

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

**CASE NO /2012
WESTERN CAPE HIGH COURT CASE NO. 21990/2012**

In the matter between:

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

and

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

**DR MATHOLDE SEROFO MOTSHEKA, MP, THE Second Respondent
CHIEF WHIP, NATIONAL ASSEMBLY**

FOUNDING AFFIDAVIT

I, the undersigned

LINDIWE DESIRÉ MAZIBUKO

do hereby state under oath that:

1. I am an adult female member of parliament and the Leader of the Opposition in the National Assembly designated as such in terms of section 57(2)(d) of the Constitution of South Africa, 1996 (the "Constitution").

2. The facts herein are, unless the contrary appears from the context, within my own knowledge and are true and correct. Where I make legal submissions, unless otherwise indicated, I do so on the basis of advice given to me by my legal advisors and I believe such advice to be correct. Where I rely on information not within my knowledge I do so on the basis of information supplied to me or upon objectively determinable facts.

THE PARTIES

3. I am the applicant herein in my capacity as the Leader of the Opposition in terms of Section 57(2) of the Constitution.
4. I bring this application on my own behalf as Leader of the Opposition and on behalf of the following political parties represented in the National Assembly:
 - 4.1. Democratic Alliance;
 - 4.2. Congress of the People;
 - 4.3. Inkatha Freedom Party;
 - 4.4. African Christian Democratic Party;
 - 4.5. Azanian People's Organisation;
 - 4.6. Freedom Front Plus;
 - 4.7. United Democratic Christian Party; and
 - 4.8. United Democratic Movement.

5. The first respondent is **MAXWELL VUYISILE SISULU, MP SPEAKER OF THE NATIONAL ASSEMBLY**, cited both in his official capacity as presiding officer in the National Assembly and in his capacity as representative of the National Assembly, a body elected to represent the people and ensure accountable government in terms of s. 43 of the Constitution.
6. The second respondent is **DR MATHOLE SEROFO MOTSHEKA, MP**, the Chief Whip of the National Assembly, cited in his official capacity.

NATURE OF THIS APPLICATION AND RELIEF SOUGHT

7. I instituted an application on an urgent basis in the Western Cape High Court on Friday 16 November 2012.
8. I sought an order directing the first respondent to take whatever steps are necessary to ensure that my motion of no confidence in the President, dated 8 November 2012, in terms of section 102(2) of the Constitution (the “Motion of No Confidence”), be scheduled for debate and vote in the National Assembly on or before Thursday, 22 November 2012.
9. The application was necessitated by:

- 9.1. The failure of the Programme Committee of the National Assembly and of the first respondent to schedule the Motion of No Confidence in the National Assembly.
- 9.2. The position of the second respondent that I had no right to have the motion of no confidence debated because, inter alia, it was frivolous.
10. The application was heard before Davis J on Tuesday, 20 November 2012. During oral argument, the first respondent, but not the second, conceded for the first time that I had a right to have the motion debated and voted upon.
11. Davis J delivered judgment on the afternoon of Thursday, 22 November 2012. He dismissed the application, with no order as to costs. A written copy of the judgment had not yet been made available at the time I deposed to this affidavit.
12. In summary, Davis J held that:
 - 12.1. It followed from section 102(2) of the Constitution, that I and every other member of the National Assembly, regardless of whether he or she belongs to the majority party or a minority party, have the right to move a motion of no confidence, which must be debated in the national interest.

- 12.2. A motion of no confidence is a matter of inherent urgency and must take precedence over other business in the National Assembly.
- 12.3. The first respondent was not vested with power under the Rules of the National Assembly (the “NA Rules”), to schedule a debate of a motion of no confidence, and the Court hence lacked the power to direct him so to do.
- 12.4. To that extent, there existed a lacuna in the NA Rules.
- 12.5. The constitutional obligation to debate and vote upon the motion of no confidence rested ultimately with the National Assembly, but this Court was vested with exclusive jurisdiction under section 167(4)(e), with respect to any determination that Parliament had failed to fulfil and constitutional obligation.
13. The relief I seek in this application is necessitated by the importance and urgency of the matters at hand, the special nature of the proceedings, and the nature of Davis J’s judgment and order.
14. In the first instance, assuming the correctness of Davis J’s finding that Parliament has failed to fulfil a constitutional obligation, I apply under Rule 11 of this Court, for a declaration to that effect, in terms of section 172(1)(a) read with 167(4)(e) of the Constitution.

