CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 115/12
[2013] ZACC 28

In the matter between:

LINDIWE MAZIBUKO, MP, LEADER OF THE OPPOSITION IN THE NATIONAL ASSEMBLY — Applicant

and

MAX VUYISILE SISULU, MP, SPEAKER OF THE NATIONAL ASSEMBLY — First Respondent

MATHOLE SEROFO MOTSHEKGA, MP, THE CHIEF WHIP, NATIONAL ASSEMBLY — Second Respondent

Heard on : 28 March 2013

Decided on : 27 August 2013

JUDGMENT

MOSENEKE DCJ (Froneman J, Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J concurring):

Introduction

[1] A dispute has arisen in the National Assembly (Assembly) over a motion of no confidence in the President of the Republic. Parties to the dispute are Ms Lindiwe Mazibuko, MP (applicant), the Leader of the Opposition[1] who also acts on behalf of seven other minority political parties represented in the National Assembly,[2] Mr Max Vuyisile Sisulu, MP, the Speaker of the Assembly (Speaker)[3] and Dr Mathole Serofo Motshekga, MP, Chief Whip of the majority party (Chief Whip) and of the National Assembly.

[2] Section 102(2) of the Constitution does envisage a motion of no confidence in the President. Its text is plain:

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

[3] Aside from ancillary differences, the core disputes between the parties are fourfold. They are: (a) whether the Speaker had the power to schedule a motion of no confidence on his own authority; (b) whether the Rules are inconsistent with the Constitution to the extent that they do not provide for motions of no confidence in the President, as envisaged in section 102(2); (c) whether Parliament has failed to fulfil a

[1] Who is so recognised in terms of section 57(2)(d) of the Constitution.

[2] The Congress of the People, Inkatha Freedom Party, African Christian Democratic Party, Azanian People's Organisation, Freedom Front Plus, United Democratic Christian Party and United Democratic Movement.

[3] Duly elected in terms of section 52(1) of the Constitution and Rule 9 of the National Assembly Rules 7th Edition (Rules).

constitutional obligation, in terms of section 167(4) of the Constitution,[4] by failing to schedule a motion of no confidence in the President for debate and vote in the Assembly within a reasonable time; and (d) whether, in the light of the fact that the National Assembly Rules Committee (Rules Committee) is currently reviewing the Rules to provide, inter alia, specifically for motions of no confidence brought under section 102, it is necessary for this Court to pronounce on the dispute at this stage.

[4] These issues arise in the context of five applications before us. The first three applications have been initiated by the applicant and the last two by the Speaker and the Chief Whip respectively.

[5] The first application is for leave to appeal directly to this Court against a decision of the Western Cape High Court, Cape Town (High Court), delivered on 22 November 2012 by Davis J, dismissing the applicant's application on the ground that the Speaker lacked the power to schedule a motion of no confidence in the President for debate in the Assembly and consequently a court may not order him to

[4] Section 167(4) of the Constitution provides:

> "Only the Constitutional Court may—
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> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
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> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;
>
> (d) decide on the constitutionality of any amendment to the Constitution;
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> (f) certify a provincial constitution in terms of section 144."

do so.[5] The second application is in the alternative to the application for leave to appeal directly to this Court. In it, the applicant seeks leave for direct access to this Court for a declaratory order that the Rules are inconsistent with the Constitution, and therefore invalid, to the extent that they do not protect the rights of the applicant and other members of the Assembly to have a motion of no confidence in the President accorded priority over other business before the Assembly. The third application is in terms of section 167(4) of the Constitution. The applicant contends that, by failing to schedule a motion of no confidence in the President for debate and vote within a reasonable time, Parliament has failed to fulfil a constitutional obligation.

[6] The Speaker lodged the fourth application for leave to cross-appeal against the costs order of the High Court. The High Court made no order as to costs. The Speaker contends that the High Court should have ordered the applicant to pay his costs. The Chief Whip, in the fifth application, seeks leave to cross-appeal against the cost order of the High Court and against two findings of the High Court, that (a) a motion of no confidence in terms of section 102(2) "is inherently urgent" and "should be treated as a matter of urgency", and (b) the Rules do not provide for a determination of what constitutes "urgency".

[5] *Mazibuko NO v Sisulu and Others NNO* [2012] ZAWCHC 189; 2013 (4) SA 243 (WCC) (High Court judgment).

Background

[7] On 8 November 2012, the applicant gave notice of a motion of no confidence in the President. The motion was initiated in terms of Rule 98(1)(a) of the Rules.[6] The motion was placed on the Assembly's Order Paper on Tuesday, 13 November 2012. The terms of the motion are:

> "Draft resolution (Ms LD Mazibuko): That the House—
>
> (1) notes that under the leadership of President Jacob G Zuma—
>
> (a) the justice system has been politicised and weakened;
>
> (b) corruption has spiralled out of control;
>
> (c) unemployment continues to increase;
>
> (d) the economy is weakening;
>
> (e) the right of access to quality education has been violated, and therefore
>
> (2) in terms of section 102(2) of the Constitution of the Republic of South Africa, 1996, pass a motion of no confidence in President Zuma."

[8] As it is the practice in the Assembly, the motion was first discussed by the Chief Whip's Forum (Forum) at its meeting of 14 November 2012. The Forum coordinates and discusses matters for which Whips are responsible[7] and provides a platform for possible political agreement on issues concerning Whips. The Rules permit the Speaker to consult the Forum when appropriate.[8] The Forum was unable to reach consensus on the scheduling of the motion for debate and vote in the Assembly.

[6] Rule 98(1)(a) of the Rules provides:

> "When giving notice of a motion a member shall read it aloud and deliver at the Table a signed copy of the notice".

[7] Rule 221.

[8] Id.

It therefore referred the motion to the Programme Committee of the Assembly (Programme Committee) for consideration.[9]

[9] The Programme Committee is chaired by the Speaker and consists of eleven other office-bearers of the Assembly, including the Chief Whip and Whips from minority parties.[10] Its functions and powers include preparing and adjusting the annual programme of the Assembly, implementing Rules on scheduling or programming related to the business of the Assembly, and making decisions to prioritise or postpone any business of the Assembly.[11]

[10] On 15 November 2012, the Programme Committee met to consider the proposed motion of no confidence, but its deliberations on the motion were deadlocked. The Speaker, who chaired the meeting, concluded that because of the absence of consensus, the motion could not be scheduled. After the meeting, the Speaker informed the opposition parties, who sought to persuade him otherwise, that he would seek legal advice on the matter. He also informed them that he would consider reporting the lack of consensus in the Programme Committee to the Assembly. He added that it was up to the Assembly to override the decision of the Programme Committee. As a result, the motion was not scheduled before the Assembly for debate – urgently or at all.

[9] Rule 187.

[10] Rules 188-9.

[11] Rule 190(a) to (e).

[11] On the evening of 15 November 2012, the applicant, acting in her earlier stated capacities, had a letter delivered to the Chief Legal Advisor in Parliament demanding that the Speaker decide, in terms of Rule 2(1), whether the motion should be tabled. The applicant also requested that the Speaker undertake all steps necessary to ensure that the motion was tabled for debate and vote in the Assembly on or before 22 November 2012. The applicant further demanded that the Speaker confirm with her attorneys by no later than 10h00 on Friday, 16 November 2012, whether the motion would be placed on the Order Paper of the Assembly for the sitting of Thursday, 22 November 2012.

[12] By 10h00 on Friday, 16 November 2012, the state attorney, acting for the Speaker, stated in a letter to the applicant that the Speaker was attending a funeral in Lesotho and had sought the advice of senior counsel, the response of which could only be furnished on Monday, 19 November 2012. In another letter received around midday, the state attorney informed the applicant's attorneys that it would be "premature and wasteful" for the applicant to initiate an urgent application in the meantime.

[13] On Friday, 16 November 2012, the applicant nonetheless commenced urgent proceedings in the High Court. She sought what she called "final interdictory relief" in the form of an order directing the Speaker to take whatever steps were necessary to ensure that the motion was scheduled for a debate and a vote in the Assembly before Thursday, 22 November 2012.

In the High Court

[14] The Speaker opposed the urgent application on several grounds. Importantly, he contended that the order sought by the applicant was not competent because Rule 2(1) does not give the Speaker the power to schedule a debate and vote in the Assembly in the absence of consensus on the part of the Programme Committee. And even if he had the power, the Assembly had the authority to override or reverse his decision. He also contested the urgency of the application. He contended that it was premature and unduly precipitous given that he was away in Lesotho and had informed the applicant that he was awaiting advice from senior counsel before assuming a final stance. The application should have awaited the decision of the Assembly after he had reported the deadlock in the Programme Committee. The Speaker added that although it was correct that the last sitting of the Assembly was scheduled to take place on Thursday, 22 November 2012, committees of the Assembly were to continue with their work until 9 December 2012. This meant that it was possible to re-convene the Assembly to debate the motion of no confidence subsequent to 22 November 2012.

[15] The opposing affidavit of the Chief Whip stated that it had been prepared and filed under extremely urgent circumstances. That must have been so. However, his opposition to the urgent application took a different turn from that of the Speaker. The Chief Whip contended that the relief sought should be refused because the matters raised in the motion of no confidence should ordinarily be dealt with by the

relevant portfolio committee of Parliament. His further ground was that the last sitting of the Assembly was on 22 November 2012 and could not be any later and that the schedule of the last remaining week was full and had no room to deliberate on the motion. The Chief Whip accused the applicant of harbouring an ulterior political motive by bringing the motion when she could renew it in the new year.

[16] The High Court heard the application on 20 November 2012 and on 22 November 2012 dismissed it with no order as to costs.[12] It held that the applicant had the right to move a motion of no confidence and to have it debated. A motion of no confidence, the Court held, "is an inherently urgent matter" and should be treated as a matter of urgency. The Court noted that "*[i]t cannot be within the gift of the majority party to decide upon the issue of the timing of this kind of motion*".[13] (Emphasis added.)

[17] The High Court, however, held that the Speaker did not have the residual power under the Rules to break the deadlock or schedule a debate of a motion of no confidence, acting on his own.[14] The Court reasoned that it had no power to grant a *mandamus* directing the Speaker to exercise a power he did not have.[15]

[18] The Court further held that there was a lacuna in the Rules that prevented the vindication of the constitutional right to move a motion of that sort; but that the High

[12] High Court judgment above n 5.

[13] Id at 255.

[14] Id at 258.

[15] Id at 256.

Court did not have the power to decide whether Parliament had failed to fulfil a constitutional obligation under section 167(4)(e) of the Constitution. That power, it held, was vested in the exclusive jurisdiction of this Court.[16]

In this Court

Does the Speaker have the residual power in terms of Rule 2(1)?

(a) Leave for direct appeal

[19] The applicant seeks leave to appeal directly to this Court against the decision of the High Court. It is regrettable that these important constitutional issues could not be properly and thoroughly ventilated through the normal judicial process. The matter was brought to the High Court on an urgent basis and was dealt with by a single judge. The application for leave to appeal directly to this Court means that we have not had the benefit of the issues being considered by a full court or the Supreme Court of Appeal. This Court, on a number of occasions, has stressed the undesirability of bypassing a multi-staged litigation process and that especially where the issues are of great complexity and importance the more compelling the need becomes for this Court to be assisted by the views of other courts.[17]

[20] This is not an inflexible rule or the only consideration in deciding whether to grant leave to appeal. The test remains whether it is in the interest of justice to grant leave to appeal. There can be no debate that the decision of the High Court relates to

[16] Id at 259-61.

