

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
CASE NO: CCT 89/17**

In the matter between:

UNITED DEMOCRATIC MOVEMENT Applicants

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 AFRICAN CONGRESS OF AZANIA Thirteenth Respondent

AFRICAN PEOPLE'S CONVENTION Fourteenth Respondent

IFP'S WRITTEN SUBMISSIONS

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INTRODUCTION AND PRECIS

1. At stake in this application is the procedure by which motions of no confidence in terms of section 102 of the Constitution (which this Court has described as “*perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance*”¹) are to be conducted.
2. The application is limited in scope: the declaratory relief sought applies only to a vote of no confidence against the President, which holds a special significance in our constitutional democracy and which forms the heartland of Parliamentary oversight over the Executive.² It relates to the role of Members of the National Assembly as overseers of the Executive branch of government, rather than as lawmakers.³
3. Yet, unless the relief which is sought in this application is granted, the power to remove a sitting President will be rendered toothless as there is a risk (and the finding need be made at no higher level than this) that Member of the National Assembly may vote along party

¹ *Mazibuko v Sisulu and Another* 2013 (5) SA 249 (CC) at para 44.

² The application relates only to motions of no confidence in the national sphere of government. It has not been canvassed before this Court factually or legally whether different considerations may apply in the provincial or municipal spheres.

³ This Court has recognised the extraordinary and distinctive nature of the power to remove a President in *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC).

lines rather than conscience, in violation of the constitutional requirements to the contrary.⁴

4. In determining these issues, this Court is called upon to balance the following competing constitutional considerations:

4.1. On the one hand, the “people” (the electorate) have a right to know which way their elective officials have voted in the vote of no confidence in line with the requirements of openness, transparency and accountability;

4.2. Arguably, too, the political parties which are represented in the National Assembly have a right to require their members to vote in accordance with party dictates;⁵

4.3. On the other hand, there is a constitutional right and obligation on Members of the National Assembly to comply with their constitutional obligations and their oath of office to “obey,

⁴ In *Van Zyl v New National Party and Others* [2003] 3 All SA 737 (C), Van Reenen J made certain remarks in respect of Members of Provincial Parliaments which apply with equal force to Members of the National Assembly:

“Despite the constraints imposed on members of provincial legislatures by the list system of proportional representation that prevails in our multi-party system of representative government in order to ensure party loyalty and discipline, as well as the long-standing practice and tradition of political parties of ensuring, through the offices of their Whips, that members vote in accordance with a predetermined party line, it is recognised that the individual members thereof retain the right to follow the dictates of their own conscience.”

⁵ The constitutionality of provisions in various political parties’ constitutions which provide for punishment or removal from office for failing to adhere to instructions is not before this Court.

respect and uphold the Constitution and all other law of the Republic".⁶ The allegiance to the Constitution and the law trumps allegiance to party instructions;

4.4. There is the right of each Member of the National Assembly to freedom of expression in the casting of their vote;

4.5. There is the obligation on the Speaker to ensure that the "*vital tool*"⁷ of the vote of no confidence is not rendered nugatory because the voting is not free and fair. The Speaker bears an obligation not to bow to political pressure and is "*required by the duties of his office to exercise, and display, the impartiality of a judge*"⁸ and

4.6. Finally, there is the consideration that votes of no confidence by secret ballot can lead to unstable government;⁹ and the contrary considerations that an open ballot in circumstances where a President survives the vote on account of party dictates rather than true confidence in his or her leadership may lead to the

⁶ Oath of Office for Members of the National Assembly, section 4 of Schedule 2 of the Constitution.

⁷ *Mazibuko v Sisulu and Another* 2013 (5) SA 249 (CC) at para 43.

⁸ *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA) at 30.

⁹ The UPM cites examples of instability in Italy in the 1980s (UPM affidavit in support of admission as *amicus curiae* at para 25.6).

perception of illegitimate government, and accompanying instability.

The narrow question before the Court

5. This application does not, in the IFP's submission, concern or require factual findings relating to the conduct of a particular President, in this case, Jacob Zuma. Nor does it entail consideration of the Constitution of the majority political party or other political parties relating to the power to discipline or expel their party members, and whether these powers are likely to be acted upon.
6. The issue is instead an objective question of interpretation of the Constitution and the National Assembly Rules and an assessment as to whether the Speaker's decision to refuse an open ballot, which is dependent on a particular construction of section 102 of the Constitution read with the National Assembly Rules, is correct.

