IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT89/17

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

WRITTEN SUBMISSIONS FOR THE UNITED DEMOCRATIC MOVEMENT

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INTRODUCTION AND OVERVIEW OF SUBMISSIONS

1 This is an urgent application concerning the impending debate and vote in the National Assembly regarding three urgent no confidence motions in the President. The motions have now been postponed, pending the determination of this application.[1]

2 The motions of no confidence could hardly be of greater public significance. They arise by virtue of a midnight cabinet reshuffle by the President which has resulted in three ratings agencies downgrading South Africa to "junk status".[2] As National Treasury has itself explained[3] and as is undisputed in this application, it is ordinary South Africans who will suffer most from this self-induced economic crisis.[4]

3 The issue in dispute between the parties is whether the vote on the no confidence motions will take place via secret ballot.

3.1 The primary contention of the UDM is that no confidence motions are always <u>required or mandated</u> to take place via secret ballot.

3.2 The alternative contention of the UDM is that, at the very least, no confidence motions are <u>permitted</u> to take place via secret ballot. The Speaker accordingly has to exercise a discretion in each case. On

[1] Speaker affidavit, para 66; Replying affidavit, paras 15 - 26
[2] Founding affidavit, paras 17 – 20; President's affidavit, para 36
[3] Founding affidavit, para 20.2.5 and Annexure UDM8
[4] Founding affidavit, para 20.2.4 – 20.2.5

the facts of the present case, she ought to have exercised that discretion in favour of granting the request for a secret ballot.

3.3 The Speaker and the President reject both contentions. Their position is unequivocal. They contend that the effect of the Constitution and the Rules is that no confidence motions may never take place by secret ballot – irrespective of the circumstances of the case concerned.

4 The UDM contends that the stance of the Speaker (supported by the President) is wrong in law and is inconsistent with the Constitution. It seeks to have this court intervene to say so.

URGENCY

5 This application is unquestionably urgent. This is so in view of:

5.1 The ongoing risk to our state institutions (and country as a whole) of enduring a President in whom the National Assembly may have lost confidence; and

5.2 The uncontested facts regarding the economic and political crisis facing South Africa at present, following the President's cabinet re-shuffle just after midnight on 31 March 2017.[5]

6 The Speaker has rightly recognised the urgency of the motions of no

[5] Founding affidavit, paras 20 – 23. Neither the Speaker nor the President contests these facts – see Speaker affidavit, para 75

confidence and of this application.

6.1 She initially directed that they would be dealt with on 18 April 2017, when Parliament was in recess. She cut short her trip to Bangladesh for this purpose.[6]

6.2 She has accepted that it is necessary that this application be determined before the motions are debated and voted on by the National Assembly.[7]

6.3 She did not take issue with the stance of the UDM that, although the motions were postponed to allow this application to be determined, they remained "*extremely urgent*".[8]

6.4 She has made expressly clear that she does "*not take issue with urgency*" in respect of this application.[9]

7 It is only the President who takes issue with urgency. He contends that the matter is no longer urgent because the no confidence vote has been postponed.[10] However, this argument cannot succeed.

7.1 The President offers no meaningful engagement with the facts relevant to the urgency of the no confidence vote and, consequently, the continuing urgency of this matter.

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[6] Founding affidavit, para 53; Replying affidavit, para 32

[7] Speaker's affidavit, para 65

[8] Replying affidavit, paras 25 to 26 and Annexure RA15, paras 5.1 and 6

[9] Speaker's affidavit, para 39

[10] President affidavit, paras 99 - 101

7.2 Moreover, the Speaker's concession on urgency carries considerably more weight than the unmotivated stance of the President. The President is not even a member of the National Assembly. The Speaker is its chairperson. She is better placed to understand the urgency of the motions of no confidence and accordingly the urgency of this matter.

8 We thus submit that this application is undeniably of great urgency.

JURISDICTION

9 The UDM approaches this Court on two alternative bases: exclusive jurisdiction and direct access.

Exclusive jurisdiction

10 Section 167(4)(e) of the Constitution provides that only this Court may "*decide that Parliament … has failed to fulfil a constitutional obligation*".

11 The requirements to be met in this regard were helpfully summarised in the *EFF* matter.[11] The judgment makes clear that:

11.1 A would-be applicant must plead both a constitutional obligation and that Parliament failed to fulfil that obligation;[12]

11.2 The obligation must be one specifically imposed on Parliament – an obligation that is shared with other organs of state cannot fall under

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11 *Economic Freedom Fighters v The Speaker of the National Assembly* 2016 (3) SA 580 (CC).

12 *Economic Freedom Fighters* at para 16

the purview of section 167(4)(e);[13]

11.3 Where obligations are "*readily ascertainable and are unlikely to give rise to disputes*", this will not fall within section 167(4)(e).[14] By contrast:

> *"[W]here the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this Court to exercise its exclusive jurisdiction would have been met."*[15]

12 The present matter concerns Parliament's obligations in terms of section 102(2). The concomitant question which then arises is whether the Speaker, on behalf of the National Assembly, is obliged by the Constitution to allow for a secret ballot in respect of such a no-confidence motion, either in all cases or at the very least in a case such as the present.

13 We submit this matter falls within this Court's exclusive jurisdiction:

13.1 It concerns a two-pronged obligation that rests primarily only on the National Assembly, and secondly on the Speaker who heads the National Assembly. The primary and secondary obligations at play are inseparable and symbiotically related.

13.2 This is a case where the Constitution – in the words of this Court in the *EFF* matter – "*imposes the primary obligation on Parliament and*

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[13] *Economic Freedom Fighters* at para 18

[14] *Economic Freedom Fighters* at para 18

[15] *Economic Freedom Fighters* at para 18

leaves it at large to determine what would be required of it to execute its mandate".

13.3 Moreover, the Speaker herself contends that this matter will engage the court in "*political controversy*".[16] Yet, this Court has held that the presence of "*political consequences*" or "*crucial and sensitive political implications*" is a factor which strongly points in favour of it having exclusive jurisdiction[17]

14 The Speaker and the President resist the proposition that this Court has exclusive jurisdiction. Their attempts to do so are unsustainable.

14.1 They apparently contend that because the Constitution does not <u>expressly</u> require a secret ballot, there can be no question of a constitutional obligation in this regard.[18] This is self-evidently not correct. If, as the UDM contends, the Constitution requires a secret ballot to be used, it is irrelevant whether this requirement is express or implied.[19]

14.2 Both the Speaker and the President commit the cardinal error of conflating issues of jurisdiction with prospects of success. This Court has repeatedly warned against this approach. As it has explained: "*the substantive merits of a claim cannot determine whether a court*

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16 Speaker affidavit, para 10

17 *Economic Freedom Fighters* at para 19

18 Speaker affidavit, paras 21-22; President affidavit, para 22

19 *See SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at paras 20-22, discussed below.

has jurisdiction to hear it".[20]

15 We accordingly submit that this matter falls within the exclusive jurisdiction of this Court.

Direct access

16 In the alternative to exclusive jurisdiction, we submit that direct access should be granted in the interests of justice.