[17] *Women's Legal Trust v The President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) at paras 27-8 and *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 11.

a constitutional entitlement of great import to our constitutional democracy. The question of when and how a member of the Assembly may vindicate the power to initiate a motion of no confidence under section 102, and have it debated by and voted on in the Assembly, deserves this Court's attention.

[21] Furthermore, the importance of a motion of no confidence to the proper functioning of our constitutional democracy cannot be gainsaid. The primary purpose of a motion of no confidence is to ensure that the President and the national executive are accountable to the Assembly made up of elected representatives. Thus a motion of no confidence plays an important role in giving effect to the checks and balances element of our separation-of-powers doctrine. One of the vital purposes of enshrining the doctrine of separation of powers is to limit the power of a single individual or institution and to make the branches of government accountable to one another.[18]

[22] The dispute before us relates, not to an issue pertaining to the common law, but to an interpretation of a constitutional provision relating to the Assembly. It is thus more likely than not that the dispute would have, in any event, ended up in this Court. Also, it would not be in the interest of justice to allow uncertainty over the proper interpretation of the constitutional provisions in issue to persist for long. Another important consideration is that neither the Speaker nor the Chief Whip sought to persuade us not to hear the appeal. If anything, the Speaker and the Chief Whip have

[18] Currie and de Waal *The New Constitutional and Administrative Law* vol 1 (Juta Law, Lansdowne 2001) at 95 and 107. See also *Ex Parte of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 112.

filed applications of their own for leave to appeal. It is indeed in the interest of justice that we grant leave to appeal directly to this Court.

(b) Merits

[23] As we have seen, in the High Court the applicant unsuccessfully sought a *mandamus* against the Speaker to take whatever steps necessary to ensure that the motion of no confidence was scheduled for a debate and a vote in the Assembly before 22 November 2012.

[24] In oral argument before us, the applicant properly conceded that the relief she sought before the High Court is now moot. She also abandoned the prayer of a *mandamus* against the Speaker. The deadline of 22 November 2012 has come and passed. The relief then sought is now moot. Additionally, the prayer in the applicant's notice of motion that the Speaker personally take whatever steps are necessary to vindicate the applicant's constitutional right, is so open-ended and vague as to render the relief incompetent.

[25] The applicant contended that she is nonetheless entitled to advance the limited ground of appeal that the High Court erred in holding that the first respondent lacks the residual power to schedule a motion of no confidence if the Programme Committee cannot arrive at a consensus on tabling the motion, a question I now turn to.

[26] The nub of this contention is that the Speaker has the residual power because Rule 2(1) empowers him to "give a ruling or frame a Rule in respect of any eventuality for which these Rules do not provide." The applicant contends that a failure to reach an agreement in the Programme Committee on the scheduling of the motion amounts to that "unforeseen eventuality" because the Rules do not provide for a deadlock-breaking mechanism. To that extent, the argument runs, the Speaker has the duty and authority to rule that the motion be heard and disposed of by the Assembly.

[27] The High Court disposed of the contention in these terms:

> "Given the specific rules dealing with programming, it cannot be said that rule 2 applies in this case, in that there is a provision dealing with the setting and scheduling of debates in the National Assembly, namely the rules concerning the programme committee. Rule 2 deals with rulings which must cover matters never contemplated in the rules."[19]

[28] I respectfully agree. Rule 2(1) does not apply. The Rule is meant to cover matters not dealt with in the Rules. Setting and scheduling of "any motion" in the Assembly is regulated extensively by Rules 187 to190.[20] These Rules inform us that

[19] High Court judgment note 5 above at 258.

[20] Rules 187-190 of the Rules of the National Assembly state:

> "187 There is a Programme Committee.
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> 188 (1) The Programme Committee consists of—
>
> (a) the Speaker;
>
> (b) the Deputy Speaker;
>
> (c) the Leader of Government Business;
>
> (d) the House Chairpersons;

the task of scheduling motions rests with the Programme Committee. Nothing in the Rules justify the inference that the power to set and schedule a motion devolves upon the Speaker when the Programme Committee cannot decide, for whatever reason, on a matter within its remit.

[29] What is more, Rule 2(1) is permissive and not peremptory. Therefore, even if it were applicable, the Speaker is not obliged to give a ruling or make a Rule. Construing the Rule as peremptory when a deadlock arises as the applicant would

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(e) the Chief Whip;

(f) the Deputy Chief Whip of the majority party in the Assembly;

(g) the whip of the majority party responsible for programming;

(h) another two whips of the majority party designated by that party;

(i) one whip and two additional representatives of the largest minority party in the Assembly designated by that party;

(j) one whip and one additional representative of the second largest minority party in the Assembly designated by that party; and

(k) one whip of each of the other minority parties in the Assembly designated by the party concerned.

(2) A whip referred to in Subrule (1)(f) to (l) who is unable to attend a meeting of the Committee may designate another whip to attend the meeting.

(3) Rule 125 does not apply to this Committee.

189 (1) The Speaker is the chairperson of the Programme Committee.

(2) If the Speaker is not available the Deputy Speaker presides at a meeting of the Committee.

190 The Programme Committee—

(a) must prepare and, if necessary, from time to time adjust the annual programme of the Assembly, subject to any relevant decisions of the Joint Programme Committee;

(b) must monitor and oversee the implementation of Parliament's annual programme in the Assembly, including the legislative programme;

(c) must implement the Rules regarding the scheduling or programming of the business of the Assembly, and the functioning of Assembly committees and subcommittees;

(d) may make recommendations to the Joint Programme Committee on any matter falling within the functions and powers of that Committee; and

(e) may take decisions and issue directives and guidelines to prioritise or postpone any business of the Assembly, but when the Committee prioritises or postpones any government business in the Assembly it must act with the concurrence of the Leader of Government Business."

have us, would run against the ordinary meaning of the wording of Rule 2(1). It would also run afoul of the scheme of the Rules which draws careful boundaries between the powers and duties of committees that facilitate the effective and efficient functioning of the Assembly.[21]

[30] The Speaker referred us to Ruling 155B in the Digest of Rulings of the Assembly which, we are told, has precedential value for the Assembly. It states that "Presiding Officers do not make up the Orders of the Day". They merely go by "what is decided by the Chief Whips and the Programme Committee." Whilst the Ruling is not binding on a court, it is consistent with the purposive construction of Rule 2(1). The residual power of the Speaker is not meant to override the powers and duties of the committees or to usurp a role that the Rules entrust to a committee.

[31] There is an additional and compelling reason why the *mandamus* the applicant sought was incompetent. Section 57(1) of the Constitution[22] vests in the Assembly the power to determine and control its internal arrangements, proceedings and procedures,

[21] For comparative foreign approaches see Blackburn and Kennon (eds) *Griffith & Ryle on Parliament: Functions, Practice and Procedures* 2 ed (Sweet & Maxwell, London 2003) (Blackburn and Kennon) and Jack (ed) *Erskine May Parliamentary Practice* (LexisNexis, London 2011) (*Erskine May*) on committees in the British Parliament; National Democratic Institute for International Affairs *Committees in Legislatures: A Division of Labor* Paper 2 in the Legislative Research Series, http://www.ndi.org/files/030_ww_committees_0.pdf, accessed on 19 May 2013, where parliamentary committees of various jurisdictions are considered.

[22] Section 57(1) of the Constitution provides:

> "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."

and it may make rules and orders concerning its business.[23] Should the Speaker choose to make a ruling on the business of the Assembly, it would always be subject to the overriding authority of the Assembly, which is the ultimate master of its own process, subject to the usual caveat that its processes are consistent with the Constitution and the law.

[32] On a proper reading of the Rules, the Speaker acting alone has no residual power to schedule a motion of no confidence in the President for debate and vote in the Assembly. I would dismiss the appeal. I deal with the costs of the appeal later.

The constitutional validity of the Rules

(a) Direct access

[33] In the alternative to the application for leave to appeal, the applicant seeks an order granting direct access for a declaration that the Rules are inconsistent with the Constitution to the extent that they do not properly allow a member or party in the Assembly to vindicate the right to have a motion of no confidence in the President scheduled for a debate and vote as a matter of urgency.

[34] The first question to resolve is whether direct access should be granted. It would be granted only if it is in the interests of justice to do so. This Court must be

[23] *Oriani-Ambrosini, v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at paras 60-5 (*Ambrosini*) and *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 118-29 (*Doctors for Life*).

persuaded that there are special circumstances that warrant bypassing other courts and thereby hearing the dispute as a court of first and last instance.[24]

[35] In *Bruce*, this Court stated that in granting an application for direct access the interests of justice requirement will ordinarily be met only where exceptional circumstances exist.[25] For the existence of exceptional circumstances there must, in addition to other factors, be sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure.[26] An additional consideration is whether there are any issues, and evidence relating to those issues, that would be better isolated and clarified through the multi-stage judicial process.[27]

[36] We have already determined that the dispute raises a constitutional issue that has a grave bearing on the soundness of our constitutional democracy. The constitutional validity of the Rules is interwoven with the matters that arise in the appeal. Both invoke constitutional construction of section 102(2) and the Rules that regulate the ordering and scheduling of the business of the Assembly. Hearing the direct access application together with the appeal would avoid prolonged and piecemeal litigation and bring certainty over the constitutional validity of the affected

[24] *Van Vuren v Minister of Correctional Services and Others* [2010] ZACC 17; 2010 (12) BCLR 1233 (CC) at paras 38-45; *Transfer Rights Action Campaign and Others v MEC for Local Government and Housing Gauteng and Others* [2004] ZACC 23 at paras 9-16; *Satchwell v President of the Republic of South Africa and Another* [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at paras 6-7; *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 4-9 (*Bruce*).

[25] *Bruce* above n 24 at para 4.

[26] Id at para 19.

[27] *Women's Legal Trust* above n 17 at para 28.

Rules. Furthermore, the issues before us are crisp and well-defined, and do not raise disputes of fact or require factual resolution. Moreover, we are here not confronted with a dispute related to customary law or the common law, but one that requires an interpretation of the Rules in light of the Constitution.

[37] None of the parties have opposed this Court hearing the constitutional challenge to the Rules. All parties were given an opportunity to deal with the applicant's submissions in written and oral argument. In our view, it is in the interests of justice to hear and dispose of the constitutional challenge.

(b) Should the declaratory order sought be granted?

[38] The Speaker and the Chief Whip resist the granting of the declaratory order sought by the applicant but for different reasons. I shall now deal with the constitutional challenge that the Rules are inconsistent with the Constitution because they fail to provide for a vindication of the entitlement of a member of the Assembly provided for in section 102(2).

[39] A good starting point to this enquiry would be Chapter 5 of the Constitution, at the end of which section 102 is located. This Chapter describes and regulates the executive authority of the Republic which is vested in the President who exercises it together with the other members of the Cabinet. The Chapter also provides for the election by the Assembly, term of office and removal of the President. The removal may occur by a resolution of the Assembly adopted with a supporting vote of at least

two thirds of its members and only on grounds of serious violation of the Constitution, serious misconduct or inability to perform the functions of office.[28] The removal provisions may be called impeachment provisions.

[40] Besides the removal or impeachment of a President, the term of office may also come to an end when she or he no longer enjoys the support of the majority of members of the Assembly. A motion of no confidence adopted by a majority of the Assembly would compel the President, members of the Cabinet and Deputy Ministers to resign.[29] Thus the scheme of the Constitution is that the President is elected into and may be removed from office by a resolution of a majority of members of the Assembly.[30]

[41] The Constitution requires that the Assembly must have a procedure or process which would permit its members to deliberate and vote on a motion of no confidence in the President. In order for members of the Assembly to vote on a motion, the Rules of the Assembly must permit a motion of no confidence in the President to be formulated, brought to the notice of members of the Assembly, tabled for discussion and voted for in the Assembly. The voting on a motion is done by members of the Assembly collectively. However, section 102(2) is silent on the source or origin of the motion of no confidence. Given the text and purpose of the provision, in our

[28] Section 89(1) of the Constitution.

