IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
CONSTITUTION HILL, JOHANNESBURG

CC Case number:_____
WCHC Case no. 11635/10

In the matter between:

MARIO GASPARE ORIANI-AMBROSINI, MP Applicant

And

MAXWELL VUYISILE SISULU, MP Respondent
SPEAKER OF THE NATIONAL ASSEMBLY

FOUNDING AFFIDAVIT

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I, the undersigned,

MARIO GASPARE ORIANI-AMBROSINI

do hereby make oath and say that:

INTRODUCTION

1. I am an adult male Member of Parliament. ["MP"]. I am a Member of the National Assembly as contemplated in sections 42 and 47 of the Constitution.

2. I am the Applicant in this application for leave to appeal directly to this Court in terms of Rule 19 of this Court's Rules. I bring this application in my individual capacity as a MP.

3. The facts deposed to hereinafter are

    a. within my personal knowledge, save where the context indicates otherwise, and, to the best of my knowledge, true and correct; and

    b. in substance the same I have averred in the Court below.

4. Where I make legal submissions, I do so on the basis of my professional experience and knowledge, as well as on the basis of legal advice I have received which I verily believe to be correct.

5. The Respondent is the Speaker of the National Assembly, Maxwell Vuyisile Sisulu, MP, who is cited in his official capacity.

6. I brought the application in the Western Cape High Court ["the Court below"] and I am bringing this application with the approval and support of the

minority political party in the electoral lists of which I was elected, the Inkatha Freedom Party ["IFP"], my party. Because these applications turn on the infringement of a right which section 73(2) of the Constitution vests in a single MP rather than in a political party, the IFP may have had no *locus standi*, or a lesser measure of *locus standi* in launching said application. As more fully set out below, the IFP's Chief Whip sought to intervene as an *amicus curiae.*

7. I bring this application on account of

    a. having leave to appeal being denied in the Court below, I have no other avenue in which, by right, I can see the review of the Judgment;

    b. the matter is

        i. a constitutional dispute between two organs of State established by the Constitution, performing functions under section 73(2) and section 52 of the Constitution respectively,

        ii. of paramount public interest,

        iii. pivotal in defining one of the most important features of our parliamentary democracy,

        iv. intrinsically and probably exclusively of a constitutional nature, and

        v. precedent-setting for a large number of related matters;

c. the outcome of this case will define what could be the most salient feature of our parliamentary democracy;

d. there are no issues or disputes of material facts;

e. the prospect of the Supreme Court of Appeals ["SCA"] granting leave to appeal are uncertain;

f. it would not appear that deliberations in this Honorable Court necessitate or could benefit from the SCA hearing it first;

g. three fifths of my terms of office have already expired, and it would seem inappropriate to delay further the definition of this matter and the introduction of my Bill by deferring the matter to the SCA before this Honorable Court hears it, and

h. the Judgment of the Court below rendered by Allie, J in case no. 11365/10 [the "Judgment"] being erroneous.

8. I intend petitioning the SCA for leave to appeal so as to preserve my only other available avenue for redress, should this Honorable Court not accept my petition.

9. This matter concerns

a. the constitutionality of certain Rules of the National Assembly ["the NA Rules"] which require that before a MP may introduce an ordinary Bill in the National Assembly in terms of section 73(2) of the Constitution that MP must receive "permission" on his "proposal" from the majority of the National Assembly which acts after having

received a report on the matter from the Committee on Private Members' Legislative Proposals and Special Petitions [the "Private Members Committee"];

b. whether the requirement --set out in section 33 of the Constitution as implemented by the Promotion of Administrative Justice Act 3 of 2000 ["PAJA"]-- that decisions be motivated can be satisfied by the Respondent giving reasons after a review application was launched or arguing that reasons were given before his relevant decision was taken; and

c. *stare decisis*, viz.:

    i. how far must an affected party endure the adverse application of an unconstitutional law or the threat thereof, before that party may challenge the constitutionality of that law, and

    ii. cost orders in respect of good faith public interest litigation in constitutional matters.

10. Moreover, the appeal relates to the failure by the Court below to exercise its discretion properly, in that the Court below

    a. held that our Constitution expresses a "majoritarian" principle which enables parliamentary majorities to give "permission" to decide what Bill can be introduced by any MP, whether such a MP is a part of that majority or belongs to a different political party;

b. held that the Constitution would require the same majority of Members of the National Assembly to give permission to the introduction of a Bill as it requires to pass that same Bill;

c. held that in a constitutional matter of this nature, a MP would have been required to exhaust the entire process set out under the impugned NA Rules to see whether permission to the introduction of his proposed Bill would be granted or denied before he could challenge the constitutionality of such NA Rules, even though said MP had already attempted to introduce a Bill in terms of section 73(2) of the Constitution and the Respondent refused to introduce such Bill because, as he later explained, of that MP's failure to obtain such permission;

d. capriciously exercised her discretion in the matter and ordered Applicant to personally pay Respondent's costs in spite of

    i. Applicant having brought his application

        1. in the public interest and in good faith, and

        2. not in his personal capacity but in his individual capacity as a MP; and

    ii. Respondent having

        1. failed to provide the Rule 53 record and any explanation for its failure to do so;

2. failed to provide reasons for his refusal to introduce the Bill which Applicant duly requested in terms of section 6 of PAJA;

3. failed to explain why in his answering affidavit he averred that he provided such reasons only long after the launching of the application, but in argument claimed that reasons had been provided long before Respondent took the decision under review and submitting that therefore he did not have to comply with the PAJA request;

4. failed to respond to Applicant's correspondence;

5. failed to justify why he failed to respond to Applicant's second letter after having admitted having lost the first; and

6. provided the Court below with incorrect and misleading information of comparative constitutional law;

e. capriciously dismissed the application for intervention by, and ordered costs against, a qualified and expert *amicus curiae* who sought to intervene to put before the Court important and relevant information relating to parliamentary procedures, praxis and records which, if duly taken into account, would have prevented the Court below from making a number of the errors in its Judgment and in the stated reasoning leading thereto; and

f. erred in about forty other aspects which are relevant and material to the reasoning and in reaching the conclusions set out in the Judgment.

11. The Judgment is attached hereto as annexure "**MGOA-CC1".** In my application to this Honorable Court I request leave to appeal against the Judgment in terms of the Notice of Motion to which this Founding Affidavit is attached.

12. After having heard oral arguments, Allie J dismissed my applications for leave to appeal with costs. Her judgment is attached hereto as annexure "**MGOA-CC2"**.

13. The substantive reliefs that I seek from this Honorable Court in the application of leave to appeal against the Judgment are the following:

    a. a declaration that the order of Allie J dismissing my application in the Court below is inconsistent with the Constitution and invalid;

    b. a declaration that the NA Rules which require a MP to obtain the permission of the National Assembly and/or the Private Members Committee before that MP may introduce a Bill in terms of section 73(2) of the Constitution are inconsistent with the Constitution and, therefore, null and void, such Rule being, *inter alia*, those listed in my Notice of Motion;

    c. an order that the Respondent must

        i. introduce in the National Assembly the Credit Act Amendment Bill which I submitted to him for introduction, and

ii. do so disregarding the NA Rules declared unconstitutional, null and void and, therefore, according to the remainder of the NA Rules, on the basis of the same procedures and under the same conditions applicable to other ordinary Bills, namely those introduced by Cabinet Members or a Deputy Minister;

d. an order that the Respondent pays the cost of this application and of the costs of my application in the Court below; and

e. any other or alternative remedy which the interest of justice may require or justify.

14. As set out below, it is in the interest of justice for this Honorable Court to be the Court which hears and decides the merits of this case, once it reaches its conclusion that it was erroneously decided by the Court below.

15. In this affidavit, I intend dealing with the following:

a. history,

i. factual history, and

ii. procedural history,

b. the merits of the case,

i. red herrings,

ii. the NA Rules,

iii. the constitutional schema,

iv. the Private Members Committee,

v. introducing Bills as part of a MP's role, and

vi. the Respondent's impugned decision,

c. the Judgment,

i. barring the *amicus*' contribution,

ii. the "majoritarian" principle,

iii. ripeness,

iv. errors in respect of PAJA,

v. errors in respect of costs,

vi. errors in respect of the Applicant's status,

vii. errors in reading the record,

viii. errors in characterizing Applicant's arguments, and

ix. errors in legal reasoning,

d. the leave of appeal judgment, and

e. conclusions and remedies

i. leave to appeal,

ii. declaration of unconstitutionality,

iii. review of Respondent's decision,

iv. costs, and

v. conclusions.

16. Annexed hereto marked "**MGOA-CC3"**, is the record of the proceedings in the Court below, including the affidavits and heads of argument that served before Allie J.

HISTORY

Factual History

17. My current term of office as a Member of the National Assembly began on 6 May 2009 and is due to expire sometime around May 2014, depending on when the President determines the date of the next elections in terms of law.

18. As a Member of the National Assembly, I exercise, and am obliged to exercise, certain functions set out in sections 42(3), 53, 55, 56 to 58 and 73 to 78 of the Constitution.

19. As a Member of the National Assembly, my primary function is the introduction of legislation and participating in the process through which the National Assembly formulates, deliberates on and passes legislation. My only other additional function is that of participating in the oversight which the National Assembly exercises in respect of how legislation is implemented by the Executive.

20. Section 73(2) of the Constitution provides:

> **"(2) 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."**
> (Emphasis added.)

21. In terms of the foregoing section, I have the power to introduce legislation in the National Assembly. This is perhaps the only function I have as a Member of the National Assembly, which I can exercise individually. In respect of the others, my functions are part of a collegial deliberative process. Current practice and conventions are ambivalent and vary from committee to committee as per whether the oversight function can be exercised by a MP individually, or is to be conducted collegially through a committee.

22. At the commencement of my term of office, I detected an inconsistency between my duties and obligations as a Member of the National Assembly as contained in the Constitution, and the NA Rules.

23. On May 9, 2009, I tried raising the relevant issues in the Rules Committee which is chaired by the Respondent, but Respondent did not allow such issues to be discussed and ruled that I had to raise them in the Sub-Committee on the Review of the National Assembly Rules.

