in which it had been brought to the Court. Davis J essentially held that the DA and its allies had failed to bring the application in good time to ensure that the Court had enough resources to grapple with the contentious

¹⁴ Judgment/28/16-24.

¹⁵ Judgment/29-30.

issues raised in the application. He also stated that the nature of the dispute between the parties was essentially of a political nature, requiring a political solution and not a legal or judicial solution. Having said that he found that the National Assembly did not have rules to deal with motions of no confidence urgently and to schedule the debate on the motion without any delay.

24. The DA filed an urgent application for leave to appeal directly to this Honourable Court on 23 November 2012. The urgent relief sought in the Constitutional Court was in some respects different to that sought in the High Court. The DA now seeks the following orders:

24.1 Under Rule 11, for an order declaring in terms of section 167(4)(e) of the Constitution that Parliament has failed to fulfil its constitutional obligations under section 102(2) of the Constitution of the Republic of South Africa, 1996, by failing to schedule a motion of no confidence in the President for debate and vote in the National Assembly, within a reasonable time, as contemplated by section 237 of the Constitution.

24.2 Under Rule 19(2), granting leave to appeal directly to this Court against the order of the Western Cape High Court (per Davis J) of 22 November 2012, dismissing the Applicant's application for an order directing the First Respondent to take whatever steps are necessary to ensure that the Motion of No Confidence is scheduled for a debate and vote in the National Assembly on or before Thursday, 22 November 2012.

- 24.3 Alternatively to prayer 2, under Rule 18, granting direct access to this Court for a declaration that the Rules of the National Assembly are inconsistent with the Constitution and invalid to the extent that they do not protect the rights of the Applicant and other member of the National Assembly, to have a Motion of No Confidence in the President of the Republic of South Africa in terms of section 102(2) of the Constitution accorded appropriate priority over other business, and, accordingly.
- 24.4 Directing the First Respondent, in his capacity as presiding officer in the National Assembly, and representative in law thereof, to take whatever steps are necessary to ensure that the National Assembly schedules the Motion of No Confidence for debate and vote as a matter of urgency, precedence and priority, and if at all possible, on or before 7 December 2012.
- 24.5 To the extent necessary declaring that the Motion of No Confidence has not lapsed per Rule 316(1) of the National Assembly.
- 24.6 Directing the Respondents to pay the costs of this application as well as the cost of the application in the Western Cape High Court.
25. The Chief Justice issued directions as to the filing of answering affidavits on 26 November 2012. He directed the respondents to file their answering affidavits by Wednesday 28 November 2012. The parties were directed to particularly answer the issue on urgency, in particular because the DA was seeking an order in terms of which the motion of no confidence could be scheduled and debated on 7 December 2012.

26. The Respondents answered the founding affidavit, directing themselves also to the issue of an urgent hearing. This Court refused the application for urgent relief sought in respect of the debate on or before 7 December 2012. It ordered that costs would be determined at the hearing of this application. The reasons advanced against the urgent application for an order that would see the motion scheduled and debated on or before 7 December 2012 are relevant to the issue of costs. Calling the National Assembly to reconvene in order to debate a motion of no confidence in December 2012 would have caused serious prejudice to the parties and the House, which at that stage was on recess. The costs that would be incurred in order to reconvene Parliament for purposes of debating a DA motion of no confidence in the President are set out in the affidavit of the Speaker and would have been unjustified. There has been nothing in the Appellant's affidavit to show prejudice if the motion was scheduled in February 2013. When the motion was provisionally scheduled for debate, the DA and its allies refused to debate the matter. The conduct of the Appellant was clearly so unreasonable as to attract a punitive cost order against it. There is no reason why the motion of no confidence should have been scheduled and debated in November or December 2012 as opposed to February 2013. The use of Courts to advance political strategies and interests is not only undesirable and regrettable, but constitutes an abuse of the Court processes.
27. It is very clear that the Appellant's urgent applications were not borne out of legal contentions a clear political strategy to use the Courts in order to force a debate on the motion of no confidence on the President's leadership prior to the elective conference of the ANC. The application was essentially influenced by considerations of a political

nature and the intentions were clearly to use the Court to settle political debates on the scheduling of the motion of no confidence in the President. If successful, the Court would force the National Assembly to schedule and hold a debate on the leadership of the President in an attempt to influence the political debates at the ANC elective conference. The motion of no confidence was a further strategy to divide the ANC and was specifically based on the perceived divisions in the ANC membership over the leadership of the President.

