

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 89/17

In the matter between:

UNITED DEMOCRATIC MOVEMENT

Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY & 13 OTHERS

Respondents

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS

1	INTRODUCTION	3
2	THE RELEVANT FACTUAL BACKGROUND.....	8
	<i>The Applicant's <u>demand</u> for a secret ballot.....</i>	<i>9</i>
	<i>The First Respondent's response to the Applicant's <u>demand</u>.....</i>	<i>9</i>
3	THE PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA.....	13
4	THE NATIONAL ASSEMBLY RULES.....	16
5	THE QUESTION OF JURISDICTION DEPENDS ON THE EXISTENCE OF A CONSTITUTIONAL OBLIGATION.....	19
6	DIRECT ACCESS.....	25
7	DOES A PURPOSIVE INTERPRETATION OF THE CONSTITUTION AND THE RULES CREATE A CONSTITUTIONAL OBLIGATION?.....	27
8	THE QUESTION OF SEPERATION OF POWERS.....	30
9	CONCLUSION.....	31
10	LIST OF AUTHORITIES.....	32

INTRODUCTION

1. The United Democratic Movement (the **Applicant**) brings this application in terms of section 167(4)(e) of the Constitution, contending that Parliament has failed to fulfil a constitutional obligation. In the alternative, it has invited the Court to grant it direct access due to the exigencies attendant upon this matter and the nature of the issues that arise for determination.

2. The Applicant invites the Court to make various declaratory orders and to issue a *mandamus* to the First Respondent. The notice of motion is crafted in more or less, the following terms:
 - 2.1. this Court has exclusive jurisdiction to determine this application, *alternatively*, that the Applicant be granted direct access to this Court;

 - 2.2. the Constitution requires (in the alternative, permits) motions of no confidence, in terms of section 102, to be decided through a secret ballot;

 - 2.3. the Rules of the National Assembly (the **Rules**) permit motions of no confidence, in terms of section 102, to be decided through a secret ballot;

 - 2.4. *alternatively*, that Rules 102 to 104 are unconstitutional and invalid to the extent that these preclude secret ballots being used for motions of no confidence;

- 2.5. the Speaker of the National Assembly's (the **First Respondent**) decision on 6 April 2017 refusing to allow the motion of no confidence to be decided through a secret ballot be reviewed and set aside and declared unconstitutional and invalid (the **impugned decision**);
- 2.6. the First Respondent be directed to make all the necessary arrangements to ensure that the motion of no confidence is decided through a secret ballot (the **mandamus**).
3. We reiterate the First Respondent's stance that she is not personally averse to having a motion of no confidence in the President being decided by secret ballot. However, the First Respondent is constrained from making such a determination, being bound by the Constitution and the Rules, the findings and decision of the Western Cape Division, Cape Town in *Tlouamma*¹ and the decision of the National Assembly (**NA**) not to include such a provision in its Rules.² The said decision of the NA is confirmed by the Applicant.³
4. As stated above and confirmed by the Applicant itself, the NA has previously considered, debated and voted on the question whether or not a secret ballot should be used for motions of no confidence. The collective majority of the NA rejected the proposal. Accordingly, the Rules do not make provision for the vote for a secret ballot be through a secret ballot. The First Respondent is bound to,

¹ See First Respondent's AA, para 4. See also *Tlouamma and Others v Mbete, Speaker of the National Assembly of the Parliament of South Africa and Another* 2016 (1) SA 534 (WCC) at paras 117 to 123.

² See First Respondent's AA, para 5.

