

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 11635/2010

In the matter between:

MARIO GASPARE ORIANI-AMBROSINI, MP

Applicant

and

MAXWELL VUYISILE SISULU, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Respondent

JUDGMENT DELIVERED ON 8 DECEMBER 2011

ALLIE, J

[1] Applicant seeks the following relief:

- "1. Reviewing and setting aside the refusal of the respondent to introduce the National Credit Act Amendment Bill ("the Bill") in the National Assembly;*
- 2. Ordering the respondent to introduce the Bill in the National Assembly on the basis of the same procedures and under the same conditions applicable to Bills introduced by a Cabinet member or Deputy Minister;*
- 3. Declaring that any Rule of the National Assembly which prevents any of its members from introducing a Bill in the National Assembly violates the Constitution of the Republic of South Africa, 1996 and is accordingly invalid and unlawful, and specifically that, inter alia, the following Rules or parts of Rules are unconstitutional, unlawful and invalid:*

- 3.1. *the words "Private Member's Legislative Proposals and" in Rule 121(1)(h);*
 - 3.2. *the words "with the permission of the Assembly" in Rule 230(1);*
 - 3.3. *the words "for the purpose of obtaining the Assembly's permission in terms of Rule 230(1)" in Rule 234(1);*
 - 3.4. *Rules 235 and 236;*
 - 3.5. *the words "If the Assembly gives permission that the proposal be proceeded with" and "draft" in Rule 237;*
 - 3.6. *Rule 237(2);*
 - 3.7. *the words "for the purpose of obtaining the Assembly's permission in terms of Rule 230(1)" in Rule 238(1);*
 - 3.8. *Rules 238(3) and (4); and*
 - 3.9. *the words "If the Assembly gives permission that the proposal be proceeded with" and "draft" in Rule 239.*
4. *In the alternative to prayers 3.1 to 3.9 above, ordering that:*
- 4.1. *Rule 233 to the extent that the words "Cabinet Member or Deputy Minister" do not include the words "a member of the Assembly and a committee";*

4.2. *the words “with the permission of the Assembly” in Rule 230(1);*
and

4.3. *Rules 234 to 240.*

5. *Ordering that the costs of this application are to be paid by any of the respondent should he oppose the relief sought in the notice of motion, such cost to include the costs of two counsel.*

6. *Granting the applicant further and/or alternative relief.”*

7. In his founding papers, applicant asserts that he seeks 3 inter-related relief, namely:

7.1 The review and setting aside of respondent’s decision not to introduce the Private Members Bill of the applicant, styled the National Credit Act Amendment Bill (“the Bill”) in the National Assembly;

7.2 An order compelling the respondent to introduce the Bill in the National Assembly by following the same procedure and adopting the same *modus operandi* applicable to the introduction of Bills by a Cabinet Member or a Deputy Minister; and

7.3 A declaration that any rule of the National Assembly which prevents any of its members from introducing a Bill in the National Assembly is in invalid and unlawful by virtue of its violation of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

8. The applicant is a member of the National Assembly and the respondent is the Speaker of the National Assembly.

9. Although the applicant is a member of the Inkatha Freedom Party ("IFP"), he brings the application in his personal capacity.

10. On 15 May 2009, applicant addressed a letter to the respondent in which he requested that the Rules of the National Assembly be adopted or re-adopted anew by the newly elected and constituted National Assembly after each national election as he was of the view that each new parliament must put in place its own rules and procedure. In that letter applicant complained that he considered it unconstitutional that the rules prohibited him from introducing a Private Member's Bill without other members of the National Assembly having considered the content of the proposed bill and then having the capacity to reject it before it is introduced.