24. On May 15, 2009, I wrote to the Respondent requesting that the NA Rules be re-adopted. I did so in the belief that under the Constitution each new National Assembly carries the responsibility to adopt or readopt its own rules, and cannot be bound by the Rules adopted by its predecessor elected through a previous election which is then *functus officio* together will all its actions, as it is the accepted case in respect of pending Bills and non-adopted reports [see: NA Rule 316]. The higher chamber of Parliament, the National Council of

Provinces, readopts its Rules after each election. I specifically pointed out that certain NA Rules deprive me of my right to introduce Bills in the National Assembly, and therefore they were in conflict with the Constitution and could not be part of the Rules to be readopted by the National Assembly. A copy of this letter is marked "MGOA1" can be found at page 29 of the Paginated Record ["PR"].

25. On May 26, 2009 Respondent replied to my aforesaid letter, with a letter to be found at page 21 of the PR as annexure "MGOA2", stating that each successive Parliament needs not to readopt its Rules, and made certain further points about the constitutionality of the NA Rules. During argument in the Court below, the Respondent argued that this letter constituted the reasons of his impugned decision of not to introduce by Bill, even though such decision was taken some nine months later and I request reasons in terms of section 5 of PAJA about ten months later.

26. On 10 June 2009, at the first practical opportunity, after having given, out of courtesy, verbal oral notice to both the Respondent and the Chief Whip of the African National Congress ("the ANC") of my intention to do so, I raised a point of order pointing out that the National Assembly had no Rules in that it had failed to re-adopt those adopted by the previous National Assembly. Therefore, I requested the formal re-adoption of the NA Rules and that the Rules which deprive me of my power and duty of introducing legislation be expunged from the NA Rules so readopted, because unconstitutional.

27. The Respondent ruled rejecting my point of order, as set out in the Hansard report marked "MGOA3" and to be found at page 34 of the PR.

28. On October 20 2009, I wrote to the Hon. Adv. M.T. Masutha, MP, the Chairman of the Sub-Committee on the Review of the National Assembly Rules ("the Chairman"), and copied the Respondent in his capacity as the *ex officio* Chairman of the Rules Committee. I requested that the issue of the unconstitutionality of the Rules be tabled before the Rules Committee. I attached to said letter a legal opinion provided by Advocate Anton Katz, SC detailing the grounds of such unconstitutionality. Both documents marked MGOA4 and MGOA5 respectively can be found at page 39 and page 40 of the PR respectively.

29. Neither the Respondent nor the Chairman gave an answer to my letter, nor did they cause the issue to be tabled in and discussed by the Rules Committee or in any other venue.

30. On 14 February 2010, I wrote to the Respondent tabling my Credit Act Amendment Bill and requested that said Bill be introduced in terms of the Constitution, rather than in terms of the aforesaid unconstitutional NA Rules. My letter and said Bill marked "MGOA6" and "MGOA7" respectively can be found at page 56 and page 58 of the PR respectively. Again, I attached to my letter the aforesaid legal opinion by Advocate Katz, SC (MGOA5 at page the PR).

31. The Respondent

    a. again gave no response;

b. did not cause said Bill to be introduced in the National Assembly as required by the Constitution and the NA Rules with the omission of the impugned NA Rules; and

c. did not refer said to the Private Members Committee as contemplated in the Rules as they stand.

32. On March 23, 2010, not having received any answer, reply or action by the Respondent, I requested via letter that the Respondent provided me with the reasons, in terms of section 5 PAJA, for his failure to introduce the aforesaid Bill in the National Assembly warning him that his failure to do so carried the rebuttable statutory presumption that his decision was taken for no good reasons and that of my intention to commence litigation on the matter. The letter marked "MGOA8" can be found at page of the PR.

33. The Respondent again failed to respond and provide the reasons for his action and/or failure to act.

34. After three months

a. I had no response from the Respondent, and

b. I had no option but to approach the Court below to protect my rights, do my job and to strike down those parts of the Rules which violate the Constitution.

Procedural History

35. On July 8, 2010, I launched an application in the Court below to review the Respondent failure to introduce my Credit Act Amendment Bill in terms of

section 73(2) of the Constitution and declare the unconstitutionality of the NA Rules requiring a MP to obtain the prior permission of the National Assembly and the Private Members Committee before introducing a Bill, consisting, inter alia, of the NA Rules specified in paragraph 3 of my Notice Motion in that application. Evenly therewith, I filed a notice of constitutional challenge in terms of Rule 16A of the Uniform Rules of Court.

36. In my Notice of Motion, in terms of Court Rule 53, I requested Respondent to provide the record of his decision. In spite of his failure to do so having been repeatedly pointed out to him, Respondent never produced such record.

37. On July 21, 2010 the Respondent gave notice of his opposition and on October 14, 2010 he served his answering affidavit. The matter was placed on the semi-urgent role for hearing on March 9, 2011.

38. In his answering affidavit, Respondent

    a. argued that because section 55(1) of the Constitution gives the National Assembly the power to "*initiate or prepare legislation except money Bill*" the National Assembly may decide by majority what Bills, if any, are to be prepared and initiated before they are introduced in terms of section 73(1) of the Constitution;

    b. submitted that section 55(1) of the Constitution provides for a collegial process before the coming into existence of an actual Bill capable of being introduced by a single MP, which process is akin to the collegial deliberative process of Cabinet, pointing out that section 85(2)(d) of the Constitution indicates that "*the President exercises executive*

authority together with other Members of Cabinet, by […] preparing and initiating legislation";

c. relied on Joint Rule 159 requiring that a Bill introduced by a Cabinet Member or Deputy Minister be approved by Cabinet, to draw the conclusion that it is constitutionally permissible for the NA Rules to require that a Bill introduced by a MP be first approved by the National Assembly;

d. explained that the Private Members Committee

    i. by majority of its members adopts a report to the National Assembly in which it recommends whether the National Assembly is to give or withhold permission of the introduction of a Bill by a MP, depending on the intended Bill's "*desirability*"; and

    ii. deliberates not on an actual Bill but on a general "proposal" submitted by the relevant MP which describes the main features and purpose of the intended Bill if that MP were given permission to introduce a Bill.

e. argued that the relief sought by the Applicant was premature because the Applicant had not yet been refused permission to introduce a Bill by the National Assembly;

f. argued that the NA Rules as they stand do not violate the Constitution but simply "regulate" the exercise of the National Assembly's power to initiate or prepare legislation;

g. attached and relied on a letter dated August 25, 2010 which he sent to me long after I had launched my application and in which he indicated that he was ready to submit my Bill to the Private Members Committee as "a proposal" so that I could begin the process and seek the permission of the National Assembly to turn a proposal into a Bill; that letter gave some reasons for its refusal to introduce my Bill without the permission required in the impugned NA Rules;

h. indicated that he did not receive my letter of February 14, 2010 on account of it "*having been mislaid internally due to some administrative oversight*" or, in the language of his letter of August 25, 2011 "*owing to a huge oversight on the part of the administrative personnel*";

i. failed to indicate why he did not acknowledge and failed to respond to my letter of March 23, 2010;

j. at paragraph 51.1 indicated that, having explained his inability to timely respond to my section 5 PAJA's request for motivation of his refusal to introduce my Bill in terms of section 73(2) of the Constitution, he had responded at that juncture in his answering affidavit ["*I have <u>now</u> responded even though it was after the Applicant's application was launched*" emphasis added]; and

k. related that after the launching of my application, the Sub-Committee on the Review of the NA Rules was convened by its Chairman to discuss ways to amend the NA rules to address the issues raised in my application.

39. On November 30, 2010 I filed my replying affidavit, mainly replying to and correcting Respondent's several erroneous statements of law.

40. It appears that Respondent did not contest the material facts I averred in my founding affidavit thereby reducing the dispute into a purely legal matter, save for an aspect which does not appear material to deciding the issues *in casu*, namely whether the Sub-Committee on the Review of the NA Rules, convened after the commencement of litigation, placed on its agenda the issues raised in such litigation in response to my aforesaid letter to its Chairman or on referral from the Rule Committee of May 9, 2009.

41. On February 21, 2011 I filed a supplementary affidavit to place before the Court below Respondent's letter of August 25, 2010 which was supposed to be attached to Respondent's answering affidavit, together with documentation showing my having solicited Respondent to correct his oversight. This letter can be found, marked as "S2" at page 356 of the PR.

42. On February 28, 2011, I filed a second supplementary affidavit to complete the record by putting before the Court below the letter of August 30, 2011 that the Respondent wrote to me in response to my letter August 5, 2010 which Respondent referred to but failed attached to his answering affidavit in which I challenged the Respondent's authority to decide to oppose my High Court application and to appoint the State Attorney to represent him in that application. These two letters can be found, marked as "MGOA12" and "MGOA 15" respectively at page 340 and page 362 of the PR respectively.

43. More averments were made by Respondent and me in our respective affidavits, but I believe that I have fairly identified and summarized their core

relevant content for the benefit of this Honorable Court, without unduly overburdening these papers with a full repetition thereof.

44. Heads of arguments were duly exchanged ahead of the hearing, one of the Respondent's side and two on mine. These heads can be found at page 429, page 494 of and page 554 the PR respectively. A separate memorandum on costs was handed to Allie J at the hearing on March 9, 2011, which can be found at page 576 the PR.

45. On March 9, 2011 Allie J entertained oral argument on the matter. On account of a number of factors, including that Respondent's out-of-town counsel having to catch an early afternoon scheduled flight back to Johannesburg, the matter could not be properly heard on that day alone, and, therefore, with the concurrence of all parties concerned, Allie J continued it to May 9, 2011.

46. On May 5, 2011 Jacobus Hercules van der Merwe, MP lodged a notice of motion and made application to intervene as *amicus curiae* attaching to his application an affidavit which

    a. stated that, having duly and timely requested him to consent to his intervention by giving him the full details of its intended evidence and submissions, the Respondent had declined to consent so;

    b. provided the full contents of the evidence and submissions he intended to submit before the Court below;

    c. detailed his experience and qualifications, including without limitation

i. having consulted and relying on the advice of the former and long-serving Secretary of Parliament, and

ii. being the oldest serving MP;

d. explained that his evidence was submitted to answer questions relating to parliamentary procedures, praxis and conventions which, even though not relevant to the main thrust of the Applicant's case or the Respondent's defense, had been nonetheless the object of investigation by Allie J during the hearing of March 9, 2011;

e. attached an affidavit in support of his motion to condone his late intervention;

f. attached an affidavit of a member of his staff who

i. conducted competent and reliable research on the circumstances relating to proposals aimed at becoming a Bill showing that there is no accessible public record relating to them and that they are dealt with in a political manner; and

ii. provided a reconciliation of the scant information which could be identified from parliamentary records and minutes in respect of all the proposals which were submitted with the aim of becoming a MP's Bill but never succeeded to become a Bill, including those from members of the majority party;

47. On May 9, 2011, Allie J dismissed the *amicus curiae* application to intervene with costs for reasons which I am not in the position of placing before this Honorable Court because

    a. a transcript has not yet been made available, and

    b. I was unable to follow the reasoning of Allie J on that occasion.

