

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

WC High Court Case No: 21990/2012

Case No: CCT 115/2012

In the matter between:

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

Applicant

and

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

1st Respondent

**DR MATHOLE SEROFO MOTSHEKGA, MP,
CHIEF WHIP OF THE AFRICAN NATIONAL CONGRESS**

2nd Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Applicant applies for leave to appeal directly to this Court against the order of the Court *a quo* dismissing the Applicant's application for an order directing the First Respondent to take whatever steps are necessary to ensure that a motion of no-confidence in the President of the Republic of South Africa be scheduled for a debate and vote in the National Assembly on or before Thursday, 22 November 2012;¹ alternatively, granting direct

¹ Notice of motion ("NoM") para 2, record p.2.

access to this Court for a declaration that the Rules of the National Assembly ("*the Rules*") are inconsistent with the Constitution and invalid to the extent that they do not protect the rights of the Applicant, as also other Members of the National Assembly, to have such a motion accorded appropriate priority over other business,² and accordingly –

1.1 directing the First Respondent to take whatever steps are necessary to ensure that the National Assembly schedules the motion of no-confidence for debate and a vote as a matter of urgency, precedence and priority, and, if at all possible, on or before 7 December 2012;³

1.2 to the extent necessary, declaring that the motion of no-confidence has not lapsed pursuant to the provisions of rule 316(1) of the Rules.⁴

2. The Applicant also seeks an order declaring, in terms of section 167(4)(e) of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*"), that "*Parliament has failed to fulfil its constitutional obligations under section 102(2) of the Constitution ... by failing to schedule a motion of no confidence ... in the President ... in terms of section 102(2) of the Constitution, as lodged by the Applicant on 8 November 2012, for debate and vote in the National Assembly, within a reasonable time, as is*

² NoM para 3, record p.2.

³ NoM para 4, record p.2.

⁴ NoM para 5, record p.3.

contemplated by section 237 of the Constitution".⁵ (Our emphasis.)

FACTUAL BACKGROUND

3. The salient facts are as follows:

3.1 On 8 November 2012, the Applicant gave notice in the National Assembly in terms of rule 98(1)(a) of her intention to move a motion of no-confidence in the President in terms of section 102(2) of the Constitution.⁶

3.2 She gave such notice only after the meeting of the Programme Committee of the National Assembly (*"the Programme Committee"*), scheduled for that very same day, had already taken place.⁷

3.3 This meant that the Programme Committee only became seized of the matter at its next scheduled meeting the following Thursday, i.e. 15 November 2012, which also happened to be the last meeting for 2012.⁸ The Applicant does not claim to have requested that the Programme Committee meet specially on an earlier date to consider the matter.

3.4 Parliament did not sit on Friday, 9 November 2012, or on Monday,

⁵ NoM para 1, record p.1.

⁶ Applicant's Founding Affidavit ("FA") para 35, record p.17.

⁷ First Respondent's Answering Affidavit ("AA") para 5.1.1, record pp.407-408.

12 November 2012.⁹ Accordingly, the motion of no-confidence was placed on the Order Paper of Tuesday, 13 November 2012, the first sitting day after the motion was tabled.¹⁰

3.5 The motion was discussed at the Chief Whips' Forum at its meeting of 14 November 2012.¹¹ The next day, 15 November 2012, the Programme Committee sat to determine the programme for the following week.¹² However, for the first time since its inception the Committee deadlocked as to whether the motion of no-confidence should be scheduled for debate in the National Assembly during the forthcoming week,¹³ the last of the 2012 session.

3.6 At the Programme Committee meeting, the First Respondent stated that, if the matter were referred back to the Chief Whips' Forum (as is the practice), it, too, would not reach agreement because it had already failed to do so.¹⁴ (This conclusion is not challenged by the Applicant.) He indicated that he would take legal advice, and that he would also report to the National Assembly that a deadlock has arisen in the Programme Committee.¹⁵

3.7 Although the minority parties have a majority in the Programme

⁸ AA para 5.1.1, record pp.407-408.

⁹ FA para 36, record p.18.

¹⁰ FA para 37, record p.18

¹¹ FA para 38, record p.18.

¹² Applicant's Founding Affidavit in the High Court ("FA in HC") para 26, record p.57;

First Respondent's Answering Affidavit in the High Court ("AA in HC") para 21.2.6, record p.79.

¹³ FA in HC para 27, record p.57.

¹⁴ FA paras 42 and 43, record pp.19-20.

Committee, they did not call for a vote in order to break the deadlock.¹⁶ The First Respondent indicated that he would have entertained a vote if it had been called for.¹⁷ He further indicated that he suspects the reason why the minority parties did not call for a vote was because not all the minority parties' members of the Programme Committee were in attendance and they accordingly did not have a majority at the time as they would have had, had all their members been present.¹⁸

3.8 After the Programme Committee meeting during the late afternoon of Thursday, 15 November 2012, the First Respondent met with the representatives of the minority parties and informed them (again) that he intended to seek legal advice on the issue.¹⁹

3.9 That same evening already the First Respondent sought the advice of senior counsel.²⁰

3.10 Also that same evening, the Applicant sent a letter to the Chief Legal Advisor in Parliament, expressing her concerns regarding what had transpired.²¹

3.11 A letter was sent by the State Attorney, on behalf of the First

¹⁵ AA para 35, record p.420.

¹⁶ AA para 5.6, record p.410.

¹⁷ AA para 5.8, record p.411.

