DA vs Speaker of the NA & Others: ConCourt judgment

Madlanga J |
19 March 2016
Majority says limitation of MPs' privilege of free speech by means of an Act of Parliament constitutionally impermissible

CONSTITUTIONAL COURT OF SOUTH AFRICA

Democratic Alliance v The Speaker of the National Assembly and Others

CCT 86/15

Date of hearing: 5 November 2015

Date of judgment: 18 March 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the constitutional validity of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Act). This provision allows the Speaker of the National Assembly (Speaker) or Chairperson of the National Council of Provinces (Chairperson) to direct the "security services" to arrest and remove a "person" creating or taking part in a disturbance within the Parliamentary precinct.

On 12 February 2015, whilst the President was delivering his State of the Nation Address in Parliament, a member of the Economic Freedom Fighters (EFF) enquired when the President was going to pay a portion of the money spent on security upgrades at his Nkandla private residence, in accordance with findings made by the Public Protector. Members of the EFF were dissatisfied with the manner in which the Speaker dealt with the question and they continued to interject.

The Speaker requested that the EFF members leave the Chamber, but this was met with defiance. The Speaker directed police officials to remove the defiant members in terms of section 11 of the Act. When members of the applicant, the Democratic Alliance (DA), learnt that it was police officers that had removed the EFF members, the DA challenged the constitutionality of the action and walked out of Parliament.

The DA filed an application in the Western Cape Division of the High Court, Cape Town (High Court) challenging the constitutional validity of section 11 of the Act on the ground that it was incompatible with members of Parliament's constitutional privilege of free speech and immunity

from arrest. Furthermore, the DA contended that the provision violated the principle of separation of powers by empowering the Speaker or Chairperson to order members of the security forces to arrest members of Parliament during parliamentary proceedings.

The High Court held that section 11 was constitutionally invalid to the extent that it permitted a member to be arrested for conduct that was protected by the immunity against arrest and the privilege protecting free speech entrenched in sections 58(1) and 71(1) of the Constitution. The Court did not rule on whether section 11 violated the principle of separation of powers. It ordered a "notional severance" to bring the provision within constitutional bounds, subjecting section 11 to a condition such that it would no longer permit violations of the immunity against arrest. It suspended the order of invalidity for a period of 12 months to allow Parliament to remedy the defect.

In this Court, the DA sought confirmation of the High Court's order. It also sought leave to appeal against the remedy ordered by the High Court, as well as the Court's decision not to address the separation of powers claim.

The Speaker, together with the Chairperson and the Government of South Africa, sought leave to appeal against the judgment and order of the High Court. They argued that the provision did not infringe members of Parliament's constitutional privileges, but instead prohibited conduct or speech by members which stops, or threatens to stop, parliamentary proceedings. In their view, this type of conduct and speech is not protected by the Constitution. Additionally, they argued that the provision did not offend the doctrine of separation of powers.

The majority judgment by Madlanga J (Moseneke DCJ, Cameron J, Khampepe J, Van der Westhuizen J and Zondo J concurring) took the view that, if the word "person" in section 11 of the Act includes members of Parliament, the section is constitutionally invalid. It then considered the question whether the word does include members. The judgment observed that throughout the Act "person" preponderantly includes members and held that when interpreted both contextually and purposively, "person" included members of Parliament.

Moreover, the judgment found that a consequence of the application of section 11 to members was that members could be deprived of further participation in parliamentary proceedings, thereby limiting their constitutionally guaranteed privilege of free speech in Parliament. The judgment acknowledged that the limitation of members' free speech may be constitutionally permissible as otherwise Parliament might be incapacitated by unruly members. But the limitation of the members' privilege of free speech by means of an Act of Parliament was constitutionally impermissible.

This was so because in terms of the Constitution parliamentary free speech could be subject only to the rules and orders of Parliament. Thus this Court did not confirm the High Court's declaration of constitutional invalidity, but found the omission of the words "other than a member" after the word "person" in section 11 to be inconsistent with the Constitution. The majority judgement rectified the constitutional defect by reading-in these words. Accordingly the majority judgment dismissed both the appeal and cross-appeal and ordered the respondents to pay the applicant's costs, including the costs of two counsel.

The concurring judgment by Nugent AJ agreed with the majority judgment insofar as it emphasised the importance of members' free speech in Parliament and that section 11 of the Act is unconstitutional insofar as it relates to members of Parliament and its committees. Nugent AJ, however, held that "arrest" in section 11 of the Act has a wider meaning to that of the majority judgment. He held that "arrest" is not confined to arrest with the objective of prosecution and that the mere act of seizure or forcible restraint, which is what occurred in this case, for whatever purpose, constituted an arrest, which is constitutionally impermissible.

In a dissenting judgment Jafta J (Nkabinde J concurring) held that the word "person" in section 11 must be interpreted restrictively to exclude members of Parliament. He concluded that if it is so construed, section 11 of the Act is consistent with sections 58(1) and 72(1) of the Constitution. He reached that conclusion on application of the reading-down principle which entails that where it is reasonably possible, a statutory provision must be read in a manner that makes it consistent with the Constitution.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 86/15

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

CHAIRPERSON OF THE NATIONAL

COUNCIL OF PROVINCES Second Respondent

GOVERNMENT OF THE REPUBLIC

OF SOUTH AFRICA Third Respondent

Neutral citation: *Democratic Alliance v Speaker of National Assembly and Others* [2016] ZACC 8

Coram: Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J

Judgments: Madlanga J (majority): [1] to [63]

Nugent AJ (concurring): [64] to [81]

Jafta J (minority): [82] to [134]

Heard on: 5 November 2015

Decided on: 18 March 2016

ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Western Cape Division, Cape Town and applications for leave to appeal against the judgment and order of the High Court:

1. The declaration of constitutional invalidity of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 made by the High Court of South Africa, Western Cape Division, Cape Town is not confirmed.

2. The omission of the words “other than a member” after the word “person” at the beginning of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 is declared to be inconsistent with the Constitution.

3. Section 11 of the Act is to be read as though the words “other than a member” appear after the word “person” at the beginning of the section.

4. The appeal is dismissed.

5. The cross-appeal is dismissed.

6. The respondents must pay the applicant’s costs, including the costs of two counsel.

JUDGMENT

MADLANGA J (Moseneke DCJ, Cameron J, Khampepe J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] A parliamentary system is central to most modern democracies. It is to this system that the first founding provision of our Constitution *inter alia* alludes.[1] By its very nature, Parliament is a body that functions through a deliberative process. Its decisions are the result of that process. Axiomatically, that process can only be meaningful if all members of Parliament are given room freely to make their points and express their opinions. Without freedom of speech in Parliament, products of the parliamentary system would be but a sham. That, in turn, would be pernicious to democracy itself.

[2] Unsurprisingly, members of our Parliament have been afforded freedom of speech. This is provided for in sections 58(1)(a) and 71(1)(a) of the Constitution in respect of the two Houses of Parliament, the National Assembly and National Council of Provinces, respectively. Further, there are cognate immunities; cognate because they flow from the idea of guaranteeing free speech in Parliament. This is plain from the words of Mokgoro J dealing with an analogous situation in *Dikoko v Mokhatla*:

“Immunising the conduct of members from criminal and civil liability during . . . deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.”[2]

What are the immunities? Sections 58(1)(b) and 71(1)(b) immunise members of the National Assembly and National Council of Provinces respectively from civil or criminal proceedings, arrest, imprisonment or damages.[3] Without these immunities, free speech would be severely curtailed.

[3] This freedom is at the centre of these proceedings. The applicant, the Democratic Alliance, which is the largest opposition party in Parliament, is seeking confirmation of an order declaring

section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act[4] (Act) constitutionally invalid.[5] This declaration was made by the High Court of South Africa, Western Cape Division, Cape Town (High Court).[6] The respondents[7] seek leave to appeal against that declaration. The Democratic Alliance is cross-appealing against the remedy and challenges certain findings of the High Court.

[4] The basis for the declaration of constitutional invalidity by the High Court is that section 11 of the Act impermissibly curtails a member's privilege of free speech in Parliament by providing for the arrest of members of Parliament (members) who create or take part in a disturbance.

Brief background

[5] The facts giving rise to this litigation received wide publicity. They relate to the State of the Nation Address delivered by the President of the Republic on 12 February 2015 at a joint session of the two Houses of Parliament. Shortly after the address had commenced, a member of the Economic Freedom Fighters, a political party represented in Parliament, rose to ask a question. The enquiry was when – in accordance with a report by the Public Protector – the President was to repay money spent on certain upgrades to his private residence at Nkandla. On the day, the Speaker of the National Assembly (Speaker) and the Chairperson of the National Council of Provinces (Chairperson) were alternating in presiding over the proceedings.

[6] When the question was raised, the Speaker was in the Chair. Her response was that the President's State of the Nation Address was not the occasion for raising questions of that nature. Dissatisfied with the Speaker's response, other members of the Economic Freedom Fighters rose – one after the other – and interjected. The issues they raised related to the repayment and the President's obligation to answer questions put to him by Parliament. That, despite the Speaker's persistence in her response and repeated requests that they take their seats for the President to continue with his address. Eventually, the Speaker asked members of the Economic Freedom Fighters to leave the parliamentary Chamber. They did not. They were then forcibly removed in terms of section 11 of the Act.

[7] At that point, the parliamentary leader of the Democratic Alliance sought clarity on whether members of the South African Police Service were involved in the removal. After some equivocation, the Chairperson – who was in the Chair at that stage – ultimately confirmed that the police were involved in the removal. The leader of the Democratic Alliance opined that the forced removal was unconstitutional and amounted to a breach of the separation of powers doctrine. Members of the Democratic Alliance then left the Chamber voluntarily.