[29] Id at section 102(2).

[30] Id at section 86(1) and (2) and Schedule 3 Part A, Item 6.

judgment, any member of the Assembly has the right to formulate and request to have a motion of no confidence serve before and voted for in the Assembly.

[42] Section 102(2) must be understood also in light of other related provisions.[31] Significantly, section 42(3) of the Constitution provides:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action."

[43] In the first instance, the Assembly "is elected to represent the people and to ensure government by the people under the Constitution." A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action. The Constitution does not set a time or preconditions for when the Assembly may vote on a motion of no confidence in the President. The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him. If a motion of no confidence in the President were to succeed, he or she and the incumbent Cabinet must resign. In

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[31] Section 1(d) of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on . . . [u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic governance, to ensure accountability, responsiveness and openness."

Section 57(1)(b) of the Constitution provides:

> "The National Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement."

effect, the people through their elected representatives in the Assembly would end the mandate they bestowed on an incumbent President.

[44] The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution.[32] It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance.

[45] The High Court was correct in stating that to move a motion of no confidence is manifestly a constitutional right, which is accorded to both the majority and minority parties.[33] The better view may be that the right to initiate a motion of no confidence is accorded to every member of the Assembly who is entitled to seek, by a motion of no confidence, to garner support for a majority vote of the Assembly.

[46] This approach to motions of no confidence is consistent with foreign practice, including in India, Canada, the United Kingdom and other Commonwealth jurisdictions,[34] which recognise the important function of motions of no confidence in

[32] *Ambrosini* above n 23 and *Democratic Alliance and Another v Masondo and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at para 42.

[33] High Court judgment above n 5 at 250.

[34] Wright (ed) *House of Representatives Practice* 6 ed, Department of the House of Representatives, Canberra 2012, http://www.aph.gov.au/~/media/05%20About%20Parliament/53%20HoR/532%20PPP/Practice6/PDF/Prelims/6Prelims.ashx, at 321. See also Kelly & Powell *Confidence Motions*, House of Commons Library, Standard Note SN/PC/2873, http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02873.pdf, (Kelly & Powell) who state as follows at para 1:

parliamentary democracies. Ample academic writing on parliamentary democracies shows how motions of no confidence are considered crucial in determining whether parliament has confidence in the government, even where the motion has little prospect of success.[35]

[47] This entitlement flows readily from section 102(2) and its exercise may be regulated by the Assembly, but its Rules may not deny, frustrate, unreasonably delay or postpone the exercise of the right. It seems to me plain that when a member of or a political party within the Assembly, acting alone or in concert with other members of the Assembly, tables a motion of no confidence in terms of section 102(2) in accordance with the Rules, the motion deserves the serious and prompt attention of the responsible committee or committees of the Assembly and, in the last resort, of the

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> "Votes of confidence or no-confidence . . . are perhaps the most important Parliamentary procedural devices, as in the 'Westminster model' the fate of a Government is ultimately dependent on the support of a majority of MPs."

The authors also quote Turpin *British Government and the Constitution* 5 ed (Cambridge University Press, Cambridge 2007) at 487, who writes:

> "[T]he requirement that the government must retain the confidence of the House of Commons is still a fundamental principle of the Constitution. In the last resort it is sustained by the government's dependence on the House of Commons for 'supply' (finance) and the passing of legislation."

See also National Democratic Institute for International Affairs *Daily proceedings of the Canadian House of Congress*, http://www.ndi.org/files/980_gov_legcapacity_0.pdf; Delhi Assembly Commentary on Rule 251 of the Rules of Procedure of the Delhi Assembly, www.delhiassembly.nic.in for the full page and http://delhiassembly.nic.in/NoConfidenceMontion.htm for the commentary; Blackburn and Kennon above n 21 at 484; *Erskine May* above note 21 at 329. Department of the House of Representatives *Standing and Sessional Orders* (March 2006), http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Australia_House_of_Representatives_Standing_Orders_as%20of%20March%202006_EN.pdf, provides in Standing Order 48:

> "A motion on notice or an amendment of a motion which expresses censure of or no confidence in the Government shall have priority of all other business until it is disposed of by the House, if it is accepted by a Minister as a motion or amendment of censure or no confidence."

[35] Kelly & Powell *Confidence Motions* 34 at para 2.

Assembly itself. The responsible committee or the Assembly must take steps that ensure that the motion is tabled and voted on without unreasonable delay.

Are the Rules consistent with section 102(2)?

[48] The Assembly has adopted extensive Rules to regulate its business. Chapter 12 of the Rules provides for a committee system in the Assembly. It lists committees of the Assembly and provides for the creation of other committees by resolution of the Assembly or the Rules Committee. Expectedly, the list includes the Programme Committee whose composition and powers I have discussed earlier. Let it suffice to repeat that the primary functions and powers of the Programme Committee include preparing and adjusting the annual programme of the Assembly, implementing Rules on scheduling or programming of the business of the Assembly, and making decisions to prioritise or postpone any business of the Assembly.[36] The Rules have entrusted the Programme Committee with the power to decide whether a motion of no confidence should be placed on the business of the Assembly.

[49] Part 2 of Chapter 12 stipulates Rules applicable to committees generally. Relevant for present purposes are Rules 129(2)(c) and (d). They provide:

> "(2) The chairperson of a committee, subject to the other provisions of these Rules and the directions of the committee —
>
> . . .
>
> (c) performs the functions, tasks and duties and exercises the powers that the committee, resolutions of the Assembly and legislation may assign to the chairperson;

[36] Rule 190(a) to (e).

> (d) in the event of an equality of votes on any question before the committee, must exercise a casting vote in addition to the chairperson's vote as a member."

[50] The plain meaning of Rule 129(2)(d) seems to be that any question before the Programme Committee must be decided by a majority vote subject to the chairperson having a deliberative and a casting vote in the event of an equality of votes. Strange as it may seem, the applicant, so too the Speaker and the Chief Whip, submitted that the Programme Committee takes decisions, not by vote, but by consensus. They contended that consensus in decision-making was a practice which the Programme Committee followed. If there was no consensus, no decision would be arrived at and the Programme Committee would consider its deliberations deadlocked.

[51] Confronted by these submissions, the High Court held that the inconsistency between the Rules and the practice within the Programme Committee matters not, because if a deadlock were to be resolved by reference to the majority vote, the outcome could still be contrary to section 102(2). A vote could allow the majority on the Committee to block an effort by the minority to schedule a motion of no confidence for debate before the Assembly. The High Court concluded there was no mechanism in the Rules to resolve a deadlock caused by either an absence of consensus or by a majority decision that refused to entertain a motion of no confidence. This, the High Court called a lacuna in the Rules which could frustrate the enforcement of the entitlement in section 102(2).[37]

[37] High Court judgment above n 5 at 261.

[52] The applicant supported the reasoning of the High Court and contended that the Rules were limping because they had omitted to provide for a Rule to resolve the inability of the Programme Committee to arrive at a decision on whether to schedule a motion of no confidence in the President. In oral submissions before this Court, the Speaker too submitted that there was indeed a lacuna in the Rules. This submission was in line with the written reports submitted by the Speaker to this Court that the Rules were being amended to give effect to section 102.

[53] The Chief Whip took an opposite view. He contended that the Rules as they stood adequately covered the field, and that there was no gap or omission on the scheduling and debating of a motion of no confidence in the President. He submitted that a party seeking to schedule a motion of no confidence in the President must follow the existing Rules which have placed the authority to schedule the business of the Assembly in the Programme Committee. That Committee adopts its decisions by the consensus of its members. If there is no consensus, that is no more than a function of the political horse-trading over the affairs of the Assembly.

[54] The core of the submission is best rendered in the Chief Whip's own words:

> "A motion of no confidence in the President should be scheduled and debated, if there is a political agreement between the parties. If there is no political agreement on the scheduling of the motion, then that is the end of the matter and the motion will not be scheduled or debated. However where there is political agreement, a motion may be scheduled and debated within a reasonable time subject to the work of the Assembly and subject to practicality. In fact where the parties agree, a motion of no confidence

> in the President may be scheduled and debated on an urgent basis subject to the rules and practicality. The power to determine whether or not the motion should be treated as urgent must always lie with the National Assembly and not elsewhere."

[55] The Chief Whip is in effect arguing that whether or not a motion of no confidence will be scheduled and debated, and any agreement about when it will be debated "is a product of political negotiations and agreement." He describes the process:

> "All the work of the National Assembly is in the national interest. The legislative duties and oversight responsibilities loom large in the work of the National Assembly. That, however, does not mean that all motions must be scheduled for debate and voting urgently. Some will be scheduled and debated urgently, others will not. It all depends on a number of considerations, including the political interests of the parties involved. The scheduling of motions is a product of political negotiations and agreement. In some instances, parties agree that a certain motion must be scheduled for debate, in other times they disagree and the motion is not scheduled for debate. Just as in its legislative work, Parliament may agree that a certain law is necessary and in that regard, process such a law without any difficulties because of the political agreement. In other times, parties disagree on whether the law is necessary or whether the law is constitutional. What happens in order to settle the debate is that Parliament puts it to a vote after a debate. Those that do not like the law vote against it and those that like the law, vote in its favour. Where a majority is achieved, the law will pass, where it is not, the law will not pass. Committees operate on relatively the same principles. Where there is disagreement on a motion, the Committee reports to the National Assembly and the matter may be put to a vote in order to diffuse the disagreement."

[56] On that reasoning, the decision to schedule a motion and the time when it may be debated are both "within the gift of the majority party". In some instances that decision could indeed be within the 'gift of a minority party' that may choose to

withhold its concurrence on whether a motion of no confidence should be heard and voted on.

[57] I agree with the High Court that a vital constitutional entitlement to move a motion of no confidence in the President cannot be left to the whim of the majority or minority in the Programme Committee or any other committee of the Assembly. It would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that Committee. It is equally unacceptable that a minority within the Committee may render the motion stillborn when consensus is the decision-making norm. It would have been an easy matter for the Constitution to specify that the scheduling of a motion of no confidence in the President is subject to political negotiations, lobbying, bargaining and agreement between the parties of the Assembly. It does not do so.

[58] Lobbying, bargaining and negotiating amongst political parties represented in the Assembly must be a vital feature of advancing the business and mandate of Parliament conferred by Chapter 4 of the Constitution. However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement. That is so, because our Constitution is supreme and demands that all law and conduct must be consistent with it. We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members serving on the

Programme Committee or any other committee of the Assembly. A vote on a motion of no confidence in the President must occur in the Assembly itself.

[59] Mogoeng CJ, writing for the majority in *Ambrosini* on the validity of comparable Rules of the Assembly, stated:

> "The validity of the Rules depends on whether they recognise and facilitate the exercise of the individual member's powers in sections 55(1)(b) and 73(2). Alternatively, whether they create a high risk of those powers being paralysed by placing the section 55(1)(b) power exclusively in the hands of the National Assembly, functioning as a collective body, thus inhibiting the exercise of the section 73(2) power by extension.
>
> The notice of motion filed in this Court singles out certain Rules for attack. Central to the constitutional challenge is the permission requirement they impose on individual members of the Assembly seeking to initiate, prepare or introduce legislation. Potentially, the permission requirement will negate the exercise of the power to initiate, prepare and introduce legislation in the National Assembly. And this does not bode well for our democracy. Common sense suggests that any majority party in the Assembly is likely to support its own legislative projects and not those of minority parties or any individual member. For this reason, a permission requirement boils down to a mechanism that is inescapably prone to denying individual members and minority parties the power to initiate, prepare and introduce legislation, however well-meaning those who drafted the Rules might have been."[38] (Footnotes omitted.)