48. On the same day, after the dismissal of the aforesaid *amicus curiae* application, I withdrew

    a. my application to introduce a supplementary affidavit

        i. which I shared with Respondent weeks prior to the hearing;

        ii. with which I sought to place before the Court below averments similar to those contained in the aforesaid *amicus curiae*'s submission;

        iii. the introduction of which the Respondent opposed, threatening to request costs against me if I proceeded with my application; and

    b. exceptions in respect of

        i. the failure of the new National Assembly to re-adopt the NA Rules adopted by previous National Assemblies;

        ii. the failure of the Respondent to receive the authority of the National Assembly or the Rules Committee to oppose my application; and

iii. the appointment of the State Attorney as Respondent's attorney.

49. On May 11, 2011, I filed a post-hearing written summary of my oral argument in reply, which can be found at page 700 of the PR.

50. On December 8, 2011 Allie J rendered the Judgment, dismissing my application with costs. The Judgment was notified to my erstwhile attorney of record whom I dismissed in open court and with his consent on May 9, 2011, so that I could represent myself from that point on. Due to the festive season and my travel abroad, the Judgment was conveyed to me only on January 19, 2012.

51. On January 25, 2012, I applied for leave to appeal and for condonation of any delay in doing so, highlighting 42 grounds for my appeal and the relevant passages in which the Judgment is in error.

52. On account of Respondent's counsel's diary being busy, a hearing could not be held until March 7, 2012. However, that hearing was continued until March 14, 2012 because the Respondent's counsel failed to appear without giving prior notice of his inability to do so.

53. On March 14, 2012 Allie J heard oral argument on my applications and

    a. granted my unopposed application to condone any delay in applying for leave to appeal, and

    b. dismissed my application for leave to appeal with costs.

54. On March 29, 2012, I gave Respondent notice of my intention to petition this Honorable Court for leave to appeal the Judgment.

MERITS

Red Herrings

55. Before entering into the merits of the case, I have to free them from red herrings and misrepresenting issues which appear to have contaminated legal analyses in the Court below.

56. Both the Judgment and in her judgment on my application for leave to appeal, Allie J held that I argued my case away from my founding papers.

    a. A review of the record shows that this is not so.

    b. Neither the Judgment nor the Respondent's averments, or the judgment on the application for leave to appeal, or any written or oral argument made in the Court below point to anything specific which I pleaded differently at different stages of the proceedings.

    c. If any, the applicable criterion is that one should not depart from the facts averred in the founding papers, not from points of law.

    d. There has been no such variance in points of fact.

    e. There has been no departure in my arguments in respect of points of law.

    f. The only variance in argument is that I pleaded my case relying on section 73(2) of the Constitution and when the Respondent juxtaposed to my case his reliance on section 55(1)(b) of the Constitution it

became necessary, natural and acceptable that debate and legal arguments moved onto discussing the import of section 55(1)(b).

g. The other variation was that, while I was represented by counsel at the hearing of March 9, 2011, I acted *pro se* at the hearings of May 9, 2011 and March 14, 2012.

57. Respondent averred that in any case my application stood to fail because the Bill I asked him to introduce

a. did not comply with NA Rule 243(3) requiring

i. depending on how one reads it, a statement that the Bill

1. received the "permission" of the National Assembly, or

2. is introduced by a MP, and

ii. a cover page, and

b. that in my Notice of Motion I failed to impugn NA Rule 243(3)

58. In fact,

a. in my Notice on Motion it is stated that I impugned all the NA Rules embodying the "permission" requirement, stating that those I listed were among them, as I used the inclusive but not exclusive qualifier "inter alia"; and

b. my bill has a cover page and was accompanied by my statement indicating that it was introduced by me.

The NA Rules

59. I now set out, in brief, the scheme of the NA Rules and the basis of my submission that they are unconstitutional insofar as they prevent individual Members from introducing Bills in the National Assembly.

60. Copy of the Rules can be found at page 65 of the PR marked as "MGOA9". Large portions of the Rules are irrelevant for the purposes of this application; I deal with what is relevant below.

61. At present the majority party is the ANC. Yet, the analysis I conduct and the issues of constitutionality raised in these papers would be equally valid if the majority party were any other party, including my own.

62. 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 majority party has a preponderance of seats and votes.

63. This "permission" is obtained in the following manner:

    a. first, in terms of NA Rule 234(1), the MP seeking to introduce a Bill must produce a memorandum on the Bill;

    b. this memorandum goes to the Private Members Committee in terms of NA Rule 235(1);

    c. after various consultations, the Private Members Committee must report to the National Assembly recommending that permission to introduce the Bill either be granted or refused; and

d. the National Assembly, in terms of NA Rule 236, must consider the recommendation of the Private Members Committee and the memorandum and may either grant or refuse permission to introduce the Bill.

64. As a matter of constant practice, Private Members Committee's reports are "below the line" in the Order Paper of the National Assembly, which means that they are not deliberated upon by the National Assembly for a long time, if ever, with the end result that as such proposals for a Bill and Private Members Committee's reports lapse at the end of a legislature in terms of NA Rule 316[1].

65. A MP may not introduce a Bill unless he or she receives prior "permission" to do so by the Private Members Committee, which in turn is dominated by the majority party of the day. However, Cabinet members and Deputy Ministers are, in terms of NA Rule 233, exempted from complying with the above process.

66. Months after the commencement of litigation in the Court below, its Chairman placed on the agenda of the Sub-Committee on the Amendment of the NA Rules the amendment of certain but not all the impugned NA Rules. He did so openly and explicitly in response of such litigation and as a way of settling it. This was the first time that the majority party put forward a proposal to amend some of the impugned NA Rules. The amendments finally agreed to by said Sub-Committee over my objection were considered and adopted by the Rules

[1] In parliamentary jargon, the Private Members Committee is also referred to as the "*graveyard committee*" see: http://www.mfp.co.za/page.asp?pg=news&newsID=400; http://www.ipocafrica.org/index.php?option=com_content&view=article&id=566:sa-zumas-lapses&catid=109:news-archive-2010&Itemid=101; http://www.pmg.org.za/report/20110223-pretorius-proposal-amend-land-and-agricultural-development-bank-act-n

Committee, which met for that purpose for 45 minutes on the November 17, 2010. Together with the meeting of May 9, 2010 held for an hour and half that was only meeting held thus far by the Rules Committee. I am not aware of said amendments having yet been adopted by the National Assembly.

67. In the Court below Respondent indicates that the amendments adopted by the Sub-Committee and by the Rules Committee were *"not relevant for present purposes"*, and in fact were not referred to in the Judgement of the Court below [Para 49.9 of the Answering Affidavit, page 301 of the PR].

68. During the deliberation in said Sub-Committee an open process of negotiation took place which led to my being unable to withdraw my application in the Court below on account of said amendments not having gone far enough, in that they

    a. still leave the opportunity for a majority party controlling the Private Members Committee to block any proposal from ever becoming a Bill in several ways, including by not deciding on it;

    b. leave untouched the unfettered discretion of the majority of the National Assembly to

        i. deny permission to the introduction of a Bill

        ii. never decide on the matter thereby preventing the Bill from seeing the light of day before the legislature lapses;

    c. purport to call for an objective and technical assessment, but vest this function in the majority of a committee of politicians who

i. are not required to have any skill or qualification which would enable to perform such assessment;

ii. by virtue of their duty and nature of office think and act in political terms and manners;

iii. routinely and historically have decided even issue of constitutionality and legality by party lines, and

iv. rarely can reach the quorum required to take a decision.

69. In said negotiations I had requested at least a deeming provision providing that

a. if the Private Members Committee does not pronounce itself on a proposal within three months, it must be deemed as having given its permission; and

b. if the National Assembly does not pronounce itself on the recommendation of the Private Members Committee within 3 months, it must be deemed as having given its own permission to the proposal being transformed into a Bill finally capable of being introduced in the National Assembly.

The Constitutional schema

70. The requirements listed above expressly violate the right and indeed the duty, ex section 73(2) of the Constitution, of every Member of the National Assembly to introduce Bills in the National Assembly.

71. The only proviso contained in 73(2) is that it is only the Cabinet member responsible for financial matters who may introduce money Bills. This means that a MP has an unfettered constitutional power to introduce any other Bill, which the NA Rules may regulate but not take away.

72. Section 57 of the Constitution provides:

> **"(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) <u>the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;</u>**
> **(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."**
> [emphasis added]

73. Section 57 does not, in any way, suggest that the procedures created by the National Assembly may trammel the constitutional powers and duties of MPs of the National Assembly.

74. It certainly does not permit the exercise of those constitutional powers and duties to be dependent on the discretion of another body, in this case the majority party of the National Assembly. On the contrary subsection 57(2)(b) requires that the Rules protect the participation in the proceedings of the

Assembly and its committees of "minority parties". The imperative of protecting minorities is not absolute but is qualified not in respect of "measure" or "extent" but in respect of "manner" only, as the provision adds "*in a manner consistent with democracy*", exactly to avoid what is known as "majoritarianism" which is the power of the majority to have exclusive control of the agenda, with no dialectic relationship with minorities.

