

Tuesday 21 November 2023

Committee Room S12A, 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

INITIATOR'S CLOSING STATEMENT

Introduction

- 1 On 9 February 2023, there was a Joint Sitting of the Houses of Parliament for the President to deliver his State-of-the-Nation address.

- 2 During the proceedings, six members of the National Assembly, namely Mr Julius Sello Malema, Mr Nyiko Floyd Shivambu, Mr Vuyani Pambo, Dr Mbuyiseni Quintin

Ndlozi and Mr Sinawo Tambo (“the six affected members”), engaged in conduct which resulted in their removal by the Security Services and a suspension of the proceedings.

- 3 The six members acted without authority when they ascended onto the stage where the President and the Presiding Officers were seated, and, in a threatening manner advanced towards the President of the Republic of South Africa and the Presiding Officers.¹
- 4 This Committee is tasked with deciding whether the six affected members crossed the line between exercising their right to freedom of speech during the State-of-the-Nation address, and committing contempt of Parliament.

Parliament’s progression from Apartheid South Africa to the present

- 5 Prior to South Africa’s constitutional democracy, Parliament represented and perpetuated the evils of the apartheid regime. It was the birthplace for many of the crimes against humanity. For many years, Parliament was restrictive instead of representative.

¹ See “Index A” the Notices and Charge Sheets of the six members at pages 1 to 36.

- 6 In the dying years of apartheid, the so-called “reforms” set up separate deliberative bodies, Parliaments, for Indian and Coloured people called the House of Delegates and the House of Representatives respectively.
- 7 At the end of apartheid, Parliament experienced total reform with refreshed values and duties.
- 8 The opening provision of the Constitution of the Republic of South Africa, 1996 states these values to include a “...democratic government, to ensure accountability, responsiveness and openness.”²
- 9 To this point, the Constitutional Court said:

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked **abuse** of state power and resources that was virtually institutionalised during the apartheid era. To achieve this goal we adopted accountability, the rule of law and the supremacy of the Constitution as **values** of our constitutional democracy. For this reason public-office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of

² Preamble to Section 1 and section 1(d) of the Constitution of the Republic of South Africa, 1996; see also *Economic Freedom Fighters V Speaker, National Assembly And Others* 2016 (3) SA 580 (CC) at paragraph 1; and *Democratic Alliance v Speaker of the National Assembly and others* 2016 (3) SA 487 (CC) at paragraph 1

impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillars of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.'

And the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.”³

10 And importantly for our purposes,

“Our constitutional democracy can only be truly strengthened when: there is **zero tolerance** for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; there is

³ *Economic Freedom Fighters V Speaker, National Assembly And Others 2016 (3) SA 580 (CC) at paragraph 1; See also Democratic Alliance v Speaker of the National Assembly and others 2016 (3) SA 487 (CC) at paragraph 11.*

observance of the rule of law and respect for every aspect of our Constitution as the supreme law of the Republic is real.”⁴

- 11 Parliament is now made up of two houses – the National Assembly and the National Council of Provinces. Both Houses are filled by elected representatives to voice the aspirations of the people of South Africa and to hold the various branches of government accountable. These elected representatives are empowered with the right to, “full and meaningful participation in and contribution to the parliamentary process and decision-making”.⁵

The role of Parliament in South Africa’s Constitutional setting

- 12 Parliament is established in terms of chapter 4 of the Constitution. It is a law-making body, and it ensures accountability of the executive as well as oversight of the executive and organs of state.⁶

- 13 It is primarily a debating chamber:

“By its very nature, Parliament is a deliberative body. Debate is key to the performance of its functions. For deliberation to be meaningful, and

⁴ *Economic Freedom Fighters v Speaker, National Assembly And Others 2016 (3) SA 580 (CC) at paragraph 54*