[60] It is indeed so, that when the Constitution entitles a member or party to take a particular step or embark on a process in the Assembly, the Rules may prescribe a procedure for the envisaged process. What the Rules may not do is to thwart or frustrate the steps and thereby negate a constitutional entitlement.

[38] *Ambrosini* above n 23 at paras 66-7.

[61] In our view, a reading of the Rules as a whole reveals that there is indeed a lacuna in the Rules regulating the decision-making and deadlock-breaking mechanism of the Programme Committee charged with the power to arrange the programme of the Assembly. To the extent that the Rules regulating the business of the Programme Committee do not protect or advance or may frustrate the rights of the applicant and other members of the Assembly in relation to the scheduling, debating and voting on a motion of no confidence as contemplated in section 102(2), they are inconsistent with section 102(2) and invalid to that extent.

[62] Even if Rules 187 to 190, that regulate the conduct of the business of the Programme Committee, read together with Rule 129(2)(d), regulating the conduct of all committees of the Assembly, were construed to require that the decision of the Programme Committee must be made by a majority vote, the lacuna would persist. A majority decision of the Programme Committee on the scheduling of a motion of no confidence could frustrate the vindication of the right envisaged in section 102(2). This would be so because, again as in the case of a consensus requirement, it would be within the discretion and generosity of the majority within the Programme Committee whether a motion of no confidence in the President would ever see the light of day.

Is a motion of no confidence inherently urgent?

[63] The applicant contended that a motion of no confidence is always urgent and must take precedence over all other business of the Assembly. The applicant urged us

to have regard to the practice of foreign parliaments as the English, Australian and French parliaments. It is so that in several other democracies, a motion of no confidence is dealt with as a matter of precedence and enjoys priority over other parliamentary business. For instance, in Australia the importance of a motion of no confidence is recognised by the rule that it takes priority over other business until disposed of.[39] In France, the rules provide time restrictions for when a motion of no confidence must be debated once tabled.[40]

[64] She also submitted that, at the very least, a motion of no confidence should be treated with the same urgency as Parliament's approval of a declaration of national defence under section 203 of the Constitution, which requires the President to summon Parliament to an extraordinary sitting within seven days of a declaration of national defence if Parliament is not then sitting.[41]

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[39] Standing Order 48 above n 34.

[40] French National Assembly, Article 153(1) *Rules of Procedure of the National Assembly*, http://www.assemblee-nationale.fr/connaissance/reglement.asp#P1956_275560, provides:

> "The filing of motions of censure is found by delivery to the President of the Assembly of a document entitled the "Motion of censure" followed by a list of signatures of at least tenth members of the Assembly. The tenth is calculated on the number of seats actually filled with, if fraction, rounding the next whole number."

Article 154(1) states:

> "The Conference of Presidents shall fix the date for discussion of motions of censure, to be held no later than the third day following the expiry of the constitutional meeting within forty-eight hours subsequent to the filing."

[41] Section 203 of the Constitution provides:

> "State of national defence—
>
> (1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—
>
> (a) the reasons for the declaration;
>
> (b) any place where the defence force is being employed; and the number of people involved.

[65] In a careful and persuasive argument, the Chief Whip referred us to the multi-party committee system of the Assembly and how the Rules are meant to ensure effective and efficient workings of the Assembly. He made the further point that important as a motion of no confidence is, it has serious consequences for the President, the Cabinet and the ruling party. All concerned within the Assembly must be afforded the space to consider and prepare for the pending debate on the motion.

[66] Our approach to the urgency of a motion of no confidence in the President must be coloured by the consideration that the Assembly has the constitutional authority to "determine and control its internal arrangements, proceedings and procedures."[42] It is unnecessary to go as far as the High Court, that a motion of no confidence in the President "is inherently urgent" and must be debated and voted on in the Assembly urgently.[43] It is sufficient to state that the motion must be accorded priority over other motions and business by being scheduled, debated and voted on within a reasonable time given the programme of the Assembly. Once sponsored in a manner prescribed by the Rules, the Assembly must take prompt and reasonable steps to ensure that the motion is scheduled, debated and voted on without undue delay.

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(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.

(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration."

[42] Section 57(1) of the Constitution above n 22.

[43] High Court judgment above n 5 at 259.

Should the direct access application be refused because the Assembly is said to be correcting the defect?

[67] The Speaker urged us to dismiss the direct access application because the applicant should have exhausted internal remedies by approaching the Assembly to resolve the deadlock in the Programme Committee before rushing to court. He also argued that there was no need for this Court to make an order even if it found for the applicant on the lacuna in the Rules because the Assembly was reforming its Rules to correct the defect. He in effect argued that the exercise of jurisdiction would offend the separation of powers doctrine in light of the ongoing negotiations within the Assembly.

[68] More than three months before the hearing, this Court issued directions requesting the Speaker to file a report by Thursday, 14 March 2013 on the progress achieved in the process of "ensuring that motions of no confidence [in the President] are appropriately provided for in the Rules". At the time of the hearing, two reports filed by the Speaker and Deputy Speaker, pursuant to the directions, recorded that the parties had met but had not reached consensus on the possible content of revised Rules. From the reports the reason for not reaching an agreement on the draft Rules is somewhat obscure.[44] The reports submitted to the Court indicated that the main points of contention related to whether the Speaker should have discretionary power over the scheduling of motions of no confidence and to a reasonable timeframe for scheduling and voting on a motion of no confidence.

[44] The first report was submitted by the Speaker on 14 March 2013 and the second report was submitted by the Deputy Speaker on 22 March 2013.

[69] The lack of consensus on the draft Rules is not surprising. Given their respective submissions in this Court, there are fundamental differences between the applicant and Chief Whip on whether the Rules are constitutionally deficient and therefore what the Rules should provide for in relation to a motion of no confidence in the President. If this dispute is not resolved by this Court, the differences are likely to persist, to the detriment of a member of the Assembly who wishes to exercise the right envisaged in section 102(2).

[70] I am therefore unable to agree with the contention of the Speaker that because the parties are in the process of remedying the alleged lacuna in the Rules the direct access application should be dismissed. First, the differences between the applicant and Chief Whip make it most improbable that the lacuna will be corrected. Second, once we have found, as we have, that the Rules regulating the business of the Programme Committee are unconstitutional, we must so declare. An order of constitutional invalidity is not discretionary. Once the Court has concluded that any law or conduct is inconsistent with the Constitution, it must declare it invalid.[45]

[71] I also do not agree with the submission that a declaration of invalidity would trench upon the separation of powers doctrine. An order of constitutional invalidity would not be invasive because it is declaratory in kind. The Court would not be formulating Rules for the Assembly. The Court would be properly requiring the

[45] Section 172(1)(a) of the Constitution.

Assembly to remedy the constitutional defect that threatens the right of members of the Assembly.[46]

Conclusion

[72] In all the circumstances, the direct access application must succeed. The applicant is entitled to a declaratory order that Chapter 12 of the Rules is inconsistent with section 102(2) of the Constitution to the extent that it fails to make provision for an unhindered exercise by a member of the Assembly, acting alone or in concert with other members, of the right to have the Assembly schedule, deliberate and vote on a motion of no confidence in the President. In our view, it would be just and equitable to suspend the declaration of invalidity for six months in order to afford the Assembly the opportunity to remedy the defect in Chapter 12 of the Rules.

Exclusive jurisdiction in terms of section 167 of the Constitution

[73] The applicant sought a declaratory order in terms of section 167(4)(e) of the Constitution that Parliament has failed to fulfil a constitutional obligation by not providing rules necessary for tabling, debating and voting on the motion of no confidence in the Assembly so as to vindicate a member of Parliament's right under section 102(2) of the Constitution. For purposes of the declaratory order sought under section 167(4)(e), the applicant does not need leave to approach this Court because her

[46] Section 172(1)(b) of the Constitution.

claim has been brought on the footing that this Court has original and exclusive jurisdiction. Whether that is in fact so, is quite another matter.[47]

[74] Given the outcome of the direct access application, we expressly refrain from deciding whether the requirements of section 102(2) create an obligation on the Assembly within the meaning of section 167(4)(e). Resolving that dispute must wait for another day.

Leave to cross-appeal against the costs order

[75] The High Court made no order as to costs. The Speaker seeks leave to cross-appeal the costs order. The Speaker contends that he was substantially successful before the High Court, which relied mainly on his arguments in dismissing the urgent application. He adds that the applicant launched the application with inappropriate haste and that in any event, the minority parties spurned an opportunity earlier this year to resuscitate and debate a motion of no confidence in the President. The Speaker further contended that the applicant raised the constitutionality of the Rules for the first time in this Court.

[76] It is in the interests of justice to allow the Speaker to cross-appeal the costs order of the High Court. The cross-appeal is closely allied to the applicant's appeal

[47] *Women's Legal Trust* above n 17 at paras 14-6 and 23; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR (CC) 175 at para 25.

and the application for direct access in this Court. It is in the interest of justice that that the cross-appeal be decided in the present proceedings in order to reach finality.

[77] The Speaker was substantially successful in the High Court. That Court placed considerable reliance on the arguments advanced by him. The applicant launched the urgent application with inappropriate haste. The applicant rushed to court and launched these proceedings regardless of the Speaker's reasonable request for time to take legal advice and explore the possibility of the Assembly sitting beyond its year-end cut-off date in order to hear the motion of no confidence. Because the initial application was overhasty, the appeal too became moot. In the circumstances, it would be appropriate that the applicant bear the costs of the Speaker in the High Court and of her unsuccessful appeal in relation to the Speaker in this Court.

Cross-appeal against the costs order, and two findings of the High Court

[78] The Chief Whip also seeks leave to cross-appeal against the costs order of the High Court and its findings that (i) a motion of no confidence in terms of section 102(2) "is inherently urgent" and "should be treated as a matter of urgency", and (ii) the Rules do not provide for a determination of what constitutes 'urgency'.

[79] For the reasons we have advanced in relation to the cross-appeal of the Speaker, it is in the interests of justice to grant leave to cross-appeal on costs. However, in the case of the Chief Whip, the appeal against the costs order of the High Court must fail. Unlike the Speaker, the Chief Whip resisted and denied that the applicant was entitled

to have a motion of no confidence tabled in the Assembly. That attitude of the Chief Whip, in large measure, precipitated the applicant's rush to Court. It was only at the hearing that the Chief Whip appeared to concede the right of the applicant to have a motion of no confidence tabled before the Assembly. Despite this concession in the High Court, before us the Chief Whip persisted in the attitude that the Rules do not evince a lacuna and that the right of a member of the Assembly to have a motion of no confidence voted on by the Assembly requires the consent of the majority party. The Chief Whip's cross-appeal on costs in the High Court must fail.

[80] In addition, the Chief Whip sought leave to cross-appeal against the two findings in the reasoning of the High Court. There is no justification for granting the Chief Whip leave to cross-appeal on this basis. An appeal of that kind is incompetent in law.[48] The Chief Whip does not impugn the dismissal order of the High Court. Although it was granted for reasons different to those he advanced before the High Court, the Chief Whip supports the order. Thus, his cross-appeal is not directed at reversing or changing the order of the High Court but at altering or discrediting a part of its reasoning without targeting or seeking to reverse its order.

[81] The cross-appeal has no merit and must be refused.

Order

[82] The following order is made:

[48] Section 20(1) of the Supreme Court Act 59 of 1959 and *Mayelane v Ngwenyama and Another* [2013] ZACC 14; 2013 (4) SA 415 (CC) at para 22.

