IN THE CONSTITUTIONAL COURT
OF SOUTH AFRICA

On the roll for hearing on 5 November 2015

CONSTITUTIONAL COURT CASE NO: 86/2015
COURT *A* QUO CASE NO: 2792/2015

In the matter between:

DEMOCRATIC ALLIANCE Applicant/Appellant
(Applicant *a quo*)

and

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent
(First Respondent *a quo*)

THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Second Respondent
(Second Respondent *a quo*)

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent
(Third Respondent *a quo*)

APPLICANT'S HEADS OF ARGUMENT

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A. INTRODUCTION

1. Can Members of Parliament ("**MPs**") be arrested and removed from Parliament by policemen or the army? That is the core question presented in these proceedings. More specifically, it raises questions about the constitutional privileges of speech and against arrest, and the proper role of the Executive branch in regulating the internal conduct of the Legislative branch.

2. The Applicant ("**the DA**") is a registered political party, and the official opposition in Parliament. The DA challenged the constitutionality of s11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("**the Act**").[1] The section allows the First and Second Respondents ("**the Speaker**" and "**the Chairperson**")[2] to order members of the police, army or intelligence services to arrest and remove "*any person*" who creates or joins a disturbance during a sitting of Parliament.

3. The application arose from the forceful removal of members of another political party, the Economic Freedom Fighters ("**the EFF**"), during the joint sitting of Parliament, held on Thursday, 12 February 2015. The meeting was convened for the delivery of the President's State of the Nation Address ("**SONA**"). The DA Members of Parliament left the proceedings in protest after it transpired that

[1] Section 11 is quoted in full in para 27 below.

[2] The DA cited as respondents, the Speaker and the Chairperson, as well as the "Government of the Republic of South Africa" ("**the government**"). The latter was joined because Uniform Rule 10A requires the joinder of the national executive authority responsible for the administration of a law if such a law is challenged in Court proceedings. It was not clear to the DA which Cabinet Minister was responsible for the administration of the Act and it accordingly joined the national executive as a whole.

it was members of the security services who entered the chamber during the SONA and removed the EFF members.

4. The Speaker, the Chairperson and the government did not file answering affidavits. Instead, they filed a Notice in terms of Uniform Rule 6(5)(d)(iii) ("**the Notice**") in which they indicated that they intended to raise a number of questions of law at the hearing.

5. A Full Bench of the Western Cape Division of the High Court (Le Grange J, Cloete J et Boqwana J) was constituted to hear the matter. The High Court's Judgment, authored by Le Grange J, was delivered on 12 May 2015. The DA's application succeeded. The High Court declared s11 of the Act to be inconsistent with the Constitution and invalid "*to the extent that it permits a member to be arrested for conduct that is protected sections 58(1)(b) and 71(1)(b) of the Constitution*." The order was suspended for a period of 12 months in order for Parliament to remedy the defect.[3]

6. The Speaker, the Chairperson and the government have appealed to this Court against the orders of the High Court.[4] We shall refer to them as the "*Appellants*". The DA applied for confirmation of the order of invalidity and also appealed against the remedy granted by the High Court.[5]

7. The heart of the DA's argument is this:

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[3] Record at pp. 107 - 108, order of Judgment at paras 2-3.
[4] The Notice of Appeal, dated 2015-02-17 appears at Record, p. 110-112.
[5] The DA' Application for confirmation / Notice of Appeal dated 2015-05-12, appears at Record pp. 115-118

7.1 Section 11 violates the privilege against arrest. MPs may not be arrested for anything they say in Parliament. Section 11 of the Act allows members to be arrested for what they say in Parliament.

7.2 Section 11 violates the privilege of free speech. Parliament has a right to regulate its internal processes, including the right to suspend members who disrupt proceedings. But Parliament may not pass legislation infringing a member's privilege of free speech.

7.3 Parliament has more than sufficient alternative mechanisms in its rules and in other provisions of the Act to maintain order in the house, without resorting to ordering the police or army to arrest MPs on the floor of the house, during legislative deliberations.

7.4 Section 11 is inconsistent with the separation of powers; the requirement for the security services to remain politically neutral; and the roles and mandates assigned to the security services. To allow the executive to use force to arrest members on the floor of the house is a serious threat to the preservation of the separation of powers, and the maintenance of the independence of Parliament.

7.5 Depending on which of the above arguments the Court accepts, there are several ways to deal with this invalidity:[6]

[6] Before the High Court, the DA contended that s11 could be interpreted to avoid a finding of invalidity. It argued that the words "*any person*" could properly be interpreted to mean "*any person except a member*". It no longer advances that contention.

7.5.1 declare s11 constitutionally invalid and read-in the words "*except for members*";

7.5.2 declare s11 constitutionally invalid and delete the words "*arrest*" and "*security services*"; or

7.5.3 declare s11 constitutionally invalid and grant an order of notional severance, that would prevent its application to any exercise of the parliamentary privilege of freedom of speech.

7.6 The High Court found s11 to be inconsistent with ss58(1)(b) and 71(1)(b) of the Constitution and granted an order of notional severance. In addition, it suspended that order of invalidity for 12 months.

7.7 The DA contends that the finding of unconstitutionality by the High Court is too narrow. Section 11 of the Act also violates: (a) ss58(1)(a) and 71(1)(a) of the Constitution; and (b) the separation of powers and s199(7) of the Constitution. As a result, the remedy granted by the High Court falls short of what is required to cure all the constitutional defects. Finally, no case was made out for suspending the order of invalidity.

8. The structure of these heads of argument is as follows:

8.1 **Part B** sets out the factual background.

8.2 **Part C** lays out the applicable legal and constitutional framework, within which the application must be decided.

8.3 **Part D** explains why s11 is inconsistent with:

8.3.1 the privilege against arrest; and

8.3.2 the privilege of speech;

8.4 **Part E** describes the violation of the separation of powers; and

8.5 Finally, in **Part F**, we deal with remedies and costs.

B. FACTUAL BACKGROUND

9. The facts that gave rise to this constitutional challenge concern the events of 12 March 2015 at the SONA in Parliament. Those facts are common cause, and are contained in the agreed statement of facts filed by the parties.[7] The following events are relevant:

9.1 Shortly after the President commenced with the delivery of his SONA, the EFF's Mr G A Gardee rose on a question of privilege and asked when the President was going to pay back the money "*in terms of what the Public Protector has said*".[8]

9.2 There followed a back-and-forth between the Speaker and various members of the EFF about how the question should be treated. The Speaker insisted that the Joint Sitting was not meant for the issues that

[7] Record p 1. These facts are recounted in the High Court's Judgment at paras 1-5; Record pp 85-88. They also appear from the transcription of the proceedings, Annexure **JS1**; Record pp 31-66.
[8] Record p. 40, transcript lines 11 – 12

the EFF was raising,[9] while members of the EFF (including its leader, Mr Malema) asserted that the President should answer the question.

9.3 Ultimately, the Speaker asked Mr Malema, and then several other members of the EFF, to leave the chamber.[10]

9.4 The Speaker asked the Serjeant-at-Arms to assist Mr Malema to leave the Chamber.[11] The Usher of the Black Rod was also asked to assist.[12] The Speaker then asked the Parliamentary Protection Services to come in.[13]

9.5 Shortly thereafter the Speaker stated: "*I also order the security officers to, please, assist!*"[14] and later that "*The security forces must come in, in terms of the Powers and Privileges Act.*"[15]

9.6 It is common cause that the Speaker relied on s11, and that members of the security services were used to remove all members of the EFF.

9.7 Following the removal of the EFF, the Leader of the DA in Parliament, Mr M Maimane, asked whether the persons who removed the members of the EFF were members of the SA Police Service.[16] The Chairperson

[9] Record p. 43, transcript lines 4 – 9
[10] Record p. 45, transcript lines 17 – 18
[11] Record p. 49, transcript lines 14 – 15
[12] Record p. 51, transcript lines 2 – 3
[13] Record p. 54, transcript lines 8 – 9
[14] Record p. 55, transcript lines 8 – 9
[15] Record p. 57, transcript lines 5 – 6
[16] Record p. 58, transcript lines 3 – 5

confirmed that members of the security services were used. Unhappy with the response, the DA left the chamber in protest.

9.8 After this last exchange, the DA members of Parliament left the joint sitting. The President then proceeded to deliver the SONA.[17]

9.9 Five days later, the DA launched the High Court proceedings.

10. The key facts that should inform the evaluation of the constitutionality of s11 are:

10.1 Section 11 was invoked because of what members of the EFF said in Parliament;

10.2 The EFF members were removed by members of the security services, acting at the command of the Speaker and/or the Chairperson.

C. LEGAL AND CONSTITUTIONAL FRAMEWORK

11. In this Part, we analyse the legislative and constitutional framework within which this case must be decided. We do so in the following order:

11.1 The Constitution;

11.2 The Act; and

11.3 The Rules.

(i) <u>The Constitution</u>

[17] Record at p.15, Selfe FA at para 20

12. There are three important parts of the Constitution:

12.1 Parliament's power to make rules and regulate its internal arrangements;

12.2 the privileges of freedom of speech, and freedom from arrest; and

12.3 the provisions dealing with the role and functions of the security services.

13. First, s57(1) of the Constitution affords the NA a general power to "*determine and control its internal arrangements, proceedings and procedures*" and to "*make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement*." Section 71(1) affords the identical powers to the NCOP.

14. In *Speaker of the National Assembly v De Lille*, Mahomed CJ held that s57(1) included the power to make rules to temporarily exclude disruptive members:

> "*There can be no doubt that this authority is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose. This would, for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates.*"[18]

15. Mahomed CJ later contrasted the power to suspend a member in order to maintain order, with the power to suspend a member as punishment. "*[T]he*

[18] 1999 (4) SA 863 (SCA) at para 16.

former kind of suspension", he explained, "*is a necessary protective measure, the latter not.*"[19] It could not, therefore, be included in the rules. While the Supreme Court of Appeal ("**SCA**") recognised the need to "*exclude*" or to "*suspend*" a disruptive member, it did not recognise the power to remove a member by force – whether through the Serjeant-at-Arms, or a member of the security services. That question was not before it.

16. The power to make rules, while important is plainly not unlimited. This Court has struck down rules that made it practically impossible for individual MPs to introduce private member bills,[20] and for opposition parties to schedule votes of no confidence in the President with appropriate expedition.[21] The key holding in these cases is that the Legislature's power to regulate its internal affairs cannot be used in a way that violates other constitutional rights or privileges. That is true whether the limitation appears in rules, or in legislation.

17. Second, while ss57 and 70 afford the houses of Parliament rule-making powers, ss58 and 71 established the privileges of their members.[22] Sections 58(1) and (2) are central to this matter and it is necessary to reproduce them in full:

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[19] Ibid at para 17.
[20] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).
[21] *Mazibuko v Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC).
[22] The Constitution also contains provisions about the internal regulation and privileges of provincial legislatures and local government. Sections 116 and 117 contain virtually identical provisions for the provincial legislatures. Sections 160 and 161 create similar provisions for municipal councils. Section 161 does not itself establish privileges for members of municipal councils. Instead, it leaves that to provincial legislation. Section 161 reads: "*Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members."*
Section 28 of the Local Government: Municipal Structures Act 117 of 1998 (the "Structures Act") requires provincial legislation to provide to councillors at least the same protections afforded in ss58(1)(a) and (b) to members of parliament and the provincial legislatures. Gauteng, the Western Cape, the Northern Cape and the Free State have adopted

> ***58 Privilege***
>
> *(1) Cabinet members, Deputy Ministers and members of the National Assembly-*
>
> *(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and*
>
> *(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-*
>
> *(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or*
>
> *(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.*
>
> *(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.*"

18. Section 71 repeats the terms of s58 with regard to the NCOP.[23] Section 45(2) of the Constitution states that the privileges apply to joint sittings, such as the SONA.[24]

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legislation in respect of the privileges and immunities of councils and their members. See Gauteng: Privileges and Immunities of Councillors Act 1 of 2002; Western Cape Privileges and Immunities of Councillors Act 7 of 2011; Northern Cape Determination of Types of Municipalities and Regulation of Privileges and Immunities of Council Members Act 7 of 2000; Free State Privileges and Immunities of Municipal Councillors Act, No. 2 of 2002;
The Western Cape Act, for example, provides councillors "*freedom of speech in any meeting of the council of which he or she is a member, and in any committee or subcouncil or mayoral committee of that council.*" Western Cape Privileges Act, s 2. It also provides a privilege against arrest in similar terms to ss58 and 71 of the Constitution.