17 First, this application raises not only a pure constitutional issue, but what this Court has described as "*a constitutional issue that has a grave bearing on the soundness of our constitutional democracy*".[21]

17.1 This Court has described a motion of no confidence as "*a vital tool to advance our democratic hygiene*".[22] Never has this been more apt than the unprecedented economic and political crisis in which South Africa presently finds itself.

17.2 Yet, the UDM contends that unless a secret ballot is used in the present circumstances, this "*vital tool*" will be rendered blunt, ineffective and pointless.

18 Second, this matter is extremely urgent. As we explained above, the Speaker concedes this and the President offers no credible basis to

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[20] *My Vote Counts NPC v Speaker of the NA* 2016 (1) SA 132 (CC) at paras 132-134, quoting *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) at para 155; *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 75

[21] *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) at para 36

[22] *Mazibuko* at para 42

disagree.

19 Lastly, a Full Bench of the High Court has already pronounced on a number of the core issues involved, in the *Tlouamma* matter.[23]

19.1 In that case, the applicants unsuccessfully sought various relief in relation to a secret ballot for a no confidence vote.

19.2 The arguments presented here and the relief sought are not identical to those in *Tlouamma*. But the reasoning of the *Tlouamma* judgment places considerable obstacles in the path of the present application succeeding in the High Court, as the Speaker recognised in her letter to the UDM.[24]

19.3 The UDM contends that *Tlouamma* was wrongly decided and ought to be overruled by this Court. Apart from incorrectly interpreting the Constitution and the Rules, *Tlouamma* did not correctly apply the separation of powers doctrine and in particular, the defference principle. But because *Tlouamma* is a decision of the Full Bench, it would be binding on even another Full Bench, unless that Court considers that it has passed the high bar of being clearly wrong.[25] There is thus no realistic prospect of the applicant obtaining effective relief from the High Court. As this Court explained in *Gundwana* in

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[23] *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* 2016 (1) SA 534 (WCC) at paras 117-121

[24] Founding affidavit, para 35.2; Annexure UDM2

[25] *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at para 28

granting direct access:

> *"If the matter was taken further to the Supreme Court of Appeal, it seems reasonable to assume that it would not easily overturn a recent decision of its own. The end of that circuitous route would likely find the situation the same as it is before us now, with much time and costs wasted."*[26]

19.4 The *Tlouamma* judgment is critical for a further reason. It is generally not in the interests of justice to grant direct access where this will bypass other courts and result in this Court determining a matter as a court of first and final instance.[27]

19.5 But that is <u>not</u> the case here. This Court already has the benefit of the judgment of the Full Bench in *Tlouamma*. It will not be considering the secret ballot issue as a court of first and final instance. This militates strongly in favour of direct access.

20 While the Speaker and the President both oppose direct access being granted, their affidavits reveal only one argument on this score. This is the contention of the Speaker[28] that the UDM failed to exhaust internal remedies – that is it should have approached the Rules Committee to amend the National Assembly Rules to provide for a secret ballot. This contention is unfounded for a series of reasons:

20.1 First, the UDM does not consider that there is any difficulty with the current rules, which were adopted on 26 May 2016. Indeed, the UDM

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[26] *Gundwana v Steko Development* 2011 (3) SA 608 (CC) at para 30

[27] *Mazibuko* at paras 34-35

[28] Speaker affidavit, paras 4 and 35

voted in favour of those rules and understood (and understands) that there is nothing in the Rules as they stand that precludes a secret ballot.[29]

20.2 Second, and relatedly, the problem is not the Rules – it is the unlawful and unconstitutional interpretation thereof by the Speaker. Thus, the alleged internal remedy relied on by the Speaker is not an internal remedy at all.

20.3 Third, the UDM's primary contention is that the Constitution requires a secret ballot for no confidence motions. Whether this is so is an issue that only the courts can determine – not the National Assembly or its rules committee.

20.4 Lastly, the Speaker's decision is not subject to PAJA. Accordingly, if any principle of exhaustion of internal remedies is to apply, it is the common law principle. This is "*far less stringent*" than PAJA and a court will condone a failure to pursue an available internal remedy where "*that remedy is regarded as illusory or inadequate*".[30] In the present case:

20.4.1 After the *Mazibuko* judgment, there was an attempt to amend the Rules to provide expressly for a secret ballot for no confidence motions, but this was rejected by the National

[29] Replying affidavit, para 40.1

[30] *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) at para 36, citing Hoexter, Administrative Law in South Africa at 539

Assembly. The Speaker does not explain why a different outcome should be expected now.[31]

20.4.2 Moreover, the need for the urgent no-confidence vote and secret ballot only became acute and obvious after the President's cabinet re-shuffle on 31 March 2017. This is (and was) so urgent that it could not be seriously contended that the UDM was required to go through a rules amendment process. This is especially given that that Parliament is in recess until 9 May 2017.[32]

20.4.3 Lastly, the Speaker's contention that this is a matter for the Rules Committee is a belated and contrived one. It is not mentioned in the Speaker's letter of 6 April 2017.[33]

21 In the circumstances, we submit that even if this Court were to conclude that this matter does not fall within its exclusive jurisdiction, it is in the interests of justice for direct access to be granted.

THE EVENTS LEADING TO THIS APPLICATION

The decision to reshuffle

22 On 31 March 2017 shortly after midnight, the President made extensive changes to Cabinet. These included the removal of the Minister of Finance

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31 Speaker affidavit, para 5; Replying affidavit, para 40.4.1

32 Replying affidavit, para 40.4.2

33 Annexure UDM2

and his deputy.

23 In the immediate response of those within and outside of the ANC was to condemn the reshuffle. The EFF, the DA and the UDM all immediately addressed requests to the Speaker for a sitting of Parliament in order to debate a vote of no confidence in the President.

The request by the UDM for a secret ballot

24 On 6 April 2017, the UDM addressed a letter to the Speaker requesting a ruling that the motion of no confidence which was to be moved at a special sitting of the National Assembly on 18 April 2017 would be determined by way of secret ballot.

25 The reasons provided for the request are set out in the letter. Importantly, the UDM alleged that it had reason to believe that the outcome of the vote might be unduly tainted by allegiance to extraneous considerations and fear of reprisal rather than "*faithfulness to the Republic and obedience to the Constitution*".

The Speaker's response

26 On 7 April 2017, the Speaker refused the request. She expressed the view that there is no provision in the Rules or the Constitution for a vote on a motion of no confidence to be conducted by secret ballot. She made no mention of the allegations raised in the UDM's letter of threats and intimidation against members of the Assembly.

The allegations of threats against and intimidation of ANC MP's

27 The affidavits before this Court are replete with allegations of deep divisions within the ANC as a direct result of the cabinet reshuffle and widespread intimidation of members of the ANC in order to quell dissent within the party.