⁵ *Democratic Alliance supra* at paragraph 11

⁶ Section 55(2)(a) and (b) of the Constitution; see also *Democratic Alliance supra* at paragraphs 14 and 17

members effectively to carry out those functions, it is necessary for debate not to be stifled. Unless all enjoy the right to full and meaningful contribution, the very notion of constitutional democracy is warped.”⁷

Freedom of Speech in Parliament

14 To ensure that the elected representatives achieve their mandate to represent the people, they are empowered with particular privileges in terms of section 58(1)(a) of the Constitution.⁸ These privileges include, most importantly free speech, which is:

“a fundamental right crucial to representative government in a democratic society. Its tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament.”⁹

15 The Constitutional Court pointed out that, “free speech becomes ever so important when one has regard to the nature of Parliament’s functions.”¹⁰

16 Madlanga J opined that as a law-making body, Parliament can only arrive at the “best possible legislative outcome” if all possible contributions find their way to the

⁷ *Democratic Alliance supra* at paragraph 11

⁸ Section 58(1)(a) reads: *Cabinet members, deputy ministers and members of the National Assembly – (a) Have freedom of speech in the Assembly and in its committees, subject to its rules and orders...*

⁹ *De Lille supra* at paragraph 29

¹⁰ *Democratic Alliance supra* at paragraph 13

legislative process and is thereafter refined through serious and meaningful deliberation:

“...deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes fear of repercussion for what is said. This advances democratic government.”¹¹

- 17 As an accountability body and overseer to the national executive and organs of state, members of Parliament need to be able to express their views without fear of arrest or detention (which functions are performed by the executive). Failing this, any oversight would be, “illusory”.¹²

Limitations of free speech

- 18 A member of Parliament’s freedom of speech is primarily constrained by the Constitution itself. The Constitution entertains supremacy over parliamentary proceedings:

“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

¹¹ *Democratic Alliance supra* at paragraph 14 and 15

¹² *Democratic Alliance supra* at paragraph 17

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.”¹³

- 19 Further, free speech is limited for members of Parliament by the “rules and orders” of the House concerned.¹⁴ The purpose of the limitation is to ensure that the right of members to speak freely is not disruptive to the extent that it thwarts Parliament’s ability to fulfil its constitutional mandate:

“Surely, the privilege contained in ss 58(1)(a) and 71(1)(a) can never go so far as to give members a license so to disrupt the proceedings of Parliament that it may be hamstrung and incapacitated from conducting its business. This would detract from the very *raison d’être* of Parliament.”¹⁵

¹³ *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA) at paragraph 14

¹⁴ *Democratic Alliance supra* at paragraphs 38, 39 and 47; see also paragraph 50 to 51 where the Constitutional Court stipulate that the reason the limitation to free speech is confined to the rules is because Parliament is empowered to direct and control its own processes and when it does so, it acts without the involvement of other arms of state. This process is internal and were the limitation of free speech to find its origins in statutes as well, this would invite the “participation of an external agency, the executive”. See also section 57 read with section 58(1)(a) of the Constitution.

¹⁵ *Democratic Alliance supra* at paragraph 38

20 Further, the rules must “enforce order to ensure that the House is at all times able to function in terms of its Constitutional mandate.”¹⁶ They too must have “due regard for representative and participatory democracy.”¹⁷

21 The authority for Parliament to regulate its own internal processes, extends to its authority to regulate discipline in proceedings:

“There can be no doubt that this authority is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose...Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates.”¹⁸

Disciplinary Processes for members of the National Assembly

22 Parliament has devised rules and processes applicable to disciplinary processes for members of the National Assembly during Joint Sittings which are contained in the Joint Rules as well as the amendments to the Joint Rules.¹⁹ The Joint Rules stipulate that when disciplinary processes follow a Joint Sitting, a member is bound

¹⁶ *Economic Freedom Fighters v Speaker of the National Assembly [2018] 2 All SA 116 (WCC)* at paragraph 37