[8] The Democratic Alliance launched proceedings in the High Court seeking a declarator that section 11 is constitutionally invalid. It asked the Court to read in words that would exclude members of Parliament from the "person" liable to be arrested and removed in terms of section 11. That means section 11 should be made to read as being applicable only to people who are not members of Parliament. In the alternative, the Democratic Alliance sought the excision of the words "arrest" and "security services" from section 11. The effect of this would be that there could be a removal – but not arrest – of members and that removal should be by persons other than members of the security services.[8] In a second alternative, the Democratic Alliance sought notional severance in order to prevent the application of section 11 to any exercise of the parliamentary privilege of freedom of speech. In a further alternative, the Democratic Alliance sought an order declaring that, as a matter of interpretation, section 11 is not applicable to the exercise of parliamentary privilege.

[9] The High Court held that it was reasonable to construe "person" in section 11 to include a member of Parliament. It also concluded that "disturbance", as it appears in the section, was so impermissibly wide as to encompass the robust debate and controversial speech that are

characteristic of parliamentary discourse. It held that this wide definition detracted from the members' parliamentary privilege of free speech. Consequently, it found section 11 to be constitutionally invalid. In order to remedy the defect, it ordered notional severance. It left the text of the provision unaltered but limited its applicability as reflected in the Court order.[9] The Court suspended the order of constitutional invalidity for a period of 12 months to afford Parliament an opportunity to remedy the defect.

[10] This matter raises a number of issues. Does section 11 infringe the privilege of freedom of speech of members of Parliament? What is the reach of "disturbance" as envisaged in section 11? In that regard, what constitutes "interference" and "disruption" in the definition of "disturbance"? Does "person" in section 11 of the Act include a member of Parliament? Does an interpretation that gives an affirmative answer to the last question sit comfortably with the entire context of the Act? Does this interpretation impinge on the parliamentary privilege of free speech guaranteed in sections 58(1) and 71(1) of the Constitution? To what extent and by what means may this privilege be limited? It is well to start by examining the purpose of the privilege of free speech.

Purpose of free speech

[11] South Africa is a constitutional democracy. Hard-won democracy that came at a huge cost to many; a cost that included arrest, detention, torture and – above all − death at the hands of the apartheid regime. The importance of our democracy, therefore, cannot be overstated. It is the duty of all − in particular the three arms of state − jealously to safeguard that democracy. Focussing on Parliament, the pluralistic nature of our parliamentary system[10] must be given true meaning. It must not start and end with the election to Parliament of the various political parties. Each party and each member of Parliament have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making. By its very nature, Parliament is a deliberative body. Debate is key to the performance of its functions. For deliberation to be meaningful, and 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.

[12] Though said in the context of municipalities, I am drawn to the concurring words of Sachs J in *Masondo*:

"The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy."[11]

[13] Free speech becomes ever so important when regard is had to the nature of Parliament's functions. I touch on but two of these many functions.

[14] Parliament makes laws.[12] We can be assured of the best possible legislative outcome only if the parliamentary process admits of: the expression of the views of the smallest party; listening to the opinions of the timorous should they manage to muster courage and find their voice; and being tolerant of the expression of the most unpopular thought that attracts untold opprobrium. The words of Mogoeng CJ are apt:

“Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.”[13]

[15] If all possible contributions may find their way to the legislative process, that better guarantees a refined product. And that makes our democracy all the more meaningful. Yet again the *Masondo* concurrence bears repetition:

“The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, ‘South Africa belongs to all who live in it’.”[14]

[16] Of course, deliberation may not go on forever. If need be, the view of the majority must finally prevail. The quoted concurrence, once more:

“[T]he Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, an appropriate balance has to be established between deliberation and decision.”[15]

[17] Parliament is also entrusted with the onerous task of overseeing the Executive. Tyrannical rule is usually at the hands of the Executive, not least because it exercises control over the police and army, two instruments often used to prop up the tyrant through means like arrest, detention, torture and even execution. Even in a democracy, one cannot discount the temptation of the improper use of state organs to further the interests of some within the Executive. Needless to say, for Parliament properly to exercise its oversight function over the Executive, it must operate in an environment that guarantees members freedom from arrest, detention, prosecution or harassment of whatever nature. Absent this freedom, Parliament may be cowed, with the result that oversight over the Executive may be illusory.

Does “person” in section 11 include a member?

[18] If “person” in section 11 of the Act does not include a member, then the constitutional issue of an infringement – by the section – of the parliamentary privilege of freedom of speech does not arise. The matter must end there; and there cannot be confirmation of the High Court’s declaration of constitutional invalidity. If it does, then I must engage in the confirmation debate. The question is: does it? It does.

[19] Writing for the majority in *Cool Ideas* Majiedt AJ said:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[16] (Footnotes omitted.)

[20] The part of the Act that is applicable to Parliament[17] is replete with references to "person".[18] The question is: what does this word mean in section 11? The Act does not define it. On a close reading, the sections that contain the word preponderantly seem to include a member. This is dictated by the context and what the sections seek to achieve. I deal later with the significance of the fact that largely "person" in the Act includes a member. Without pretending to be exhaustive, let me touch on some of the sections that illustrate this fact.

[21] Section 4 provides:

"(1) Members of the security services may—

(a) enter upon, or remain in, the precincts for the purpose of performing any policing function; or

(b) perform any policing function in the precincts,

only with the permission and under the authority of the Speaker or the Chairperson.

(2) When there is immediate danger to the life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger. Any such action must as soon as possible be reported to the Speaker and the Chairperson."

Plainly, the hurried entry by members of the security services in terms of subsection (2) – without sanction from the Speaker or Chairperson as envisaged in subsection (1) – is meant to avert harm to whomever may be at risk. It should matter not that the person is or is not a member. It would be absurd to suggest otherwise. In short, I read "person" in section 4 to include a member.

[22] Section 8(1) proscribes the improper influence or inducement or compulsion by a person or a member to perform or not to perform her or his functions in a particular manner or even not to attend Parliament.[19] Since a member may commit acts of this nature, I see no reason why the proscription in section 8(1) should not apply to members. Otherwise the section would be rendered less effective. In fact, this interpretation is buttressed by the provisions of section 13. Section 13 provides that a member who contravenes section 8 – not just section 8(2) which refers to a member – is guilty of contempt of Parliament. A member may only contravene section 8 if that section is applicable to her or him. One may be tempted to argue that section 13 may be making reference only to section 8(2) which specifically deals with a member. I put that temptation to rest by referring to the fact that the lawgiver appears to have been quite alive to the need – when the occasion so required – to make reference to and distinguish between subsections. For example, section 13(a) refers to sections 7, 8, 10, 19, 26 and – notably – 21(1).

[23] Section 12(5)(c) provides that—

"[w]hen a House finds a member guilty of contempt, the House may, in addition to any other penalty to which the member may be liable under this Act or any other law, impose any one or more of the following penalties: . . . an order to apologise to Parliament or the House or any person, in a manner determined by the House".

That the apology may even be to an individual is a recognition that – in addition to the impugned conduct being contempt against Parliament – it may have been particularly contemptuous of a specific individual. It is so that the individual may be a non-member. But there is no plausible reason why that individual may not be a member.

[24] A few sections deal with the summonsing and examination and privileges of persons that have to give testimony before Parliament or its committees.[20] Quite easily, evidence in hearings before Parliament and its committees may have to be that of members. I see no reason why "person" in these sections would exclude a member. In fact, that it constitutes contempt of Parliament by a member, without sufficient cause, to fail to attend a hearing in accordance with a summons or remain in attendance until excused,[21] is indication enough that sections 14 to 16 do apply to members.

[25] Section 17(1) and (2) criminalises certain conduct like: failure to obey the prescription of a summons issued by Parliament in terms of section 14; refusal to be sworn in as a witness; failure to answer questions fully and satisfactorily; failure to produce any document required to be produced; threatening, obstructing or assaulting another or depriving another of a benefit to influence testimony; inducing another to refrain from giving evidence or to give false evidence before a House or committee; deception of Parliament through production of a false, untrue, fabricated or falsified document; and wilfully furnishing Parliament with a false or misleading statement or information.[22] Section 17(3) provides that "[s]ubject to section 13(b), subsections (1) and (2) do not apply to a member".[23] The need for this section expressly to exclude a member from its application tells us one thing; the section would otherwise have applied to a member. Indeed, the criminalised conduct is susceptible to commission by members.

[26] One section in which "person" explicitly does not include a member is section 25. It provides:

"(1) A person, *other than a member*, who feels aggrieved by a statement or remark made by a member or a witness in or before a House or committee about that person, may submit a written request to the Secretary to have a response recorded.

(2) The committee referred to in section 12(2) must, subject to the standing rules, consider the request and, if approved, publish the response of the person in the appropriate parliamentary paper." (Emphasis added.)

[27] It is not without significance that "person" in the Act preponderantly includes members. On a proper interpretation, the word does not include a member only in instances where that is quite plain from the context of the provision,[24] or where the provision specifically excludes a member.[25] All this provides a context within which "person" in section 11 must be interpreted in the statute as a whole. That context suggests that in this section the word includes a member. Writing for the majority in *Bertie Van Zyl*, Mokgoro J said:

"The text [of a statutory provision] must be interpreted in the context of the Act as a whole, taking into account whether the preamble and the other relevant provisions in the Act support the envisaged construction."[26] (Footnote omitted.)

In *Hoban* the Supreme Court of Appeal held that "context" does not mean only "parts of a legislative provision which immediately precede and follow the particular passage under examination"; it "includes the entire enactment in which the word or words in contention appear".[27]

[28] Recalling the injunction in *Cool Ideas* to interpret legislation purposively,[28] I read the purpose of section 11 to be to ensure that the business of Parliament is not hamstrung and brought to a standstill by a disturbance.[29] Members are more likely − than non-members − to

cause an unwelcome disturbance in Parliament. It makes sense for "person" in section 11 to include a member. Otherwise the section would be denuded of much of its efficacy. This accords with what Mhlantla AJ articulated in *Kubyana* that "[i]t is well established that statutes must be interpreted with due regard to their purpose and within their context".[30] Put differently, the words of a statute "should be read in the light of the subject-matter with which they are concerned, and . . . it is only when that is done that one can arrive at the true intention of the Legislature".[31]

[29] This interpretation commends itself because grammatically "person" does include a member.[32] Is there anything that militates against that meaning being ascribed to the word? I think not. That meaning does not lead to any absurdity.