³ Applicant's Replying Affidavit para 40.4.1

inter alia, adhere to the Constitution and the Rules in the execution of her role.⁴

5. The First Respondent's argument before this Court is limited in its purview.⁵ It goes no further than to assist the Court, assuming it has exclusive jurisdiction to entertain this matter, in deciding whether or not the impugned decision should be reviewed and set aside and the question of an appropriate remedy. In respect of the latter, we take issue with the Applicant's request for a *mandamus*. We propose instead, in order to respect the autonomy of each arm of government, that in the event that the Court finds the Rules to be invalid and unconstitutional to the extent that they do not provide for voting through a secret ballot for a motion of no confidence, that the matter be remitted to the First Respondent in order for her to reconsider her decision or for the House to review and amend the Rules, in accordance with the Court's judgment.⁶

6. This case concerns the scope of NA's power to run its processes. It also involves the question whether the Court can prescribe a method for voting in the NA. This translates into a consideration of whether or not the Constitution requires the NA to determine a vote of no confidence in the President by secret ballot. In our view, these are the questions that the Court is called upon to determine.⁷

7. Our written submissions are structured as follows:

⁴ See First Respondent's AA, para 5.

⁵ See First Respondent's AA, para 2.

⁶ First Respondent's AA, para 119.

⁷ First Respondent's AA, paras 86 to 92.

7.1. Firstly, we consider the brief factual background that gave rise to this application;

7.2. Secondly, we consider the applicable legislative framework;

7.3. Thirdly, we respond to the Applicant's case under the following headings:

7.3.1. Does this Court have exclusive jurisdiction to determine this application?

7.3.2. Has the Applicant satisfied the test for direct access?

7.3.3. Does the Constitution require or permit motions of no confidence to be decided by secret ballot?

7.3.4. Do the NA Rules permit motions of no confidence in terms of section 102 of the Constitution to be determined by secret ballot?

7.3.5. In failing to provide for a secret ballot, are Rules 102 to 104 of the Constitution unconstitutional and invalid? and

7.3.6. In the event that the Court finds in the Applicant's favour, what is the appropriate remedy?

7.4. Lastly, we address the Court on the issue of costs.

RELEVANT FACTUAL BACKGROUND

8. On 30 March 2017, the Democratic Alliance (the **DA**) addressed correspondence to the First Respondent requesting that a motion of no confidence in the President of the Republic of South Africa be scheduled for debate and vote before the National Assembly of the Republic of South Africa. (NA).

9. Between 30 March 2017 and 2 April 2017, various opposition parties also addressed correspondence to the First Respondent to urgently convene a sitting of the NA in order to process the proposal for the motion of no confidence.

10. On 2 April 2017, the First Respondent issued a statement noting that:

“...I must stress that I am alive to the extreme challenges and sense of anxiety our young democracy is going through at this moment. Our people are looking to Parliament to play its part and exercise its Constitutional responsibilities. South Africans are expecting our institutions of democracy such as Parliament to demonstrate decisive leadership. This is a responsibility that Parliament... does not take lightly. I, therefore, assure South Africans that this legislative arm of the State must and will rise to the occasion.”

11. On 2 April 2017, pursuant to various consultations, the First Respondent announced that the motion of no confidence would be scheduled for 18 April 2017.

The Applicant's demand for a secret ballot

12. On 6 April 2017, the Applicant's attorneys addressed correspondence to the First Respondent demanding that the First Respondent "...agree with [the Applicant's] proposal that the Motion of No-Confidence be determined by way of secret ballot...".
13. The Applicant acknowledged in its letter that the Constitution and the Rules are silent on the method applicable to voting on the motion of no confidence. It noted also that there was no prohibition to the voting being by secret ballot.
14. Furthermore, the Applicant argued that a purposive interpretation of the Constitution, bearing in mind section 57(1)(a) of the Constitution, read with Rule 2, and sections 57(2)(b) and 86(2), as well as clause 6(a) of Part A of Schedule 3 of the Constitution requires votes for motions of no confidence to be by secret ballot.

The First Respondent's response to the Applicant's demand

15. On 6 April 2017, and after careful consideration of the Applicant's demand, the First Respondent addressed correspondence to the Applicant and noted that:

"Voting procedures in the Assembly are determined by the Constitution and the Rules of the Assembly. As correctly stated in your letter, there is no

provision in the Rules or the Constitution for a vote on a motion of no confidence to be conducted by way of a secret ballot.