[23] It reads:

> "***71 Privilege***
>
> *(1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67 -*
>
> *(a) have freedom of speech in the Council and in its committees, subject to its rules and orders; and*
>
> *(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -*
>
> *(i) anything that they have said in, produced before or submitted to the Council or any of its committees; or*
>
> *(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees.*
>
> *(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.*"

[24] The section reads: "*Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a joint committee of the Assembly and the Council as they have before the Assembly or the Council.*"

19. Sections 58(1) and 71(1) afford MPs two constitutional privileges: (a) freedom of speech; and (b) freedom from arrest, imprisonment or damages. Sections 58(2) and 71(2) allows Parliament to establish "*other privileges and immunities*." Neither section permits Parliament, by legislation, to limit the constitutional privileges afforded in ss 58(1) and 71(1), save by creating new privileges or immunities for the house itself in terms of ss 58(2) and 71(2).[25] We return to this issue, as well as the history and purpose of the privileges, in Part D.

20. Third, the Constitution establishes the roles and functions of the security services: the police service, the defence force and the intelligence services.[26] The Constitution affords the authority over the security services to the Executive branch of government.[27]

21. Section 205(3) provides that the objects of the police service are "*to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*" Similarly, the role of the defence force is "*to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of*

[25] *De Lille SCA* (n 18 above) at paras 20 and 23.
[26] Section 199(1) of the Constitution defines "*the security services*" as: "*a single defence force, a single police service and any intelligence services established in terms of the Constitution.*"
[27] Constitution ss201, 207 and 209(2).

force."[28] Legislation that required the police service or the defence force[29] to act outside those well-defined mandates would be unconstitutional.

22. Moreover, s 199(7) of the Constitution emphasises the non-political role that the security services must play. It reads:

> "*Neither the security services, nor any of their members, may, in the performance of their functions -*
>
> *(a) prejudice a political party interest that is legitimate in terms of the Constitution; or*
>
> *(b) further, in a partisan manner, any interest of a political party.*"

Legislation that required members of the security services to act contrary to this mandate would also be unconstitutional.

(ii) <u>The Act</u>

23. The Act, which came into force on 7 June 2004, applies to Parliament and the provincial legislatures.[30] The preamble to the Act records that Parliament considered it "*essential to provide for … further privileges and immunities in order to protect the authority, independence and dignity of the legislatures and their members and to enable them to carry out their constitutional functions*". As we explain below, this purpose is relevant because only privileges and

[28] Constitution s200(2).

[29] The intelligence services are not directly established by the Constitution, and the Constitution does not define their objects. Rather, ss 209-210 allow the President to establish intelligence services in terms of legislation, and requires national legislation to determine the powers and functions of those services. But it would be a blatant infringement of the separation of powers to suggest that intelligence services should be involved in maintaining order in Parliament.

[30] Most of the provincial legislatures have now repealed the provincial laws dealing with powers, privileges and immunities, and most of the provincial laws now merely deal with the compulsion of witnesses to appear before the provincial legislature. However, it appears that in Gauteng, Limpopo, and the North West Province, provincial laws on the subject matter continue to apply, as well. See: Powers, Privileges and Immunities of the Provincial Legislature Act (PWV) 2 of 1995; Northern Province: Powers and Privileges of the Provincial Legislature Act 8 of 1995; and North West Provincial Legislature's Powers, Privileges and Immunities Act 5 of 1994.

immunities of Parliament can limit the constitutionally-entrenched privileges of members.

24. Section 3 of the Act affords the Speaker and the Chairperson "*joint control and authority over the precincts on behalf of Parliament.*" However, that authority is "*subject to this Act, the standing rules and resolutions of the Houses*".[31] The Act then details the role that the security services can play in Parliament.[32]

25. The powers of the security services in Parliament are set out in s4, which is headed "***Presence of security services in precincts of Parliament***".[33] It reads:

> "*(1) Members of the security services may-*
>
> *(a) enter upon, or remain in, the precincts <u>for the purpose of performing any policing function</u>; or*
>
> *(b) <u>perform any policing function</u> in the precincts,*
>
> *only with the permission and under the authority of the Speaker or the Chairperson.*
>
> *(2) When there is immediate danger to the life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger. Any such action must as soon as possible be reported to the Speaker and the Chairperson.*" (emphasis added)

26. It is necessary to highlight two elements of s4:

26.1 It applies only to "*policing functions*". While the Act does not define "*policing functions*", s205(3) (quoted above) does.[34] Not included in

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[31] Section 3 reads in full: "*The Speaker and the Chairperson, subject to this Act, the standing rules and resolutions of the Houses, exercise joint control and authority over the precincts on behalf of Parliament."*
[32] "*Security services*" is defined as "*the security services referred to in section 199 of the Constitution*".
[33] The precincts of Parliament are defined in s 2.

s205(3)'s list of objects is the maintenance of order in Parliament; nor can the removal of members be regarded as a policing function on the ordinary meaning of the term "*policing functions*".

26.2 Under s4, the Speaker or Chairperson do not direct or instruct the members of the security services to perform specific functions. Instead, the security services operate "*with the permission and under the authority*" of the Speaker or Chairperson. The section envisages a general level of supervision where security services must first obtain permission before entering the precinct and may not act contrary to instructions issued by the Speaker or Chairperson. It contemplates that the police will perform their ordinary functions – with their ordinary lines of authority – subject to the over-arching permission and authority of Parliament. Section 4 does not contemplate that the Speaker or Chairperson would take the initiative and order members of the security services to perform a specific task. It does not purport to convert the security services into a private security force to be deployed at the instance of the Speaker or the Chairperson to maintain order in Parliament.

27. Section 11 – the provision at issue in this application – is very different. It reads:

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[34] We note that, by purporting to permit the defence force and the intelligence services to perform policing functions, s4 violates the provisions of the Constitution that afford very different roles to those three services.

"***11 Persons creating disturbance***

A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services." (emphases added)[35]

28. The term "*disturbance*" is defined extremely widely in s1 as: "*any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee*".

29. The purpose and nature of s11 is distinct from s4 in two respects:

29.1 Section 4 is directed at ordinary "*policing functions*". Section 11 is intended to allow the presiding officer to "*control its internal arrangements, proceedings and procedures*". That is not a policing function, it is a function assigned exclusively to Parliament in terms of s57 of the Constitution.

29.2 Section 11 requires an "*order*" from the Speaker or Chairperson to the staff member or the member of the security services. The presiding officer is expressly directing who shall arrest and remove whom and why.

30. Section 11 also has to be read with ss12 and 13 of the Act. While s11 allows the presiding officer to deal with a person creating a disturbance, ss12 and 13 concern Parliament's internal regulation of contempt by the relevant house

[35] Section 11 largely repeats the provisions of s14 of the Powers and Privileges of Parliament Act 91 of 1963 ("the 1963 Act"). Section 14 read: "*Any person creating or joining in any disturbance in Parliament during its actual sitting may be arrested without warrant on the verbal order of the Speaker and may be kept in the custody of an officer of Parliament, designated by the Speaker, until a warrant can be issued for his imprisonment.*" However, the 1963 Act did not allow the use of the security forces to arrest those creating disturbances.

itself. In doing so, it creates a privilege of the house to find its own members guilty of contempt.

31. Section 12(1) reads: "*a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared by or under section 13 to be contempt of Parliament by a member, and taking the disciplinary action provided therefore*". It then sets out the procedures necessary to deal with contempt by members.

32. Section 13 sets out what constitutes contempt. Section 13 does not mention s11. In addition, s13 states that it is contempt if a member "*wilfully fails or refuses to obey any rule, order or resolution of a House or the Houses*". Lastly, s13(d) provides that it is contempt to commit "*an act which in terms of the standing rules constitutes – (i) contempt of Parliament; or (ii) a breach or abuse of parliamentary privilege.*" The important point is that the Act itself creates separate consequences for members who create disorder in a House through the mechanism of contempt of Parliament.

33. Lastly, it is necessary to consider the acts prohibited by s7 of the Act. Under s27(1), "*[a] person, including a member*" who commits one of those acts is guilty of an offence.[36] Two of those offences cover the type of conduct engaged in by the EFF, and that might provoke similar removals in the future.

[36] Section 7(1) reads: "*(1) A person, including a member, who contravenes section 7 or 8 (1) commits an offence and is liable to a fine or to imprisonment for a period not exceeding three years or to both the fine and the imprisonment."*

33.1 The first, in s7(a), states that "*a person may not improperly interfere with or impede the exercise or performance by Parliament or a House or committee of its authority or functions*".

33.2 Section 7(d), which covers similar ground, makes it an offence, "*while Parliament or a House or committee is meeting*", to "*create or take part in any disturbance within the precincts*".

34. The result is that any interruption, disruption or interference in the proceedings of Parliament is a crime, whether it is committed by a member, or a visitor to Parliament. It is not, however, a criminal offence for a member to refuse to obey an order of the Speaker or the Chairperson.[37]

(iii) The Rules

35. Three sets of rules – those of the NA, the NCOP and the Joint Rules[38] – establish comprehensive mechanisms to deal with disruptive members. Both the NA Rules and NCOP Rules grant ample powers to the Speaker and the Chairperson to deal with members who refuse to obey the Rules. More particularly:

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[37] Section 7(f) makes it an offence to:

"*fail or refuse to comply with an instruction by a duly authorised staff member regarding-*

(i) the presence of persons at a particular meeting in the precincts; or

(ii) *the possession of any article, including a firearm, in the precincts or any part thereof*."

This plainly does not cover an instruction by the Speaker or Chairperson, neither of whom could be described as "*a duly authorised staff member*".

[38] The relevant rules are 14G, 14H and 14K. They differ from the rules of the NA and the NCOP only insofar as they require the presiding officer to refer a proposal to suspend or censure a member to the Speaker or the Chairperson. This is to ensure that the person is disciplined by their own house.

35.1 The member may be ordered to withdraw (NA Rule 51 and NCOP Rule 37);[39]

35.2 The member may be suspended or censured (NA Rule 52 and NCOP Rule 38);[40]

35.3 The member may be required to leave the precinct of Parliament, and not to return until the action taken against him or her is announced;[41] and

35.4 In the event of grave disorder, the meeting may be adjourned or suspended for a period of time (NA Rule 56 and NCOP Rule 41).[42]

36. At the time this litigation was launched, neither set of rules expressly permitted the removal of a member for non-compliance with the Rules, disorderly behaviour or refusal to obey the Speaker or Chairperson. Presumably in light of

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[39] NA Rule 51 reads:

"*If the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules, or that a member is in contempt of or is disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, he or she may order the member to withdraw immediately from the Chamber for the remainder of the day's sitting.*"

[40] NA Rule 52 reads:

"*If a presiding officer is of the opinion that a contravention committed by a member of this House is of so serious a nature that an order to withdraw from the Chamber for the remainder of the day's sitting is inadequate, the presiding officer may —*

(a) if he or she is the Speaker, suspend the member; or

(b) if he or she is not the Speaker, name the member, whereupon the Speaker, after consultation with the presiding officer, may take such action as he or she deems necessary."

