IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 115/2012

In the matter between:

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

and

MAXWELL VUYISILE SIBULU, MP, SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
DR MATHOLDE SEROFO MOTSHEKA, MP, CHIEF WHIP, NATIONAL ASSEMBLY	Second Respondent

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APPLICANT'S WRITTEN SUBMISSIONS

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A. Introduction

1. In this application, which raises issues of deep constitutional importance,[1] this Court is required to make a determination on three issues:

   1.1.1. First, the interpretation of the Rules of the National Assembly (the "NA Rules"), particularly whether they provide, in a constitutionally acceptable manner, for the tabling and debate of a motion of no confidence as contemplated by section 102(2) of the Constitution; and

   1.1.2. secondly, if the NA Rules are capable of being interpreted in a constitutionally acceptable manner, whether the first respondent or the National Assembly acted in a manner inconsistent with the Constitution by failing properly to schedule a debate on the applicant's motion of no confidence.

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[1] A motion of no confidence, if successful, has the consequence that the President, Cabinet and all Deputy Ministers must resign (section 102(2) of the Constitution). The only provisions of comparable gravity are section 203 (which requires the President to summon Parliament to an extraordinary sitting within 7 days of a declaration of national defence if Parliament is not then sitting) and section 89 (which empowers the National Assembly to remove a President by a resolution adopted by two thirds of its members). In terms of section 86(3) of the Constitution, the National Assembly must elect a new President within 30 days of the office becoming vacant.

1.2. Thirdly, if the NA Rules are not capable of a constitutionally permissible interpretation, what the appropriate remedy should be, bearing in mind the directions of the Senior Registrar of this Court dated 30 November 2012[2] and the first respondent's report issued pursuant to those directions.[3]

2. In these written submissions, we deal with the following in turn:

2.1. First, a brief description of the relevant facts;

2.2. secondly, the role and importance of motions of no confidence in a parliamentary democracy, including a consideration of relevant foreign parliamentary procedures. In this section, we also consider the respondents' contentions regarding the importance and urgency of motions of no confidence and why these contentions are not constitutionally acceptable;

2.3. thirdly, an outline of the applicable NA Rules;

2.4. fourthly, the applicant's submissions concerning the interpretation of the NA Rules, in particular NA Rule 2(1), and why the NA Rules, although not necessarily desirable, are not inconsistent with the Constitution; and

[2] Record Index B page 1.
[3] First Respondent's Affidavit to comply with the Court's Directions, Record Index A pages 445ff.

2.5. fifthly, some conclusions and the appropriate remedy.

3. Whatever this Court holds regarding the substance of the National Assembly Rules, bearing in mind the steps taken by the Speaker toward the amendment of the Rules,[4] it is clear that the Leader of the Opposition has succeeded in vindicating her right to have her motion of no confidence tabled and voted on in a constitutionally compliant manner, and is entitled to her costs.

B. Relevant Facts

4. On 8 November 2012, the applicant, mandated by opposition parties representing approximately one third of the members of the National Assembly,[5] gave notice of her intention to move a motion of no confidence in the President in terms of section 102(2) of the Constitution.[6]

5. Section 102(2) of the Constitution provides:

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

[4] As reflected in the first respondent's report to this Court, Record Index A page 445.
[5] Paragraph 18 of the founding affidavit in the High Court, Record Index A page 55, read with paragraph 18 of the first respondent's answering affidavit in the High Court, Record Index A page 76.
[6] See paragraph 35 of the founding affidavit, Record Index A page 17. The text of the motion is reflected at paragraph 37 of the founding affidavit, Record Index A page 18.

6. As a result of a deadlock in the National Assembly's Programme Committee on Thursday, 15 November 2012, the motion of no confidence was not scheduled for debate, urgently or at all.[7]

7. This deadlock precipitated the applicant's urgent application to the Western Cape High Court.[8] The applicant sought an order directing the first respondent to take whatever steps were necessary to ensure that the applicant's motion of no confidence was scheduled for debate and a vote in the National Assembly on or before Thursday, 22 November 2012.[9]

8. The application was heard on Tuesday, 20 November 2012. The High Court handed down judgment on Thursday, 22 November 2012, dismissing the application with no order as to costs.[10]

9. The High Court held that, while the applicant had a right to move a motion of no confidence and to have it debated urgently,[11] there was a *lacuna* in the NA Rules that prevented the vindication of that right.[12]

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[7] Paragraph 41 of the founding affidavit, Record Index A page 19. The role of the Programme Committee and the circumstances concerning the deadlock are discussed in detail below. The first respondent concluded that the motion could not be scheduled, and reported the outcome of the Programme Committee's debates to the National Assembly (paragraph 44 of the founding affidavit, Record Index A page 20).

[8] The applicant instituted proceedings in the Western Cape High Court on 16 November 2012. See the Notice of Motion in the High Court, Record Index A page 46.

[9] See the Notice of Motion in the High Court, Record Index A pages 46-47.

[10] Record Index A page 399.

[11] High Court judgment, page 369 at lines 4-6, Record Index A pages 369 and page 42, line 3-4, , Record Index A pages 394.

[12] High Court judgment, page 46, line 5, Record Index A page 398.

The High Court found that it did not have the power to direct the first respondent to schedule the motion for debate.[13]

C. Motions of No Confidence

10. The High Court held that section 102(2) presupposes that a motion of no confidence may be brought in the National Assembly. The Court held that there "*is manifestly a constitutional right to move a motion of no confidence, which is to be enjoyed by majority and minority parties which sit in the assembly*".[14] The High Court further observed that:

> "*the Constitution envisages that this motion could be brought, not only by a majority party, but also by a minority party, which seeks to garner support for the motion from members across the floor of the House. [T]his is the very stuff of deliberative democracy. For this reason alone, this is not a case about the merits of the debate, but about the principle of holding such a debate*."[15]

(i) Importance of Motions of No Confidence – Foreign Practice

11. The observations of the High Court are consistent with foreign practice, which recognises the important function motions of no confidence serve in a parliamentary democracy. Motions of no confidence enable parliamentary representatives to test whether or not the executive continues to command the confidence of parliament.

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[13] The High Court's reasoning is considered in detail below.
[14] High Court judgment, page 17, lines 4-7, Record Index A page 369.
[15] High Court judgment, page 9, lines 13-19, Record Index A page 361.

"*Perhaps the most crucial motions considered by the House of Representatives are those which express censure of or no confidence in a Government, as it is an essential tenet of the Westminster system that the Government must possess the confidence of the lower (representative) House*."[16]

12. The High Court's observations are also consistent with the foreign recognition of the principle that the opposition must be able to table a motion of no confidence even when there is little prospect of the motion being passed:

"*…Opposition 'no confidence motions' represent the ultimate expression of the Westminster model of 'parliamentary opposition' … – the attempt by the Opposition to remove the present Government and, directly or otherwise, replace it by itself. Of course, while one would expect that a Government, save in the most extraordinary of circumstances, will resort to a test of Parliament's confidence only when it has the expectation of success, the majority of censure motions moved by an Opposition will be in circumstances when the parliamentary arithmetic can provide it with no real prospect of winning the vote*."[17]

13. The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisaged by the Constitution.[18] It implicates

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[16] Wright (ed) *House of Representatives Practice* (6ed), Department of the House of Representatives at 321. See also Kelly & Powell *Confidence Motions* House of Commons Library, Standard Note SN/PC/2873 (http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02873.pdf), who state (at para 1) as follows:

"*Votes of confidence or no-confidence … are perhaps the most important Parliamentary procedural devices, as in the 'Westminster model' the fate of a Government is ultimately dependent on the support of a majority of MPs*."