28 The UDM's founding affidavit describes at length the immediate aftermath of the President's decision to reshuffle the cabinet. Much of the UDM's account is drawn from media statements made by members of the ANC. The media reports which record these statements are all annexed to the founding affidavit. Neither the Speaker nor the President pertinently deny the facts contained in the media reports. The response of both the Speaker and the President is a general and bare denial.[34] Neither has engaged earnestly with the allegations, notwithstanding the fact that these are within the peculiar knowledge of both the President and the Speaker.

29 The Speaker makes the casual reference in her affidavit that the allegations in the media reports are hearsay.[35] However, this is insufficient to dislodge the allegations in the media reports:

29.1 In terms of s 3(1)(a) of the Law of Evidence Amendment Act 45 of 1988 this Court has a discretion to admit hearsay evidence when it is in the interests of justice to do so. In the present case it is indeed in the interests of justice to admit the evidence.

[34] Speaker affidavit para 3; President affidavit para 6

[35] Speaker affidavit, para 91

29.2 A key factor to be taken into account is the nature of the proceedings – this application was brought on a very urgent basis.

29.3 The UDM was compelled by force of circumstances to rely on hearsay statements reported in the media and elsewhere. These facts would otherwise not be accessible to the UDM. The statements made by the ANC officials as recorded in the media statements are all matters of public record. These are sufficiently notorious to enable this Court to take them into account.

29.4 The Speaker, the President and the ANC were afforded a full opportunity to repudiate the allegations. They elected not to do so.

29.5 The Speaker and the President stand to suffer little or no prejudice if the reports are admitted as evidence. On the other hand, the threats and intimidation of ANC members of the Assembly is a matter of significant public interest. This far outweighs any potential prejudice to the ANC.

29.6 To a large extent, the allegations contained in the President's affidavit corroborate the contents of the media reports.

30 The salient allegations (which are uncontested on these papers) are:

30.1 The Deputy President, Treasurer-General and Secretary General were three of a number of senior ANC leaders who publicly distanced

themselves from the decision to reshuffle.[36] They intimated that the reshuffle was not a decision of the ANC and that it had originated elsewhere.

30.2 Deep divisions within the ANC and its Alliance featured prominently in the news.[37] The SACP,[38] COSATU[39] and ANC stalwarts[40] all expressed the view that President Zuma should no longer lead the country.

30.3 The Speaker returned from Bangladesh in the midst of the public dissidence by senior ANC officials on the decision to reshuffle. She held a press conference at which she lamented the candour of ANC leaders and vowed that henceforth the ANC would speak in an organised voice.[41]

30.4 Immediately thereafter, the ANC held a meeting of national officials as well as a meeting of its National Working Committee ("NWC"). Both the Speaker and the President were present.

30.5 The allegation is made in the UDM's founding affidavit that: "*In the wake of its chairperson's return from Bangladesh and the subsequent meetings of the national officials of the ANC and its*

[36] Founding affidavit, paras 41, 42
[37] Founding affidavit para 45
[38] Founding affidavit para 46
[39] Founding affidavit para 51
[40] Founding affidavit para 50
[41] Founding affidavit para 54

NWC, the ANC seems committed to ensuring that its members toe the party line in defending President Zuma and his cabinet reshuffle".[42] Significantly, this is not disputed by the Speaker or the President.

30.6 In presenting the outcomes and decisions of the NWC meeting, the Secretary-General of the ANC warned that ANC members of the National Assembly who voted with the opposition in the motion of no confidence risked being fired. He stated "*No army in the world will allow its soldiers to be controlled by an enemy general. No ANC MP will vote with the opposition*".

30.7 ANC chief whip Mr Jackson Mthembu confirmed that ANC MP's were facing threats of removal should they vote in favour of the vote of no confidence. [43]

30.8 Senior members of the ANC, including Human Settlements Minister Lindiwe Sisulu, had received death threats for dissenting with President Zuma. [44]

31 Neither the Speaker nor the President engage seriously with these allegations of threats and intimidation of ANC members. In *Malan,*[45] this Court held that:

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[42] Founding affidavit para 55
[43] Founding affidavit para 59
[44] Founding affidavit para 60
[45] *Malan v City of Cape Town* 2014 (6) SA 315 (CC) at para 73

> *"A litigant is required to engage fully and seriously with allegations in an affidavit, more so when all or some of those allegations are sought to be disputed. A bare denial in circumstances where the relevant facts are peculiarly within the litigant's knowledge does not suffice. Absent a detailed and motivated answer or countervailing evidence from Ms Malan we are bound to accept the city's uncontroverted allegations".*

32 Rather than engage fully and seriously with the allegations of threats and intimidation contained in the media reports, the response of the Speaker was that: "*The issues raised in the media reports in the Applicant's founding papers are not issues to be determined in these proceedings*".[46]. This notwithstanding the fact that the issue of threats and intimidation is clearly relevant in these proceedings.

33 Furthermore, the Speaker tellingly stops short of denying the allegations that the ANC firmly clamped down on dissonance on the question of the reshuffle. She states that: "*Save for the admission that I returned from Bangladesh to attend to the important matter of the vote of no confidence in the President, the allegations that follow are not relevant to the legal question and the relief sought*"[47].

34 The President on the other hand appears to accept the truth and accuracy of the media reports. In his affidavit:

34.1 He "*notes utterances*" by the Secretary-General and Deputy President regarding his failure to consult the ANC leaders and

[46] Speaker affidavit Para 88

[47] Speaker's AA para 92

officials. His response is not to deny these utterances but to indicate that these are political matters. [48] These utterances are therefore effectively admitted.

34.2 He deals at length with what he describes as "*The Party Discipline Principle*". [49] He contends that the ANC is entitled to discipline members who do not comply with "*the decision of the ANC's National Committee*".[50] This is an implied admission that the ANC's NWC indeed took a decision that members who may vote in favour of the motion of no confidence risk being fired.

35 Other parties and amici before this Court have also provided evidence of threats and intimidation by the ANC.[51] This evidence supports the uncontested allegations made in the UDM's founding affidavit that ANC MP's face threats and intimidation from within the ANC to vote against the motion of no confidence. In the words of the ISS, "*threats and intimidation for political outcomes are real and not idle*".[52]

THE PRIMARY ARGUMENT: A SECRET BALLOT IS <u>REQUIRED</u> OR <u>MANDATED</u> FOR ALL MOTIONS OF NO CONFIDENCE

36 Section 102(2) of the Constitution deals with votes of no confidence in the President. It provides:

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[48] President's AA para 48
[49] President's AA para 79

[50] President's AA para 90

[51] See EFF at para 11, Cope at paras 6 to 8 UPM at para 20; ISS at paras 16; 34 to 45

[52] Para 38

> *"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."*

37 The section is self-evidently silent on the question of whether the motion of no confidence must be voted on by secret ballot or open ballot. It requires merely that the motion be passed by "*a vote*" supported by the majority of the NA members.