[41] NA Rule 53 reads:

"*(1) A member ordered to withdraw from the Chamber or suspended or named shall, subject to Subrule (2), forthwith withdraw from the precincts of Parliament.*

(2) If a presiding officer other than the Speaker orders a member of this House to withdraw from the Chamber and the member is a Minister or a Deputy Minister, the Speaker shall, after consultation with the presiding officer, order the member to withdraw from the precincts of Parliament or take such other action as the Speaker deems necessary.

(3) The action taken against a member by the Speaker under Rule 52(b) or Subrule (1) of this Rule shall be announced in this House."

(4) A member of this House who has been named shall not return to the precincts of Parliament before the action taken against him or her by the Speaker has been announced.

[42] NA Rule 56 reads:

"*In the event of grave disorder at a meeting, the presiding officer may adjourn the meeting, or may suspend the proceedings for a period to be stated by him or her.*"

the disruption of the SONA, other similar incidents and the judgment of the High Court, the National Assembly has recently amended its rules to include a power for the removal of members.[43] The newly-inserted rule 53A permits the presiding officer to instruct the Serjeant-at-Arms to remove a member who refuses to obey an instruction to withdraw from the chamber.[44] If the Serjeant-at-Arms is unable to remove the member, the presiding officer may call on the Parliamentary Protection Services ("**PPS**")[45] to remove him or her,[46] and they may use reasonable force in doing so.[47]

37. Rule 53A also affords a limited role to the security services. It allows the security services to assist with removing a member "*from the precincts*", but not from the chamber.[48] In addition, if there is a threat of violence or "*serious disruption*", the presiding officer may call the security services into the chamber in terms of s 4 of the Act.

38. There are several noticeable elements of rule 53A:

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[43] The new rule was adopted by the House on 30 July 2015.

[44] Rule 53A(1), which reads: "*If a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of Rule 51, the presiding officer must instruct the Serjeant-at-Arms to remove the member from the Chamber and the precincts of Parliament forthwith.*"

[45] The recent amendment inserts the following definition of the PPS: "*any employee authorised by Parliament to perform security and protection services within the precincts of Parliament, and includes all parliamentary staff members employed, appointed, assigned, delegated or contracted by Parliament to perform security and protection functions within the precincts of Parliament.*" As is clear from rule 53A(8), (10) and (11), the definition does not include members of the security services.

[46] Rule 53A(2), which reads: "*If the Serjeant-at-Arms is unable in person to effect the removal of the member, the presiding officer may call upon the Parliamentary Protection Services to assist in removing the member from the Chamber and the precincts of Parliament.*"

[47] Rule 53A(4).

[48] Rule 53A(10), which reads: "*If a member(s) offers resistance to being removed from the precincts, members of the security services may be called upon to assist with such removal."*

38.1 It makes no mention of s11 of the Act. It expressly relies on the security services' powers under s4, not s11.

38.2 It does not permit the arrest of members in any circumstances, only their removal.

38.3 It only permits the security services to be used to remove members outside the chamber, or if there is a threat of violence or serious disruption.

39. As we explain in more detail below, the new regime established by NA rule 53A largely conforms with what the DA argued in the High Court is the constitutionally compatible position by abandoning the two offensive elements of s11: arrest and the involvement of security services. The DA submits that, by adopting rule 53A, the National Assembly has largely conceded the correctness of its position. The Speaker's continued opposition to confirmation in light of the decision by the NA is difficult to understand.

40. Lastly, we mention NA rule 320(1) which provides for a finding that a member has abused a constitutional privilege. It reads:

> "*The Assembly may make a finding that a breach or abuse of the privilege provided for in sections 45(2) and 58 of the Constitution, or as set out in rule 44 of these Rules, is contempt of Parliament as envisaged by section 13(d) of the Act, in accordance with the Subrule (2).*"

41. This rule tracks s13 of the Act which requires Parliament, not the presiding officer, to determine whether or not a privilege has been abused. This is

important. In a case of disorder, the presiding officer is entitled to take the steps outlined above to maintain order. And a member can be suspended for not complying with the presiding officer's orders. But the presiding officer does not determine whether, in creating the disruption, the member was abusing her privilege. That question can only be judged by the member's peers.

D. PARLIAMENTARY PRIVILEGES

42. While s11 is aimed at a legitimate purpose – maintaining order in Parliament – the manner in which it seeks to achieve that end is inimical to basic parliamentary privileges and constitutional principles. It violates a range of constitutional provisions. We address these violations in the following order:

42.1 The history and purpose of parliamentary privileges;

42.2 The violations of the privileges against arrest;

42.3 The violation of the privilege of free speech;

42.4 The Appellants' defences.

(i) <u>The History and Purpose of Parliamentary Privileges</u>

43. Before the new constitutional dispensation came into force, the Appellate Division recognised, in *Poovalingam v Rajbansi*, that *"there is this close bond*

between our law and English law on the subject of Parliamentary privilege".[49] It is therefore helpful to look at the English origins of the privileges. They arise from "*the bitter and prolonged dispute*"[50] between the Tudor and Stuart monarchs and the English Parliament in the 16th and 17th centuries.[51] The Canadian Supreme Court has summarised this conflict as follows:

> "*In essence, it was a struggle for independence as between the different branches of government. In earlier times, particularly prior to 1640, the Crown and the courts showed no hesitation to intrude into the sphere of the Houses of Parliament. ... For example, in 1629, Charles I had Sir John Eliot and two other members charged and imprisoned for sedition for words spoken in debate in the House.*
>
> *Initially, the Houses simply claimed privilege on their own behalf. They did not request its recognition by the Crown in statute, or by the courts in common law. ... When a member was arrested in violation of privilege, the House would not turn to Crown or courts for his release. It would not make an application for habeas corpus before the courts and argue it on the basis of a doctrine of privilege; it would simply send the Sergeant-at-Arms with the ceremonial mace to the prison to demand the member's release on its own authority.*"[52]

44. The conflict was eventually resolved, largely in favour of Parliament, by the establishment of several "*privileges and immunities*".[53]

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[49] 1992 (1) SA 283 (A) at 291F. See also *Swartbooi and Others v Brink and Another (2)* [2003] ZACC 25; 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC) at para 13 ("*[T]he history of absolute privilege with which we are concerned shows that parliamentary privilege came to South Africa from England*").

[50] R Reinstein & H Silvergate 'Legislative Privilege and the Separation of Powers' (1972-73) 86 *Harvard Law Review* 113 at 1120.

[51] See generally Reinstein & Silvergate (n 50 above) at 1120-1135. The monarch attempted to use his executive power to intimidate Parliament into submission on issues of conflict. This intimidation took a variety of forms:

> "*The Crown's arsenal included the practices of issuing direct orders to the Speaker to cease debate on sensitive topics, spreading rumors of royal displeasure and threats of retaliation, bribing corruptible members of Parliament, summarily arresting others and arraigning them before the Star Chamber and other secret, inquisitorial bodies, or committing them directly to the Tower of London*." Ibid at 1127.

[52] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 344-5.

[53] Ibid.

45. The purpose of these privileges is, as the Act records, "*to protect the authority, independence and dignity of the legislatures and their members and to enable them to carry out their constitutional functions*". The purpose of the privileges are explained as follows in *Erskine May's* treatise on the topic:

> "*privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity.*"[54]

46. Both the freedom of speech and the freedom from arrest were always designed to protect members of parliament from two potential threats: private suits and the executive. As Corbett CJ explained in *Poovalingam*: "*the privileges of Parliament were principally established in order to protect its Members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown*."[55] That is also true in other

[54] Sir William McKay (ed) *Erskine May's Treatise on The Law Privileges, Proceedings and Usages of Parliament* (23rd ed, 2004) at 176.

[55] *Poovalingam* (n 49 above) at 286H-I (emphasis added). See also A Bernstein 'Executive Targeting of Congressmen as a Violation of the Arrest Clause' (1984-85) 94 *Yale Law Journal* 647 at 660: "*Throughout its history in both England and America, privilege has served two purposes: to protect the legislator against harassment and legal action instituted by fellow citizens, and to protect all legislators against encroachments from the executive branch. ... Both invocations of privilege helped to establish Parliament as a body independent from the monarch, yet sharing authority over the populace*." (emphasis added)

countries that find the origin of their parliamentary privileges in England, such as the United States of America.[56]

47. As such, the privileges are a vital element of the separation of powers. They are "*a force for equality between branches*".[57] They prevent the executive from using its control over the police and the army to bring Parliament into line. They ensure that members of Parliament are, at all times, free to speak their minds and fearlessly represent those who elected them.

48. The privilege of freedom of speech is vital to allow Parliament to perform its function of permitting unrestrained debate about matters of public import. The purpose of the privilege was described as follows by this Court in *Dikoko v Mokhatla*:

> "*Immunising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.*"[58]

49. The privileges therefore prevent improper interference by both the judiciary and the executive in Parliament's internal affairs.

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[56] See A Bernstein (n 55 above) at 660: "*Throughout its history in both England and America, privilege has served two purposes: to protect the legislator against harassment and legal action instituted by fellow citizens, and to protect all legislators against encroachments from the executive branch. … Both invocations of privilege helped to establish Parliament as a body independent from the monarch, yet sharing authority over the populace*." (emphasis added).
[57] Bernstein (ibid) at 662-3.
[58] 2006 (6) SA 235 (CC) at para 39.

50. We do not suggest that the privileges permit members of Parliament to avoid prosecution for ordinary crimes, or for civil suits for conduct that occurred outside of Parliament. The privileges are designed to ensure that Parliament is able to perform its function, and to preserve Parliament's primary authority over what happens in Parliament.[59] It is not intended to afford members of Parliament a special status to allow them to avoid being held accountable for their conduct. The question is whether s11 interferes with the basic purpose for which the privileges were afforded.

(ii) <u>The violation of the privilege against arrest</u>

51. The privilege against arrest protects "*anything that [members] have <u>said in</u>, produced before or submitted to [Parliament] or any of its committees*".[60] Section 11 permits arrest for disturbances. The definition of disturbances includes speech that disrupts the proceedings of Parliament. As a result, it violates the privilege against of arrest.

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[59] Reinstein & Silvergate (n 50 above) at fn 46 point out that the "*privilege against arrest was first codified in a statute of Henry IV, which provided that members of Parliament and their servants were immune from arrest <u>during session and shortly before and after.</u>*" See also fn 48 which records that the privilege against arrest was initially linked not only to what was done in Parliament, but to members' presence <u>in Parliament</u>. This is made explicit in art 1 § 6 of the US Constitution, which reads: "*The Senators and Representatives shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest <u>during their Attendance at the Session of their respective Houses, and in going to and returning from the same</u>*". We do not contend that the privilege afforded in ss 58 and 71 prohibits arrest for crimes unrelated to the performance of legislative functions, merely because the person is present on Parliamentary precincts. It is plainly not intended to have that reach. We refer to the history of protecting members in Parliament because where both the conduct precipitating the arrest and the arrest occur in the parliamentary chamber, the violation plainly cuts at the heart of the privilege.

[60] The meaning of "said" in the context of the 1963 Act was considered by the Appellate Division in *Poovalingam*. The case concerned a defamatory letter that a member of the House of Delegates had distributed to other members prior to a sitting. The member claimed privilege from civil proceedings relying on the equivalent of s58(1)(b) in the Powers and Privileges of Parliament Act 91 of 1963 ("**1963 Act**"). Corbett CJ held that, considering the history of Parliamentary privilege, the protection of what is "said" was intended "to deal only with the spoken word." *Poovalingam* (n 49 above) at 293J-294A.