Your letter also articulates an instance where a vote must be conducted by way of secret ballot, which is the election of the President. Other instances are the election of the Speaker and the Deputy Speaker where more than one candidate is nominated. A motion of no confidence is not one of these instances. This was confirmed in the matter of Tlouamma and Others v The Speaker and Another where the Western Cape High Court (the Court) dismissed an application which sought, amongst others, to compel the National Assembly to vote on a motion of no confidence by secret ballot. The Court ruled, inter alia, that there is no implied or express constitutional requirement for voting by secret ballot in respect of a motion of no confidence in the President.

Needless to say, the Speaker has no authority in law or in the Rules to determine that voting on a motion of no confidence be conducted by secret ballot.

As the Speaker, I am entrusted with the responsibility to ensure that the House is at all times able to perform its constitutional functions and I am obliged to do this in strict compliance with the Constitution and the Rules and Orders of the Assembly.

For these reasons, your client's demand that the motion of no confidence be determined by way of secret ballot cannot be acceded to, as it does not have any basis in law..." (Our emphasis)

16. On 10 April 2017, the First Respondent issued a statement recording receipt of the Applicant's attorney's letter of demand. In the statement the following is stated:

“voting procedures in the Assembly are determined by the Constitution and the Rules of the Assembly. Neither the Constitution nor the Rules of the Assembly provide for a vote of no confidence to be conducted by secret ballot and the Speaker has no authority in law to alter such provisions...”.

17. On 11 April 2017, a statement was issued on behalf of the National Assembly. In relevant part, the statement states:

“...wish to state that, with regard to whether motions of this nature ought to be conducted by way of a secret vote, the Speaker of the National Assembly holds no position on the matter. Where the Speaker and the UDM disagree is in relation to the powers of the Speaker under the Constitution to make such a determination.

Section 102 of the Constitution, which outlines the procedure for motions of no confidence, makes no provision for voting to be conducted through a secret ballot. Similarly, the rules of the National Assembly do not provide for secret voting. In 2015 the Western Cape High Court dismissed an application which sought to force the National Assembly to vote on a motion of no confidence by secret ballot. The court ruled, among others, that there was no implied or express constitutional requirement for voting by secret ballot in motions of no confidence in the President.

The Speaker has sworn to uphold the Constitution and thus all her decisions must have a basis in law and the Rules of the House. Therefore, acceding to the request of the UDM would have been unconstitutional, as she does not enjoy such powers in the Constitution.

This...does not suggest opposition to the principle of a secret ballot on motions of this nature.”

18. Pursuant to this Court’s directions, and the DA’s request, the debate and vote on the motion of no confidence was postponed, pending the final determination of this application.

19. In summary, the First Respondent’ case is that:

19.1. the Constitution does not require votes on motions of no confidence to be decided by a secret ballot;

19.2. the First Respondent is not empowered, in terms of the Rules, to decide that voting should be through a secret ballot;

19.3. If indeed the First Respondent has the power to decide that voting should be through a secret ballot, it would not have been an appropriate exercise of her power to accede to such a request in the face of a decision by the NA to decline to include such a provision in its Rules.

19.4. the Court in *Tlouamma* found that there is no constitutional requirement

for a vote to be through a secret ballot; this judgment remains valid and has not been appealed against.

19.5. accordingly, in the absence of this Court reaching a conclusion different to that in *Tlouamma*, and the Rules being amended in accordance with such finding, the First Respondent is constrained from acceding to the Applicant's request.

THE PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

20. The Republic of South Africa is founded on values of, *inter alia*, supremacy of the Constitution and the rule of law [section 1(c)] and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. [section 1(d)].
21. The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled (section 2).

The functions and powers of the National Assembly

22. The Parliament of the Republic of South Africa comprises two houses, the NA and the National Council of Provinces [section 42(1)(a) and (b)]. The NA is elected to represent the people of South Africa and to ensure government by the people under the Constitution. It does so, by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action [s42(3)]. The

legislative authority in the national sphere is vested in Parliament. [section 43(a)].

