[Reportable]

OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 23230/2023

In the matter between:

ECONOMIC FREEDOM FIGHTERS	**First Applicant**
JULIUS SELLO MALEMA, MP	**Second Applicant**
NYIKO FLOYD SHIVAMBU, MP	**Third Applicant**
MBUYISENI QUINTIN NDLOZI, MP	**Fourth Applicant**
MARSHALL MZINGISI DLAMINI, MP	**Fifth Applicant**
VUYANI PAMBO, MP	**Sixth Applicant**
SINAWO TAMBO, MP	**Seventh Applicant**

And

THE CHAIRPERSON OF THE POWERS AND PRIVILEGES COMMITTEE N.O.	**First Respondent**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**Second Respondent**
THE SECRETARY TO PARLIAMENT	**Third Respondent**

THE INITIATOR N.O.	**Fourth Respondent**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Fifth Respondent**
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	**Fifth Respondent**

JUDGMENT HANDED DOWN ELECTRONICALLY ON FRIDAY, 26 JULY 2024

DAVIS J:

Introduction

[1] "*If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which leadership given by government rest on the cogency of the case offered in defence of its decisions, not the fair inspired by the force at its command. The new order must be a community built on persuasion not coercion*".[1]

[2] In one paragraph South Africa's finest academic public lawyer of his generation Professor Mureinik captured the very essence of the legal principles upon which our Constitution rested. The exercise of power was required to be justified by reasoned argument. Over the past 30 years of constitutional democracy it is apparent that our

[1] Etienne Mureinik "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 South Africa Journal of Human Rights 31 at 32

jurisprudence has sought to vindicate this idea not only insofar as the executive is concerned but also, in appropriate circumstances, when Parliament exercises powers granted to it by the Constitution. Thus in *Mazibuko N.O v Sisulu and others NNO* 2013 (6) SA 249 (CC) the majority of the Court by way of the judgment of Moseneke DCJ held that the Court had jurisdiction to examine the constitutionality of the Rules of the National Assembly, holding, in effect, that Chapter 12 thereof was constitutionally invalid to the extent of not providing for a constitutional right to be exercised; in this case the right of a member of the National Assembly to move a motion of no confidence in the President within a reasonable time.

[3] The present case before this Court requires consideration of these principles. It turns on the extent to which the judicial power of review should be exercised over powers granted to and exercised by the National Assembly. In short, the central question raised in this dispute is to what extent Parliament is entitled to decide whether a member of Parliament is in contempt of Parliament or whether that power should be circumscribed to ensure the introduction of an independent third party to play an investigating role in the determination of whether a member of Parliament is in contempt of Parliament. Hence this Court is confronted with the following question: To what extent does the culture of justification require an intervention from this Court insofar as the parliamentary disciplinary process of a Member of Parliament is concerned?

The factual context

[4] On 9 February 2023 the President of the Republic of South Africa was required to present his State of the Nation (SONA) address. SONA is a constitutional event set out in s 84 of the Constitution where the President calls the two Houses of Parliament together. The rest of the country is given an opportunity to assess what the Executive tells the people of South Africa what has been done and what plans the Executive has for the future. The respondents contend that the six affected members did not regard that constitutional event in a way which respects the dignity and decorum and the constitutional values that underlie SONA.

[5] As the President began his SONA address, various members of the Economic Freedom Fighters (EFF) raised points of order which the Speaker of Parliament rejected as "being spurious". She ordered the members of the EFF, who were continuously raising these points of order to cease doing so. When these members persisted in their conduct, the Speaker, considering these members to be engaged in disruptive behaviour, ordered them to exit the House. This apparently included some but not all of the applicants before this Court. Following her decision, the Speaker ordered the Serjeant at Arms to approach these members to ensure that they vacated the House.

[6] It then appeared that as all of the parliamentary representatives of the EFF were about to leave the House, 6 members thereof, being the applicants, alighted the stage where the Speaker of Parliament, the Chairperson of the National Council of Provinces (NCOP), the President and various support staff were located. At this point, members

of the security forces and the Parliamentary Protection Services moved onto the stage to remove the applicants from the House.