¹⁷ *De Lille supra* at paragraph 22

¹⁸ *De Lille supra* at paragraph 16

¹⁹ See the Joint Rules (7th Edition) at page 254 to 403 to the Trial bundle; as well as the amendments to the Joint Rules from page 406 to 410 of the Trial Bundle

by the Rules of whichever House the member belongs to – in this case the National Assembly Rules apply as the members implicated are members of the National Assembly.²⁰

23 The process provided for by the Joint Rules stipulates that when a member is removed from the Chamber during a Joint Sitting, the Speaker must refer the matter to a multiparty committee for consideration.²¹ The Joint Rules Committee is the multiparty structure envisioned in the Joint Rules.²²

24 On 10 February 2023, the Speaker produced a report of the matter, and on the same day referred the matter to the Joint Rules Committee.²³

25 Thereafter, the Joint Rules Committee considered the report by the Speaker on 25 April 2023.²⁴ The Joint Rules Committee resolved that the Rules of Parliament needed to be “tightened” and that the presiding officers should decide on the further conduct of the matter.²⁵

²⁰ See Joint Rule 12(a)

²¹ See Joint Rule 14GA(13)

²² See the Minutes of the proceedings of the Joint Rules Committee dated 25 April 2023 at page 644 of the Trial Bundle

²³ See the Speaker’s referral at page 636 and 637 of the Trial Bundle; and the Speaker’s report dated 10 February 2023 at pages 629 to 635 of the Trial Bundle.

²⁴ See the Minutes of the proceedings of the Joint Rules Committee dated 25 April at pages 644 to 647 of the Trial Bundle (page 644 to page 646 contains the Joint Rules Committee’s findings); confirmed by the Speaker’s referral dated 7 September 2023 at page 643 of the Trial Bundle

²⁵ See the Minutes of the proceedings of the Joint Rules Committee dated 25 April 2023, more especially the “discussion” at pages 645 to 646 of the Trial Bundle

- 26 The matter was referred to the Speaker who decided, after consulting with the Chairperson for the National Council of Provinces that the matter should be referred to the Powers and Privileges Committee (hereinafter referred to as “the Powers Committee”) for investigation.²⁶
- 27 The Speaker was empowered to do so in terms of Joint Rule 14H which provides that if the presiding officer is of the opinion that a member’s conduct is serious in nature that the presiding officer orders the member to withdraw from the Chamber, that they may refer the matter to the member’s House for the appropriate action to be taken against them.²⁷
- 28 The Powers Committee is empowered to enquire into and pronounce upon any potential contempt of Parliament by a member in terms of section 13 of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act 4 of 2004 (“the Powers Act”).²⁸

²⁶ See the Referral dated 7 September 2023 in respect of the incident dated 9 February 2023 to the Chairperson of Powers and Privileges Committee of the National Assembly page 642 of the Trial Bundle; the Powers Committee is constituted in terms of National Assembly Rule 211 which can be found at page 149 of the Trial Bundle read with section 12 of the Powers Act (which can be found at page 7 of the Trial Bundle)

²⁷ See page 280 of the Trial Bundle

²⁸ See section 12(1) and (2) read with section 13 of the Powers Act at pages 7 and 8 of the Trial Bundle

The State-of-the-Nation address 2023

- 29 The Cabinet is comprised of the President, who is the head of the Cabinet as well as the Deputy President and the Ministers.²⁹ As head of the Cabinet, the President assigns various powers and functions to the Deputy President and the Ministers.³⁰ Collectively, and individually, the President, the Deputy President and the Ministers are accountable to Parliament for the exercise of their powers and the performance of their functions.³¹
- 30 Additionally, the President, Deputy President and the Ministers must provide Parliament with full and regular reports concerning the matters under their control.³²
- 31 **To do so, the President is empowered by section 84(2)(d) of the Constitution to call an extraordinary sitting of both Houses of Parliament to conduct special business.**³³