Potential outcomes to the application

7. There are five potential outcomes to the application:

7.1. The first is that the contentions of the Speaker¹⁰ and the President¹¹ are upheld. That is that the Constitution and the Rules of the National Assembly prohibit the holding of a vote of no confidence by secret ballot under any circumstances;

7.2. The second is that the primary contention of the UDM,¹² the EFF,¹³ the IFP,¹⁴ COPE¹⁵ and CASAC¹⁶ is upheld, namely that this Court finds that the Constitution and the Rules of the National Assembly require that a vote of no confidence be held by secret ballot;

7.3. The third to fifth outcomes involve a finding that the Speaker has a discretion under the Rules to order a secret ballot:

7.3.1. The third is that the Court finds that the default position is that a vote of no confidence is to be held by secret ballot, but that the Constitution and the National Assembly Rules confer a discretion on the Speaker to order an open vote in appropriate circumstances;

¹⁰ Speaker's Answering Affidavit, para 46.

¹¹ President's Answering Affidavit, paras 65 and 68.

¹² Founding Affidavit, paras 74 – 83.

¹³ EFF's Answering Affidavit, para 4.1.

¹⁴ IFP's Answering Affidavit, para 6.

¹⁵ COPE's Answering Affidavit, para 22.

¹⁶ CASAC's Affidavit in support of its application for admission as *amicus curiae*, para 19.

7.3.2. The fourth is that the Court finds that the default position is that a vote of no confidence is to be held openly, but that the Constitution and National Assembly Rules confer a discretion on the Speaker to order a secret vote in appropriate circumstances;¹⁷

7.3.3. The fifth is that the Court finds that there is, in general, a discretion on the Speaker to order a secret ballot but on account of the exceptional circumstances of this case, this Court orders a substitution of the decision of the Speaker and orders that the particular vote of no confidence which was originally scheduled for 18 April 2017 is to be conducted by secret ballot.¹⁸

¹⁷ This is the alternative submission of the UDM (Founding Affidavit, paras 100-106); and the EFF (EFF's Supporting Affidavit, para 4.2). At paragraph 115 of the Speaker's Answering Affidavit, the Speaker seems to imply that she accepts this proposition ("*The fact that the Constitution may permit a secret ballot, as alleged is irrelevant. The real issue in this matter is whether the Constitution imposes such an obligation*"), but this concession is not clear in the light of the remainder of her affidavit, particularly in light of paragraph 4 where the Speaker indicates that she is bound by the Constitution and the Rules and accordingly has "*no authority or discretion to accede to the Applicant's request*".

¹⁸ The principles relevant to substitution were set out in this court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 47, where Khampepe J held: "*To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.*"

8. It is the IFP's submission that the vote must always be held by secret ballot. Accordingly, the IFP proposes the following amendments to the relief sought by the UDM in the Notice of Motion:

“3. It is declared that the Constitution read with the Power, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 requires that motions of no confidence in terms of section 102 of the Constitution must be decided by secret ballot.

4. On a proper and constitutional interpretation of the National Assembly Rules, the Rules require motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot”.

9. To the extent that this Court finds that the National Assembly Rules do not require that a vote of no confidence in terms of section 102 should be decided by way of secret ballot, the IFP seeks a declaration that such rules are unconstitutional and invalid.¹⁹

¹⁹ IFP's Supporting Affidavit, para 5.2.

10. The effect of this relief is that the Speaker does not retain a discretion as to whether a vote of no confidence is to be held by secret ballot or openly. The absence of a discretion is appropriate, it is submitted, because it is not the actual existence of intimidation, threats or coercion in voting which grounds the need for a secret ballot. Nor does this Court need to make an assumption that any Member of the National Assembly will not vote according to his or her conscience, or that his or her vote will be improperly influenced by fear or other extraneous factors.²⁰
11. It is merely the potential for such unlawful conduct to occur should any Member vote or not vote in a particular way which gives rise to the constitutional risk and the constitutional requirement of the secret ballot.
12. The potential for this unlawfulness is not unique to the facts before this Court. For so long as it is possible to match up the name of the voter with the vote cast, this potential threat will always be present and it is on this basis that the IFP has called for votes of no

²⁰ The Speaker is mistaken when she states that such assumptions are a necessary prerequisite for the relief to be granted. See Speaker's Answering Affidavit, para 111.

confidence to be conducted by secret ballot for many years and has argued at various levels that this is what the Constitution requires.²¹