The authors also quote Turpin *British Government and the Constitution*, (5 ed) p487, who writes:

"*…the requirement that the government must retain the confidence of the House of Commons is still a fundamental principle of the Constitution. In the last resort it is sustained by the government's dependence on the House of Commons for 'supply' (finance) and the passing of legislation.*"

[17] Kelly & Powell *Confidence Motions supra* para 2.

[18] See Democratic Alliance and Another v Masondo NO and Another 2003 (2) SA 413 (CC) para [42], where this Court held:

the values of democracy, transparency, accountability and openness. A debate on a motion of no confidence falls squarely within the deliberative and oversight role of the National Assembly envisaged by s 42(3) of the Constitution, which provides:

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

14. A motion of no confidence is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account:

"*In a very real sense, one of the main jobs of the legislature in a parliamentary democracy is to sit as a court passing continual judgment on the record of the executive, and continuous sentence on its future prospects*."[19]

15. A motion of no confidence serves the purpose of bringing the performance of the executive before a national forum in which public representatives may interrogate it:

"*The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged*."

See also Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC), footnote 66.

[19] Daily proceedings of the Canadian House of Congress, National Democratic Institute for Internal Affairs. http://www.ndi.org/files/980_gov_legcapacity_0.pdf

"*Normally the members supporting the motion are aware that such a motion will fall. However, it is moved with the objective of showcasing the Government's activities, which is not satisfactory according to the movers. It is an effective forum to discuss the entire functioning of the Government*."[20]

16. As Brazier notes:

"*The real significance of the general requirement that a government retain the confidence of the House of Commons is not in the rare loss of a vote of confidence or in the somewhat more frequent legislative defeat, but rather that it obliges every government to defend itself, explain its policies, and justify its actions, to its own back-benchers, to the opposition parties, and through them to the country as a whole*."[21]

(ii) *Urgency of Motions of No Confidence*

17. In other jurisdictions, motions of no confidence are to be dealt with as a matter of precedence and they enjoy priority over other parliamentary business. In England, a debate on a confidence motion "*will generally take precedence over the normal business for that day*".[22] Indeed, Parliament may be recalled from a recess for such a debate to take place.[23]

[20] Delhi Assembly commentary on Rule 251 of the Rules of Procedure of the Delhi Assembly (www.delhiassembly.nic.in (full page); http://delhiassembly.nic.in/NoConfidenceMontion.htm (commentary)).
[21] R Brazier *Constitutional Practice* (2ed) pp212-13 quoted in Kelly & Powell *Confidence Motions supra* para 1.
[22] Kelly & Powell *Confidence Motions supra* para 1.
[23] *Ibid*.

18. Blackburn and Kennan state:

> "*By convention ... if the official opposition tables a motion of censure on the government, the government provides time for it to be debated*."[24]

19. Erskin May says:

> "*By established convention the government always accedes to the demand from the Leader of the Opposition to allot a day for the discussion of a motion tabled by the official opposition which, in the government's view, would have the effect of testing the confidence of the House. In allotting a day for this purpose the government is entitled to have regard to the exigencies of its own business, but a reasonably early day is invariably found. This convention is founded on the recognised position of the Opposition as a potential government, which guarantees the legitimacy of such an interruption of the normal course of business. For its part the government has everything to gain by meeting such a direct challenge to its authority at the earliest possible moment*."[25]

20. Similarly, in Australia, the importance of motions of no confidence is recognised by the rule that a motion of no confidence takes priority over all other business until disposed of.[26]

21. In France, a motion of no confidence, if supported by a tenth of the members of the House, must be debated no later than the third sitting day following the expiry of 48 hours after the tabling of the motion.[27]

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[24] Blackburn and Kennan *Griffith & Ryle on Parliament* (2003) p 484.
[25] Erskine May *Parliamentary Practice* (2011) p 329.
[26] Standing Order 48 of the Australian House of Representatives Standing and Sessional Orders provides that:

> "*A motion on notice or an amendment of a motion which expresses censure of or no confidence in the Government shall have priority of all other business until it is disposed of by the House, if it is accepted by a Minister as a motion or amendment of censure or no confidence*."

22. Similar time restrictions apply in the Israeli Knesset. The rules of the Knesset generally require the motion to be debated in the week following its tabling and the deferral of a debate on any other item.[28] The rules, furthermore, explicitly recognise the right of any faction of the Knesset to bring a motion of no confidence.[29]

23. The first respondent attached a parliamentary research document into international practice to his progress report filed on 13 March 2013.[30] With the exception of Australia, none of the parliamentary procedures considered in the research document expressly addresses the timing and urgency of motions of no confidence.[31] The report does not

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[27] Article 153(1) of Rules of Procedure of the National Assembly (http://www.assemblee-nationale.fr/english/8ac.asp#chap3-11) provides as follows:

"*A motion of no-confidence shall be tabled by delivering to the President of the Assembly a document entitled 'Motion no-confidence' together with a list of signatures of at least one tenth of the members of the House*."

Article 154(1) states:

"*The Conference of Presidents shall determine the date on which motions of no-confidence are to be debated, the date to be not later than the third sitting day after the expiry of the constitutional time limit of forty-eight hours subsequent to the tabling of the motion*."

[28] Article 44(e) of the Knesset Rules of Procedure provides as follows:

"*A motion to express no-confidence in the Government that was submitted by way of a proposal for an item on the Agenda before the adjournment of the Knesset sitting on the last day of the week of Knesset sittings, including a sitting day during the recess, shall be debated at the first regular sitting of the Knesset during the Knesset's Session in the week after the week in which it was submitted, and shall defer a debate on any other item, subject to what is said in article 20(c) [dealing with debates on the opening day of the Knesset]. A motion submitted after the said time, shall be considered to have been submitted the following week*."

See http://www.knesset.gov.il/rules/eng/ChapterD1.pdf - for no confidence provisions - and http://www.knesset.gov.il/rules/eng/contents.htm - for full rules).

In Bangladesh, the motion must, if supported by at least thirty members, be debated within 10 days of leave being requested for its debate. See Article 159 of the Rules of Procedure of the Parliament of the People's Republic of Bangaldesh (http://www.parliament.gov.bd/rprocedure.htm).

[29] Article 44(b) of the Knesset Rules of Procedure (http://www.knesset.gov.il/rules/eng/ChapterD1.pdf).

[30] Annexure MVS3 to the first respondent's affidavit, Record Index A pages 461ff.