38 Does the phrase "*a vote*" in section 102(2) prescribe, include and/or exclude a secret ballot? That is the only question.

39 In contending that this requires (or at least permits) the use of a secret ballot, we begin by dealing with the general principles regarding the interpretation of the Constitution. We then turn to deal with why the section should be interpreted as requiring a secret ballot to be used.

The principles of constitutional interpretation

40 The approach of the President and the Speaker is essentially to focus only on the language of the relevant section, with little attention to its purpose or context. This leads them to conclude that because there is no express provision requiring a secret ballot for no confidence votes, the secret ballot is *ipso facto* prohibited.

41 However, this approach is not consistent with the general interpretative trend in our law,[53] still less with the approach required in respect of the

[53] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28. See also: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 18-19

interpretation of the Constitution itself.

42 Since its very earliest decisions, this Court has rejected the idea of an excessively legalistic or formalistic approach to the interpretation of the Constitution. It has adopted this approach in respect of both fundamental rights provisions and structural provisions.

43 As this Court explained in *Mansingh*:

> *"The Constitution is the supreme law of the Republic. This court has given approval to an interpretive approach that, while paying due regard to the language and the context, is generous and purposive and gives expression to the underlying values of the Constitution."*[54]

44 Moreover, in *Matatiele 2*, dealing with the obligations of Parliament in relation to its processes, this Court held:

> *"The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution."*[55]

45 The same approach was recently adopted by the Botswana Court of Appeal. The case concerned the question of whether the Constitution precluded Parliament adopting a secret ballot procedure for the election of the Vice-President and Speaker. In holding that the Constitution did not preclude this approach, the Court held:

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[54] *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC) at para 16

[55] *Matatiele Municipality v President of the RSA (No 2)* 2007 (6) SA 477 (CC) at paras 36 – 37 (emphasis added)

> *"… the very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution; and that where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms should be narrowly or strictly construed."*[56]
>
> and
>
> *"A Constitution must also be interpreted in its context – historic, social, and political – to inject the full contemporary meaning into its broad terms. It must be interpreted… '… in relation to the vicissitudes of fact which from time to time emerge.'"*[57]

The role played by secret ballots

46 Of considerable importance in this regard is the role played by a secret ballot.

47 Historically, the fundamental freedom to make political choices was undermined by public voting processes. Voting in public gave rise to issues of physical and economic intimidation:

> *"Intimidation took various forms. Mob violence was common, as was assault of voters by supporters of particular candidates. Somewhat more subtle was economic intimidation, entailing dismissal from employment or eviction from property if the employer/landlord's voting instructions were not followed. The impact of these practices was exacerbated by the lack of a secret ballot. Public voting was justified on the basis that the right to vote was akin to a trust, and so necessarily open to scrutiny. Reformers regarded this as a guarantor of corruption and intimidation: candidates who bought votes could check they gained value for money and penalise voters of independent inclinations."*[58]

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[56] *Botswana Democratic Party v Umbrella for Democratic Change* CACGB-114-14 at para 44, quoting Attorney General v Dow (1992) BLR 119 CA at 131-132 (emphasis added)

[57] At para 45, quoting James v Commonwealth of Australia (1936) AC 578 at 614

[58] Loveland I "*Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*" (Oxford University Press, 2015) at 201.

48 It is now internationally accepted that secret ballots, historically also referred to as the "*Australian ballot*" due to its origins in the 1850s, strengthens democratic processes rather than undermines them. Article 21(3) of the UN Declaration of Human Rights provides:

> "*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.*"[59]

49 Section 19(2) of our Constitution is, of course, perfectly consistent with this principle. It provides:

> *"Every adult citizen has the right to vote in elections for any legislative right body established in terms of the Constitution, and to do so in secret."*

50 But the need for a secret ballot is not only present when it is members of the public who are voting. Rather, it is present also when members of a legislative assembly vote on certain issues in circumstances where a similar risk of electoral fraud or voter intimidation arises.

51 This was well-explained by the Zimbabwean Supreme Court:

> *"The legislature chose the secret ballot for its optimum benefits … the prescription of a secret ballot as the method of election of the Speaker [by members of the legislature] is based on the acceptance of the principle that it promotes and protects freedom of expression of choice of a preferred candidate without undue influence, intimidation and fear of disapproval by others."*[60]

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[59] See also section 25(b) of the International Covenant on Civil and Political Rights

[60] *Moyo & Others v Zvoma* SC 28/10, quoted with approval in *Botswana Democratic Party v Umbrella for Democratic Change* CACGB-114-14 at para 55

A secret ballot is required to elect the President

52 The President argues that a secret ballot for National Assembly is not consistent with our constitutional values.[61]

53 This is not sustainable. The Constitution expressly envisages the use of a secret ballot for the election of the President, the Speaker, provincial Premiers and provincial Speakers: "*If more the one candidate is nominated … a vote must be taken at the meeting by secret ballot"*.[62]

54 The Constitution "*must be read as a whole and its provisions must be interpreted in harmony with one another*".[63] The Constitution thus itself recognises that a secret ballot is not inconsistent with values of openness, transparency and accountability.

55 In the process prescribed for the election of the President there is no provision for voting by any method other than secret ballot. In terms of item 5 of Part A of Schedule 3, if there is only one candidate nominated, the President is elected by the declaration of the Chief Justice and not by so-called open vote. The open vote is foreign to the selection of a President. It can therefore never be compulsory in the event of his or her non-selection.

56 The constitutional scheme thus recognises that the position of President is not something that should be determined by members of the National

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61 President affidavit, para 69

62 Item 6(a) of Part A of Schedule 3 (emphasis added)

63 *UDM v President of the RSA (No 2)* 2003 (1) SA 495 (CC) at para 12

Assembly as mere extensions of their political parties. If this were the case, there would be no need for a secret ballot under any circumstances. Rather, the constitutional scheme is intended to achieve a situation where each member of the National Assembly is able to apply his or her mind and conscience freely as to who should be elected as President, without fearing recriminations or punishment thereafter from a political party or anyone else.

57 The scheme of the Constitution is thus that when there is a contestation in the National Assembly regarding the position of President, the members of the Assembly must be allowed to express themselves via secret ballot.

57.1 But there is no difference, in principle, between a contestation in the National Assembly over which of two candidates will be elected to become President and a contestation in the National Assembly over whether the person previously elected as President should be compelled to step down.

57.2 They are flip sides of the same coin and it only makes logical sense for them to proceed by means of the same procedure. Anything else risks placing form above substance.[64]

57.3 The Speaker and President insist on viewing the sections regarding the election of the President in isolation, hermetically sealed from the remainder of the Constitution, including section 102(2). But this is impermissible:

[64] *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at para 18

> *"The contention advanced by the government and the province of KwaZulu-Natal does not take sufficient account of the basic and fundamental objectives of our constitutional democracy. In the end, it considers and construes s 118(1)(a) in isolation, without regard for the basic principles which underlie our democracy and the other provisions of the Constitution. This approach to constitutional interpretation is flawed."*[65]

58 Indeed, the Speaker's decision gives rise to the following anomaly:

58.1 When the President is elected by the members of the National Assembly, this gets done by secret ballot whenever there is more than one nomination.