75. This provision is not isolated. It flows from, implements, actualizes and gives substance to

    a. the cornerstone of our Constitution which in its first Founding Provision at section 1(b) commits our Republic to the "**multi-party system of democratic government**" over, above and beyond a democracy merely characterized by "*universal adult suffrage, a national common roll and regular elections*", which requires for the overall legislative system to guarantee that under the circumstances of the time political minorities are protected and enabled to play the role they must play to fulfill this founding constitutional vision;

    b. the political rights declared and protected in section 19 of the Constitution, which

        i. through the mechanism of "political representation" enunciated in section 43(2) of the Constitution, make the actions on a MP the expression of the political views and will of those whom elected him or her,

ii. enable citizens to make their voice and will heard through the agency of their MP or political party, *inter alia* and in particular as such MP articulate and compose that will and voice into the details of a Bill,

iii. in turn, embody and express within the political realm and the system of government the individual fundamental constitutional rights of

1. freedom of opinion ex section 15 of the Constitution,

2. freedom of expression ex section 16 of the Constitution,

3. the right to petition ex section 17 of the Constitution, and

4. the right of freedom of association ex section 18 of the Constitution.

iv. if violated, by *inter alia* silencing the opportunity of placing Bills on record and soliciting public debate around them, cause the indirect but inescapable violation of the rights set out in sections 15 to 18 of the Constitution.

76. In the Court below, Respondent sought to justify the constitutionally of the impugned NA Rules by relying on section 55(1) of the Constitution in relation to section 73(2) of the Constitution and with reference to section 85(2)(d) of the Constitution. Section 55(1) reads:

Powers of the 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.

77. Section 55(1)(b) is part of a group of provisions of the Constitution headed "the National Assembly" which provide for the composition and functions of the National Assembly as a whole. This provision headed "Powers of the National Assembly" describes the general powers that are accorded to the National Assembly as a whole. As an empowering provision, it does not specifically provide how and by whom the power is to be exercised. It merely records the obvious: that in "*exercising its legislative power*" it may "*initiate or prepare legislation, except money Bills*".

78. The actual process by which that generally accorded legislative power is exercised is described elsewhere in the Constitution.

79. Section 73 is the first of a group of provisions which determine in detail how legislation is to be made. Thus section 73(2) is part of a group of provisions of the Constitution headed "National Legislative Process" which provides for how laws are made and passed. This provision is headed "All Bills" and provides how a Bill can be introduced.

80. Section 85(2)(d) is part of a group of provisions of the Constitution headed "The President and the National Executive" which provide for the composition and functions of the Executive. This particular section headed "Executive authority of the Republic" describes what Cabinet can do as a whole, and

describes the general power of members of the Cabinet, together with the President, to prepare and initiate legislation. Section 85(2)(d) reads:

> **The President exercises the executive authority together with other members of the Cabinet by [...] preparing and initiating legislation**.

81. Read together, these provisions make the following plain: legislation is prepared and initiated within the national executive or the National Assembly and, in terms of section 73(2), is introduced by a Cabinet member or a Deputy Minister by right and with no permission requirement.

82. By empowering the National Assembly and Cabinet, the Constitution correctly identifies that in their respective spheres legislation is initiated and prepared, to the exclusion of any other sphere of government, entity or person. There is where it stops. Occam's razor applies to judicial interpretation as it does to philosophy, rendering truer the simpler reading. Taking the interpretation any further leads to a breach of the clear language of section 73(2): that section does not require that a MP may introduce a Bill in the National Assembly only if the Assembly has consented.

83. In the Court below, in his heads of argument, Respondent conceded that such a requirement would be unique to South Africa and unknown in the democratic world: if the drafters of the Constitution had intended such an extraordinary requirement they would have said so expressly, and they did not.

84. The difference in meaning between the words "initiate" and "prepare" in sections 55 and 85 and "introduce" in section 73 must also be explained with the benefit of the simpler, and likely to be truer, explanation. The introduction of legislation is a formal action, requiring tabling in Parliament, presentation

and publicity. The initiation and preparation are informal processes which are to be located only within the executive and the legislature, rather than elsewhere, and include compliance with formal requirements only, as opposed to desirability, such as proper legal drafting and format.

85. The alternative reading, proposed by Respondent and adopted in the Judgment, that it is the National Assembly, as a body or a collective, that is authorized by the Constitution to introduce and prepare legislation, and that MPs cannot do so unless permitted by the National Assembly, is unsustainable. The Judgment accepted and relied on Respondent's theory which

    a. conceded that the Constitution imposes no requirement on a Cabinet member or Deputy Minister to seek the approval of Cabinet before introducing his or her Bill, but proceeded to state that Members need the permission of the National Assembly, notwithstanding the controlling language of sections 55(1)(b) and 85(2)(d) being identical;

    b. argued that the South African system of initiation of legislation is so different and "unique" that comparative references just do not apply; yet the foundational section 1 of the Constitution, refers to the "value" of democracy which is broader than our own Republic, while it is repugnant to section 1 to postulate that our Constitution is unique in a manner which would render it less democratic;

    c. contended that the impugned NA Rules are not unconstitutional because they merely "regulate" the process of initiating and preparing legislation, when in fact the NA Rules do not "regulate" Bills the way

NA Rules and standing orders "regulate" the flow of MPs' questions, Members' statements, interpellations and other parliamentary activities which is only as per form, quantity, time and place but never for content, while the "permission" requirement goes beyond regulation since it allows permission to be refused on the basis of the Bill's merits, rather than the quality of its drafting or format;

d. concluded that in order to introduce a Bill a MP must persuade the majority and secure their support for his or her proposal, but persuading the majority is what is required to "pass" a Bill[2], thereby requiring the same burden to introduce a Bill as to get the National Assembly to pass it, which begs questioning the point of the process of legislative deliberations set out in both the Constitution and the Rules;

e. ignored that throughout the democratic world, one first introduces a Bill and then through arguments, deliberations, public participation and mobilization, one secures the support of the majority for its enactment;

f. struggles

    i. to divine a differentiation between a legislative proposal and a Bill properly called, as the Constitution speaks only of Bills, or

    ii. account for the fact that the text of section 55(2)(b) empowers the National Assembly to "initiate <u>or</u> prepare" legislation [emphasis added] in which the use of the disjunctive form

[2] Section 53(1)(c) provides that "*all questions before the Assembly are decided by a majority of the votes cast.*" However, it is of course the case that a matter is not *before* the Assembly until it has been formally introduced.

contemplates the situation where the Assembly will "*prepare*" – in the sense of assisting in the drafting process - yet will have no part in the "*initiation"* of a Bill per se[3]; and

g. fails both the values and the text of the Constitution and flounders under Occam's test.

86. If our Constitution intended to sharply depart from the whole of South African parliamentary history, it would have expressed such intention in clear terms, and it did not. In fact our parliamentary history

a. knows no precedent in which a MP could only introduce a Bill with the permission of the majority of his or her colleagues, and

b. is part of a British tradition in which a Bill was written by a MP and just laid on the table, hence "tabled".

The Private Members Committee

87. The Private Members Committee has operated for several years under the new NA Rules requiring prior "permission" to the introduction of a Bill. I have studied its activities as they emerge from its scant minutes and records. Fuller evidence on the matter can be found in the affidavit of Anthony Mitchell

[3] It is revealing that in order to support its erroneous reading of the Constitution, NA Rule 231 has to re-write the constitutional text as "*prepare and initiate legislation*", as the Judgment does. Moreover, section 85(2)(d) of the Constitution, when referring to Cabinet, uses the expression "*prepare and initiate legislation*" while section 55(1)(b) refers to "*initiate or prepare*" legislation. This differentiation in wording must be given meaning and can be explained by the order or the words having been changed to accommodate the "or" rather than the "and", so as to emphasize that the Assembly may "prepare" without "initiating", for otherwise preparation would come before initiation when the two go together.

attached to the Affidavit of the intended *amicus curiae*, JH van der Merwe, MP.

88. There is no clear and permanent public record of Bills which a MP intended to introduce and in respect of which permission was not granted. Contrary to any Bill introduced in Parliament, such proposals are not published in the *Gazette* and are not detailed in permanent and searchable public records such as the parliamentary Order Paper, the ATC (Announcements, Tablings and Committee Reports) or the Hansard records. As set out in the aforesaid affidavit of Anthony Mitchell, diligent research, conducted by a competent insider, cannot even unearth the minutes of the Private Members Committee. This results in silencing and obliterating both a MP's Bill and the will and views of the constituency for which such MP and his party act as representatives.

89. Once Private Members Committee receives a proposal for a Bill from a MP, Private Members Committee solicits the views of the Executive on whether such Bill should receive permission to be introduced in the Assembly. Customarily and routinely the Private Members Committee, and consequently the National Assembly, proceed to decide in conformity with the advice received from the Executive. Practically and effectively, this means that the Executive decides whether or not a MP may introduce legislation.

90. This subverts the doctrine of separation of powers in which Parliament carries the sole responsibility of making laws and the Executive is limited to implementing such laws. It departs from the principle set out in section 43(a) of the Constitution that Parliament exercises national legislative function and

further constitutes an abdication of the role provided for the National Assembly in section 42(3) of the Constitution, which provides:

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

91. The NA Rules presently in force have been carried over from the pre-democratic pre-1994 order with only a few amendments. The National Assembly has not yet brought them into compliance with the Constitution: in the text published by the National Assembly, the text of the NA Rules recognizes that the NA Rules are not consistent with the Constitution, as in respect of NA Rules 20(1), 30, 39, 44, 330 the text indicates the need for being brought into compliance with a Constitution adopted 16 years ago, as set out in MGOA9 to be found at page 64 of the PR. In order to facilitate and accelerated the process, I took it upon myself to produce a first draft of a possible revision of the NA Rules so as to bring them into compliance with the Constitution and address the most pressing issues within the public debates relating to Parliament, such draft and its cover letter being found at page 222 and page 221 of the PR respectively, marked as "MGOA11" and "MGOA10" respectively. Deliberations on this or many other outstanding proposals for the full review of the Rules have not yet begun or been scheduled to begin.

92. In reaction to the litigation in Court below ---- There is no indication that either the Respondent, the Rules Committee or the ANC intends changing the Rules to enable MPs to introduce legislation as contemplated in the Constitution. On the contrary, Respondent's statements and the statements

made by other representatives of the ANC made it clear that it is their intention to maintain the present situation.

Introducing Bills as part of a MP's role

93. The power of introducing legislation is essential to my function as a MP who is not part of the governing majority, for if a Bill introduced by me has merit the governing majority will either pay a political price by rejecting it or will have to recognize my contribution by accepting it, both of which are relevant and valuable actions in terms of political accountability and the functioning of a multi-party system of government.