¹⁸ AA para 5.7, record pp.410-411.

¹⁹ Letter annexed to the FA in HC as "LDM2", record p. 66.

²⁰ AA para 36.1, record p.421.

Respondent, to the Applicant's attorney by 10h00 the following morning, 16 November 2012, indicating that the Applicant could expect a substantive response to her letter dated 15 November 2012, by Monday, 19 November 2012.²² He further indicated that the Speaker was attending to the matter urgently, and that he viewed it as a matter of *"considerable importance raising matters of constitutional law"*.²³

3.12 At 11h00 on 16 November 2012 the Applicant's attorney informed the First Respondent's attorney that a High Court application would nevertheless be made at 14h00 on Tuesday, 20 November 2012, and that the notice of motion and founding affidavits would be ready during the early afternoon of 16 November 2012.²⁴

3.13 Significantly the Applicant's attorney conveyed that they were still unsure about the nature of the relief that they would be seeking, notwithstanding the fact that the decision to make application to the High Court had already been taken.²⁵

3.14 Paragraphs 4 to 6 of the aforesaid letter²⁶ are, in our submission, very important for the determination of this matter and we take the liberty of quoting them in full:

²¹ AA para 36.1, record p.421; letter annexed to the FA in HC as "LDM1", record p.64.

²² AA para 51.2, record p.426; letter annexed to the FA in HC as "LDM2", record p.66.

²³ AA para 51.2, record p.426; AA para 37.1, record p.422; letter annexed to the FA in HC as "LDM2", record p.66.

²⁴ Para 2 of the letter annexed to the AA in HC as "LDM3", record p.68.

²⁵ Para 3 of the letter annexed to the AA in HC as "LDM3", record p.68.

- "4. *I confirm that your clients were informed, at a meeting with the Speaker during the course of the afternoon of Thursday, 15 November 2012, that the possibility of him reporting to the National Assembly that the Program Committee could not reach consensus on the matter was under consideration by him.*
5. *This is one of the aspects of the matter about which senior counsel's advice is being sought. Another is the question as to whether or not the Speaker has the authority to place the matter on the Order Paper for debate by the National Assembly on his own. There are also other aspects of the matter in respect of which advice is being sought as a matter of utmost urgency.*
6. *It is our view that lodging an urgent application in circumstances where our client is taking legal advice as to what the appropriate course of action would be, is premature and wasteful, particularly in view of the fact that the deadlock in the Program Committee occurred yesterday, i.e. 15 November 2012."*

3.15 This notwithstanding, the Applicant proceeded to launch an urgent application on Friday, 16 November 2012, without waiting for the substantive response promised.²⁷

3.16 On 21 November 2012, the First Respondent reported the deadlock in the Programme Committee to the National Assembly, as he undertook to do at the Programme Committee meeting.²⁸ However,

²⁶ Record p.69.

²⁷ AA para 15, record p.414; AA para 38, record p.423.

²⁸ FA para 44, record p.20.

in view of the application which was at that stage already pending before the High Court, the National Assembly did not debate the matter.²⁹

LEGAL FRAMEWORK

4. The powers of the National Assembly to control its internal arrangements derives from section 57 of the Constitution, which reads:

- "(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;*
 - (a) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and*
 - (b) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition."*

²⁹ Judgment of the Court *a quo*, record pp.373-374.

5. The sources of parliamentary procedure are, according to Rautenbach & Malherbe³⁰ -
 - 5.1 the Standing Orders, viz the rules that are adopted in terms of its power to determine its own procedures;
 - 5.2 customs that have developed over the years;
 - 5.3 decisions which the Speaker and other presiding officers give in their application of the rules; and
 - 5.4 legislation.
6. Rule 2(1) provides that the Speaker may give a ruling or frame a rule in respect of any eventuality for which the Rules do not provide. We submit that since the Rules provide that the Programme Committee –
 - 6.1 has to implement the Rules regarding the scheduling or programming of the business of the National Assembly;³¹ and
 - 6.2 may take decisions and issue directives and guidelines to prioritise or postpone any business of the National Assembly,³²

³⁰ Constitutional Law, 5th edition (2008) at p.150.

³¹ Rule 190(c).

³² Rule 190(e).

dealing with a motion of no-confidence in the President, is not an eventuality for which the Rules do not provide.

7. However, even if it can be said that the unprecedented deadlock in the Programme Committee exposed a shortcoming in the Rules, the Speaker indeed gave a ruling that he would report the matter to the National Assembly which could have decided, in plenary session, to schedule the matter of no-confidence for debate. If the National Assembly had declined to schedule the matter for debate, the Applicant would have had cause to approach the Courts. In the event, as we have indicated, the National Assembly did not take any decision in respect of the matter because of the pending court application.
8. The list of Committees of the National Assembly is set out in rule 121. It includes the Programme Committee, which is established in terms of rule 187. Rule 188 determines the composition of the Programme Committee, in terms of which the minority parties have the majority on the Programme Committee.
9. Rule 190 provides that the functions and powers of the Programme Committee include that it must prepare and, from time to time, adjust the annual programme of the National Assembly;³³ that it must monitor and oversee the implementation of Parliament's annual programme in the

³³ Rule 190(a).