52. It is important to stress that there is purposefully no limit on what is said, as long as it is said "*in Parliament*". It would include things that were said contrary to the rules, or even speech that is otherwise unlawful because it constitutes defamation, or hate speech, or reveals classified information. Indeed, that is exactly the purpose of the privilege – to protect members of Parliament from repercussions for controversial speech.

53. In *Swartbooi and Others v Brink and Another (2)*,[61] this Court had to decide whether the equivalent privilege afforded to members of municipal councils in s161 of the Constitution, protected members from an order of costs *de bonis propriis* for voting in favour of a resolution that was subsequently set aside by a court. Yacoob J held that the privilege only protected what was done "*in the course of the legitimate business of that council*".[62] However, the meaning of legitimate business was not limited to lawful resolutions:

> "*If the section were to protect only that conduct in support of lawful resolutions of a council, the protection would, in my view, be too limited to fulfil the purpose of the protection. That purpose is to encourage vigorous and open debate in the process of decision-making. This is fundamental to democracy. Any curtailment of that debate would compromise democracy. The protection is not limited to conduct in support of lawful resolutions.*"[63]

54. Similarly, there is no reason to restrict the meaning of "*said in*" to things that are said within the rules, or that are not declared out of order. While s58(1)(a)

[61] N 49 above.
[62] Ibid at para 18.
[63] Ibid at para 20.

makes the freedom of speech subject to Parliament's rules and orders, the freedom from arrest is not so limited. It applies to "*anything that they have said in Parliament*". The wording is intentionally broad and should be interpreted as such in order not to stifle democratic debate because legislators fear arrest, civil liability or prosecution if they are ruled out of order by the Speaker.

55. This flaw exists no matter who arrests the member – a member of staff or a member of the security services.[64] The only way to cure it is to find that s11 has no application to members. As we explain below, this can be done either by interpretation, or by reading-in the words "*except for a member*".[65]

(ii) <u>The violation of the privilege of speech</u>

56. Sections 58(1)(a) and 71(1)(a) afford members of Parliament freedom of speech "*subject to its rules and orders*". Section 11 limits that freedom by creating the threat of arrest and removal for exercising their freedom of speech in Parliament if that speech disrupts proceedings. It will create a chilling effect that will prevent MPs from exercising their privilege, and raises the threat of arrest for speaking in Parliament. As s11 is not part of the "*rules and orders*", it is contrary to ss58(1)(a) and 71(1)(a) and therefore invalid.

57. It is important to stress that this approach does not prevent Parliament from regulating the conduct of its members, or creating sanctions for speech that

[64] It is questionable whether a member of staff has the lawful authority to arrest anybody. However, s11 clearly contemplates such power, and presumably affords it to members of staff to the extent that it does not already exist.
[65] See Part F below.

disrupts parliamentary proceedings. The DA contends only that affording the Speaker and the Chairperson the power to order the arrest of members for what they have said is unconstitutional.

58. Two obvious methods recommend themselves. First, ss58(2) and 71(2) allow Parliament to prescribe "*other privileges and immunities*" in national legislation. That includes the power to create immunities and privileges for the NA and the NCOP themselves, such as the privilege to suspend a member as a punishment. The SCA held in *De Lille* that the power in s58(2) could be used to limit the privilege of freedom of speech in s58(1)(a).[66] That does not save s11 because it is not the type of provision permitted under ss58(2) and 71(2):

58.1 Sections 58(2) and 71(2) allow national legislation that creates new privileges and immunities for a house or its members. In *De Lille*, Mahomed CJ recognised that legislation enacted under s 58(2) could limit the privileges in s 58(1) by, for example, allowing Parliament to suspend its members as a punishment.[67] But the legislation enacted in terms of s 58(2) can only limit the privileges in s 58(1) if it creates a new ("*other*") privilege or immunity for the house or members, and that new privilege is invoked to regulate the exercise of an existing privilege.

58.2 Sections 12 and 13 of the Privileges Act meet this definition – they allow a house to hold its members in contempt and punish them. It creates a

[66] *De Lille* (note 18 above).
[67] Ibid.

new privilege for the house that limits the existing privilege of speech of members. Section 11 is not a new privilege of a house or its members. It is a power, not a privilege. And it is granted to the Speaker, Chairperson or other presiding officer, not to a house as a whole, or to its members. Accordingly, it is not the type of legislation envisaged in ss58(2) and 71(2) and cannot save the violation of the privileges.

59. Second, as ss 58(1)(a) and 71(1)(a) envisage, the power of the presiding officer to regulate internal proceedings must be dealt with in "*rules and orders*". As we have set out in detail above, the rules of the NA, the NCOP and the Joint Rules already have detailed provisions limiting members' privilege of free speech. They include NA rule 53A which permits the removal of members by the PPS. The very existence of those rules demonstrates that s11 is not only unconstitutional, it is also unnecessary – any measures necessary to preserve order in Parliament can and should be taken in Parliament's rules.

60. Accordingly, s11 is not envisaged in s58(2) or s71(2) and cannot be relied on to limit the privileges that are indeed afforded to members in ss58(1) and 71(1).

(iv) The Appellants' Defences

61. Before the High Court, the Appellants advanced four defences to attempt to avoid the finding that s11 violates the privileges of speech and against arrest.

62. First, they argued that the reference to "*rules and orders*" must include legislation. This argument does not assist the Appellants:

62.1 It is textually unsupportable. The phrase "*rules and orders*" cannot be interpreted to mean legislation. It is designed to exclude legislation.

62.2 It would render the privileges meaningless. If privileges could be limited by any legislation, then they would have no constitutional force. It would be impossible to challenge any law that violated them, no matter how severely.

62.3 It would, in any event, only assist in allowing a limitation of the privilege of speech in ss58(1)(a) and 71(1)(a). The privilege against arrest in ss58(1)(b) and 71(1)(b) can, naturally, not be limited even by rules and orders.

63. Second, the Appellants contended that, while s11 may be overbroad, that overbreadth is cured by the discretion afforded to the Speaker/Chairperson/presiding officer. Because the presiding officer can choose when to send in the police or army to arrest members of Parliament, the Respondent argues, that power will never be exercised in a way that violates the privileges in ss 58(1) and 71(1). This argument fails for the following reasons:

63.1 The presiding officer is still afforded an unconstitutional power. It is not a defence to say that the power will not be exercised. If the Speaker did exercise her power to violate s 58(1), it would not be possible to review that power as *ultra vires* to s11 because the power – on the Appellants'

own version – is constitutionally conferred. The only remedy is to declare s11 unconstitutional.

63.2 It is not plausible for the Appellants to assert that a presiding officer will not use her s 11 power to violate s 58(1) when the common cause facts demonstrate precisely such a violation.

63.3 This Court has already rejected similar arguments. In *Glenister II*[68] it considered a challenge to a power afforded to a Ministerial Committee to determine policy guidelines for the Directorate for Priority Crime Investigation ("**DPCI**"). The majority held that this provision was inconsistent with the independence of the DPCI, not because it would be abused, but because its very existence was "*inimical to independence.*"[69] The same is true here. The very existence of the power is inimical to the privileges of speech and against arrest.

63.4 The argument is, in essence, a concession that s11 is unconstitutional and a claim that it should be read down to exclude application when the disruption is caused by speech. But a reading down must still be faithful to the text of the section. The Appellants make no attempt to explain how s11, or the definition of disturbance could be interpreted in the manner they suggest.

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[68] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)
[69] Ibid at para 234.

64. Third, the Appellants submitted that the DA's argument is that any disturbance by a member, however grave, is not covered by s11 of the Act, on the premise that all disturbances by members are protected by ss58(1)(b) and 71(1)(b) of the Constitution. This approach cannot avail the Appellants because that is not the DA's argument.

64.1 The DA's argument is that arrest for anything "*said*" is prohibited by the privilege against arrest. Section 11 allows members to be arrested for both disturbances caused by what is "*said*", and disturbances caused by other conduct.

64.2 Because it includes the first, it is unconstitutional. That unconstitutionality is not lessened because s 11 may also allow arrest in instances that are lawful, such as physical violence by members on the floor of the house.

64.3 How a court addresses that overbreadth is a question of remedy, not validity.

65. Fourth, related to the third argument, the Appellants argued that the DA's approach will leave Parliament powerless to maintain order and therefore prevent Parliament from performing its function. That is obviously not the case:

65.1 This argument is, in reality, about remedy. It is premised on the basis that there is a constitutional flaw in s11, but pleads that the Court should

not interfere in a way that prevents Parliament from performing its duty. The DA agrees. The remedies it proposes are designed to address this concern by allowing s11 to apply to non-members, or allowing removal, but not arrest, by parliamentary staff, not the security services. But the need to craft an appropriate remedy cannot affect the validity of s11.

65.2 Parliament in any event has more than sufficient tools to maintain order in the house without s 11. It has the rules. It has the power to hold members in contempt. It has offences in s 7(a) and 7(e), and the power to allow the security forces to enforce them granted by s 4. And the NA now has the power to remove disruptive members in terms of NA rule 53A. If Parliament cannot maintain order with these tools, s11 is unlikely to make a difference.

66. For all these reasons, the Appellants failed to deal with the basic constitutional flaw in s11. The section must be declared invalid for violating both the privilege against arrest, and the privilege of speech.

E. THE SEPARATION OF POWERS

(i) General doctrine

67. The "*separation of powers*" is simply the sum total of how the Constitution assigns powers and responsibilities between the three spheres of government,

and the various other organs of state that it establishes.[70] It is "*uniquely*" South African because it is defined by the precise manner in which the Constitution determines which entity should perform which tasks. Although not a separately articulated provision, non-compliance with the Constitution's scheme for the separation of powers is justiciable.[71]

68. More specifically, legislation that affords one branch the ability to exercise powers that are "*pre-eminently within the domain*"[72] of another branch will be unconstitutional. Seedorf and Sibanda describe this doctrine of pre-eminent domain as follows:

> "*The principle of pre-eminent domain signifies that there are certain functions and powers that fall squarely within the domain of one or the other branch of government. Within this domain, interference or involvement by another branch cannot be justified as 'checks and balances', but must instead be treated as unconstitutional intrusions. The principle of pre-eminent domain, in other words, emphasizes the separation of functions and limits the attribution of certain powers to the 'wrong' institution.*"[73]

69. The pre-eminent domain of the Legislature includes, obviously, the parliamentary process. As this Court put it in *Doctors for Life*: "*The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings.*" [74]

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[70] See *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 109-111; S Seedorf & S Sibanda 'Separation of Powers' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) ch12-p21.
[71] See *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).
[72] *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC) at para 98.
[73] Seedorf & Sibanda (n 70 above) at ch12-p40-1.
[74] See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at paras 36-7.

Similarly, the heartland of executive power is to arrest people, and the principle of separation of powers will equally require the other branches not to interfere in that realm.

(ii) Summary of violations

70. In light of this basic doctrine, s11 violates the separation of powers in four ways. First, it is inconsistent with the idea of independent ("*separate*") branches, for the police and the army to be used to arrest and remove members of Parliament from the house. Parliament must manage its own internal affairs and use its own staff to do so. Relying on the security services to perform that function makes the legislature dependant on the executive, and allows the executive, literally, to enter the heart of the legislative domain. Parliament appears to have accepted this argument in rule 53A which limits the security services to traditional policing functions, and leaves maintenance of order to the Serjeant-at-Arms, the Usher-of-the-Black-Rod and the PPS.

71. Second, the power to order the arrest of a fellow member of a House of Parliament is entirely inconsistent with the Office of the Speaker or Chairperson (or another presiding officer). The power to arrest is a quintessentially executive function. More specifically, it is a policing function. It is not appropriate for a member of the legislature – including the Speaker or Chairperson – to exercise a power that the Constitution reserves for the

executive (more specifically the police, under the control of the National Commissioner).