23. The Constitution provides that when exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution [section 44(4)].

24. Members of the NA, including the First Respondent, swear or affirm their faithfulness to the Republic of South Africa and obedience to the Constitution [section 48 read with clause 4(1) of Schedule 2 thereof].

25. Section 57(1) of the Constitution provides that the NA may:

25.1. determine and control its own internal arrangements, proceedings and procedures [s57(1)(a)]; and

25.2. make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement [s57(1)(b)].

The appointment and removal of the President

26. Section 86(2) of the Constitution provides that the procedure set out in Part A of Schedule 3 applies to the election of the President.

27. The election procedure is set out in great detail and provides for voting by

secret ballot when more than one candidate has been nominated.

28. Section 102(2) of the Constitution provides for the resignation of the President, together with ministers and Deputy-Ministers in the event of the NA passing a motion of no confidence in the President by a vote supported by a majority of its members.
29. Section 89(1) of the Constitution provides that the NA, by resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of: (a) serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office.
30. It is notable that there is no constitutional requirement for the vote of no confidence or for the removal of the President to be conducted by a secret ballot.

The exclusive jurisdiction of the Constitutional Court

31. Section 167(4)(e) of the Constitution provides that the Constitutional Court has exclusive jurisdiction to determine that Parliament or the President has failed to fulfil a constitutional obligation.

The prescribed election procedure contained in Schedule 3 of the Constitution

32. Part A of Schedule 3 to the Constitution sets out the procedure applicable to

the election of, among others, the President, the Speaker or Deputy Speaker of the NA . It provides that where one candidate is nominated, such candidate must be declared as the elected candidate. If more than one candidate is nominated, the vote shall be by secret ballot [clause 6(a) of Schedule 3, Part A].

33. This procedure is not applicable to the resignation or removal of the President. In the case of the resignation of the President pursuant upon a vote of no confidence in her or him or the President's removal in terms of section 89 of the Constitution, the procedure is regulated by the Rules of the NA.

NATIONAL ASSEMBLY RULES

34. The current Rules (9th ed) were adopted by the NA on 26 May 2016. The Rules record that the sources of authority of the NA are, *inter alia*, [Rule 2(a) to (h)]:

34.1. the Constitution;

34.2. the Powers and Privileges Act and any other applicable legislation;

34.3. the Rules;

34.4. the orders or any other binding decision of the NA;

34.5. the directives and guidelines of the Rules Committee;

34.6. the rulings by the Speaker and other presiding officers.

35. The Rules were adopted by the NA, in accordance with section 57 of the Constitution, (Rule 2), and must be strictly adhered to by members of the NA (Rule 3), including the First Respondent.

36. The Rules Committee, is empowered in terms of Rule 193, to issue directives and guidelines to assist with the implementation of the Rules and orders and members of the NA must comply such directives and guidelines (Rule 7). Its functions and powers are set out in Rule 193.

37. The Rules Committee can deal with a matter falling within its functions and powers on its own initiative or when referred to it for consideration and report by the NA or the Speaker. In this regard, the First Respondent indicated that the Applicant's complaint in respect of the impugned Rule could (and should have) been referred to the Rules Committee for deliberation, direction and guidelines in terms of clause 8(4)(a) of the Rules.

38. The Applicant has not exhausted the above-mentioned internal remedy.

39. The First Respondent's authority and responsibility is set out as follows in the Rules:

"26. General authority and responsibility of Speaker:

(1) In exercising the authority of the Speaker, as provided for in the

Constitution and legislation and the rules of Parliament, the Speaker must —

- (a) ensure that the National Assembly provides a national forum for public consideration of issues, passes legislation and scrutinises and oversees executive action in accordance with Section 42(3) of the Constitution;*
 - (b) ensure that parties represented in the National Assembly participate fully in the proceedings of the Assembly and its committees and forums, and facilitate public involvement in the processes of the Assembly in accordance with Sections 57 and 59 of the Constitution; and*
 - (c) whenever possible, consult with relevant office-bearers and structures within Parliament to achieve the efficient and effective functioning of Parliament in a transparent and accountable manner.*
- (2) The Speaker must maintain and preserve the order of and the proper decorum in the House, and uphold the dignity and good name of the House.*
- (3) The Speaker is responsible for the strict observance of the rules of the House and must decide questions of order and practice in the House, such a ruling being final and binding as provided for in Rule 92.*