13. Moreover, on a proper and constitutional interpretation of the Constitution and the National Assembly Rules, all such votes must be conducted by secret ballot.
14. In the alternative to the IFP's primary submission, the IFP supports the submissions by the UPM and the alternative submissions by the UDM, the EFF and COPE that the Speaker has a discretion to order a secret ballot. The IFP accordingly seeks an alterantive order that the decision of the Speaker not to hold the vote of no confidence originally scheduled of 18 April 2017 by secret ballot falls to be set aside, and that this Court should, as a result of the exceptional circumstances in this case (dealt with further below), substitute its decision that the vote is to be conducted secretly.
15. In what follows, we set out the role of the Members of the National Assembly and their obligations; the constitutional legislative

²¹ IFP's Supporting Affidavit paras 11 – 25. In the light of the fact that the IFP has consistently and continually made these submissions and they have been ignored by the Speaker and the Rules Committee, the Speaker's submission that there was an "*internal remedy*" which was required to be exhausted before the UDM approached this Court is untenable. (See Speaker's Answering Affidavit, paras 35, 55, 56).

framework; the reasons why the relief should not be limited to this particular vote; and our submissions on remedy and costs.

THE ROLE OF MEMBERS OF THE NATIONAL ASSEMBLY IN SOUTH AFRICA'S CONSTITUTIONAL DEMOCRACY

16. The President asserts that it is the right or obligation of a political party to know which way its members vote in a vote of no confidence,²² and that this militates against a secret ballot. The President asserts that Members of Parliament are accountable not to the people of South Africa but “*to their respective parties and Parliament*”.²³ It is “*the party*” (not the individual Member), so the President asserts, which “*is accountable to the electorate*”.²⁴
17. This proposition is wrong in law. Members of the National Assembly are not elected by their parties. All Members serve in the National Assembly because they have been elected by the people of South Africa.²⁵ As such, they are accountable to the people of South Africa and not to the parties whom they represent.

²² President’s Answering Affidavit, para 80.

²³ President’s Answering Affidavit, para 80.

²⁴ President’s Answering Affidavit, para 80.

²⁵ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) at para 57.

18. 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”.

19. In *Nkandla*,²⁶ this Court set out the National Assembly’s duties towards the people of South Africa thus:

*“Similarly, the National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the **voice of all South Africans**, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. **For this***

²⁶ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) at para 22.

reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.” (Emphasis added).

20. The role of the National Assembly and its Members is clear:

20.1. Members of the National Assembly are entitled to choose to follow a party line. But they are not obligated to. Their

obligation is to the Constitution and to all South Africans regardless of their political affiliation. This is what the Constitution²⁷ and the oath of office requires.²⁸

20.2. Any political party is entitled to lobby, canvass or persuade its members who also sit as Members of the National Assembly, to follow a party line and to vote in a particular manner. But any suggestion that a Member can be compelled to enforce the will of the party leaders would be unconstitutional.²⁹ Members of Parliament represent all South Africans, not only members of their political parties. They are elected through their political parties. But their ultimate allegiance is to the Constitution and the people;

20.3. Members of Parliament embody the chief restraint on the abuse of executive power, though the provisions of section 102 of the Constitution and their ability to remove the President from office on account of a “*serious violation of the Constitution*” or

²⁷ See in particular sections 55(2)(a), 55(2)(b)(i) of the Constitution.

²⁸ Section 3, Schedule 2 of the Constitution.

²⁹ See also the discussion of the Powers and Privileges Act below.

other law of the Republic, or of misconduct or inability to exercise his or her powers and functions.³⁰

21. When the function of the National Assembly is properly understood, it becomes vital to ensure that Parliament's role is not twisted into being the "*mouthpiece*" of any particular party, but that it retains its autonomy and authority to ensure and bastion good governance in South Africa.³¹

22. We turn now to consider the relevant constitutional statutory framework.

THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

The election and removal of the President

23. The Republic of South Africa is one, sovereign, democratic state founded, inter alia, on the values of "*(u)niversal adult suffrage, a national common voter's roll, regular elections and a multi-party*

³⁰ Section 89 of the Constitution.

³¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) at para 22.

system of democratic government, to ensure accountability, responsiveness and openness“.³²

24. In terms of section 86(1) of the Constitution, the National Assembly shall “*at its first sitting after its election and whenever necessary to fill a vacancy... elect a woman or a man from among its members to be the President*”.
25. The procedure for the election of the President by the National Assembly is set out in Part A of Schedule 3 to the Constitution.³³ Item 6(a) of Part A of Schedule 3 to the Constitution provides that if more than one candidate is nominated for the position of President, “*a vote must be taken by the meeting by secret ballot*“ (our emphasis).
26. Section 102(2) of the Constitution provides for the removal of a sitting President through the mechanism of a vote of no confidence. It states:

“If the National Assembly, by a vote supported by a majority of its members, passes a motion of no

³² Section 1(b) of the Constitution.