11. On 26 May 2009, in his letter in response, the respondent pointed out that there is no specific constitutional provision that requires the House of Assembly to do that at the commencement of each new parliament. The respondent further

pointed out in his letter, that although the Constitution allows members to introduce legislation, it also allows the National Assembly to make rules and orders concerning its business, including procedures related to the passage of legislation. These rules are contained in Assembly Rules 234, 241 and 243. The respondent further explained that the Assembly Rules 209 to 213 set out the role of the committee on Private Members' Legislative Proposals and Special Petitions.

12. On 10 June 2009, the applicant raised the issue that he believed that the House of Assembly has no rules as it had failed to re-adopt the rules of the previous parliament. On the same day, the respondent ruled that the House of Assembly was not required to re-adopt its rules at the beginning of a new parliament.

13. On 20 October 2009, the applicant wrote to the Chairperson of the sub-committee on the review of the National Assembly's Rules enclosing a legal opinion favouring the applicant's views as expressed earlier and he sent a copy of that letter to the applicant.

14. On 14 February 2010, applicant wrote to the respondent tabling the Bill and requesting that it be introduced in accordance with the Constitution as opposed to following the procedure laid down in the Rules of the National Assembly.

15. The applicant alleged that he did not receive a response to his letter of 14 February 2010. The respondent submitted that the issue was placed on the agenda for the meeting of the Rules sub-committee on 6 October 2009. On that day it was decided that legal advice should be sought. The advice was provided but the Rules sub-committee could not meet until July 2010. In July 2010 the sub-committee discussed the matter but could not reach finality on it.

16. On 14 September 2010 the sub-committee finally concluded the matter and agreed to make certain amendments to the Rules that do not impact on the disputes in this case. The proposed amendments aimed to address the issue of guidelines about when the Private Members' Committee may grant or refuse the tabling of the Bill.

17. The respondent alleged that the applicant's letter of 14 February 2010 was mislaid internally and he received it much later when the application was launched. Thereafter, the respondent informed the applicant that he was willing to refer the proposed Bill for consideration in accordance with the Rules of the National Assembly, a procedure which applicant had indicated earlier, he did not wish to subject the Bill to.

18. The respondent denied that the procedure provided for in the Rules make the introduction of the Bill subject to the discretion of the African National Congress (ANC) i.e. the majority party in the National Assembly. He submitted further that the Rules provide for procedures to ensure that the National

Assembly's power to initiate legislation, including members' Bills, is exercised in an efficient and participatory manner as it involves the Bill being considered not only by the Committee on Members' Legislative Proposals but also all relevant portfolio committees before it is considered by the National Assembly which must ultimately grant permission for the introduction of members' Bills.

19. The respondent considers the procedure laid down by the Rules for the introduction of members' Bills to be similar to the procedure followed for the introduction of executive Bills which must also obtain prior approval albeit by Cabinet.

20. The respondent went on to state that the committees of the National Assembly and the National Assembly itself provide for debate between the majority and minority parties in relation to the introduction of members' Bills.

21. Applicant alleged that in terms of Rules 234 to 237, a member of the National Assembly may not introduce a Bill in the National Assembly unless he receives prior "permission" to do so by the National Assembly, itself, in which the ANC, as the majority party has the majority votes.

22. Applicant alleged further that:

22.1 In terms of Rule 234(1) the member seeking to introduce a Bill must produce a memorandum on the Bill;

22.2 This memorandum goes to the Committee on Private Members' Legislative Proposals & Special Petitions ("the Private Members' Committee") in terms of Rule 235(1);

22.3 After consultation, the Private Members' Committee must recommend to the National Assembly that permission to introduce the Bill either be granted or rejected;

22.4 The National Assembly must consider the recommendation of the Private Members' Committee and the memorandum and either grant or refuse permission to introduce the Bill.

22.5 In practice the Private Members' Committee's reports are "below the line" on the Order Paper of the National Assembly, i.e. they are not discussed by the National Assembly and effectively the Private Members' Committee has the final word on it.

23. The applicant concluded that members may not introduce a Bill without prior authorisation of the committee which is dominated by the majority party.