[30] On the contrary, there is some incongruity in interpreting "person" in section 11 to exclude a member. First, section 27 creates certain criminal offences. It stipulates:

"(1) A person, including a member, who contravenes section 7 or 8(1) commits an offence and is liable to a fine or to imprisonment for a period not exceeding three years or to both the fine and the imprisonment.

(2) A person, including a member, who contravenes section 19, 21(1) or 26 commits an offence and is liable to a fine or to imprisonment for a period not exceeding 12 months or to both the fine and the imprisonment."

[31] Section 7(e) provides that "[a] person may not . . . while Parliament or a House or committee is meeting, create or take part in any disturbance within the precinct". This is what section 27(1), *inter alia*, criminalises. That means section 7(e) envisages that a member may be guilty of creating or participating in a disturbance. If that were not the case, the offence of creating or taking part in a disturbance contained in section 27(1) would be meaningless in so far as a member is concerned. If the proscription – in section 7(e) – of the creation of or taking part in a disturbance applies to a member, it strikes me as absurd that in section 11 this same proscribed activity should exclude a member.

[32] Second, a similar argument may be made with regard to section 13. In a different context, I referred to this section in paragraph 22 above. What I now want to highlight is a conjoined reading of sections 7 and 13 insofar as that relates to a "disturbance". Properly construed, these two sections mean that a "disturbance" may be committed by a member. Once more, this raises the oddity of the "disturbance" envisaged in section 11 suddenly not including a member.

[33] One basis for interpreting "person" in section 11 to exclude a member that commends itself is a *Hyundai*-inspired interpretation: that is, courts should "prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section".[33] That is the interpretation that my colleague, Jafta J, advances in his judgment (the minority judgment) which I have had the pleasure of reading. But that interpretation is not viable. That is so because of the cumulative effect of: the grammatical meaning of "person"; the context provided by the Act as a whole; the purpose of section 11; and – in particular – the absurdity arising from interpreting "person" in section 11 to exclude a member. After all, *Hyundai* and other judgments that pronounced similarly qualify the need to interpret legislation in conformity with the Constitution.[34] This must be done provided that this interpretation "can be reasonably ascribed to the section"[35] or is not "unduly strained".[36] Reading "person" in section 11 to exclude members would result in precisely the kind of strained interpretation that Langa DP discouraged in *Hyundai*.

[34] The minority judgment also invokes section 39(2) of the Constitution in advancing its preferred interpretation. This section enjoins courts and other adjudicative bodies to interpret

legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. This must mean − as far as possible − legislation must be interpreted so as not to be in conflict with the provisions of the Bill of Rights. It does not mean legislation must be interpreted so as not to be in conflict with any part of the Constitution. My interpretation of section 11 of the Act implicates the right of parliamentary free speech contained in section 58(1) of the Constitution. Section 58(1) is not within the Bill of Rights. The injunction in section 39(2) of the Constitution cannot apply to the interpretation of legislation that − like section 11 of the Act – implicates a constitutional right provided for outside the Bill of Rights. This, of course, is not a departure from the wider principle that legislation must be interpreted in conformity with the Constitution.[37]

[35] To meet the point made in the preceding paragraph, the minority judgment places reliance on two rights in the Bill of Rights. These are freedom of expression[38] and freedom and security of the person.[39] The difficulty with this is that – unlike sections 58(1) and 71(1) which create a privilege and immunities enjoyed only by members of Parliament – these two rights are enjoyed by all. Now, the thrust of the minority judgment is to set members of Parliament apart from non-members. As freedom of expression and freedom and security of the person are enjoyed by everyone, they are not apt tools of interpretation that help set members apart from people in general.

[36] The minority judgment also makes the point that section 27 does not refer to section 11. I agree. What I do not agree with is the conclusion that the minority judgment draws from this. That is: "This . . . suggests that in the eyes of the Act, a contravention of section 11 is not regarded as an offence".[40] The lack of reference – in section 27 – to section 11 is understandable. Section 27 creates offences for conduct that is proscribed elsewhere in the Act. Section 11 does not proscribe any conduct. It cannot be contravened. Rather, it empowers the presiding officer to take certain steps when the proscription in section 7(e) has been contravened. Thus there is nothing in section 11 that section 27 may criminalise.

[37] In sum, I cannot agree with the minority judgment that an interpretation that saves section 11 from constitutional invalidity is open to us.

Limitation of free speech

[38] Surely, the privilege contained in sections 58(1)(a) and 71(1)(a) can never go so far as to give members a licence 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. Section 57 of the Constitution provides that the National Assembly may determine and control internal arrangements, proceedings and procedures and make rules and orders concerning its business.[41] Of this power, Mahomed CJ tells us in *De Lille*:

"There can be no doubt that this authority [contained in section 57(1)] 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. This would for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates."[42]

[39] More pertinently, sections 58(1)(a) and 71(1)(a) of the Constitution make freedom of speech in the two Houses subject to "the rules and orders" envisaged in sections 57 and 70. That must mean rules and orders may – within bounds that do not denude the privilege of its essential content – limit parliamentary free speech. The Democratic Alliance contends that section 11 is not a rule or order of the National Assembly or National Council of Provinces. The argument

continues that the section is constitutionally invalid because – in terms of sections 58(1)(a) and 71(1)(a) of the Constitution – parliamentary free speech is subject to the rules of the National Assembly and National Council of Provinces, and not an Act of Parliament. This raises the question whether an instrument other than rules and orders may be employed to limit free speech. This arises in relation to the impugned section 11 which undoubtedly does limit parliamentary free speech. Before grappling with this question, let me demonstrate that section 11 does indeed limit the privilege and immunities contained in sections 58(1) and 71(1) of the Constitution.

[40] On the interpretation I have given to section 11, the creation of or taking part in a disturbance by a member is a criminal offence. That being the case, the spectre of not only an arrest, but everything that may follow it, is real. I am here talking of being detained in police or prison cells and charged with and possibly convicted of a criminal offence. That may have a chilling effect on robust debate. If so, that does limit free speech. Addressing itself to the suspension of members as a punishment, the Supreme Court of Appeal in *De Lille* had this to say:

"[Freedom of speech in the Assembly] is a crucial guarantee. The threat that a member of the Assembly may be suspended for something said in the Assembly inhibits freedom of expression in the Assembly and must therefore adversely impact on that guarantee."[43]

[41] It follows more strongly that this must be so where the threat is arrest, incarceration, criminal prosecution and possibly more. It was submitted on behalf of Parliament that its interest is not really criminal prosecution. All it wants is to remove the member concerned and leave them "on the pavement"; it is for the prosecuting authorities to decide what to do thereafter, if anything at all. That is cold comfort. The reality is that a criminal offence exists. And section 11 provides that a member may be arrested for it. There is no reason for members not to believe that detention and prosecution may follow. This chilling effect alone constitutes an infringement of parliamentary free speech.

[42] In addition, section 11 directly infringes the immunities from criminal proceedings, arrest and imprisonment enjoyed by members in terms of sections 58(1)(b) and 71(1)(b) of the Constitution. Textually, unlike the privilege of free speech contained in sections 58(1)(a) and 71(1)(a) of the Constitution, these immunities are not subject to the rules and orders of the National Assembly or National Council of Provinces. They are by their nature absolute.

The reach of "disturbance"

[43] As a consequence of the application of section 11, a member – through removal from the Chamber – may be deprived of further participation in the proceedings of Parliament for the duration of her or his removal. That does limit the member's privilege under section 58(1) or 71(1). I do accept that the limitation may well be constitutionally permissible.[44] But then the deprivation of further participation in parliamentary proceedings is pegged on the creation of or taking part in a "disturbance". Section 1 of the Act defines "disturbance" as "any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee".

[44] It cannot be all conduct that annoys and tests the patience of the presiding officer and some in Parliament that amounts to interference or disruption. Robustness, heatedness and standing one's ground inhere in the nature of parliamentary debate. To warrant removal from the Chamber, interference or disruption must go beyond what is the natural consequence of robust debate. Otherwise the very idea of parliamentary free speech may be eroded. In the heat of a debate one must expect that – from time to time – a member's contributions will not come to a screeching, mechanical halt once the presiding officer has ruled that the member desist from further debate on a subject.

[45] Is that the sort of conduct to which section 11 is meant to apply? If it is, then section 11 would also be constitutionally invalid for impermissible overbreadth.[45] Interference and disruption that may be sufficient for the removal of a member must be of a nature that hamstrings and incapacitates Parliament from conducting its business. Even so, there must be no anticipation of resumption of business within a reasonable time. I take the view that interference or disruption that does not meet this threshold is not hit by section 11. This I do based on the *Hyundai* principle.[46]

Permissible means of limiting free speech

[46] I revert to the question raised towards the end of paragraph 10. Is it constitutionally permissible for parliamentary free speech to be limited by means other than rules and orders? The words of Kentridge AJ in *S v Zuma* are instructive:

"[I]t cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination." [47]

[47] The language of sections 58(1)(a) and 71(1)(a) is plain. It makes freedom of speech in the National Assembly and National Council of Provinces subject to the relevant House's rules and orders, and nothing else. Limiting this freedom by means of an Act of Parliament is at variance with this constitutional stipulation. This must be constitutionally impermissible.

[48] The difference in the language of sections 58(1)(a) and 71(1)(a), on the one hand, and 58(2) and 71(2), on the other, warrants close scrutiny. Sections 58(1)(a) and 71(1)(a) make freedom of speech subject to "rules and orders". Sections 58(2) and 71(2) provide that other privileges and immunities may be prescribed by "national legislation". This distinction in language is not idle. It buttresses the conclusion that only rules and orders may limit freedom of speech in Parliament.