94. In all democratic legislatures known to me, members of at least the lower chamber have the right to introduce legislation, which submission I make on the strength of

    a. several years of comparative constitutional studies,

    b. my direct involvement in the workings and procedures of the legislatures of Italy, the United States of America and the Commonwealth of Virginia, and

    c. the failure of the extensive deliberations and submission made by both parties in the Court below to identify a similar example where MPs of established and credible democracies have to ask the permission of the ruling majority before introducing a Bill.

95. Allowing MPs the democratic power to introduce legislation has no adverse impact on the functioning of Parliament, for according to standard

parliamentary procedures, each parliamentary committee which has expertise on the Bill's subject matter has the power to dispose of the Bill in a matter of minutes through a simple vote declaring the Bill's non-desirability and without having to analyze its provisions.

96. The possibility of demonstrating to the electorate that I have introduced legislation on critical issues and of canvassing public opinion is vital for my parliamentary role and the growth of democracy, which, *inter alia*, requires that the approval or rejection of a Bill must be conducted on an actual and complete Bill rather than on a fuzzy proposal, and within the committee with the expertise in the Bill's subject matter where the Bill's merits can be fully evaluated rather than by a generalist committee like the Private Members Committee with no specific expertise.

97. My right and democratic function to provoke debate on national issues within the portfolio committee which has the competence and role to legislate on them is vital to protecting my role and that of my party as the political minorities contemplated in section 57(2)(b) of the Constitution; also in consideration of the fact that under present practice a member of a committee who is not a member of the majority party has no right to otherwise place matters on a committee's agenda.

98. MPs' Bills often are the incubators of good ideas ahead of their time. For instance, South African parliamentary history recalls the Bill repeatedly submitted by Alf Whitman, MP and ridiculed at the time, aimed at banning smoking in public places.

99. The ban on introduction of Bills impairs the exercise of my parliamentary functions as well as the exercise of democracy which made litigation on the matter in the Court below both ripe and necessary.

The Respondent's impugned decision

100. In the Court below I sought the review and setting aside or correction of the refusal of the Respondent to introduce the Bill in the National Assembly in accordance with the Constitution.

101. Section 6 of PAJA provides that judicial review of administrative action may be granted, *inter alia*, if:

> **(d) the action was materially influenced by an error of law;**
> **(e) the action was taken—**
> **[. . .]**
> **(i) because irrelevant considerations were taken into account or relevant considerations were not considered;**
> **(ii) because of the unauthorized or unwarranted dictates of another person or body;**
> **(iii) in bad faith;**
> **(iv) the action itself—**
> **contravenes a law or is not authorized by the empowering provision;**
> **[. ..]**
> **(g) the action concerned consists of a failure to take a decision.**

102. Section 5(3) of PAJA provides:

> **If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.**

103. All of the above were grounds upon which I sought the review of the Respondent's decision in the Court below.

104. In the Court below Respondent argued

a. the compliance of his decision with the NA Rules;

b. the validity of the NA Rules;

c. in spite of having failed to respond to my request made in terms of section 5 of PAJA to furnish reasons for his decision, he nonetheless gave his reasons,

i. in his answering affidavit, or

ii. in a letter August 25, 2011 long sent after the commencement of litigation, or

iii. several months before his decision, in spite of my having made several submissions to him, including the opinion of Adv. Katz, SC, which could have changed his mind and/or made him take his action for different reasons.

105. The Respondent's decision was based on material misconception of the law, namely that the NA Rules for the introduction of Bills to the National Assembly are *intra vires* the Constitution.

106. Respondent has failed, despite frequent reminders, to respond within 90 days to my request for reasons. Respondent's failure to provide me with reasons for his decision demonstrates that the decision was taken without good cause. Otherwise, the text and purposes of the PAJA requirements, as well as the dictates of section 33 of the Constitution which such requirements embody and express, would be frustrated and ridiculed if an "administrator" could satisfy them by providing his reasons

a. after litigation has commenced and after having failed to produce the Rule 53 record of his decision, possibly so as to adopt *ex post facto* the best reasons to defeat an applicant's challenge while hiding his real reasons probably set out in the undisclosed record; and

b. by reference to anything he said or did before he took the impugned decision especially, as *in casu*, there where new evidence, arguments and considerations were submitted to him so that he could apply his mind to them before he decided.

107. Accordingly there was good cause for the review and setting aside of the Respondent's decision.

THE JUDGMENT

108. The Judgment is flawed by fatal errors of reasoning and in conclusions and therefore stands to be reviewed and reversed.

Barring of the *amicus curiae*'s contributions

109. The Judge erred in

a. not allowing J.H van der Merwe, MP to intervene as an *amicus curiae* as the affidavit set out in attachment to his application to intervene and the affidavits and documentation attached thereto [hereinafter collectively referred to as "JHVM"] would have assisted the court in reaching findings and conclusions not affected by the errors of law or fact which are identified below in respect of the relevant portions of the Judgment; and

b. capriciously ordering the prospective *amicus curiae* to pay the costs.

The "Majoritarian" principle

110. The Judge erred, at Para 94 of the Judgment, in holding that the application of the "majoritarian principle" as put forward by the Respondent and in the Judgment, does not undermine democracy, in that

a. a MP would need to muster the same majority of the National Assembly to exercise his right to introduce a Bill in terms of section 73(2) of the Constitution as he would need to have that Bill passed by the National Assembly in terms of section 53(1) of the Constitution: throughout the democratic world, a MP first introduces a Bill and then, through arguments, deliberations, public participation and mobilization, secures the support of the majority for it[4];

b. a MP would not have the possibility of eliciting and soliciting national debate of a document which has no official status, and is in no public record;

c. a MP would be prevented from building in the open, rather than behind closed doors and in secret procedures, the consensus necessary for a Bill to be approved, which would counter the "open democracy" our Constitution wants South Africa to be;

[4] The notion of voting on legislation before its actual text even exists, and before it has been subjected to hearings, public and expert input, amendments, multi-party debate and compromise echoes the upside-down fantasy world of *Alice in Wonderland* in which the Red Queen said: "Sentence first – verdict afterwards! … Off with her head!"

d. democracy is not the "majoritarian principle", but rather anyone having the opportunity to be heard and then the majority deciding what to adopt: the "majoritarian principle" is expressed in the power of the majority to ignore, bury, otherwise kill or formally reject any Bill, but not on its right to prevent something it does not like from being said or a Bill from being tabled, for that is the principle of democracy in force as in the erstwhile Soviet Union, and not one applicable to the "participatory" democracy our Constitution wants South Africa to be.

111. Judge erred in that the rationale of the Judgment leads to an incurable contradiction. Notwithstanding the controlling language of subsections 55(1)(b) and 85(2)(d) of the Constitution being identical, no permission is required for a Cabinet member or a Deputy Minister to introduce legislation, while the Judgment holds that subsection 55(1)(b) requires the NA Rules to provide for the permission of the National Assembly to be given in respect of a MP introducing a Bill.

112. The Judge erred in relying on section 57(1) and (2) of the Constitution as the basis on which the National Assembly can impose a permission requirement to the exercise of the right/function contemplated in section 73(2) of the Constitution, as said two subsections give the National Assembly power to "regulate" proceedings, as correctly noted at Para 71 of the Judgment. The power to regulate does not involve scrutiny of the merits, but is limited to format, manner, time and place. In terms of NA Rules 95 to 102 and 105, a MP could make as many statements and motions in the National Assembly as he or she pleases. Yet, pursuant to NA Rules 187 to 190 and as a matter of

parliamentary praxis, this power is regulated by the Program Committee in terms of time, place and manner and MPs are given opportunities for statements and motions on certain days only set aside in the program of the National Assembly. There is no control of content and, in fact, no-one knows the contents of a statement or a notice of motion until they are presented in the Assembly. In respect of Bills, the Rules do not merely "regulate" modality of the process of initiating and preparing legislation. The Applicant would not object to this. Instead the impugned Rules control contents, as they allow the National Assembly and/or its Committee to refuse permission on the basis of the Bill's merits, rather than the quality of its drafting or format.

113. The Judge erred in not considering in her Judgment the wealth of submissions drawn from comparative experience made by both parties and the arguments which the Applicant relied on in respect thereof. In this respect

a. as the Applicant submitted, comparative experience is critical in construing the meaning of the word "democracy" used in subsection 57(2)(b) of the Constitution which makes reference to an abstract value or notion rather than the specific democracy established under the Constitution, as otherwise the words "provisions and values of this Constitution" would have been used in its place as they are elsewhere in the Constitution [see: Applicant's Second HoA, Para 20 of Applicant's Post Hearing Summary and Para 18 of JHVM at page 408 of the PR],

b. holding the constitutionality of the "permission" requirement would collide with the entire parliamentary history of South Africa which,

until very recently and since its very inception and with the inclusion of the legislatures of TBVC states and self governing territories, did not require any permission for the introduction of a Bill, often providing that the Private Members Committee be the dedicated forum where formal Bills [not proposals] would be introduced and processed; and

c. the Respondent submitted that reference to the comparative experience show that our system is "unique" in respect of a constitutional feature, which, as the Applicant argued, is an undemocratic feature, thereby making our country "unique" in being less democratic: a conclusion which should lead to rejecting the Respondent's and the Judgment's erroneous construction of sections 73(2) and 55(1)(b) of the Constitution, as this construction rolls back, rather than forward, the frontiers of democracy not only for MPs who belong to minority parties but also for all those who belong to the majority party, including those from the ANC listed at in ACM2 of JHVM at page 422 of the PR whose Bills never saw the light of day or found a place in the public records.

114. The majoritarian principle, as enunciated by the J.J. Rousseau, is not part modern rigid constitutions which are the supreme law of the land. In terms of that principle:

a. power vests in the majority:

b. the majority expresses the *"general will"* and therefore by definition is always right, while the minority by definition is always wrong, having

no right other than that of aspiring to become the majority of the future.