24. The applicant contended that the above procedure violates Section 73(2) of the constitution which expressly gives every member of the National Assembly

the right to introduce Bills in the National Assembly. Section 73(2) reads as follows:

“Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) A money Bill; or

(b) a Bill which provides for legislation envisaged in section 214. “

25. The applicant submitted further that while Section 57 of the Constitution gives the National Assembly the power to determine and regulate its own proceedings and procedure, such power does not include trammelling upon the powers and duties of members of the National Assembly nor does it allow the National Assembly to make the members' exercise of their powers and duties subject to the discretion of another body. Section 57 reads as follows:

“Internal arrangements, proceedings and procedures of National Assembly

(1)The National Assembly may-

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement

(2) The rules and orders of the National Assembly must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

26. The applicant further relies on Sections 6(1)(d), (iii) – (v), (f) and (g) and 5(3) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as grounds for the review of the respondent's refusal to introduce the Bill in the National Assembly in the same way that an Executive Bill is introduced.

27. Finally the applicant suggests that the procedure contained in the Rules subvert the doctrine of separation of powers and conflates the powers of the Executive with that of the Legislature.

28. In response, the respondent submitted that the National Assembly and its committees take the oversight function over the executive of the National Assembly seriously. He denied that they defer to the executive on whether or not it is appropriate to introduce a particular members' Bill.

29. The respondent alleged further that it is not inappropriate for the National Assembly to solicit the views of the executive while remaining mindful of the fact that the National Assembly must make the final decision on whether a members' Bill should be introduced.

30. In reply, the applicant denied that the National Assembly has the sole power to initiate or prepare legislation to be introduced in the National Assembly as suggested by respondent with reference to Section 55 of the Constitution.

31. The respondent alleged that Section 73(2) of the Constitution does not provide for a procedure to be followed to introduce a Bill in the National Assembly nor the procedure to be followed for the initiation of a Bill. The respondent argued that the National Assembly has to adopt Rules that regulate its procedure.

32. National Assembly Rule 230 reads as follows:

“Initiation of Legislation by Assembly

(1) *The Assembly initiates legislation through its committee and members acting with the permission of the Assembly in terms of these Rules;*

(2) *Any committee or member of the Assembly may in terms of Section 73(2) of the Constitution introduce a Bill in the Assembly that has been initiated in terms of Sub-rule (1).”*

33. Rule 231 reads as follows:

“Initiation of legislation by national executive

(1) *The national executive may prepare and initiate legislation in terms of Section 85(2)(d) of the Constitution for introduction in the Assembly”*

34. Rule 234 reads as follows:

“Submission of Legislative proposals to Speaker

(2) *An Assembly member intending to introduce a bill in the Assembly in an individual capacity (other than as a Cabinet member or Deputy Minister) must for the purpose of obtaining the Assembly’s permission in terms of Rule 230(1), submit to the Speaker a memorandum which:*

- (a) *sets out particulars of the proposed legislation;*
 - (b) *explains the objects of the proposed legislation; and*
 - (c) *states whether the proposed legislation will have financial implications for the State and, if so, whether those implications may be a determining factor when the proposed legislation is considered.*
- (3) *The Speaker must table the member's memorandum in the Assembly."*

35. Rule 235 reads as follows:

"Referral of proposals to committee

- (1) *The Speaker must refer the member's memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions.*
- (2) *The Committee must consult the portfolio committee within whose portfolio the proposal falls.*
- (3) *.....*
- (4) *After considering the member's memorandum and the portfolio committee's report, if there is such a report, the Committee must recommend that permission either be:*

(a) *given to the member to proceed with the proposed legislation; or*

(b) *refused*

(5) *.....”*

36. Rule 236 reads as follows:

“Consideration of Legislative proposal by Assembly

(1) *The Committee on Private Members’ Legislative Proposals and Special Petitions must table in the Assembly the member’s memorandum and the Committee’s recommendation including any views of a portfolio committee on the financial or other implications of the proposal.*