[49] A possible argument against this conclusion is that the Act as a whole is meant to provide for "other" privileges and immunities envisaged in sections 58(2) and 71(2); and section 11 of the Act is but an integral part of the parcel of privileges and immunities provided for by the Act. This argument need be stated only to be knocked down. Section 11 serves to limit the very privilege contained in sections 58(1) and 71(1). It does not provide for "other" privileges and immunities as envisaged in sections 58(2) and 71(2); the "other" being a reference to privileges and immunities other than those guaranteed in sections 58(1) and 71(1).

[50] Is the insistence that the limitation can only be by means of rules and orders not an insistence on form over substance? That, because both (a) rules and orders and (b) Acts emanate from Parliament. I think not. When making its rules and orders in terms of section 57 of the Constitution, Parliament acts without the involvement of other arms of state. The same cannot be said of the legislative process. Although the legislative authority of the national sphere of government is vested in Parliament, the Executive plays a not insignificant role in the legislative process. The President assents to Bills.[48] She or he may refer a Bill back to the National Assembly for reconsideration of its constitutionality.[49] The President may refer a Bill to the Constitutional Court for a decision on its constitutionality.[50] In terms of section 85(2)(d) of the Constitution legislation may even be prepared and initiated by the Executive.

[51] Sections 57(1) and 70(1) of the Constitution dictate that the rule and order making power vests in the National Assembly and National Council of Provinces respectively. The process is thus wholly internal. Limiting parliamentary free speech by means of an Act of Parliament would

bring in the participation of an external agency, the Executive. The Executive – a different arm of state – would thus be taking part in a process that sections 57(1) and 70(1) have made the exclusive domain of the Legislature. Also, at a practical level the making of rules by Parliament must certainly be a more streamlined exercise than the cumbersome process of passing legislation.

[52] To sum up, section 11 is constitutionally invalid to the extent that it applies to members of Parliament.

[53] The Democratic Alliance urged that, whatever this Court may hold on the issues discussed above, it must also decide whether section 11 is constitutionally invalid on the ground that it is at variance with the separation of powers doctrine. Having reached the above conclusion, I am not willing to accept this invitation.

[54] I have had the privilege of reading the judgment by my colleague, Nugent AJ (qualified concurrence). Whilst I do not quarrel with the literal and wide meaning the qualified concurrence ascribes to the word “arrest”, I doubt that in section 58(1)(b) “arrest” bears that meaning. I do not think it includes any forcible restraint, even if not for the purpose of prosecution. If that were what it meant, a removal from the Chamber in terms of rules and orders made under sections 57(1)(b) and 70(1)(b) would infringe the immunity from arrest contained in sections 58(1)(b) and 71(1)(b). The upshot of that would be that Parliament would never be able to remove from the Chamber a member causing a disruption. Needless to say, that would negate the power given to Parliament to: “determine and control its internal arrangements, proceedings and procedures” in terms of sections 57(1) and 70(1); and make rules and orders subject to which members would exercise free speech.[51]

[55] The qualified concurrence realises this problem. It concedes – as it must – that its interpretation “does not mean the Speaker is powerless to cause the forcible removal of a member who disrupts the proceedings of the National Assembly”.[52] Its resolution of the problem, with which I disagree, goes:

“The prohibitions in section 58(1)(b) of the Constitution are designed to reinforce the protection afforded by section 58(1)(a) to freedom of speech of members of the National Assembly. Under section 58(1)(a) that freedom may expressly be limited by the Rules and Orders of the House, and by the same token, in my view, the prohibitions in section 58(1)(b) must similarly be taken implicitly to be subject to the same limitation.”[53]

[56] The text of the Constitution is plain. Sections 58(1) and 71(1) do not provide that both free speech and the immunities contained in paragraph (b) of each of the two sections are subject to the rules of the two Houses. Only parliamentary free speech under sections 58(1)(a) and 71(1)(a) is subject to the rules of the two Houses. On the other hand, the immunities in sections 58(1)(b) and 71(1)(b) are absolute. This appears to be crafted with care and deliberateness. Yes, the privilege in sections 58(1)(a) and 71(1)(a) and the immunities in sections 58(1)(b) and 71(1)(b) are interrelated. The immunities exist to enhance the privilege. But − at the same time − the immunities are distinct. The implication drawn by the qualified concurrence that even the immunities may be subject to the rules and orders seems forced and untenable.

[57] I am not engaging in the philosophical question concerning the distinction between being removed for what one says − which is what the immunities are about − and being removed for the effect of what one says in the sense of one’s speech creating a disturbance. The qualified concurrence does not raise that debate; and I need not reach it. Indeed, the debate does not arise on the approach I adopt in invalidating section 11.

[58] I say all this not to reach a definitive decision on the outer reaches of “arrest” as envisaged in sections 58(1)(b) and 71(1)(b). I say it to go no higher than to indicate that the approach adopted in the qualified concurrence is questionable. For two reasons, I do not consider it necessary to decide this issue. First, section 11 − insofar as it relates to members − is constitutionally invalid in its entirety. I do not see the need also to invalidate it on the basis suggested in the qualified concurrence; a basis that appears questionable. Second, the present National Assembly rules do provide for the forcible removal of members.[54] The issue addressed by the qualified concurrence may well arise and have to be determined if the constitutional validity of the relevant part of the rules is challenged.

Relief

[59] The High Court correctly found section 11 to be constitutionally invalid. But the above discussion and conclusion on constitutional invalidity makes it necessary to make a different order. The High Court declared the provision invalid “to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution”. That order is not apposite. The invalidity of section 11 stems from the fact that the section applies to members.

[60] I propose curing the constitutional defect by reading in the words “other than a member” after the word “person”.[55] This ensures that the section does not apply to members of Parliament. Thus formulated, the section continues to apply to non-members and it is constitutionally compliant. This approach is consistent with the principles articulated by this Court in *National Coalition*.[56] When reading in, a court must ensure that the resulting provision “is consistent with the Constitution and its fundamental values and . . . interfere[s] with the laws adopted by the Legislature as little as possible”.[57] The reading-in I propose defines with precision to whom the section will continue to apply.[58] Also, courts must endeavour to be as faithful as possible, within constitutional constraints, to the purpose of legislation.[59] Here, the purpose of section 11 is to prevent disturbances in the precinct. Reading-in will enable Parliament to continue fulfilling this purpose with respect to individuals who are non-members. Insofar as members are concerned, it is within Parliament’s remit to create a constitutionally compliant instrument to address disturbances where they are the culprits.[60]

[61] On the question of whether to suspend the declaration of constitutional invalidity, Parliament’s rules make it possible to deal with errant members effectively, including removing them from the Chamber forcibly.[61] When the order made below takes effect, Parliament will not be left unable to deal with members who cause or take part in disturbances. I do not see a need for a suspension. I repeat that I am not

pronouncing on the constitutional validity of the rules insofar as they permit forcible removals from the Chamber. That is a matter for another day.

Costs

[62] Costs must obviously follow the result.

Order

[63] The following order is made:

1. The declaration of constitutional invalidity of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 made by the High Court of South Africa, Western Cape Division, Cape Town is not confirmed.

2. The omission of the words “other than a member” after the word “person” at the beginning of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 is declared to be inconsistent with the Constitution.

3. Section 11 of the Act is to be read as though the words “other than a member” appear after the word “person” at the beginning of the section.

4. The appeal is dismissed.

5. The cross-appeal is dismissed.

6. The respondents must pay the applicant’s costs, including the costs of two counsel.

NUGENT AJ:

[64] I have read the comprehensive and eloquent judgment of my colleague, Madlanga J, and I am in full agreement with his general observations concerning the importance of free speech in Parliament. I also agree that section 11 of the Act, so far as it purports to apply to members of Parliament and its committees, infringes that

right of free speech and is inconsistent with the Constitution, and I agree with the order he proposes.

[65] I am concerned, however, that his limitation of an “arrest” in section 11 to one directed at prosecution for commission of an offence[62] and his questioning of an extended meaning in sections 58(1) and 71(1) of the Constitution[63] unduly truncates the constitutional prohibition on limiting free speech in National Assembly and the National Council of Provinces. I consider the authorisation in section 11, and the constitutional prohibition, to go wider, and of that the Legislature should be left in no doubt, lest it consider the effect of this Court’s judgment as permitting the section to be resuscitated in different form.

[66] Moreover, on the approach adopted by my colleague, the restraint that was placed on members in the circumstances that gave rise to this case, the restraint occurring not with the objective of prosecution, but for the purpose only of removing them from the National Assembly, was permitted by section 11. I disagree. I support my colleague’s order because I consider legislation that permits physical restraint being placed on members for whatever objective, including mere removal, for what they say[64] in National Assembly or the National Council of Provinces, to offend the Constitution.

[67] That is not to say Parliament does not have the power to deal appropriately with members who create or take part in proscribed disturbances. I say only that it may not be done by legislation. Should it so choose, as no doubt it must, the National Assembly must do so through the rules and orders.

[68] The starting point for the enquiry must be the relevant sections of the Constitution. For ease of reading I reiterate section 58(1):

"(1) 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; and

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said, produced before, or submitted to the Assembly or any of its committees."

The section is replicated, with appropriate modifications, in section 71(1) of the Constitution, in relation to members of the National Council of Provinces.

[69] Section 11 of the Act provides:

"A person who creates or takes part in any disturbance in the precincts while Parliament or a House [the National Assembly or the National Council of Provinces] or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services."

[70] I refer in this judgment to those sections so far as they apply to the National Assembly and the Speaker, they being the font of the present dispute, but my conclusions apply as much to proceedings in the National Council of Provinces, committees of Parliament, and their Chairpersons.

[71] I agree with my colleague and the High Court that a "person" referred to in section 11 includes members of the National Assembly. On that basis the High Court declared the section to be inconsistent with the Constitution and invalid, but only "to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution".

[72] The difference between my colleague and me lies in the differing meanings we give to "arrest" in section 11 of the Act and his questioning of the meaning I give to it in section 58(1)(b) of the Constitution.