³³ Section 86(2) of the Constitution.

confidence in the President, the President and the other members of the Cabinet and any Deputy Minister must resign.“

27. The Constitution is silent as to mechanism by which the vote of no confidence is to be held, save that the vote must be supported by a “majority” of Members of the National Assembly.

The Rules of the National Assembly

28. Section 57(1)(a) of the Constitution confers on the National Assembly the constitutional power to control its own arrangements.
29. On 26 May 2016, the National Assembly adopted a 9th Edition of the Rules, which are described in the preamble as having been “*comprehensively revised (necessitating their complete renumbering)*”.³⁴
30. The relevant rule dealing with motions of no confidence in terms of Section 102 of the Constitution is Rule 129. It states:

“(1) A member may propose that a motion of no confidence in the Cabinet or the President in terms

³⁴ The relevant portions of the Rules are annexed as IFP4 of the IFP’s Supporting Affidavit.

of section 102 of the Constitution be placed on the Order Paper.

(2) The Speaker must accord such motion of no confidence due priority and before scheduling it must consult with the Leader of Government Business and the Chief Whip.

(3) The motion must comply, to the satisfaction of the Speaker, with the prescripts of any relevant law or any relevant rules and orders of the House and directives and guidelines approved by the Rules Committee, before being placed on the Order Paper, and must include the grounds on which the proposed vote of no confidence is based.

(4) The Speaker may request an amendment of, or in any other manner deal, with a notice of a motion of no confidence which contravenes the law, rules and orders of the House or directives and guidelines approved by the Rules Committee.

(5) After proper consultation and once the Speaker is satisfied that the motion of no confidence complies with the aforementioned prescribed law, rules and orders of the House and directives or guidelines of the Rules Committee, the Speaker must ensure that the motion of no confidence is scheduled, debated and voted on

within a reasonable period of time given the programme of the Assembly.

(6) The debate on a motion of no confidence may not exceed the time allocated for it by the Speaker, after aforesaid consultation process.

(7) 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.

(8) Rules 120, 123 and 127 do not apply to motions of no confidence in terms of this rule. “

31. Rule 129 of the National Assembly Rules is silent on whether voting in a motion of no confidence should be conducted by secret ballot or not. The Rules do not, in terms, provide for secret ballots, but also do not proscribe secret ballots.
32. Accordingly, to the extent this Court should find that the Constitution requires the vote to be conducted by way of secret ballot, this requirement would be carried through to the interpretation of the Rules and there is no inconsistency.³⁵ This much is clear from Rule

³⁵ See section 39(2) of the Constitution requires that “When interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” See also: *Investigating*

102 of the National Assembly Rules which states: “*Unless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104*”.

33. In any event, even if the Constitution is not prescriptive as to the way in which a vote of no confidence should be conducted, the ordinary voting procedures prescribed elsewhere in the National Assembly Rules must be applied. These Rules are Rules 103 and 104 which provide a broad discretion to the Speaker to determine the appropriate mechanism and procedure for voting and, if possible, these Rules must be afforded a constitutional interpretation.³⁶

34. Rule 103(1) states:

Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC).

³⁶ It is so that in legal interpretation and the application of legislation, if there are two possible interpretations, one of which is constitutional whereas the other is not, the constitutional interpretation must be preferred. See for example *National Director of Public Prosecutions and Another v Mohamed NO and Another* 2003 (4) SA 1 (CC) at para 35, where Ncgobo J stated:

It is now a settled principle of constitutional construction that where a statute is capable of more than one reasonable construction, with one construction leading to constitutional validity while the other not, the former construction being in conformity with the Constitution must be preferred to the latter, provided always that such construction is reasonable and not strained.

Furthermore, when there are two possible interpretations, both of which are constitutionally compliant, the interpretation which is more constitutional – i.e. better promotes the spirit, purport and objects of the bill of rights – should be preferred. See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 11 BCLR 1123 (CC) at para 47:

“By the same token, where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which better reflects those structural provisions should be adopted.”

“At a sitting of the House held in a Chamber where an electronic voting system is in operation, unless the presiding officer directs otherwise, questions are decided by the utilization of such system in accordance with a procedure predetermined by the Speaker and directives as announced by the presiding officer”.

35. Rule 104 similarly provides:

“Where no electronic voting system is in operation, a manual system may be used in accordance with a procedure predetermined by the Speaker and directives to be announced by the presiding officer”.