[7] The applicants were charged with misconduct on the basis of a charge sheet of 7 November 2023. The charge sheet which read in identical terms insofar as all of the applicants were concerned provided thus:

> "*During the Joint Sitting, you as well as Mr Nyiko Floyd Shivambu, Mr Vuyani Pambo, Mr Marshall Mzingisi Dlamni, Mr Mbuyiseni Quintin Ndlozi and Mr Sinawo Tambo ascended on the stage, without the authority to do so and advanced towards the President of the Republic of South Africa ("the President") and the Presiding Officers in a threating manner.*
>
> *Your conduct as particularised above resulted in a suspension of the proceedings and your removal from the House by Security Services of the Republic of South Africa.*
>
> *Charge 1: Contempt of Parliament*
>
> *It is alleged that you are guilty of contempt of Parliament in term so the s 13 (a) and (c) read with s 7 (a) and (e) of the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act 4 of 2004 ('the Act') and National Assembly Rule 64 (a) and (d), Rule 64 A 9 and (f), in that, as a Member of Parliament and during a Joint Sitting of the Houses of Parliament on 9 February 2023 at City Hall, a precinct of Parliament in terms of s 2(1) (d) of the Act, where the business of the day was the State-of-the-Nation address by the President of the Republic of South Africa, you deliberately created and took part in a serious disturbance, disorder and disruption in the House, and acted in way which was seriously detrimental to the dignity, decorum and orderly procedure of the House by:*

1. *Acting together with Mr Nyiko Floyd Shivambu, Mr Vuyani Pambo, Mr Mashall Mzingisi Dlamani, Mr Mbuyiseni Quintin Ndlozi and Mr Sinawo Tambo;*
2. *You ascended onto the stage without authority to do so;*
3. *And in a threatening manner approached the President of the Republic of South Africa and the Presiding Officers;*
4. *And had to be physically removed by Security Services of the Republic of South Africa;*
5. *Resulting in a suspension of proceedings*."

[8] On 7 November 2023, the Power and Privileges Committee, which is the committee empowered to make recommendations to Parliament in respect of acts of parliamentary contempt, informed the applicants that they were charged with contempt of court pursuant to this charge sheet. On 18 November 2023 the applicants applied for a postponement to the Powers and Privileges Committee ('Committee') in respect of the hearing which had been scheduled for 20 to 22 November 2023.

[9] On 20 November 2023 counsel representing the applicants moved for this postponement which was dismissed by the committee. On 27 November 2023 the committee resolved to recommend a sanction to the effect that the applicants apologise to the Speaker, the President and the people of South Africa and further that the applicants be suspended for a month from 1 February 2024 to 29 February 2024 without a month's salary.

[10] On 5 November 2023 the National Assembly, by a majority vote, resolved to adopt the recommended sanctions of the Committee.

[11] Following this decision, on 20 December 2023, applicants launched an urgent application which, at the time, sought two forms of final relief, that is a declaration that National Assembly Rule 214 and the Schedule: Procedure to be followed in the investigation and determination of allegations of misconduct and contempt of Parliament ('the impugned rules") and s 12 (5) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("the Privileges Act") were unconstitutional. Secondly, the applicants sought to impugn the decision of the National Assembly to impose the Committee's recommended sanctions upon the applicants.

[12] By the time that the applications were heard by this Court, an amendment to the notice of motion had been filed. Thus, what is relevant to the disposition of these proceedings is the following notice of motion:

> "*6. Declaring the National Assembly Rule 214 and the Schedule: Procedure to be followed in the investigation and determination of allegations of misconduct and contempt of Parliament (9th edition – 2009) ("the impugned Rules") relating to the Powers and Privileges Committee as unlawful and unconstitutional to the extent that:*
>
> *6.1. they fail to ensure that Parliament's process for disciplining members of parliament ("MPs") is conducted by an independent and impartial decision maker.*
>
> *6.2. they fail to provide sufficient guidelines for the exercise of discretion insofar as sanctions are concerned;*

6.3. *they provide the Powers and Privileges Committee with unfettered discretion without providing sufficient guidelines on the right to cross-examine witnesses, the discovery of documents and information; and the standard of proof; and*

6.4. *they fail to provide a time-bar for the institution of charges against an MP.*

7. *Declaring the impugned Rules relating to the Powers and Privileges Committee as unlawful and unconstitutional to the extent that they fail to conform to the requirements of s 12 (3) (a) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No 4 of 2004 ("the Act") as well as ss 1 (c) and 57 (1) of the Constitution of the Republic of South Africa, 1996.*

8. *Declaring s 12(5) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No 4 of 2004 as unlawful and unconstitutional in that it fails to provide sufficient guidelines for the imposition of sanctions on a Member of Parliament.*

9. *Declaring the following decisions and action ("the impugned decisions and actions") of the Powers and Privileges Committee and the National Assembly unconstitutional, unlawful and invalid:*

9.1. *The proceedings in terms of which the second to sixth applicants were charged and found guilty of contempt of Parliament held from 20 November 2023 to 22 November 2023;*

9.2. *The report of the Powers and Privileges Committee date 1 December 2023 conveying the guilty finding and recommending a penalty of an apology to the President, the Speaker, and the people of South Africa, as well as suspension of the applicants for a month without remuneration.*

9.3. The decision of the National Assembly dated 5 December 2023 to adopt the report of the Powers and Privileges Committee and to impose the recommended penalties.