15. In addition, I apply for leave to appeal directly to this Court under Rule 19(2) against Davis J's order of 22 November 2012 dismissing my application; I appeal specifically against his finding that the first respondent lacks the power to schedule a motion of no confidence in the President for debate in the National Assembly.
16. In the alternative to my application for leave to appeal, I apply in terms of Rule 18 for 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 properly vindicate my rights and those of other members of the National Assembly to have a Motion of no Confidence accorded appropriate priority over other parliamentary business, and, accordingly, scheduled for debate and vote as a matter of urgency, and in any event not later than 7 December 2012.
17. In addition to the orders set out in the alternative above, I seek an order directing the first respondent, in his official capacity as presiding officer in the National Assembly, and in his capacity as representative of the National Assembly, to schedule the Motion of No Confidence for debate and vote in the National Assembly as a matter of urgency, precedence and priority, and in any event not later than 7 December 2012.
18. Finally, I apply in terms of section 172(1)(b) of the Constitution, for an order declaring that the Motion of No Confidence did not lapse on 22 November 2012, *per* NA Rule 316(1).

19. For this Court's convenience, and taking into account the extreme urgency of this matter, I annex to this affidavit:

19.1. A copy of the entire record of the proceedings that served before in the Western Cape High Court, marked "**CC - LDM1**";

19.2. copies of two sets of heads of argument filed on my behalf, marked "**CC - LDM2**" and "**CC - LDM3**"; and

19.3. A copy of the heads of argument filed on behalf of the first respondent, marked "**CC - LDM4**".

20. In the remainder of this affidavit, I set out:

20.1. the content and significance of the right under section 102(2) of the Constitution;

20.2. the factual background to the extent relevant;

20.3. the pertinent features of Davis J's judgment;

20.4. the grounds for urgency; and

20.5. my contentions in support of the relief I seek. In this regard, I set out separately the grounds for:

20.5.1. a declaration 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;

20.5.2. leave to appeal directly to this Court;

20.5.3. direct access to this Court; and

20.5.4. the order directing the first respondent to schedule the Motion of No Confidence for debate and vote in the National Assembly as a matter of urgency, precedence and priority, and if at all possible, on or before 7 December 2012.

SECTION 102(2) OF THE CONSITUTION

21. The right upon which I rely in this application derives from section 102(2) of the Constitution, which reads as follows:

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

22. In order to properly vindicate section 102(2) of the Constitution, a motion of no confidence in the President must, as accepted by Davis J, be scheduled for debate and vote when called for as a matter of urgency and priority.

23. A debate on a confidence motion must generally take precedence over other business in Parliament. This is in accordance with practice internationally. As stated by Blackburn and Kennan, with reference to practice in the United Kingdom:

“By convention... if the official opposition tables a motion of censure on the government, the government provides time for it to be debated”.¹

24. In similar vein, Erskine May writes:

“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 (...). This convention is founded on the recognized 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.”²

25. The rules of Australia's House of Representatives similarly provide that if a member gives notice of a motion of no-confidence or censure against the Government that motion takes *precedence* over all other business until disposed of.³

26. The importance and urgency of a motion of no confidence is akin to that envisaged under section 86(3) of the Constitution, which requires Parliament to fill a vacancy in the office of the President no later than

¹ Blackburn and Kennan (2003), citing Griffith & Ryle on Parliament, p 484.

² Parliamentary Practice (2011), p 329.

³ www.aph.gov.au/About_Parliament/House_of_Representatives

30 days after the vacancy occurs, and that under section 203 of the Constitution, which requires the President to summon Parliament to an extraordinary sitting within 7 *days* of a declaration of national defence, if Parliament is not sitting when a state of national defence is called.

27. The matters implicated by a motion of no confidence are of equally fundamental significance to the integrity of the institutions of State and public confidence in them.

