

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT 89/17**

In the matter between:

**UNITED DEMOCRATIC MOVEMENT**

Applicant

and

**SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

**PRESIDENT JACOB ZUMA**

Second Respondent

**AFRICAN NATIONAL CONGRESS**

Third Respondent

**DEMOCRATIC ALLIANCE**

Fourth Respondent

**ECONOMIC FREEDOM FIGHTERS**

Fifth Respondent

**INKATHA FREEDOM PARTY**

Sixth Respondent

**NATIONAL FREEDOM PARTY**

Seventh Respondent

**CONGRESS OF THE PEOPLE**

Eighth Respondent

**FREEDOM FRONT**

Ninth Respondent

**AFRICAN CHRISTIAN DEMOCRATIC PARTY**

Tenth Respondent

**AFRICAN INDEPENDENT PARTY**

Eleventh Respondent

**AGANG SOUTH AFRICA**

Twelfth Respondent

**PAN AFRICANIST CONGRESS OF AZANIA**

Thirteenth Respondent

**AFRICAN PEOPLE'S CONVENTION**

Fourteenth Respondent

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**EIGHTH RESPONDENT'S HEADS OF ARGUMENT**

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## A. INTRODUCTION

***“We, the people of South Africa...***

***Believe the South Africa belongs to all who live in it, united in our diversity...***

***Therefore, through our freely elected representatives adopt this Constitution as the supreme law of the Republic...”*** excerpt from the Preamble of the Constitution

1. In this document, the argument is raised that National Assembly Rules 103 and 104, regarding the motion of no confidence in the President as set out in section 102(2) of the Constitution, 1996 (hereinafter referred to as “*the Constitution*”) is inconsistent with the democratic exercise of political rights of all citizens as well as elected representatives as enshrined in section 19 of the Constitution. These Rules as referred do not enable the power that elected representatives in the National Assembly has towards the people of South Africa to ensure accountable leadership in the executive.
2. It will be concluded that elected representatives in the National Assembly represent all citizens of the Republic, irrespective of whether those citizens are voters or not for a specific political party. As a result, only the secret vote at a motion of no confidence in the President, will enable the publicly elected

representative to fulfil his / or her mandate in representing all the people of South Africa.

**B. PRELIMINARY ASPECTS**

3. It is submitted that the Eighth Respondent concur with the submissions made by the Applicant regarding urgency, direct access to this Honourable Court and the condonation of any rules of court and all other preliminary issues that will be raised.

4. It is further submitted that the answering affidavit deposed to by the Second Respondent regarding the ANC should be disregarded by this Honourable Court since the Second Respondent deposed to his affidavit in his capacity as the president of the Republic and not in his capacity as president of the ANC.

**SEE: Paragraphs 1, 79 to 98 of the Second Respondent's Answering Affidavit.**

**C. MERITS OF THIS APPLICATION**

5. It is submitted that the constitutional question that this current matter raises is twofold: whether the proposed implementation of the vote in section 102(2) of the Constitution, 1996<sup>1</sup> by the National Assembly of Parliament, through an

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<sup>1</sup> Motion of no confidence.

electronic<sup>2</sup> and / or manual<sup>3</sup> public vote enables the political rights<sup>4</sup> of a) citizens of South Africa and b) members of the National Assembly to meaningfully and democratically participate in the activities of the political parties as present in the National Assembly and thus ultimately in the democracy of Parliament.

6. The Eight Respondent concurs with the Applicant who seeks from the Speaker of Parliament to implement a manual process of voting which requires that members' names and votes not be reflected.<sup>5</sup> However, it is also submitted that even the electronic vote can be a secret vote *provided that the secrecy of the members and their choice of votes are protected.*

a) Political rights of citizens of South Africa  
7. Citizens of South Africa can be categorised into those members that are card carrying and thus affiliated to political parties, but also those members that are not affiliated to any political party. In addition, citizens can be also be voters of a political party, irrespective of their affiliation to the party or not through means of membership.