1. The applicant's application for leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant's application for direct access is granted.
4. It is declared that Chapter 12 of the Rules of the National Assembly is inconsistent with section 102(2) of the Constitution to the extent that it does not provide for a political party represented in, or a member of, the National Assembly to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for a debate and voted upon in the National Assembly within a reasonable time, or at all.
5. The declaration of constitutional invalidity in paragraph 4 above is suspended for a period of six months, to allow the National Assembly to correct the defect.
6. The first respondent's application for leave to cross-appeal on costs is granted and the cross-appeal is upheld.
7. The applicant is directed to pay the costs of the first respondent in the High Court, and in this Court only in relation to the applicant's dismissed appeal.
8. The second respondent's application for leave to cross-appeal is granted only in respect of costs, but the appeal is dismissed.
9. Save for paragraph 7 above, no order as to costs is made.

JAFTA J (Mogoeng CJ, Mhlantla AJ and Zondo J concurring):

Introduction

[83] Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution. A timely warning was issued in this case by Davis J in a judgment delivered by the High Court.[49] He cautioned:

> "There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every and all political disputes as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of this dispute, judges cannot be expected to dictate to Parliament when and how it should arrange its precise order of business matters. What courts can do, however, is to say to Parliament: 'you must operate within a constitutionally compatible framework; you must give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence. However, how you allow that right to be vindicated is for you to do, not for the courts to so determine'."[50]

[84] What happened in this case provides evidence that supports the observation made by the High Court. A simple process of tabling a motion for consideration in the Assembly has triggered striking errors and ineptitude arising from the misinterpretation and misapplication of the Rules. As illustrated later in this judgment, the Rules give a right to every member to table motions in the Assembly. Acting in terms of the relevant Rule, the applicant tabled a motion of no confidence in the President. Consistent with that Rule, the motion was put on the Assembly's agenda by placing it on the Order Paper. But instead of debating and voting on the

[49] *Mazibuko NO v Sisulu and Others NNO* [2012] ZAWCHC 189; 2013 (4) SA 243 (WCC) (*Mazibuko*).

[50] Id at 256E-H.

motion, the Assembly referred it to the Programme Committee for that Committee to place the matter on the Assembly's agenda in circumstances where the motion was already on the agenda of the Assembly.

[85] This decision set in motion a series of errors. Without explanation, the matter was not referred to the Programme Committee but was first submitted to the Chief Whips' Forum which failed to reach consensus. It was then forwarded to the Programme Committee whose majority membership comes from the opposition parties on whose behalf these proceedings were instituted. On the day the matter was considered by the Committee, some members coming from the opposition parties did not attend, even though their parties felt strongly about the motion. As a result the majority of members present were from the ruling party. The Committee applied a practice that required decision-making to be made by way of consensus instead of voting which is provided for in the Rules and the Constitution. As this judgment shows, the challenge of invalidity mounted by the applicant arose from the misapplication of one Rule and the failure to apply another.

[86] Later when an offer was made to the applicant that her motion would be debated and voted on, her party rejected it, indicating that it was no longer interested. By that time all parties had accepted that the Assembly's Rules needed to be reformed to provide for a specific regulation of motions of no confidence in the President. The process of amending the Rules is at an advanced stage. It could not be finalised because members of the relevant Committee failed to attend the last meeting

scheduled to decide on the amendments and as a result the Committee was inquorate. Given this background, the question that arises is whether this Court should entertain the matter.

Should the matter be entertained?

[87] I have read the judgment prepared by the Deputy Chief Justice (main judgment). I agree that the matter raises constitutional issues and therefore meets the jurisdiction requirement. But, in my respectful opinion, all applications advanced by the applicant must fail, primarily because it is not in the interests of justice to grant them. The interests of justice is the standard applicable to the applications for leave to appeal and direct access. Regarding the claim for direct access, the applicant has failed to show that it falls within the exclusive jurisdiction of this Court.

[88] I begin by setting out the scheme created by the Constitution and the Rules. This analysis will be followed by the facts necessary for the findings made in this judgment. In this regard I must record my gratitude to the main judgment for its comprehensive rendition of the facts.

The scheme

[89] Section 102(2) empowers the Assembly to pass a vote of no confidence in the President. Such vote must be supported by a majority of the members of the Assembly. A consequence of the vote of no confidence envisaged in the section is

that the President and the entire Cabinet must resign from office. Section 102(2) provides:

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

[90] Notably the power to pass the motion is vested in the Assembly, acting as a collective, through its members. The section does not empower political parties to pass a motion of no confidence in the President. It is therefore incorrect to analyse the process followed in pursuing motions of this kind by making reference to political representation. That process must be seen in the context of membership of the Assembly and not of the parties represented in it. This is so because it is the Assembly, and it alone, which is the repository of the power to pass motions of no confidence in the President. Where a power is conferred on individual members of the Assembly, the Constitution expressly says so.[51] But because the Assembly can only act through its members, these members have a right in terms of section 102 to table a motion of no confidence in the Assembly for the exercise of the power.

[91] The Constitution does not prescribe how and what form motions of no confidence in the President should take. Nor does it impose an obligation on the

[51] For example Section 73(2) of the Constitution provides:

> "Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly—
>
> (a) a money Bill; or
>
> (b) a Bill which provides for legislation envisaged in section 214."

Assembly to make rules for the exclusive regulation of procedures applicable to motions of this nature. What is implicit in section 102 though is the fact that the Assembly may make rules in terms of which the power is exercised. Indeed the Rules facilitate the tabling of motions contemplated in this section.

[92] Rules regulate how motions of no confidence are processed, irrespective of whether they are directed at the President, Cabinet or another body. Rule 94 gives every member the right to propose any motion for discussion and approval by the Assembly.[52] Rule 97 prescribes that every motion requires notice but lists exceptions to this requirement. None of those exceptions applies to the present case.

[93] Most importantly, Rule 98 sets out the procedure to be followed when a member gives notice of a motion. It provides:

> "(1) When giving notice of a motion a member shall—
>
> (a) read it aloud and deliver at the Table a signed copy of the notice; or
>
> (b) deliver to the Secretary a signed copy of the notice on any Parliamentary working day, for placing on the Order Paper.
>
> (2) Written notices of motion delivered to the Secretary after 12:00 on any Parliamentary working day may be placed on the Order Paper of the second sitting day thereafter and not earlier, unless in a particular case the Speaker determines otherwise.
>
> (3) Except with the unanimous concurrence of all the members present, no motion shall be moved on the day on which notice thereof is given."

[52] Rule 94 provides: "A member may propose a subject for discussion, or a draft resolution for approval as a resolution of this House."

[94] It is plain from this Rule that a member giving notice of a motion is required to read it aloud and deliver a signed copy of the notice at the table of the Secretary who must place the matter on the Order Paper. Notices delivered to the Secretary after 12h00 may be placed on the Order Paper for the subsequent second sitting day unless for some reason the Speaker decides otherwise. A motion cannot be moved on the day of giving notice except with the unanimous concurrence of all members present. This caters for urgent motions to be debated and approved without delay. Motions concerning the privileges of the Assembly take precedence over other motions and orders of the day.[53]

[95] Implicit in these Rules is the fact that a member whose motion has been placed on the Order Paper is entitled to have it moved on the appointed day unless such member withdraws the motion. The withdrawal may be effected without notice. But if a motion is not moved, it remains on the agenda until it lapses on the last day of the Assembly's sitting in a year.[54]

Relevant facts

[96] It is now convenient to set out what happened in the Assembly in relation to the motion which the applicant wished to move. On 8 November 2012, the applicant acting in terms of Rule 98(1)(a), gave notice of the motion by tabling it in the Assembly. Because the Assembly did not sit on Friday 9 November and Monday

[53] Rule 101 provides: "An urgent motion directly concerning the privileges of this House shall take precedence of other motions and of orders of the day."

[54] Rule 316(1) provides: "All motions and all other business, other than bills, on the Order Paper on the last sitting day of an annual session of the Assembly, lapse at the end of that day."

12 November, the motion was placed on the Order Paper of the next sitting day, 13 November 2012. On that day the motion was read again for consideration by the Assembly. But its consideration was made subject to the motion being scheduled for debate by the Programme Committee. It is not clear in terms of which Rule this procedure was adopted. However, it is apparent from the Speaker's affidavit filed in the High Court that the Assembly followed a practice not provided for in the Rules, in dealing with the motion.

[97] In accordance with the practice in question, the motion was first referred to the Chief Whips' Forum.[55] This forum is established in terms of Rule 217. The Forum is chaired by the Chief Whip and its functions and powers are to discuss and coordinate matters for which the whips are responsible and those on which the Speaker may consult it, whenever appropriate. But it is not clear why the motion was referred to the Forum when the Assembly was to consider it subject only to the condition that it be scheduled by the Programme Committee.

[55] Rule 218 in relevant part provides:

> "(1) The Chief Whips' Forum consists of—
>
> (a) the House Chairpersons;
>
> (b) the Chief Whip;
>
> (c) the Deputy Chief Whip of the majority party;
>
> (d) the most senior whip of each of the other parties represented in the Assembly; and
>
> (e) a committee chairperson designated by the Committee of Chairpersons.
>
> (2) The Speaker and the Deputy Speaker may attend meetings of the Forum or designate someone to attend on their behalf.
>
> (3) A whip referred to in paragraph (d) or (e) who is unable to attend a meeting of the Forum may designate another whip to attend the meeting."

[98] Dealing with the course followed by the applicant's motion, the Speaker's affidavit is confusing. In relevant part the Speaker states:

> "The motion was tabled in the House by being read out loud on Thursday, 8 November 2012.
>
> Since the National Assembly did not sit on Friday, 9 November 2012, and Monday, 12 November 2012, the motion was published in the Order Paper of the next sitting day, i.e. Tuesday, 13 November 2012, under the rubric *'Further Business*'.
>
> That having happened, the motion was ready for consideration by the National Assembly subject to scheduling by the Programming Committee.
>
> In accordance with National Assembly practice, it was first discussed in the Chief Whip's Forum (*'the CWF'*), established in terms of rule 217 of the Rules, which is responsible for political consultation among parties in the National Assembly, also as to whether and when motions should be scheduled.
>
> In the ordinary course motions go to the Programme Committee for scheduling after the CWF has come to agreement in this regard.
>
> Since the CWF was, *in casu*, unable to reach agreement at its meeting on Wednesday, 14 November 2012, the matter was referred to the Programme Committee for consideration at its 15 November 2012 meeting without any recommendation as to whether and when it should be put on the Order Paper."

[99] What emerges from the Speaker's evidence, is that in terms of the practice he refers to, it is not only the Forum which schedules motions. Instead, from the Forum motions are forwarded to the Programme Committee for scheduling. It is not clear why two committees have to perform the same function, one committee after the other.

[100] The Forum was unable to reach agreement on whether to schedule the motion at its meeting on 14 November 2012. The motion was then referred to the Programme Committee for its consideration on 15 November 2012. According to the Speaker, the Programme Committee too could not reach consensus on whether to schedule the motion for debate. Strangely, in this regard and as it appears from the Speaker's statement quoted above, he says the Programme Committee could not make a recommendation on whether and when the motion should be put on the Order Paper. This illustrates the misapplication of the Rules in terms of which the motion had already been placed on the Order Paper.