72. Third, it is contrary to s 199(7) for the "*security services*" to be enlisted to assist with the arrest and removal of members of the Houses of Parliament because that will inevitably result in the entanglement of those services into political disputes. As the facts in this case demonstrate, the power will almost inevitably be used by a member of one party to order the arrest and removal of members of another party.

73. Fourth, s 11 requires the security services to: (a) perform functions outside their constitutionally-defined mandates; and (b) take instructions from a person outside their constitutionally-determined chain of command.

74. Individually and collectively, these four flaws render s11 unconstitutional. Section 11 requires both the legislature and the executive to act outside of their permissible roles. In doing so, it forces each branch to assume the functions of the other – to intrude into the "*pre-eminent domain*". That is a core case of a violation of the separation of powers. We now expand on each of these aspects in greater detail.

(iii) Executive interference with the legislature

75. This violation of separation of powers is obvious. There is nothing that is more intimately part of the legislature's domain than the conduct of its proceedings

and the treatment of its members during those proceedings.[75] The use of the army, police or intelligence services to interfere with the procedures on the floor of the House is a manifest violation of the separation of powers. The Executive is performing a task that the Constitution directly assigns to the Legislature: "*determin[ing] and control[ling] its internal arrangements, proceedings and procedures*".[76]

76. The violation is both symbolic and practical. It is symbolic because the presence of the security services on the floor of the house to remove elected representatives can only send a message that the executive is able and willing to use force to resolve political disputes.

77. It is practical because once on the floor and empowered to arrest members, the members of the security services are serving two masters: the presiding officer and their executive-appointed commander. The presiding officer's control over the security services once they are called on to act is uncertain and her ability to prevent abuses of their power (particularly against members of the opposition) unclear.

78. The violation is not lessened by the fact that the executive authorities act at the behest of the presiding officer. Parliament, if it is going to be an independent and self-sufficient branch of government must be able to control its own processes without reliance on the executive. As the control of its own affairs is

[75] *Doctors for Life* (n 74 above).
[76] Constitution s 57(1)(a) and 71(1)(a).

a part of the heartland of legislative power, no executive interference can be justified.

(iv) Legislative interference with the Executive

79. Section 11 also results in Parliament interfering in the pre-eminent domain of the executive: the control of the security services. The Constitution assigns control of the police force, the defence force and the intelligence services to the executive.[77] Section 11 perverts that assignment because it requires members of the executive to obey orders of legislative officials. Quite simply, it is inconsistent with ss201, 207 and 209(2) because it purports to afford the Speaker/Chairperson the power to control and instruct the police, the defence force and the intelligence services.

80. This power will inevitably lead to conflict. If a policeman in Parliament is given conflicting orders by his commanding officer and the Speaker, what should he do? The ordinary chain of command requires him to disobey the Speaker, yet s11 commands his obedience. For this reason too, s11 is unconstitutional.

(v) Partisan interests

[77] Constitution ss201, 207 and 209(2).

81. The third separation of powers defect is closely related to the second: Section 11 requires the security services to act outside, and even contrary to their constitutional mandate and limits. Section 199(7) – quoted above – prohibits members of the security services from prejudicing a political party interest, or acting in a partisan manner to further the interests of a political party.

82. Section 11 makes it impossible for the security services to comply with this requirement of non-partisanship. It will enable the Speaker or Chairperson to intervene in disturbances that – like the events during the SONA – will inevitably concern disputes between political parties. The security services will be instructed by the Speaker – who is a member of one political party – to use force against members of other political parties because of a political or procedural dispute.

83. Even if the security services do not intend to act in a partisan manner, they will inevitably appear to do so. That is particularly so given that the Speaker will likely be a member of the governing party, and the President – also a member of the governing party – appoints the Minister of Police and the National Commissioner of Police.

84. In *Glenister II*, this Court emphasised that "*'the appearance or perception of independence plays an important role' in evaluating whether independence in*

fact exists."[78] At best, s11 threatens the appearance of independence of the security services. People who see the police or the army being used to remove their elected representatives from Parliament will naturally doubt that they are neutral players in a game. When the security services lose that perception of independence, their ability to perform their basic functions will be seriously undermined.

(vi) Constitutional mandate of the security services

85. Section 11 also requires the police, army and intelligence services to act outside their defined constitutional competence, and intrude on the constitutional competence of Parliament.

85.1 As noted earlier, the role of the police is set out in s205(3) of the Constitution, and does not include regulating Parliamentary disputes.

85.2 The role of the defence force is "*to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.*"[79] That does not include maintaining order in Parliament.

85.3 The intelligence services are not directly established by the Constitution, and the Constitution does not define their objects. But it would be a blatant infringement of the separation of powers to suggest that

[78] *Ibid* at para 207.
[79] Constitution s200(2).

intelligence services should be involved in maintaining order in Parliament.

86. By requiring the security services to perform a task assigned by the Constitution to Parliament, s11 is incompatible with those mandates.

(v) <u>The need to address the separation of powers</u>

87. Having concluded that s11 was inconsistent with the parliamentary privileges, the High Court elected not to consider the argument that s11 violated the separation of powers. This was a mistake. The DA raised both arguments squarely before the High Court. It was necessary to determine both arguments because the nature of the remedy to be granted by the High Court would be different if it found that s11 also violated the separation of powers.

88. This is not a case where a constitutional question could be left unanswered. Failing to answer the question could lead to further constitutional violations in the future because the remedy provided only addressed one of the constitutional violations.

F. REMEDIES

89. The appropriate remedy will depend on the nature and extent of the violations this Court finds. However, the DA contends that following remedies could solve one or more of the constitutional violations:

89.1 Reading-in words to exclude its application to members will solve:

89.1.1 the violation of privilege; and

89.1.2 a limited part of the violation of the separation of powers;

89.2 Severing the words "*arrest*" and "*or a member of the security services*" will address:

89.2.1 The violation of privilege; and

89.2.2 The full violation of the separation of powers.

89.3 Notionally severing s11 so that it does not permit arrest or removal of a member for conduct that is protected by s57(1)(a) or s71(1)(a) will deal with:

89.3.1 Only the violation of privilege.

90. This Part addresses each form of relief outlined above, and then deals with the suspension order granted by the High Court.

(i) Excluding Members

91. The first relief the DA seeks is to simply read-in the words "*other than a member*" after the words "*A person*" in s11. As already noted, it is not necessary for s11 to cover members. Members are already adequately incentivised to comply with rules and orders by the Rules and the provision for contempt in ss12 and 13, and can now be removed by the PPS in terms of rule 53A.

92. This remedy would cure the violations of the members' freedom of speech and freedom from arrest. If the power to arrest and remove is limited to non-members, there can be no infringement of these privileges which are held only by members. There can also be no infringement of s199(7), as the application of s11 to non-members cannot give rise to a perception of partisan conduct on the part of the security services.

93. But the exclusion of members would not fully address the infringement of the separation of powers. The security services would still be required to remove and arrest non-members on the orders of the Speaker or the Chairperson or a person designated by them. If the Court finds that the separation of powers argument is good it must granted further relief, in addition to excluding members from s11.

(ii) Severing "arrest" and/or "security services"

94. If s11 violates the separation of powers as outlined in Part E, then the constitutional defect can most effectively be cured by severing the following words from the section: "*arrest*"; and "*or a member of the security services.*"

95. Severing both sets of words will cure the violation of the separation of powers because the security services will no longer be at the behest of the Speaker/Chairperson.

96. Section 11 would still permit members of staff to remove non-members. But this is constitutionally unproblematic.

(iii) <u>Notional severance</u>

97. Notional severance is a remedy that leaves the text of the statute unaltered, but limits the extent of its application by subjecting it to a condition.[80] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court described notional severance as follows:

> "*The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the presence of particular provisions which is constitutionally offensive and where the scope of the provisions is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision.*"[81]

98. The High Court ordered that s11 is invalid "*to the extent that it permits a member to be arrested for conduct that is protected by ss58(1)(b) or 71(1)(b) of the Constitution.*" This order would allow the arrest of members for conduct that fell outside the protection of the privilege against arrest, while prohibiting arrest (but not removal) if it fell within that ambit.

99. The High Court's order presupposed that it is only unconstitutional for a member to be arrested under s11 if the conduct that led to the arrest was protected in terms of ss58(1)(b) and 71(1)(b). Differently put, the High Court accepted that it is permissible for the Speaker to order the security services to arrest a member if the conduct that caused the disturbance was not covered by

[80] On notional severance generally, see M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2008) at 9:102-9:104.
[81] 2000 (2) SA 1 (CC) at para 63.

the privilege against arrest. It was on this basis that notional severance was ordered.

100. Notional severance naturally does not cover the violation of the separation of powers. It still permits the arrest of members by the security services under the control of the Speaker or Chairperson. It is only an appropriate remedy if the Court concludes that there is no violation of the separation of powers.

101. There is another reason notional severance should not be preferred – it creates greater uncertainty than actual severance or reading-in. O'Regan J put the point as follows in *SANDU I*:

> "*Although there can be no doubt that notional severance is permissible in terms of section 172(1)(a) of the Constitution, where actual severance can achieve the same result, it is generally to be preferred. The omission of words or phrases from a legislative provision leaves it with clear language subject to the ordinary rules of interpretation. Notional severance leaves the language of the provision intact but subjects it to a condition for proper application. At times, such an order is appropriate in order to achieve a constitutional result. <u>It should, however, not be preferred to an order of actual severance where such is linguistically competent.</u>*"[82]

102. Severance and/or reading-in is plainly competent in this matter without undue interference with the text of the statute. Indeed, it better addresses all the constitutional violations at issue. It should, therefore, be preferred.

(iv) <u>Suspension</u>

[82] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 16.

103. In the absence of compelling reasons to exercise the power to suspend, the usual effect of a finding of unconstitutionality will be the immediate invalidation of the relevant legislation or conduct.[83] This places a burden on a litigant seeking a suspension of an order of invalidity to persuade the court to exercise its section 172(1)*(b)*(ii) power in the interests of justice and equity.

104. In the present instance that burden was not discharge by the Appellants. The Appellants filed no affidavits in the proceedings *a quo*, and accordingly provided no evidentiary basis for the suspension ordered. The High Court too provided no explanation for suspending the order of invalidity.

105. There is, in any event, no justification for the suspension order. There can be no suspension where the invalidation of the unconstitutional provision will have little or no detrimental effect. This will be the case if the concerns about invalidation can be addressed by proper application of the remaining provisions in a statute,[84] or if the purpose of the unconstitutional section can be achieved by some other mechanism.[85] The question to be addressed is accordingly whether there is any compelling reason why the impugned sections should be kept alive for an interim period?

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[83] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 30; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 51.
[84] *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) paras 22-37.
[85] See *S v Bhulwana* note 54, para 30. See also *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) para 18 where the Court held that the system of debt collection envisaged by s 65 of the Magistrates' Courts Act 32 of 1944 did not depend on the sanction of imprisonment for its viability. There were a number of other aids to judgment debt collection in the law of civil procedure, for example property attachment and garnishment of wages.

106. We have already explained the multiple alternative tools available to Parliament to ensure order in the house. It has the rules, including the power to remove under rule 53A. It has the power to hold members in contempt. It has the offences in s 7(a) and 7(e), and the power to allow the security forces to enforce them granted by s 4. If Parliament cannot maintain order with these mechanisms, s11 is unlikely to make a difference.

107. In addition, the remedies the DA has proposed are designed to address this concern by allowing s 11 to apply to non-members, or allowing removal, but not arrest, by parliamentary staff, not the security services.

108. In the circumstances, we submit that the High Court erred by suspending the order of invalidity.

(v) Costs

109. The general rule for costs in constitutional matters brought by private parties against the state is set out in *Biowatch Trust v Registrar Genetic Resources and Others*.[86] If the DA is successful, it is entitled to its costs. If it is unsuccessful, there should be no order as to costs. This application is not frivolous or vexatious and there is therefore no reason to depart from the ordinary rule.