10. Reviewing and setting aside the impugned decisions and actions referred to in paragraph 9 above.

11. In the event that prayer 8, 9 and 10 is granted, directing the respondents, as appropriate, to cause the necessary amendments to the Act, Rules and the Schedule within twelve months of the granting of this order.

12. *Costs, including the costs of two counsel, one being senior, in the event of opposition to be awarded against any respondent opposing the relief set out herein such costs to be paid on a joint and several basis.*"

[13] The relief sought by the applicants can be conveniently divided into two parts being a constitutional attack on National Assembly Rule 214 and the Schedule together with the argument that s 12 (5) of the Privileges Act is unlawful and unconstitutional in that it fails to provide such guidelines for the impositions of sanctions on a member of Parliament and secondly that the decisions and actions of the Committee which applied to applicants and subsequently the confirmation thereof by National Assembly were unconstitutional, unlawful and invalid.

[14] Briefly the structure of the process of discipline of members can be summarised thus: The Committee must consider any matter referred to it by the Speaker relating to contempt of Parliament or misconduct by a member or a request to have a response

recorded in terms of s 25 of the Powers and Privileges Act, except a breach of the Code of Conduct contained in the Schedule to the Joint Rules.

[15] Upon receipt of the matter relating to alleged contempt of Parliament or misconduct by a member, the Committee must deal with the matter in accordance with the procedure contained in the Schedule to the Rules of the National Assembly.

[16] The Committee must table a report in the Assembly on its findings and recommendations in respect of any alleged contempt of Parliament, as defined in s 13 of the Powers and Privileges Act, or misconduct.

[17] If it is found that a member is guilty of contempt or misconduct, the Committee must recommend an appropriate penalty from those contained in s 12 (5) of the Powers and Privileges Act.

[18] The National Assembly may impose the recommended penalty, an alternative penalty contained in s 12 (5) of the Powers and Privileges Act, or no penalty.

[19] I turn to deal firstly with the constitutional challenge to the Rules and the Privileges Act.

The Constitutional Challenge to the Rules and the Act

[20] A central argument advanced by counsel for the applicants was that the process for disciplining members of Parliament was conducted by a committee comprising of members of political parties, most of whom he described as political opponents of the EFF and hence of the applicants. In his founding affidavit Mr Malema, described therein as the Commander in Chief of the EFF, notes:

> "*Committee decisions are made on the simple majority. This means that the ANC alone could have made decisions in the Committee (whether in a caucus meeting outside the Committee hearing or in the Committee hearing itself without the involvement of other parties ... in our hearing it was our political opponents that sat in judgment of us. It was our political opponents that decided to charge us. It was also our political opponents that ultimately decided the punishment that metered against us*."

[21] It was for this reason that the applicants' counsel insisted that an independent person should be instructed to conduct the mandated inquiry into members of Parliament who were charged with contempt of Parliament before the report thereof would be considered by the National Assembly.

[22] In support of this submission counsel referred to the decision in *Economic Freedom Fighters and others v Speaker of the National Assembly and others NO* 2018 (2) SA 571 (CC) ("the EFF case") at para 192:

> "*The rules relevant to the establishment of ad hoc committees do not determine the size of a committee. Nor do they require that all parties be represented. They merely state that the resolution establishing such committee must specify the number of members to be appointed or their names. If more than one party is represented, the representation*

mirrors their representation in the Assembly. The majority party would have majority representation. This raises the risk of an impeachment complaint not reaching the Assembly, even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus, as provide in Rule 255. A decision by members of the majority party in the ad hoc committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their leader."

[23] Accordingly, the argument was advanced that this *dictum* applied with equal force to the present dispute as it related to the Committee's work in a disciplinary process. For this reason, it was contended that the Committee ought to have granted the applicants their request for an independent senior legal practitioner or a retired judge to be appointed to make the factual assessments that were necessary to this form of disciplinary process. By refusing to do so, the Committee, ultimately in the view of counsel, became a judge in its own cause.