28. The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisaged by the Constitution. It implicates the values of democracy, transparency, accountability and openness. Indeed, a motion of no confidence is perhaps the most important mechanism for the legislature 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.”⁴

29. Relying heavily upon the recent judgment of this Court in **Ambrosini v The Speaker**,⁵ Davis J recognised - correctly I submit - that the right to have a motion of no confidence debated in the National Assembly is enjoyed both by the majority party and minority parties. The majority party may not frustrate the ability of a minority party to propose a motion of no confidence and to have it debated before the National

⁴ Daily Proceedings of the Canadian House of Congress, National Democratic Institute for Internal Affairs.

⁵ Mario Gaspare Oriani-Ambrosini v. Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27.

Assembly. Any effort to do so would not be compatible with section 102(2). As stated by the Chief Justice in **Ambrosini**:

“Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.⁶”

30. As representatives of the people, Parliament must allow the views of the people they represent to be freely and openly debated. A motion of no confidence may not eventually succeed, but it must be debated and voted upon.
31. When the majority of opposition parties, representatives of about a third of the electorate, ask the National Assembly to pass a motion of no confidence in the President, as they have done, the National Assembly must be given the opportunity to debate and vote upon the matter as a matter of urgency, precedence and priority.
32. It is important to note that, as correctly emphasised by Davis J, that this application does *not* concern:
 - 32.1. The merits of the motion or whether the President has violated the Constitution or the law, or has committed serious

⁶ Mario Gaspare Oriani-Ambrosini v. Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27 at para 43, citing South African Transport and Allied Workers Union and Another v Garvas and Others [2012] ZACC 13 at para 61.

misconduct or has an inability to perform the functions of office.

32.2. The prospects of success of the motion of no confidence in the President.

32.3. Whether the motion of no confidence is frivolous or vexatious.

33. With this legal framework as a context, I turn now the factual background to this application.

FACTUAL BACKGROUND

34. I address most of the key factual matters in paragraphs 22 to 35 of my founding affidavit in the High Court.⁷ I summarise them here for the sake of convenience.

The motion of no confidence

35. On 8 November 2012, mandated by the parties listed above, I gave notice in the National Assembly in terms of NA Rule 98(1)(a) of my intention to move a motion of no confidence in the President in terms of section 102(2) of the Constitution.

⁷ Pages 11-15 of the record.

36. Parliament did not sit on Friday, 9 November 2012 or Monday, 12 November 2012.

37. The Motion of No Confidence was accordingly placed on the National Assembly's Order Paper of the next sitting day, which was Tuesday, 13 November 2012. The terms of the Motion of No Confidence in the President, as set forth in the Order Paper, are as follows:

"Draft resolution (Ms L D Mazibuko): That the House -

- (1) notes that under the leadership of President Jacob G Zuma –
 - (a) the justice system has been politicised and weakened;*
 - (b) corruption has spiralled 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."*

38. The Motion was first discussed at the Chief Whips' Forum (the "CWF"), established in terms of NA Rule 217, at its meeting of 14 November 2012. (The CWF is responsible for political consultation among parties in the National Assembly and considers, amongst other matters, the scheduling of motions for debate in the National

Assembly.) The CWF was unable to reach agreement regarding the scheduling of the motion of no confidence.

39. The matter was referred to the National Assembly's Programme Committee (the "Programme Committee"), for consideration at its meeting on 15 November 2010. (The Programme Committee, under NA Rule 190, determines the matters to be placed on the agenda for consideration by the National Assembly.)
40. The first respondent is the chairperson of the Programme Committee in terms of NA Rule 189(1). The remaining members of the Programme Committee are set out in NA Rule 188.
41. The Programme Committee sat on Thursday, 15 November 2012 to determine the programme of the National Assembly for the forthcoming week. But it could not reach consensus on whether or not the motion should be scheduled for debate at all in the National Assembly in the forthcoming week, as requested by the Chief Whip of the Democratic Alliance, Mr Watty Watson. Indeed, the second respondent suggested it should not be tabled because, inter alia, it was frivolous.
42. Where consensus cannot be reached, the practice is for the respondent to refer the matter to the CWF under NA Rule 221, the objective being for the Chief Whips to reach political agreement.