[31] In India, the rules of the Lok Sabha provide for the discussion of a motion of no confidence (subject to the requirements, *inter alia*, that the motion is supported by at least fifty members), but do not prescribe when the discussion must take place (Record Index A pages 461-462).

The rules of the Ugandan Parliament provide only for the removal of the President as a result of, for example, abuse of office, misconduct or illness (Record Index A pages 462-466). While these rules set out time restrictions, they do not relate to motions of no confidence. These provisions are comparable to

consider the procedures in countries such as those discussed above, where the relevant rules expressly provide for motions to be debated on an urgent basis. The report also omits reference to the academic commentary regarding the importance and priority of motions of no confidence in Westminster.[32]

24. The judgment of the High Court is consistent with foreign practice insofar as it recognises the priority to be accorded to a motion of no confidence. The High Court accepted that a motion of no confidence in the President "*must contain the idea of inherent urgency*".[33]

25. The applicant submits that, at the very least, a motion of no confidence should be treated with the same urgency as Parliament's approval of a declaration of national defence under s 203 of the Constitution. S 203 requires the President to summon Parliament to

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Parliament's powers under s 89 of the Constitution. The research document considers motions of no confidence under the general parliamentary rules relating to substantive motions in Uganda (Record Index A pages 474-475).
The Kenyan Constitution is similarly silent regarding when a debate must take place (Record Index A pages 466-467). As with Uganda, the research document considers motions of no confidence under the general parliamentary rules relating to substantive motions (Record Index A pages 475-476)
The research document also considers the position in Australia (Record Index A pages 467-469 and 471-474), New Zealand (Record Index A page 477), Canada (Record Index A pages 469 and 471-474) and England (Record Index A pages 469-470). The report notes that in these jurisdictions the procedures regarding motions of no confidence are not specifically dealt with in the rules, but are debated under provisions or conventions dealing with ordinary or other types of motions. The research document recognises the priority afforded to motions of no confidence in Australia (at para 3.1 Record Index A page 467), but does not consider the academic commentary set out in paragraphs 17 to 19 above in relation to the practice in England.

[32] See paragraphs 017 to 19 above.

[33] High Court judgment, page 29, line 4, Record Index A page 381.

an extraordinary sitting within 7 days of a declaration of national defence if Parliament is not then sitting.[34]

(iii) Respondents' contentions regarding Motions of No Confidence

26. The second respondent argues that the High Court was wrong in deciding that motions of no confidence are matters of urgency.[35] The second respondent states that whether or not a motion is urgent is for Parliament to determine.[36] This submission is entirely at odds with the principles underlying motions of no confidence.

27. The majority cannot use its position to subvert the right of the minority to have the debate heard,[37] nor can the majority decide upon when that debate will take place. As the High Court noted:

> "*It cannot be within the gift of the majority party to decide upon the issue of the timing of this kind of motion…*"[38]

28. Similarly, it cannot be within the power of the majority to determine whether a motion is frivolous or whether it is brought for party political purposes and to use this determination to block or delay a debate and vote on a motion of no confidence.

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[34] For an understanding of the notion of a state of national defence see Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic Of South Africa, 1996 1997 (2) SA 97 (CC) at paras [41]-[45].
[35] Paragraph 57 of the second respondent's answering affidavit, Record Index A pages 253 – 254.
[36] Paragraphs 58, 66, 70, 82.7 of the second respondent's answering affidavit, Record Index A pages 254, 257, 258 and 264.
[37] High Court judgment, page 28, lines 12-14, Record Index A page 380.
[38] High Court judgment, page 28, lines 21-23, Record Index A page 380.

29. The second respondent averred that the applicant's motion of no confidence is frivolous and "*constitutes political posturing*" by the opposition.[39] The second respondent says that he is entitled to that opinion and to act in accordance with that view in Parliament.[40]

30. The applicant does not dispute that the second respondent is entitled to this view. The applicant does, however, dispute that the majority's views on the merits of the motion can determine when and if it is debated.

31. The second respondent states that, without the support of the majority, a motion of no confidence in Parliament cannot succeed.[41] The respondent contends, therefore, that it should not be prioritised. The second respondent misconceives the role a motion of no confidence serves. As discussed above, it is precisely through the debate of a motion of no confidence that the minority seeks to garner support from the majority. The majority cannot prejudge the debate by blocking the debate from even occurring.

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[39] Paragraph 52 of the second respondent's answering affidavit, Record Index A pages 251-252.
[40] *Ibid*.
[41] Paragraph 78 of the second respondent's answering affidavit, Record Index A page 261.

32. Both respondents now accept that the applicant has a right in terms of s 102(2) of the Constitution to bring a motion of no confidence.[42] The second respondent, however, states that the right does not exist without any limitation, but is subject to the rules and procedures of Parliament.[43]

33. The second respondent argues that s 57 of the Constitution is the provision expressly regulating how debates and voting must be scheduled and that the NA Rules comply with the requirements of this section.[44] The second respondent maintains that the existing conventions and rules providing for the scheduling of debates and voting are accordingly consistent with the constitutional rights and obligations of the National Assembly.[45] The second respondent contends that the applicant must therefore exercise her right to have a motion of confidence tabled and debated within that framework.

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[42] Paragraph 5.9 of the first respondent's answering affidavit, Record Index A page 411, and paragraphs 39 and 53 of the second respondent's answering affidavit, Record Index A pages 243-244 and page 252

[43] Paragraph 39 of the second respondent's answering affidavit Record Index A pages 243-244. Similarly, the first respondent, while acknowledging the urgency of the motion, states that this "*does not mean that the procedures and Rules of the National Assembly should simply be discarded in the face of a motion of no confidence*" (at paragraph 5.9 of the first respondent's answering affidavit Record Index A page 411).

[44] S 57 provides (insofar as is relevant) as follows:

"*(1) The national Assembly may –*

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

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

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

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

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

(c) ...

(d) ..."

[45] Paragraphs 41.17 and 41.19 of the second respondent's answering affidavit, Record Index A page 248.

34. The second respondent argues, furthermore, that s 57(1) provides that the National Assembly is "*exclusively responsible*" for determining and controlling its internal arrangements.[46] Relying on the doctrine of "exclusive cognisance", the second respondent maintains that Parliament must be free to regulate its internal proceedings and internal affairs without interference from any outside body, including the judiciary.[47]

35. The second respondent states that the courts "*must always defer to Parliament on matters involving the internal organization of parliamentary business*."[48] He suggests that interference of this nature would "*undermine the independence of a sovereign Parliament*."[49]

36. Under the framework introduced by the Constitution, however, Parliament is no longer sovereign. South Africa is founded on the supremacy of the Constitution.[50] The Constitution is the supreme law of the country and law or conduct inconsistent with it is invalid.[51] All public power is subject to the limits of the Constitution:

[46] Paragraph 32 of the second respondent's answering affidavit, Record Index A page 240.
[47] Paragraph 33 of the second respondent's answering affidavit, Record Index A page 240.
[48] Paragraph 117 of the second respondent's answering affidavit, Record Index A page 275.
[49] Paragraph 33 of the second respondent's answering affidavit, Record Index A page 240.
[50] S 1(c) of the Constitution.
[51] S 2 of the Constitution.