8. Members that are affiliated to a political party (that is present in the National Assembly) at least have an opportunity (through internal party structures) to rid themselves of corrupt or incompetent leaders in government. However, citizens

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<sup>2</sup> Rule 103 of the National Assembly

<sup>3</sup> Rule 104 of the National Assembly

<sup>4</sup> Section 19 of the Constitution, 1996.

<sup>5</sup> Paragraph 106.2.5 of the Founding Affidavit: B Holomisa commissioned 9<sup>th</sup> April 2017.

that are not affiliated to political parties are at the mercy of those members of other political parties in the National Assembly to hopefully adhere to the values in the Constitution regarding voting out a corrupt or incompetent leader of government.

9. According to section 1(d) of the Constitution all citizens in South Africa have a right to be represented by accountable and responsive leaders in government. However, party loyalty suppresses the right to accountability of all citizens.<sup>6</sup>

10. According to N Roberts, one of the cornerstones of constitutional democracy is the active and meaningful participation of citizens in decisions that influences their lives.<sup>7</sup> This notion was also expressed in the **Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC); (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC) (17 August 2006)** matter where this Honourable Court indicated that the civic dignity of citizens is enhanced when they participate in political decisions that have a bearing on their lives.

11. In addressing the political rights of citizens as enshrined in section 19 of the Constitution, this Honourable Court in the matter of **United Democratic**

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<sup>6</sup>L Wolf "Democratic representation: A critical assessment of the current South African electoral system" 2015 SALJ 780 page 817

<sup>7</sup> N Roberts 'Public Deliberation in an Age of Direct Citizen Participation' (2004) 34 American Review of Public Administration 315, 315. See generally S Freeman 'Deliberative Democracy: A Sympathetic Comment' (2000) 29 Philosophy and Public Affairs 371–418; ME Warren 'What can Democratic Participation mean Today?' (2002) 30 Political Theory 677–701.

**Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as amici curiae) (No 2) (CCT23/02) 2003 (1) SA 495; [2002] ZACC 21; 2002 (11) BCLR 1179 (4 October 2002) (UDM)**<sup>8</sup> indicated that voters cannot dictate to political parties as present in the National Assembly how they must vote in Parliament or cannot insist that political parties should conduct themselves in a particular manner. However, it is submitted that the rights of citizens to meaningfully and democratically exercise their political rights through their representatives in Parliament is easily capable of being violated in between elections<sup>9</sup> and for this reason this Honourable Court now has an opportunity to give effect to the substance of section 19 of the Constitution to all citizens of the Republic.

12. It is further submitted that as it was the constitutional right of the Applicants in **Ramakatsa v Magashule (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012) paragraph 59**, as members of the ANC to meaningfully and democratically participate in the activities of the ANC, even more so is it the constitutional right of the citizens of South Africa (whether they are politically affiliated or not) to meaningfully and democratically participate in the activities of the National Assembly, and in particular in the motion of no

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<sup>8</sup> Paragraph 49.

<sup>9</sup>T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) Constitutional Law of South Africa (2012) 101,155.

confidence as currently proposed by some of the opposition parties in the National Assembly.<sup>10</sup>

13. It is submitted that the Constitution of South Africa with the Rules of the National Assembly regarding the motion of no confidence forms the “political constitution” that citizens and their representatives have with government and that it is these two documents that dictates how citizens and public representatives may meaningfully and democratically exercise their political rights as set out in section 19 of the Constitution.
  
14. According to academic Loammi Wolf<sup>11</sup> *“popular sovereignty vests in the nation as a collective of individual voters, and all the members of Parliament together represent the people. The Constitution does not support the idea of sovereignty of political parties.”*
  
15. In the premises, it is concluded that all citizens of the Republic have a political right to participate in the motion of no confidence debate in Parliament and be represented during the vote. This right however, can only be enabled through a secret ballot since elected representatives must use their conscience to incorporate all the views of the citizens and the members of his or/ her political party regarding this debate.

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<sup>10</sup> See also M Dafeel 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 SAJHR 56.