43. 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.
44. The first respondent therefore concluded that the motion could not be scheduled for debate. The first respondent reported the outcome of the Programme Committee's debates to the National Assembly, but in fact did so only on 21 November 2012, the day the application was heard by Davis J.⁸
45. Later on Thursday, 15 November 2012, my legal representatives sent an email to Parliament's Chief Legal Advisor.⁹ In summary, I required the first respondent to decide, under NA Rule 2(1), whether or not to give a ruling on the question as to whether the motion should be tabled. In terms of NA Rule 2(1), the Speaker may "*give a ruling or frame a rule in respect of any eventuality for which these Rules do not provide*" (emphasis added).
46. Alternatively, I asked the first respondent to confirm that he would take whatever steps were appropriate and necessary to ensure that the Motion be scheduled for debate in the National Assembly on or before 22 November 2012.

⁸ Paragraph 22.4 of the answering affidavit, page 35 of the record.

⁹ The letter is attached as Annexure "LDM1" to the Founding Affidavit, page 19 of the record.

47. I requested this confirmation by 10h00 the following morning, Friday 16 November 2012. The State Attorney responded on behalf of the first respondent on Friday 16 November 2012, saying that the first respondent was not available. He was attending a funeral in Lesotho, and would respond on Monday 19 November 2012.¹⁰
48. Given the urgency of the matter, I instituted the application in the Western Cape High Court on the afternoon of Friday 16 November 2012.
49. The first respondent filed his answering affidavit on Monday, 19 November 2012.¹¹ The second respondent filed his answering affidavit on the morning of Tuesday, 20 November 2012. I filed my replying affidavit on the morning of Tuesday 20 November 2012.
50. The application was heard before Davis J at 14h00 on Tuesday 20 November 2012.

The hearing before Davis J

51. The principal contentions advanced on my behalf before Davis J were:
- 51.1. That section 102(2) of the Constitution guarantees me and other members of the National Assembly the right to have a

¹⁰ A copy of this letter is attached as "LDM2" to the founding affidavit, record page 21.

¹¹ Page 25 of the record.

motion of no confidence debated and voted upon by the National Assembly.¹²

51.2. A motion of no confidence was urgent and must take precedence over all other business before the National Assembly.¹³

51.3. The majority party cannot frustrate the urgent debate of a motion of no confidence.

51.4. The first respondent's failure to ensure that the motion be debated in the National Assembly falls foul of the Constitution. It acts as an effective and insurmountable impediment to the entitlement in terms of section 102(2) of members to propose a motion of no confidence in the President, and to have such a motion debated and voted upon in the National Assembly. It was, I contended, conduct inconsistent with the Constitution, and therefore invalid under section 2 thereof.¹⁴

51.5. The first respondent has a constitutional obligation to schedule a motion of no confidence as a matter of urgency and had to take whatever steps necessary to comply with this obligation.

¹² Paragraph 51.1 of the Applicant's Heads of Argument.

¹³ Paragraphs 40 and 41 of the Applicant's Heads of Argument.

¹⁴ Paragraph 36 of my founding affidavit, page 36.

51.6. To the extent that the Rules of the National Assembly did not provide a mechanism for the scheduling of a motion of no confidence as a matter of urgency, this constituted an *“eventuality for which these Rules do not provide”* (as contemplated in NA Rule 2(1)). The first respondent has the power under Rule 2(1) to give a ruling or frame a rule that the motion be scheduled for debate in these circumstances. In order to vindicate the right in section 102(2), he had the duty to do so.

52. The respondent’s principal contentions were as follows:

52.1. The first respondent lacked authority to schedule a motion of no confidence for debate.¹⁵

52.2. He could not invoke Rule 2(1) of the NA Rules for this purpose;¹⁶

52.3. The application was premature,¹⁷ and the appropriate course of action was to report the deadlock at the Programme Committee to the National Assembly.¹⁸ Because the Programme Committee is a “substructure of the National Assembly”, the National Assembly could then take the

¹⁵ Paragraph 28.1 of the first respondent’s answering affidavit, page 40 of the record.

¹⁶ Paragraph 24.4 of the first respondent’s answering affidavit, record page 36.

¹⁷ Paragraphs 11.6 (record page 28) and paragraph 28.7 (record page 41) of the first respondent’s answering affidavit.