[24] There are significant challenges which the applicants were required to meet in order for this submission to be successful. These are contained in the judgment of the Constitutional Court in the EFF case, to which I referred in para 22 of this judgment.

[25] The EFF case which confronted the Constitutional Court turned on the question as to whether the National Assembly should establish an ad hoc committee to conduct an investigation or an inquiry in terms of s 89 of the Republic of South Africa

Constitution of 1996 ('the Constitution') whether to establish that the then President, Jacob Zuma had committed serious violations of the Constitution, sufficient to justify impeachment proceedings being taken against him.

[26] Much of the dispute turned on the meaning of s 89 of the Constitution which provides

> *(1) "that the National Assembly by a resolution adopted with the supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of;*
>
> *(a) a serious violation of the Constitution of the law;*
>
> *(b) serious misconduct; or*
>
> (c) *inability to perform the functions of office*."

[27] In emphasising that among the relevant grounds in that case were a serious violation of the Constitution and serious misconduct, Jafta J, on behalf of the majority of the Court, said at para 177:

> "*It is evident that the drafters left the details relating to these grounds for the Assembly to spell out. But the drafters could not have contemplated that members of the Assembly would individually have determined what constitutes a serious violation of the law or the Constitution and conduct on the part of the President, which in the first place, amounts to the misconduct and whether, in the second place, such conduct may be characterised as serious misconduct*."

[28] It is for this reason that Jafta J at para 180 then said:

"*Therefore any process for removing the President from office must be preceded by a preliminary enquiry during which the Assembly determines that a listed ground exists. The form which this preliminary enquiry may take depends entirely upon the Assembly. It may be an investigation or some other form of enquiry. It is also up to the Assembly to decide whether the President must be afforded a hearing at the preliminary stage*."

[29] Critically Jafta J held "without rules", defining the entire process it is impossible to implement s 89 (para 182). It was for this reason that the majority of the Court held that s 89 (1) of the Constitution implicitly imposed an obligation on the National Assembly to make rules especially tailored for an impeachment process as contemplated in the section.

[30] In examining the manner in which Parliament established an ad hoc committee, the majority of the Court ruled that the rules did not determine the size of the committee nor did it require that all parties be represented. It was within this context that para 192 cited by applicant's counsel in the present dispute must be read.

[31] There is no suggestion in the judgment in the EFF case that Parliament cannot establish its own committee, subject to rules which it was required to develop in order to give content to the concept of 'serious' as that word is employed in s 89 of the Constitution in order that impeachment proceedings could validly take place. To that extent the Rules had to specify, to some extent, the meaning of the word "serious".

[32] It must also be remembered that s 89 of the Constitution provides for a dramatic remedy; that is the removal of a President from office on a permanent basis. Try as applicants' counsel did, it was difficult to define the justification offered as to why the *dictum* cited at para 192 is of equal force and effect insofar as the present dispute is concerned. In the first place there is a committee which is established pursuant to the Privileges Act in order to deal with parliamentary misconduct. Secondly, the maximum sanctions contained therein are a 30 day suspension which is hardly comparable to the impeachment of a President. Thirdly, there is no suggestion in any of the *dicta* in the EFF case that the Constitutional Court envisaged an "outsourcing" of the enquiry to an independent third party.

[33] But to the extent that counsel was able to overcome these burdens and rely on the EFF Constitutional Court judgment, he was confronted with a further difficulty; that is a full bench judgment of this Court in *Economic Freedom Fighters and others v Speaker of the National Assembly and others* [2018] (2) All SA 116 (WCC). The exact argument raised before this Court was considered by the Full Bench in this earlier case. In his judgment, Dlodlo J (as he then was) stated on behalf of a unanimous court at para 21:

> "*It is provided by Rule 12 (3) of the Powers, Privileges and Immunities Act that the standing committee must enquire into the matter and table a report on its findings and recommendations in the House. Needless to mention that these functions are delegated (as it were) to the Committee by the statute. There is clearly no room for a further delegation of these powers to yet another body (as suggested by the applicants). Accordingly, the Committee is by law required to sit as the disciplinary Committee itself. I am of the view that if the Committee had the power to delegate its functions, this would*

have been further stated in Rule 138 of the Rules of the National Assembly dealing with the General Powers of the Committees. The point is that there is no such provision. Importantly, Part 7 of the Rules of the National Assembly dealing particularly with Powers and Privileges Committee does not contain any provision permitting delegation of these functions to any other Committee, subcommittee or some other body."