28. The approach adopted by the DA to the interpretation of the rules governing motions of parliament was influenced by its political strategy and considerations of the elective conference of the majority party, the ANC, in which elections for the ANC president would be conducted. This is important in determining whether the DA in fact generated a legitimate legal debate on the rules of the National Assembly or simply twisted the rules in order to suit a political outcome favourable to the DA.
29. In these submissions, the Second Respondent makes the following contentions, which are incontrovertible:

29.1 Motions of no confidence in terms of section 102(2) of the Constitution are subject to the Rules and procedures of National Assembly. This is because of section 58(1) (a) of the Constitution says so.¹⁶ Chapter 7 and 8 of the Rules of

¹⁶ The 2008-2009 Canadian parliamentary dispute was a political dispute during the 40th Canadian Parliament.

the National Assembly regulate the members' rights to propose motions. Rule 103 and 104 specifically deal with matters that are urgent and of national importance.

29.2 The Rules of the National Assembly provide sufficient guidance on how motions should generally be treated. In this regard, the rules of the National Assembly permit the scheduling of any motion including a motion of no confidence in the President. Such scheduling is subject to a number of considerations, some of practicality, others of a political nature. Whether or not

It was triggered by the expressed intention of the opposition parties (who together held a majority of seats in the House of Commons) to defeat the Conservative minority government on a motion of non-confidence six weeks after the federal election of October 14, 2008.

The intention to vote non-confidence arose from the government's fiscal update, tabled on November 27, 2008. It included several contentious provisions that were rejected by the opposition parties and that the government would later withdraw to resolve the crisis. The Liberal Party and New Democratic Party reached an accord to form a minority coalition government. The Bloc Québécois agreed to provide support on confidence votes, thereby enabling the coalition a majority in the Commons. On December 4, 2008 Governor General Michaëlle Jean (representative of the Canadian monarch and head of state, Elizabeth II) granted Prime Minister Stephen Harper (the head of government) a prorogation on the condition that parliament reconvene early in the new year; the date was set as January 26, 2009. The first session of the 40th parliament thus ended, delaying a vote of no-confidence.

After prorogation, the Liberals underwent a change in leadership and distanced themselves from the coalition agreement, while the NDP and Bloc remained committed to bring down the government. The Conservative government's budget, unveiled on January 27, 2009, largely met the demands of the Liberals who agreed to support it with an amendment to the budget motion.

a motion is urgent must be left to the National Assembly to decide and a Court should not do so. The Appellant did move her motion in terms of Rule 103 or 104, which deal with urgent motions of public or national interest. The failure to utilize these rules demonstrates on its own that the DA did not consider the motion of no confidence in the President to be inherently urgent and important.

29.3 There is no legal authority for requiring a motion of no confidence in terms of section 102(2) of the Constitution to be scheduled and debated on an urgent basis at a time and date chosen by the sponsor of that motion. A motion of no confidence in the President may not be conducted in a manner that undermines democracy or disrupt the proper functioning of the democratic or parliamentary system. It is a democratic device designed to test the confidence in the leadership of the President and must be activated in a responsible manner, that advance the interests of good and stable government, democratic stability and transparency. Because the objectives of a motion of no confidence are political, the Court must recognise political responses and accept them to be appropriate.

29.4 A Speaker may not override the decision of the Programme Committee on the scheduling of any motion. In other words, where the Programme Committee agrees to schedule a motion of no confidence, the Speaker may not interfere with that decision by overriding it. Similarly where the Programme Committee disagrees on the scheduling of a motion, the Speaker should not be allowed to override such a disagreement by taking sides with one party.

- 29.5 On the principles of separation of powers, a Court should give due deference to Parliament on the management of its internal affairs or arrangements relating to the scheduling of motions. The Courts should not act as the Rules Committee or Sub-Committee on Review of the National Assembly by issuing rules that regulate the internal management of the National Assembly. Courts should also not find that there is a breach of constitutional duty by the National Assembly where the matter has never been brought to the attention of or been dealt with by the Rules Committee or the Sub-Committee on Review of the National Assembly.
30. We now address the basis for the position adopted above. In order to properly address the issues, it is important to set out the constitutional framework in terms of which Parliament functions.

THE CONSTITUTIONAL FRAMEWORK

31. The primary constitutional duty of the National Assembly is “*to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.*”¹⁷

¹⁷ Section 42(3) of the Constitution.

32. Parliament is vested with the legislative authority of the Republic of South Africa¹⁸, which confers on the National Assembly the power to amend the Constitution, to pass legislation on any matter and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.¹⁹ Section 45 of the Constitution give Parliament the sole constitutional authority to make rules and orders concerning the joint business of the National Assembly and National Council of Provinces, including rules and orders:

32.1 To determine procedures to facilitate the legislative process, including setting a time limit for completion of any step in the process;

32.2 To establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in sections 74 and 75 that are referred to such a committee;

32.3 To establish a joint committee to review the Constitution at least annually; and

32.4 To regulate the business of –

32.4.1 The joint rules committee;

32.4.2 The mediation committee;

¹⁸ Section 43 of the Constitution.