(2) *The Speaker must place the Committee’s report together with the member’s proposal on the Order Paper for a decision.*

(3) *The Assembly may:*

(a) *give permission that the proposal be proceeded with;*

(b) *refer the proposal back to the Committee or the Portfolio Committee concerned for a further report; or*

(c) *refuse permission.*

(4)

37. Rule 237 reads as follows:

“Preparation of draft Bill

(1) *If the Assembly gives permission that the proposal be proceeded with, the member concerned must:*

(a) *prepare a draft bill, and a memorandum setting out the objects of the bill in a form and style that complies with any prescribed requirements;*

(b) *consult JTM for advice on the classification of the bill; and*

(c) *comply with Rule 241 or, if it is a proposed constitutional amendment, with Rule 258.*

(2)

38. On behalf of applicant, it was submitted by Mr Osborne, that the Private Members’ Legislative Proposals and Petition Committee can vote by majority to refuse the legislative proposal of a private member without being subject to the application of any criteria. This committee, it was argued effectively operates as a gatekeeper that prevents the introduction of members’ proposals. Accordingly,

on the argument advanced on applicant's behalf, it was concluded that the committee is allowed to deny a member the right granted to him/her under Section 73(2) of the Constitution. The applicant however, failed to allege a lack of criteria in its founding papers.

39. On applicant's behalf it was contended that Rule 235(4)(b) is offensive because it permits refusal without setting out criteria that the committee should apply in arriving at its decision.

40. Applicant's counsel argued that he takes issue only with the principle of majoritarianism at the stage when the committee has to accept or reject that a member's legislative proposal may be introduced to the National Assembly. This reflects a departure from applicant's papers.

41. Mr Osborne explained that applicant was no longer pursuing the argument that every newly constituted National Assembly should adopt its own rules. The applicant also abandoned the point taken that the respondent had no authority to oppose the application.

42. On behalf of respondent's it was alleged that members who wish to introduce Private Members' Bills must initiate and prepare the Bill themselves.

43. Two months after the application was launched, on 25 August 2010, the respondent replied to applicant's request for reasons for his decision not to table the Bill.

44. The primary motivation for applicant's challenge is the right of a minority MP to elicit debate on issues by introducing a Bill in a multi-party democracy.

45. On applicant's behalf, it was argued that the National Assembly's Rules, as outlined above, have the effect of preventing the introduction of any Private Members' Bill by stifling its debate in the National Assembly at committee level.

46. On applicant's behalf it was further alleged that the substantive effect of the restrictions imposed by the Rules is inimical to the Constitution and to a multi-party democracy.

47. Applicant contends that even if the new amendments proposed to the Rules are adopted, the majority party would still be able to frustrate the introduction of a Bill by denying it permission to be placed before the National Assembly for consideration.

48. Rule 243 reads as follows:

"Introduction of Bills in Assembly

(1) A Cabinet member or Deputy Minister or an Assembly member or committee introduces a bill (other than a bill mentioned in sub-rule (4)) by submitting to the Speaker –

(a) a copy of the bill or, if the bill as it is introduced was published in terms of Rule 241(1)(c), a copy of the Gazette concerned;

(b) the explanatory summary referred to in Rule 241(1)(c), if the bill itself was not published; and

(c) a supporting memorandum which must –

(i) state whether the bill is introduced as a section 75 bill, a section 76(1) bill, a money bill or a mixed section 75/76 bill;

(ii) explain the objects of the bill;

(iii) give an account of the financial implications of the bill for the state;

(iv) contain a list of all persons and institutions that have been consulted in preparing the bill; and

(v) *if the bill is introduced by a Cabinet member or a Deputy Minister, include a legal opinion by a State law adviser, or a law adviser of the State department concerned, on the classification of the bill and any other question in respect of which the JTM is required to make a finding in terms of Joint Rule 160.*