[101] Furthermore, the record shows the motion was not debated and voted on by the Assembly only because the Forum and the Programme Committee did not reach consensus on whether to schedule it for debate. We are told that the Programme Committee decides matters sent to it by means of consensus. The source of this is a practice which is contrary to Rule 129.[56] This Rule provides that decisions of

[56] Rule 129(2) provides:

> "The chairperson of a committee, subject to the other provisions of these Rules and the directions of the committee—
>
> (a) presides at meetings of the committee;
>
> (b) may act in any matter on behalf of and in the best interest of the committee when it is not practical to arrange a meeting of the committee to discuss that matter, if that matter concerns —
>
> (i) a request by a person to give evidence or make oral representations to the committee;
>
> (ii) any other request to the committee; and
>
> (iii) the initiation of any steps or decisions necessary for the committee to perform its functions or exercise its powers;
>
> (c) performs the functions, tasks and duties and exercise the powers that the committee, resolutions of the Assembly and legislation may assign to the chairperson;
>
> (d) in the event of an equality of votes on any question before the committee, must exercise a casting vote in addition to the chairperson's vote as a member."

committees are taken by voting and where there are equal votes, the chairperson has a casting vote. The application of this Rule to the Programme Committee has not been excluded. Whenever the application of a particular Rule to a committee is excluded, the Rules expressly say so. For example, Rule 188 prohibits the application of Rule 125 to the Programme Committee.[57]

[102] The present record does not cast any light on why a mere practice was given precedence over the Rules. What emerges from the reading of evidence is that the parties before us did not have a good understanding of the Rules under which they operate. The analysis set out above illustrates this point. The important question that arises in this regard is whether the failure to reach consensus by the Programme Committee in circumstances where consensus is not required by the Rules, renders the Assembly's Rules inconsistent with the Constitution. I return to this issue below.

[103] Following the Programme Committee's failure to reach consensus on 15 November 2012, the applicant addressed a letter on the same day to the Speaker, requiring him to table the motion or take whatever steps necessary to ensure that the motion was scheduled for debate and vote in the Assembly on or before 22 November 2012. The Speaker's legal representatives responded to this demand by a letter dated 16 November 2012 wherein it was stated that the Speaker was in Lesotho and that he was seeking legal advice from senior counsel on how to deal with the matter. The Speaker's legal representative warned that the institution of an urgent application in

[57] Rule 188(3) provides: "Rule 125 does not apply to this Committee."

the High Court at that stage would be premature and wasteful in view of the fact that the deadlock in the Programme Committee occurred the previous day.

In the High Court

[104] The Speaker's warning was not heeded and the applicant launched an urgent application in the High Court, on the same day. In it, she sought an order directing the Speaker to take steps necessary to ensure that the motion was scheduled for debate and vote in the Assembly, on or before 22 November 2012. Notably, no challenge was raised against the constitutionality of the Assembly's Rules. The affidavit supporting the claim was deposed to by the applicant. She did not specify why the debate had to be scheduled on or before 22 November, except that that date was the last sitting day of the Assembly in the year. But she asserted that Rule 2(1) of the Rules empowers the Speaker to ensure that a motion such as the present is scheduled for consideration by the Assembly.

[105] In opposing the application, the Speaker reiterated among the issues raised by him, that the applicant prematurely rushed to court for relief. He indicated that the deadlock in the Programme Committee was to be reported to the Assembly for it to take a decision on whether to debate and vote on the motion. On the merits the Speaker disputed that Rule 2(1) applied to this case. He contended that the Rule applies to situations not catered for in the Rules. He pointed out these Rules regulate the tabling and consideration of motions in the Assembly.

[106] The High Court construed this Rule and concluded, correctly so, that it did not apply to this case. Rule 2(1) empowers the Speaker to formulate a rule only in circumstances where the Assembly's Rules do not cover the situation dealt with and the rule so formulated by the Speaker remains in force until the Rules Committee decides on the matter.[58] The tabling of a motion is a matter expressly covered by the Assembly's Rules and consequently does not fall within the ambit of Rule 2(1).

In this Court

[107] The applicant approached this Court on the basis of urgency on 23 November 2012. In the main she sought two prayers. First, she sought an order declaring that Parliament has failed to fulfil its constitutional obligation under section 102(2) of the Constitution, "by failing to schedule a motion of no confidence . . . in the President of the Republic of South Africa . . . as lodged by the Applicant on 8 November 2012, for debate and vote in the National Assembly, within a reasonable time as contemplated by section 237 of the Constitution."

[108] Second, the applicant sought leave to appeal directly to this Court against the judgment of the High Court dismissing the application for an order directing the Speaker to take steps necessary to ensure that the motion was scheduled for debate and vote on or before 22 November 2012. In the alternative to this prayer, the applicant sought direct access so as to ask for a declaration that the Rules are inconsistent with the Constitution and invalid "to the extent that they do not protect

[58] Rule 2(2) provides: "A Rule framed by the Speaker shall remain in force until a meeting of the Rules Committee has decided thereon."

the rights of the Applicant, and other members of the National Assembly, to have a motion of no confidence in the President . . . in terms of section 102(2) of the Constitution accorded appropriate priority over other business". She also sought an order directing the Speaker to ensure that the motion was scheduled for debate, taking precedence over other business on 7 December 2012. Lastly, she sought an order declaring that the motion did not lapse on 22 November 2012, in terms of Rule 316(1) of the Assembly's Rules.

[109] Some of the orders sought were motivated by the findings and the interpretation of section 102 by the High Court. Put differently, the High Court's judgment is the foundation on which these claims were based. This much is clear from the applicant's affidavit filed in this Court. Having set out the High Court's findings the applicant said:

> "The relief I seek in this application is necessitated by the importance and urgency of the matters at hand, the special nature of the proceedings, and the nature of Davis J's judgment and order.
>
> In the first instance, assuming the correctness of Davis J's finding that Parliament has failed to fulfil a constitutional obligation, I apply under Rule 11 of this Court, for a declaration to that effect, in terms of section 172(1)(a) read with 167(4)(e) of the Constitution.
>
> In addition, I apply for leave to appeal directly to this Court under Rule 19(2) against Davis J's order of 22 November 2012 dismissing my application; I appeal specifically against his finding that the first respondent lacks the power to schedule a motion of no confidence in the President for debate in the National Assembly."

[110] What is important for noting at this stage is that if the foundation to these claims is faulty, the applicant would not have shown prospects of success. This is an important, although not decisive, factor in determining whether it is in the interests of justice to grant direct access or leave to appeal.

[111] This Court considered the matter and concluded that it was not urgent. Consequently an order dismissing the request that the matter be heard on the basis of urgency was issued on 30 November 2012. In their affidavits the Speaker and the Chief Whip supported the scheduling of the motion for debate in February 2013 and pointed out that a committee tasked with reviewing the Rules had already started the reform process. This Court issued directions regulating the future conduct of the case.[59] This was done to cater for hearing the case in the event of it not being resolved in terms of the process that was followed in the Assembly.

[59] The directions issued were framed in these terms:

> "1. The application for leave to appeal, the appeal if leave to appeal is granted and the application for direct access are set down for hearing at 10h00 Thursday 28 March 2013.
>
> 2. The Applicant shall, not later than ten days before the hearing,—
>
> (i) lodge one copy of a supplemental volume to the record, consisting of all documents filed in this Court which do not form part of the record already lodged;
>
> (ii) number these documents consecutively beginning with the page immediately after the last page of the record already lodged; and
>
> (iii) provide an updated index which includes the supplementary volume(s).
>
> 3. The first respondent is required to file a report with the Registrar of this Court by Thursday 14 March 2013 on the progress achieved in the process of ensuring that motions of no confidence are appropriately provided for in the Rules of the National Assembly.
>
> 4. Written argument must be lodged on behalf of :
>
> (i) the Applicant by Tuesday 19 March 2013; and
>
> (ii) the Respondents by Friday 22 March 2013.
>
> 5. Further directions may be issued."

[112] In terms of those directions, the applications for leave to appeal and direct access were set down for 28 March 2013 so as to allow the parties and the Assembly space and time to resolve the dispute. The Speaker was required to file a report on 14 March 2013 setting out "the process of ensuring that motions of no confidence are appropriately provided for in the Rules" of the Assembly. Indeed, on that date the Speaker filed a detailed report, setting out steps taken to amend the Rules. Of importance in this regard is the meeting of the National Assembly Rules Committee (Rules Committee) on 22 February. There had been other meetings before it in which a research document on comparative international practices was considered. At the meeting of 22 February, two proposals were tabled, one by the opposition parties represented by the applicant here, and the other by the majority party – African National Congress (ANC) – in the Assembly.

[113] The Speaker requested members on both sides to discuss the matter in an attempt to achieve consensus. No agreement was reached at that meeting. The Rules Committee met again on 6 March 2013. Members from the ANC tabled a new draft of amendments. Members of the Rules Committee representing opposition parties indicated that they had no mandate on the new draft and that they needed time to discuss it with their parties. A further meeting was scheduled for 12 March 2013. It transpired at that meeting that members needed more time to consider the amendments. As a result the Rules Committee concluded that it should reconvene on 19 March 2013. Meanwhile the Speaker was authorised to submit the report on

progress, required by this Court. In it the Speaker asked for leave to file a further progress report on what occurred subsequently.

[114] On 19 March 2013 the Rules Committee met and still no consensus was reached and the meeting was adjourned to the following day. The Speaker expressed optimism that consensus would be found. He filed a further affidavit placing the information before this Court. In view of this further report, the Court issued further directions requiring an updated report to be filed by 22 March 2013.

[115] As the Speaker was out of the country, the Deputy Speaker filed the report on 22 March 2013. This report dealt with what occurred at the meeting on 20 March 2013 which was chaired by her. No decision was taken at the meeting because the Rules Committee was inquorate. Attached to the report, however, is a draft amendment of the Assembly's Rules, dealing specifically with motions of no confidence envisaged in section 102 of the Constitution.[60]

[60] The draft reads:

> "(1) A member may propose a motion of no confidence in the President or Cabinet in terms of section 102 of the Constitution for approval as a resolution of the House, and must state the grounds for the motion.
>
> (2) The Speaker must schedule the motion after consultation with the Leader of Government Business, the Chief Whip and the Majority Party and the Chief Whips' Forum.
>
> (3) When it is scheduled, consideration of the motion of no confidence by the House must take place within a reasonable time, but no later than 12 Parliamentary working.
>
> (4) If a motion of no confidence cannot reasonably be scheduled by the last sitting day of an annual session, it must be scheduled for consideration as soon as possible in the next annual session as if notice had been given on the first sitting day of that session.
>
> (5) The debate on a motion of no confidence shall not exceed the time allocate for it by the Speaker, after consultation with the Chief Whip of the Majority Party as Chairperson of the Chief Whips' Forum.
>
> (6) If a motion of no confidence is proposed a second time the Speaker may schedule the motion after—

[116] What is set out above illustrates clearly that steps have been taken to amend the Assembly's Rules. Possibly if the Rules Committee was quorate on 20 March 2013, the amendments could have been adopted. The question that arises is whether in these circumstances it is necessary for this Court to make a pronouncement on a matter that is so close to resolution. I will now consider this issue and the other claims made by the applicant to illustrate that it is not in the interests of justice to grant the relief sought.

Leave to appeal

[117] Leave to appeal may be granted if the case raises a constitutional issue and it is in the interests of justice for leave to be allowed. Unquestionably this case meets the first requirement. It implicates the power conferred on the Assembly to pass a motion of no confidence in the President.

[118] But I am not persuaded that it is in the interests of justice to grant leave. The obstacle that stands in the way of leave here is the absence of prospects of success on the merits of the appeal. This is so because the applicant has not asked, other than impugning the judgment of the High Court, that this Court pronounce on any

---

(a) the consultation contemplated in subrule (2) above; and

(b) having considered whether another motion of no confidence brought on the same or materially similar grounds, was rejected during that annual session.

