

**Monday, 20 November 2023**

**Committee Room M64, Parliament, Cape Town**

**BEFORE THE POWERS AND PRIVILEGES COMMITTEE OF THE**  
**NATIONAL ASSEMBLY**

In the hearing between:

**THE SPEAKER OF THE NATIONAL ASSEMBLY**

and

**JULIUS SELLO MALEMA and Five Others**

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**SUBMISSIONS on Postponement application by JS MALEMA and Five Others**

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1. On **Tuesday, 7 November 2023** the Honourable JS Malema and five other members of the National Assembly (“the six affected members”) were served with notices of hearing.<sup>1</sup>

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<sup>1</sup> The hearing concerns the conduct by the affected members of jumping (uninvited) onto the stage during SONA 2023, whilst the President of the Republic of South Africa was addressing Parliament.

2. The notices indicated that there would be a hearing for the members some **8 working days** thereafter at 10h00 on **Monday, 20 November 2023** in Committee Room M64 concerning the allegation that they had committed conduct constituting contempt of Parliament in terms of, *inter alia*, section 13 read with section 7 of the Powers and Privileges Act and the National Assembly Rules.
3. On **Friday, 10 November 2023** (at 7:24:32 PM) Ms. Janyde Cupido of Ian Levitt Attorneys on behalf of the six affected members sent a letter to the Speaker of the National Assembly and the Chairperson of the Powers and Privileges Committee.<sup>2</sup>
4. Ms. Cupido's letter requested certain information.
5. The letter also demanded that the hearing be **postponed** to a date in 2024 after judgment by the Western Cape High Court in a matter to be heard on Monday, 4 December 2023.<sup>3</sup>
6. The letter required a response by no later than 17H00 on **Monday, 13 November 2023**. Ms. Cupido's letter (in paragraph 19.1) threatened an urgent court

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<sup>2</sup> The Powers and Privileges Committee is established by NA Rule 211 as required by section 12 of the Powers and Privileges Act. Part 7 (Rules 211 -215) of Chapter 12 of the NA Rules deals with Powers and Privileges Committee. See also Chapter 4 (sections 12 and 13) of the Powers and Privileges And Immunities of Parliament and Provincial Legislatures Act 4 of 1994 ("the Powers and Privileges Act")

<sup>3</sup> The High Court applications effectively concerns a complaint that proceedings before this Committee are unfair. The letter stated: "As you are aware, in that application, the EFF is challenging the failure of the Act and the Rules to allow charged MPS the right to subpoena or summon witnesses. In our view, if our clients are successful in that litigation, this will have a direct impact on the future conduct of the present disciplinary hearing."

application to secure a postponement by way of interdictory relief were a postponement not agreed to.

7. On **Sunday, 12 November 2023 at 17h00** the State Attorney addressed a letter to Ms. Cupido in which the requested information was provided to her.
8. The demand for a postponement was refused for two principal reasons. First, there was no merit, as far as the Speaker was concerned, in the request for a postponement, but secondly, and importantly it was incumbent on those seeking a postponement to first bring an application for a postponement to this Committee **before** approaching a court of law seeking interdictory relief.
9. Less than 36 hours before the hearing a substantive postponement application was served at **18:14 on Saturday, 18 November 2023**. Ms. Cupido deposed to the founding affidavit. In her founding affidavit she sets out the basis for the postponement application.
10. There is now a substantive application before this Committee in which a postponement of this hearing is sought.
11. The postponement application by the six affected members is an abuse.

12. It is a clear stratagem by the six affected members to avoid taking any responsibility for their alleged disruptive conduct at SONA 2023. They wish to evade the hearing and the charges at all costs. They are ducking and diving, and such conduct should not be tolerated.
13. It is classical **Stalingrad**.<sup>4</sup> Delay, delay, delay! Take every step reasonable and unreasonable – just make sure the hearing does not commence.
14. On the version testified to by Ms. Cupido on behalf the six affected members a postponement is certainly not warranted.
15. Simply put: the six affected members have not made out a proper case to be granted a postponement.
16. There should be no postponement of this hearing.