115. This principle, which created the philosophical underpinning for both the French Revolution and any government based on the so-called dictatorship of the proletariat,

a. began to be abandoned in the wave of constitutionalism which emerged during the many revolutions of 1848 and resulted in the constitutions drafted from 1860 to 1920;

b. was finally abandoned in 1920 with the Austrian constitution which asserted that power does not vest in the majority, but rather in the constitution itself, and its underpinning '*grundnorm"* thereby fully fledging the notion of a "*Rechtsstaat*" or rule of law as opposed to rule of man or rule of majority;

c. was rejected for ever in 1948 with the Universal Declaration of Human Rights and all the post-WWII constitutions inspired by it, which prohibited any majority, no matter how large, *inter alia*, may

i. violate human rights,

ii. silence the voice of dissidents, whether they are protesters in the street or opposition MPs, and

iii. prevent opposition MPs to actively canvass support and partake in the democratic process, *inter alia,* through their right to speak openly in parliament, receiving parliamentary

immunities and protections, hold the government accountable through questions and other oversight techniques and their power to introduce legislation.

116. Our Constitution is based on the *Rechtsstaat.* Its Founding Principle set out in section 2 embodies the principle of *"rule of law"*, which carries the corollary that:

a. public power is not vested in any majority but in the Constitution only,

b. any entity, including a parliamentary majority, has only the measure of power vested in, and entrusted to it by the Constitution, and

c. the exercise of any public power must be in accordance with the Constitution; and

d. the exercise of power by the majority must comply with the Founding Principle of "*multi-party system of democratic government*"[5] entrenched in section 1(d), which is fully nugatory of the majoritarian principle enunciated by Rousseau.

117. In this sense

a. their Lordships Sachs J and Chaskelson CJ held[6]:
The Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold

[5] I submit that the reference to "*government*" instead of "*parliament*" is salient, considering the background of the mandatory government of national unity in the Interim Constitution and the thrust of the entire negotiation process aimed at the ensuring that country is, to an extent, governed collegially, which is incompatible with the idea of the majority alone introducing Bills.

[6] S vs Lawrence; S v Negal, S vs Solberg 1997 (4) 1 176 CC G SA page 1 176, Judges Chaskelson, Langa, Ackerman, Goldstone, Kriegler, Madala, Mokgoror, O'Regan and Sachs.

> *beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the State is.*
> His Lordships Sachs J *"Practical inconvenience and disturbance of established majoritarian mindsets are the price that constitutionalism exacts from government"*[7] (Emphases added)

Ripeness

118. The Judge erred, at Para 98 and in the last sentence of Para 90 of the Judgment, in holding that before the Applicant could seek judicial redress he had to subject himself to the procedures set out in the impugned NA Rules and had to wait for the outcome of such procedures. It is trite law that one has the right to challenge the constitutionality of a law, regulation or Rule as soon as one is adversely affected or threatened by the application of same to him. *In casu* the Respondent is on record stating that he applied such Rules in dealing with the Applicant's requests and that his denial of introducing the Applicant's Bill flows from the application of such Rules; This notwithstanding, the evidence submitted in JHVM, which the Judge erroneously excluded, provides ample demonstration on the poor functioning of said procedures.

119. There is no need to exhaust remedies and avenues before one can claim the unconstitutionality of a law which is being applied to one. Section 38 of the Constitution provides that remedies be available not only in respect of breached rights but also in respect of a threat that such rights be breached. It is common cause that this matter impacts, *inter alia*, on the political rights set out in section 19 of the Constitution.

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[7] In Constitutional Library/South African Journal on Human Rights 1985 - 2011/2009: Volume 25/Part 1:1 - 178/Articles/Equality, plurality and structural power/Democracy.

120. Matters involving the constitutionality of a law are ripe for adjudication as soon as such a law is called upon being applied, as public interest and legal certainty on the constitutionality of laws, including regulations and subordinate legislation, displease the doctrine of ripeness and exestuation of remedies as these notions apply in administrative law. In this sense:

a. Van Heerden AJ stated[8]:

> "Counsel for the respondents in both the *Dawood* and the G *Thomas* applications contended further that the relevant application was 'premature' and not yet 'ripe for hearing'. They argued that, in addition to the non-payment of the prescribed fee by both Mrs Dawood and Mr Thomas, their respective applications for an immigration permit were not 'received' by or on behalf of the second respondent because they were 'incomplete' in other respects (see H the discussion under the heading 'The factual background' above). In this regard, however, I accept the argument of applicants' counsel that this objection is misplaced and appears to rest upon a confusion between ripeness in administrative, as opposed to constitutional, matters. As pointed out by applicants' counsel, under administrative law an application to a Court would indeed be premature if the relevant public authority had not yet completed its decision-making processes[9]. In constitutional matters, on the other hand, the doctrine of *"ripeness"* prevents a party from approaching a court prematurely at a time when s/he has not yet been subjected to prejudice, *or the real threat of prejudice*, as a result of the legislation or conduct [Emphasis added].

b. Hartzenberg J stated

> "Relying on the doctrine of ripeness Mr *Fabricius* contends that the applicant brought the application prematurely. The question is discussed by Chaskalson *et al Constitutional Law of South Africa* para 8.3 at 8.12 - 8.14. The argument is that no action has been taken against anybody and that the Court will not entertain purely academic matters. Reliance is placed on allegations on behalf of the respondents to the effect that the Defence Force is in the process of drafting a new Act and

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[8] Dawood and another vs Minister of Home Affairs and others; Shalabi and another vs Minister of Home Affairs and others; Thomas and another vs Minister of Home Affairs anothers. 2000(1) SA 997 (C) 2000 (1) SA pages 997200 (1) SA page 1031).
[9] Lawrence Baxter *Administrative Law* (1984) at 719 - 20.

regulations. It is a rather opportunistic argument". (Emphasis added).[10]

c. Chaskalson P, Mahomed et alt. stated

"Canadians call it "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. (Emphasis added.)[11]

d. In Khosa[12] the impugned law had not even come into force and no-one could have been adversely affected by it. Yet this Honorable Court held that

" Section 81 of the Constitution provides that a Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act. […] The Welfare Laws Amendment Act has been signed by the President and is therefore an Act of Parliament within the meaning of section 81 of the Constitution. In terms of section 172(2)(a) a court may make an order concerning the constitutional validity of an Act of Parliament. Thus, the fact that section 4B (b) (ii) has not yet been brought into force should not remove it from the jurisdiction of this Court to determine its constitutionality.[…] Once a matter is properly before this Court, there should be no bar to the just and equitable remedies that can be granted, so long as this Court is ever mindful of its role in relation to Parliament.

Errors in respect of PAJA

[10] Ferreira v Levin No and others; Vryenhoek and others v Powell No and others 1996 (1) SA 984 (CC)

[11] Ferreira v Levin No and others; Vryenhoek and others v Powell No and others 1996 (1) SA 984 (CC) 1996 SA p984; Chaskason P, Mahomed DP, Ackermann J, Didcott J, Kreigler J, Langa J, Madala J, Mokgoro J, O'Regan J, Sachs J and Trengrove AJ.

[12] CCT 12/03 Louis Khosa et alt, v. The Minister of Social Development. 4 March 2004

121. The Judge erred, at Para 54 of the Judgment, in finding that the Respondent gave reasons for his administrative decision, and that such reasons were given on May 26, 2009 and that such reasons were such as to satisfy the requirements of section 5 of PAJA, in that

a. such reasons were not given on May 26, 2009, but, if at all, only on August 25, 2010, long after the Applicant had launched and served the main application [see "S2" at page 356 of the PR];

b. May 26, 2009 was before the time when the Respondent took the impugned administrative decision which, inter alia, implies that the Respondent could have acted for other reasons once he finally acted, especially having received, and possibly considered, the Applicant's extended Senior Counsel opinion in the interim;

c. the Respondent averred that

i. his response to the Applicant's letter of February 14, 2010 was his letter Marked "S2" sent after the launching of the Applicant's main application as he states: "*I have <u>now</u> responded*"

ii. he "*could not give reasons*" because he lost the letter of February 14, 2010. [see: Para 50.1 and 50.2 of the Answering Affidavit at page 301 of the PR and Para 31 of the Reply Affidavit at page 332 of the PR];

d. the Judgment ignores that in terms thereof, the presumption of section 5 of PAJA is triggered by the Applicant's March 23, 2010 letter requesting reasons for the impugned decision;

e. no reasons were given and therefore, in terms of section 5 of PAJA, it must be presumed that the decision was taken for no good reason, and set aside.

122. The Judge erred, at Para 99 of the Judgment, in refusing to review the Respondent's impugned decision merely because

a. she did not uphold part of the legal basis on which the Applicant challenged it;

b. when the Respondent failed to provide reasons within 90 days of his having been requested to do so and before the commencement of litigation and therefore, in terms of section 5 of PAJA, his decision was to be presumed to have been taken for no good reason;

c. the latter is a separate legal ground capable by itself of setting aside an administrative decision under review;

d. by not reviewing the decision and applying her mind to the issue, the Judge has not determined whether *in casu* the effects of the presumption set out in section 5 of PAJA are sufficient to set aside the impugned decision.

Errors in respect of costs

123. The Judge erred and utilized her discretion in a capricious manner, at Para 100 of the Judgment, in ordering Applicant to pay Respondent's cost of two counsel in that

a. the Applicant's papers did not differ from his heads of argument;

b. legal arguments, as opposed to facts, may be changed during proceedings, without this being cause for punitive considerations;

c. the Applicant brought the application

i. in his individual capacity as a MP, but not in his personal capacity

ii. in good faith,

i. in the public interest, and

ii. because of a good faith constitutional dispute between persons charged by the Constitution with the exercise of constitutional functions;

iii. to define and bring certainty in one of the most important aspects of our parliamentary democracy;

d. the Judgment ignored the test set out by this Honorable Court in *Chonco and others v President, RSA,* in respect of cost orders in good faith constitutional litigation;

e. the record shows extraordinary negligence on the side of the Respondent including

i. losing the Applicant's February 14, 2010 letter,

ii. ignoring the Applicant's March 23, 2010 letter,

iii. failing to respond to two other pieces of correspondence received from the Applicant in this matter,

iv. after having received from the Applicant an expert Senior Counsel opinion on the basis of which the Applicant would months later proceed to litigation, failing to reply or react to it to counter its findings through any of the many law advisors at his disposal,

v. providing no reasons for the impugned decision until after litigation had long commenced, and

vi. failing to provide the Rule 53 record or an explanation or justification for such failure;

f. the Judgment did not

i. consider and abide by the controlling authorities and precedents submitted to the Court below supporting the fact that in cases of this nature it is inappropriate and capricious to order the Applicant to pay the Respondent's costs,

ii. distinguish this case from them;

iii. take cognizance that both parties in the litigations are representative organs of State in that

1. Applicant launched his application in his individual, but not personal capacity, viz. in his capacity as the person vested with the function contemplated in section 73(2) of the Constitution and impaired by the impugned NA Rules;

2. Respondent was cited in his individual, but not personal capacity, viz. in his capacity as the person vested with the function contemplated in section 52 of the Constitution;

3. in his prayer Respondent did not ask for an order for costs against the Applicant personally; and

4. Applicant

    a. did not ask for and order of costs against the Respondent personally

    b. cannot possibly be ordered to pay costs personally, if that is the import of the Judgment, which I do not concede to.

g. this is a good faith public interest litigation and dispute between organs of State occurring within the scope of their respective functions.