(4) *The Speaker must act fairly and impartially and apply the rules with due regard to ensuring the participation of members of all parties in a manner consistent with democracy.*

40. The Rules also set out the voting procedures in the NA in Rules 102, 103 and 104, whereas Rule 129 sets out the procedure for a motion of no confidence in the President.
41. Rule 102 stipulates that unless the Constitution provides otherwise, voting takes place in accordance with Rules 193 or 104.
42. Save for the voting procedure prescribed in sections 52 and 86 of the Constitution, (both read with Part A of Schedule 3 thereto), none of these Rules provide for a secret ballot.
43. It is therefore submitted that the Constitution itself does not contemplate voting by secret ballot in the NA except in terms of sections 52 and 86 of the Constitution, read with Part A of Schedule 3 thereto.
44. This submission is fortified by the constitutional value of openness⁸ and the requirement of transparency relating to the NA's rules and orders concerning its business.⁹
45. It is also submitted that Rules 103 and 104 also do not contemplate voting by secret ballot, particularly in the light of the constitutional value of openness

⁸ Section 1(d) of the Constitution.

⁹ Section 57(1)(b) of the Constitution.

[section 1(d) of the Constitution] and the requirement of transparency [section 57(1)(b) of the Constitution].

THE QUESTION OF JURISDICTION DEPENDS ON THE EXISTENCE OF A CONSTITUTIONAL OBLIGATION

46. Section 167(4)(e) provides that the Constitutional Court has jurisdiction to determine whether Parliament has failed to fulfil its constitutional obligation.
47. A litigant cannot found jurisdiction on a superficial pleading that the Court has jurisdiction to entertain a matter.
48. It is important to interrogate the source of such a constitutional obligation.¹⁰ It is common cause that the Constitution does not contain an express requirement for voting on a motion of no confidence to be by secret ballot.
49. The Constitution does, however, provide (in express terms) for the procedural voting requirements and the threshold for the election of the President of the Republic by the NA.¹¹
50. The Constitution also regulates the voting threshold for the removal of the President in terms of section 89 and her or his resignation pursuant upon a vote on a motion of no confidence in terms of section 102. It, then leaves it to the NA to regulate the procedure and method of the debate and vote (section 57).

¹⁰ AA, para 17.

¹¹ Section 86 of the Constitution, read with Part A of Schedule 3.

The Rules are an embodiment of the NA's resolution on the matter. The voting procedure is set out in Rules 102, 103 and 104. The Rules do not provide for a secret ballot.

51. That the NA is an organ of state and is thus, enjoined to act in accordance with the provisions of the Constitution is not in dispute.¹²
52. The core of the issue is: Does the failure of the Rules, in the absence of an express requirement in the Constitution, to provide for a vote by secret ballot in a motion of no confidence in the President, constitute a failure to discharge a constitutional obligation on the part of the NA? If so, the next question is whether such a constitutional obligation falls within the purview of section 167(4)(e) of the Constitution.
53. The First Respondent's case has been (and remains) that there is no express or implied constitutional obligation imposed on the NA. Rules 103 and 104 also preclude a secret ballot. To the extent that is so, the NA cannot be said to have failed to fulfil a constitutional obligation. This issue was settled in the judgment of the High Court in *Tlouamma*.¹³ This finding has not been appealed against and/or set aside and remains, with submission, good law.

¹² *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), where the court stated that "The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to the limitations imposed by the Constitution. It is subject in all respects to the provisions of the Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes that are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution or by necessary implication."

¹³ *Tlouamma and Others v Mbete, Speaker of the National Assembly of the Parliament of South Africa and Another* 2016 (1) SA 534 (WCC) at paras 117 to 123.