¹⁸ Paragraphs 11.7 (record page 28) and paragraph 28.3 (record page 40) of the first respondent’s answering affidavit.

decision as to whether or not to debate and vote upon the motion;¹⁹ and

52.4. Only if the National Assembly decided not to debate the motion might the decision fall foul of section 102(2).²⁰

53. At best for first respondent, it might be said that he was equivocal as to whether or not I had a right under section 102(2) of the Constitution to have the Motion of no Confidence tabled and debated in the National Assembly as a matter of urgency.²¹

54. The second respondent was less equivocal. After explaining at length the other important business of Parliament, including “study tours for the advancement of proper governance in this country,”²² he concluded:

“there is no urgency in this application, it is brought for an ulterior purpose and with the object of undermining the business of the National Assembly.”²³

55. The majority party’s attempts to frustrate the motion are illustrated by the minutes of the Programme Committee.²⁴ Mr Jeffrey, of the

¹⁹ Paragraph 22.3 of the first respondent’s answering affidavit, record page 35. See also paragraph 28.3 of the first respondent’s answering affidavit, record page 40.

²⁰ Paragraph 28.1 of the first respondent’s answering affidavit, record page 40.

²¹ Paragraphs 31 and 32.2 of the first respondent’s answering affidavit, record page 43.

²² Paragraph 10 of the second respondent’s answering affidavit, record page 95.

²³ Paragraph 13 of the second respondent’s answering affidavit, record page 95.

²⁴ Annexure “LDM4” to my replying affidavit, record page 83.

majority party, stated that “parties did not have a constitutional right to a motion and that this was subject to a decision of the majority.”²⁵

56. At the hearing, the first respondent’s Counsel admitted at the hearing that I and other members of the National Assembly, including members of minority parties, had a right to have a motion of no confidence debated. In addition, he submitted that a debate and vote must take place as a matter of urgency.

57. That said, the first respondent contended that:

57.1. He lacked authority to schedule a debate.

57.2. The court did not have the power to order so to do, and

57.3. I should have awaited for the outcome of the first respondent’s report to Parliament.

58. At the hearing it was understood that the first respondent would be reporting the matter to Parliament the following day. Hence, Davis J reserved judgment on the premise that he would deliver his judgment after being appraised of the outcome of the first respondent’s report to Parliament.

²⁵ Page 88 of the record.

59. On 21 November 2012, the day after of the hearing, the second respondent issued a memorandum – clearly tailored to the legal argument then proceeding – addressed to the Chief Whips and party representatives in the National Assembly.²⁶ He said:

59.1. There was no question whether or not the motion should be scheduled.

59.2. The parliamentary schedule from 26 November 2012 to 7 December 2012 (the last day of Parliament) was busy and summoning Members of Parliament for a special sitting would “place a significant administrative, logistical and financial burden on the institution.”

59.3. The motion was serious and a debate could not be arranged hastily.

59.4. The majority would “impress upon Parliament that this motion be scheduled for debate by the National Assembly on the week of 26 February 2012.”

60. However, the matter did not come before the National Assembly for consideration.

²⁶ Included as an attachment to Annexure “CC- LDM3”.

61. Davis J accordingly handed down his judgment at 13h00 on Thursday, 22 November 2012.

DAVIS J'S JUDGMENT

62. Davis J framed the issues as follows:

62.1. First, as to whether the National Assembly has the obligation to debate a motion of no confidence, with reference to the principles of deliberative and multiparty democracy, openness and accountability, and with particular emphasis on the judgement of this Court in **Ambrosini**,²⁷ he stated that section 102(2) manifestly provides a right to bring a motion of no confidence in the National Assembly.

62.2. Second, such a motion is inherently urgent and must come before the National Assembly without delay.

62.3. Third, as to whether or not the Rules of the National Assembly vindicate the right:

62.3.1. In terms of Rule 129(2), it appeared that, in relation to National Assembly committee meetings, including the Programme Committee, matters should be decided by majority vote; it was therefore not clear why the first

²⁷ Supra.

respondant insisted that a consensus was required in the Programme Committee.

62.3.2. That being said, to the extent that the deadlock could be resolved by reference to a majority vote, this would be contrary to section 102(2), as this would permit the majority to block an attempt by the minority to schedule a motion of no confidence for debate, and

62.3.3. This there was a lacuna in the Rules, which frustrated the vindication of the right in section 102(2).

62.4. Fourth, as to whether the first respondent lacked the power to schedule a debate on a Motion of No Confidence:

62.4.1. The lacuna in the NA Rules could *not* be resolved, as urged by my legal representatives, by the application of NA Rule 2(1), which, as stated above, provides that the Speaker may “*give a ruling or frame a Rule in respect of any eventuality for which these Rules do not provide.*”

62.4.2. The Speaker lacked a residual power to schedule the debate.

62.4.3. The High Court itself lacked the power to direct the first respondent when to schedule a debate or, indeed, to schedule a debate at all.