National Assembly;³⁴ and that it must implement the Rules regarding the scheduling or programming of the business of the National Assembly; and, the functioning of assembly committees and subcommittees.³⁵

10. The Chief Whips' Forum is established in terms of rule 217.
11. Rule 222 provides that Chief Whip *"must arrange the business of the Assembly on the Order Paper, subject to these Rules, the directives of the Programme Committee and the concurrence of the Leader of Government Business when any government business is prioritised."*
12. Ruling 155B in the Digest of Rulings contains the following ruling which has precedential value:

*"As has been stated previously, in this House, Presiding Officers do not make up the Orders of the Day or what comes before us. We merely go by what appears before us – what is decided by the Chief Whips and the Programme Committee."*³⁶

THE FIRST RESPONDENT'S ARGUMENT

13. The First Respondent's argument as it pertains to the different prayers contained in the notice of motion in the Court *a quo* and the notice of application in this Court, respectively, will be dealt with separately.

³⁴ Rule 190(b).

³⁵ Rule 190(c).

³⁶ Debates, 1998: Col 6598.

14. We point out at the outset and by way of a general statement that the application is not a review. It is not brought in terms of the Promotion of Administrative Justice Act, No. 3 of 2000 ("*PAJA*"). Indeed, no decision is being challenged, whether in terms of PAJA, the principle of legality, irrationality or any other recognised ground.
15. Although the application concerns a very important constitutional entitlement, it falls to be decided with reference to first principles. For example, the original application was premature and lacked specificity. Whereas, to begin with, the matter was not ripe, it has since become moot. Also, the Applicant has misinterpreted important statutory provisions such as section 167(4)(e) of the Constitution. We deal with these, and other aspects of the matter, in what follows.

(a) Section 167(4)(e)

16. In prayer 1 of the notice of application in this Court, the Applicant seeks a declarator in terms of section 167(4)(e) of the Constitution.³⁷
17. That section provides that only this Court may "*decide that Parliament or the President has failed to fulfil a constitutional obligation*".
18. It is submitted that this relief is incompetent for the following reasons:

³⁷ NoM para 1, record p.1.

- 18.1 In terms of section 42(1) of the Constitution, Parliament consists of –
- 18.1.1 the National Assembly; and
 - 18.1.2 the National Council of Provinces ("*the NCOP*").
- 18.2 Section 57(1) of the Constitution empowers the National Assembly specifically to –
- 18.2.1 determine and control its own internal arrangements, proceedings and procedures; and
 - 18.2.2 make rules and orders concerning its business.
- 18.3 Similar, but separate, provision in respect of the NCOP is made in section 70 of the Constitution.
- 18.4 Since section 102 of the Constitution provides for motions of no-confidence in the Cabinet and the President in the National Assembly, not Parliament, this Court cannot, as the Applicant requires it to do, declare in terms of section 167(4)(e) of the Constitution that Parliament has failed to fulfil its constitutional obligations under section 102(2).

(b) The power of the Speaker to schedule the motion

19. Prayer 2 of the notice of application seeks leave to appeal against the judgment of the Court *a quo*.³⁸ In order to evaluate the merits of the appeal, we turn to the relief which was sought, and the order which was granted, in the Court *a quo*.

20. The core of the relief sought in the Court *a quo* is set out in prayer 2 of the notice of motion,³⁹ in terms of which a *mandamus* was sought against the First Respondent personally, ordering him to "*take whatever steps necessary to ensure*" that the motion of no-confidence be scheduled for debate and a vote in the National Assembly on or before Thursday, 22 November 2012. It is not averred that the steps which he did take, i.e. including referral to the National Assembly, was unlawful or irrational.

21. Apart from the fact that the date of 22 November 2012 has now passed, which renders the relief moot, it was incompetent from the outset, for the following reasons:
 - 21.1 The Applicant did not even attempt to identify the steps which the First Respondent could lawfully take to "*ensure*" that the motion be scheduled for debate and a vote. Reference was made to rule 2(1),⁴⁰ in terms of which the First Respondent "*may give a ruling or frame a*

³⁸ NoM para 2, record p.2.

³⁹ Record p.46.

⁴⁰ FA in HC para 32, record p.58.

Rule in respect of any eventuality for which these Rules do not provide". However, the Court *a quo* correctly found that rule 2(1) is not applicable in the circumstances. The Court *a quo* held as follows:⁴¹

"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 of debates in the National Assembly, namely the Rules concerning the Programme Committee. Rule 2 deals with rulings which must cover matters never contemplated in the Rules."

21.2 It can certainly not be said that the First Respondent has any residual powers to schedule the motion once the Programme Committee, who is charged with the scheduling of motions by the Rules, has deadlocked.

21.3 However, if this Court were to hold that the Speaker could have had recourse to rule 2(1), it will take cognisance of the fact that the Speaker in fact gave a ruling,⁴² albeit not invoking rule 2(1), that he would report the deadlock to the National Assembly which could, pursuant to the powers which it derives from section 57 of the Constitution, have scheduled the motion of no-confidence for debate itself.

⁴¹ Judgment of the Court *a quo*, record pp.388-389.

⁴² Latib v The Administrator, Transvaal 1969 (3) SA 186 (T) at 190F-191A and the other authorities referred to in Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) at fn 14.