[34] At the outset of counsel's argument, this court asked counsel for the applicants directly as to whether his argument was that this *dictum* was palpably wrong which would then have allowed this court to deviate therefrom. No cogent argument was offered to justify that it was palpably wrong save for the assumption that the *dictum* of Jafta, J in the EFF case was applicable and that if the Constitutional Court judgment could be employed in the present case as authority for a finding that the judgement of the Full Bench was no longer good law. It would then follow that this Court would have been required to find that the *dictum* at para 192 had implicitly overruled the full bench decision of this Court. There is no basis to so conclude for, as analysed in terms of the context of 192 of the EFF judgment, it is located in entirely different facts to those that confronted the Full Bench.

[35] No other explanation was provided as to why this Court should deviate from the approach adopted by the Full Bench judgment of Dlodlo, J. For all of these reasons therefore, the argument that an independent third party should be introduced to conduct a fact finding investigation prior to the National Assembly considering disciplinary action against a Member of Parliament must be dismissed. It never got out of the legal starting blocks. This conclusion obviates the necessity of dealing with the extent to which the

doctrine of separation of powers would be breached, were a retired judge to be appointed to conduct the enquiry.

The guideline for the imposition of sanctions argument

[36] In order to examine the arguments put before the court by applicants, it is necessary to have recourse to s 12 of the Privileges Act which reads thus:

> *"(1) Subject to this Act, a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared by or under s 13 to be contempt of Parliament by a member, and taking the disciplinary action provided therefore.*
>
> *(2) A House must appoint a standing committee to deal with all enquires referred to in subsection (1).*
>
> *(3) Before a House may take any disciplinary action against a member in terms of subsection (1), the standing committee must –*
>
> *(a) enquire into the matter in accordance with a procedure that is reasonable and procedurally fair; and*
>
> *(b) table a report on its findings and recommendations in the House.*
>
> *(4) The fact that the standing committee is enquiring into a matter or that a House has taken disciplinary action against a member does not preclude criminal investigation or proceedings against the member in connection with the matter concerned.*
>
> *(5) When a House finds a member guilty of contempt, the House may, in addition to any other penalty to which the member may be liable under this Act or any other law, impose any one or more of the following penalties;*
>
> *(a) a formal warning;*
>
> *(b) a reprimand*

(c) *an order to apologies to Parliament or the House or any other person, in a manner or determined by the House;*

(d) *the withholding, for a specified period, of the member's right to use or enjoyment of any specified facility provided to members by Parliament;*

(e) *the removal, or the suspension for a specified period, of the member from a parliamentary position occupied by the member;*

(f) *a fine no exceeding the equivalent of one month's salary and allowance payable to the member concerned by virtue of the Remuneration of Public Office Bearers Act, 1998 (Act 20 of 1998); or*

(g) *the suspension of the member, with or without remuneration, for a period not exceeding 30 days, whether or not the House or any of its committees is scheduled to meet during that period.*"

The central argument raised by the applicants was that when this legislation is read together with the National Assembly Rules, in particular Rule 214, no guidance is given to the Committee as to the imposition of an appropriate sanction. Accordingly, the imposition of the severity of a sanction is left entirely to the discretion of the Committee. It was thus argued that this holds the potential for abuse and runs contrary to a process that is rational, reasonable and procedurally fair.

[37] To the extent relevant, Rule 214 must be read through the prism of the relevant constitutional provisions, being ss 57 and 58 of the Constitution. In this connection a judgment of Mohamed CJ in *Speaker of National Assembly v De Lille and another* [1999] 4 All SA at 241 (A) at para 16 is relevant:

"*There can be no doubt that this authority [contained in s 57 (1)] is wide enough to enable the Assembly to maintain internal order and discipline its proceedings by means*

which it considers appropriate for this purpose... without some such internal mechanism with control and discipline, the Assembly would be impotent to maintain affective discipline and order during debates."

[38] Significantly, the Constitutional Court confirmed this approach in *Democratic Alliance v Speaker of the National Assembly and others* 2016 (3) SA 487 (CC) in which it said at para 39:

"[s]ections 58 (1) (a) and 71 (1) (a) of the Constitution make freedom of speech in the two Houses subject 'to the rules and orders' envisaged in s 57 and s 70. This must mean rules and orders may – within bounds that do not denude the privilege of its essential content – limited parliamentary free speech."