¹⁹ Section 44(1) of the Constitution.

32.4.3 The constitutional review committee; and

32.4.4 Any joint committees established by Parliament.

33. The National Assembly may determine and control its internal arrangements, proceedings and procedures and make rules and orders concerning its business, with due regard to representative democracy, accountability, and transparency and public involvement.²⁰ The rules and orders of the National Assembly must provide for the following:

33.1 The establishment, composition, powers, functions, procedures and duration of its committees;

33.2 The participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

33.3 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 Assembly effectively;

33.4 The recognition of the Leader of the largest opposition party in the Assembly as the Leader of the Opposition.

²⁰ Section 57 of the Constitution.

34. The constitutional authority of the National Assembly to regulate its own activities is designed to advance the legislative or any constitutional business of the National Assembly in a manner that reflects the democratic system of South Africa.
35. It is on this constitutional authority of the National Assembly that the questions in this application must be answered. It is also in this constitutional framework that the notion that a deadlock outcome in the parliamentary committees arising from a failure of political negotiations between the parties ought to be resolved by the Speaker's interventions. A deadlock outcome in the Programme Committee over the scheduling of a motion of no confidence or any motion should be accepted as lawful and one that is consistent with the democratic process. To require the Speaker to intervene in the manner advanced by the Appellant would essentially introduce an anti-democratic measure that allows the activities and programmes of the National Assembly to be hung on the shoulders of the Speaker, rather than the National Assembly itself.

PRELIMINARY ISSUES IN THIS COURT

36. Paragraph 2 and 4 of the relief sought by the Appellant in this Court to direct the Speaker to intervene and do whatever is possible to schedule a motion of no confidence on 22 November 2012 or on or before 7 December 2012 is moot.²¹ This Court and others have emphasized that Courts should be utilized to resolve live or justiciable

²¹ Director of Public Prosecutions, *Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC) at para 60-69; *Van Wyk v Unitas Hospital and Another (Open Democracy Advice Centre as Amicus Curie)* 2008 (2)SA 472 (CC).

controversies as opposed to disputes of academic interests. Whether or not the motion of no confidence should have been scheduled and debated in November or December 2012 is an academic question that cannot give the Appellant any effective remedy. The orders sought in paragraph 2 and 4 do not present a live controversy that is justiciable. The orders sought cannot be given effect to because the dates on which the Appellants would have benefited from them if granted have come and gone.

37. The only issue that needs to be said about the mootness issues in respect of paragraphs 2 and 4 of the relief sought is that the relief was the Appellant's political strategy to use the Courts in order to advance a political agenda relating to the ANC's elective conference that was scheduled to take place in December 2012. The reason why this Court should now adjudicate an academic question of whether or not the Appellant was entitled to have a debate on the motion in November or December 2012 serves only political interests. It is so that the Appellant may accuse the ANC of having abused its legitimate political majority to forestall a political onslaught on its party's president and preserve the integrity of the ANC political events in December 2012. In any event, the relief is based on a fundamental misconception of the extent of the alleged right to have a motion of no confidence. There is no legal authority on which the Applicants are able to rely on, to contend that a motion of no confidence ought to have been held on the dates and times suggested by them.
38. The DA and its allies intended to force a debate on the motion of no confidence not because of some urgency or importance in the motion, but because it was a political strategy to influence the leadership debate and possibly the outcome of the ANC elective conference. This was simply because the motion of no confidence was called

without the support of the majority party and entirely a minority party motion. This is also borne out by the fact that the DA and its allies rejected the ANC's offer to support the debate on the motion after the elective conference of the ANC in February 2013. The attitude of the Appellant to the offer of the ANC to settle the motion of debate politically has the following consequences:

- 38.1 There was no infringement of the DA's right to have a motion of no confidence in the President debated, if such a right is found to exist. The DA rejected a debate on its motion because it did not suit its political agenda or interests to schedule and debate the motion after the ANC's elective conference on 26 February 2013. The intention of the motion of no confidence was therefore not to test the confidence of the House on the President's leadership, since this could have still been achieved on 26 February 2013. The intention was simply to embarrass the President and influence the ANC elective conference on his leadership.
- 38.2 The National Assembly has not failed to fulfil its constitutional obligations under section 102(2) of the Constitution to schedule and debate the motion of no confidence. The Appellant refused to agree with the majority party to schedule and debate the motion of no confidence after December 2012 and more specifically on 26 February 2013.
- 38.3 Parliament has fulfilled its constitutional duty to promulgate rules and practices for the scheduling and debating of motions, including motions of no confidence in terms of section 102(2) of the Constitution.