(7) If a motion of no confidence in terms of section 102 is approved by the house, the Speaker must inform the Leader of Government Business in writing forthwith."

constitutional issue, to provide guidance for the future. So, leave is sought singularly to have the High Court's order set aside.

[119] To show lack of prospects it is necessary to re-trace what was sought in the High Court and reasons for its order. The relief sought by the applicant there was limited to an order directing the Speaker to take steps necessary to ensure that the motion of no confidence in the President was scheduled for debate and vote in the Assembly on or before 22 November 2012. The applicant contended that the Speaker has, in terms of Rule 2(1), a residual power to do so. The High Court construed this Rule and concluded, correctly, that it does not apply. Its reasoning in this regard is endorsed in the main judgment.

[120] Moreover, as recorded in the main judgment, the applicant conceded that the relief sought in the High Court has become moot and she has abandoned the request for a mandamus against the Speaker. However, the applicant pursued leave on a narrow basis, namely that the High Court erred in holding that the Speaker has no power to schedule a motion of no confidence, based on Rule 2(1). As mentioned, the High Court was right in rejecting the proposition that Rule 2(1) gave such power to the Speaker.

[121] In the absence of prospects, no purpose will be served by the granting of leave here and therefore it is not in the interests of justice to do so. In *S v Boesak*[61] this Court said:

> "A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court and, in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the [Supreme Court of Appeal]."[62] (Footnotes omitted.)

Failure to fulfil an obligation

[122] Section 167(4)(e) of the Constitution confers exclusive jurisdiction on this Court to decide whether Parliament has failed to fulfil a constitutional obligation.[63] It is true that a litigant seeking adjudication of a claim of this kind does not require leave for direct access. But the right to come to this Court does not depend on the mere say

[61] [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[62] Id at para 12.

[63] Section 167(4) provides:

> "Only the Constitutional Court may—
>
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;
>
> (d) decide on the constitutionality of any amendment to the Constitution;
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> (f) certify a provincial constitution in terms of section 144."

so of a litigant that its claim falls within the exclusive jurisdiction of this Court. It must truly in law be a claim that falls within the ambit of the exclusive jurisdiction provision. The applicant must also establish that there was a failure to fulfil the obligation in question.

[123] This enquiry requires us to consider the nature and the basis of the claim so as to determine if indeed it falls within exclusive jurisdiction. The applicant has instituted a narrow claim that expressly defines the manner in which the Assembly has failed to fulfil a constitutional obligation. In the notice of motion this claim is framed in these terms:

> "Parliament has failed to fulfil its constitutional obligations under section 102(2) of the Constitution of the Republic of South Africa, 1996 (the 'Constitution'), by failing to schedule a motion of no confidence (the 'Motion of No Confidence'), in the President of the Republic of South Africa, in terms of section 102(2) of the Constitution, as lodged by the Applicant on 8 November 2012, for debate and vote in the National Assembly, within a reasonable time, as is contemplated by section 237 of the Constitution."

[124] For the applicant to succeed in coming to this Court under exclusive jurisdiction, she must show that section 102(2) imposes a particular obligation on the Assembly to perform a specified act.[64] This is so because the word "obligation" in section 167(4)(e) of the Constitution is given a narrow meaning so as to prevent conflict between this section and section 172.[65]

[64] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC).

[65] Id at para 36. See also *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[125] Section 102(2) does not impose a duty on the Assembly to perform a specific act or function. Instead it confers power on the Assembly to pass a motion of no confidence in the President if the motion is supported by the majority of its members. Consequently the alleged failure to make Rules which specifically regulate the exercise of the section 102(2) power does not give rise to a claim falling within the exclusive jurisdiction of this Court. Nor did the Assembly fail to schedule the motion. It was placed on the agenda in terms of Rule 98. What was wrong was the decision to refer it to the Programme Committee.

Direct Access

[126] Permission to approach this Court directly is granted in respect of constitutional matters which fall under the jurisdiction of other superior courts as well. In other words the procedure applies to cases which do not fall under the exclusive jurisdiction of this Court. The granting of access has its genesis in section 167(6) of the Constitution.[66] Permission is discretionary and obtainable only if it is in the interests of justice to grant direct access. The section expressly gives this Court a discretion by requiring that cases of this kind be brought to it with its leave, if it is in the interests of justice to do so.

[66] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[127] But underpinning the standard of the interests of justice are various principles. First, since cases for which direct access is sought are matters in respect of which the Constitution confers jurisdiction on other courts as well, a stringent test is laid down for by-passing the other courts and denying them the opportunity to exercise a constitutionally ordained jurisdiction.[67] Consistent with this principle, an applicant for direct access is required to show compelling reasons justifying the exercise of the discretion to permit direct access.[68] In *Bruce and Another v Fleecytex Johannesburg CC and Others*[69] this Court affirmed the compelling reasons requirement. There the Court said:

> "Under the 1996 Constitution, High Courts as well as the Supreme Court of Appeal have constitutional jurisdiction including the jurisdiction to make an order concerning the validity of the provisions of an Act of Parliament. Although an order made by such Courts declaring an Act of Parliament to be invalid has no force unless confirmed by this Court, the Court making the order may grant a temporary interdict or other temporary relief pending the decision of this Court. The procedure contemplated by the 1996 Constitution is that such orders of constitutional invalidity will be referred to this Court for confirmation, and that appropriate procedures in such cases will be provided for by national legislation. This Court has held that pending the enactment of such legislation it has the competence to give directions as to the procedures to be followed in respect of such referrals. Bearing in mind the jurisdiction of the High Courts and the Supreme Court of Appeal, and the matters referred to in paras [7] and [8] of this judgment, compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a Court of first instance."[70] (Footnotes omitted.)

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[67] *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 9.

[68] *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 16.

[69] [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex*).

[70] Id at para 9.

[128] Second, this Court does not ordinarily sit as a court of first and last instance. It values the views of other courts and appreciates that the process of going through more than one court reduces the risk of mistakes. Third, if the Court sits as a court of first and last instance, the losing party would be denied the right of appeal. In *Fleecytex*, this Court stated:

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[71]

[129] Therefore, as was observed in *AParty and Another v Minister of Home Affairs and Others; Moloko and Others v Minister of Home Affairs and Another*[72] there must be compelling reasons which move the Court to exercise its discretion in favour of granting direct access. In that case direct access was refused in circumstances where the Court accepted that the impugned legislation implicated an important constitutional right, the right to vote. The Court refused direct access on the basis that no compelling reasons were established by the applicants despite the fact that they were granted direct access in respect of another claim for constitutional invalidity. In respect of the other claim the Court reasoned that it was not essentially sitting as a court of first and last instance because there was a judgment of the High Court in a

[71] Id at para 8.
[72] [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC).

similar matter where the same issues were raised and the two cases were heard on dates that were close to each other.

[130] Before I consider whether in this case the applicant has met the test of compelling reasons, I must make a few observations. First, the claim for a declaration that the Assembly Rules were inconsistent with the Constitution was advanced as an alternative claim to the request for leave to appeal. What this means is that if the main claim relating to leave succeeds, the alternative claim on constitutional invalidity falls away because one claim was an alternative to the other.[73] They were not consecutive claims. Since the main judgment grants leave, it ought not, in my respectful view, have considered the direct access claim. What is important is the fact that the claim for constitutional invalidity was made dependent on the request for leave failing. In setting it out the applicant said:

> "In the alternative to my application for leave to appeal, I apply in terms of Rule 18 for direct access to this Court, for a declaration that the Rules of the National Assembly are inconsistent with the Constitution and invalid to the extent that they do not properly vindicate my rights and those of other members of the National Assembly to have a Motion of no Confidence accorded appropriate priority over other parliamentary business, and, accordingly, scheduled for debate and vote as a matter of urgency, and in any event not later than 7 December 2012."

[131] Second, the Speaker argued that it is not in the interests of justice to grant direct access because the Assembly was already remedying "the lacuna" by amending its Rules. The main judgment rejects this argument as having no merit because, so it

[73] *Jenkins v S.A. Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15 at 23.

holds, once this Court finds that the impugned Rules are unconstitutional, it must declare them invalid. For reasons that follow I am unable to agree with this finding.

[132] The first reason is that this Court is not obliged to enquire into the validity of Rules which are the subject of reform by the Assembly. In these circumstances the Court does not have to determine the constitutionality of the Rules, which are about to change to cater for the very complaint raised by the applicant. The declaration of invalidity will serve no useful purpose because the parties concerned agree that the Rules need to be amended and how this is to be done cannot be effected by this Court but by the Assembly which is mandated by the Constitution to make its own Rules.[74]

[133] In my view it is not in the interests of justice to grant direct access to the applicant to seek nothing more than a declarator over a matter which is already being addressed by the competent authority. Scarce judicial resources should not be spent on matters such as the present.[75] It is certainly not in the interests of justice for 11 Judges of the highest Court to entertain matters where the cause of the complaint is being addressed by a competent authority. In *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*[76] this Court said:

[74] Section 57(1) provides:

> "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."

[75] *Wiese v Government Employees Pension Fund and Others* [2012] ZACC 5; 2012 (6) BCLR 599 (CC).

[76] [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC).

> "Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, *indeed none whatsoever beyond the bare declaration*."[77] (Footnote omitted and emphasis added.)

[134] Moreover, the principle of separation of powers forbids the Judiciary from intervening in matters that fall within the domain of Parliament except where the intervention is mandated by the Constitution.[78] This is what our constitutional order requires. Therefore in exercising their review power, the courts should always observe constitutional bounds within which they are permitted to act. For the Constitution is not only supreme but also binds all arms of government. Thus in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[79] this Court said:

> "In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.
>
> It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But

[77] Id at para 15.

[78] *Doctors for Life* above n 65 at para 37.

[79] [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC).

> even in these circumstances, courts must observe the limits of their own power."[80]
> (Footnotes omitted.)

[135] When it comes to matters falling within the heartland of Parliament, our Constitution contemplates a restrained approach to intervention in those matters by the Courts. Such intervention is permissible if it is undertaken to uphold the Constitution because our courts are the ultimate guardians of the Constitution. But where a competent authority has already taken steps to correct conduct inconsistent with the Constitution, it may not be necessary for the guardians to take action, particularly where action to be taken is limited to declaring a legal position already accepted by all parties concerned. The position might have been different if, assuming that there is an inconsistency, the defect were to be cured by the Court itself rather than referring it back to the Assembly to continue with the process which was already at an advanced stage. The order proposed by the main judgment does not give the applicant immediate and effective relief. The declaration will be suspended for six months to enable the Assembly to complete the process of amending its Rules.

[136] The Speaker's argument based on the principle of separation of powers must be assessed in this context. He argued that granting direct access in the present circumstances would offend the doctrine of separation of powers. The main judgment dismisses this argument on the basis that the declaration of invalidity will not trench upon the separation of powers because the Court will not formulate rules for the Assembly. Instead, it will leave the matter to the Assembly to remedy the

[80] Id at paras 92-3.

constitutional defect.[81] But this raises the anterior question: whether there is a genuine constitutional defect.

Are the Assembly's Rules unconstitutional?

[137] In dealing with this question, we need to go back to the pleaded claim and determine its content and scope. The applicant sought direct access in order to ask—

> "for a declaration that the Rules of the National Assembly are inconsistent with the Constitution and invalid to the extent that they do not properly vindicate my rights and those of other members of the National Assembly to have *a Motion of no Confidence accorded appropriate priority over other parliamentary business, and, accordingly, scheduled for debate and vote as a matter of urgency*, and in any event not later than 7 December 2012." (Emphasis added.)