36. In respect of any vote before National Assembly covered by these sections, the Speaker’s powers extend to:

36.1. Directing that the electronic voting system (which records the identity and vote of every MP) not be used;

36.2. Determining in advance the procedure to be used in respect of the voting procedure; and

36.3. Issuing directives as to how the votes are to be cast.³⁷

37. In the light of these provisions, the Speaker's submission that she does not have a discretion to order a secret ballot is revealed to be false.³⁸

38. Importantly for the present case, the Speaker is clearly empowered (and, we submit, obliged because of the constitutional provisions set out above and developed below) to determine or direct that the vote of no confidence be held by secret ballot.

The Powers and Privileges Act

39. Rule 2 of the National Assembly Rules states that the “*sources of authority*” for the National Assembly include (amongst others):

39.1. The Constitution;

39.2. The Powers and Privileges Act;³⁹ and

³⁷ IFP's Supporting Affidavit, para 49.

³⁸ Speaker's Answering Affidavit, para 4, where the Speaker states: “*At the outset, I wish to state that I am personally not averse to having a motion of no confidence in the President being decided by secret ballot. I am, however, bound by the Constitution and the Rules that the NA has adopted (the Rules). Accordingly I have no authority or discretion to accede to the Applicant's request*”.

³⁹ Powers, Privileges and Unities of Parliament and Provincial Legislatures Act 4 of 2004.

39.3. The Rules of the National Assembly.

40. Section 8 of the Powers and Privileges Act states:

(1) A person may not by fraud, intimidation, force, insult or threat of any kind, or by the offer or promise of any inducement or benefit of any kind, or by any other improper means:

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

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

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

41. In respect of a vote of no confidence, the only way to ensure that Members of Parliament are protected from fraud, intimidation, force, insults or threats of any kind, or from the offer or promise or any inducement or benefit is by rendering the vote of any one particular Member of Parliament uncertain – i.e. through the operation of a secret ballot. There can be no threat or reward if the person offering

the threat or reward has no means to ensure that the person against whom the threat made or in respect of whom the reward is offered acted as he or she had been influenced or compelled to do.

42. Accordingly, when the Rules of the National Assembly are interpreted together with and subject to the Powers and Privileges Act, the Speaker must direct that the vote of no confidence takes place by way of secret ballot in order to protect Members from threats aimed at compelling them to vote one way or another in respect of the motion of no confidence. Should she fail to do so, such decision would be in breach of her obligations in section 8 of the Powers and Privileges Act.

43. As such, and to the extent that the National Assembly Rules are interpreted in a manner which is consistent with the constitutional requirements of a secret ballot, there is no constitutional invalidity and the Rules, read with the Powers and Privileges Act and the Constitution require only to be applied by the Speaker.

WHY THE RELIEF SHOULD NOT BE LIMITED TO THIS PARTICULAR VOTE: THE SWORD OF DAMOCLES ARGUMENT

44. One of the questions which has arisen in the affidavits before this Court is whether the Court should grant general relief (a declaration in perpetuity about the process to be followed in respect of votes of no confidence) or whether the relief should be limited to the facts before it.

45. We submit that it would not be appropriate or desirable to limit the findings to this particular vote, and that this Court should set out the general principles applicable to such votes. We say so for the following reasons:

45.1. It is so that there is no express equivalent requirement that in respect of the removal of the President through a vote of no confidence in section 102(2) of the Constitution such a vote must take place by means of a vote of no confidence. However, the removal of the President is the corollary of his or her appointment, and the reasons for which a secret ballot is required at election stage apply *a fortiori* at removal stage. In particular:

45.1.1. The secret ballot removes the potential for threats or inducements to vote in a particular way, as when there is a secret ballot, there is no way of proving or demonstrating which way any particular individual Member of Parliament has voted; and

45.1.2. It also removes the Hobson's Choice faced by members of the majority party who may wish to vote in favour of the motion of no confidence or members of an opposition party who may wish to vote against it which requires them either to lose their seat through the party disciplinary procedures or to violate their oaths of office. That oath requires Members to be "*faithful to the Republic of South Africa and obey, respect and uphold the Constitution and all other laws of the Republic*".