62.4.4. With reference to paragraph 84 of the **Ambrosini** judgment,²⁸ he held that the court could not tell Parliament itself how to regulate its affairs.

63. Finally, Davis J concluded that, while Parliament may well have failed in its constitutional obligation to provide a rule for the scheduling of a motion of no confidence, it is this Court, and this Court alone, which has jurisdiction to determine if the NA Rules are consistent with the Constitution.

URGENCY

64. I launched the proceedings in the Western Cape High Court and in this Court as a matter of urgency. I did so in view of the importance of the matters my motion of no confidence concerns, and in light of the nature of a motion of no confidence as a general proposition. I submit that Davis J correctly emphasised the importance and urgency of a motion of no confidence, the first respondent having conceded as much during (but not before), the oral argument.

²⁸ *Supra.*

65. I gave notice of the Motion of No Confidence on 8 November 2012. On 15 November 2012 deadlock ensued at the Programme Committee. The last plenary sitting of the National Assembly for this year's session was on Thursday 22 November 2012, two weeks after I had given notice of the Motion of No Confidence; my Counsel argued before Davis J that, if the right was to be meaningfully vindicated, the matter should serve before the National Assembly on or before that day, after which it would lapse.
66. It is unacceptable and contrary to the requirements of the Constitution that my Motion of No Confidence did not come before the National Assembly within two weeks of its having been proposed, particularly given that Parliament was in session during that period. Moreover, it was deliberately frustrated by the majority party, which took the view that it could block its debate because the motion was frivolous and ill-founded. This argument forms the basis for my appeal from the decision of the High Court.
67. These proceedings are animated by similar considerations of urgency, insofar as they relate to the inherent urgency of a motion of this nature and the fact that it should take precedence over all other business of the house.
68. There are now new timelines at play:

- 68.1. The National Assembly stands adjourned from 22 November 2012 until 14 February 2012.
- 68.2. Significantly, committees of the National Assembly will, however, continue to meet from 26 November 2012 to 7 December 2012. The National Assembly's annual leave period begins on 17 December 2012 and ends on 11 January 2013.
69. I submit therefore that, if a motion of no confidence is inherently urgent and must take precedence above all other business before the National Assembly – as I and Davis J say it is – then the Motion of No Confidence must come before the National Assembly without delay and, in any event no later than 7 December 2012.
70. I must point out that, in his answering papers, the first respondent accepts that there is no reason why the plenary should not sit after 22 November 2012. Parliament can indeed be recalled in a moment of necessity. Rule 30(2) enables the Speaker to reconvene the National Assembly for the resumption of business. Given the inherent urgency of the motion and the added inconvenience of recalling members to Cape Town after 7 December 2012, I submit that the matter should be debated in the National Assembly on or before that date.
71. If this Court is not inclined to require that the matter be debated before then, I submit that the Speaker should be directed to schedule the

matter for debate by reconvening the National Assembly in terms of Rule 30(2) after 7 December 2012, and at least before the public holiday season commencing on Friday 14 December 2012.

72. The second respondent's proffered reason that the debate and vote cannot be scheduled before 7 December 2012 are a transparent attempt to delay this matter. He lists what he says are important items that the National Assembly has to deal with from 26 November to 7 December 2012, including: 'committee meetings', 'oversight visits' and 'going abroad on study tours'.
73. The parliamentary paper entitled 'Meetings of Committees' lists the National Assembly's committees' forthcoming activities and is updated on a daily basis. The most recent paper, dated 22 November 2012, a copy of which is attached marked "**CC – LDM5**", lists ten Portfolio Committee meetings from 26 November to 5 December 2012. These meetings are scheduled to take place in the National Assembly in Cape Town. According to this same paper, the Portfolio Committee on Public Enterprises is conducting an oversight visit to South African Airways and South African Express Airways in Johannesburg, and Denel in Bredasdorp. The Portfolio Committee on Agriculture, Forestry and Fisheries is conducting follow-up oversight on farms on the Eastern Cape.
74. It seems plain that the respondents' protestations that Parliament has a full schedule over the next two weeks are exaggerated.