(1A) *A bill introduced by a Cabinet member or Deputy Minister must be certified by the Chief State Law Adviser or a state law adviser designated by him/her as being –*

(a) *consistent with the Constitution; and*

(b) *properly drafted in the form and style which conforms to legislative practice.*

(1B) *If a Bill is not certified as contemplated in sub-rule (1A), the Bill must be accompanied by a report or legal opinion by a state law adviser mentioned in sub-rule (1A) on why it has not been so certified.*

(2) *A bill introduced by a Cabinet member or Deputy Minister must contain on its cover page a reference to that Cabinet member or Deputy Minister as the person introducing the bill.*

(3) *A bill introduced by an Assembly member or committee with the Assembly's permission in terms of Rule 236(3) or 238(3) must –*

- (a) *Be accompanied by a statement to that effect; and*
 - (b) *Contain on its cover page a reference to the name of the member or the committee as the member or committee introducing the bill.*
- (4) *This Rule does not apply to –*
- (a) *Constitution amendment bills, which must be introduced in accordance with Rule 260; and*
 - (b) *Money bills when the special procedure set out in Rule 287(2) is followed.*
- (5) *Bills initiated by Assembly members or committees may be introduced only when the Assembly is in session.”*

49. Section 55(1) of the Constitution gives the National Assembly the legislative power. It reads as follows:

“Powers of National Assembly

In exercising its legislative power, the National Assembly may:

- (a) *Consider, pass, amend or reject any legislation before the Assembly; and*

(b) *Initiate or prepare legislation, except money Bills.*

50. The National Assembly's power to make Rules are limited by the Constitution. Section 57 of the Constitution provides as follows:

"Internal arrangements, proceedings and procedures of National Assembly

(1) *The National Assembly may:*

(a) *determine and control its internal arrangements, proceedings and procedures; and*

(b) *make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.*

(2) *The rules and orders of the National Assembly must provide for:*

(a) *the establishment, composition, powers, functions, procedures and duration of its committees;*

(b) *the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;*

(c) *financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and*

(d) *the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.*

51. Section 42(3) of the Constitution provides an understanding of the role of the National Assembly. It provides as follows:

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

52. The applicant relied on the case of **De Lille & Another v Speaker of the National Assembly 1999 (4) SA 863 (SCA)** where Section 57(1) of the Constitution was read to mean that the National Assembly cannot craft rules which effectively negate the principles of democracy.

53. On applicant’s behalf it was submitted that respondent’s decision not to introduce the Bill directly in the National Assembly is reviewable under Section 6 of PAJA as unlawful administrative action.

54. Section 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that where reasons for the decision are not provided, they may be

requested. The respondent however gave reasons why he could not accede to applicant's request as long ago as 26 May 2009.

55. Applicant's counsel argued that the Rules are unconstitutional in so far as they are inconsistent with Section 73(2) of the Constitution and fall to be declared unconstitutional. Applicant relied on the following cases in support of this argument: **Masetlha v President of the Republic of SA & Another 2008 (1) SA 566 (CC)**; **Dawood v Minister of Home Affairs & Others 2000 (3) SA 936 (CC)**; **Gory v Kolver N.O. & Others 2007 (4) SA 97 (CC)**; **Tongoane & Others v National Minister for Agriculture & Land Affairs & Others 2010 (6) SA 214 (CC)**.

56. On behalf of respondent it was argued that in reality applicant did not seek to introduce a Bill in the National Assembly, but in fact initiated and prepared legislation entitled the National Credit Act Amendment Bill. Applicant then tried to introduce the "Bill" in the National Assembly under Section 75 of the Constitution without taking into account the Rules of the National Assembly which prescribes how a Bill should be introduced.

57. The respondent refused to allow the applicant to so introduce the proposed Bill as he had not complied with the Rules.