"*the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.*"[52]

37. This Court has explicitly held that Parliament's rule-making powers are not immune from judicial scrutiny. In Ambrosini, this Court stated that the validity of the NA Rules depends on whether they recognise and facilitate the exercise of constitutionally recognised powers.[53]

38. This Court held that it would be "*inappropriate to interpret s 57 in a way that allows the Assembly to make rules that undermine or vitiate*" constitutionally recognised powers of members of the Assembly.[54] S 57 must be interpreted as "*empowering the Assembly to make rules that do not constitute an inadvertent deployment of invincible giants in a member's path to exercising*" constitutionally guaranteed powers.[55]

39. The second respondent's contentions regarding the autonomy of Parliament to regulate its affairs rest on his appeal to the doctrine of separation of powers. This doctrine cannot, however, shield the

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[52] Pharmaceutical Manufacturer Association of SA: In re: ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 20.

[53] Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) para [66]

[54] Oriani-Ambrosini *supra*, para [65].

[55] Oriani-Ambrosini *supra*, para [64].

executive or Parliament from judicial scrutiny for constitutional compliance. As this Court stated in Doctors for Life: [56]

"*[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.*"

40. And in Minister of Health v TAC: [57]

"*The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*"

41. The same principles apply to the extent that the Constitution mandates an intrusion into the realm of Parliament. As the High Court correctly observed:

"*What courts can do, however, is to say to Parliament: you must operate within a constitutionally acceptable 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,*

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[56] Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC); 2006 (6) SA416 (CC) para [200].

[57] Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) para [99].

how you allow that right to be vindicated is for you to do, not for the courts to so determine."[58]

42. To the extent that the NA Rules do not provide for the proper vindication of the applicant's right to have a motion of no confidence tabled and debated as a matter of priority, the courts are mandated to intervene and make an appropriate declaratory order. Similarly, if parliamentary officials fail to exercise the powers vested in them to vindicate that right, the courts must intervene.

43. The applicant does not require this Court to dictate to Parliament how the right is to be vindicated. The applicant does not require the courts to "*micro manage the running of parliament and the scheduling of debates and motions*".[59] She requires this Court to determine whether Parliament or the first respondent have fallen short of the requirements of the Constitution by failing to vindicate her right and, if so, to intervene.

44. The applicant contends that the deadlock in the Programme Committee amounted to (in the words of the Ambrosini judgment) the "*inadvertent deployment of [an] invincible giant*" in the path of the applicant's exercise of her rights. The High Court agreed that the

[58] High Court judgment, pages 32, line 23 to page 33, line 4, Record Index A pages 384 - 385
[59] See paragraph 65 of the second respondent's answering affidavit Record Index A page 257.

deadlock - and consequent inability to debate and vote on the motion - were incompatible with the Constitution.[60]

45. The High Court, however, held that the first respondent did not have the power under the NA Rules to break the deadlock. The applicant appeals against this finding.

46. To the extent that this Court endorsesthe views of the High Court that the first respondent does not have the power to break the deadlock, the applicant submits that the NA Rules themselves are inconsistent with the Constitution and invalid as they do not vindicate and protect the applicant's right to have a motion of no confidence debated and voted upon as a matter of urgency or, indeed, even within a reasonable time.

D. The Rules of the National Assembly

47. The applicant's motion of no confidence was properly introduced by her on 8 November 2012 in terms of NA Rules 94 and 98(1)(a).[61]

48. The motion duly appeared on the Order Paper on 13 November 2012 terms of NA Rule 137(1):

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[60] High Court judgment, page 28, lines 11-12, Record Index A page 380.

[61] Rule 94 states:

"***94. Nature of motions***
A member may propose a subject for discussion, or a draft resolution for approval as a resolution of this House."

Rule 98(1)(a) provides as follows:

"***98. 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.."

"*A committee must report to the Assembly on a matter referred to the committee —*

(a) when the Assembly is to decide the matter in terms of these Rules, the Joint Rules, a resolution of the Assembly or legislation;

(b) if the committee has taken a decision on the matter, whether or not the Assembly is to decide the matter as contemplated in paragraph (a); or

(c) if the committee is unable to decide a matter referred to it for a report."

49. The committee of the National Assembly of special relevance *in casu* is the Programme Committee (the "Programme Committee").

50. The composition of the Programme Committee is set out in NA Rule 188(1). It is common cause that representatives of the minority parties comprise the majority of the Programme Committee.

51. In terms of NA Rule 189:

"*(1) The Speaker is the chairperson of the Programme Committee.*

(2) If the Speaker is not available the Deputy Speaker presides at a meeting of the Committee."

52. In terms of NA Rule 190, the Programme Committee:

"...

(c) must implement the Rules regarding the scheduling or programming of the business of the Assembly, and the functioning of Assembly committees and subcommittees;

...

(e) *may take decisions and issue directives and guidelines to prioritise or postpone any business of the Assembly, but when the Committee prioritises or postpones any government business in the Assembly it must act with the concurrence of the Leader of Government Business*."

53. Part 2 of Chapter 12 deals with rules applicable to committees generally. NA Rule 124 (the first rule in Part 2 of Chapter 12) provides as follows:

"*The provisions of this Part apply to all committees established by or in terms of these Rules except in so far as any of these provisions is inconsistent with —*

(a) another provision of these Rules applicable in a specific case; or

(b) a resolution of the Assembly."

54. In terms of NA Rule 129(2) (which is also included in Part 2):

"*The chairperson of a committee, subject to the other provisions of these Rules and the directions of the committee —*

(a) presides at meetings of the committee;

...

(d) in the event of an equality of votes on any question before the committee, must exercise a casting vote in addition to the chairperson's vote as a member."

55. In terms of NA Rule 138:

"*For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these Rules and resolutions of the Assembly —*

...

(e) determine its own procedure...."

56. The motion of no confidence was first discussed at the Chief Whips' Forum (the "CWF"), established in terms of NA Rule 217, at its meeting of 14 November 2012.[62] In terms of NA Rule 221:

"*The Chief Whips' Forum acts as forum for –*

(a) the discussion and co-ordination of matter for which the whips are responsible; and

(b) which the Speaker may consult when appropriate."

57. The CWF was unable to reach consensus regarding the scheduling of the motion of no confidence and it was referred to the Programme Committee for consideration at its meeting of 15 November 2012.[63]

58. The Programme Committee also could not reach consensus on whether or not the motion should be scheduled for debate at the National Assembly in the forthcoming week.[64]

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[62] Paragraph 38 of the founding affidavit, Record Index A page 18, paragraph 29 of first respondent's answering affidavit, Record Index A page 419; paragraph 80 of the second respondent's answering affidavit, Record Index A page 262.

[63] Paragraph 39 of the founding affidavit, Record Index A page 19, paragraph 29 of first respondent's answering affidavit, Record Index A page 419; paragraph 80 of the second respondent's answering affidavit, Record Index A page 262.

[64] Paragraph 41 of the founding affidavit, Record Index A page 19; paragraph 31 of first respondent's answering affidavit, Record Index A page 420; paragraph 80 of the second respondent's answering affidavit, Record Index A page 262.