46. The Unemployed People's Movement has helpfully set out a number of principles as to why it submits that this Court should decide the issues raised in this application with reference to the specific motion of no confidence only.⁴⁰ We agree with these principles but submit that almost all of these reasons do not only apply to this particular

⁴⁰ UPM's Founding Affidavit for admission as *amicus curiae*, paragraphs 15-28.

vote, but arise in respect of all votes and militate in favour of a general declaratory order that the Constitution and the National Assembly Rules, properly interpreted, require a secret ballot in respect of a motion in terms of section 102 of the Constitution:

46.1. First, there is nothing “*abstract*” or “*overbroad*” about this Court being asked to determine an objective constitutional principle of interpretation of the Constitution and the Rules and to decide the question whether the Speaker’s decision, which is dependent on a particular construction of section 102 of the Constitution read with the National Assembly Rules is correct. Although the question arises with respect to the particular vote of no confidence (originally scheduled for 18 April 2017), the interpretation of the Constitution and National Assembly Rules is not fact-dependent;

46.2. Secondly, in our view, the Court should avoid making factual findings surrounding the ability and intention of political parties to discipline and potentially remove Members of the National Assembly who vote against the instructions of their parties, particularly in circumstances such as this where the Court is

sitting as court of first and final instance, as a “one-off” finding relating to this particular vote of no confidence would entail;⁴¹

46.3. Third, it is irrelevant to the question of constitutional interpretation contended for by the IFP whether there is a party in Parliament who holds an absolute majority. The same considerations around the need for secrecy apply where party pressure can equally be brought to bear in respect of political allegiances and alliances;

46.4. Fourthly, any potential for instability following a closed ballot in a vote of no confidence is offset by the corresponding and equally-serious instability which may occur if the potential for a motion of no confidence ceases to be an effective check and balance on executive conduct, because the outcome is certain and potentially dictated upon party lines. This openness has the potential to undermine the legitimacy of government, and to render toothless this important constitutional limitation on executive power.

⁴¹ In *Bruce and Another v Fleecytx Johannesburg CC* and 1998 (2) SA 1143, Chaskalson P held: “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.”

46.5. Finally, the primary, overriding factor in respect of the interpretation contended for by the UDM, CASAC, COPE, the EFF and the IFP is that (as correctly identified by the Unemployed People's Movement), "*without a secret ballot, the motion of no confidence cannot fulfil its purpose to hold the Executive to account*".⁴² The very operation of the checks and balances in our constitutional democracy and the limitations of executive power will cease to be effective without the operation of a secret ballot.

47. This Court has remarked that the importance of a motion of no confidence to the proper functioning of our constitutional democracy cannot be gainsaid.⁴³ It is an enshrinement of the separation of powers and limits the power of a single individual or institution and to make the branches of government accountable to one another.⁴⁴

48. In *Mazibuko v Sisulu and Another*,⁴⁵ this Court held that the motion of no confidence in the President is "*a vital tool to advance our democratic hygiene*" and provides "*a vital power and duty to scrutinize and oversee executive action.... A motion of this kind is*

⁴² See for example UPM's Founding Affidavit for admission as *amicus curiae*, para 24.

⁴³ *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) at 21.

⁴⁴ *Ex Parte of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at para 112.

⁴⁵ *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) at 43-44.

perhaps the most important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance".

49. This "*most important power*" is rendered nugatory if the Members of Parliament who are required to vote on the motion of no confidence are in any event held to account by the very members of the Executive whom they may wish to remove.
50. The vote of no confidence is, as it were, a Sword of Damocles which at all times hangs over the head of the Executive and restrains their powers. In order to be effective, the threat of the Sword must be a real threat – in other words, its outcome must be uncertain.
51. For these reasons, we submit that this Court should not attempt to limit the relief it grants, but should interpret the Constitution and the Rules for the benefit of this and future votes.

THE CONSTITUTIONAL REQUIREMENT OF A SECRET BALLOT

52. There are, in addition to the reasons set out above, several further constitutional principles which militate strongly against an

interpretation of the National Assembly Rules that the removal of as President is capable of being decided by means of a closed vote.

53. The first arises from international law.⁴⁶

International law as a guide to the purpose of the secret ballot

54. The requirement for suffrage to be exercised by way of secret ballot is recognised in international instruments.⁴⁷ The International Covenant on Civil and Political Rights, 16 December 1966, provides insight as to the political philosophy behind the requirement of a secret ballot. Article 25 (b) requires that elections must be held periodically and “*shall be held by secret ballot, guaranteeing the free expression of the will of the electors*”.

⁴⁶ Section 39(1) of the Constitution governs the interpretation of the Bill of Rights and provides that a court interpreting a provision of the Bill of Rights must consider international law and may consider foreign law.

⁴⁷ Article 21(3) of the United Declaration of Human Rights, 10 December 1948, states: “(3) *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures*”

See too article 25 of the International Covenant on Civil and Political Rights, 16 December 1966, which reads: “*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

(a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*

(b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors*”.

See too Article 13 of *The African Charter on Human and Peoples' Rights* (“*African Charter*”), adopted on 27 June 1981, which was acceded to by South Africa on 9 July 1996 which provides: “*Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*”

55. The ICCPR recognises that it is only by voting through a secret ballot that the “*free expression of the will of the electors*” is guaranteed.