38.4 There is no right of any member of any party in Parliament to demand that all parliamentary programs and motions be suspended in order to schedule and debate a motion, including a motion of no confidence in terms of section 102(2) of the Constitution. Any motion, or motion of no confidence in particular, is subject to the rules and practices of the National Assembly. The scheduling of motions and holding of debates in the National Assembly is an outcome of political negotiations and agreement within the committee system of the National Assembly.

38.5 Lastly, the complaint that there is a lacuna in the rules governing motions in the National Assembly has never been raised by the Appellant before the relevant committees of the National Assembly. This amounts to a failure by the DA to exhaust the internal mechanisms of the National Assembly before rushing to Court. This is not permissible. With regard to exhausting domestic remedies Hoexter Administrative Law in South Africa, at 480, contends that:

“Review is prohibited unless any internal remedy provided for in any other law has been exhausted. The court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted, and may grant exemption from the duty only in exceptional circumstances where it is in the interests of justice to do so. It may well be asked whether this statutory duty will pass constitutional muster, or whether it be regarded as unjustifiably infringing the right of access to a court of law.

In this regard, much depends on how the courts interpret the adjective "internal" and the phrase "any other law". These terms ought to be read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned."

39. Clearly, the Appellant essentially choose to challenge the constitutionality or lawfulness of the rules before giving the Committees in the National Assembly an opportunity to deal with the rules. If the Appellant has given the committees of the National Assembly the opportunity to review the Rules, and the National Assembly had failed to pass appropriate rules, then a complaint of the nature advanced by the Appellant could be justified. In addition, the Appellant is the leader of the opposition together with the other opposition political parties. The rules have been passed with their participation. They have operated under these rules without raising any constitutional breach.

40. The only question that remains for adjudication is whether the rules of the National Assembly are inconsistent with the Constitution and therefore invalid to the extent that they do not protect the right of the Applicant, and other members of the National Assembly, to have a motion of no confidence in the President accorded priority over other business or motions. The contention advanced by the Appellant would force the National Assembly to suspend all its business to schedule and debate a motion of no confidence irrespective of its frivolity, relevance and prospects of success. Two issues arise from this contention:
 - 40.1 The first issue is whether section 102(2) of the Constitution creates or

recognizes a justiciable right to have a motion of no confidence debated urgently and above all other motions or business of Parliament.

- 40.2 If there is a justiciable right under section 102(2) of the Constitution to have a motion of no confidence scheduled and debated as a priority above all other business in Parliament, the second question is whether a constitutional breach occurred on the facts and evidence of this case.

THE AUTONOMY OF THE NATIONAL ASSEMBLY TO MANAGE ITS BUSINESS

41. Section 57(1) of the Constitution vests the National Assembly with authority to manage its own business. It gives the National Assembly the freedom and space to:

41.1 determine and control its internal arrangements, proceedings and procedures;
and

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

42. Having regard to these constitutional powers, the question is whether is it consistent with the doctrine of separation of powers for a Court to interfere with the rule making functions and powers of the National Assembly. The Appellant wants an order in terms of which it is declared that the National Assembly has failed in its constitutional duty to promulgate appropriate internal rules to regulate motions of no confidence in the

President. This claim is without any merit as demonstrated above.

43. Firstly, the motion of no confidence tabled by the Appellant was scheduled for debate for 26 February 2013 and could not have been scheduled earlier because:

43.1 The week (of 19 – 22 November 2012) during which Appellant tabled a motion of no confidence was the last sitting of the National Assembly for the year 2012. It is the practice of the National Assembly to schedule and determine its business for the week of the last sitting a fortnight in advance,²² and that week being the last sitting, the business of the National Assembly had already been so scheduled and determined.

43.2 The business of the National Assembly for the two weeks preceding recess had also already been scheduled and determined. The business of Parliament for that period involved committee meetings, oversight visits by committee members across the country as well as study tours abroad. The costs for these businesses, which included travel and accommodation costs had already been paid for.²³

44. It is worth noting that the basis of Appellant's motion of no confidence as set out in the Order Paper are not issues that had suddenly and urgently arisen at a time when the motion of no confidence was tabled or at any time immediately before the motion of no confidence was scheduled. Therefore, the business of the National Assembly could not

²² P142, par 8.
²³ P143, par 10.

have been stalled to accommodate a motion of no confidence the basis of which were not urgent, and which in any event was not tabled in accordance with Rule 103 or 104 of the Rules of the National Assembly.