54. Accordingly, the First Respondent is bound to adhere to the interpretation of the Constitution adopted in *Tlouamma*, the Constitution and the Rules (as adopted), unless this Court were to find otherwise.
55. The Applicant also accepted that “...the ...Rules of the [NA] and the Constitution are ... silent on the method of voting during the section 102 proceedings...”.¹⁴ This observation is correct. *Tlouamma* takes it further and finds that there is no obligation to provide for a secret ballot. The Rules as presently adopted preclude the secret ballot and do not offend the principles established in *Tlouamma*.
56. Until then, the First Respondent is duty bound to apply the Rules and to adhere to them – strictly.
57. In the event that the Court finds that an interpretation of the provisions of the Constitution and the Rules do not impose a constitutional obligation on the NA to provide for a vote through a secret ballot; that would be the end of the matter.
58. In those circumstances, we submit that this application falls to be dismissed.
59. In the event that the Court finds that there is a constitutional obligation on the part of the NA to provide for a secret ballot in its Rules, then, this application

¹⁴ See annexure “UDM1”.

would fall squarely within the purview of section of the 167(4)(e) of the Constitution.¹⁵

60. To determine whether section 167(4)(e) finds application, the correct point of departure would be to interrogate Applicant's founding papers.¹⁶ The high watermark of its case is to be found in paragraphs 28 to 30 of the founding papers where it is alleged:

"29. In the present case, the question that arises is whether the Speaker, on behalf of the National Assembly, is obliged by the Constitution to allow for a secret ballot on a no-confidence motion, either in all cases or at the very least in a case such as the present.

29. ... there is indeed such a constitutional obligation...

30. ...

30.1 This is an obligation that rests only on the National Assembly, and the Speaker who heads the National Assembly.

30.2 Moreover, this is a case where the Constitution..."imposes the primary function on Parliament and leaves it at large to determine what would be required of it to execute its

¹⁵ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) (*EFF v Speaker*) at para 18 and *Doctors for Life International v Speaker of the National Assembly and Others* at paras 24 to 26.3

¹⁶ *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT 121/14) (*My Vote Counts*) at paras 21ff.

mandate...

61. At face value, the pleadings appear to establish a basis for this Court's jurisdiction in terms of section 167(4)(e). Whilst that is so, the Applicant is misguided in its contention that *"the sole question is whether in its pleadings the applicant asserts that, in the words of section 167(4)(e) of the Constitution: "Parliament has failed to fulfil a constitutional obligation" and which obligation is uniquely and exclusively placed on Parliament. If that is the applicant's cause of action, then this court has jurisdiction..."*¹⁷
62. The pleadings are a starting point and but more is required.¹⁸ A question pertaining to the Court's jurisdictional competence implicates the sensitive principle of separation of powers and must, accordingly, be carefully scrutinised.¹⁹
63. The provisions of section 167(4)(e) appear to be wide. This Court has previously held that the section must be construed narrowly.²⁰
64. The alleged breach of the constitutional obligation *"must relate to an obligation*

¹⁷ RA, para 37.

¹⁸ *EFF v Speaker* at para 16.

¹⁹ *King and Others v Attorneys Fidelity Fund Board of Control and Another* [2005] ZASCA 96; [2006] 1 All SA 458 (SCA) at para 14-6, and approved in *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) at para 21. These cases are cited in foot note 35 in *My Vote Counts NPC v Speaker*.

²⁰ *Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA (CC) at para 20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* v 1999 (2) SA 14 CC at para 25; *Doctors for Life* at para 19; *Van Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 36 and *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 11.

that is specifically imposed on the President or Parliament”.²¹ The Court in *Tlouamma* has determined that there is no such obligation. We respectfully support such finding. If the Court, contrary to the decision in *Tlouamma*, finds that such a constitutional obligation exists, then, this Court has the jurisdiction to entertain this matter in terms of section 167(4)(e).²²

65. The Court in *EFF v Speaker*²³ is the most recent iteration of the Court’s pronouncement on the jurisdiction question concerning section 167(4)(e). In that case, the NA was called upon to fulfil a constitutional obligation imposed on it through the Public Protector’s remedial findings. There was a specific obligation placed on the NA. *In hoc casu*, there is none (*Tlouamma*).²⁴

DIRECT ACCESS

66. In the event that the Court is satisfied that section 167(4)(e) is applicable, the question of direct access does not arise.