²⁹ Section 91(1) of the Constitution

³⁰ Section 92(1) of the Constitution

³¹ Section 92(2) of the Constitution

³² Section 92(3)(b) of the Constitution

³³ Section 84(2)(d) reads, “The president is responsible for –
...(d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business...” See also Joint Rule 7(1)(a) which provides that the President may call a joint sitting of the Houses when it is necessary for the President to deliver an annual or special address to Parliament (page 277 of the Trial Bundle)

32 It is submitted that the State-of-the-Nation address is one such extraordinary sitting.

33 First, it is a Joint Sitting of Parliament.³⁴

34 Secondly, during the State-of-the-Nation address by the President, he makes it clear what the business of the day was when he said:

“This evening, we will give an account of a number of areas where progress in implementing the commitments we made in last year’s state of the nation address has been made. And there are other areas where progress has not been made and we will be quite candid about that.”³⁵

35 In so doing, the President, as he was entitled to, made it clear that he was reporting to the Joint Sitting to report back to, *inter alia*, the legislature and the judiciary on his Cabinet’s achievements, set-backs and goals for the year ahead.

36 Third, the extraordinary nature of the sitting is illustrated by those who were in attendance.

³⁴ See the Order Paper which stipulates that the sitting is a “Joint Sitting” and which provides a time for the “Meeting of the Houses” at page 648 of the Trial Bundle. This is done in terms of Joint Rule 9(a) which provides that the date and time of the joint sitting must be made known to the members of the National Assembly by placing it on the Order paper of the Houses (see page 277 of the Trial Bundle)

³⁵ See the Minutes of the Proceedings of the Joint Sitting dated 9 February 2023 at page 606 of the Trial Bundle

- 37 At the commencement of his address, the President honours some of the guests including (but not limited to) the Deputy President, former President Thabo Mbeki, the Chairperson of the National Council of Provinces, the Executive Mayor of the City of Cape Town, the President of the Pan African Parliament, the Chief Justice of South Africa (and head of the judiciary), the Deputy President of the governing party and the people of South Africa.³⁶
- 38 The electorate do not attend personally, but rather their attendance is measured through the members of Parliament which represent them.
- 39 They have access to view the proceedings via a livestream. Their role is to passively engage with the business of the day, the State-of-the-Nation address, with a view to assessing the executive's exercise of its duties to the people of South Africa.
- 40 While, Parliament is primarily a debating a chamber, the time for debate is not in the Joint Sitting at SONA.³⁷

³⁶ See the Minutes of the Proceedings of the Joint Sitting dated 9 February 2023 at page 603 of the Trial Bundle

³⁷ To illustrate Joint Rule 14U read with Joint Rule 14V permits a member to speak when permitted to do so by the Speaker or when raising a point of order, and to reply except at the State-of-the-Nation address (see page 283 of the Trial Bundle)

41 After the business of the day has come to a close, the debating chamber opens at a different time, day and venue. Members of Parliament get an opportunity to air their views and thereafter, the President gets an opportunity to respond.³⁸

The Charges and the evidence led

42 It is alleged that at the State-of-the-Nation address on 9 February 2023, the six members of the National Assembly, acting together, ascended onto the stage during the proceedings without the authority to do so.

43 While on the stage, they approached the President and Presiding Officers in a threatening manner.

44 Their conduct was thwarted after Security Services of their own volition, and thereafter ratified by the Speaker, physically removed them. This conduct resulted in proceedings being suspended.

45 In so doing, it is alleged that the six members acting together took part in a serious disturbance, disorder, and disruption in the House contravening NA Rule 64(a) and (d). Additionally, that they acted in a way which was seriously detrimental to the dignity, decorum, and orderly procedure of the House.

³⁸ See National Assembly Rule 20 which stipulates that after the President has delivered his State-of-the-Nation address, the Speaker must place it on the Order Paper for discussion by the Houses.

46 Consequent to contravening the Rules, it is alleged that the members acted in contravention of section 7(a) and (e) of the Powers, Privileges and Immunities of Parliament Act 4 of 2004 (“the Powers Act”). By impeding the exercise or performance of Parliament or a House of its authority and functions; as well as by taking part in a disturbance in the House. Notably a contravention of section 7 constitutes contempt of Parliament in terms of section 13(a) of the Powers Act.