45. Secondly, the Rules of the National Assembly, made pursuant to section 57(1) of the Constitution established *inter alia* the Rules Committee,²⁴ the Subcommittee on Review of the National Assembly Rules,²⁵ as well as the Subcommittee on Powers and Privileges of Parliament.²⁶ These structures of the National Assembly were primarily established to deal with the development of rules and policies concerning the exclusive business of the National Assembly²⁷ and make recommendations to the Rules Committee regarding the proceedings, procedures, Rules and practices of the National Assembly.²⁸
46. A member of the National Assembly, as the Appellant, who is of the view that the Rules, Procedure or Policies of the National Assembly do not adequately address some of the issues relating to the business of the National Assembly, ought to first approach these Committees for a relief. The Appellant did not exhaust this process prior coming to Court.
47. The Court should refuse to be involved in matters that are essentially political, relating to how the National Assembly manages its internal affairs to advance the legislative and oversight responsibilities of Parliament. A declaratory relief sought by the

²⁴ Rules 158 – 161.

²⁵ Rules 172 – 174.

²⁶ Rules 184 – 186.

²⁷ Rule 161 (1)(a).

²⁸ Rule 174 (a) (i) and (ii).

Appellant would, under the circumstances, place undue pressure on the political system to regulate itself. Such an order as sought by the Appellant would offend against the doctrine of separation of powers which recognizes the functional independence of branches of government. The scheduling of motions, including the motion of no confidence in the National Assembly remains the concern of the National Assembly and no other.

48. In *Ferreira v Levin NO and Others*,²⁹ this Court stated the following reasoned as follows on the roles of the three spheres of government:

“....In a democratic society the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate”.

49. Similarly, in *Doctors for Life International v Speaker of the National Assembly*,³⁰ this Court observed as follows:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating

²⁹ 1996(1) SA 984 (CC) at para 184.

³⁰ 2006 (6) SA 416 (CC) at para 37.

powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’. Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to the other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution.”

50. The principle that the judiciary should not interfere with in the process of other branches of government is in accordance with the practice in other jurisdictions. In *British Railways Board v Pickin*³¹ Lord Morris firmly summarized the principle relating to Parliament’s conduct of its business in the following terms:

“It must surely be Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and construe its Standing Orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and

³¹ [1974] AC 765 at 790 C – E.

the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.” (Emphasis added.)

51. In *Canada (House of Commons) v Vaid*,³² the Supreme Court of Canada emphasized the right of parliament to conduct its business without external interference in the following terms:

“It is a wise principle that the courts and Parliament strive to respect each other’s role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the sub judice rule. The courts, for their part, are careful not to interfere with the workings of Parliament. None of the parties to this proceeding questions the pre-eminent importance of the House of Commons as “the grand inquest of the nation”. Nor is doubt thrown by any party on the need for its legislative activities to proceed unimpeded by any external body or institution, including the courts. It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a complaint that the Speaker’s choice of another member of the House

³² [2006] 135 CRR (2d) 189 at para [20].

discriminated on some ground prohibited by the Canadian Human Rights Act, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the Charter. These are truly matters "internal to the House" to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable even if, in the end, the Speaker's rulings were vindicated as entirely proper."

**WHETHER THE RULES OF THE NATIONAL ASSEMBLY ARE
UNCONSTITUTIONAL**

52. There is no constitutional attack on the specific rules of the National Assembly by the Appellant. The contention advanced by the Appellant is that the rules of Parliament do not afford a member the right to have a motion of no confidence in the President scheduled and debated on an urgent basis, taking priority over all the other business of Parliament. This is self-evidently incorrect on the facts of this matter. The Appellant's claim is based on a false premise that the motion of no confidence was not scheduled. It was but not at the time and date that Appellant wanted it scheduled and debated. The difference of opinion was when the motion should be debated not whether the motion should be debated or not.
53. This contention presupposes the existence of a justiciable right in section 102(2) of the Constitution. Section 102(2) of the Constitution on its terms does not recognize the

existence of a justiciable right to have a motion of no confidence scheduled and debated on an urgent basis and taking priority over all the other business of Parliament. It provides for the resignation of the President and members of cabinet, if the National Assembly, by a majority of its members passes a vote of no confidence.