58.2 When the members of the National Assembly consider whether to adopt a vote of no confidence against him or her, no secret ballot may be used – irrespective of the circumstances.

58.3 But if the vote of no confidence succeeds and the President resigns, his successor will again have to be appointed using a secret ballot procedure, in the event of a contest.

59 We submit that such an anomalous and, ultimately, incoherent approach is not consistent with the constitutional scheme.

The absence of a secret ballot undermines the purposes of the no confidence motion

60 In *Mazibuko*, this Court considered at length the importance and purpose of a no confidence vote.

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[65] *Matatiele Municipality v President of the RSA (No 2)* 2007 (6) SA 477 (CC) at para 39

60.1 The Court began by explaining what a vital tool it was:

> *"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 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."*[66]

60.2 The Court added it is was "the most important mechanism" by which Parliament can hold the executive to account:

> *"The right that flows from section 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."*[67]

60.3 The Court held the right to seek a no confidence vote is not merely vested in the majority and minority parties represented in the National Assembly, but that the "*better view*" is that it is vested in each individual member of the National Assembly:

> *"[T]he 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."*[68]

61 Each of these aspects and purposes of the no confidence mechanism are fatally undermined when the vote of no confidence is required to take place without a secret ballot. Without a secret ballot:

61.1 The fear of repercussion will inhibit members from voting freely in

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[66] *Mazibuko* at para 43

[67] *Mazibuko* at para 44

[68] *Mazibuko* at para 45

accordance with their consciences. Freedom from threats and harassment is essential in ensuring that members are not cowed in carrying out their oversight function.

> *"Parliament is also entrusted with the onerous task of overseeing the executive. … [F]or Parliament properly to exercise its oversight function over the executive, it must operate in an environment that guarantees members freedom from arrest, detention, prosecution or harassment of whatever nature. Absent this freedom, Parliament may be cowed, with the result that oversight over the executive may be illusory."*[69]

61.2 There is no realistic possibility that the motion of no confidence will succeed, unless the majority party decrees that it must. The "*ever present possibility*" referred to by this court in *Mazibuko* is accordingly denuded of all meaning and members are accordingly unable to use it "*to keep the President accountable to the Assembly*".

61.3 The constitutional entitlement to initiate a motion of no confidence would be negated in the absence of mechanism to adequately protect members from fear of reprisal.

61.4 The no confidence mechanism effectively becomes a dead letter – which can operate only when the majority party decides so. This "*most important mechanism … to hold the executive to account*" thus fails to fulfil its function.

61.5 The right accorded to "*every member of the Assembly … to garner support*" from a majority of members in respect of the no-confidence

[69] *Democratic Alliance v Speaker* 2016 (3) SA 487 (CC) at para 17

vote is rendered illusory. Every member will know that they will be unable to garner the necessary support from their fellow members unless they persuade the majority party to support it.

62 It is only by allowing a secret ballot that this can be remedied.

62.1 Doing so in no way guarantees that the no confidence motion will succeed. Nor does it put the majority party at any disadvantage. The majority party still has its majority and will still give guidance to its MPs as to how they should vote.

62.2 But the critical difference is that it will ultimately be for each MP to exercise that right in a manner that reflects his or her conscience, without fear that voting the "wrong" way will lead to dismissal from the party, removal from Parliament and the loss of his or her means of livelihood.

62.3 An interpretation which places party loyalty above the dictates of the Constitution will in any event offend the Constitution.

63 This Court held in *Mazibuko* that "*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.*"[70]

64 Similarly, it would be inimical to the vital purpose of section 102(2) to accept

[70] *Mazibuklo* at para 57

that a motion of no confidence can never succeed without the generosity and concurrence of the majority party instructing its MPs to support it.

65 The inappropriateness of allowing the majority party to pre-determine the outcome of the vote of no confidence is also made clear by the minority judgment of Jafta J in *Mazibuko.* It held that it is incorrect to view the issue through the lens of parties:

> *"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. 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."*[71]

65.1 A refusal to allow a secret ballot for a no confidence vote produces precisely the problem to which Jafta J referred. It means that the outcome of the no confidence vote will inevitably be determined by the majority party – and the role of individual members is denuded of any meaningful content.

65.2 When exercising their vote to install or remove a president the members of parliament are not necessarily and/or exclusively wearing their party hats. No doubt each political party has its own

[71] *Mazibuko* at para 90

mechanisms to hold its members, including the President, to account. Section 102 has a different purpose.

The role of members of the National Assembly and the duty on them to give effect to their oath and duty to the Constitution

65 The Constitution emphasises the important role to be played by the individuals who make up the National Assembly. Section 46(1) provides that "*(t)he National Assembly consists of no fewer than 350 and no more than 400 women and men*". Their primary role appears from section 42(3) which provides that the Assembly is elected to represent the people and to ensure government by the people.[72]

66 The Constitution also obliges individual MPs to consider the Constitution, the laws of the country and the interests of the Republic when carrying out their functions as members of the Assembly. Section 48 makes it compulsory that members swear or affirm faithfulness to the Republic prior to performing their functions in the Assembly. The oath, set out in schedule 2, provides that:

> *"I [name] swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly to the best of my ability".*

67 This Court has affirmed the important role played by individuals in the National Assembly in carrying out the constitutional legislative and oversight

[72] *Oriano-Ambrosini* at para 43: *Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalized or the powerless minorities, listen"*

functions of the Assembly. In *Oriani-Ambrosini,* this Court, held that section 55(1)(b) conferred the power to introduce a Bill in the Assembly to each individual member of the Assembly. It held that mention of "*the National Assembly*" in the section should be interpreted as a reference to the elected members by whom the Assembly is constituted rather than the institution as a whole.[73]

68 This Court held that individual members had the right to be heard and to have their views considered:

> *"It is a collective responsibility of both the majority and minority parties and their individual members to deliberate critically and seriously on legislative proposals and other matters of national importance…This approach would give meaning to and enrich our representative and participatory democracy, and will probably yield results that are in the best interests of all of our people."*[74]

69 The recognition of the special role played by individuals in the National Assembly is consistent with this Court's emphasis on the deliberative nature of the National Assembly in a pluralistic democracy. In *Masondo*, Sachs J said:

> *"(T)he Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. . . . The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants."*[75]

70 While these decisions dealt with the role played by individual members of

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[73] *Oriani –Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para 40

[74] Para 48 (emphasis added), relying on *Democratic Alliance v Masondo NO* 2003 (2) SA 413 (CC)

[75] *Masondo* at paras 42 - 43

the Assembly while carrying out legislative functions, this Court has also made clear that individual members play an equally critical role in the Assembly's oversight function over executive action.[76]

Privileges and Immunities of members

71 The privileges and immunities of members of the Assembly are set out in section 58(1) of the Constitution. It provides that they:

71.1 have freedom of speech in the Assembly (subject to the Rules); and

71.2 are not liable to civil and criminal proceedings, arrest, imprisonment or damages for anything said in the Assembly or its Committees or anything revealed as a result of something said in the Assembly or its Committees.