59. When consensus cannot be reached, the practice is to refer the matter to the CWF under NA Rule 221, the objective being for the Chief Whips to reach political agreement.[65]

60. In this instance, the first respondent indicated that he would not refer the matter to the CWF, because it was clear that the Chief Whips would not reach agreement, having already considered the matter.[66]

61. The first respondent therefore concluded that the motion could not be scheduled for debate.[67] The first respondent reported the outcome of the Programme Committee to the National Assembly on 20 November 2012.[68]

E. Applicant's Submissions Concerning the Interpretation of NA Rule 2(1)

62. The motion was not scheduled for debate as a result of a deadlock in the Programme Committee. It could not reach consensus.

[65] Paragraph 42 of the founding affidavit, Record Index A page 19; paragraph 32 of first respondent's answering affidavit, Record Index A page 420; paragraph 80 of the second respondent's answering affidavit, Record Index A page 262.

[66] Paragraph 43 of the founding affidavit, Record Index A page 20; paragraph 33 of first respondent's answering affidavit, Record Index A page 420; paragraph 80 of the second respondent's answering affidavit, Record Index A page 262.

[67] Paragraph 44 of the founding affidavit, Record Index A page 20; paragraphs 34 and 35 of first respondent's answering affidavit, Record Index A pages 420-421; paragraph 80 of the second respondent's answering affidavit, Record Index A page 262.

[68] Paragraph 44 of the founding affidavit, Record Index A page 20. The date of 21November 2012 in the founding affidavit is incorrect. The first respondent sets out the correct date in paragraph 34 and 35 of his answering affidavit, Record Index A pages 420-421.

63. The High Court held that the Speaker had no residual power to break the deadlock in the Programme Committee. It held that NA Rule 2(1) had no application and that the Speaker does not have any residual power to schedule a debate.[69] The applicants appeal against these findings.

64. NA Rule 2(1) - which deals with "Unforseen Eventualities" - provides that the Speaker may "*give a ruling or frame a Rule in respect of any eventuality for which these Rules do not provide*."

65. The High Court held that:

> "*Given the specific rules dealing with programming, it cannot be said that Rule 2 applies in this case, in that there is a provision dealing with the setting and scheduling concerning the Programme Committee. Rule 2 deals with rulings which must cover matters never contemplated in the Rules*."[70]

66. As discussed in greater detail below, however, the NA Rules do not provide for a mechanism to break the deadlock at the Programme Committee when the deadlock must be broken in order to protect or vindicate a constitutional right. The applicant submits that this is a matter not contemplated by the NA Rules and that Rule 2(1) is therefore applicable.

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[69] High Court judgment, page 41, lines 17-22, , Record Index A page 393; pages 36-37, Record Index A page 388-389 and pages 46-47, Record Index A page 398-399.

[70] High Court judgment, page 36, line 23 to page 37, line 3, Record Index A pages 388-389.

67. The NA Rules also do not provide for the manner in which the Programme Committee must reach its decisions. In this respect, it is unlike a number of other committees, where the rules governing those committees make specific provision for the manner in which decisions are to be reached.

68. NA Rule 208D (Committee on the Auditor-General), NA Rule 202 (portfolio committees) and NA Rule 164 (Rules Committee), for example, each provide that a question before the committee is decided when "*there is agreement among the majority of members present*". NA Rule 148 provides that a question before a subcommittee is decided by consensus.

69. The NA Rules do not specify that questions before the Programme Committee are to be decided by majority vote or by consensus. It is a matter of practice that the Programme Committee reaches its decisions by way of consensus.[71] The practice of reaching decisions by consensus would be consistent with its powers "*to determine its own procedure*" under NA Rule 138.[72]

70. The respondents contend that the NA Rules provide two possible avenues of escape from the deadlock in the Programme Committee:

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[71] Paragraph 32 of the first respondent's answering affidavit, Record Index A page 420.
[72] See paragraph 55 above.

70.1. First, they propose that the Programme Committee could have voted.[73]

70.2. Secondly, they state that the deadlock should have been referred to the National Assembly (as it was).[74]

71. Each of these will be addressed in turn. It is submitted that neither avenue is available under the NA Rules. The applicant's submission is that deadlock at the Programme Committee, at least in the event of a failure to vindicate and protect constitutional rights, is consequently an "*eventuality for which [the] Rules do not provide*." Rule 2(1) therefore finds application.

(i) Voting at the Programme Committee

72. The first respondent maintains that the NA Rules provide for committees to vote unless specific provision is made to the contrary.[75]

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[73] Paragraph 32.1 of the first respondent's answering affidavit, Record Index A page 420.

[74] Paragraphs 11.7 and 22.3 of the first respondent's answering affidavit in the High Court, Record Index A pages 73 and 80. The second respondent similarly states that if there is a deadlock in the Programming Committee, the matter may be referred to the National Assembly (paragraph 41.15 of the second respondent's answering affidavit, Record Index A pages 248).
The second respondent also, belatedly, raises the provisions of NA Rules 103 and 104 in his answering affidavit in this Court (Record Index A page 264). The second respondent suggests that these rules, which deal with matters of public importance, would have enabled the Speaker to use his discretionary powers to allow the motion to be debated. S 102(2) of the Constitution, however, contemplates a motion. Chapter 7 of the NA Rules deals with motions. NA Rules 103 and 104, however, are in Chapter 8 of the NA Rules, which does not concern motions. Chapter 8 (including NA Rules 103 and 104) provides only for discussion of matters of importance. It does provide not for a debate or for the resolution or determination of matters tabled for discussion. NA Rules 103 and 104 can therefore not assist this Court in determining whether the NA Rules are valid.

[75] Paragraph 32.1 of the first respondent's answering affidavit, Record Index A page 420.

The first respondent states that he would have considered entertaining a vote in the Programme Committee had this been called for.[76]

73. There is no Rule to this effect. The only support the first respondent can provide for this proposition is NA Rule 129(d).[77] This Rule gives the chairperson of a committee a casting vote "*in the event of an equality of votes on any question before the committee.*" Without deciding the point, the High Court shared the first respondent's view that this provision might support the notion that the Programme Committee may decide by way of majority vote.[78]

74. This interpretation is, however, not supported by the text of the NA Rules or by a reading of the Rules that is consistent with the Constitution:

74.1. First, as set out above, the NA Rules provide for certain committees to decide questions by majority vote. The Programme Committee is not one of them. The implication is that it does not decide by majority vote.

74.2. Secondly, NA Rule 129(d) applies only "*in the event of an equality of votes on any question before the committee.*" It can

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[76] Paragraph 5.8 of the first respondent's answering affidavit, Record Index A page 411.
[77] Paragraph 5.7 of the first respondent's answering affidavit, , Record Index A page 410-411. The text of Rule 129(d) is set out in paragraph 54 above.
[78] High Court judgment, page 39, lines 2-3, Record Index A page 391, read with page 41, lines 13-14, Record Index A page 393.

only apply where, based on another Rule or provision, a committee must decide by majority and is deadlocked because there is an equality of votes.