54. The proper interpretation of section 102(2) of the Constitution would therefore recognize the purpose of the provision. The purpose of the provision is to provide for the removal of the President and the Cabinet by a majority vote of the National Assembly. Section 102(2) of the Constitution therefore recognizes the collective right of a majority in the National Assembly to remove the President and the Cabinet by a vote of no confidence. It does not create a justiciable right of an individual member to have a motion of no confidence in the President scheduled and debated irrespective of the circumstances. A member is entitled to move any motion including a motion of no confidence in the President in terms of the rules of the National Assembly as part of the right to freedom of expression given to members of Parliament. No member may be prevented from raising or sponsoring any motion of any nature. The right of a member to sponsor any motion cannot be limited. However there is no right of a member to have a motion scheduled and debated by the National Assembly. The scheduling of any motion for debate is subject to the rules of the National Assembly.
55. The right recognized in section 102(2) of the Constitution is of members of the National Assembly to remove the President by a majority vote, in a motion of no confidence. A member may propose a motion of no confidence, and this not in terms of section 102(2) but section 58(1) of the Constitution, but the scheduling of a vote and debate is subject to the rules of the National Assembly. The justiciable right that exists

is for a member to propose a motion of no confidence. That right does not come from section 102(2) of the Constitution but section 58(1)(a) of the Constitution. Section 58(1)(a) of the Constitution gives members of the National Assembly the right to freedom of speech in the Assembly and in its Committee subject to its rules and orders.

56. The next issue is whether the right in section 58(1)(a) which includes the right of a member to sponsor a motion of no confidence extends to have the motion scheduled and debated as a matter of urgency and priority. It is important at this stage to recognize that the Appellant's right to sponsor a motion of no confidence in the President was not interfered with. The Appellant was not prevented from expressing her belief that the President no longer enjoys the confidence of the National Assembly. That is her privilege in terms of section 58(1)(a) of the Constitution. However, the question that must be asked is whether that right extends to forcing the National Assembly to suspend all its other business in order to give effect to the right of the Appellant to schedule a debate on her motion. If that were to be the case, the National Assembly would be diverted from its core constitutional business of processing legislation and overseeing the performance of the executive. If the right of a member extended to having the motion scheduled and debated on an urgent basis above the other business of Parliament, it would frustrate the programme of the majority party, and by sequence the majority of South Africans who voted for that majority party to debate and pass laws that ensure the delivery of services.

57. Whether or not such a motion must be scheduled and debated is subject to the rules of Parliament. There is no duty on the National Assembly, arising from section 102(2) of the Constitution, to regard a motion of no confidence in President to be urgent or to be

so important as to take priority over all the other business of the National Assembly. There is no constitutional duty arising from section 102(2) of the Constitution requiring the National Assembly to regard a motion of no confidence in the President as desiring more privilege and status than a motion on the state of education or health care for example. The Appellant's contentions are a misreading of the constitutional obligations of the National Assembly arising out of section 102 of the Constitution.

58. The parliamentary right of a member in the National Assembly to call for a motion of no confidence in the President must be interpreted in context of the following constitutional principles.

58.1 Section 1 of the Constitution that provides for a democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms:

58.1.1 Multi-party system of democratic government to ensure accountability, responsiveness and openness;

58.1.2 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.

59. Section 42(3) of the Constitution, 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.

60. Section 55(2) imposes on the National Assembly the obligation to provide for mechanisms of ensuring 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.
61. 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.
62. The rules and orders of the National Assembly provide for:
 - 62.1 The establishment, composition, powers, functions, procedures and duration of its committees;
 - 62.2 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;
 - 62.3 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;

62.4 The recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

63. Nowhere in the Constitution is there a duty on the National Assembly to schedule a motion of no confidence in the President in any particular manner. While section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay, there is no factual basis on which to claim that Parliament failed to meet its obligations to provide for the rules governing motions. There is also on the facts- no basis for alleging that Parliament failed to schedule the motion of no confidence within reasonable time. If the Appellant had wanted to debate the motion of no confidence in the President, she had the opportunity on the 26 February 2013- which she rejected.

PARLIAMENT COMPLIED WITH ITS DUTIES

64. Parliament has complied with its constitutional obligations to set out above in that:

64.1 It has determined and controlled its internal arrangements, proceedings and procedures (section 57(a) of the Constitution);

64.2 Made rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. In this regards, it distinguishes between motions that are urgent

and not urgent in terms of rules 103 and 104 of the National Assembly.

- 64.3 It has established multiparty committees that perform the function of oversight and other business, including the scheduling of parliamentary business or activities;
- 64.4 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;
- 64.5 The recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.
65. Having regard to the applicable constitutional provisions and to the facts set out below and in the chronology, no case has been made out by the Applicant for a declaratory order that the National Assembly has failed to fulfil its constitutional obligations under section 102(2) of the Constitution.
66. We have dealt with how the Applicant has misconstrued the scope of the right in section 102(2) of the Constitution as follows:
- 66.1 She believes that section 102(2) of the Constitution gives her the right to have a motion scheduled and debated at a time and date of her choice. Her view is wrong. Her right is subject to the rules and procedures of Parliament. In any event her conduct does not support the existence of such a right. First she did

not utilize the rules for urgent motions or motions of public importance in rule 103 and 104 of the National Assembly. Having failed to utilize the rule for urgent motions, she was not entitled to argue that the motion was urgent and of serious public importance.