Furthermore, it is of no relevance that Parliament's business has "already been determined and finalised."²⁹ As set out at length above, a motion of no confidence takes precedence over all other business in the National Assembly.

75. It is axiomatic that administrative inconvenience can never be a reason to postpone or frustrate the realisation or protection of a right, let alone an important one like that in issue in this case.

76. Should the respondents seek to argue that the relief I originally sought, namely the scheduling of a debate of the motion on or before 22 November 2012 is moot, I submit that this approach would be misguided. The circumstances that prevail in this matter are akin to those that were before this Court in **Pheko and Others v Ekurhuleni Metropolitan Municipality**.³⁰ In paragraph 32 of that judgment, Nkabinde J stated:

"It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot."

77. The issue of the Motion of No Confidence remains live. I, and the parties who have mandated me, maintain that it should be tabled and

²⁹ Paragraph 10 of the second respondent's answering affidavit, record page 95.

³⁰ **Pheko and Others v Ekurhuleni Metropolitan Municipality** 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC).

that there is a constitutional imperative that it be debated and voted upon. Neither Davis J's judgment, nor the passing of 22 November 2012 alter this.

DECLARATION IN TERMS OF SECTION 167(4)(e) OF THE CONSTITUTION

78. Davis J held that the frustration of my rights under section 102(2) of the Constitution can possibly be attributed to Parliament's failure to fulfil a constitutional obligation to promulgate Rules to address the lacuna relating to the scheduling of a motion of no confidence. I submit that Davis J was wrong in so finding, and in fact that it was the National Assembly that failed in its obligation, in terms of Rule 57(1)(b) of the Constitution to make rules to properly vindicate the s 102(2) rights.
79. However, to the extent that this is not so, and this Court enjoys exclusive jurisdiction under section 167(4)(e) of the Constitution, the appropriate remedy in this regard would be a declaration that Parliament has failed to fulfil its constitutional obligations under section 102(2) of the Constitution by failing to schedule the Motion of No Confidence for a debate and vote in the National Assembly within a reasonable time as contemplated by section 237 of the Constitution, and/or in failing to provide for the Rules necessary to vindicate the s 102(2) rights.

THE APPEAL

80. As noted above, to the extent that Davis may be wrong in respect of the exclusive jurisdiction of this Court for leave to appeal directly to this Court, then I apply under Rule 19(2) for leave of appeal against the order a direct appeal to this Court against Davis J's order.
81. In particular, I seek to appeal against his finding that the first respondent, in his official capacity, does not have the authority to schedule a debate on the Motion of No Confidence in the National Assembly.
82. In this regard, I submit that Davis J erred in holding that Rule 2(1) does not confer this power upon the first respondent and that the first respondent does not have a residual power to schedule a debate.
83. In relation to the former contention, on any interpretation of the Rules, the right in section 102(2) is frustrated:
- 83.1. If the motion requires consensus in the Programme Committee, and any one member of the committee can block the scheduling of the debate. This is inconsistent with the Constitution.

- 83.2. If the Programme Committee is to decide by majority vote, and the majority can block a debate. This is likewise unconstitutional.
- 83.3. If the matter is referred to the National Assembly to determine whether or not to schedule the debate, this is similarly unconstitutional. The majority cannot determine the National Assembly's agenda and delay or frustrate the debate of a motion of no confidence.
84. A constitutional impasse of this nature is an eventuality not foreseen by the Rules. In order to interpret the Rules in a manner consistent with the Constitution, the first respondent must be conferred with the power under Rule 2(1) of the Constitution to schedule the debate and vote.
85. I submit, furthermore, that Davis J erred to the extent that he stated or implied, in reliance on paragraph 84 of the **Ambrosini** judgment, 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.
86. I submit that, in the present case, to the extent that the majority is frustrating the hearing of the debate and the Rules do not allow a minority party to compel the debate within a particular period, it is just

and equitable that this Court stipulates a period within which that debate must take place.