[73] I give the word, in both sections, its ordinary meaning, which is not confined to arrest with the objective of prosecution. Its ordinary meaning is no less than "to catch, capture, seize, lay hold upon",[65] according to the Oxford English Dictionary, or to subject a person, or indeed, a thing, to what Black's Law Dictionary defines as "[a] seizure or forcible restraint",[66] or what Stroud's Judicial Dictionary calls the action that occurs "when one is taken and restrained from his liberty".[67] Its ordinary meaning is not constrained by the objective with which the seizure or forcible restraint occurs. The mere act of seizure or forcible restraint, for whatever purpose, constitutes an arrest.

[74] It is because the word has that ordinary meaning that it sits comfortably in various laws authorising seizure or forcible restraint even when not directed at prosecution. It was used, for example, in section 19 of the Supreme Court Act[68] (founded on the common law, which has since been held unconstitutional, rendering the section of no effect),[69] which authorised the seizure of a person for the purpose of confirming civil jurisdiction, or to prevent him or her fleeing the civil jurisdiction of the courts. It is used in section 3(5) of the Admiralty Jurisdiction Regulation

Act[70] to describe the seizure of a vessel for the purpose of commencing a maritime claim. "Arrest" is also used in section 39(1) of the Criminal Procedure Act[71] with that ordinary meaning. It is true that an arrest referred to in that section contemplates prosecution, but that is not because the word has that restricted meaning.[72] It is because the only circumstance in which the "seizure" or "forcible restraint" of a person is authorised by the section is for the purpose of criminal prosecution.[73]

[75] Section 58(1)(b) of the Constitution would be most deficient if it prohibited the arrest of members of Parliament only if the objective was prosecution. As rightly pointed out by my colleague, the prospect of being arrested for criminal prosecution would undoubtedly have a chilling effect on debate. The prospect of being "seized" or "forcibly restrained", with any objective, would be just as chilling. I imagine members would be loath to express their views if they foresaw the prospect of being manhandled or handcuffed.

[76] Indeed, it seems to me that section 11, although capable of encompassing arrest for criminal prosecution, was not enacted with that in mind, but was enacted precisely for the purpose it was used in this case, which was the forcible restraint of the members so as to remove them from the National Assembly. Authority to arrest for criminal prosecution, of both members and the public, is catered for elsewhere, and section 11 is superfluous for that purpose.

[77] As pointed out by my colleague, section 7 of the Act prohibits certain conduct in relation to the proceedings of the National Assembly, which includes creating or taking part in any disturbance within the precincts, and section 27 makes it a criminal offence. Where an offence is committed in his or her presence, or a person is suspected to have committed a Schedule 1 offence (which includes contravention of section 7)[74] a peace officer is authorised by section 40(1)(b) of the Criminal Procedure Act to arrest the person concerned in the ordinary course. Executing that ordinary policing function is permitted by section 4(1) of the Act with the permission and under the authority of the Speaker, and without that permission if there is immediate danger to the life or safety of any person or danger to property.[75] (We are not called upon to decide whether those powers are constitutionally offensive insofar as they may be exercised against members and I do not do so.)

[78] The power to arrest with the objective of detention and prosecution of offenders, once having been provided for in those sections, is superfluous if repeated in section 11, which is why I suggest the section was intended to be directed elsewhere. As I see it, the section is directed instead at what it was used for in this case, which is to seize a person merely so as to remove him or her from the precincts of the National Assembly. That supports the wider meaning I give to the term, and is also supported by the conjunction of "arrest" and "remove", which go hand in hand, because it is not possible forcibly to remove a person without prior seizure or forcible restraint. I suggest the power to "arrest" in section 11 merely expresses in terms what is inherent in forcible removal.

[79] As I see it, the powers conferred by the section, both to "arrest" and to "remove" a member, whether viewed conjunctively or separately, are constitutionally offensive. This is because any forcible restraint being placed upon a member, if only with the objective of removal, is prohibited by section 58(1)(b). That being the case, it is not necessary to consider whether arrest and removal is permitted at the hands of the security forces: arrest and removal of a member by any person is not permitted by legislative authority.

[80] I repeat that does not mean the Speaker is powerless to cause the forcible removal of a member who disrupts the proceedings of the National Assembly. The prohibitions in section

58(1)(b) of the Constitution are designed to reinforce the protection afforded by section 58(1)(a) to freedom of speech of members of the National Assembly. Under section 58(1)(a) that freedom may expressly be limited by the Rules and Orders of the House, and by the same token, in my view, the prohibitions in section 58(1)(b) must similarly be taken implicitly to be subject to the same limitation.

[81] It is on these grounds I support the order proposed by my colleague, Madlanga J.

JAFTA J (Nkabinde J concurring):

[82] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (main judgment). I am unable to agree that the word "person" in section 11 of the Act includes a member of Parliament as defined.[76] In my view the section does not apply to members of Parliament and consequently it is not constitutionally objectionable. Therefore, the declaration of invalidity by the High Court should not be confirmed.

Background facts

[83] The background facts that led to the purported invocation of section 11 are comprehensively set out in the main judgment and there is no need for them to be repeated here, except to the extent necessary for a proper understanding of this judgment.

[84] When members of the Economic Freedom Fighters (EFF) rose, one after the other, in terms of Rule 14(c) of the Joint Rules of Parliament, on a question of privilege, to ask "when the President was going to pay back the money in terms of what the Public Protector has said", the Speaker ruled that the joint session was convened only for the purpose of the State of the Nation Address by the President. Unhappy with this ruling, members of the EFF questioned the legal basis for the ruling and asked which of the rules empowered the Speaker to make the ruling. As proceedings could not move to the address by the President, the Speaker ordered several members of the EFF to leave the Chamber.

[85] In defiance of this order, the relevant members remained in the Chamber. The Speaker asked the Serjeant-at-Arms and the Usher of the Black Rod to remove them. But the affected members resisted. At that juncture, the Speaker asked the Parliamentary Protection Services and the security services to come into the Chamber, purportedly in terms of the Act and to remove the recalcitrant members of the EFF. The security forces that came in comprised police officers.

[86] The leader of the Democratic Alliance (DA), having confirmed from the Speaker that the police were called into the Chamber to remove members of Parliament, led members of his party out of the Chamber. By its action, the DA was protesting the invitation of police into the Chamber to remove members of Parliament. In the view of the DA, the decision by the Speaker amounted to a breach of the Constitution and the principle of separation of powers. After the departure of the DA's representatives, the President proceeded to deliver his address.

[87] Shortly thereafter, the DA launched these proceedings on an urgent basis in the High Court. It cited the Speaker, the Chairperson of the National Council of Provinces and the Government of the Republic of South Africa, as respondents. The main relief sought was a declarator to the effect that section 11 of the Act does not apply to members of Parliament and the Speaker or the Chairperson may not invoke the section to ask security forces to remove members of Parliament from the Chamber during sessions of Parliament. In the event that the Court held that section 11 applied to members of Parliament, the DA claimed as an alternative remedy, a declaration that the section was inconsistent with the Constitution and invalid.

[88] Although the respondents opposed the relief claimed, they did not file affidavits. Instead they lodged a notice setting out the legal points they wished to raise at the hearing.[77] Three points were advanced but only two are relevant for present purposes. These were that properly construed, the word "person" in section 11 includes a member of Parliament and as a result the section applies to members. The other point was that section 11 is not inconsistent with the Constitution.

[89] In support of the alternative claim for constitutional invalidity, the DA contended that section 11 was not only inconsistent with the principle of separation of powers but was also not in line with section 199 of the Constitution. Section 199(7) protects political parties from prejudice by members of the security services.[78]

[90] Section 58(1)(b) provides:

"(1) Cabinet members, Deputy Ministers and members of the National Assembly—

. . .

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees."

[91] In identical terms, section 71(1)(b) insulates members of the National Council of Provinces from arrest, imprisonment and liability in civil or criminal proceedings, arising from what they said or did in the Council as members. This protection extends to what may have been "revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees".

High Court conclusions

[92] The High Court was asked first to interpret section 11 and determine if the word "person" in it covered members of Parliament. If it did not, then the main claim would succeed and the alternative constitutional challenge would fall away. Having outlined the legal framework, the High Court proceeded to set out the principles of interpretation used in construing the relevant provision.[79] It commenced with reference to a decision of this Court in *Hyundai Motor Distributors*[80] from which the following principles were drawn. The first is that the Constitution requires judicial officers to read legislation in ways that give effect to fundamental values. The second is that courts are under a duty, when the constitutionality of legislation is in issue, to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution. Therefore, it is imperative, continued the High Court, where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, that it should be preserved. Only if this is not possible, the Court concluded, should resort be had to the remedy of reading in or notional severance.

[93] The High Court also cited the decision of the Supreme Court of Appeal in *Endumeni Municipality*.[81] This case reaffirmed the common law principles applied to interpretation of legislation and written documents. These principles stress the primacy of the language employed in the provision to be interpreted and that Judges should guard against "the temptation to substitute what they regard as reasonable, sensible or business-like for the words

actually used". Substitution of words used is regarded as constituting an impermissible intrusion into the domain of law-making.

[94] While all these principles were relevant to the interpretation exercise undertaken by the High Court, it was in the application of some and the omission of others that the High Court fell in error. This was because the High Court proceeded from the wrong premise. That Court characterised the interpretation question thus:

"Applying these stated principles and approach to the provisions of section 11, the question now is whether the reference to 'a person' is reasonably capable of including 'a member' and, if so, whether such meaning *is* congruent with sections 58(1) and 71(1) of the Constitution and the doctrine of the separation of powers."[82] (Emphasis added.)