G. CONCLUSION

[86] [2009] ZACC 14; 2009 (6) SA 232 (CC) at para 22.

110. The removal of the EFF from Parliament was a watershed moment in our democracy. If left unchallenged, there is every possibility that the executive will continue to be employed to regulate what should be the business of Parliament. Members will be arrested and removed for exercising their parliamentary rights in the name of order. While the DA has never supported the actions of the EFF, they demand that Parliament is conducted in accordance with the Constitution. They insist that they are able to represent their electorate without fear of arrest.

111. For all these reasons, DA is entitled to the relief sought and its costs, including the costs of three counsel.

S P ROSENBERG SC

H J DE WAAL

M J BISHOP

Chambers, Cape Town
12 August 2015

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3. Gauteng: Privileges and Immunities of Councillors Act 1 of 2002
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5. Northern Cape Determination of Types of Municipalities and Regulation of Privileges and Immunities of Council Members Act 7 of 2000
6. Powers and Privileges of Parliament Act 91 of 1963
7. Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004
8. Western Cape Privileges and Immunities of Councillors Act 7 of 2011

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3. **Certification of the Constitution of the Republic of South Africa, 1996** [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)

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6. **Doctors for Life International v Speaker of the National Assembly and Others** [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

7. **Glenister v President of the Republic of South Africa and Others** [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

8. **Mazibuko v Sisulu and Another** [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC)

9. **Minister of Health & Others v Treatment Action Campaign & Others** (2) 2002 (5) SA 721 (CC)

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15. **S v Bhulwana; S v Gwadiso** 1996 (1) SA 388 (CC)

16. **South African Association of Personal Injury Lawyers v Heath and Others** [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC)

17. **South African National Defence Union v Minister of Defence** [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC)

18. **Speaker of the National Assembly v De Lille** 1999 (4) SA 863 (SCA)

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 86/2015

In the matter between:

DEMOCRATIC ALLIANCE Appellant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Second Respondent

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent

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RESPONDENTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1. May Parliament not make a law providing for the removal of members disrupting or interfering with the continuation of proceedings, if needs be by the police at the instance of the presiding officer? Is such a law valid insofar as it applies to other persons present in the precincts of Parliament, but not if it includes lawmakers themselves? Is the effect of the Constitution's protection of the speech of lawmakers that irrespective of what they do to disrupt a legislative proceeding, or to stop it from continuing, they may not be so removed? These inquiries lie, we submit, at the heart of the present dispute.

2. Despite the formal designations of the parties, this matter is in essence an appeal by the Speaker and Chairperson of the NCOP (to which we shall refer jointly as 'Parliament') and the Government of the Republic of South Africa, and a cross-appeal by the Democratic Alliance ('the DA'), against the order made in an application brought by the DA in the Western Cape Division of the High Court, Cape Town ('the High Court').

3. It concerns section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ('the Act'), which reads as follows:

‘***11 Persons creating disturbance***

A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services.’

4. Section 1 of the Act defines ‘disturbance’ as follows:

‘*“**disturbance**” means any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee*’.

5. In the High Court the DA sought the following final relief:

5.1 in the first instance, a declaratory order that section 11 of the Act does not apply to a ‘*member*’ as defined in the Act, who creates or takes part in any disturbance in the Parliamentary precincts;

5.2 as a first alternative, a declaratory order that section 11 of the Act is contrary to section 1 and/or section 199(7) of the Constitution of the Republic of South Africa 1996 (‘the Constitution’); and

5.3 as a second alternative, a declaratory order that section 11 of the Act does not apply to a disturbance by a member of the National Assembly (‘the NA’) or the National Council of Provinces (‘the

NCOP') falling within the ambit of section 58(1)(b) and section 71(1)(b) of the Constitution, including in respect of '*anything that they have said in, produced before or submitted to the NA or NCOP or any of its committees.*'

6. On 12 May 2015 the High Court delivered a judgment in which it:

6.1 declared in terms of section 172(1)(a) of the Constitution that section 11 of the Act is inconsistent with the Constitution and invalid to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution;

6.2 ordered in terms of section 172(1)(b) of the Constitution that the declaration of unconstitutionality be suspended for a period of 12 months in order for Parliament to correct the defect;

6.3 referred its orders in terms of section 172(1)(a) and (b) of the Constitution to the Constitutional Court for confirmation; and

6.4 ordered that Parliament pay the DA's costs, including the costs of two counsel.

7. On 13 May 2015 Parliament noted an appeal to this Court against the judgment and orders of the High Court. The ground of appeal is that the High Court erred in making the declaration of unconstitutionality referred to in paragraph 6.1 above. This because, properly interpreted, section 11 of the Act does not apply to speech or conduct by a member of the NA or the NCOP falling within the ambit of sections 58(1)(b) and 71(1)(b) of the Constitution. The 'disturbance' which section 11 of the Act proscribes is not a content-based limitation on lawmakers. Instead, insofar as it applies to members, it relates to conduct or speech which stops, or threatens to stop, the proceedings of Parliament from continuing. Sections 58(1)(b) and 71(1)(b) do not protect such conduct or speech. They confer an immunity on members outside Parliament against civil or criminal consequences of what they say in discharging their functions in Parliament. They do not confer an impunity in respect of speech or conduct rendering, or threatening to render, Parliament dysfunctional.

8. On 25 May 2015 the DA applied to this Court for confirmation of the order of invalidity made by the High Court, but added in effect that the High Court did not go far enough. It consequently also noted an appeal to the Constitutional Court. For this reason, we submit, the DA is in fact a cross-appellant. In its notice of appeal the DA contends in effect that the High Court erred:

8.1 in finding that section 11 of the Act applies to members of the NA and the NCOP, i.e. in not affording members an absolute immunity against arrest and removal from the precincts for any disturbance they create or take part in while Parliament or a House or a committee is meeting. This first objection is thus not to such a provision applying to others (such as officials or visitors) – it is to its ambit including lawmakers;

8.2 in failing to deal with the DA's first alternative declarator that section 11 of the Act is inconsistent with the principle of separation of powers and that the only way to cure the unconstitutionality is to sever and strike out from the section the words '*arrested and*' as well as the words '*or a member of the security services*'. In the High Court the DA had argued that to allow the Speaker and the Chairperson of the NCOP to use the security services to remove members from meetings of the NA and the NCOP would violate the principle of separation of powers in the Constitution because they would then be using the executive arm of government to interfere with the internal affairs of Parliament, its Houses and its committees. The objection was that the act of arrest and removal was not performed by a

separate security mechanism created for the task by Parliament itself; and

8.3 in suspending the order of invalidity for a period of 12 months in order to allow Parliament to rectify the defect in the unconstitutional legislation. The objection is thus that a remedial opportunity should not be afforded, i.e. the mechanism to deal with disruption afforded by section 11 of the Act should go with immediate effect.

9. The parties have agreed a statement of facts. The constitutional challenge launched in the High Court by the DA was the consequence of events in a joint sitting of the National Assembly and National Council of Provinces for the State of the Nation Address by the President on 12 February 2015. But the DA has chosen not to challenge the validity of the decisions of the Speaker and the Chairperson in relation to the events of that day. Its challenge instead is to the Act itself. The agreed facts therefore only provide a narrative of the events which lead to the bringing of the case by the DA.

10. We submit Parliament's notice of appeal and the DA's application for confirmation and notice of appeal raise the following issues for decision by this Court:

10.1 whether section 11 of the Act is inconsistent with the principle of separation of powers in the Constitution;

10.2 if not, whether section 11 of the Act is inconsistent with sections 58(1)(b) and 71(1)(b) of the Constitution; and

10.3 if section 11 of the Act is inconsistent with either the principle of separation of powers in the Constitution or with sections 58(1)(b) and 71(1)(b) of the Constitution, whether the declaration of unconstitutionality should be suspended and, if so, what the period of suspension should be.

11. Before dealing with the merits of these submissions, we briefly address the question of whether a '*person*' includes a '*member*'.

DOES 'PERSON' INCLUDE A 'MEMBER'?

12. As noted, the primary relief that the DA sought in the High Court was an order that section 11 of the Act does not apply to a '*member*' as defined in the Act, who creates or takes part in any disturbance in the Parliamentary precinct.[1] In its founding affidavit the DA contended that read in context, the word '*person*' does not include a '*member*'. The DA argued that the word '*member*' is specifically defined in section 1 of the

[1] NM 8: 2.1.

Act and where the word '*person*' is to be read as including a '*member*', this is spelt out in the Act.[2]

13. The High Court found that taking into account the ordinary rules of grammar and the wording of section 11, the word '*person*' in the provision includes a '*member*'.[3] Although no express order to that effect was made, it is implicit in prayer 2 of the High Court's order.

14. The DA has not placed this aspect of the High Court's reasoning in issue in this Court.

15. We submit that it must stand because it is correct for the following reasons:

    15.1 If '*person*' in section 11 is given a restrictive interpretation which excludes '*member*', the effect will be that the presiding officer may not invoke section 11 and order the removal of a member, irrespective of: (a) how grave a disturbance is caused by the member; (b) the extent to which the disturbance by the member undermines or impedes the role of the NA as a representative of the people of South Africa in providing a

[2] FA 11: 27.

[3] Judgment 100: 30.

national forum for public consideration of issues, in passing legislation and in scrutinising and overseeing executive action[4]; (c) the extent to which the disturbance by the member undermines or impedes the role of the NCOP as a representative of the Provinces in providing a national forum for public consideration of issues affecting Provinces[5]; and (d) the extent to which the disturbance by a member undermines the authority and dignity of Parliament as a whole. Instead, the only recourse available to the presiding officer would be to invoke section 13[6] and/or section 27[7] of the Act, which provide for after-the-fact sanctions but do not address the immediate problem of the disruption of the proceedings of Parliament or a committee of Parliament.

15.2 The circumstances just described will undermine, not promote the proper functioning of Parliament and the fulfilment of its constitutional obligations.

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[4] Section 42(3) of the Constitution. See too: sections 43 and 44 of the Constitution.

[5] Section 42(4) of the Constitution. See too: sections 43 and 44 of the Constitution.

[6] Section 13(a) provides a member is guilty of contempt of Parliament if the member contravenes, amongst others, section 7(e), which in turn provides a person may not while Parliament or a House or committee is meeting, create or take part in any disturbance within the precincts.

[7] Section 27(1) provides a person, including a member, who contravenes, amongst others, section 7(1)(e) commits an offence and is liable to a fine or to imprisonment for a period not exceeding three years or to both the fine and the imprisonment.

15.3 Such an interpretation is also inconsistent with the long title of the Act which identifies its purpose to include facilitating protection for '*authority, independence and dignity of the legislatures and their members and to enable them to carry out their constitutional functions.*' Responding to a '*disturbance*' (as defined) in terms of section 11, whether caused by a member or any other person is key to maintaining the authority and dignity of Parliament.

16. We accordingly submit that both on its plain wording and when read with reference to its purpose in the context of the Act as a whole, it is clear that reference to '*person*' in section 11 includes a '*member*'. To hold otherwise, we submit would: (a) subvert the purpose of the Act (which includes protecting the authority, independence and dignity of the legislatures and enabling them to carry out their constitutional functions); (b) undermine and impede the important constitutionally prescribed role for Parliament as the national legislative authority[8]; (c) be inconsistent with the wording of the Act; and (d) create an anomaly and inconsistency within the Act.

[8] Sections 42 to 44 of the Constitution.

DOES SECTION 11 INFRINGE THE SEPARATION OF POWERS?