56. As this Court held in *Doctors for Life*,⁴⁸ the right enshrined in article 25 must be understood in the light of article 19 of the ICCPR, which provides:

“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

57. The interplay between these two rights applies equally to this application: The right to make and express political choices, including the right of Members of the National Assembly to remove the President, can only be meaningful if persons can vote by way of secret ballot as expressly provided for in, for example, section 19(3)(a) of the Constitution since this ensures that they can vote

⁴⁸ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 91.

according to their conscience, in other words, when their vote is a true reflection of their real preferences.⁴⁹

58. Without the secret ballot, there is a risk (and this Court need make no more positive finding that there is a potential) for voting in respect of a secret ballot to fail to represent the true will of the people, thereby subverting the right to freedom of expression. The potentially distorting effect of threats of party discipline upon the voting choices of Members of the National Assembly is sufficient to ground a finding that such vote must always be held in secret, ironic though it may seem, in order to protect the requirements of free speech in the Constitution.⁵⁰

59. Without a secret ballot, the purpose of section 102 of the Constitution, which is to ensure executive accountability, responsiveness and openness than through a system whereby those charged with the responsibility to oversee it, are able to express their views freely in accordance with the dictates of their conscience, will be undermined.

⁴⁹ Section 19 of the Constitution provides that every citizen has the right to vote in secret.

⁵⁰ Jason Brickhill & Ryan Babuch: Political Rights in S Woolman & N Bishop (eds): Constitutional Law of South Africa, 2nd edition, Chapter 45, p.45-29: “(t)he purpose of FC s 19(1) is to ensure that citizens are able freely to align themselves with the political cause or party of their choice without fear of adverse consequences“. As such, according to the learned authors, section 19(1) “is essentially a freedom right and a special political species of the rights to equality, freedom of expression, belief, opinion, assembly and association“.

The requirements of sections 42(3) and 57(1)(b) of the Constitution

60. In *Mazibuko*,⁵¹ Moseneke DCJ (speaking for the majority) made it clear that section 102(2) of the Constitution must be understood also in light of other related provisions. One of these is section 1(d) of the Constitution and the others are section 42(3) and 57(1)(b).

61. Section 42(3) 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 scrutinising and overseeing executive action.” (Our emphasis)

62. The task of scrutinising and overseeing executive action can, particularly when the National Assembly is being asked to decide whether or not the present incumbents can continue to exercise executive authority, only be effectively performed if the Members of the National Assembly are able to express themselves freely without fear of intimidation.

⁵¹ *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) at para 42.

63. Section 57(1)(b) provides:

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

64. In paragraphs 43 and 44, Moseneke DCJ continued as follows:

“[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 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 s 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution. 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.”⁵²

65. For these further reasons, we submit that the only constitutional interpretation to be applied to the operation of section 102 of the Constitution read with the National Assembly Rules is that on a proper and constitutional interpretation of the National Assembly Rules, read with the Powers and Privileges Act, and in light of the constitutional and international law injunctions referred to above, the National Assembly Rules require motions of no confidence in terms of section 102 of the Constitution to be decided by secret ballot.

⁵² See also *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) at paras 60-65 and *Democratic Alliance and Another v Masondo and Another* 2003 (2) SA 413; 2003 (2) BCLR 129 (CC), para 42.

66. Before concluding, we deal briefly with *Tlouamma*.⁵³

TLOUAMMA IS DISTINGUISHABLE

67. Both the President and the Speaker rely on the decision of the Full Bench of the Western Cape High Court in *Tlouamma* as authority for the propositions that:

67.1. The issues in this application do not fall within the exclusive jurisdiction of this Court; and

67.2. The High Court has correctly determine that the application has no merit.

68. As set out in the IFP's Supporting Affidavit, *Tlouamma* is authority for neither proposition. Judgment in *Tlouamma* was handed down on 7 October 2015, and the matter was decided in terms of the 8th edition of the National Assembly Rules, adopted in February 2014. The relevant rules were not permissive, as are the current rules. They were prescriptive as to the procedure to be followed. *Tlouamma* does

⁵³ *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC) (7 October 2015),

not deal with the 9th edition of the Rules, nor could it bind this Court.⁵⁴

69. Nor does *Tlouamma* provide authority for the fact that the questions as to the Speaker's power (or lack thereof) to order a secret ballot does not fall within this Court's exclusive jurisdiction. The IFP aligns itself with the argument in this regard by the UDM and submits that in any event this case is an exceptional one which warrants the attention of this Court via direct access.