[95] This characterisation of the issue reveals the misapplication of the principles taken from *Hyundai Motor Distributors*. As a result, a wrong question was asked. The question was not whether the word "person" is reasonably capable of including members of Parliament. The answer to the question posed by the High Court would unavoidably lead to striking down the provision. And as a result that Court came to this conclusion:

"Taking into account the ordinary rules of grammar and the syntax in which the particular wording of section 11 is expressed, it is indeed reasonably possible to construe the reference to 'a person' in the provision to include a 'member'. It is not difficult to imagine a situation where a member may create or cause a disturbance of such gravity that it undermines the authority or dignity of Parliament as a whole. In those instances common sense dictates that the Presiding Officer must be in a position to take decisive action as an orderly measure to protect the dignity of Parliament from obstruction, disruption and disturbances."[83]

[96] Owing to its incorrect characterisation of the issue, the High Court proceeded straight to declaring section 11 unconstitutional. In doing so, it failed to follow the principles enunciated in *Hyundai Motor Distributors*. The first of which is the duty to read a legislative provision "through the prism of the Bill of Rights" and give effect to its values. Consistent with this principle is the rule that where the validity of legislation is challenged, having examined the objects and purport of the Act, the Court must read its provisions, so far as is possible, in conformity with the Constitution. However, the reach of the latter principle is limited to the extent that the language of the provision under interpretation is reasonably capable of the alternative confirmation.

[97] Since the High Court was asked to determine whether section 11 applied to members of Parliament and so declare, the right issue which the High Court had to determine was whether the word "person" is reasonably capable of a meaning that excludes members of Parliament. If it did and that construction fell within constitutional bounds, then the High Court should have preferred the narrow meaning, regardless of whether the wider scope of section 11 was intended. For as long as the language of a provision is reasonably capable of the alternative meaning, the principle finds application. In *Hyundai Motor Distributors* Langa DP formulated the principle in these terms:

"There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[84]

[98] It is only if reading the provision under construction in conformity with the Constitution is not reasonably possible, that a court must declare it invalid. The High Court failed to do this. Instead once it found that "person" is reasonably capable of including a member of Parliament, the High Court adopted that construction and held that section 11 was inconsistent with the Constitution.

Is section 11 invalid?

[99] At the outset I accept that the word “person” may reasonably be construed to include a member of Parliament. In its ordinary sense “person” refers to human beings and members of Parliament belong to the human species. While the word “person” has a broader meaning, the Act distinguishes between members of Parliament and other persons, for example staff members and members of the public. A staff member is defined as the Secretary to Parliament or “any other person employed or contracted by Parliament, whether in a permanent or temporary capacity”. Therefore, although the Act regards employees of Parliament as persons, they are not taken as members of Parliament.

[100] This is so because the Act defines a member of Parliament differently. With regard to the National Assembly “member” means a member of the Assembly and includes a Minister or Deputy Minister who is not such a member. As contemplated in the Act the word “member” includes Ministers and Deputy Ministers who are not in truth members of the Assembly. This is because the President may appoint to Cabinet persons who are not members of the Assembly. In the eyes of the Act, Ministers who are not elected to the Assembly become members of Parliament by virtue of their appointment to Cabinet.

[101] With regard to the National Council of Provinces, “member” means a permanent delegate or a special delegate to the Council while acting as a delegate. The word also includes the Deputy President, a Minister and a Deputy Minister. What is apparent from this definition is that the Act does not consider other persons, including members of the public as members of Parliament.

[102] A close reading of the Act also reveals that its purpose is to define and declare powers, privileges and immunities of members of Parliament and provincial legislatures, together with those of the institutions they serve. It is in this context that section 3 places the control of Parliament in the Speaker and the Chairperson.[85] Consistent with this, section 4 proclaims that members of security services, including the police and army, may enter Parliament and perform policing functions only with the permission and under the authority of the Speaker or the Chairperson. This means that when the police investigate crime within the precinct of Parliament or seek to arrest a suspect, they may only do so with the permission of the Speaker and the Chairperson. And while they perform their duties in Parliament, the police fall under the authority of the Speaker or the Chairperson.

[103] Although the word “person” is not defined in the Act and ordinarily it should be assigned its grammatical and ordinary meaning, the sense in which it is used in section 11 will be revealed by context which must be gathered not only from section 11 but also from the Act, as a whole. Section 11 provides:

“A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services.”

[104] Plainly the section authorises an arrest and removal, from the precinct of Parliament, of a person who creates or takes part in a disturbance while Parliament or one of its committees is meeting. The arrest and removal may be effected by a staff member or a member of the security services. That arrest and removal must be authorised by the Speaker or the Chairperson or a person designated by them. What is immediately apparent from the reading of section 11 is that the word “person” is used twice. In the first place, it is used in the context of an arrestee, that is the person to be arrested. In the second, it is used in the sense of the person who authorises the arrest. This demonstrates that the word is used in different senses.

[105] Crucial though to the relief sought in the High Court was the meaning of person in the first sense, that is the one to be arrested and removed. In that forum the DA contended that "person" did not include members of Parliament. Therefore what we need to determine is whether in the relevant sense, "person" as it appears in section 11 does not include members of Parliament. Happily in this process, we are guided by established principles of interpretation. Some of these principles are based in the Constitution as stated in *Hyundai Motor Distributors* and others in the common law.

Applicable principles

[106] I prefer to start with the common law. At common law there is a well-known principle to the effect that the legislature is presumed to use language consistently. Where the same word appears in different parts of the statute, it is taken to have been used in the same sense unless there is a clear indication to the contrary. This principle was affirmed by this Court.[86]
In *Hoërskool Ermelo* Moseneke DCJ stated:

"[P]recepts of statutory interpretation suggest that the word 'function' should have the same meaning whereas it occurs in the statute, since there is a 'reasonable supposition, if not a presumption' that 'the same words in the same statute bear the same meaning; throughout the statute.'"[87] (Footnote omitted.)

[107] The first section that uses "person" more than once like section 11 is section 5 of the Act. It reads:

"A person may not within the precincts—

(a) execute or serve or tender for service any summons, subpoena or other process issued by a court; or

(b) except as authorised by section 4 or 11, arrest another person, without the express permission of, or in accordance with the directives of, the Speaker or the Chairperson or a person authorised by the Speaker or the Chairperson."

[108] It is apparent that the word is used in three senses in this section. The first being the context of someone who executes or serves a summons or other process issued by a court. In that sense the word "person" cannot be read as including members of Parliament because these members do not have the power to execute or serve a court process.[88] In the second context, the word is used with reference to the person on whom the process is served or who is subject to arrest. In this context the word may reasonably include a member of Parliament on whom process is served. There is a clear indication that "person" in section 5 does not bear the same meaning. The presumption that the word bears the same meaning is rebutted because here we know that in some sections "person" is used in different senses.

[109] In the third context the word is used to denote someone authorised by the Speaker or the Chairperson to grant permission to the sheriff or police officer to serve process within the precincts of Parliament. Again it appears that in this context the word may reasonably be taken to include staff members and members of Parliament. After all, the Speaker and the Chairperson are members of Parliament.

[110] On the same approach one finds that in section 11, "person" is used in different contexts which signify an indication that the word does not bear the same meaning. In the second context, it is used to refer to someone on whom the power to issue an arrest order is delegated by the Speaker or the Chairperson. Here too that someone may be a staff member or member of Parliament. Whereas in the first context, the word is used to refer to someone who creates or

participates in a disturbance while Parliament is meeting. In that context, members of Parliament are expected to be part of the meeting which section 11 seeks to protect.

[111] Section 11 is located in Chapter 3 of the Act and the title of this Chapter expressly refers to the protection of members and Parliament.[89] Reading the word "person" in the first part of section 11 as including members, defeats the objective of protecting members of Parliament. That construction may achieve institutional protection of Parliament but it does not safeguard members of Parliament. Whereas the interpretation that reads "person" as excluding members of Parliament advances the objective of protecting the institution and its members. Therefore I disagree with the main judgment that such reading is not viable.[90]

[112] Consistent with the purpose of protecting Parliament and its members, which Chapter 3 seeks to achieve, in creating offences section 27 makes it plain that a contravention of sections 7 and 8(1) by a person, including a member, amounts to an offence. If "person" as appearing in those sections included members, section 27 could not have used the phrase "a person, including a member". The words "including a member" were deliberately chosen to signify that members too would be committing an offence if they contravene those two sections. Accordingly, the protection that Chapter 3 affords members of Parliament does not extend to situations where a member commits a crime. The purpose of the protection is to safeguard members in the performance of their legitimate functions.

[113] Significantly, section 11 does not only authorise the removal from the Chamber or House where the disturbance occurred but from the precincts. The precincts of Parliament are defined widely to cover all land and every building under Parliament's control. This includes the forecourt, yard and gardens.[91] If "person" were to be construed as including members, it would mean that the member so removed would not be entitled to go to her office within the precincts. This would be absurd because she would have been removed from the venue where the disturbance occurred and barring her from her office and other facilities would not be consistent with the purpose of section 11. Yet the person empowered to arrest and remove would be entitled to take her out of the precincts.

[114] Of course, I also agree with the main judgment that on the opposite side of the scale, there is an indication that "person" may have been used to include members.[92] In relevant part, section 25 reads "a person, other than a member. . . ." While this may be taken as an indication that Parliament wanted to be explicit that in section 25 "person" excluded members, it does not follow that that was the purpose of the quoted words. The heading of section 25 dispels the notion. It shows that the purpose of the section is to protect members of the public. It reads: "Protection of members of public". This sufficiently shows that the section deals with the protection of the public.

[115] It seems to me that the words "other than a member" in section 25(1) were used in contra-distinction to the word "person" in section 25(2). In the latter section "person" clearly includes a member of Parliament. According to the structure of section 25, a non-member who is aggrieved by what was said in Parliament may request a recorded response. The recorded response of the person who made the offending statement or remark may be published in the appropriate parliamentary paper. It is apparent from section 25(1) that the offending remark may be made by a member or non-member.[93] But a member who is aggrieved by a remark made by another member cannot make the request envisaged in section 25 because that provision protects the public only.

[116] The common thread that emerges from sections 5, 11 and 25 of the Act is that within each the word "person" is used in two different meanings. One meaning includes members and the other excludes them.

[117] Notably, in creating offences section 27 makes no reference to section 11. This omission suggests that in the eyes of the Act, a contravention of section 11 is not regarded as an offence. It follows that there can be no objection to protecting and immunising members of Parliament from arrest and removal envisaged in section 11. If a member of Parliament conducts himself in a manner that breaches section 11, he may be dealt with in terms of Rules of Parliament. Rule 14 empowers the Speaker to order that a member should leave the Chamber. The fact that a member may defy the Speaker's order does not justify the interpretation that the power of arrest and removal in section 11 applies to members of Parliament.