[39] Within the context of the present dispute, paragraph 51 of the Democratic Alliance judgment is also important:

"*Sections 57 (1) and 70 (1) of the Constitution dictate that the rule and order making power vests in the National Assembly and National Council of Province respectively. The process is thus wholly internal. Limiting parliamentary speech by means of an Act of Parliament would bring in the participation of an external agency, the Executive. The Executive – a different arm of government would thus be taking part in a process that s 57 (1) and s 70 (1) have made the exclusive domain in the legislature. Also at a practical level the making of rules of Parliament would certainly* be a more streamlined exercise than the cumbersome process of passing legislation."

[40] These *dicta* need to be read within the context of the provisions of s 12 (1), 12 (2), 12 (3) of the Privileges Act. None of these sections, I might add, were assailed by the applicants insofar as their constitutional validity was concerned. Only s 12 (5) was the focus of the applicants' constitutional attention.

[41] It thus follows that s 12 (1), which provides that the House has all the powers which are necessary for enquiring into or pronouncing upon whether a member has committed a contempt has to be regarded by this Court as constitutionally valid. It therefore follows that a valid section of legislation following upon the manner in which the enabling constitutional provision in s 57 has been interpreted by the Constitutional Court envisaged that the National Assembly has significant powers and thus discretion to conduct an enquiry by its designated committee and thereafter to make a decision in respect of the severity of the appropriate sanction. It is important to emphasise that this system of discipline was not assailed by the applicants.

[42] Turning to s 12 (5), it provides for a list of possible penalties ranging from a formal warning to the suspension of the member with or without remuneration for a period not exceeding 30 days. Invited to explain to this Court as to how some more specific sentencing guidelines insofar as the imposition of one or other of these restricted range of penalties would add coherence and reasonableness to the entire process, counsel for the applicants demurred and significantly was unable to explain the necessity therefor, save for the argument that s 12 (3) as presently constituted provided an unfettered discretion to the House. An inchoate argument was made based on the

broad set of principles of sentencing guidelines in criminal cases; in particular the Criminal Law Amendment Act of 1998 which enacted a set of minimum sentences for a wide range of serious offences.

[43] The difficulty with this submission is the following: whatever the merits of that sentencing dispensation, the notion that the maximum sanction being the suspension of a member for 30 days can seamlessly be transplanted to a minimum sentence dispensation designed to deal with very serious criminal offences, needs to be plausibly justified, at the very least. To the extent that the House would recommend, for example, the severest of sanctions, being 30 days suspension, and an aggrieved member contended that the decision could be considered to be irrational, the power of review by a court is still available to such an aggrieved member. He or she is not without a remedy.

[44] It was argued by applicants counsel that recourse to review was no solace to a member who had been suspended in that an attempt to litigate may not solve the problem of the member not being immediately available to participate in the proceedings of the House as an elected Member of Parliament. This problem would however also arise in circumstances where it was contended that the proposed guidelines had not been adhered to by the House. This would trigger a similar delay, were the member to seek legal relief by way of a review.

[45] In summary, no cogent reason was offered to sustain the argument that Rule 214 should be declared unlawful for want of sufficient guidelines.

[46] The same reasoning must apply to the application to declare the impugned rules unlawful and unconstitutional to the extent that they fail to conform with the requirements of s 12 (3) (a) of the Privileges Act. The reason therefore is precisely because of the wide powers granted to the House by the Privileges Act none of which, as I have indicated above, were placed in legal issue by the applicants.

[47] A fundamental difficulty which confronted applicants in their case throughout was the singular failure to raise any constitutional attack on the Privileges Act, save for s 12 (5) which was attacked specifically but only in terms of applicants' notice of motion for want of sufficient guidelines for the imposition of a sanction.

[48] I turn now to deal with the second leg of applicants' attack, namely the application to declare the decisions and actions of the Committee and National Assembly as applicable to the applicants to be unconstitutional, unlawful and invalid.

The impugned decisions and actions

[49] The approach adopted by the applicants in respect of their challenge to review the process in terms of which they were ultimately suspended for 30 days was hardly set out with the clarity required to bring such a challenge. Suffice to say, it appears that

a number of grounds for review were raised, albeit in broad brush strokes. The lack of clarity about the severity of sanctions meant that the Committee could and should exercise a discretion impose a sentence other than that which had been recommended by the initiator. It was submitted that neither the Committee nor the National Assembly applied an independent mind to whether the requirements were properly met before the sanction of suspension was imposed. The applicants were not afforded the opportunity to make representations in respect of mitigating factors on sanctions after the Committee rendered its decision that the applicants were guilty of contempt of Parliament. It was further contended that the refusal of the request by applicants for such a postponement justified the setting aside of the entire disciplinary process.