21.4 Also, rule 2(1) is clearly permissive and not peremptory and the Speaker was not obliged to invoke it.⁴³

21.5 The Applicant's own inability to stipulate any empowering provisions in terms of which the First Respondent could lawfully take the unidentified steps she required him to take, bears testimony to the fact that the First Respondent was acting in a responsible manner by taking legal advice and requesting an opportunity to be allowed to do so. In this regard, it must be remembered that the deadlock of the Programme Committee was an unprecedented occurrence.⁴⁴

21.6 The matter was not ripe when the Applicant launched the proceedings, for two main reasons:

21.6.1 She was too quick off the mark in launching her application in the Court *a quo*. Despite the First Respondent's indication that he was treating the matter as urgent and taking legal advice during the late hours of Thursday, 15 November 2012, and the morning of Friday, 16 November 2012, the Applicant launched an application that afternoon without waiting for the First Respondent's response which was promised by Monday,

⁴³ Devenish: Interpretation of Statutes (1992) at pages 229-230; Du Plessis: The Interpretation of Statutes (1986) at page 144; De Ville: Constitutional and Statutory Interpretation (2000) at page 260 and the authorities cited there.

⁴⁴ Para 5.1.2 of the AA, record p.408.

19 November 2012.⁴⁵

21.6.2 Due to the Applicant's premature launching of the application, she incorrectly proceeded against the Speaker on the basis that he personally should have taken unidentified steps to have the matter debated. The Applicant should have waited for the National Assembly to become seized of the matter as it would have once the First Respondent reported the deadlock to it. If the National Assembly had taken a decision adverse to the Applicant, the Applicant would have been able to proceed against it, citing the First Respondent as its nominal representative.

21.7 These considerations are exacerbated by the fact that the Applicant is the author of her own predicament, by waiting too long before tabling the motion. The motion was only tabled during the penultimate week of the National Assembly's annual session.⁴⁶ The first opportunity for the Programme Committee to schedule the motion was at its last sitting of the year. If the Applicant had tabled the motion in time for the Programme Committee to deal with it at its meeting of 8 November 2012, there would have been two weeks within which to deal with the matter.

21.8 Moreover, the members of the parties which the Applicant represents

⁴⁵ Para 38 of the AA, record p.423; letter annexed to FA in HC as LLDM3", record p.68.

could have called for a vote in the Programme Committee meeting. In this regard it is pointed out that rule 129 of the Rules, which is applicable to Committees generally, *inter alia* provides that in the event of an equality of votes on any question before a Committee, the Chairperson has to exercise a casting vote in addition to the deliberative vote. The First Respondent indicates that the reason why the minority parties did not call for a vote was presumably because they were not all in attendance.

21.9 The fact that it is not the Programme Committee's practice to vote does not mean that it could not have decided to vote, even if only in this particular instance, since the practice cannot trump the Programme Committee's power, provided for in rule 138(e), to determine its own procedure.

21.10 The Applicant's party could also have approached the National Assembly itself, to decide on the scheduling and voting of the motion of no-confidence. Instead, the Applicant rushed to Court without the National Assembly even having expressed itself on the matter.

21.11 The Applicant avers in her founding papers that on Friday, 16 November 2012, the State Attorney responded on behalf of the First Respondent, "*saying that the first respondent was not available*" and that he was "*attending a funeral in Lesotho and would respond on*

⁴⁶ Para 5.1.1 of the AA, record pp.407-408.

Monday 19 November 2012".⁴⁷ This is untrue. The 16 November 2012 letter from the State Attorney clearly states that "[n]otwithstanding the fact that the Speaker will be attending the funeral to which we have referred, he is attending to this matter, as also your letter under reply, urgently".⁴⁸ The letter moreover emphasised that the First Respondent viewed the matter as urgent, important and raising complex matters of constitutional law, and that he was obtaining legal advice on an urgent basis.

21.12 It is clear that the First Respondent's conduct was at all times without reproach. The First Respondent never opposed the scheduling of the motion of no-confidence, and considered at all times that the Applicant had a constitutional right to bring her motion in terms of section 102 of the Constitution. He rightly insisted, however, that the scheduling of the motion had to take place in terms of the Rules, a matter about which he had called for legal advice, particularly since, as the Court *a quo* found, he might not have the authority to schedule the matter for debate himself; especially not after the Programme Committee had deadlocked on the issue. Accordingly, he reported the Programme Committee's deadlock to the National Assembly, of which the Programme Committee is a substructure.

21.13 The Applicant should have waited before launching her application until the National Assembly had made a decision. The Applicant's

⁴⁷ Para 47 of the FA, record p.21.

correct challenge would have lied against any adverse decision of the National Assembly or inaction on its part. However, due to the Applicant's premature launching of court proceedings, the National Assembly never took a decision, and there was (and still is) no adverse decision for the Applicant to challenge. Nor is there scope for a *mandamus* for reasons which will become apparent.

22. Hoexter writes:⁴⁹

"The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the court's time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made."

23. According to Baxter, the test is whether *"prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not"*.⁵⁰

24. In Ferreira v Levin NO,⁵¹ Kriegler J held in a dissenting judgment as follows:

"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally, the Canadians call it, 'ripeness'. That term has a particular connotation in the constitutional jurisprudence of those

⁴⁸ Letter annexed to the AA in HC as "LDM2", record p.66.

⁴⁹ Hoexter: *Administrative Law in South Africa*, 2nd Ed (2012) at p.585.

⁵⁰ Baxter: *Administrative Law* (1984) at 720.

⁵¹ 1996 (1) SA 984 (CC) at para 199.

countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air." [Footnotes omitted.]