67. For reasons set out above, should the Court find section 167(4)(e) not be applicable (i.e. endorse the finding in *Tlouamma* that there is no constitutional obligation on the NA), then this Court should dismiss the application without further ado.

68. The principles pertaining to direct access application are set out below in order

²¹ *EFF v Speaker* at para 18.

²² *EFF v Speaker* at para 19 and 18; *Doctors for Life* at paras 24 and 26.

²³ *EFF v Speaker* at paras 18 to 24; and paras 41 to 47.

²⁴ See *Doctors for Life* at paras 25 and 26.

to be of assistance to the Court.

69. Ordinarily, and in respect of matters where this Court has concurrent jurisdiction with other superior courts, this Court functions as an appellate court. However, the Court may grant an applicant direct access where it is in the interests of justice to do so.²⁵ The Applicant would need to satisfy the Court, providing cogent reasons, that it is in the interests of justice for direct access to be granted.²⁶

70. Some of the considerations that militate against the Court granting direct access are:

70.1. the Court is denied the benefit views and assistance of courts having concurrent jurisdiction;²⁷

70.2. the Court's jurisprudence is enriched by being able to draw on the considered opinion of another Court;²⁸

70.3. where the subject matter of the litigation is exceptionally important and complex, the Court should avoid sitting as court *a quo*;²⁹

²⁵ Rule 18(1) of the Constitutional Court Rules.

²⁶ *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA (CC) 1143 at para 7 and 8.

²⁷ *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 489 (CC) at para 13.

²⁸ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) at para 39.

²⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu Natal Law Society and Msunduzi Municipality as Amicus Curiae)* 2005 (1) SA 530 (CC) at para 11.

70.4. there should be exceptional reasons to compel the Court to hear a matter directly.³⁰

**DOES A PURPOSEIVE INTERPRETAION OF THE CONSTUTITON AND THE RULES
CREATE A CONSTITUTIONAL OBLIGATION?**

71. The Applicant's case is that *"the constitutional scheme is intended to achieve a situation where each member of the National Assembly [is] able to apply his or her mind and conscience freely as to who would be elected as President, without fearing recriminations or punishment thereafter from a political party."*³¹

72. The Applicant argues that the election of the President takes place through a secret ballot. By implication, and despite the Constitution's silence on the issue, the voting on President's removal must be through a secret ballot. We submit that this is a *non sequitur*. It does not follow as a matter of logic or principle that where the Constitution expressly lays down a particular defined procedure for the election of the President and expresses in general and different terms the procedures for her or his removal or resignation, the Constitution thereby prescribes identical procedures.

73. On the contrary, the Constitution does prescribe a particular procedure for the removal of the President, which involves a supporting vote of at least two thirds of the members of the NA (Section 89). To this end, the Rule 103 is

³⁰ *Bruce v Fleecytex* at para 9.

³¹ FA, para 79.

peremptory, and precludes a secret ballot.

74. Similarly, the Constitution prescribes does prescribe a particular procedure for a motion of no confidence in the President in terms of section 102(2) of the Constitution. Such a motion is conducted in terms of Rule 129 read with Rules 102 to 104. None of the said Rules compel voting by secret ballot.

75. The central theme of the Applicant's case is an invitation to the Court to adopt a purposive interpretation to the Constitution and the Rules. The principles set out below are, *inter alia*, applicable to the interpretation of the Constitution:

75.1. the Constitution is supreme and must be given a generous and purposive interpretation;³²

75.2. the provisions of the Constitution cannot be interpreted in isolation but must be read in context as a whole;³³

75.3. the language employed in the Constitution must be respected, without adherence to strict austerity of literal legalism;³⁴

75.4. the Constitution was drafted with a view to the future, providing a continuing framework for the legitimate exercise of governmental power

³² *Shabalala v The Attorney-General of Transvaal* 1996 (1) SA 725 (CC) at para 26.