74.3. Thirdly, where the NA Rules provide that decisions must be taken by consensus or a committee has determined that its own procedure is to decide by consensus – which the Programme Committee appears to have done – NA Rule 129(d) can have no application. Its application would undermine the very principle of consensus.

74.4. Fourthly, in the present circumstances, interpreting NA Rule 129(d) such that a deadlock in the Programme Committee can be resolved by a majority vote would be inconsistent with s 102(2) of the Constitution. It would allow the majority in the Programme Committee to block the scheduling of a no confidence motion. The High Court correctly identified this concern.[79]

74.5. It does not matter that the minority parties collectively constitute a majority of the Programme Committee.[80] The right to move a motion of no confidence cannot rest with

[79] High Court judgment, page 41, lines 15-17, Record Index A page 393.
[80] See paragraph 50 above, paragraph 5.6 of the first respondent's answering affidavit, Record Index A page 410, and Rule 188(1).

minority parties collectively. Individual minority parties should properly be entitled to exercise the right without having to rely on the support of other minority parties in order to obtain the necessary majority in the Programme Committee.[81]

75. The applicant accordingly submits that the NA Rules do not provide for the Programming Committee to decide by majority vote in the event of a deadlock. Furthermore, even if they did so, the NA Rules would not be consistent with the s 102(2) right as they would entitle a majority in the Programme Committee to block the scheduling of a debate.

(ii) Referal to the National Assembly

76. The first respondent maintains that the correct approach, following a deadlock in the Programme Committee, was for him to refer the matter to the National Assembly.[82] He states that it was the only step he was entitled to take in terms of the NA Rules.[83]

77. The first respondent cannot, however, point to a Rule that empowers or requires him to do so. He locates this power in the idea that because the Programme Committee is a "*mere substructure of the*

[81] Indeed, a majority voting mechanism in the Programme Committee could have the result that the minority could block the majority's own call for a motion of no confidence.
[82] Paragraphs 11.7 and 22.3 of the first respondent's answering affidavit in the High Court, Record Index A pages 73 and 80. See footnote 74 above.
[83] Paragraph 15 of the first respondent's answering affidavit, Record Index A page 414.

National Assembly, the National Assembly can still decide to debate the motion of no-confidence and vote upon it".[84] Even if this principle holds water and provides a deadlock-breaking mechanism, it is not one provided by the NA Rules.

78. This point was taken no further in the heads of argument filed on the first respondent's behalf in the High Court. The section dealing with the legal framework of the dispute concludes with the following:

> "*In* casu, *no* lacuna *arises from the Rules as the Rules clearly make provision for the Speaker to report the deadlock of the Programme Committee to the National Assembly, which is what he is done*."[85]

79. The preceding three pages of analysis in the first respondent's heads of argument make no mention of any Rule which provides for this. At best, they refer to s 57(1) of the Constitution, which provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures.[86] Even if this were the source of the Speaker's power to refer the motion to the National Assembly, this is not a power derived from the Rules.

80. More importantly, any interpretation of the Rules that would allow the Speaker to refer a motion of no confidence to the National Assembly

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[84] Paragraph 22.3 of the first respondent's answering affidavit in the High Court, Record Index A page 80.
[85] Paragraph 12 of the first respondent's heads of argument in the High Court, Record Index A page 201.
[86] Paragraph 4 of the first respondent's heads of argument in the High Court, Record Index A page 199.

for it to determine whether or not it should be scheduled for a debate and vote would not be consistent with s 102(2) of the Constitution. It would allow, for example, the majority in the house to vote against scheduling the motion of no confidence for debate.

81. The applicant submits that the NA Rules do not provide for the referral of the matter to the National Assembly in the event of a deadlock at the Programme Committee. Even if they did so, the NA Rules would in any event not be consistent with the s 102(2) right as they would entitle a majority in the National Assembly to block the scheduling of a debate.

(iii) The applicability of NA Rule 2(1)

82. Deadlock in the Programme Committee is an eventuality for which the NA Rules do not provide.

83. The matter cannot, in terms of the NA Rules, be decided by majority vote in terms of NA Rule 129(d), nor can it be referred to the National Assembly. Neither of those routes is an avenue provided by the NA Rules. NA Rule 2(1) deals with eventualities not provided for by the Rules.

84. Even if it were correct that a matter on which the Programme Committee cannot decide by way of consensus may be referred to a majority vote in the committee or to the National Assembly, this gives rise to a slightly different eventuality not contemplated by the Rules, at least in respect of matters involving constitutional rights.

85. The eventuality would be the failure of the Programming Committee to reach consensus on the scheduling of a vote of no confidence in circumstances where the deadlock-breaking mechanisms that would otherwise be available (majority vote in the Committee or the National Assembly) are not constitutionally permissible.

86. Framed in this manner, this too constitutes an unforeseen eventuality in the implementation of the NA Rules.

87. As noted above, the High Court stated that NA Rule 2(1) does not apply because "*there is a provision dealing with the setting and scheduling of debates in the National Assembly, namely the Rules concerning the Programming Committee.*[87]

88. The applicant accepts that the setting and scheduling of debates in the National Assembly is an eventuality provided for by the NA Rules. That formulation of the eventuality is, however, too broad. On this

[87] Judgment of the High Court, page 36, line 23 to page 37, line 2, Record Index A pages 388 to 389.

formulation, there could never by any matter concerning the setting and scheduling of debates that is not contemplated by the NA Rules. The eventuality must be framed more narrowly.

89. The High Court itself does in other parts of its judgment. In so doing, however, it undermines the basis for its decision that NA Rule 2(1) does not apply.

90. At pages 30-31,[88] for example, the High Court stated:

> "*It is clear that the Rules, as I have outlined them, do not provide the necessary deadlock breaking mechanism to ensure what should occur when an impasse occurs in this regard*."

91. And at page 41:[89]

> "*[T]he Rules as I read them, provide no deadlock breaking mechanism, save for the possible interpretation that a majority vote may determine the issue in the Programme Committee*."

92. The unforeseen eventuality for which the NA Rules do not provide is deadlock at the Programme Committee, at least in respect of the vindication of constitutional rights.

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88 Record Index A pages 382-382.
89 Line 12, Record Index A page 393.

93. In these circumstances, the only manner in which the deadlock at the Programme Committee could have been broken was by recourse to the Speaker. As the High Court noted:

> "*Absent an express provision, the only possibility is to have recourse to the first respondent.*"[90]

94. The High Court, however, concluded that it could not find any authority which suggests that the first respondent can come to the aid of the applicant.[91] For the reasons set out above, however, it is submitted that this conclusion is not correct. NA Rule 2(1) is applicable.

95. Furthermore, in order to give effect to s 102(2) of the Constitution, the Speaker was obliged to use his powers under Rule 2(1) to schedule the debate and vote on the motion of no confidence before the National Assembly as a matter of urgency.

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[90] High Court judgment, page 41, lines 16-27, Record Index A page 393.
[91] High Court judgment, page 41, lines 20-21, Record Index A page 393.