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<sup>4</sup> See *Zuma v Downer and Another* [2023] ZASCA 132 (13 October 2023) where Ponnar JA stated: “[6] As long ago as May 2007, Mr Zuma’s then counsel intimated, in response to a query from Hugo J, that he was following a ‘Stalingrad’ strategy’ in the conduct of Mr Zuma’s defence to the criminal charges that the latter faced. As explained by Wallis JA in *Moyo v Minister of Justice and Constitutional Development and Others*: ‘The term “Stalingrad defence” has become a term of art in the armoury of criminal defence lawyers. **By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place.** I need hardly add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.’[3] The high court recorded in the main judgment that ‘[t]he application [by the respondents to set aside the private prosecution] is directed at ensuring that there is an end to the abuse of an unlawful private prosecution and an end hopefully to the “Stalingrad” strategy.’” The definition is that it is a legal defense strategy usually used by a defendant to wear down the plaintiff or legal proceedings by appealing every ruling that is unfavorable to the defendant **and using whatever other means possible to delay proceedings.** Typically a meritorious case is not presented by the defendant. The term comes from the World War II era Battle of Stalingrad where the Soviet Union won the battle by wearing down attacking German forces over the course of 5 months.

17. The application for a postponement of the hearing should be dismissed.

## **THE LAW ON POSTPONEMENTS GENERALLY**

18. In Court proceedings the postponement of a hearing is an *indulgence*.
19. And that indulgence will only be granted where the party seeking a postponement demonstrates that it is in the interests of justice to do so. That is the burden of a party seeking a postponement.
20. Although this Committee does not sit as a court, tribunal or arbitration forum, it nevertheless has the power to consider an application for a postponement of a hearing.
21. It is stressed: this Committee does not acquit or convict!

It merely tables a report on its findings and recommendations to the House.<sup>5</sup> The “court postponement principles” are to be given even greater weight in this Committee’s exercise of its discretion to grant or not to grant a postponement.

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<sup>5</sup> Section 12(3) of the Powers and Privileges Act.

22. The principles in relation to postponements in court matters should guide this Committee's exercise of its powers to regulate its own process.<sup>6</sup> This Committee does not impose any sanction. We repeat: this Committee enquires into the matter and tables a report on its findings and recommendations to the House.<sup>7</sup>
23. A **proper** case for a postponement of a hearing must be brought before the Committee so that it can grant the indulgence sought and justify the granting of the postponement on the basis of a clear principle.<sup>8</sup>
24. Where the application for a postponement is based on, for example, first being given an opportunity to bring a constitutional challenge in court the authorities are clear:  
a postponement should **not** generally be granted.

The applicant for a postponement should rather wait until the trial/hearing/enquiry is complete; and only if then **at that stage** any need to appeal and/or review the finding of the court/tribunal/committee and/or bring a constitutional challenge may the person make the challenge.<sup>9</sup>

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<sup>6</sup> See the general powers of the chairperson of a committee to interrupt, suspend or adjourn a meeting (NA Rule 164) read with the general powers of a committee (NA Rule 167), and in particular NA Rule 167 (f), which gives a committee for the purposes of performing its functions the power to "determine its own working arrangements." See also NA Rule 214 (2)(b) read with the Schedule to the NA Rules.

<sup>7</sup> Section 12(3)(b) of the Powers and Privileges Act.

<sup>8</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 1999 (3) BCLR 280 (C)*. See also *Vorster v CCMA and Others (2002) 23 ILJ 1899 (LC)*, where the Court effectively held that postponement in arbitration proceedings should not easily be granted.

<sup>9</sup> In *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others (387/2017; 386/2017) [2018] ZASCA 100; 2018 (8) BCLR 972 (SCA); [2018] 3 All SA 342 (SCA)*;

25. For example, in court proceedings the charged person may be acquitted or exonerated and there would obviously be no need for the constitutional challenge.
26. In the present case this Committee may, after hearing evidence and considering argument, table a report to the House in terms of section 12(3)(b) of the Powers and Privileges Act recommending that no action of any kind be taken against the members.

Also, the members may feel the enquiry conducted by this Committee was *reasonable and procedurally fair*; so there would be no need to challenge its report to the House and the procedures adopted by the Committee. That is whatever findings and recommendations this Committee may table.

27. The current application for a postponement by the members fits into the premature pre-emptive category repeatedly warned against by the courts.
28. The postponement application by the members is, *inter alia*, on the High Court constitutional challenge,<sup>10</sup> currently pending in *Mente and Marais*.

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2018 (2) SACR 313 (SCA) (20 June 2018), Wallis JA ((Maya P and Makgoka AJA concurring) commented critically concerning those accused who embark in preliminary litigation.

<sup>10</sup> It is unfortunate that the High Court challenge includes, *inter alia*, a prayer that section 56(a) and 69(a) of the Constitution are unconstitutional. How a provision of the Constitution can be unconstitutional is not something easily understood.