[118] If the rules of Parliament do not empower the Speaker or the Chairperson to call Parliamentary Protection Services to remove a defiant member of Parliament, then there is inadequacy in the rules that must be cured. After all, the discipline of members of Parliament is maintained through the rules. That is why section 58(1) and 71(1) of the Constitution proclaim that freedom of speech in the Assembly and the Council is subject to their rules and orders. We must accept that when Parliament enacted the Act, it was alert to these constitutional provisions and that it did not seek to pass unconstitutional legislation by purporting to use this Act instead of the rules to curtail the rights of members to freedom of speech.

[119] Thus in *De Lille*,[94] Mahomed CJ pronounced that:

"Not only is the right to freedom of speech in the Assembly expressly constitutionalised in section 58(1)(a) (subject to its rules and orders), but the 'Rules and orders' which the Assembly makes to control its 'internal arrangements, proceedings and procedures' must, in terms of section 57(1)(b), have 'due regard to representation and participatory democracy'."

[120] With regard to the Assembly's power to discipline its members, Mahomed CJ stated:

"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. This would, for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates."[95] (Footnote omitted.)

[121] I agree that the Assembly and Council have the power to exclude, for limited periods, disruptive members who obstruct or unreasonably impair their proceedings. I also agree with the main judgment that the exercise of that power must be located in the rules of the Assembly or the Council. Accordingly, an interpretation that excludes members of Parliament from the application of section 11 does not leave a vacuum which cannot be filled by the rules.

[122] In accordance with constitutional principles, section 11 must not only be interpreted purposively to achieve the dual objective of protecting Parliament and its members, by affording members privileges and immunities, but also in a manner that promotes the members' rights to freedom of speech. As it was observed by this Court in *SATAWU*,[96] legislation that limits or intrudes upon fundamental rights must be interpreted in a manner least restrictive of those rights if the text is reasonably capable of bearing that meaning.

[123] The constitutional principle is triggered by the limitation of the rights to freedom of speech and the freedom and security of the person which the impugned provision imposes. The arrest and removal of members from parliamentary precincts infringes their rights to freedom and security of the person. But the arrest is also in conflict with section 58(1)(b). While the same conduct constitutes a breach of the members' rights to freedom of speech, it is also inconsistent with the privilege afforded to members by section 58(1)(a). The fact that section 58 confers

privileges on members does not mean that their rights contained in sections 12 and 16 of the Bill of Rights cease to exist when they are in parliamentary precincts which include not only the house chambers but also open spaces and gardens.

[124] Instead what this constitutional principle means is that a statutory provision, which on the face of it limits the rights in the Bill of Rights must be read through the lens of the Bill of Rights. This principle is activated independently of the case pleaded in a particular matter. The fact that a constitutional challenge is not, as is the position here based on a clause in the Bill of Rights, does not affect the application of the principle. That both sections 58(1) and 71(1), on which the challenge relied, afford members of Parliament privileges and immunities, as opposed to rights, is not in dispute.

[125] The interpretation of section 11 that was preferred by the High Court conforms to the common law principle that says words used in a statute must be accorded their ordinary meaning and that one may depart from this rule only if the ordinary meaning leads to an absurdity or injustice that was not intended by the law-maker. The Constitution has changed all this. It empowers the courts to depart from the ordinary meaning even if it does not lead to an absurdity. The Constitution, in requiring that legislation be read in conformity with it, authorises courts to read legislation restrictively if doing so would bring an overbroad provision within the bounds of the Constitution.

[126] This is known as the reading-down of legislation. This technique is usually applied to overbroad provisions. In *National Coalition*, this Court said:

"There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional invalidity, such a construction should be preferred to another construction which, although reasonable, would give rise to such inconsistency."[97] (Footnote omitted.)

It applies even to cases where, like in the present, the validity of a statutory provision is tested against a clause in the Constitution but outside the Bill of Rights.

[127] There can be little doubt that "person" as used in the relevant part of section 11, is reasonably capable of a wider and a narrower meaning. The wider meaning would include members of Parliament and this meaning gives rise to constitutional inconsistency. Whereas the narrower meaning which excludes members of Parliament does not. According to the principle of constitutional interpretation, the narrower meaning must be preferred over the wider one, even though both of them are reasonably possible meanings of the word. This principle is called reading-down and it is not restricted to cases where a provision under interpretation is inconsistent with a clause in the Bill of Rights.

[128] The reading-down principle was applied by the Supreme Court of Appeal in *Govender*.[98] In that case the Court had to construe a statutory provision which authorised the use of force to overcome resistance or prevent a suspect from fleeing. The relevant provision empowered a person authorised to effect an arrest to "use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing", in order to carry out the arrest. Notably, in this provision too, the word "person" is used twice and in different contexts, namely the arrestor and the arrestee.[99]

[129] Applying section 39(2) of the Constitution and following *Hyundai Motor Distributors*, the Supreme Court of Appeal in *Govender* departed from its previous decisions in which the predecessor of section 49(1) accorded a liberal meaning.[100] According to that literal meaning, police could use deadly force to effect an arrest, regardless of whether the force was proportional

to the threat posed by the suspect's resistance. They were only required in terms of that meaning to show that the force used was necessary to effect an arrest.

[130] Interpreting section 49(1) in a manner that promotes the suspect's rights like the right to life, the right to physical integrity, the right to dignity and the right to equality before the law and equal protection of the law, in *Govender* the Court held:

"The words '. . .use such force as may in the circumstances be reasonably necessary . . . to prevent the person concerned from fleeing . . .' in section 49(1)(b) of the Act must therefore generally speaking (there may be exceptions) be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorised to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing:

1. that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or

2. that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm."

[131] What emerges from this interpretation of section 49(1) is that the reach of the provision was reduced from the use of any force reasonably necessary to overcome resistance or prevent flight, by excluding the use of firearms or similar weapons, except where one of the two conditions is present. This reading-down approach was endorsed by this Court in *S v Walters*.[101] Needless to stress that the reading-down in *Govender* preserved section 49(1) by bringing it within the constitutional bounds.

[132] Since the inclusive reading of section 11 limits the members' right to free speech and as a result is inconsistent with the Constitution, section 39(2) of the Constitution obliges us to prefer the narrow meaning that removes the inconsistency and preserves the section. I can think of no grounds that exclude the applicability of section 39(2) to this matter. The peremptory obligation flowing from section 39(2) was affirmed in these terms in *Phumelela Gaming*:

"A court is required to promote the spirit, purport and objects of the Bill of Rights when 'interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."[102] (Footnotes omitted.)

[133] The question that arises here is whether, on the narrow interpretation, section 11 would still achieve its purpose. The apparent object of section 11 is to protect the proceedings of Parliament from disturbances. It seems to me, that on the narrow construction, the section would still achieve its object, except with regard to a disturbance caused by members of Parliament. But since the Constitution guarantees these members certain privileges that can be limited only by the rules and orders of Parliament, the section could not competently protect proceedings against disruption by members. Any disruptive conduct by members of Parliament must be addressed in a constitutionally permissible manner, in the rules and orders.

[134] I conclude that, properly constructed, section 11 is constitutionally compliant. It follows that I cannot confirm the declaration of invalidity made by the High Court. Instead I would have declared that to the extent that the section authorises the arrest and removal of persons, it does not apply to the members of Parliament.

For the Applicant:

For the Respondents:

S P Rosenberg SC and M J Bishop instructed by Minde Shapiro Smith Inc

J J Gauntlett SC and K Pillay instructed by the State Attorney

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[1] The founding provisions of the Constitution are sections 1-6. Section 1(d) provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

. . .

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

In the text I use "*inter alia*" because this section also alludes to other elected bodies, namely the Provincial Legislatures and Municipal Councils.

[2] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at para 39. This was in the context of municipalities. But it is of relevance to Parliament. This part of the judgment received the unanimous support of this Court. See also *Swartbooi and Others v Brink and Others* [2003] ZACC 25; 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC) (*Swartbooi*) at para 20; and *Speaker of the National Assembly v De Lille and Another* [1999] ZASCA 50; 1999 (4) SA 863 (SCA) (*De Lille*) at para 20.

[3] Section 58(1) provides:

"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; and

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees."

In the case of the National Council of Provinces, section 71(1) provides for the freedom similarly.

[4] 4 of 2004.

[5] Section 11 provides:

"A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services."

In terms of section 2(1) of the Act:

"[t]he precincts of Parliament is the area of land and every building or part of a building under Parliament's control, including—

(a) the chambers in which the proceedings of the Houses are conducted and the galleries and lobbies of the chambers;

(b) every part of the buildings in which the chambers are situated, and every forecourt, yard, garden, enclosure or open space appurtenant thereto;

(c) committee rooms and other meeting places provided or used primarily for Parliament's purposes; and

(d) every other building or part of a building provided or used in connection with the proceedings of Parliament, while so used."

[6] *Democratic Alliance v Speaker of the National Assembly and Others* [2015] ZAWCHC 60; 2015 (4) SA 351 (WCC) (High Court judgment) at para 48. The High Court ordered:

"1. The application succeeds with costs.

2. Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 is declared inconsistent with the Constitution and invalid 'to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution'.

3. The order in paragraph 2 is suspended for a period of 12 months in order for Parliament to remedy the defect.

4. The orders in paragraphs 2 and 3 above are referred, in terms of section 15(1)(a) of the Superior Courts Act 10 of 2013, to the Constitutional Court for confirmation.

5. The respondents are to pay the costs occasioned by the employment of two counsel, jointly and severally, the one to pay the other to be absolved."

[7] The Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Government of the Republic of South Africa.

[8] In terms of section 199(1) of the Constitution, security services comprise “a single defence force, a single police service and any intelligence services established in terms of the Constitution”.

[9] See above n 6.

[10] Above n 1.

[11] *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) (*Masondo*) at para 42.