72 These privileges and immunities have been described by this Court as a 'bulwark of democracy'[77]. This Court has held that this "*promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.*"[78]

73 Section 58(2) then provides that other privileges and immunities may be prescribed by national legislation. This is the Powers, Privileges and

[76] *Democratic Alliance v Speaker* at para 17; *Mazibuko* at para 41
[77] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 39
[78] *Dikoko* para 39. This Court held in *DA v Speaker* that these sentiments were equally applicable to Parliamentary processes.

Immunities of Parliament and Provincial Legislatures Act[79] ("the PPIPA Act"). Sections 7 and 8 of the Act expressly prohibit improper interference with the performance by a member of his or her functions and provide that no person may improperly influence a member in the performance of his or her functions as a member. Section 27(1) provides that anyone who contravenes these sections commits an offence and is liable to a fine and three years' imprisonment.

74 The impact of these sections is to confer additional legislative protection on members of the Assembly beyond section 58(1) of the Constitution. The PPIPA secures freedom for individual members of the Assembly to not only participate freely in debate but also to engage freely and independently in decision-making. This freedom is consonant with the demands of a pluralistic parliamentary system which requires that each individual member participate freely in debate and decision-making. As Madlanga J said in *DA v Speaker*:

> *"Focusing on Parliament, the pluralistic nature of our parliamentary system must be given true meaning. It must not start and end with the election to Parliament of the various political parties. Each party and each member of Parliament have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making…Unless all enjoy the right to full and meaningful contribution, the very notion of constitutional democracy is warped."*[80]

The objections of the Speaker and the President

75 In their answering affidavits, the Speaker and the President raise essentially

[79] 4 of 2004
[80] *DA v the Speaker* at para 11 (emphasis added)

five objections to the UDM's interpretative argument.

76 First, they place considerable reliance on the fact that the Constitution does not expressly require a secret ballot to be used.[81] However, this objection cannot succeed.

76.1 There is nothing unusual or impermissible about a constitutional constraint being implied, as opposed to express. Some of our most central substantive constraints on public power are implied constraints.

76.2 Take the example of the principle of legality and the related principle of rationality. These are both implied rather than express constraints, as this Court explained in *Fedsure:*

> *"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle and they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution."*[82]

76.3 Similarly, the constitutional text contains no express reference to another cardinal principle of our Constitution, the "*separation of powers*". Yet, in *SAAPIL*, this Court held that this was indeed a requirement of our Constitution and laws inconsistent with it were invalid.[83] It rejected the suggestion that an implicit constitutional requirement had less force than an express one:

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[81] President affidavit, paras 17 - 18

[82] *Fedsure Life Assurance Ltd v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) at para 58 (emphasis added)

[83] *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC*)* at para 22

> *"I cannot accept that an implicit provision of the Constitution has any less force than an express provision. In Fedsure this Court held that the principle of legality was implicit in the interim Constitution and that legislation which violated that principle would be inconsistent with the Constitution and invalid.*
>
> *… The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different."*[84]

76.4 The only question is whether the Constitution requires that motions of no confidence be dealt with via secret ballot. Whether it requires this expressly or implicitly is irrelevant.

77 Second, the opposing respondents seek to contend that because the Constitution requires a secret ballot in certain other instances, it must follow that it does not do so in this case.[85] This too cannot succeed.

77.1 In the context of interpreting statutes, this Court has expressed considerable caution regarding the *expressio unius* doctrine:

> *"'This maxim has been described as 'a valuable servant, but a dangerous master'. 'It is not a rigid rule of statutory construction'; in fact it has on occasion been referred to as a 'principle of common sense' rather than a rule of construction, and 'it must at all times be applied with great caution'."*[86]

77.2 In *Ferreira*, in the context of the interpretation of the Constitution, this Court has rightly been even more sceptical of the principle. Ackermann J endorsed the Canadian approach:

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[84] *SAAPIL* at paras 20-21 (emphasis added)

[85] Speaker affidavit, paras 21 and paras 97-98

[86] *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at paras 40 - 41

> *"The principle of statutory construction, expressio unius, is ill-suited to meet the needs of Charter interpretation. It is inconsistent with the purposive approach to Charter interpretation which has been endorsed by this Court and which focuses on the broad purposes for which rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions of ordinary statutes in order to discern legislative intent".*[87]

77.3 Chaskalson P for the majority then held:

> *"I agree with Ackermann J that the mechanical application of the expressio unius principle is not appropriate to an interpretation of chap 3. This does not mean, however, that the structure of chap 3, the detailed formulation of the different rights and the language of s 11 can be ignored."*[88]

77.4 Indeed, the Botswana Court of Appeal recently rejected almost exactly the argument now advanced by the Speaker:

> *"It does not follow that because Parliament had directed that a secret ballot must be held in two instances, that that method of voting is forbidden in all other elections.…*
>
> *…. I agree with Leburu J. that the expressio unius maxim has no application in this case. It is, in any event, as he said, a rule to be sparingly invoked, particularly where enactments have been carefully crafted. …. There can be no instrument more carefully crafted than the Constitution, so it will be very rare that artificial rules of construction fall to be invoked in interpreting its provisions. And the rule cannot properly be invoked to whittle down parliamentary privilege…."*[89]

78 Third, the President submits that since section 46(1) of the Constitution provides for a system of proportional representation, this means that "*it is the political parties that are the main constitutive element of the democratic process, the Legislature and the Executive and not the members allocated*

[87] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 78

[88] *Ferreira* at para 172 (emphasis added)

[89] At paras 53 – 54 (emphasis added)

by parties to the legislative bodies."[90] He thus effectively argues that this entitles a political party on the basis of "party discipline", to coerce its members to vote in a particular way regarding a motion of no confidence. This is fatally flawed:

78.1 It ignores the fact that MPs perform different kinds of functions.

78.1.1 At one end of the spectrum, are policy matters like MPs voting on the passing of legislation. Here it may arguably be permissible for a party to expect members to toe the party line.

78.1.2 At the other end of the spectrum, are MPs voting to elect the President. Here, the Constitution recognises that MPs must be able to vote their conscience, not the party line and requires a secret ballot to enable this.

78.1.3 That leaves the function presently at issue – determining whether to continue to express confidence in the President. As explained above, this is quite different from enacting legislation and very similar to the election of the President. It involves a judgement call to be made by each MP in accordance with his or her conscience or oath. The secret ballot enables that to occur, thus fulfilling the objectives of section 102(2) distilled by this Court.