25. In Dawood v Minister of Home Affairs,⁵² the Court held as follows:

"[T]his objection is misplaced and appears to rest upon a confusion between ripeness in administrative, as opposed to constitutional, matters. As pointed out by applicants' counsel, under administrative law an application to a Court would indeed be premature if the relevant public authority had not yet completed its decision-making processes. In constitutional matters, on the other hand, the doctrine of ripeness 'prevents a party from approaching a court prematurely at a time when s/he has not yet been subjected to prejudice, or the real threat of prejudice, as a result of the legislation or conduct alleged to be unconstitutional'..." (Our emphasis)

26. Hoexter summarised this *dictum* as follows:⁵³

"Van Heerden J emphasised the difference between ripeness at common law and under the Constitution by distinguishing between 'ripeness in administrative, as opposed to constitutional, matters' – the former being a good deal stricter, as it would require a public authority to have completed its decision-making process. The distinction is unfortunate in so far as it suggests that administrative matters are not constitutional matters – most of

⁵² 2000 (1) SA 997 (C) at 1030H-J.

⁵³ Hoexter *ibid* at p.586.

them clearly are – but it is correct in so far as it suggests that legislative and non-legislative conduct lend themselves to different standards of ripeness. This is simply because legislation is capable of being in conflict with the Constitution from the moment it is enacted, and long before any action is taken in terms of it."

27. As mentioned above, no action is sought to be reviewed in this application. This is because the Applicant's premature launching of court proceedings did not allow the National Assembly to take any decision with regard to the scheduling of her motion.

28. In any event, the application which served before the Court *a quo* has now become moot, for the following reasons:

28.1 The Applicant's motion of no-confidence lapsed at the conclusion of the annual session, viz on 22 November 2012, and, despite the fact that the debate on the motion was preliminarily scheduled for debate on 26 February 2013, the Applicant's party declined to revive the motion.⁵⁴

28.2 This rendered the matter moot, as the motion of no-confidence which lies at the heart of this matter is no longer before the National Assembly, not because it declined to schedule, debate and vote on it, but because the DA declined to pursue it as pointed out in the First

⁵⁴ Paras 10-12 of the First Respondent's supplementary affidavit to comply with the Court's directions, record p.510.

Respondent's second report to this Court dated 19 March 2013.⁵⁵

28.3 It also suggests that the matter was never really urgent – certainly that there was no good reason not to have given the First Respondent a reasonable opportunity to obtain legal advice as per his request of 16 November 2012.

28.4 Furthermore, as evidenced by the progress reports filed by the First Respondent, the National Assembly is in the process of amending the Rules to specially provide for the tabling of motions of no-confidence in terms of section 102 of the Constitution.

29. For these reasons, the application for leave to appeal and the appeal should fail.

(c) The Rules

30. Prayer 3 of the notice of application, which is brought in the alternative to the appeal contained in prayer 2, asks for a declarator that the Rules are unconstitutional in that they fail to afford motions of no-confidence brought in terms of section 102 of the Constitution appropriate priority over other business.⁵⁶

⁵⁵ Record p.510, para 11.

⁵⁶ NoM para 3, record p.2.

31. Apart from the fact that a declaratory is a discretionary remedy and the facts to which we have referred militate against one being issued in this matter, this prayer is likewise incompetent. It is notionally possible for a Court of competent jurisdiction to issue a declarator that, for example, the Rules do not give effect to a constitutional obligation, but it is not possible to issue a declarator that unidentified Rules *"are inconsistent with the Constitution and invalid to the extent that they do not protect the rights of the Applicant, and the other members of the National Assembly, to have a Motion of no Confidence in the President ... in terms of section 102(2) of the Constitution accorded appropriate priority over other business"*.
32. In Shaik v Minister of Justice and Constitutional Development and Others,⁵⁷ this Court held as follows per Ackerman J:⁵⁸
- "It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie."*
33. In any event, it is submitted that the Rules are not inconsistent with the Constitution inasmuch as motions brought in terms of section 102 of the Constitution can be scheduled by the Programme Committee; alternatively, the National Assembly itself. However, since it has now transpired that in

⁵⁷ 2004 (3) SA 599 (CC).

the event of a deadlock in the Programme Committee, the majority party in the National Assembly can notionally block motions of no-confidence, the National Assembly Rules Committee ("*the NARC*") is attending to the problem as evidenced by the First Respondent's various reports to the Court.

34. Accordingly, the NARC has been attending to the drafting of a new rule aimed specifically at giving effect to section 102 of the Constitution.⁵⁹ In these circumstances, it is submitted that, in accordance with the dictates of the *trias politica* doctrine, this Court will not usurp the NARC's function by prescribing a rule(s) to Parliament.
35. The National Assembly's rule-making function is not one with which this Court will lightly interfere.
36. Although, as we shall show, the new constitutional dispensation has significantly added to the authority of the Courts to pronounce upon the lawfulness or otherwise of the activities of the legislative and executive branches of government, the authority to do so is not unfettered and they approach the task with appropriate deference, particularly for policy decisions which are assigned to the other branches of government and for

⁵⁸ At para 25.

⁵⁹ First Respondent's affidavit to comply with the Court's directions, record p.445, First Respondent's supplementary affidavit to comply with the Court's directions, record p.507, First Respondent's 3rd supplementary affidavit to comply with the Court's directions, record p.517 ("First Respondent's progress reports").

which they are best equipped. Their approach in this regard is underpinned by the doctrine of separation of powers to which we shall shortly refer.