[50] A recourse to the record of the deliberations of the Committee shows that the appointed initiator set out, in some considerable detail, the basis by which an appropriate sanction should be imposed in respect of the six applicants. It is also important to emphasise that the substance of the conviction was never contested in the papers; that is. No argument was put up to gainsay the assessment of the conduct in terms of which the applicants were convicted of contempt. In short, the decisions of the Committee were assailed only on the basis of a series of procedural grounds to which I have made reference.

[51] The record of deliberations and the findings of the Committee, set out in particular that the Committee engaged with the evidence presented by the initiator and that this evidence ‘presented (was) persuasive in terms of the arguments and evidence

put forward.' It is clear that the Committee took very serious cognisance of the argument that 'it could not be clearer that to jump onto a stage as well as exiting the House after – and it is important to note – after being ordered by the Speaker to leave the House cannot be anything other than grossly disorderly conduct.' The Committee then considered the following submissions of the initiator.

> "*We submit an appropriate sanction would be for those six affected members to miss out on the SONA 2024. So that appropriate sanction would be in terms of s 12 (5) (g), to suspend the six affected members with or without remuneration for those 10 days. The 10 days cover SONA 2024 the 8th of February.*
>
> *...*
>
> *In order to impose a sanction that is set out in s 12 (5) (g), the committee would need to be satisfied, by virtue of s 12 (9) (a) that – two issues are at stake. One is, the member is guilty of a serious or repeated contempt and we would say clearly this is a case of serious contempt. There are some of the six who have been found guilty on the past of repeated contempt but we do not rely on repeated contempt aspect. We say the finding of this committee that they are guilty as charges are finding of guilt of serious content.*
>
> *And (b), none of the other penalties will be sufficient and we do submit that the apology that I refer to as per s 12 (5) (g) is not sufficient for the serious conduct that particular content constituted. And therefore we would say that s 12 (5) (g) is clearly satisfied with reference 12 (9) in respect of 12(5) (g).*"

[52] In the light of the absence of any attack on the substance of the finding of the Committee and within the context of a careful evaluation of the initiator's recommendations, there was no basis placed before this Court by which it is possible to

conclude that the Committee did not take account of the important components of s 12 (9) of the Privileges Act, namely that the applicants were guilty of a serious act of contempt and that none of the other penalties set out in s 12 (5) were sufficient.

[53] It is significant that the Committee, having found the applicants guilty of contempt, then adjourned to the following day, on 22 November 2023, to deliberate on the question of sanctions. This is relevant to the argument of applicants that there were two separate hearings; one dealing with conviction and the second in respect of sentence.

[54] The problem with the case brought by applicants in respect of the postponement, that is apart from the clear discretion vested in the committee to grant a postponement, (see *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC)) was that there was only one hearing. The Schedule to the Rules of the National Assembly which govern the Committee's process refers to the hearing. There is no separate hearing in respect of the sanction as opposed to the conviction.

[55] Item 9 for example of the Schedule to the Rules reads:

> "*If the committee finds a member guilty of misconduct or contempt the member or fellow member or legal representative must be given an opportunity to present mitigating factors to the committee before the committee reports to the House. Such representation may be verbal or in writing*."

[56] But once a member has chosen, as was the case in the present dispute, to no longer attend the hearing, this particular Item no longer applies. There was, in short, one hearing. Applicants chose to withdraw from the proceedings in terms of which Mr Malema labelled the Committee "a kangaroo court'"and instructed his legal representatives no longer to appear. The fact that the hearing continued into the following day in order to deal with a sanction does not detract from the fundamental principle that there was only one hearing from which the applicants had expressly withdrawn.

[57] A further problem with the applicants' case is the basis for the postponement as set out in the applicants founding affidavit: "*apart from the above the committee should have given the EFF the postponement it requested. The request was reasonable and fair. There was no basis at all to refuse a postponement. The refusal of the postponement on its own is reviewable and is a stand - alone basis for the setting aside of the entire disciplinary process*." Save for stating that the request was "reasonable and fair" no further case was made out in the affidavit as to why the refusal to grant the postponement should be set aside.