17. The DA contends that section 11 is constitutionally invalid because it violates the separation of powers by requiring both the legislature and the executive to act outside their permissible roles, thereby forcing each branch to assume the functions of the other.[9]

18. The DA's argument proceeds from the premise that the functions of the legislative arm of government must be kept entirely distinct from that of the executive arm of government and that any overlap between both these arms of government is an infringement of the principle of separation of powers.

19. Section 11 of the Act allows for the arrest and removal of a person from the precincts by '*a staff member or a member of the security services*'.

20. Section 1 of the Act defines '*security services*' as meaning the '*security services referred to in section 199 of the Constitution*'. Section 199 provides that the security services consist of a single defence force, a

[9] DA's Heads of Argument 38:74.

single police service and any intelligence services established in terms of the Constitution.[10]

21. Generally as to the doctrine of separation of powers, this Court has held it is part of our constitutional architecture. It is nowhere explicitly provided, but it is derived from Constitutional Principle VI and implicit in the Constitution.[11] Courts are carving out a distinctively South African design of separation of powers. It must be a design which in the first instance is authorised by the Constitution itself; it must sit comfortably with South Africa's democratic system of government; it must find the careful equilibrium that is imposed on the constitutional arrangements by South Africa's peculiar history; and it must give due recognition to the popular will as expressed legislatively, provided that the laws and policies in issue are consistent with constitutional dictates.[12]

22. This Court has also recognised that although the principle of separation of powers recognises the functional independence of branches of

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[10] Section 199(1) of the Constitution.

[11] **South African Association of Personal Injury Lawyers v Heath** 2001 (1) SA 883 (CC) at par 19.

[12] **International Trade Administration Commission v SCAW South Africa (Pty) Ltd** 2012 (4) SA 618 (CC) at par 91.

government, no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.[13]

23. This Court has also '*clearly enunciated that the separation of powers under our Constitution: although intended as a means of controlling government by separating or diffusing power, is not strict; embodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.*'[14]

24. This Court has repeatedly disavowed an approach to separation of powers questions that focuses on the form of the institutional arrangements alone, preferring to examine in detail the substantive effect of these arrangements. The point about checks and balances is that they do provide for interference between the branches of government. The courts

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[13] **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) at par 109. "*[A]lthough there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. The courts should be sensitive to and respect this separation*". See too: **Minister of Health v Treatment Action Campaign (2)** 2002 (5) SA 721 (CC) at par 98. (The comment in *Woolman* **Constitutional Law of South Africa** Original Service 06-08 at 12-45 that "*[w]ithin the pre-eminent domains, separation of powers is absolute and no checks and balances apply*…" (emphasis supplied) is accordingly inapt. Cf. **ITAC** *supra* at par 95 and **National Treasury v Opposition to Urban Tolling Alliance** 2012 (6) SA 223 (CC) at pars 63-6).

[14] **S v Dodo** 2001 (3) SA 382 (CC) at par 16. See too: **De Lange v Smuts NO** 1998 (3) SA 785 (CC) at par 60.

are asked to carefully examine if such interference is an unwarranted intrusion into the domain and independent functioning of one branch of government or another constitutional body, or if such interference constitutes an institutional safeguard designed to prevent the abuse of power.[15]

25. In short, in Professor Laurence Tribe's apophthegm, approved and applied by this Court, "*[w]hat counts is not any abstract theory of separation of powers, but the actual separation of powers 'operationally defined by the Constitution'. Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but might not in fact have found their way into our Constitution's structure*".[16]

26. We submit that the principle of separation of powers is not infringed by section 11 of the Act for the following reasons:

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[15] Seerdorf and Sibanda, "Separation of Powers" in Woolman *et al* **Constitutional Law of South Africa** Original Service 06-08 at 12-46. See too: **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA**, **1996** 1996 (4) SA 744 (CC) at par 123 and **Van Rooyen v The State and Others (General Council of the Bar of South Africa Intervening)** 2002 (5) SA 246 (CC) at par 27 and 28.

[16] Cited with approval in both **S v Dodo** 2011 (3) SA 382 (CC) at par 17 and **Van Rooyen v The State and Others (General Council of the Bar of South Africa Intervening)** 2002(5) SA 246 (CC) at par 34. The emphasis is Tribe's, inserted in a passage quoted from Koukoutchos (see Tribe **Constitutional Law: Volume One** Foundation Press, New York, 3rd edition 2000) 127 fn 10.

26.1 The security services on the one hand and the legislature on the other hand perform separate, distinct and different functions. We have already referred to the role of Parliament. The objects of the police service in particular are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.[17]

26.2 Section 11 of the Act does not threaten the 'functional independence' of Parliament. Nor does it result in a usurpation of power.

26.3 The DA's argument that Parliament must manage its own internal affairs and use its own staff to do so[18] is not borne out by its own acknowledgement that the security services may perform a traditional policing function in Parliament[19] or indeed that NA Rule 53A (which provides for the removal of members of

[17] Section 195(3) of the Constitution.

[18] DA's Heads of Argument 37: 70.

[19] DA's Heads of Argument: 37: 70.

Parliament from the precincts by members of the security services, as a last resort[20]) is constitutionally compatible.[21]

26.4 The intervention of the security services under section 11 facilitates the proper functioning of Parliament as opposed to impeding it. In the words of this Court quoted in paragraph 23 above, it '*avoids diffusing power so completely that government is unable to take timely measures in the public interest.'*

26.5 The intervention of the security services under section 11 to arrest and remove a member is lawful if, and only if, it occurs on the order of the Speaker, the Chairperson of the NCOP or a person designated by them, and further the member or members in question have committed an act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee of Parliament. It is not content-driven, i.e. aimed at legitimate (if robust) speech or conduct. It is aimed at avoiding Parliament becoming dysfunctional. It thus does not entail an intrusion into

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[20] Rule 53A(10) provides: '*If a member(s) offers resistance to being removed from the precincts [by the Sergeant-at-Arms and members of the Parliamentary Protection Services], members of the security services may be called upon to assist with such removal*'.

[21] DA's Heads of Argument 22: 39.

'the pre-eminent domain' of the legislature as the DA suggests.[22] On the contrary, its objective is to facilitate the proper functioning of Parliament (as opposed to impeding it).

26.6 Consequently, the involvement of the security services in the manner contemplated by section 11 does not constitute '*an unwarranted intrusion into the domain and independent functioning*' of Parliament.

26.7 On the DA's approach, neither the judiciary nor the legislature can invoke security services to protect the integrity and proper functioning of their institutions and processes because, to do so would constitute an infringement of separation of powers. Yet that extreme notion of the separation of powers, would mean that Parliament would have to create a quasi-police service of its own to maintain public order and uphold and enforce the law within its precincts, to the entire exclusion of the South African Police Service. On this approach, Parliament would not even be able to call on the SAPS to assist its own officers were the latter to be faced with a security problem of such a scale or degree of seriousness that they could not cope alone.

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[22] DA's Heads of Argument 38:74.

26.8 This approach would also render unconstitutional and invalid section 4 of the Act,[23] which, despite its extreme separation of powers argument, the DA endorses.[24] Section 4 contemplates that there is scope for members of the security services to perform a policing function in the precincts and that they may enter and remain in the precincts for that purpose. Save for the exceptional circumstances contemplated in section 4(2), this can only be done with the permission and under the authority of the Speaker or the Chairperson. By providing that the performance of policing functions by members of the security services in the precincts of Parliament is to be done not only with the permission of the Speaker or the Chairperson, but also under the authority of the Speaker or the Chairperson, section 4(1) places the members of the security services concerned under the control of the Speaker for so long as they are performing policing functions in the precincts of Parliament.

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[23] Section 4 provides:
'*4 Presence of security services in precincts of Parliament*
(1) Members of the security services may-
(a) enter upon, or remain in, the precincts for the purpose of performing any policing function; or
(b) perform any policing function in the precincts,
only with the permission and under the authority of the Speaker or the Chairperson.
(2) When there is immediate danger to the life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger. Any such action must as soon as possible be reported to the Speaker and the Chairperson.'

[24] DA's Heads of Argument 16:26.2.

26.9 The same would have to apply to the judiciary. The courts firstly depend on the executive for the enforcement of all court orders. Secondly, the judiciary depends on the police to perform security functions within court buildings. Section 41 of the Superior Courts Act 10 of 2013[25] allows a superior court to order the removal and detention in custody until the court adjourns of any person who amongst other things wilfully hinders or obstructs any member of the court or any officer thereof in the exercise of his or her powers or the performance of his or her duties, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held.[26] Section 178 of the Criminal Procedure Act 51 of 1977[27] is similar.

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[25] Section 41 of the Superior Courts Act provides:
'*Court may order removal of certain persons*
(1) Any person who, during the sitting of any Superior Court-
(a) wilfully insults any member of the court or any officer of the court present at the sitting, or who wilfully hinders or obstructs any member of any Superior Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties;
(b) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held; or
(c) does anything calculated improperly to influence any court in respect of any matter being or to be considered by the court,
may, by order of the court, be removed and detained in custody until the court adjourns.
(2) Removal and detention in terms of subsection (1) does not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court.'

[26] Unlike section 11 of the Act (which refers to arrest and removal by a staff member or a member of the security services), sections 41 of the Superior Courts Act and 178 of the Criminal Procedure Act do not specify who is to undertake the removal. Presiding officers in courts commonly call upon members of the police present in their courts to do so. See e.g. the facts recounted in **Moeketsi v Minister van Justisie en 'n Ander** 1988 (4) SA 707 (T) 708H-709E.

26.10 Section 11 is in conformity with this. It requires an order from the Speaker or the Chairperson (or a person designated by them) for the arrest and removal from the precincts of Parliament, by a member of the security services, of a person who creates or takes part in a disturbance, as defined.

27. We thus make the following submissions in response to the DA's specific arguments:[28]

27.1 The decisions of this Court establish that South Africa does not adhere to a strict separation of powers which results in diffusing power so completely that government is unable to take timely measures in the public interest.

27.2 The power to order the arrest of a fellow member is by no means inconsistent with the Office of the Speaker or the Chairperson (or another presiding officer). As recognised by the SCA,[29] the Speaker is the representative and spokesperson of the House in

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[27] Section 178 of the Criminal Procedure Act provides:
'*178 Arrest of person committing offence in court and removal from court of person disturbing proceedings*
(1) Where an offence is committed in the presence of the court, the presiding judge or judicial officer may order the arrest of the offender.
(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he be detained in custody until the rising of the court.'

[28] DA's Heads of Argument 37:70 and following.

[29] **Gauteng Provincial Legislature v Kilian** 2001 (2) SA 68 (SCA) at par 26.

its collective capacity, the orders of the Speaker are a regular part of the apparatus of the House and these orders cover almost the whole field of the regulation of Parliament's business. The Speaker is also the interpreter and custodian of the rights and privileges of the members of the House. The power to order the arrest of a member of Parliament in circumstances where such member is rendering Parliament and its workings dysfunctional is entirely consistent with the role of the Speaker.

27.3 It is also not correct that it is contrary to section 199(7) for the 'security services' to be enlisted to assist with the arrest and removal of members of Parliament because that will inevitably result in the entanglement of those services in political disputes. Section 11 is invoked by an order of the Speaker, Chairperson or a designated person. As recognised by the SCA, a Speaker must discharge his or her functions impartially, fairly and rationally.[30] In the event that the Speaker does not act in a manner consistent with her office, her specific decision may be challenged. As noted, the DA chose not to do that in the present case.

[30] **Gauteng Provincial Legislature v Kilian** 2001 (2) SA 68 (SCA) at par 30.

27.4 It is not correct that section 11 requires security services to perform functions outside their constitutionally-defined mandates. We have already explained the ambit of section 11. While section 11 does require that the security services takes instructions from a person outside their constitutionally determined chain of command, this does not, in our submission, infringe the doctrine of separation of powers. It is no different from the security services coming to the assistance of a judge in the course of judicial proceedings.