³³ *S v Makwanyane* 1994 (3) SA 868 (A).

³⁴ *Shabalala* at para 27.

and the protection of individual rights and freedoms;³⁵

75.5. there are no inflexible rules to interpretation; the interpretative process is not a dogmatic and mechanical application with predefined approaches and rules; it makes for changing circumstances.³⁶

76. The First Respondent has no difficulty with a purpose driven interpretation of the Constitution. The Court in *Mansingh*³⁷ and *Endumeni*³⁸ support a purposive interpretation to statutes. The language used in the Constitution and the Rules place constraints on the purposive interpretation.

77. The Supreme Court of Appeal in *Mansingh* made it clear that there are limitations to a purposive interpretation of legislation:³⁹

“Though the court must thus seek to give effect to the object and purpose of the provision, it is limited by the language used. The court is not permitted to impose a meaning on the text that it is not capable of bearing.... Another way of stating this limitation is that a purposive interpretation may not be unduly strained”.

78. This Court endorsed this finding and held that:⁴⁰

“There is, in my view, no difficulty with the approach taken by the Supreme Court of Appeal, including its remark that, when adopting the purposive and contextual approaches, courts are simultaneously constrained by the plain language used in the section.”

79. Notably, the Court in *Endumeni*, was at pains to stress the limits of the

³⁵ *Khala v The Minister of Safety and Security* 1994 (4) SA 218 (W) at 122D-E.

³⁶ *Nortje v Attorney-General of the Cape* 1995 (2) SA 460 (C).

³⁷ *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC).

³⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

³⁹ *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA) at para 10 (emphasis added)

⁴⁰ *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) at para 17 (emphasis added)

contextual approach to interpretation. It held:⁴¹

“Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation... The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

80. The Applicant’s insistence of a purposive approach should not disregard the actual language used in the statute.

THE QUESTION OF SEPERATION OF POWERS

81. Contrary to what the Applicant states in paragraph 15 of its founding Affidavit, it is submitted that the principle of the separation of powers is implicated in this application. The Applicant seeks this Court to prescribe to the NA that it must determine motions of no confidence in the President, generally, alternatively, *in hoc casu*, by secret ballot.⁴²

82. We submit that the principle of separation of powers forbids courts from intervening in matters that fall within the domain of the national legislature, unless mandated by the Constitution.⁴³ Even so, the intrusion must be to the extent necessary.

83. This brings us to the question of remedy. If the Court finds that the Rules are unconstitutional, unlawful and invalid, and that the First Respondent has the

⁴¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18

⁴² Prayer 6 of the NOM.

power to consider and order a motion of no confidence involving a secret ballot procedure, the matter must be referred to the First Respondent for reconsideration. The request for a mandamus is ill-conceived.

84. It is submitted that, in such a case, the issue of a declarator and a remittal would be appropriate. The First Respondent and the NA would then decide how best the law, once stated, should be observed.⁴⁴

CONCLUSION

85. We submit that the applicant's application should be dismissed with costs, including the costs of two counsel.
86. We submit, in the alternative, that impugned decision be remitted to the First Respondent for reconsideration, with each party paying their own costs.

MTK MOERANE SC

RT TSHETLO

Chambers
Durban & Sandton

21 April 2017

⁴⁴ See *Rail Commuters Action Group & Others v Transnet t/a Metrorail & Others* 2005 (4) BCLR 301 (CC) para [108]. *Doctors for Life* at para [37]. See also: *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para [92] – [93].

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21. *Van Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC).
22. *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC).
23. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 489 (CC).

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24. The Rules of the Constitutional Court.

25. The National Assembly Rules (9th ed), adopted on 26 May 2016.