29. Ms Cupido's arguments for a postponement are premised on the ***potential*** unfairness and unreasonableness of the hearing before this Committee.<sup>11</sup>
30. But that is certainly ***no*** basis to seek, or for this Committee to grant, a postponement.
31. If the Committee's report tabled in the House is that conduct constituting contempt of Parliament was committed **and** the House endorses the finding and recommendations of this Committee's report, then and **only at that point**, would the "procedural fairness," "reasonableness" and lawfulness of the enquiry and the constitutional issues complained of in the *Mente* and *Marais* matters potentially become relevant and ripe for consideration. The issue of reasonableness, procedural fairness and lawfulness of the members' hearing is not yet ripe.<sup>12</sup>
32. So, in summary: the members seek a postponement of their hearing to await the outcome of some High Court case which may have no relevance or any bearing to this hearing.

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<sup>11</sup> Ms Cupido concludes her affidavit in paragraph 18 by stating: "...we contend that the hearing must be postponed (*sic*) if the lawfulness and the fairness of the disciplinary process is to be preserved."

<sup>12</sup> See *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others* (387/2017; 386/2017) [2018] ZASCA 100; 2018 (8) BCLR 972 (SCA); [2018] 3 All SA 342 (SCA); 2018 (2) SACR 313 (SCA) (20 June 2018) at [156] – [170] and *Savoi and Others v National Director of Public Prosecutions and Another* (CCT 71/13) [2014] ZACC 5; 2014 (5) BCLR 606 (CC); 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC) (20 March 2014) at [13].



33. It is emphasised that before the House may take any disciplinary action against a member, the Committee must enquire into the matter in accordance with a procedure that is reasonable and procedurally fair.<sup>13</sup>
34. And if it ultimately transpires that the High Court, and possibly the Supreme Court of Appeal and Constitutional Court judgments have some bearing on the reasonableness of the members' hearing before this Committee, and its procedural fairness, they will certainly not be without a remedy.
35. They would be perfectly entitled **at that stage** [some-time in the future] to argue that their hearing before this Committee was tainted by irregularity (as for example it was not reasonable or procedurally fair). It is now too early and premature to advance that argument.
36. It is obvious that what the six affected members seek to do, is to avoid even having their hearing commence.<sup>14</sup>
37. And when did they lodge their substantive postponement application? At the eleventh hour! They have known since Sunday, 12 November 2023,<sup>15</sup> when the State Attorney responded to Ms. Cupido's letter demanding a postponement that

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<sup>13</sup> Section 12(3)(a) of the Powers and Privileges Act.

<sup>14</sup> The hearing may turn out to reasonable and procedurally fair. How can they know in advance that the hearing will not be fair? They cannot! And if it turns out to have been unfair they have their remedies, both internal [before the House] and external [before the Courts].

<sup>15</sup> Or at worst for them on Monday 13 November 2023.

it was their right to apply for a postponement before this Committee. The members knew that they would bring a substantive application for a postponement at the latest on Thursday, 16 November 2023.

38. Yet they waited until the hearing was about to commence (less than 36 hours before the commencement) to bring their “substantive application” for a postponement.<sup>16</sup>

39. In *National Police Services Union and Others v Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110; 2001 (8) BCLR 775 (CC) (27 September 2000) the Constitutional Court stated:

“[4] The Constitutional Court has the inherent power to protect and regulate its own process **The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court.** Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. **In this respect the applicant** [for a postponement] **must show that there is good cause for the postponement.** In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application.”

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<sup>16</sup> It is difficult to avoid the impression that the manner in which the postponement application was brought constituted an ambush.

(footnotes omitted, emphasis added)

40. In *Myburgh Transport v Botha t/a SA Truck Bodies*, the Court (per Mohamed AJA)<sup>17</sup> set out the factors applicable to postponement applications. Of relevance are:

40.1 the Court has a discretion to grant or refuse postponement and must exercise its discretion in a judicial manner;<sup>18</sup> and a postponement may only be granted for “substantial reasons.”

40.2 an application for postponement must always be *bona fide* and not be used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled; and

40.3 the application for a postponement must be made timeously and in good faith.

41. In *Greyvenstein v Neethling*, the Court explained that a postponement will not be granted for a circumstance that was foreseen by a litigant:

“Secondly, that a postponement will not be granted to the plaintiff in circumstances where the postponement is caused or is occasioned by a

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<sup>17</sup> *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315, endorsed by the Western Cape High Court (Full Bench) in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280 (C).