58. On respondent's behalf, it was argued that the application is misconceived for the following three reasons:

58.1 Section 55(1)(b) of the Constitution confers the exclusive right to initiate and prepare legislation on the National Assembly and Section 85(2)(a) of the Constitution confers that power on the Cabinet and the relief sought conflicts with those constitutional provisions.

58.2 Section 73(2) of the Constitution confers a right to introduce a Bill (properly drafted as a Bill) on a member of the National Assembly. The different powers and functions expressed, namely, "initiate and prepare" on the one hand and "introduce" on the other is meant to convey the different powers conferred by the different sections of the Constitution.

58.3 The principle of majority vote was established to facilitate the legislative process in the National Assembly where consensus could not be reached. It is an integral part of the way a democracy arrives at decisions.

59. In support of the majoritarian principle, respondent relied upon the cases of **Democratic Alliance & Another v Masendo NO & Another 2003 (2) SA 413 (CC)** at paras 15 – 17, 13 and 61 and **MEC KZN for Local Government,**

Housing & Traditional Affairs v Amajuba District Municipality & Others 2011

(1) ALLSA 401 (SCA) at paras 16 and 17.

60. In their Heads of Argument, respondent's counsel point out that applicant brings the application as an individual MP and not as a political party and the papers of applicant do not allege that a political party's right to participate in the National Assembly and its committees is being hampered by the Rules.

61. On respondent's behalf, it was pointed out that majority decision making cannot be avoided in a multi-party democracy and that to find the majoritarian principle to be inimical to a multi-party democracy would mean that the National Assembly cannot take decisions by simple majority when passing ordinary legislation.

62. Respondent's counsel submitted that the "Bill" is in fact not a Bill as it had not as yet been enrolled as such and is in fact a legislative proposal. The procedure that applicant wanted respondent to adopt to introduce his proposal is the procedure which governs the introduction of Bills by a Cabinet Member or a Deputy Minister and that the respondent is justified in refusing to apply that procedure to a legislative proposal of a member of the National Assembly.

63. On respondent's behalf it was argued that respondent could not refer the proposal to the relevant Committee as the applicant refused to subject the

proposal to the procedure applicable to Private Members' Legislative Proposals as prescribed by the Rules.

64. The approach by the applicant in argument, departs from applicant's papers to the extent that, in argument applicant seeks the introduction of the Bill disregarding certain Rules whereas in paragraph 2 of the Notice of Motion, applicant seeks to have the Bill introduced on the same procedure that apply to Bills of the Cabinet or of a Deputy Minister.

65. Respondent's counsel argue that it is not permissible for a party to amend its papers in argument without moving for an amendment of its papers.

66. As the relief sought in paragraph 2 of the Notice of Motion is essentially the nature of the demand that applicant placed on respondent and as applicant has effectively abandoned that relief, respondent cannot be found to be lacking in his refusal to accede to that demand.

67. Respondent's counsel argues that the Rules reflect the distinction drawn in the Constitution between initiating and preparing and introducing legislation.

68. Respondent accepts that the Rules of the National Assembly should be in conformity with the Constitution. He alleges that the Rules are in line with the Constitution.

69. Section 43 of the Constitution vests legislative authority of the National government in Parliament. Section 43 reads as follows:

“Legislative authority of the Republic

In the Republic, the legislative authority:

(a) *of the national sphere of government is vested in Parliament, as set out in section 44;*

(b) *of the provincial sphere of government is vested in the provincial legislature, as set out in section 104; and*

(c) *of the local sphere of government is vested in the Municipal Councils, as set out in section 156.”*

70. Section 44(4) of the Constitution provides that Parliament must act in accordance with the Constitution when exercising its legislative authority. Section 44(4) reads as follows:

“National legislative authority

When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.”

71. Section 57(1) and (2) of the Constitution read with Section 55 gives the National Assembly the power to regulate its own procedure by means of Rules and orders.

72. Respondent submits that the Private Members Legislative Proposals and Petitions Committee plays an important role in the processes of initiating and preparing proposals undertaken by members of the National Assembly.