66.2 Her right to raise any motion is secure in terms of section 58(1)(a) of the Constitution and not in terms of section 102(2) of the Constitution. That right was not violated because she was not prevented from proposing a motion of no confidence in the President. She was prevented from her unreasonable actions in wanting to hijack the programme of the National Assembly over the motion of no confidence.

66.3 In any event, the right to free expression in section 58(1)(a) of the Constitution does not extend to the right to have any motion scheduled and debated at a date and time of one's choice. It is subject to the parliamentary rules and orders. It is also subject to the principles of representative and participatory democracy, accountability, transparency and public involvement requirements set out in section 57 of the Constitution.

67. Davis J found that the National Assembly had failed to fulfil 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. First, the High Court was not entitled to make a finding that Parliament had failed a constitutional obligation. Section 167(3)(e) reserves the exclusive jurisdiction to the Constitutional Court. To the extent that the High Court

purported to make such a finding against Parliament, no value should be accorded to its opinion.

68. The Appellant has in an uncritical fashion, hinged her remedy on that finding and now hopes and wishes the remarks of the High Court to be an order of this Court. The National Assembly did not fail to fulfil its constitutional obligation for the following reasons:

68.1 All the work of the National Assembly is in the national interest. The legislative duties and oversight responsibilities loom large in the work of the National Assembly. That, however, does not mean that all motions must be scheduled for debate and voting urgently. Some will be scheduled and debated urgently, others will not. It all depends on a number of considerations, including the political interests of the parties involved. The scheduling of motions is a product of political negotiations and agreement. In some instances, parties agree that a certain motion must be scheduled for debate, in other times they disagree and the motion is not scheduled for debate. Just as in its legislative work, Parliament may agree that a certain law is necessary and in that regard, process such a law without any difficulties because of the political agreement. In other times, parties disagree on whether the law is necessary or whether the law is constitutional. What happens in order to settle the debate is that Parliament puts it to a vote after a debate. Those that do not like the law vote against it and those that like the law, vote in its favour. Where a majority is achieved, the law will pass, where it is not, the law will not pass. Committees operate on relatively the same principles. Where there is disagreement on a

motion, the Committee reports to the National Assembly and the matter may be put to a vote in order to diffuse the disagreement.

68.2 A motion of no confidence in the President should be scheduled and debated, if there is political agreement between the parties. If there is no political agreement on the scheduling of the motion, then that is the end of the matter and the motion will not be scheduled or debated. However where there is political agreement, a motion may be scheduled and debated within a reasonable time subject to the work of the NA and subject to practicality. In fact where parties agree, a motion of no confidence in the President may be scheduled and debated on an urgent basis subject to the rules and practicality. The power to determine whether or not the motion should be treated as urgent must always lie with the National Assembly and not elsewhere. It is undesirable to create a rigid rule on the scheduling of motions, including a motion of no confidence. The right to schedule any motion must remain that of Parliament and subject to the political mechanisms that exists in Parliament. Courts should loath to tell Parliament when to regard a motion as urgent and requiring urgent scheduling and vote.

68.3 On the facts of this application, the Applicant, in effect, is claiming that the minority parties have a justiciable 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 National Assembly for 2012.

68.4 That is unreasonable. It is a demand that the National Assembly virtually stops

its core business to debate a motion of no confidence in the President where a large majority evidently does not support that motion. In addition, the urgency to have the motion scheduled and debated is not supported by any urgent considerations and facts. The reasons for the motion of no confidence have ostensibly existed for some time now. Yet Applicant called for it nine 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, in circumstances where there was clearly no support for it from a large majority in the Parliament, she ran the risk that it might not be heard before the end of the year, alternatively, that she would have no time to strike a political agreement to have the motion scheduled and debated within that short space of time.

68.5 The Applicant did not say why it is nationally 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. It is unlikely that the reasons for the debate will not exist on 26 February 2012. It is clear that the reason why the Applicant was bent on having the motion scheduled and debated at specific dates in 2012, is political and related to the ANC's elective conference which took place in December 2012.

68.6 The 2008-2009 Canadian Parliamentary dispute indicates that motions of no confidence were political strategies and not necessarily urgent.