<sup>11</sup> L Wolf “Democratic representation: A critical assessment of the current South African electoral system” (2015) 132 SALJ 780 at 788 – 95, 817 – 8.

b) Political rights of Members of the National Assembly

16. It was already confirmed in **Mazibuko v Sisulu and Others 2013 (6) SA 249 CC para 43** that "... the assembly is elected to represent the people and to ensure government by the people under the Constitution.". Any rule of the National Assembly that thus do not give effect to this notion, should be regarded as inconsistent with the Constitution.
17. Even though political parties (as present in the National Assembly) play a central role in the democracy in the National Assembly the current Constitution of South Africa is silent on the relationship between political parties and their members of Parliament who serve in the National Assembly.<sup>12</sup> According to Professor Pierre De Vos the Constitution is "...*silent on whether these representatives participate in [the National Assembly] under dictation from the party that they represent and to what extent party structures can instruct or 'guide' decisions made by elected representatives in their capacity as elected representatives.*"<sup>13</sup> Unfortunately this issue was raised in this Honourable Court in **Merafong Demarcation Forum v President of the Republic of South Africa (CCT 41/07) 2008 (5) SA 171 (CC); [2008] ZACC 10; 2008 (10) BCLR 968 (CC) (13 June 2008)** but not addressed. However, this Honourable Court did express once in the **Certification of the Constitution of the Republic of**

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<sup>12</sup> P De Vos, it's my party (and I'll do what I want to?): Internal party democracy and section 19 of the South African Constitution 2015 SAJHR 30, page 42.

<sup>13</sup> Footnote ibid.

**South Africa, 1996 1996 (4) SA 744 (CC) paras 180–1, paragraph 186** that it is consistent with democracy for a member of the National Assembly to vote in accordance with his / or her conscience.

18. Voting in accordance with a public representative's conscience occurred at least twice in the history of Parliament of South Africa. The first time the Chief Whip of the ANC allowed ANC members of the National Assembly to be absent from the vote in the National Assembly on the Termination of Pregnancy Bill, 1996. The second time the DA allowed its members to vote in accordance with their conscience when the Civil Union Bill, 2006 was read for a second time in the House.<sup>14</sup>
  
19. Academics are at one that any Chief Whip of a political party that forces members of the caucus to "*toe the party line*" is unconstitutional especially if accountability issues are raised at a motion of no confidence against the President. It is unconstitutional since it infringes on individual public representative's right to vote according to his / or her conviction.<sup>15</sup>

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<sup>14</sup> L Wolf "The removal from office of a President: Reflections on Section 89 of the Constitution." (2017) 134 SALJ page 10, footnote 46.

<sup>15</sup> Footnote *ibid*, page 11.

20. It is the Eighth Respondent's submission that this current matter presents the ideal time for this Honourable Court to enforce the political rights of all citizens as well as individual public representatives.
21. Similarly, section 19 of the Constitution as coupled with the **Ramakatsa v Magashule (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012)** judgment protects all the (ANC) members of the National Assembly "...against external interference but also against interference arising from within the party".<sup>16</sup>
22. It is submitted, through the knowledge of Professor De Vos that for any political party to only allow its members, and thus public representatives in the National Assembly to only attend meetings and follow instructions from political leaders, but to be refrained from meaningfully participating in the democratic processes within the legislature would render the political rights of citizens that the public representatives meaningless and would amount to section 19 of the Constitution to be a "*paper right*".<sup>17</sup>
23. The logical questions that thus follow are whether the manner of voting in the National Assembly for purposes of a motion of no confidence would ensure the "reasonable and effective" democratic participation of all members in the

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<sup>16</sup>Footnote 8 *ibid*, page 51.

<sup>17</sup>Footnote 8 *ibid*, page 51.

National Assembly. Or to put it differently, do the rules currently respect, protect and promote the fulfilment of section 19 of the Constitution for both all the members of the National Assembly as well as all the citizens of South Africa? Can individual members objectively consider the matter and vote? All answers to the above questions are in the negative.