37. Pre-constitutionally South African constitutional law was characterised by the sovereignty of Parliament. Post-constitutionally it is characterised by the paramountcy of the Constitution.
38. Pre-constitutionally South African constitutional law was understood to be part of its common law.⁶⁰ Traditionally and in Westminster systems, parliamentary sovereignty was described as follows:

*"Thus Parliament may remodel the British Constitution, prolong its own life, legislate **ex post facto**, legalise irregularities, provide for individual cases, interfere with contracts and authorise the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Commonwealth, introduce communism or socialism, or individualism or fascism, entirely without legal restriction."*⁶¹

39. Blackstone⁶² put it as follows:

"It has sovereign and uncontrollable power in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws; concerning matters of all possible denominations ..."

⁶⁰ Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 33, where it was held that the control of public power by the Courts through judicial review is, and always has been, a constitutional matter. Prior to the adoption of the Interim Constitution, such control was exercised by the Courts through the application of common law constitutional principles.

⁶¹ Jennings: The Law and the Constitution (1960) 5th edition at p.147.

40. However, in South Africa it was established early on that –

40.1 Parliament has to comply with its definition; and

40.2 it has to speak in accordance with the prescribed manner and in the prescribed form.⁶³

41. Post-constitutionally *"the judicially enforceable claim to legality inhabits South African law not as a part of the common law carried over from pre-Constitutional days but as a norm sourced directly in the Final Constitution"*.⁶⁴

42. Pre-constitutionally, Parliamentary proceedings, despite supremacy, were not immune to judicial scrutiny. Courts had the power to make rulings pertaining to the manner and form of Parliamentary proceedings. Parliament had to adhere to its own definition.

43. Post-constitutionally, Parliament retains the exclusive jurisdiction over the application of its internal rules, but the constitutional validity of those internal rules may be challenged in Court. An example of this effect of the Constitution on the internal rules is the recent case of Oriani-Ambrosini v Speaker,⁶⁵ where the Rules of the National Assembly pertaining to the

⁶² Commentaries on the Laws of England (1775) 7th edition, Vol 1, p.160.

⁶³ Barrie Die Soewereiniteit van die Parlement Unpublished LLD Thesis (1968) pp.124-126.

⁶⁴ Michelman: The Rule of Law, Legality and the Supremacy of the Constitution in Woolman et al: Constitutional Law of South Africa 2nd edition, Vol 1 at 11-2.

⁶⁵ Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC).

introduction of a private member's bill were challenged as being unconstitutional.

44. The South African Constitution does not expressly refer to the doctrine of separation of powers, but the provisions of the Constitution are structured in a way that makes provision for a separation of powers.
45. The text of the new Constitution was required to comply with Constitutional Principle VI (which called for a separation of powers), and was so certified by the Constitutional Court.
46. The limitations on the doctrine of separation of powers emerge clearly from Ex parte Speaker of the Western Cape Legislature: In re Certification of the Constitution of the Western Cape, 1997,⁶⁶ ("*the provincial Certification Judgment*"), where the Court stated as follows:⁶⁷

"There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute....

.... No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjointed'."

⁶⁶ 1997 (4) SA 795 (CC) at para [32].

⁶⁷ At paras 108-109.

47. There is no rigid or inflexible separation of powers under the Constitution. In the provincial Certification Judgment,⁶⁸ the Court held:

"An essential part of the separation of powers is that there be an independent Judiciary. ... What is crucial to the separation of powers and the independence of the Judiciary is that the Judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive."

48. Four principles emerge from the provincial Certification Judgment:

48.1 There is no universal model of separation of powers.⁶⁹

48.2 In democratic systems of government *"in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute"*.⁷⁰ Moreover, *"no constitutional scheme can reflect a complete separation of powers: The scheme is always one of partial separation"*.⁷¹

48.3 The principle of separation of powers *"recognises the functional independence of branches of government"*.⁷²

⁶⁸ At para 123.

⁶⁹ At para 108.

⁷⁰ At para 108.

⁷¹ At para 109.

⁷² At para 109.

- 48.4 The principle of checks and balances *"focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another"*.⁷³
49. These principles are reflected in the constitutional scheme itself. An analysis of the Constitution reflects clearly that the separation of powers is not – and cannot be – absolute. The doctrine of separation of powers does not require that the three branches of government be kept in watertight compartments.
50. It is trite that judicial control over non-administrative decisions of the executive and legislative branches of government is informed by the principle of legality and the test of rationality. As far as the application of the doctrine of separation of powers is concerned, this Court has recently confirmed:⁷⁴

"I must next address a contention that this Court's upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large. As O'Regan J helpfully explained:

⁷³ At para 109.

⁷⁴ Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248

'A central principle of the United States jurisprudence has been to impose different levels of scrutiny on different categories of legislative classification. The most stringent level of scrutiny is reserved for classifications based on race or nationality, or those that invade fundamental rights. Such classifications are almost inevitably considered to be a breach of the Fourteenth Amendment. An intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The third level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose.'"

51. The Constitution lists "*supremacy of the Constitution and the rule of law*" as a founding value of the state alongside democracy, human dignity and the achievement of equality, non-racialism and non-sexism.⁷⁵
52. The guarantee has gained recognition as a guarantee provided by the supreme law, the Constitution, and in this regard the central and decisive judgment is that in Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others,⁷⁶ as also other important way-stations such as President of the Republic of South Africa and Another v Hugo,⁷⁷ Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,⁷⁸ and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Another.⁷⁹

(CC) at para 41.

⁷⁵ Section 1(c).

⁷⁶ 2000 (2) SA 674 (CC).