<sup>18</sup> *Myburgh* at 314 G - H

happening or circumstance, which the plaintiff, at the time of the set – down of the matter could have, or should have foreseen”.<sup>19</sup>

42. The holding in *Greyvenstein* was affirmed in *Kentridge v Coastal Finance Co (Pty) Ltd* in respect of a defendant who should have foreseen, in light of the progress of the litigation, that the trial was likely to be set down:

“But it appears from the decided cases that it does not lie within the competence of a litigant to insist that a trial to which he is a party will not be heard on the appointed day merely because he is in a position, on account of his favourable financial position, to prevent financial loss to his opponent as a result of the adjournment. It is clear to my mind, in the circumstances, that the applicant should have known that there was a real likelihood of the case being set down for hearing early in this year and that his attitude was one of unconcern in that regard”.<sup>20</sup> (emphasis added).

43. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Western Cape High Court (Full Court) (approved by the Constitutional Court) stressed the importance of parties litigating in a constitutionally appropriate manner and avoiding delays in the finalisation of matters. An application for a postponement was refused despite the Minister of Home Affairs having failed to

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<sup>19</sup> *Greyvenstein v Neethling* 1952 (1) SA 463 (C) at 466A – D.

<sup>20</sup> *Kentridge v Coastal Finance Co (Pty) Ltd* 1960 (2) SA 40 (D) at 42.

file papers in a constitutional challenge to legislation.<sup>21</sup> A reason was that the application for a postponement was brought just before (less than 24 hours) the case was to commence.

44. It is now trite that any application for a postponement must be brought as soon as the applicant (for the postponement) knows that such an application will be brought. It can hardly be suggested that the six affected members have complied with that injunction.
45. In *MEC for Health, Eastern Cape v Melane*, Mbenenge JP for a unanimous Full Court dismissed a postponement application and explained that it is—

“a cardinal rule that an application for a postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.”<sup>22</sup>

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<sup>21</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280 (C) at 287H – 288. Read with the Constitutional Court endorsement - *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) - [7] Davis J also correctly pointed out that this Court has made it clear[5] that any evidence that the State considers relevant to an issue of the constitutional invalidity of a statutory provision ought to be adduced before the High Court first hearing the matter.[6] The learned Judge held that such consideration, however important, did not in itself justify the granting of a postponement which had to be based on clear principle. Davis J pointed out that no reasons at all had been furnished for the respondents' failure to observe the rules of court, that they had treated their obligations to the court with disdain and had ignored the rights of the applicants to a resolution of their claims and that accordingly the application had been dismissed.[7]

<sup>22</sup> *MEC for Health, Eastern Cape v Melane* [2022] ZAECMHC 4 (15 March 2022) at [62].

46. Ms Cupido complains about the lack of extra CCTV footage provided to her.<sup>23</sup> But her complaint has no substance.
47. She also complains about the lack of sufficient time to prepare.<sup>24</sup> This is a tired and well worn, but meritless complaint.
48. In paragraph 39 she complains about a “hearing bundle of over 640 pages”. But what she does not explain to the Committee is that the State Attorney, correctly, pointed out in her letter of Sunday 12 November 2023 at paragraph 20 that “ ...The bundle consists largely of documentation your clients and you are well versed in. It would indeed be surprising were your client and you not to know and be fully aware of items 1, 2, 3.1 and 3.2 of the bundle. The balance of the bundle consists of formal documentation, none of which is complex or weighty...”
49. In Ms Cupido’s responses on 13 November and 16 November she did understandably not take issue with the State Attorney’s averment.
50. The “insufficient time” complaint is a non-starter, especially bearing in mind the requirement in item 1 of the Schedule to the NA Rules that any notification must be delivered to the member at least 5 working days before the hearing. In the present matter the notices were delivered 8 working days before the hearing on

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<sup>23</sup> See paragraph 52 of her affidavit of 18 November 2023. But she and her clients have known since Sunday 12 November 2023 that the Speaker’s stance is that the CCTV footage provide on 7 November 2023 was sufficient. No other footage is needed – further footage is irrelevant.

<sup>24</sup> See paragraphs 39 – 49 of her affidavit of 18 November 2023

Tuesday, 7 November 2023. And Ms Cupido responded after hours on Friday, 10 November 2023.

51. The six affected members have had more than sufficient time to prepare for the hearing.

#### Conclusion

52. The current application for a postponement has been brought for one purpose only - to delay the commencement of the enquiry on unsustainable grounds. It has not been brought in good faith. It has been brought at the eleventh hour in what may legitimately be regarded as an ambush.
53. The application for postponement must be dismissed.

**Initiator adv Anton Katz SC**  
**assisted by adv Jade Aspeling**  
**Cape Town, 20 November 2023**