See also:

**Glenister v President of the Republic (CCT 48/10) 2011 (3) SA 347 (CC); [2011] ZACC 6; 2011 (7) BCLR 651 (CC) (17 March 2011);**

**Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC); [2001] ZACC 22; 2001 (10) BCLR 995 (CC) para 44.**

24. Members of Parliament in the National Assembly not only represent their own political party affiliated members, but also those citizens who are not affiliated to a political party. It is thus submitted that those Members in the National Assembly must essentially carry out the mandates of both those type of citizens. It would thus not be democratic and reasonable upon those Members to vote in a motion of no confidence other than through a secret vote.
25. The above notion is also consistent with the President of South Africa that ceases to be a member of the National Assembly once he is elected President

of the country,<sup>18</sup> since he now represents all South Africans irrespective of their political affiliation.<sup>19</sup>

26. A public vote as currently prescribed in terms of the Rules of the National Assembly as opposed to a secret vote would only result in putting members of the National Assembly to be “on the line”.<sup>20</sup> It is submitted, in accordance with **Oriani–Ambrosini v Sisulu, Speaker of the National Assembly (2012 (6) SA 588 (CC)) paragraph 66**, that the Rules of the National Assembly prohibiting a secret vote does not recognise and facilitate each member of the National Assembly’s power to represent both citizens that are politically affiliated and otherwise. It should thus be declared inconsistent with the Constitution.

27. In the premises, it is thus submitted that this matter provides the legal context in which this Honourable Court can develop the political rights of public representatives regarding their own political parties as well as to all the people of South Africa that they represent.

#### D. CONCLUSION

28. It is submitted that the current Rules of the National Assembly regarding a motion of no confidence to not enable the elected public representatives to hold the executive to account on behalf of all the people of South Africa in a manner

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<sup>18</sup> Section 87 of the Constitution.

<sup>19</sup> “The no confidence Vote is a dubious idea” 43 Geo. Wash. L. Rev. 372 1974-1975, page 373.

<sup>20</sup> Footnote *ibid*, page 375.

that is consistent with their conscience. It is thus submitted that Rules 103 and 104 must be amended to ensure that all public representatives in the National Assembly is entitled to a secret vote at the next motion of no confidence debate in the President.

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ADV LUZELLE H ADAMS  
JOHANNESBURG SOCIETY OF ADVOCATES  
PITJE CHAMBERS  
21 APRIL 2017

## **E. LIST OF CITATIONS**

1. Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC); [2001] ZACC 22; 2001 (10) BCLR 995 (CC) para 44
2. M Dafeel 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 SAJHR 56
3. Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC); (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC) (17 August 2006)
4. S Freeman 'Deliberative Democracy: A Sympathetic Comment' (2000) 29 Philosophy and Public Affairs 371–418; ME Warren 'What can Democratic Participation mean Today?' (2002) 30 Political Theory 677–701
5. Glenister v President of the Republic (CCT 48/10) 2011 (3) SA 347 (CC); [2011] ZACC 6; 2011 (7) BCLR 651 (CC) (17 March 2011)
6. Mazibuko v Sisulu and Others 2013 (6) SA 249 CC para 43
7. Merafong Demarcation Forum v President of the Republic of South Africa (CCT 41/07) 2008 (5) SA 171 (CC); [2008] ZACC 10; 2008 (10) BCLR 968 (CC) (13 June 2008)
8. Oriani–Ambrosini v Sisulu, Speaker of the National Assembly (2012 (6) SA 588 (CC)) paragraph 66
9. Ramakatsa v Magashule (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012) paragraph 59
10. N Roberts 'Public Deliberation in an Age of Direct Citizen Participation' (2004) 34 American Review of Public Administration 315, 315

11. T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) Constitutional Law of South Africa (2012) 101,155
12. Rules 103 and 104 of the National Assembly
13. Section 1 (d); 19; 102 of the Constitution
14. United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as amici curiae) (No 2) (CCT23/02) 2003 (1) SA 495; [2002] ZACC 21; 2002 (11) BCLR 1179 (4 October 2002) (UDM)
15. L Wolf "Democratic representation: A critical assessment of the current South African electoral system" 2015 SALJ 780 page 817
16. L Wolf "The removal from office of a President: Reflections on Section 89 of the Constitution." (2017) 134 SALJ page 10, footnote 46