F. Conclusions and remedy

96. The appropriate remedy in this application is dependent upon whether or not the NA Rules are held to be valid in that they adequately provide for the vindication of the applicant's s 102(2) right.[92]

97. For the reasons set out above, the applicant submits that NA Rule 2(1) provides an appropriate - albeit less than ideal - mechanism for the vindication of this right.

(i) NA Rules are valid

98. If the NA Rules are valid, two separate orders are appropriate:

    98.1. First, granting the applicant's direct appeal against the High Court's decision that it did not have the power to direct the first respondent to schedule a debate on the applicant's motion of no confidence.

    98.2. Secondly, a declaration that the first respondent, *qua* Parliament, failed to fulfil its constitutional obligation to schedule the debate.

99. Each of these will be addressed in turn.

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[92] As appears below, whatever order this Court grants, what cannot be in doubt is that the applicant must be awarded its costs in both the High Court and in this Court.

(a) *Direct appeal – Interests of Justice and Constitutional Issues*

100. The applicant submits that the High Court erred in finding that NA Rule 2(1) does not empower the first respondent to schedule a motion of no confidence. The applicant applies for leave to appeal directly to this Court against this finding.

101. This Court, in Ambrosini,[93] granted the applicant leave to appeal directly to this Court. The grounds upon which it did so are shared by those in this case. As noted in Ambrosini:

> "*The National Assembly, its individual members and the public have a keen interest in the guidance to be provided by this court on the constitutional validity of elements of the existing regulatory framework of the Assembly. Reasonable prospects of success also exist. The interests of justice therefore dictate that leave be granted to appeal to this court.*"[94]

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[93] Oriani-Ambrosini *supra.*

[94] Oriani-Ambrosini *supra*, para [21].

In addition, the applicant submits that:

(a) This application raises constitutional issues of importance on which a decision of this Court is desirable (De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para [3]).

(b) A decision on this matter by this Court would serve a public purpose and be to the benefit of the public (Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another 2005 (4) SA 319 (CC); 2005 (3) BCLR 321 (CC) at para [19]).

(c) Time and costs will be saved by a direct appeal to this Court, rather than an appeal to the Supreme Court of Appeal, particularly in light of the crisp constitutional issues in this application and the likelihood that the matter will ultimately be decided by this Court (Dudley v City of Cape Town & Another 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC) at para [19]).

(d) Given that this application does not concern the interpretation or development of the common law, but concerns principally constitutional matters, it is desirable that this matter be brought directly to this Court (Amod v Multilateral Motor Vehicle Accidents Fund 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para [9]).

(e) There is a measure of urgency in having a final determination on the issues by this Court, given the inherently urgent nature of a motion of no confidence. This was particularly true at the time that the application was instituted in this Court (Dudley, *supra* at para [7]; Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para [32]).

102. In addition, this application concerns constitutional issues not dissimilar to those considered in Ambrosini, namely:

> "*the interpretation of the National Assembly's power to make rules in terms of which it business is governed, and the values that underpin our democracy*."[95]

103. More specifically, the application for leave to appeal relates primarily to a constitutional matter, namely whether the first respondent has a constitutional obligation under s 102(2) of the Constitution to schedule a debate and a vote on a motion of no confidence as a matter of urgency.

104. In addition to its submission that the High Court's interpretation of NA Rule 2(1) was incorrect, the applicant contends that the High Court erred to the extent that it stated or implied, in reliance on paragraph 84 of the Ambrosini judgment,[96] that directing that the motion of no confidence be debated, or stipulating a date for its debate, would be an unlawful interference in the manner in which Parliament regulates its affairs.

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[95] Oriani-Ambrosini *supra*, para [20].

[96] Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).

105. As discussed above, the courts are bound to intervene where the framework within which Parliament operates, or the conduct of its officials, violates the Constitution.

106. The prayer that the motion of no confidence be heard before a specific date was necessitated by the failure of the Speaker to exercise the powers he possesses to prevent the violation of a constitutional right.

107. The applicant submits that the margin of appreciation contemplated in the order sought in the High Court was consistent with the interference permitted by the Constitution. The applicant requested the first respondent only to take the steps necessary to vindicate her constitutional right, and no more. The Speaker misinterpreted the powers granted to him by the NA Rules. The Speaker was requested to do no more that what the Constitution requires. A Court, it is submitted, may certainly grant such an order.

(b) Declaration under s 167(4)(e) of the Constitution: Parliament's failure to comply with a Constitutional Obligation

108. If this Court holds that the obligation to schedule a motion of no confidence for debate rests upon Parliament, then this Court has

exclusive jurisdiction to determine that matter under s 167(4)(e) of the Constitution.[97]

109. Parliament failed to fulfil in its obligation to schedule the applicant's motion of no confidence for debate as a matter of urgency. The applicant is entitled, at the very least, to a declaratory order to this effect.

(ii) NA Rules are invalid

110. If the NA Rules are invalid (because NA Rule 2(1) is not applicable), again two orders are appropriate:

110.1. First, a declaration in terms of section 167(4)(e) that Parliament failed to fulfil its constitutional obligation to provide the rules necessary to vindicate members of Parliaments' rights under s 102(2) of the Constitution.[98]

110.2. Secondly, granting the applicant direct access to this Court in terms of Rule 18 read with s 167(6)(a) of the Constitution for a declaration that the NA Rules are inconsistent with the

[97] For the factors to be considered in determining whether this Court has exclusive jurisdiction, see Women's Legal Centre Trust v President of the Republic of South Africa 2009 (6) SA 94 (CC) para [16]. This Court considered "*the nature of the obligation, whether its content can be clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring*."

[98] This is an objective enquiry that requires the Court to consider the position of members' of Parliament generally, not only the applicant. See Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at paras [25] to [26].

Constitution and invalid to the extent that they do not properly vindicate the applicant's rights and those of other members of the National Assembly to have a motion of no confidence accorded appropriate priority over other parliamentary business.

111. Each of these alternatives will be considered in turn.

(a) Parliament's failure to provide for appropriate rules: declaration in terms of section 167(4)(e)

112. The High Court held that, in the absence of a power of the Speaker to schedule a motion of no confidence, there is a *lacuna* in the NA Rules.[99] They do not provide for an adequate mechanism for a minority party to vindicate its right to table and have debated a motion of no confidence.[100] The High Court suggested that Parliament may well have failed in its constitutional obligation by omitting to provide for an appropriate rule.[101]

113. If, however, this Court is inclined to accept that: (a) the Speaker has no power to schedule a debate; and (b) that this matter does require a determination whether Parliament has failed to fulfil a constitutional

[99] High Court judgment, page 46, line 5, Record Index A page 398.
[100] High Court judgment, page 44, lines 11-13, Record Index A page 396.
[101] High Court judgment, page 44, lines 13-16, Record Index A page 396. For the reasons set out herein, the applicant submits that there is no *lacuna* as the Speaker has the power under NA Rule 2(1) to schedule a debate.

obligation to provide for appropriate rules, then this Court clearly has exclusive jurisdiction to determine that matter under s 167(4)(e) of the Constitution.