⁷⁷ 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

⁷⁸ 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

⁷⁹ 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

53. Essentially, and for present purposes, the point is that the exercise of public power, such as that conferred upon the First Respondent, is only legitimate where lawful and this principle of legality is generally understood to be a fundamental principle of constitutional law. In Fedsure it is explained thus:

"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution ... we ... hold that fundamental to the interim Constitution is a principle of legality."⁸⁰

54. In Speaker of the National Assembly v De Lille and Another,⁸¹ in which the question was whether the National Assembly "had any lawful authority to take any steps to suspend the respondent from Parliament",⁸² Mahomed CJ stated as follows:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. It is Supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body,

⁸⁰ At para 58.

⁸¹ 1999 (4) SA 863 (SCA).

⁸² At para 13.

*which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."*⁸³

55. This is the yardstick of judicial control over public functionaries attached to the executive branches of government as also the legislative branches of government, including the National Assembly.

56. The only remaining live issue before this Court is the question as to whether the Rules of the National Assembly adequately protect the rights of members to bring motions of no-confidence in terms of section 102 of the Constitution. As this issue is currently being addressed by the NARC in terms of the internal procedures of the National Assembly, it is submitted that the Court will not interfere with that process in view of the applicability of the principle of separation of powers and the concomitant requirement of deference for the decisions of the other branches of government in respect of their functional areas of responsibility.

57. Against this backdrop, we point to the following:

57.1 The Court *a quo*, which did not have to contend with an attack on the constitutionality of any rule(s) of the National Assembly, held that it is not for the Courts to decide when motions of no-confidence should be debated, but that "*[r]ules should deal with this problem, probably*

⁸³ At para 14.

*a specific rule to deal with a specific provision in the Constitution.*⁸⁴ It found that *"Parliament may well have failed its constitutional obligation by omitting to provide a Rule which ... specifically deals with this express constitutional provision."*⁸⁵ However, the Court found that this was not the issue before the Court, and that it did not consider *"the relief couched in the notice of motion [to be] justifiable."*⁸⁶ Without being able to make an order to this effect, the Court nevertheless *"express[ed] the hope that a rule be so crafted"*.⁸⁷

57.2 This was met with due deference by the First Respondent. In his answering affidavit in this Court, dated 28 November 2012, the First Respondent indicated as follows:⁸⁸

"I have taken note of the Court a quo's finding that there exists a lacuna in the Rules. In my capacity as Speaker I am the Chairperson of the Rules Committee, and I have already resolved to place this issue before the Rules Committee with a view to addressing any such lacuna."

57.3 On 30 November 2012, this Court issued directions, requiring the First Respondent to *"file a report...on the progress achieved in the process of ensuring that motions of no confidence are appropriately provided for in the Rules of the National Assembly"*.

⁸⁴ Record p.393.

⁸⁵ Record p.396.

⁸⁶ Record p.398.

⁸⁷ Record p.398.

57.4 Three such progress reports have duly been filed,⁸⁹ and it is clear that the NARC is in the process of developing a new rule dealing specifically with the scheduling of motions of no-confidence brought in terms of section 102 of the Constitution.

58. The NARC (and through it the National Assembly) is accordingly still seized of the matter, and there is no reason to believe that it will not conclude its process. That being the case, this Court will be slow to interfere with a task which is, first and foremost, constitutionally the responsibility of the National Assembly.

59. In National Treasury and Others v Opposition to Urban Tolling Alliance and Others,⁹⁰ this Court (per Moseneke DCJ) held as follows:

"Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of Government in a manner inconsistent with the doctrine of separation of powers."

60. The Court further held:⁹¹

"A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully."

⁸⁸ AA para 5.11, record p.412.

⁸⁹ Record pp. 445, 507 and 517.

⁹⁰ [2012] ZACC 18, CCT 38/12, handed down on 20 September 2012.

⁹¹ At para 26.

61. In this regard we submit that the current situation is hardly akin to the Oriani-Ambrosini matter, where extant and operational rules were the subject-matter of the challenge at the outset.

62. As was stated by this Court in the Oriani-Ambrosini matter:⁹²

"The power to determine what processes ought to be followed falls within the constitutional domain of the National Assembly. It is not for this court to dictate to the Assembly how it should go about regulating its own business."

63. In the Court *a quo*, Davis J rightly held as follows:⁹³

"In the context of this dispute, judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business matters. What courts can do, however, is to say to Parliament: you must operate within a constitutionally compatible framework, you must give content to section 102 of the Constitution, you cannot subvert this expressly formulated idea of a motion of no confidence. However, how you allow that right to be vindicated, is for you to do, not for the courts to so determine."

64. In Lekota and Another v Speaker of the National Assembly and Another,⁹⁴ the question was whether a ruling made by the Deputy Speaker during the course of a debate in the National Assembly was lawful. A Full Bench of the Cape High Court held as follows per Fourie J:⁹⁵

⁹² At para 84.

⁹³ Record pp.384-385.

⁹⁴ Unreported judgment handed down on 11 December 2012, Case No 14641/12.

⁹⁵ At para 22.

"In exercising the constitutional authority that it has to subject Parliament, including officials such as the Speaker, to judicial scrutiny, a court should, however, be careful not to attribute to itself superior wisdom in relation to matters entrusted to Parliament as the legislative branch of government. It has often been said that a court should treat the decisions of the other branches of government with the appropriate respect, thereby recognising the proper role of such other branches within the Constitution."