[138] This pleading does not identify the Rules that are inconsistent with the Constitution. Nor does it state which provision of the Constitution is breached by the unidentified Rules. This essential information does not appear anywhere in the affidavit deposed to by the applicant and filed in support of the direct access application. One remains in the dark as to which Rules are inconsistent with the Constitution and against which provisions of the Constitution the impugned Rules may be tested for constitutional invalidity. The task of constitutional adjudication in these circumstances becomes difficult to carry out. But fortunately the solution is a simple one. The defect in the applicant's papers is fatal to the claim and therefore it fails at the starting line. As was observed in *Shaik v Minister of Justice and*

[81] Main judgment at [71].

Constitutional Development and Others,[82] to require accuracy in the identification of challenged provisions "constitutes sound discipline in constitutional litigation".[83]

[139] Specificity and accuracy are the hallmarks of pleadings in constitutional litigation. It cannot be left to a court, as is the position here, to choose which of the provisions of the attacked legislation is targeted. The pleading that contains the challenge must itself identify accurately the impugned provisions and the sections of the Constitution it is claimed they are inconsistent with. That has not happened here.

[140] As a result of this serious defect in the applicant's papers, the main judgment has been unable to identify specific Rules which are inconsistent with the Constitution. Its finding in this regard is in general terms and so is the order granted. But before dealing with the difficulty I have with the order, I must record that at the hearing counsel for the applicant was asked on a number of occasions to identify the Rules which the applicant contends were inconsistent with the Constitution. He was unable to do so. He could not locate the lacuna complained of in the Rules simply because it does not arise from the Rules.

[141] The order in the main judgment declares, without identifying a particular Rule, that the Rules are inconsistent with section 102(2) of the Constitution to the extent that they do not "provide for a political party represented in or a member of the National

[82] [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

[83] Id at para 25 and *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC).

Assembly, to enforce the right to have a motion of no confidence in the President scheduled for a debate and voted for in the National Assembly within a reasonable time, or at all." The first difficulty I have is that the order is too generic and covers the whole chapter 12 of Rules. The second is that it assumes that section 102(2) confers rights on political parties. As stated earlier, the Rules allow members to table section 102 motions in the Assembly. Section 102 does not require that provision be made for political parties to table motions.

[142] The section does not require that motions of no confidence in the President be accorded priority over other business of the Assembly. Nor does it provide that such motions be scheduled and debated as a matter of urgency. It bears repeating that the Rules cater for the consideration of urgent motions. Ordinarily, a motion that has been put on the Order Paper may be moved at any time by its author, except that it cannot be moved on the day notice is given unless all members present agree.

[143] The foregoing analysis demonstrates that if direct access were to be given, there are no prospects that the applicant will succeed in the claim for having the Rules declared invalid for being inconsistent with the Constitution. Prospects of success is an important factor in determining whether direct access should be granted. Affirming this in *Fleecytex* the Court stated:

> "Whilst the prospects of success are clearly relevant to applications for direct access to this Court, there are other considerations which are at least of equal importance. This Court is the highest court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal

> with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other Courts having constitutional jurisdiction. These factors have been referred to in decisions given by this Court on applications for direct access under the interim Constitution, and are clearly relevant to the granting of direct access under the 1996 Constitution."[84] (Footnotes omitted.)

[144] Another consideration which indicates the lack of prospects is the fact that the bedrock of the present constitutional attack is the absence of a deadlock-resolving mechanism. The complaint is that once the Programme Committee fails to reach a consensus, a deadlock arises, for which the Rules do not provide a solution. It was argued that the omission was inconsistent with section 102(2) of the Constitution because a motion may never be scheduled for debate in the Assembly if there is a deadlock.

[145] The flaw in this argument lies in its own foundation. The so-called deadlock arose because, as stated by the Speaker, the Programme Committee adopted and followed a practice of taking decisions by consensus which was different from what the Rules provide. It decided to follow this practice in the decision-making process even though section 102(2) requires that the motion be passed by "a vote supported by a majority". The practice followed was not only inconsistent with Rule 129 but was also not in line with the constitutional provision on which the claim for invalidity is based.

[84] *Fleecytex* above n 69 at para 7.

[146] It was irregular for the Programme Committee to follow a practice which is inconsistent with the Constitution and the Rules. In terms of section 57(1) of the Constitution, the control and determination of internal arrangements and procedures of the Assembly, vests in the Assembly and not in its committees. A committee of the Assembly cannot follow a procedure that frustrates the Assembly's processes or its business. Just as no functionary may perform a power not conferred competently, a committee may not follow a practice or procedure not authorised by the Rules unless specifically empowered by the Assembly.

[147] In *Speaker of the National Assembly v De Lille and Another*[85] Mahomed CJ stated the principle thus:

> "This enquiry must crucially rest on the Constitution of the Republic of South Africa. . . . *It* is Supreme ─ not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution."[86]

[148] Central to the applicant's contention that the Rules are inconsistent with the Constitution is a simple proposition that they fail to provide for a deadlock-breaking mechanism. The error in the edifice which the applicant sought to construct is in its foundation. The premise from which she proceeds is unsound. Section 102(2) of the Constitution does not require the Assembly specifically to make Rules regulating the

[85] [1999] ZASCA 50; 1999 (4) SA 863 (SCA).

[86] Id at para 14.

passing of a motion of no confidence in the President. It merely confers the power to pass such motion on the Assembly. The process to be followed by the Assembly in exercising that power is left to the Assembly's discretion. This is in line with the general power in section 57(1). Exercising this power the Assembly made Rules regulating the scheduling of motions, including motions of no confidence in the President. As stated earlier, these Rules prescribe the process followed when motions are introduced in the Assembly.

[149] Rule 98 requires notice of a motion to be given by a member of the Assembly who wishes to introduce a motion. The notice may be given in two ways. The author of the motion may read it aloud in the Assembly and deliver a signed copy of the motion at the Table or deliver a signed copy of the motion to the Secretary on any working day of Parliament. Once so delivered the motion is placed on the Order Paper. In other words the motion is placed on the agenda of items to be considered by the Assembly. Having been placed on the Order Paper, the motion may be moved by its author, failing which it remains on the Order Paper until it lapses on the last day of the Assembly's sitting in a year.[87]

[150] The applicant followed the procedure prescribed in Rule 98 when she tabled the motion that forms the subject matter of these proceedings. The motion was placed on the Order Paper for 13 November 2012 and on that day it was read for consideration in the Assembly. But contrary to the Rules regulating motions, the Assembly instead

[87] Rule 316(1) above n 54.

of considering the motion, referred it to the Programme Committee so that it could be scheduled for debate. There is no explanation for the course followed here. It is difficult to fathom why an item that was already placed on the agenda for consideration by the Assembly was referred to a committee for the purpose of placing it on the Assembly's agenda for debate. This illustrates confusion and the fact that the Rules were misconstrued.

[151] But the confusion did not end there. Instead of referring the motion to the Programme Committee, it was first forwarded to the Chief Whips' Forum. The need for this course which was not in line with the Assembly's decision is not explained by the Speaker. Nor is there any explanation for the Programme Committee to follow a practice that led to the so-called deadlock, contrary to Rule 129 which provides a mechanism for breaking a deadlock.

[152] As I see it, the applicant's challenge should have been directed at the Assembly's decision in terms of which the motion was referred to the Programme Committee. On the face of it, the decision was not in accordance with the Rules. The attack on the Rules is misconceived. The complaint is that due to the deadlock in the Programme Committee, the motion could not be tabled for debate and vote. But the facts demonstrate that the motion was tabled for debate in terms of Rule 98 and in terms of that Rule the motion remained on the Order Paper until it lapsed on the last day of the Assembly's sitting in November 2012. The referral of the motion to the Programme Committee was unnecessary and contrary to the Rules. It is therefore not

true to say that because of the deadlock in the Programme Committee, the motion could not be tabled for debate.

[153] Moreover, the constitutional defect raised by the applicant is embedded in the so-called deadlock which occurred in the Programme Committee. But we know from the facts that this deadlock did not arise as a result of the Committee applying the Rules. The Committee deadlocked because it followed a practice which was not in line with the Rules. It was this practice that gave rise to the deadlock and not the Rules. Furthermore, it was the same practice which failed to provide a deadlock-breaking mechanism. The Rules provide such mechanism by giving the chairperson a casting vote in the event of equal votes. Therefore it is illogical to translocate the defect in the practice to the Rules and conclude that the defect is in the Rules in circumstances where if Rule 129 was applied, the so-called deadlock could not have arisen.

[154] When the Assembly drew its Rules, it could not have foreseen that one of its Committees would depart from those Rules and follow a practice which would lead to a deadlock. Consequently, the Assembly could not have provided a mechanism to break a deadlock that was not anticipated and which did not flow from the application of the Rules.

[155] The fact that the Speaker has conceded that the Rules contain a lacuna cannot be a basis for the finding that the Rules are inconsistent with the Constitution. The

question whether the Rules are not in line with the Constitution is a legal question which must be determined by the Court itself. In view of the misinterpretation of the Rules by the Speaker, illustrated earlier in this judgment, the concession by him carries no weight. In any event the lacuna referred to must be seen in its proper context. The concession was to the effect that in present form the Rules do not specifically cater for motions envisaged in section 102 of Constitution. This does not mean that counsel for the Speaker was saying that section 102 demands exclusive Rules regulating motions contemplated in it. In their current form the Rules allow the tabling of all motions, including those contemplated in section 102.

Conclusion

[156] In concluding I must explain why I am unable to support the findings at the heart of the conclusion reached in the main judgment. First, the main judgment endorses the interpretation given to section 102(2) of the Constitution by the High Court.[88] The main judgment finds that the section confers a constitutional right on parties represented in the Assembly. I have already stated that this construction is incorrect. The section confers power and not a right and that power is given to the Assembly. It is an institutional power exercised by the Assembly through its members. In my respectful view, our Constitution does not confer rights on institutions of government. Consequently section 102 does not have two different meanings. It does not confer power on the Assembly and at the same time give a right

[88] Main judgment at [44]-[45].

to political parties. The interpretation that the section vests power only is consistent with the one preferred in *Ambrosini*.[89]

[157] Second, the main judgment finds: "[t]he Rules have entrusted the Programme Committee with the power to decide whether a motion of no confidence should be placed on the business of the Assembly."[90] This is inferred from Rule 190 which sets out the power and functions of the Committee. Rule 190 does not expressly say that the Programme Committee has the power to decide whether a motion should be placed on the Assembly's agenda or not. Instead, it gives the Committee the power to prepare and adjust the Assembly's annual programme. This does not include the placing of motions on the agenda of the Assembly. All motions, including those envisaged in section 102, are placed on the agenda in terms of Rule 98. This Rule requires that notice of a motion be given by either reading it aloud and delivering the notice at the Table in the Assembly or delivering a signed copy to the Secretary who is obliged to place the motion on the Order Paper once notice has been given. This is what happened in this case. The applicant's motion was placed on the Order Paper after she gave notice by reading it aloud in the Assembly.

[158] Third, the main judgment holds that the reading of the Rules as a whole reveals a lacuna in the Rules regulating the decision-making and deadlock-breaking

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

[90] Main judgment at [48].

mechanism of the Programme Committee.[91] I have demonstrated that no lacuna exists in the Rules and that the tabling of motions in the Assembly had nothing to do with the Programme Committee. The decision to refer the present motion to that Committee was wrong. I have also shown that the so-called deadlock in that Committee came about as a result of following a practice and that it did not arise from the application of the Rules. If Rule 129 was applied the so-called deadlock would have been broken.

[159] For all these reasons I would have dismissed the applications and ordered the applicant to pay costs of the hearing.

[91] Id at [61].

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