- 68.7 In any event, if the Applicant really wanted this debate, it was scheduled with the support of the majority party, for debate on 26 February 2013. In particular the programme of the National Assembly 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. The Applicant declined to accept the debate rather preferring to rely on the Court for a political solution. If the reasons no longer exist by that date, then it there would be no reason for the debate then.
- 68.8 The debates held in the National Assembly until the time when the Applicant lodged a motion of no confidence with a demand to suspend all the work of Parliament demonstrate that the motion was a political strategy to embarrass the President towards the ANC elective conference in December. On 30 October 2012 there was a debate on a topic introduced and led by Mr van der Merwe of the IFP. On 1 November 2012 there was a debate on a topic introduced and led by Mr Rabie of the DA. On 8 November 2012 there was a debate on a topic introduced and led by Mr Koornhof of COPE. On 13 November 2012 there was a debate on a topic led and introduced by Ms Dudley of the ACDP. The minority parties could have used any of these slots for the debate and voting on the motion of no confidence. None of these debates touched on the vote of no confidence motion, until a few days before the closing of Parliament.
- 68.9 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. The

schedule appearing as **MSM2** to the answering affidavit shows of approved oversight visits and international study tours and the estimated costs for the period November 2012 – February 2013. A schedule appearing as **MSM3** to the answering affidavit of shows pending applications for oversight visits and international tours and the estimated costs for the period November 2013 – February 2013.

- 68.10 A no confidence debate is sufficiently important to require the attendance of all members of the National Assembly. It is particularly important to have the attendance of those members who are active in the various committees and work outside the National Assembly at the debate. In the circumstances under which the motion of no confidence was brought, all these considerations were ignored by the Applicant because of her party's desire to influence the debates on the President's election in Mangaung.
- 68.11 The scheduling of a debate on the dates demanded by the Applicant would have been too disruptive of the work of the National Assembly. It would have resulted in unnecessary and wasteful costs in circumstances where such could have been avoided had applicant used the slots reserved for the introduction and debate of topics by minority parties or where the Applicant had moved a motion of no confidence with sufficient time to enable proper political debates on the scheduling and necessary arrangements for members to attend. The Applicant's conduct would have forced the recalling of the National Assembly during a period when it had risen and at a great cost over a motion of no confidence that did not enjoy the support of a large majority and therefore had no prospects of

succeeding. Members of the National Assembly and the executive would have had to be flown to Cape Town from the rest of the country and outside the country.

- 68.12 Based on the existence of rules, in particular chapter 7 and 8 of the National Assembly, it cannot be said that there is a gap in the rules of Parliament that prejudiced the scheduling and debate of the Appellant's motion of no confidence.
69. 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 Chip Whip's Forum on the principle of political consensus. If the Whips cannot agree, the dispute over scheduling may be referred to the Programme Committee. If the Programme Committee cannot agree the dispute may be referred to the National Assembly by the Speaker to enable it decide when to schedule the debate and voting.
70. The Speaker does not have the power to schedule a debate on a motion. If the Speaker were to be involved, then he would place himself in a partisan position that is undesirable for a Speaker. It would place him in a position to override the decision of Committees without the involvement of the National Assembly.

"The speaker is the servant of the House. When Charles I went to the House of Commons to arrest five members and demanded their whereabouts from Speaker Lanthall, the Speaker said: "I have neither eyes to see nor tongue to speak in this place but as the House is pleaded

to direct me whose servant I am."³³

71. 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. There is a Sub Committee on the Review of Rules. It is a Committee of the National Assembly. Its members are drawn from all parties. The purpose of the Committee is to review and propose amendments to existing Rules or new Rules. A copy of a draft report on the review of the Rules of the NA dated 18 April 2012 and appearing as **MSM5** shows that the National Assembly has decided to undergo a comprehensive review of its Rules.
72. 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.
73. 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. 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.
74. The Sub Committee and the Task Team are where minority parties can make proposals

³³ Constitutional Law of India Second Edition by T.K. Tope p.460

about fixing gaps in the Rules (in so far as there are any) relating to the scheduling of motions of no confidence. Changes that are necessary or desirable can and should be brought about in and by the Task Team and not by the Court.

75. The contentions advanced by the Applicant in favour of the existence of a right to have a motion of no confidence scheduled and debated are wrong. 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. The decision on whether the motion is urgent or not is for Parliament scheduling and not the Court.
76. The majority party 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.
77. 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. 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.

78. While the Court described a motion of no confidence 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 would have been 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.
79. 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.
80. 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 urgency is not as alleged by the Applicant. The only urgency for the Appellant was her political belief that the President of the majority party, the ANC, would have been removed from power by a majority of votes because of the perceived internal divisions in the ANC. She believed also that a motion of no confidence would force the ANC at its elective conference to change its leadership in the President.
81. In the circumstances, the relief sought by the Appellant must be dismissed with costs including the costs occasioned by the employment of three counsels. The costs in the

High court should also be borne by the Appellant.

MODISE KHOZA SC

THABANI MASUKU

GCOBANI NGCANGISA

Johannesburg & Cape Town

20 March 2013