[90] President affidavit paras 45, 46, 47

78.2 In addition, the secret ballot does not preclude a party from lobbying its members to vote in a particular manner, just as it can in the contested election of a President. What the party cannot do, however, is what the President has effectively done in his answering papers - threaten any member who has the temerity to vote against him with expulsion from the party. This is not consistent with the Constitution, the purpose of section 102(2) or the provisions of the Powers and Privileges Act discussed above. (It is not even clear if such a threat can be lawfully carried out, as alleged by the President in his affidavit.) As the Botswana Court of Appeal explained:

> *"[I]n a telling argument, [it was] pointed out that in terms of Section 19(i) of the National Assembly Powers and Privileges Act Cap 02:05, it is a criminal offence to attempt directly or indirectly by threats or intimidation of any kind to influence a Member in his vote upon any question arising in the Assembly. This certainly does not support an argument that political parties are entitled to 'coerce' their members to vote in a particular way. Rather this is to be done by agreement in terms of the party constitution."*[91]

78.3 Indeed, any party disciplinary rule which provided for expulsion based on upholding the oath of office would be unconstitutional and unenforceable. This of course does not avoid the need for the secret ballot – victimisation can take many other forms.

78.4 As demonstrated earlier:

78.4.1 Individual members of the Assembly play a critical role in carrying out both the legislative and oversight functions of the

[91] *Botswana Democratic Party* at para 61 (emphasis added)

Assembly. They must be afforded the freedom to not only participate fully and freely in debate in the Assembly but also in the decision-making; and

78.4.2 When MPs perform their functions, the PPIPA prohibits improper interference by and undue influence from anyone, including the relevant political parties. Individual members are thus required to adhere to their oath.

79 Fourth, the President makes a remarkable submission suggesting that it is perfectly appropriate for the ANC alone to determine whether a motion of no confidence should fail or succeed.

79.1 He submits that:

> *"As a matter of fact, that is the advantage of enjoying a majority in Parliament and that is how the mandate of the majority is carried out by the majority party"*[92]
>
> *"The applicant in effect requires this Honourable Court to subvert the rights of the majority party in Parliament deny(ing) the ruling party the benefit of its majority status"*[93]
>
> *"This, I submit, is a self-serving interpretation, and if permitted, would undermine the will of the electorate that elected such party into Parliament and would be unconstitutional"*[94]

79.2 The President submits that the ANC is entitled to discipline members who fail to "*remain loyal*" to the party[95] and that such members may face expulsion if they support the motions.[96]

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[92] President affidavit, para 70
[93] President affidavit, para 73
[94] President affidavit, para 73
[95] President affidavit, para 81
[96] President affidavit, para 91

79.3 These contentions stem from a fundamental misconception of the nature of our multiparty democracy and the role of political parties and MPs within that system. They violate the provisions of the Constitution and the PPIPA set out above.

79.4 The President also relies on this Court's statement in *UDM v President of the RSA*[97] that Courts are not concerned with the motives of members of Parliament in voting for or against particular pieces of legislation. But while motive may be irrelevant, what is extremely relevant is whether or not that member was subject to improper interference or undue influence including threats and intimidation by the relevant political party. Such conduct is inconsistent with the Constitution and is prohibited by the PPIPA.

80 Lastly, the Speaker and the President seek to raise separation of powers concerns.[98] However, this too is without merit.

80.1 This application concerns a determination of (a) what the Constitution provides and requires; (b) what the Rules provide and require; and (c) whether the Speaker's decision meets these legal requirements.

80.2 These are matters pre-eminently suited to be pronounced on by the courts and indeed only the courts can pronounce on them.

[97] *UDM v President of the RSA* (No 2) 2003 (1) SA 495 (CC) at para 56
[98] Speaker affidavit, paras 10 and 40 – 48; President affidavit, paras 74 - 78

THE ALTERNATIVE ARGUMENT: THE CONSTITUTION AND RULES PERMIT A SECRET BALLOT FOR NO CONFIDENCE MOTIONS

81 We have set out above the applicant's primary argument – that the Constitution requires a secret ballot for no confidence motions. In the event that this Court is not persuaded by this argument, the UDM's alternative argument is then that the Constitution and Rules at the very least permit a secret ballot for no confidence motions in appropriate circumstances.

82 In this regard, what is crucial is that there is nothing in the Constitution or Rules that precludes a secret ballot being used for no confidence motions. We have already dealt with the constitutional provisions and so, in what follows, we focus on the Rules.

The relevant Rules

83 Rule 129(1) provides that a member may propose that a motion of no confidence in terms of section 102 be placed on the Order Paper. It contains no reference to how voting occurs – meaning that the ordinary rules on the casting of votes apply.

83.1 Rule 102 deals with the casting of votes. It provides that, unless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104.

83.2 Rule 103 (1) provides:

> *"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 utilisation of such system in accordance with a procedure predetermined by the Speaker*

and directives as announced by the presiding officer" (emphasis added).

83.3 Rule 103(1) expressly empowers the presiding officer (who is the Speaker in a vote of no confidence) to direct a mode of voting other than through the electronic voting system described in rule 103(1). The rules do not specify what form such alternative voting method should take, meaning this must include the power to order a secret ballot.

83.4 That the Speaker has the power and discretion to order an alternative method of voting is reinforced by rule 104 which provides for a manual voting system. Rule 104(1) provides:

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

83.5 This rule expressly empowers the Speaker to use a manual voting system; predetermine the voting procedure; and issue directives as to how the vote would take place.

84 The rules do not constrain the Speaker as to the type of manual voting system to be utilised under rule 104(1). There is no reason why this should not include a secret ballot voting procedure. On the contrary, the rules appear to specifically contemplate that a manual voting procedure may require that members' names and votes not be disclosed. Rule 104(3) provides that "*If the manual voting procedure permits, members' names and votes must be printed in the Minutes of Proceedings."*

Interpretation of the Rules

85 On an ordinary interpretation of the Rules, as explained above, we submit that it is clear that the Speaker has the power and discretion to order a secret ballot. Certainly, none of the rules prohibit the use of a secret ballot.

86 The rules of the National Assembly must be interpreted in light of the provisions of the Constitution.[99] This yields the same result.

86.1 The Constitution and PPIPA require that members of the National Assembly be free from improper interference and undue influence when voting in the Assembly. This means that the Speaker must be empowered to, when the need arises, order a voting system which ensures that members are duly and properly protected.

86.2 Hence the words "*unless the Speaker directs otherwise*" in section 103(1) ought to be interpreted as conferring a discretion on the Speaker to order a secret ballot. Similarly, the words "*in accordance with a procedure predetermined by the Speaker"* in section 104(1) must be interpreted as permitting the Speaker to order a secret ballot.

87 Alternatively, to the extent that the Rules are silent on the circumstances in which the Speaker may rule that a vote takes place by secret ballot, the Speaker is empowered by Rule 8(2) to do so.

88 In the event that the Rules do not empower the Speaker to direct that a vote

[99] *Mazibuko* at para 36

of no confidence can take place through a secret ballot, then we submit that the Rules are inconsistent with the Constitution.