73. Respondent's counsel submitted that the court should be mindful of the doctrine of separation of powers before interfering with Parliament's powers to initiate, prepare, consider and pass legislation. For this submission reliance was placed on the case of **Doctors for Life International v Speaker of the National Assembly 2006 (12) BCLR 1399 (CC) at 1417**.

74. Although Section 73(2) Constitution gives individual members of the National Assembly the authority to introduce Bills in the National Assembly, the Constitution also makes the process by which such introduction takes place, subject to the Rules of the National Assembly by allowing the National Assembly to make its own Rules or orders under Section 57 of the Constitution. Accordingly individual members of the National Assembly are not given the authority to initiate and prepare legislation as those powers vest in National Assembly, the National Executive and the National Council of Provinces (NCOP) in terms of Sections 55(1)(b), 68(b) and 85(2)(d).

75. Respondent's counsel argued that an individual member's power to introduce legislation is subject to the National Assembly's power to initiate and prepare legislation for introduction in the National Assembly.

76. The Rules of the National Assembly recognise that individual members may wish to exercise their right to introduce legislation in the National Assembly and accordingly, the precursor to such legislation would be a legislative proposal. A proposal would involve some initiation and preparation. That initiation and preparation is however in relation to a legislative proposal which at that early stage clearly cannot as yet, have the status of a Bill. Initiating and preparing in that context cannot be conflated with the right to initiate and prepare legislation.

77. By the time the proposal is considered by the broader house i.e. the National Assembly, it must have gone through a process of motivation, debate and refinement to produce a legally defensible Bill that is not in conflict with the Constitution and prevailing legislation.

78. Even Bills initiated by the Executive go through a vetting process in as much as they are drafted by a particular State department and State Law Advisors and then considered by Cabinet before they are presented to the National Assembly. [see: **Currie et al: The New Constitutional & Administrative Law Vol 1 at 170.**] The Rules provide for consultation with Cabinet because it is the National Executive, as a collective, that holds the

authority to initiate and prepare legislation. Individual members of the Executive hold only the power to introduce Bills in the National Assembly.

79. Similarly, the National Assembly, acting collectively and not its individual members, hold the power to initiate and prepare legislation. In terms of the Rules, the National Assembly put in place a process of initiating and preparing which involves the Committee and relevant Portfolio Committees.

80. Rule 236 provides that the Speaker should put the Committee's report together with the member's proposal on the Order Paper for a decision.

81. It then provides that the full National Assembly may do the following:

79.1 give permission for the proposal to be proceeded with;

79.2 refer the proposal back to the Committee or the portfolio committee;

79.3 refuse permission.

82. If the National Assembly gives permission for it to be proceeded with, it may choose to do one of the following:

80.1 express itself on the desirability of the proposal; or

80.2 subject its permission to conditions.

Majoritarian Principle

83. Section 53 of the Constitution provides that a majority of members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill and that all questions before the Assembly are decided by a majority of the votes cast.

84. The Constitution provides for special majorities to provide special protection for example, of entrenched provisions, thereby protecting minority parties [see: **Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996. 1997 (2) SA 97 (CC) at para 53 – 57.**]

85. What is peculiar, in *casu*, is that it is not a minority political party that argues that the majoritarian principle undermines multi-party democracy, but one individual who does so.

86. The Constitution does not only create a multi-party democracy in the narrow terms asserted by applicant. It creates an open, participatory, Constitutional democracy with checks on the power of all three arms of government which are subjected to the ultimate test of whether they offend the provisions of the Constitution [see: Section 59 of the Constitution].

87. Provision is made in the Constitution for the participation of minority parties in the affairs of government. It is the responsibility of a member to motivate and argue persuasively for the acceptance of his legislative proposal and if he persuades sufficient members of the National Assembly, his proposal ought to see the light of day.