CONCLUSION AND COSTS

70. In sum, for the reasons set out above, any vote on a motion of no confidence by the National Assembly will be nugatory, and incapable of vindicating the crucial function of holding the President accountable to Parliament, unless the vote is by secret ballot.

⁵⁴ Rule 102A of the 8th edition of the Rules (and which deals with motions of no confidence) is in similar terms to the current Rule 102. However, the rules dealing with the voting procedure under the 8th Edition are far more narrow in scope than the current Rules 102-104. Rule 77 (8 ed) stated:

“(1) At a sitting of this House held in a Chamber where an electronic voting system is in operation, questions may at the discretion of the presiding officer be decided by the utilization of such system in accordance with a procedure determined by the Speaker.

(2) Where no electronic voting system is in operation or where such a system is in operation but not utilized, questions shall be decided in accordance with the provisions of Rules 78 to 93.”

The provisions of Rules 78 to 93 (8 ed) were prescriptive. They, unlike the current rules, did not permit the Speaker to deviate from the procedure which is set out there, and this procedure precluded the voting by operation of secret ballot. As set out above, the procedure provided for in the 9th edition of the Rules is significantly different and, when interpreted with the constitutional requirement for a secret ballot and the obligations on the Speaker in terms of the Powers and Privileges Act, requires that a vote of no confidence in terms of section 102 of the Constitution is conducted by way of secret vote.

71. In the alternative to the IFP's primary submission, the IFP supports the submissions by the UPM and the alternative submissions by the UDM, the EFF and COPE that the decision of the Speaker not to hold the vote of no confidence originally scheduled of 18 April 2017 by secret ballot falls to be set aside, and that this Court should, as a result of the exceptional circumstances in this case, substitute its decision that the vote is to be conducted secretly. The relevant circumstances which militate in favour of a substitution order include:

71.1. This Court in as good a position as the Speaker to make the decision;

71.2. On account of the principles set out above and the particular circumstances of the case, the result of the Speaker's decision is a foregone conclusion. These circumstances include the fact that the ANC holds a majority of seats in the National Assembly and has (on the President's version) instructed its Members not to support the motion;⁵⁵ there are plausible threats against those Members who disregard the party's instruction in violation of the Powers and Privileges Act which result in the Hobson's choice described above; and the secret ballot is supported

⁵⁵ President's affidavit para 87 and 90-91.

by the IFP, the EFF, COPE, the UDM. The DA abides and the ANC has not opposed this application.

71.3. Finally, it would be just and equitable and fair to all parties for the decision on the secrecy of the vote to be made by this Court. The decision would in particular resolve the conflict faced by the Speaker who, in her capacity as Speaker is bound by the Constitution and the law, and in her capacity as Member of the ANC is bound by the party dictates.

72. On these grounds, the “*exceptional circumstances*” test in *Trencon* is met.⁵⁶

Costs

73. It is submitted that the ordinary rule as to costs should apply to the extent that parties supporting the secret ballot relief are substantially successful. In the event that this honourable Court rejects the argument of the President and the Speaker that the Constitution and the National Assembly Rules serve to prohibit the conducting of the vote of no confidence by way of secret ballot, these parties should be

⁵⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 47.

made to pay the costs of the UDM, IFP, EFF and COPE, including costs of two counsel.

74. On the other hand, if the application does not succeed and this Court confirms the views of the President and Speaker that a vote in terms of section 102 must be held openly, the parties should bear their own costs.⁵⁷

75. This Court has highlighted the rationale for this approach to costs as:

75.1. Reducing the “*chilling effect*” that an adverse costs order might have on parties contemplating asserting constitutional rights;

75.2. “*enrich[ing] the general body of constitutional jurisprudence*”; and

⁵⁷ See, for example, *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247; 2005 (6) BCLR 529 (CC) para 138; *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) paras 21-2. See Also *Du Toit v Minister of Transport* 2006 (1) SA 297; 2005 (11) BCLR 1053 (CC) para 55; *Omar v Government of the Republic of South Africa and Others* (Commission for Gender Equality *Amicus Curiae*) 2006 (2) SA 289; 2006 (2) BCLR 253 (CC) para 64; *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 (3) SA 121; 2007 (5) BCLR 280 (CC) para 62; *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 ; 2010 (1) BCLR 35 (CC) para 78.

75.3. confirming that the State bears the primary responsibility for ensuring that law and state conduct conform to the Constitution.⁵⁸

105. This application is of such constitutional importance that it falls squarely within this category.

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21 April 2017

⁵⁸ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 23.