47 The initiator called one witness.

48 Mr Xaso, the Secretary to the National Assembly testified about the nature of the Joint Sitting dated 9 February 2023.³⁹

49 Mr Xaso was present during the 9 February 2023 joint sitting.

³⁹ Mr Xaso’s evidence was uncontested as the affected members elected not to attend the hearing as was their right in terms of section 8 of the Schedule to the NA Rules (at page 229 of the Trial Bundle). Instead, they elected to abandon proceedings. The continuity of proceedings in instances such as these has been well set out by the authorities and in this regard see *Futshane v Millard NO and Others (J1309/21) [2021] ZALCJHB 432 (3 November 2021)* at paragraphs 24 and 25 where the Court said the following about walking out of the disciplinary hearing, “The right to a fair hearing before one’s dismissal is indeed an integral part of our law. This right is explicitly recognised by the Act and has been restated in numerous decisions of this Court. However, once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or to refuse to attend the enquiry. Should the employee refuse to attend the enquiry, such employee must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made’. The right to fair hearing and thus a fair procedure in disciplinary hearings, is a fundamental right. This right that was extended to the applicant and a right she deprived herself of by walking out of the disciplinary hearing when postponement was refused. This is the right she seeks to enforce, albeit on her own terms, in prescribing how the hearing should commence and directing her own process. This, she seeks to do, by asking this Court to assist her in directing her own processes and procedures that suit her. There is no clearer definition of abuse of Court process and this conduct must be discouraged.”

50 He calmly recalled what he witnessed, namely that the six affected members of the National Assembly “stormed” onto the stage, without authority to do so.

51 The proceedings had to be suspended as a result of the affected members’ conduct.

52 Their conduct was unprecedented.

53 The storming of the stage constituted, in Mr. Xaso’s view, a clear disruption of the proceedings.⁴⁰

54 Mr Xaso also commented that the impugned conduct improperly interfered with the performance by Parliament.

55 During Mr Xaso’s testimony a short video clip of the storming of the stage by the affected members was shown. Mr Xaso testified that the CCTV footage correctly reflected his memory of the event.

56 He could not say whether the President and/or the Speaker and other officials felt threatened by the conduct of the affected members.

57 He also could not comment on the intentions of the affected members.

⁴⁰ Section (e) of the Powers Act.

58 But what he could say was it would not be unreasonable for a person on the stage, bearing in mind, the “abruptness” or suddenness of the “storming” of the stage to feel threatened by their conduct.

Are the affected members guilty of the charge?

59 Section 13 of the Powers Act makes a member guilty of contempt of Parliament if, *inter alia*, the member contravenes section 7. Section 7 sets out the prohibited acts in respect of Parliament and members. Section 7(a) prohibits improperly interfering with or impeding the exercise or performance by Parliament of its authority or functions, and section 7(e) prohibits members from creating or taking part in any disturbance within the precinct while Parliament is meeting.

60 There can be no doubt that the affected members contravened section 7(a) and section 7 (e) on the basis of the evidence of Mr Xaso.

61 They are accordingly guilty of a violation of section 13 of the Powers Act.

62 Similarly, there can be no doubt that the storming of the stage as the affected members were leaving the House was not with the dignity and decorum required by National Assembly Rule 64 (a). And they violated Rule 64(d).

- 63 The affected members are guilty of grossly disorderly conduct and they clearly violated the injunction contained in Rules 69(a) and (f).
- 64 The affected members' conduct was seriously detrimental to the dignity, decorum, and orderly procedure of the House. The affected members are charged with having deliberately created and taken part in a serious disturbance, disorder, and disruption in the House.
- 65 It is submitted that all six affected members be found guilty individually of the charges put to them.

Initiator: adv Anton Katz SC
assisted by adv Jade Aspeling
Cape Town, 21 November 2023