88. Section 59 of the Constitution imposes a positive duty on the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly, and its committees (my emphasis) and to conduct its business in an open manner. A National Assembly that is duty bound to facilitate participation in its legislative process is irreconcilable with the impression which applicant attempts to create in his papers of a committee of the National Assembly, effectively stifling proper consideration and debate concerning a legislative proposal made by an individual member of the National Assembly.

89. Constitutional democracy embraces participation and consultation. [see **Doctors for Life International v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC) at para 145**].

90. At paragraph 146 of the Doctors for Life case, the court said that: *"In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the court will consider what Parliament has done in that case."* In *casu*, the applicant's papers are replete with allegations that the majoritarian principle has operated to prevent consideration of a Private

Member's Bill in the National Assembly without reference to a specific instance concerning the Bill in issue in this case as applicant has refused to subject the Bill to the process prescribed by the Rules.

91. In **Democratic Alliance And Another v Masondo NO And Another 2003 (2) SA 413 (CC)** at para 22 the court said the following concerning the right of minority parties to representation in the decision making process:

"It is not, in my view, correct to emphasise the importance of one aspect only of the purposes of local government. The democratic principle and the requirement of minority party representation in the deliberative processes of government are important, but so is the need for effective and efficient delivery of services. The Constitution accordingly allows the Legislature the leeway to determine how those purposes should be achieved by local government. The Constitution permits the delegation of powers and functions by a municipal council but requires that this should be determined and regulated by national legislation. In this the Legislature is afforded a certain amount of flexibility subject always to the provisions of the Constitution."

92. Similarly *in casu*, the right of a member of the National Assembly to introduce a Bill in the National Assembly must be balanced against the power of the National Assembly to initiate and prepare legislation, to make its own rules of procedure and orders and to scrutinize and oversee executive action.

93. In the **Amajuba District Municipality** case, the court found as follows at para 17:

“Moreover, in my view, a requirement that the members of the executive committee of a municipal council be elected by a majority of the members of that council does not do violence to democracy or the underlying values of the Constitution. An essential element of democracy is that effect be given to the will of the majority.

94. I am not persuaded by the applicant’s argument that the application of the majoritarian principle in the committee of the National Assembly operates to undermine democracy.

95. I accordingly cannot conclude that the Rules that provide for a Private Member’s Legislative Proposal to be considered by the Committee and portfolio Committee first, offends against the Constitution.

Conclusion

96. It is evident that the applicant interprets Rule 235(4)(b) as giving the Committee *carte blanche* to refuse the proposal. It does not. The Rule provides that the Committee must recommend (my emphasis) that permission either be given to proceed with proposal or that permission be given to refuse the proposal.

97. The ultimate authority on whether to refuse the proposal vests in the National Assembly who may give permission that the proposal be proceeded

with, refer it back to the Committee (which it could do if the Committee recommended a refusal) or it could refuse permission (Rule 236 (3)).

98. To the extent that applicant suggests that in practice, the Committee's recommendations are followed without the National Assembly, applying its mind, as a collective, to the Committee's recommendations, the applicant is at liberty to challenge that practice on a case by case basis as it occurs. In this matter, however the applicant has refused to subject the legislative proposal or Bill, as he terms it, to the scrutiny of the committee and/or portfolio committee, hence he is not in a position to allege that the committee's recommendation will be slavishly followed by the National Assembly.

99. Having found that the Rules of the National Assembly, in issue do not contravene the provisions of the Constitution, there is clearly no basis for reviewing the respondent's refusal to introduce the "Bill" in terms of Section 6 of PAJA when applicant first demanded that respondent introduce the "Bill" without following the Rules applicable to Private Members' Legislative Proposals.

100. Given the complexity of the issues raised and the fact that applicant's papers differed vastly from his Heads of Argument, the respondent's employment of two counsel is justified.

It is ordered that:

The application is dismissed with costs, including the cost of two counsel.

Allie

ALLIE, J