Errors in respect of the Applicant's status

124. The Judge erred in finding, at Para 9 of the Judgment, that the Applicant brought his application in a "personal" capacity, when in fact I, as

the Applicant, brought it in my capacity as an "individual" MP [see: Para 6 of the Founding Affidavit at Page 11 of the PR, while at Para 22 of my Reply Affidavit, page 326 of the PR, I indicated that the IFP authorized the introduction of the Bill referred to in Para 1 of the Judgment, while Para16 of JHVM at page of the 406 of the PR indicate that his Party authorized the Applicant to launch the main application in this Court.

125. The Judge erred, at Para 44 of the Judgment, in mischaracterizing the Applicant's argument as relating to the right of a "minority MP" as his challenge was brought with reference to the right of any MP, while JHVM pointed to specific instances of MPs belonging to the majority party whose intended Bills were not introduced because permission was withheld or denied [see: JHVM's Para 6 at page 417 of the PR and Annexure ACM 2 at page 422 of the PR];

126. The Judge erred, at Para 85 of the Judgment, in holding that it is "peculiar" for the Applicant and not his party to bring his application and through it argue for the defense of minority political rights, in that

a. section 73(2) of the Constitution ascribes the right of which the Applicant laments the infringement to an individual MP, not a party

b. the Applicant's party

i. approved and authorized the Applicant to introduce the Bill referred to in Para 1 of the Judgment [see: Para 22 of the Reply Affidavit at page 326 of the PR and Para 16 of JHVM

ii. approved and authorized the Applicant to bring this application [see: Para16 of JHVM at page 406 of the PR];

iii. may not have had *locus standi*; and

c. self evidently, sought to assist this Court though the intervention of its Chief Whip as an *amicus curiae* see: [Para16 of JHVM at Page 406 of the PR].

Errors in reading the record

127. At Para 13 the Judge erroneously found that copy of the letter referred to therein was sent to the Applicant when in fact it was sent to the Respondent [see: Para 21 of the Founding Affidavit at page 14 of the PR]

128. The Judge erred, at Para 15 of the Judgment, in

a. connecting the tabling of the issue referred to therein in the Rules Sub-Committee, which occurred on October 6, 2009, to the Applicant's letter of February 14, 2010 which Respondent did not answer;

b. not finding that such tabling took place at the initiative of the Applicant and not as a response by the Respondent;

c. not finding that the Respondent

i. failed to respond not only to the Applicant's letter of February 14, 2010 but also to the Applicant's letter of March 23, 2010 which referred to the previous letter while asking for reasons

under section 5 PAJA, [see: Para 26 of the Founding Affidavit at page 15 of the PR];

ii. gave no reasons for his failure to respond until after the launching of the Applicant's main application on July 8, 2010 [see: Para 31 of the Reply Affidavit at page 332 of the PR];

iii. averred that his response to the Applicant's letter of February 14, 2010 was his letter Marked "S2" sent after the launching of the Applicant's main application and not the referral of the issue to the Rules Sub-Committee [see: Para 50.1 and 50.2 of the Answering Affidavit at page 301 of the PR and Para 31 of the Reply Affidavit at page 332 of the PR in which the Respondent averred that he responded "now"]; and

iv. in finding that the Rules Sub-Committee "could not meet" rather than "would not meet" until July 2010 when no evidence of, or reasons for, such impossibility was adduced, and the Applicant questioned the Respondent's general will to attend to the matter [see: Para 30 of the Reply Affidavit at page 324 et seq. of the PR].

129. The Judge erred, at Para 17 of the Judgment, in not finding that the communication from the Respondent to the Applicant referred to therein took place after the launching of the main application [see: Para 50.1 and 50.2 of the Answering Affidavit at page 301 of the PR].

130. The Judge erred, at Para 64 of the Judgment, in holding that the Applicant's papers depart from his notice of motion, in that by disregarding the Rules which the Applicant claims to be unconstitutional the remainder of the Rules would enable a MP's Bill to be introduced in the National Assembly on the same procedure applicable to a Bill of a Member of Cabinet or a Deputy Minister.

131. The Judge erred, at Para 38 of the Judgment, in finding that Applicant "failed to allege in his founding a lack of criteria" used to guide decision-making in the Private Members Committee or the National Assembly, in that

a. Applicant stated in his founding papers that the Private Members Committee and the National Assembly may decide as they wish and on account of purely political reasons; and

b. this is not a factual allegation, but a legal conclusion and founding papers are not required to contain all legal arguments and conclusions.

<u>Errors in characterizing Applicant's arguments</u>

132. The Judge erred, at Para 18 and 21 of the Judgment, in finding the Applicant's argument as being concerned about no MP being capable of introducing a bill unless he or she receives permission from the ANC, when the Applicant argued that such permission requirement is repugnant to the Constitution and democracy no matter what political party holds the majority [see: Para 33 of the Reply Affidavit at page 334 of the PR and Para 3 of Applicant's Post-Hearing Summary of Oral Reply].

133. The Judge erred, at Para 22 and 23 of the Judgment, in finding the Applicant's argument as being concerned about the permission requirement as relating to the Private Members Committee only, when, in fact, Applicant argued that such permission requirement is repugnant to the Constitution and democracy because it enables a parliamentary majority so inclined to prevent any minority, or its own members, from introducing any bill, whether this is at the level of the Private Members Committee or at that of the National Assembly.

134. The Judge erred, at Para 24 of the Judgment, in mischaracterizing the Applicant's argument and in failing to find the Applicant's reliance on subsection 57(2)(b) of the Constitution and on his argument that a MP's right to introduce legislation in terms of section 73(2) of the Constitution is part of the word "democracy" set out in said subsection 57(2) and of that which enables minority parties to participate in the proceedings of the Assembly and its committees.

135. The Judge erred, at Para 24 of the Judgment, in mischaracterizing the Applicant's argument and in failing to find the Applicant's reliance on his argument that

a. subsection 55(1)(b) of the Constitution locates, rather than vests, the power to initiate and prepare legislation in the National Assembly as a whole, while section 73(2) of the Constitution provides for the exercise of such power by vesting the powers of introducing legislation in those listed therein, including a MP; and

b. the Respondent is in error in construing the words “initiate or prepare legislation” as being a different stage within a process which includes, as a separate stage, the “initiation”, rather than a generic description of what happens within the National Assembly, consisting of all its MPs and the support staff, when a Bill is introduced.

136. The Judge erred, at Para 32 to 38 of the Judgment, in taking into account only the text of the NA Rules submitted by the Applicant and listed therein, and not also

a. the relevant parliamentary practices and praxis submitted to assist her in JHVM; and

b. finding that parliamentary practices and praxis are part and parcel of what defines parliamentary law alongside the Rules.

137. The Judge erred, at Para 24 of the Judgment, in mischaracterizing the Applicant’s argument and in failing to find the Applicant’s reliance on his argument mentioned therein as referring both to the permission for the introduction of a Bill required by the Rules from the Private Members Committee as well as that required from the National Assembly.

138. The Judge erred, at Para 39 of the Judgment, in mischaracterizing the Applicant’s argument as limited to a lack of criteria on the basis of which permission for the introduction of a Bill is to be given, when in fact the Applicant challenged the permission requirement in that Rule.

139. The Judge erred, at Para 40 of the Judgment, in mischaracterizing the Applicant's argument and in finding that counsel's argument departed from the Applicant's papers in that Applicant

a. did not invoke to the principle of majoritarianism, which was instead conjured and invoked by the Respondent,

b. stated that the exercise of a function ascribed by the Constitution to a single MP cannot be subjected to the will of a majority; and

c. made the same point both in his papers and through counsel.

140. The Judge erred, at Para 45 of the Judgment, in mischaracterizing the Applicant's argument as suggesting that what inhibits the exercise of the constitutional right to introduce legislation is the stifling at the committee level of debates in the National Assembly on whether permission is to be granted, when in fact the Applicant's objection is in respect of the permission requirement both within the National Assembly and at the committee level.

141. The Judge erred, at Para 47 of the Judgment, in mischaracterizing the Applicant's argument which was rather the argument that even if the new amendments to the Rules were adopted, such Rules would only abridge the discretion of the committee, while the remainder of the Rules would leave the National Assembly with the unfettered discretion to withhold permission for any reason.

142. The Judge erred, at Para 86 of the Judgment, in holding that the Applicant "asserted" that the Constitution created a multiparty democracy "in narrow terms" which differs from one which is "open, participatory,

constitutional… with checks on all three arms of government …", for the Applicant never made such a submission.

Errors in legal reasoning

143. The Judge erred, at Para 48 and 49 of the Judgment, in taking into account only the text of the Rules submitted by the Applicant and listed therein, and not also

a. the relevant parliamentary practices and praxis submitted to assist her throughout JHVM; and

b. finding that parliamentary practices and praxis are part and parcel of what defines parliamentary law alongside the Rules.

144. The Judge erred, at Para 76 and 79 of the Judgment, in

a. not holding that, in order not to be in conflict with the "right to introduce legislation of a MP", recognized in this Para of the Judgment, the "right to initiate and prepare legislation" must be a right, to the extent that it is a right which the National Assembly as a whole exercises through its individual MPs; and

b. holding that the National Assembly has the "power to initiate and prepare legislation"; in that

i. subsection 55(1)(b) of the Constitution locates, rather than vests, the power to initiate and prepare legislation in the National Assembly as a whole, while section 73(2) of the Constitution provides for the exercise of such power by vesting

the powers of introducing legislation in those listed therein, including a MP;

ii. it is erroneous to construe the words "initiate or prepare legislation" as being a different stage within a process which includes, as a separate stage, the "initiation", rather than a generic description of what happens within the National Assembly, consisting of all its MPs and the support staff, when a Bill is introduced;

iii. fails to acknowledge and give meaning to the constitutional wording being "initiate or prepare legislation" rather than "initiate and prepare legislation", meaning that the National Assembly could very well prepare but not initiate legislation; and

iv. here and throughout, needs to re-write the constitutional text to make it fit its reasoning erroneously stating it as "initiate and prepare legislation".