GROUNDS OF LEGALITY REVIEW

89 In the event that this Court concludes that the Speaker had the discretion to direct that a secret ballot be used, her decision falls to be declared unconstitutional and reviewed and set aside.

90 First, the Speaker committed an error of law when she concluded that she does not have the power to rule that the vote of no confidence proceed by secret ballot. Since this was the only reason for her decision, the error was clearly material. A decision based on a material error of law is palpably irrational. The SCA has held that in order for a decision to be rational it must be based on accurate findings of fact and a correct application of the law.[100]

91 Second, the Speaker irrationally ignored material relevant considerations.[101]

91.1 The Speaker failed to respond rationally to concerns that the provisions of the Constitution which provide for a vote of no confidence in the President would be abrogated if ANC members of parliament were intimidated and compelled by the party to vote according to the party line and not in accordance with their consciences.

[100] *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA) at para 40

[101] See *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at paras 38-40

91.2 She ignored relevant factors including that she had the power to rule that the motion of no confidence could proceed by way of secret ballot; and that there were ANC members of the Assembly being threated and intimidated to toe the party line and not to vote according to their consciences.

92 Third, the Speaker acted *mala fide* and/or for an ulterior purpose:

92.1 Immediately upon her return from Bangladesh the Speaker intimated that she was unhappy that members of the top 6 of the ANC were openly critical of the decision of the President. She asserted that henceforth the ANC would speak in a more organized voice;

92.2 The Speaker was part of the meeting of the national officials of the ANC and the meeting of the NWC. In those meetings 'dissonance' amongst ANC members was discussed and a decision was taken that members who voted for the motion of no confidence would be disciplined.

92.3 In its founding affidavit the UDM made the allegations that the decision reached by the Speaker to decline a secret ballot is consistent with her earlier stated view that the ANC should speak in a more organized voice. It also is consistent with the outcome of the meetings of the ANC's national officials and national working committee (which she was part of) that members must toe the party

line.[102]

92.4 These allegations are baldly denied by the Speaker without any meaningful engagement with its substance.[103] On the strength of the *Malan* decision quoted above, this Court must deal with the UDM's allegations as uncontroverted.

92.5 Further evidence of the fact that the Speaker acted *mala fide* or for an ulterior purpose is the following:

92.5.1 The Speaker does not engage with or even baldly deny the serious allegation in the founding affidavit that it "*was peculiar behaviour*" for her only to announce the date for the no confidence debate and vote after the NWC meeting had concluded.[104]

92.5.2 It is striking that the Speaker offers only a bare denial of the even more serious allegation that she has a "*proven inability to differentiate between her two roles*" of Chairperson of the ANC and Speaker of the National Assembly.[105]

92.5.3 The Speaker's initial obstructive and inexplicable behaviour when asked by the UDM, EFF and DA to postpone the vote and debate pending the determination of this matter, and her

[102] Founding affidavit para 106.6
[103] Speaker affidavit para 117
[104] Founding affidavit, para 57; Speaker's affidavit, paras 86-92
[105] Founding affidavit, para 108; Speaker's affidavit, para 118

persistence with this stance until threatened with an urgent application[106], confirms that she is not approaching this issue as impartial and unbiased decision-maker.

92.6 In the circumstances the Speaker failed in her duty under the Rules and the Constitution to be independent and impartial.

REMEDY

93 In terms of section 172(1), this Court must declare the decision by the Speaker to refuse the UDM's request for a secret ballot to be inconsistent with the Constitution in that her decision was in breach of the Constitution and irrational. This is so on both the primary and alternative arguments.

94 This Court then has a discretion to grant "*just and equitable relief*":

> *"This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements."*[107]

95 We are mindful that substitution is ordinarily seen as an exceptional remedy.[108] Nevertheless, in the present matter, constitutional justice is advanced by an order setting aside the decision by the Speaker and directing the Speaker to take steps to ensure that the motion of no

[106] See Replying Affidavit paras 15 – 25

[107] HoD: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) at para 97

[108] Trencon Construction (Pty) Limited v Industrial Development Corporation 2015 (5) SA 245 (CC)

confidence is decided by secret ballot:

95.1 Such a remedy would be a substantive resolution of the underlying dispute between the parties;

95.2 It is extremely urgent that the issue of the secret ballot be finally resolved, so that the urgent motions of no confidence can be debated and voted on;

95.3 No useful purpose would be served by sending the matter back to the Speaker for reconsideration. The Speaker has been shown to be conflicted and unable to differentiate between her roles as Speaker and that of Chairperson of the ANC;[109]

95.4 The uncontroverted facts of this case cry out for a secret ballot. To proceed in any other way would unduly expose ANC members of the Assembly to threats and intimidation and may ultimately result in them facing disciplinary sanction for doing no more than complying with their constitutional obligations;

95.5 The Speaker has expressly stated that she is not averse to having the motion of no confidence being decided by secret ballot.[110] She merely declined the secret ballot on account of her understanding that she has no authority or discretion to accede to the request. Once this impediment is removed, there is no reason why a secret ballot

[109] Replying Affidavit, para 51

[110] Speaker affidavit, para 4

should not be ordered.

COSTS

96 The UDM requests this Court to order the President to pay the costs of this application in his personal capacity, as well as on a punitive scale.

97 In his answering affidavit, the President, although cited in his capacity as President of the Republic of South Africa,[111] pins his opposition to the applicant's application on the issue of discipline within the ANC.[112] He seeks to ensure that those ANC members who vote in favour of the motion of no confidence can be known, and can be "disciplined" for having been disloyal to the ANC. This is clearly a move to further his own interest and avoid him being compelled to resign.

98 It is on this basis that the UDM requests this Court to order that he be personally liable for the costs of this application. Our courts have expressed the view that will ordinarily be granted in exceptional circumstances.[113] We submit that this is such a case. We refer in this regard to the detailed motivation contained in the replying affidavit.[114]

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[111] Founding affidavit, para 7

[112] President ffidavit, paras 79 – 98

[113] *Moyakhe and another v Attorney-General, Transkei* 1993 (3) SA 197 (Tk) at 203G–H; *Prinsloo v Nasionale Vervolgingsgesag En Andere* 2011 (2) SA 214 (GNP) at paras 51 and 55; *Absa Bank And Others v Robb* 2013 (3) SA 619 at para 27. See also: Clive Plasket, "Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials" (2000) Vol 117, *SALJ* at page 151.

[114] Replying affidavit, paras 53 – 53.9

99 It bears emphasis too that the President is represented by the State Attorney. Yet it is apparent from section 3 of the State Attorney Act[115] that the State Attorney cannot be used by an individual official who is litigating in circumstances independent of his office.

CONCLUSION

100 We therefore submit that an order in terms of the Notice of Motion should be granted, including an order for the costs of three counsel.

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21 April 2017

[115] Act 56 of 1957