[58] An examination of the transcript of the deliberations of the Committee reveals that various reasons were offered by members for why a postponement should not be granted, namely that the applicants had enough time to prepare, there was no merit in the claim for an independent adjudicator to be appointed and that applicants were possessed of all the relevant documentation required to put up whatever case they so choose before the Committee. Within this context it is important to note that the facts leading to the charges were never put in issue; that is the alighting the stage and the

violation of the Speaker's order. In addition the application for postponement concerned the imposition of a sanction and was not concerned with the merits of the finding.

[59] There was some argument that the entire context of postponement should have been viewed within the long period that it had taken from the time of the SONA to the hearing before the committee.

[60] In the answering affidavit deposed to by Ms Zuraya Adhikarie, Chief Legal Advisor to Parliament, the chronology leading up to the hearing was carefully set out. The delays were explained and very little turns on the argument in respect of the merits of the applicants' case.

[61] Applicants' counsel contended that the adoption of the committee's report by the National Assembly was tainted by the unlawfulness that flowed from the committee's unlawful process and conduct.

[62] Given the conclusions to which I have arrived, namely that the Committee's process, and conduct was not unlawful, there is no merit in this submission. Indeed, it must be emphasised within the context of the broad thrust of applicants' case that the National Assembly voted on the issue. This decision inevitably reflected the representation of the members of the National Assembly. In short, the notion that somehow the entire process is tainted through bias clearly cannot possibly be extended to the argument that the ultimate decision as to whether to discipline a Member of

Parliament rests with the members of the House, most of whom are political opponents of the applicants. The only argument that was raised to gainsay this majoritarian principle, to the extent that it is relevant, was that the committee should have been staffed by an independent fact finder. Once that argument was no longer plausible, the balance of these allegations with regard to how members of Parliament might comport themselves became irrelevant. Suffice to say, as was set out in *UDM v Speaker of the National Assembly and others* 2017 (5) SA 300 (CC) at para 79, the ultimate obligation upon a member of the National Assembly is fidelity to the Constitution as opposed to loyalty to a political party. Accordingly, that is the duty which should govern each member who happens to sit on the Committee, in the execution of his or her duty.

Conclusion

[63] There is no dispute that Parliament exercises the ultimate power to discipline members. Applicants' counsel correctly conceded the priority of this principle. Once, as it must be accepted, that Parliament in terms of the Privileges Act, which is sourced in s 57 of the Constitution, has the power to vindicate this authority over members of Parliament, there is no basis by which to find that an independent third party should be involved in this process.

[64] Given the fundamental difference between an impeachment of a President (see *EFF and another v the Speaker of the National Assembly* 2018 (2) 571 (CC) and the maximum suspension of 30 days of a member of Parliament for contempt, no basis was

provided for the constitutional invalidity of s 12 (5) of the Privileges Act. To the extent that s 12 (5) set out various forms of sanctions which can be issued by the National Assembly, applicants failed to show that this section breached any constitutional principle or rule.

[65] In *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC) at para 37, Ngcobo J (as he then was) said 'Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government.'

[66] In the present dispute, as noted in the introduction to this judgment, all powers including those given to Parliament are sourced in the Constitution. But there must be circumspection exercised in exercising a review over powers granted to Parliament. And in this case, the structure by which members of the House should be disciplined clearly falls within the competent powers of Parliament.

[67] Given the manner in which the case was pleaded by the applicants and in particular that no challenge was lodged against the merits of the conviction, the entire basis of the review was predicated on procedural grounds, all of which stand to be dismissed either on the basis of absence of legal justification or the very conduct of applicants, particularly with regard to the argument of a postponement in respect of the imposition of a recommended sanction.

Costs

[68] It was conceded by the respondents that the *Bio Watch* principle should apply in this case in that what was involved was unsuccessful constitutional litigation. There should be no award of costs to respondent. See *Bio Watch Trust v Registrar Genetic Resources and others* 2009 (6) SA 232 (CC).

[69] In the result the application is dismissed.

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DAVIS, J

I concur.

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FORTUIN, J

I concur.

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NZIWENI, J

CORAM:	DAVIS, J et FORTUIN, J et NZIWENI, J
DATE OF HEARING	5 & 6 JUNE 2024
DATE OF JUDGMENT	26 JULY 2024
COUNSEL FOR APPLICANTS	ADV KAMEEL PREMHID
ATTORNEYS FOR RESPONDNETS	IAN LEVITT ATTORNEYS
COUNSEL FOR RESPONDNETS	ADV ADIEL NACERODIEN
	ADV MICHAEL BISHOP
ATTORNEYS FOR RESPONDNETS	THE STATE ATTORNEY, CAPE TOWN