145. The Judge erred, at Para 77 and 78 of the Judgment, in confusing the formal requirements with the scrutiny over the policy substance of a Bill, for,

a. as suggested by the Applicant, it would be constitutionally permissible for the Rules to require that a Bill be certified by the State law advisors or the parliamentary law advisors for compliance with the Constitution and formal drafting requirements; and

b. the Rules instead make provision for a permission requirement given by a political committee rather than technical bodies.

146. The Judge erred, at Para 78 of the Judgment, in not taking into account

a. that MPs' bills also go through a process of internal approval of the collegial body to which a single MP belongs, as stated at Para 9 and 22 of the Reply Affidavit at pages 319 and 326 respectively of the PR;

b. the stringent party discipline to which MPs are subjected in terms of

i. subsection 47(3)[c] of the Constitution which provides for the loss of office of a MP if the party to which the MP belongs terminates his membership for any reason;

ii. most party constitutions which enable the governing bodies of political parties to terminate a MP's membership for any reason [see: Para 3 of Applicant's Post-Hearing Summary]; and

iii. judicially sanctioned political praxis [see Para 17.1.3 of JHVM at page 407 of the PR and Para 3 of Applicant's Post-Hearing Summary]

c. that the Applicant's Bill referred to in Para 1 of the Judgment was approved by the Applicant's political party [see: Para 22 of the Reply Affidavit at page 326 of the PR and JHVM].

147. The Judge erred, at Para 87 of the Judgment, in not realizing that

a. for “a MP to be able to persuasively argue for the acceptance of his legislative proposals”, that MP needs to be able to table such proposal in a forum not only accessible to his colleagues but also to the public at large which can put pressure on that member’s colleagues to support such proposals; and

b. as stated at Para 5 and 8 of Anthony Mitchell’s Affidavit in JHVM at pages 417 and 418 respectively of the PR, and as the Applicant invited the Court to easily take judicial notice of by making a basic search of the public parliamentary records, there is no accessible public record of proposals for legislation which are not transformed into introduced Bills, while the text of introduced Bills are published in the official Gazette and in the parliamentary records.

148. The Judge erred, at Para 88 of the Judgment, in dismissing evidence submitted by the Applicant and JHVM that, as a matter of fact, a committee of the National Assembly may stifle proper consideration and debate, merely because such evidence collides with a legal duty of that committee to act differently.

149. The Judge erred, at Para 90 of the Judgment, to rely in her reasoning on the Applicant having failed to refer to “specific instances” in which by virtue of a majority decision the Private Members Committee refused to give permission for the introduction of a Bill, when such information

a. is not relevant; and

b. if relevant, was provided with ample details in JHVM which also showed how some of such decisions of the Private Members Committee appear either irrational or led exclusively by political reasons.

150. The Judge erred, at Para 91 of the Judgment, in relying on a dictum with no direct bearing on what stood to be decided *in casu*.

151. The Judge erred, at Para 92 of the Judgment, in conducting a balancing test between two rights as

a. no two rights are involved in reconciling section 73(2) with subsection 55(1)(b) of the Constitution, for the former provisions locate a power in the National Assembly while the latter vests a function in the National Assembly; and

b. there is no need to conduct a balancing test when reconciliation can be achieved by means of interpreting the provisions in a manner which enables their full co-existence, namely that section 73(2) vests a function or right within a MP, while subsection 55(1)(b) locates the general powers in the collegiality of the National Assembly, inclusive of its MPs, law advisors and large staff which are called upon to cooperate in order to prepare and initiate legislation, viz. draft a Bill, so that a MP can introduce a Bill.

152. The Judge erred, at Para 93 of the Judgment, in relying on a dictum with no direct bearing on what stood to be decided *in casu*.

153. The Judge erred, at Para 94 of the Judgment, in directing her conclusion towards the provisions of a Private Members Committee when the Applicant's challenge was directed towards the permission requirement both in the National Assembly and that Committee.

154. The Judge erred, at Para 96 of the Judgment, in

a. holding that the Private Members Committee does not have an unfettered discretion in granting or withholding permission for the exercise by a MP of the right set out in section 73(2) of the Constitution;

b. directing her conclusion in respect of the Private Members Committee only, when the Applicant's challenge was directed towards the permission requirement both in the National Assembly and that Committee; and

c. not addressing the unfettered discretion of the National Assembly in granting or withholding permission for the exercise by a MP of the right set out in section 73(2) of the Constitution.

155. The Judge erred, at Para 97 and 98 of the Judgment, in holding that it is permissible for the National Assembly to have the unfettered discretion of granting or withholding permission for the exercise by a MP of the function/right set out in section 73(2) of the Constitution.

156. The Judge erred in not drawing any adverse inference from the Respondent's failure to provide

a. the Rule 53 record; and

b. a justification for such failure.

THE LEAVE TO APPEAL JUDGMENT

157. To the extent that one may be able to follow its reasoning, the judgment rendered by Allie J on my petition for leave to appeal seems to compound the errors of the Judgment, without adding to what is relevant to the applications before this Honorable Court. It is, however, worth noting that this judgment

a. decides the application exclusively by applying the "majoritarian" principle, misconstrued and misconceived as set out above;

b. ignores and fails to address the other 42 grounds of appeal set out in the relevant notice of motion and the issue of ripeness dealt with in my heads of argument;

c. purported to sanction the Applicant for

i. "*challenging the provisions of the rules and not the practice*" (page 2:4); and

ii. failing "*to actually subject the bill to the prevailing practices*" (page 2:5);

d. utilized the erroneous test of "*not being persuaded that another court will come to a different conclusion*", rather than "another court <u>may</u> come to a different conclusion" (page 2:10);

e. holds that the dispute was not about a constitutional matter, or "*a constitutional challenged in the proper sense of a constitutional challenge*" [*sic*!] (page 2:13 and 21); and

f. confuses what may justify the judgment on the merits, viz. the court's "plain reading of the rules", with what may justify the determination of cost under the test set out by this Honorable Court in *Chonco and others v President, RSA,* a case cited in argument and relied on by both parties (page 2:15 to 20); and

g. ignores and does not address any of the submissions made in the parties' respective heads of argument and during oral argument.

CONCLUSIONS AND REMEDIES

Leave to Appeal

a. The first prayer contained in the Notice of Motion to which this affidavit is annexed if for leave to appeal to this Honorable Court against the Judgment. This prayer is justified and in the interest of justice as per the facts and considerations set out under Para 7 above which, *mutatis mutandae,* is hereby incorporated by reference, so as not overburden these papers.

Declaration of Unconstitutionality

158. In terms of section 172(1)(a) of the Constitution, a court considering a constitutional matter within its power has no discretion but must declare any unconstitutional law invalid to the extent of its inconsistency.

159. After having made the declaration of invalidity, a court may then, in terms of section 172(1)(b) of the Constitution, make any order that is just and equitable.

160. In terms of section 172(1)(a), therefore, I submit that this Honorable Court must, on the basis of the reasons set out above, make an order declaring those parts of the NA Rules which prevent a Member of the National Assembly from exercising his or her constitutional powers to be unlawful and invalid. This is the fourth prayer contained in the aforesaid Notice of Motion.

161. In terms of section 172(1)(b) of the Constitution, should this Court find that the Rules are unconstitutional, it may grant me just and equitable relief.

162. I submit that the second and third prayers in the aforesaid Notice of Motion constitute such relief, and should be granted by this Honorable Court.

Review of the Respondent's Decision

163. If the relevant NA Rules are unconstitutional, the Respondent's decision, which was based upon the Rules, is clearly unlawful and falls to be set aside in terms of the fourth prayer in the aforesaid Notice of Motion.

164. I submit that, once the impugned are declared null and void, the remainder of the NA Rules reads well enough to enable me introduce a Bill in a manner which is akin to the procedures and under the same conditions applicable to Bills introduced by a Cabinet member or a Deputy Minister.

165. However, in the alternative, if the remainder of the NA Rules does not enable me introduce a Bill in a manner which is akin to the procedures and

under the same conditions applicable to Bills introduced by a Cabinet member or a Deputy Minister, there would be no NA Rule in place permitting me to introduce the Bill, and accordingly my constitutional power and obligation to introduce Bills would still be infringed. In such case I seek an order permitting me to act on the basis of the same procedures and under the same conditions applicable to Bills introduced by a Cabinet member or a Deputy Minister. This is the third prayer in the aforesaid Notice of Motion.

Costs

166. The fifth and sixth prayers in the aforesaid Notice of Motion relates to an order for costs against the Respondent, with the prayer that such order be made even if this Honorable Court dismissed my applications

a. in respect of the costs of my applications before this Honorable Court; or

b. subordinately, in respect of the costs relating to the proceedings in Court below.

167. In support of this prayer, I make reference to

a. the facts and considerations set out under Para 123 above which, *mutatis mutandae,* are hereby incorporated by reference, so as not overburden these papers;

b. the Court below exercised its discretion in an arbitrary or capricious manner;

c. the criteria set out by this Honorable Court in at paragraphs 6 to 7 *Chonco and others v President*, RSA 2010 (6) BCLR 511 (CC), inter alia, with reference how *"in constitutional litigation [...] the way in which a costs order will hinder or advance constitutional justice"*; and

d. additional argument and reasons to be submitted to this Honorable Court with my Heads of Argument and in oral argument.

Conclusions

168. I submit that the aforesaid prayers are

a. consistent with my prayers in the Court below, and

b. consonant with the interest of justice.

169. For the reasons set out above, I submit that I have made out a case for the relief contained in the Notice of Motion to which this affidavit is annexed, and I pray for an order incorporating its terms.

_____
DEPONENT

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Cape Town on this 30th day of March 2012, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

_____
COMMISSIONER OF OATHS

Full names.....
Business address.....
Capacity.....Area.....