65. It is submitted that this Court will, consistently with the guidelines which were mainly formulated by it regarding deference for the activities of the other branches of government, not interfere with the process which the National Assembly has embarked upon, at the instance of the First Respondent, to make appropriate and specific provision in the Rules to give effect to the provisions of section 102 of the Constitution.

(d) Mootness

66. Similarly to prayer 2 of the notice of motion in the Court *a quo*, prayer 4 of the notice of application calls for a *mandamus* against the First Respondent personally to *"take whatever steps are necessary to ensure"* that the National Assembly schedules and votes on the motion of no-confidence *"as a matter of urgency, precedence and priority, and if at all possible, on or before 7 December 2012"*.⁹⁶
67. This relief has self-evidently become moot.

68. The incompetence of the relief asked against the First Respondent has been dealt with above. The First Respondent does not have the power to schedule this debate on his own authority, especially not after the Programme Committee reached a deadlock. This has been confirmed by the Court *a quo*. A *mandamus* against the First Respondent was not indicated, because he took the only steps available to him, *viz.* to report the Programme Committee's deadlock to the National Assembly.

69. The relief sought in this prayer is, however, now also moot for the following reasons:

69.1 Clearly, insofar as the relief is substantially centred around the insistence that the motion be scheduled on or before 7 December 2012, this is no longer possible.

69.2 The motion of no-confidence tabled by the Applicant has lapsed and her party has declined to revive it, despite it being provisionally scheduled for debate on 26 February 2013.⁹⁷

69.3 The Applicant cannot credibly ask this Court on 28 March 2013 to order a debate to be scheduled which her own party has declined to

⁹⁶ NoM para 4, record p.2.

⁹⁷ Paras 10-12 of the First Respondent's supplementary affidavit to comply with the Court's directions, record p.510.

have scheduled for 26 February 2013 when it had the opportunity to do so.

69.4 Moreover, since the NARC is now seized of the matter, the issue pertaining to the drafting of the rule has also become moot.⁹⁸

70. In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,⁹⁹ this Court (per Ackermann J) held as follows:¹⁰⁰

"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

71. In Independent Electoral Commission v Langeberg Municipality,¹⁰¹ this Court (per Yacoob J and Madlanga AJ) held as follows:¹⁰²

"This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has

⁹⁸ First Respondent's progress reports, record pp. 445, 507 and 517.

⁹⁹ 2000 (2) SA 1 (CC).

¹⁰⁰ At fn 18.

¹⁰¹ 2001 (3) SA 925 (CC).

¹⁰² At para 11.

determined one moot issue arising in an appeal it is obliged to determine all other moot issues."

72. For these reasons, the relief sought in prayer 4 of the notice of application is both incompetent and moot.

CROSS-APPEAL ON COSTS

73. The First Respondent has brought a cross-appeal against the Court *a quo*'s decision not to grant the First Respondent his costs.¹⁰³ The reasons for the cross-appeal have been dealt with above, in that the Court *a quo*'s judgment was squarely based on the contentions advanced by the First Respondent regarding his lack of authority to schedule the motion.

74. Moreover, the fact that the Court *a quo* waited for the National Assembly to consider the First Respondent's report on the deadlock of the Programme Committee before handing down judgment,¹⁰⁴ is indicative of the fact that this was the appropriate step for the First Respondent to have taken, and that the Applicant should have waited for the National Assembly to make its decision before launching her application.

75. As it happened, due to the premature launch of the application, the National Assembly never reached such decision.

¹⁰³ Record p.435.

¹⁰⁴ Judgment of the Court *a quo*, record p.373.

76. Moreover, the application was launched with inappropriate haste evidenced by the fact that the Applicant did not even consent to the First Respondent's request to be given an opportunity to take legal advice. Astonishingly, the same motion which was so extremely urgent during the last week of the 2012 annual session, has now seemingly shed its urgency to such an extent that the Applicant's own party has declined to have it debated on 26 February 2012, despite it being provisionally scheduled for that day.¹⁰⁵

77. It could be argued that the Court *a quo*'s decision not to make any order as to costs is consistent with the benchmark decisions of this Court in Affordable Medicines Trust and Others v Minister of Health and Others,¹⁰⁶ and Biowatch Trust v Registrar, Genetic Resources and Others.¹⁰⁷

78. However, these decisions do not express an inflexible rule.

79. We submit that as far as costs are concerned, the Court's approach should, apart from the considerations already mentioned, be informed also by the following considerations:

79.1 The Applicant represents eight political parties who are represented in the National Assembly, which translates to a third of the membership thereof.

¹⁰⁵ Paras 10-12 of the First Respondent's supplementary affidavit to comply with the Court's directions, record p.510.

¹⁰⁶ 2006 (3) SA 247 (CC).

79.2 The Applicant did not challenge the constitutionality of any statutory provision in the Court *a quo*.

79.3 The Applicant's approach to this matter, for reasons already canvassed, has been cavalier particularly inasmuch as her party had passed up an opportunity to debate a motion of no-confidence in the President – a matter which was said to be so urgent that this Court was called upon to convene and deal therewith on a few days' notice.

80. In the premises, in the event of this Court giving leave to appeal and/or allowing direct access, it should order the Applicant to pay the First Respondent's costs of the proceedings *a quo*, including the costs consequent upon the employment of two counsel.

CONCLUSION

81. It is submitted that the application should be dismissed with costs, including the costs of two counsel.

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22 March 2013