87. This Court, in the **Ambrosini** decision,³¹ granted the applicant in that case leave to appeal directly to this Court. The grounds upon which it did so are shared by those in this case. As Mogoeng CJ noted (at paragraph 21):

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

88. In relation to the matters required under Rule 19(3):

88.1. The constitutional issue in this appeal is whether the first respondent has a constitutional obligation under section 102(2) of the Constitution to schedule a debate and vote on a motion of no confidence in the President as a matter of urgency, precedence and priority and whether a court can direct that he does so.

88.2. I have not applied and do not intend to apply for leave or special leave to any other court.

³¹ Supra.

89. I submit that, given the urgency of the matter and the gravity of the constitutional issues to which it relates, a direct appeal to this Court is necessary and appropriate, and ought to be granted in the interests of justice.

DIRECT ACCESS

90. To the extent that this Court finds that it does not have exclusive jurisdiction to hear this matter under section 167(4)(e) of the Constitution, and/or refuses the application for a direct appeal to this Court under Rule 19(2), I request leave to bring an application directly to this Court in terms of Rule 18 read with section 167(6)(d) of the Constitution.
91. Unlike the relief sought in the Western Cape High Court, I seek as an alternative a declaration that the Rules of the National Assembly are inconsistent with the Constitution and invalid to the extent that they do not properly protect my rights and those of the other members of the National Assembly under section 102(2) of the Constitution to have a motion of no confidence under that section scheduled for a debate and vote as a matter of urgency, precedence and priority.
92. I contend that exceptional circumstances exist in the present case.
93. In *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) at paragraph 6, this Court stated:

“In determining whether exceptional circumstances have been demonstrated, the Court will consider a range of factors. Relevant considerations include whether any dispute of fact may arise in the case, whether the issues have been properly traversed by other Courts, the attitude of the other parties to the litigation, the possibility of the applicant obtaining relief in another Court, the importance of the legal issues raised and the desirability of an immediate decision thereupon. Perhaps the most important factor is the recognised undesirability of this Court being the Court of both first and final instance in a matter.”

94. Firstly, the issues in this case 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.
95. Secondly, in light of the views expressed by Davis J and the matters with which this application is concerned, it is unlikely that I would obtain relief in another court.
96. 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.
97. 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.

98. Fifthly, it is submitted that I have strong prospects of success, for all the reasons set out above.
99. 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.
100. 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.
101. Seventhly, this application is, for all the reasons set out above, an urgent one. It has generated huge public debate and the finding of the highest court should be given as soon as possible.
102. An order requiring Parliament, through the respondent, to comply with its constitutional obligations necessarily implies that it has failed to do so.
103. This constitutes judicial intrusion into the domain of the principal legislative organ of the State. Such an order will inevitably have important political consequences.
104. Accordingly, it is submitted that an assessment of all the facts of this case demonstrates that it is exceptional and that it is appropriate that it

be heard as a matter of direct access by this Court. It is, furthermore, in the interests of justice that this Court grants me leave to bring this application directly to this Court.

ORDER DIRECTING THE FIRST RESPONDENT TO SCHEDULE A DEBATE

105. Regardless of which of the approaches set out above this Court believes is accepted by the Court, I seek an order directing the first respondent, in his official capacity as presiding officer in the National Assembly and in his capacity as representative of the National Assembly, to schedule the Motion of No Confidence for debate and vote in the National Assembly as a matter of urgency, precedence and priority, and if at all possible, on or before 7 December 2012.

106. I submit that this is just and equitable relief, and the only means by which my constitutional right to have a motion of no confidence debated in the National Assembly on an urgent basis may be vindicated in the circumstances.

CONCLUSION

107. On the basis of what I have set out above, I submit that I am entitled to the relief as sought and I request this Court to hear this application as a matter of urgency.

LINDIWE DESIRÉ MAZIBUKO

SIGNED AND SWORN TO BEFORE ME AT _____ ON THIS
_____ DAY OF _____ 2012, THE DEPONENT HAVING
ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE
CONTENTS OF THIS AFFIDAVIT, THAT SHE HAS NO OBJECTION TO
TAKING THIS OATH, THAT SHE CONSIDERS THE OATH TO BE BINDING
ON HER CONSCIENCE AND SHE UTTERED THE WORDS "I SWEAR
THAT THE CONTENTS HEREOF ARE TRUE SO HELP ME GOD".

COMMISSIONER OF OATHS