[12] Section 43(a) of the Constitution provides that “[i]n the Republic, the legislative authority . . . of the national sphere of government is vested in Parliament”.

[13] *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at para 43.

[14] *Masondo* above n 11 at para 43.

[15] Id.

[16] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

[17] Sections 1-27. From section 28, the Act deals with Provincial Legislatures.

[18] Examples of sections that contain “person” are 4-5, 7-8, 11-2, 14-9, 21-2 and 24-7.

[19] Section 8(1) stipulates:

“A person may not by fraud, intimidation, force, insult or threat of any kind, or by the offer or promise of any inducement or benefit of any kind, or by any other improper means—

(a) influence a member in the performance of the member’s functions as a member;

(b) induce a member to be absent from Parliament or a House or committee; or

(c) attempt to compel a member to declare himself or herself in favour of or against anything pending before or proposed or expected to be submitted to Parliament or a House or committee.”

[20] Sections 14-6.

[21] This is in terms of section 13(b) read with section 17(1)(b).

[22] Section 17(1) and (2) provides:

“(1) A person who—

(a) has been duly summonsed in terms of section 14 and who fails, without sufficient cause—

(i) to attend at the time and place specified in the summons; or

(ii) to remain in attendance until excused from further attendance by the person presiding at the enquiry;

(b) when called upon under section 15(a), refuses to be sworn in or to make an affirmation as a witness; or

(c) fails, without sufficient cause—

(i) to answer fully and satisfactorily all questions lawfully put to him or her under section 15(b); or

(ii) to produce any document in his or her possession or custody or under his or her control which he or she has been required to produce under section 15(b),

commits an offence and is liable to a fine or to imprisonment for a period not exceeding 12 months or to both the fine and the imprisonment.

(2) A person who—

(a) threatens or obstructs another person in respect of evidence to be given before a House or committee;

(b) induces another person—

(i) to refrain from giving evidence to or producing a document before a House or committee; or

(ii) to give false evidence before a House or committee;

(c) assaults or penalises or threatens another person, or deprives that person of any benefit, on account of the giving or proposed giving of evidence before a House or committee;

(d) with intent to deceive a House or committee, produces to the House or committee any false, untrue, fabricated or falsified document; or

(e) whether or not during examination under section 15, wilfully furnishes a House or committee with information, or makes a statement before it, which is false or misleading,

commits an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both the fine and imprisonment."

[23] Section 13(b) provides:

"A member is guilty of contempt of Parliament if the member—

. . .

(b) commits an act mentioned in section 17(1)(a), (b) or (c) or (2)(a), (b), (c), (d) or (e)."

[24] An example is section 5, which provides:

"A person may not within the precincts—

(a) execute or serve or tender for service any summons, subpoena or other process issued by a court; or

(b) except as authorised by section 4 or 11, arrest another person,

without the express permission of, or in accordance with the directives of, the Speaker or the Chairperson or a person authorised by the Speaker or the Chairperson."

The first mentioned person is not a member, or would not be acting as a member in performing the functions referred to in (a) and (b) of the section.

[25] An example is section 25(1), which entitles a person "other than a member" who feels aggrieved by a statement or remark made by a member or a witness in or before a House or committee about that person to submit a written request to the Secretary to have a response recorded.

[26] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 32.

[27] *Hoban v ABSA Bank Ltd t/a United Bank and Others* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at para 20.

[28] *Cool Ideas* above n 16.

[29] I deal later with the nature of disturbance the section is addressing.

[30] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18.

[31] *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E. This case was quoted with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90, which – in turn – was approvingly quoted in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 52.

[32] Compare *Cool Ideas* above n 16 on the principle that words must be given their ordinary grammatical meaning unless that would lead to an absurdity.

[33] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 23.

[34] See also *Richter v Minister of Home Affairs and Others* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) at paras 62-3; *S v Singo* [2002] ZACC 10; 2002 (4) SA 858 (CC); 2002 (8) BCLR 793 (CC) at para 15; and *Mistry v Interim Medical and Dental Council and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 32.

[35] *Hyundai* above n 33.

[36] Id at para 24.

[37] See *Hyundai* above n 33, and *Cool Ideas* above n 16.

[38] Section 16(1) of the Constitution provides:

“Everyone has the right to freedom of expression, which includes—

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.”

[39] Section 12(1) of the Constitution provides:

“Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

[40] The minority judgment at [117].

[41] Section 57 provides:

“(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.”

The equivalent constitutional provision applicable to the National Council of Provinces is section 70.

[42] *De Lille* above n 2 at para 16.

[43] *De Lille* above n 2 at para 20.

[44] Above [38].

[45] Compare *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 118.

[46] *Hyundai* above n 33.

[47] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 17-8.

[48] Section 84(2)(a) of the Constitution.

[49] Section 84(2)(b) of the Constitution.

[50] Section 84(2)(c) of the Constitution.

[51] In respect of the National Assembly the relevant section is 58(1)(a) read with section 57(1)(b); and in respect of the National Council of Provinces it is section 71(1)(a) read with section 70(1)(b).

[52] Qualified concurrence at [80].

[53] Id.

[54] Rule 51 provides:

"If the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules, or that a member is in contempt of or is disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, he or she may order the member to withdraw immediately from the Chamber for the remainder of the day's sitting."

Rule 53A reads:

"(1) If a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of Rule 51, the presiding officer must instruct the Serjeant-at-Arms to remove the member from the Chamber and the precincts of Parliament forthwith.

(2) If the Serjeant-at-Arms is unable in person to effect the removal of the member, the presiding officer may call upon the Parliamentary Protection Services to assist in removing the member from the Chamber and the precincts of Parliament.

. . .

(10) If a member(s) offers resistance to being removed from the precincts [by the Serjeant-at-Arms or Parliamentary Protection Services], members of the security services may be called upon to assist with such removal."

[55] Indicating the insertion with italics, the section will then read:

"A person *other than a member* who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services."

[56] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*).

[57] Id at para 74.

[58] Compare id at para 75.

[59] Compare id where – instead of purpose – reference is made to the legislative scheme.

[60] In n 54 above, this judgment refers to rules 51 and 53A which enable Parliament to deal with errant members. I should not be understood to be pronouncing on the constitutional validity of these rules.

[61] Id.

[62] [40] - [41] of the main judgment.

[63] [54] of the main judgment.

[64] I include conduct that constitutes forms of expression other than speech.

[65] *The Oxford English Dictionary* 2 ed (Clarendon Press, Oxford, 1989) vol 1 at 648.

[66] *Black's Law Dictionary* 8 ed (West Group, 2004) at 116.

[67] *Stroud's Judicial Dictionary of Words and Phrases* 8 ed (Sweet & Maxwell, London, 2012) vol 1 at 201.

[68] 59 of 1959.

[69] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* [2007] ZASCA 144; 2008 (3) SA 355 (SCA) at para 59.

[70] 105 of 1983.

[71] 51 of 1977.

[72] The section extends the ordinary meaning of arrest by providing that an arrest is effected, if the person does not submit to custody, merely by touching his or her body.

[73] See, for example, *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 820 B-D; and *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (AD) at 17A-H, in relation to Act 31 of 1917, a predecessor of Act 51 of 1977.

[74] Contravening section 7 of the Act, which carries a potential penalty up to three years' imprisonment without the option of a fine, is a Schedule 1 offence.

[75] Section 4 provides:

"(1) Members of the security services may—

(a) enter upon, or remain in, the precincts for the purpose of performing policing function; or

(b) perform any policing function in the precincts, only with the permission and under the authority of the Speaker or the Chairperson.

(2) When there is immediate danger to the life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger. Any such action must as soon as possible be reported to the Speaker and the Chairperson."

[76] Above n 4.

[77] Rule 6(5) of the Uniform Rules of the High Court permits this course.

[78] Section 199(7) provides:

"Neither the security services, nor any of their members, may, in the performance of their functions—

(a) prejudice a political party interest that is legitimate in terms of the Constitution; or

(b) further, in a partisan manner, any interest of a political party."

[79] High Court judgment above n 6 at paras 20-4.

[80] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai Motor Distributors*).

[81] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

[82] High Court judgment above n 6 at para 22.

[83] Id at para 30.

[84] Above n 80 at para 24.

[85] Section 3 provides:

"The Speaker and the Chairperson, subject to this Act, the standing rules and resolutions of the Houses, exercise joint control and authority over the precincts on behalf of Parliament."

[86] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*).

[87] Id at para 70.

[88] A court process is usually served by a sheriff or a police officer.

[89] The Chapter is titled: “Privileges, Immunities, Independence, and Protection of Members and Parliament”.

[90] Main judgment at [33].

[91] Section 2(2) of the Act provides:

“In so far as it may be necessary for the achievement of the objects of this Act in a case where a House or committee convenes beyond the seat of Parliament, this Act applies as if the premises where the House or committee is sitting were within the precincts of Parliament.”

[92] Main judgment at [27] – [29].

[93] Section 25(1) provides:

“A person, other than a member, who feels aggrieved by a statement or remark made by a member or a witness in or before a House or committee about that person, may submit a written request to the Secretary to have a response recorded.”

[94] *De Lille* above n 2 at para 22.

[95] Id at para 16.

[96] *SATAWU and Others v Moloto NO and Another* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) (*SATAWU*) at paras 44 and 53.

[97] *National Coalition* above n 56 at para 23.

[98] *Govender v Minister of Safety and Security* [2001] ZASCA 80; 2001 (4) SA 273 (SCA) at para 9.

[99] Section 49(1) of the Criminal Procedure Act 51 of 1977 reads:

“(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person—

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,

the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.”

[100] *Matlou v Makhubedu* 1978 (1) SA 946 (A); *Mazeka v Minister of Justice* 1956 (1) SA 312 (A); and *R v Britz* 1949 (3) SA 239 (A), cited in *Govender* above n 98 at para 16.

[101] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*S v Walters*) at para 39.

[102] *Phumelela Gaming and Leisure Limited v Grundlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) (*Phumelela Gaming*) at para 27.