114. The applicant accordingly submits that Parliament failed to fulfil its constitutional obligation to schedule her motion of no confidence for debate and vote within a reasonable time, as is contemplated in s 237 of the Constitution. In addition, it failed to provide for the rules necessary to vindicate the applicant's rights under s 102(2) of the Constitution.

115. To the extent that this Court holds that the obligations of the National Assembly under s 57 are properly also obligations of Parliament, the applicant submits that Parliament has failed to have "*due regard to representative and participatory democracy [and] accountability*" in making its rules, as contemplated in s 57(1)(b).[102] In addition, it has failed to make rules that provide for the participation of minority parties in the proceedings of the National Assembly in a manner consistent with democracy, as contemplated in s 57(2)(c).

116. The ability of minority parties to be able to have a motion of no confidence tabled and debated without delay, free from the ability of

[102] The text of s 57 is reflected in footnote 44 above.

the majority to thwart the debate, is fundamental to the representative and participatory model democracy envisaged by the Constitution.

117. If the NA Rules result in a consensus requirement in the Programme Committee and provide no mechanism for breaking a deadlock that arises through a lack of consensus, the ability to have a motion of no confidence debated is subject to the approval of the majority. This is inconsistent with the requirements of s 57 of the Constitution. Parliament has failed in its obligation to make rules that are consistent with s 57.

118. The applicant accordingly is entitled (in the alternative) to an order declaring that Parliament has failed to fulfil its obligation and for a declaration in terms of s 172(1)(a) read with s 167(4)(e) of the Constitution.

(b) Direct access: Invalidity of the NA Rules

119. To the extent that this Court finds that it does not have exclusive jurisdiction under s 167(4)(e) of the Constitution and/or refuses the application for direct appeal to this Court and/or dismisses the appeal, the applicant applies for direct access to this Court in terms of Rule 18 read with s 167(6)(a) of the Constitution.

120. The applicant seeks a declaration that the NA Rules are inconsistent with the Constitution and invalid to the extent that they do not properly vindicate her and other members' rights to have a motion of no confidence accorded appropriate priority over other parliamentary business.

121. In the High Court, the applicant sought an order directing the first respondent to schedule the motion of no confidence for debate. The appeal concerns, primarily, whether or not the Speaker had the power to schedule a debate and consequently whether a court can direct him to do so. The application for direct access concerns the validity of the NA Rules themselves.

122. The circumstances of this case are, consequently, different from those in the Maccsand decision.[103] In that case, the third respondent sought direct access as an alternative to an application for leave to cross-appeal. The issues in the application for direct access were, however, the same as those considered by the Supreme Court of Appeal and subject to the appeal. As this Court noted:

> "*Since direct access implies that the issues sought to be raised have not been adjudicated by another court, it is impermissible to seek direct access in respect of matters which were decided by another court. Therefore, an issue which is the subject matter of an*

[103] Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC).

application for leave to appeal cannot, at the same time, be the subject matter of an application for direct access."[104]

123. As set out above, in this case, the applicant does not seek direct access in relation to matters decided by the High Court or that are the subject of leave to appeal in these proceedings.

124. The applicant submits that it is in the interests of justice that direct access be granted and that exceptional circumstances exist. The basis for theses submissions is set out extensively in the founding affidavit in this application.[105]

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[104] Maccsand *supra* at para [54].

[105] Paragraphs 93 to 103 of the founding affidavit, record page 39. Taking into account the factors set out in Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC) at para [6], the applicant submits that:

(a) Firstly, while not decided upon, a number of the issues in to be considered in relation to the direct appeal have been traversed in the Western Cape High Court. This Court has the benefit of that court's consideration of the issues. This application is, in many respects, substantially similar to an appeal.

(b) Secondly, in light of the views expressed by the High Court and the matters with which this application is concerned, it is unlikely that I would obtain relief in another court. Another court may similarly hold that this Court has jurisdiction.

(c) Thirdly, there are no disputes of fact. Not only are there no disputes of fact, but the facts are such that they are almost irrelevant.

(d) Fourthly, the dispute at the heart of this application is crisply constitutional in nature. At its most basic level, this case concerns the interpretation and application of one subsection of the Constitution.

(e) Fifthly, it is submitted that the applicant has strong prospects of success, for all the reasons set out above.

(f) Sixthly, as set out at some length above, the importance of the questions raised in this application are indisputable. They go to the heart of the role, powers and institutional integrity of the National Assembly and the separation of powers doctrine in South Africa. The legal and practical consequences of any judgment – or lack thereof – will have profound implications for the role and significance of the National Assembly as an institution.

(g) Seventhly, this application is, for all the reasons set out above, an urgent one.

(h) An order requiring Parliament, through the respondent, to comply with its constitutional obligations necessarily implies that it has failed to do so.

(i) This constitutes judicial intrusion into the domain of the principal legislative organ of the State. Such an order will inevitably have important political consequences. Only this Court has this power.

125. In addition, as was the case in the Independent Newspapers decision, this Court is already seized with the record of proceedings in issue.[106] That applicant's submissions relate to substantive issues that are already before this Court. The applicant has also approached this Court partly on the basis of the High Court's suggestions that this Court would be the appropriate forum.[107] The applicant submits, furthermore, that this application concerns important and vital constitutional questions which in all probability would have eventually ended up in this Court.[108]

126. The applicant contends that the NA Rules are inconsistent with the constitution and invalid on substantially the same basis as her submissions relating to the failure of Parliament to comply with its constitutional obligations.

127. To the extent that the NA Rules require consensus in the Programme Committee (as they do) and provide no mechanism for breaking a deadlock that arises through a lack of consensus, the ability to have a motion of no confidence debated is subject to the approval of the majority. This is inconsistent with the requirements of s 57 of the

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[106] Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC), para 20.

[107] In Independent Newspapers, the parties were, however, spurred on by the directions of this Court (Independent Newspapers, *supra* para 20).

[108] Independent Newspapers, *supra* para 20.

Constitution and constitutes an impermissible impediment to the exercise of the applicant's rights under s 102(2) of the Constitution.

128. If the NA Rules are inconsistent with the Constitution, this Court is obliged, in terms of s 172(1)(a) of the Constitution, to declare the Rules invalid to the extent of their inconsistency and may make any order that is just and equitable.[109]

129. Whether this Court finds the Rules of the National Assembly constitutionally compliant or not, the Leader of the Opposition has succeeded. She has ensured that "the foundations for a democratic society in which government is based on the will of the people" as set out in the Preamble to the Constitution is achieved.[110]

To protect and vindicate her right to bring a motion of no confidence in the President, she was required to approach the Courts.

She did so successfully and is entitled to her costs, including those occasioned by the employment of two counsel.[111]

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[109] Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936; 2000 (8) BCLR 837, para 59.

[110] See Ambrosini *supra*, footnote 66.

[111] See Malachi v Cape Dance Academy International (Pty) Ltd and Others 2010 (6) SA 1 (CC) ; 2010 (11) BCLR 1116 (CC); Malachi v Cape Dance Academy International (Pty) Ltd and Others 2011 (3) BCLR 276 (CC).

ANTON KATZ SC

GRANT QUIXLEY

Counsel for the Applicant