28. We consequently submit that sections 4 and 11 of the Act balance the need for proper and effective policing and the need to promote and protect the independence and integrity of Parliament, while conforming with sections 198 and 199 of the Constitution. The DA's approach does none of these things.

DOES SECTION 11 INFRINGE SECTIONS 58(1)(b) AND 71(1)(b) OF THE CONSTITUTION?

29. As stated, the High Court declared in terms of section 172(1)(a) of the Constitution that section 11 of the Act is inconsistent with the Constitution and invalid to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of

the Constitution. As we understand the High Court's judgment, the basis for this declaration was its finding that the word '*disturbance*' in section 11 is so widely defined (in section 1) that it detracts from members' constitutional privilege of free speech protected by sections 58(1)(b) and 71(1)(b) of the Constitution.[31] This reasoning must entail that the '*disturbances*' which render members liable to be arrested and removed from the precincts include things said or done by them when exercising that constitutional privilege of free speech. So reasoned, speech or conduct by members, of whatever kind or degree, which interferes with or disrupts a proceeding (or threatens that consequence) enjoys absolute protection by virtue of the privilege accorded by the Constitution. We submit this confuses immunity with impunity, consequences outside Parliament with maintaining order in it, and disregards the purpose and constitutional function of the privilege.

30. Section 58 of the Constitution reads, in relevant part, as follows:

'*58 Privilege*

(1) Cabinet members, Deputy Ministers and members of the National Assembly-

(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and

[31] See the High Court judgment at par 31, 42 and 43.

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.'

31. Section 71 of the Constitution is in similar terms:

'71 Privilege

(1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67-

(a) have freedom of speech in the Council and in its committees, subject to its rules and orders; and

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-

(i) anything that they have said in, produced before or submitted to the Council or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees.

(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.'

32. Sections 58(1)(b) and 71(1)(b) of the Constitution must be interpreted '*according to their purpose, gleaned from the language read in the context of the Constitution as a whole*.'[32]

33. The following provisions of the Constitution provide the context in which sections 58(1)(b) and 71(1)(b) of the Constitution fall to be interpreted:

33.1 The underlying objective of the NA is '*to represent the people*' and '*to ensure government by the people under the Constitution*'[33]. It does this by, amongst other things, providing a national forum for public consideration of issues, passing legislation and scrutinizing and overseeing executive action[34].

33.2 The NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national

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[32] **Judge President Hlophe v Premier, Western Cape; Judge President Hlophe v Freedom Under Law** 2012 (6) SA 13 (CC) 2012 (6) SA 13 (CC) at par 33. See too: **Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party** 1998 (4) SA 1157 (CC) at par 43 and 45; **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO** 1996 (1) SA 984 (CC) at par 172; **S v Mhlungu** 1995 (3) SA 867 (CC) at par 15, 45 and 105; and **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at par 10.

[33] Section 42(3) of the Constitution.

[34] Section 42(3) of the Constitution.

legislative process and by providing a national forum for public consideration of issues affecting the provinces [35].

33.3 Section 57 of the Constitution recognises that when regulating its business through rules and orders, the NA must have due regard to '*representative and participatory democracy*' amongst other things.

34. In dealing with the corresponding protection afforded by statute to municipal councillors attending meetings of the full municipal council, this Court has said:

34.1 the purpose of such provisions is '*to encourage vigorous and open debate in the process of decision-making*'[36];

34.2 '*the words "said in", "produced before" and "submitted to" the council taken together are wide enough to cover all the conduct*

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[35] Section 42(4) of the Constitution.

[36] **Swartbooi v Brink** 2006 (1) SA 203 (CC) at par 20. See too: **Dikoko v Mokhatla** 2006 (6) SA 235 (CC) par 39 which reads as follows:

> '*To determine the question requires a consideration of the purpose of the privilege in a constitutional democracy. Immunising the conduct of members from criminal and civil liability during council deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government. There is therefore much to be said for a conclusion that, if a councillor participates in the genuine and legitimate functions or business of council, whether inside or outside of council, the privilege afforded under s 28 ought to extend to her or him. For the reasons stated below, however, it is not necessary to determine that question in this case.*' (Our underlining.)

in the council that is integral to deliberations at a full council meeting and to the legitimate business of that meeting'[37]; and

34.3 '*there may be conduct that is so at odds with the values mandated by our Constitution that neither the Constitution nor the National Legislature could conceivably have contemplated its protection*'.[38]

35. We therefore submit that section 58(1)(b) of the Constitution accords certain privileges and immunities to members of the NA (as does section 71(1)(b) to members of the NCOP) precisely for the purpose of facilitating (as opposed to impeding) the constitutionally mandated role of the NA and the NCOP.

36. In the DA's heads of argument, reliance is placed on parliamentary privilege in relation to freedom from arrest and freedom of speech.[39] As recognised by the SCA, the privilege rests upon two bases: (a) that

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[37] **Swartbooi v Brink** 2006 (1) SA 203 (CC) at par 12. See also par 17 and 18.

[38] At par 22. See also **Speaker of the National Assembly v De Lille** 1999 (4) SA 863 (SCA) par 16, which reads as follows:

> '*The first section of the Constitution upon which reliance is placed on behalf of the appellant is s 57. This section provides that the National Assembly "may determine and control its internal arrangements, proceedings and procedures". There can be no doubt that this authority is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose. This would, for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates*.' (Our underlining.)

[39] DA's Heads of Argument 23: 42 and following.

Parliament must have complete control over its own proceedings and its own Members and that accordingly matters arising in this sphere should be examined, discussed and adjudged in Parliament and not elsewhere; and (b) that a Member must have a complete right of free speech in Parliament without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter.[40] Given that the invoking of section 11 is not content-based, we submit that neither of these bases for the privilege is compromised.

37. This interpretation of sections 58(1)(b) and 71(1)(b) of the Constitution accords with the position in the African Union and elsewhere in the Commonwealth. By way of example:

37.1 Article 9(1) of the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament provides as follows: '*The Pan-African Parliamentarians shall enjoy parliamentary immunity in each Member State. Accordingly, a member of the Pan African Parliament shall not be liable to civil or criminal proceedings, arrest, imprisonment or damages for what is said or done by him or her within or*

[40] **Poovalingam v Rajbansi** 1992 (1) SA 283 (A) at 286F.

outside the Pan-African Parliament in his or her capacity as a member of Parliament in the discharge of his or her duties.'[41]

37.2 According to the New Zealand Parliamentary Privilege Act No 58 of 2014, the purpose of the parliamentary privilege is: (a) to uphold the integrity of the House as a democratic legislative assembly; and (b) secure the independence of the House, committees, and members, in the performance of their functions.[42] The privilege relates to '*proceedings in Parliament*' which is defined as '*all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee*.'

37.3 In terms of the Australian Parliamentary Privileges Act No. 21 of 1987 the parliamentary privilege applies to '*proceedings in Parliament*' which is defined as *'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes: (a) the giving of evidence before a House or a committee, and evidence*

[41] Accessed on 23 June 2015 on: http://www.au.int/en/sites/default/files/PROTOCOL_TREATY_ESTABLISHING_THE_AFRICAN_ECONOMIC_COMMUNITY_RELATING_PAN_AFRICAN_PARLIAMENT.pdf

[42] Section 7.

so given; (b) the presentation or submission of a document to a House or a committee; (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.'

37.4 In **Canada (House of Commons) v Vaid**[43] the Supreme Court of Canada held:

> '*41 Parliamentary privilege is defined by the degree of autonomy necessary to perform Parliament's constitutional function. Sir Erskine May's leading text on the subject defines parliamentary privilege as*
>
> > *the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. [Emphasis added; p. 75.]*
>
> *Similarly, Maingot defines privilege in part as "the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work" (p. 12 (emphasis*

[43] [2005] 1 SCR 667 at par 41.

> *added)). To the question "necessary in relation to what?", therefore, the answer is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business. To the same effect, see R. Marleau and C. Montpetit, eds., House of Commons Procedure and Practice (2000), where privilege is defined as "the rights and immunities that are deemed necessary for the House of Commons, as an institution, and its Members, as representatives of the electorate, to fulfil their functions" (p. 50 (emphasis added)). Reference may also be made to J. G. Bourinot, Parliamentary Procedure and Practice in the Dominion of Canada (4th ed. 1916), at p. 37:*
>
> > *It is obvious that no legislative assembly would be able to discharge its duties with efficiency or to assure its independence and dignity unless it had adequate powers to protect itself and its members and officials in the exercise of their functions. [Emphasis added.]*"
>
> (Emphasis in the original)

38. It is well-established that when the constitutionality of legislation is in issue the courts are under a duty to examine the objects and purport of the legislation and to read its provisions, so far as is possible, in conformity with the Constitution. Accordingly judicial officers must prefer interpretations of legislation that fall within constitutional bounds over

those that do not, provided that such an interpretation can be reasonably ascribed to the section, without undue strain.[44]

39. So approached, section 11 of the Act does not permit a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution. This because the protection conferred by sections 58(1)(b) and 71(1)(b) cannot extend to that which strikes at, or threatens to strike at, Parliament's very capacity to function. The actions and utterances of lawmakers are for the purposes which lie at the core of a democratic legislature: to debate public issues in the context of a legislature which makes laws and holds the executive to account. They are not perquisites – 'perks', in the colloqialism – of office, without any constraint under the Constitution.

40. Moreover, we point out that the word '*disturbance*', which is widely defined in section 1 of the Act, includes but is not limited to things said, produced before or submitted to the NA or the NCOP or one of their committees by members of the NA and the NCOP.

41. Consequently, members of the NA and the NCOP may take part in a '*disturbance*', i.e. commit an act '*which interferes with or disrupts or*

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[44] **Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO** 2001 (1) SA 545 (CC) at par 21 to 24.

which is likely to interfere with or disrupt the proceedings of Parliament or a House or a committee', otherwise than by saying something in, producing something before or submitting something to the NA or the NCOP or one of their committees. For example, a member of the NA may bang on his desk or stamp his feet incessantly; or use a loud noisemaker or instrument in an attempt to drown out a speaker or to disrupt the proceedings generally; or a member may even start fighting physically with another member or someone else present on the precincts.

42. The DA acknowledges in its heads of argument, as it must, that the privileges are designed to ensure that Parliament is able to perform its function and to preserve Parliament's primary authority over what happens in Parliament; it is not intended to afford members of Parliament a special status to allow them to avoid being held accountable for their conduct.[45]

43. Consequently, the definition of '*disturbance*' in section 1 of the Act, and hence section 11 of the Act, insofar as they apply to members of the NA and the NCOP, can reasonably be interpreted in conformity with sections 58(1)(b)(i) and 71(1)(b)(i) of the Constitution by:

43.1 including disruptive conduct of the sort just described; and

[45] DA's Heads of Argument 26:50.

43.2 excluding the saying of things in, the production of things before and the submission of things to the NA, the NCOP or any of their committees for the purpose of facilitating (as opposed to impeding) the constitutionally-mandated role of the NA and the NCOP.

44. Our suggested approach responds fully to the DA's complaints that:

44.1 the definition of '*disturbance*' in the Act includes speech that disrupts proceedings of Parliament and thereby violates the privilege against arrest;[46] and

44.2 section 11 limits freedom of speech as provided for in sections 58(1)(a) and 71(1)(a) by creating the threat of arrest and removal for exercising freedom of speech in Parliament if that speech disrupts proceedings; it will create a chilling effect that will prevent MPs from exercising their privilege and raises the threat of arrest for speaking in Parliament.[47]

45. We point out that the consequence of a finding that section 11 of the Act applies to members who create or take part in disturbances of the sort just

[46] DA's Heads of Argument 27: 51.

[47] DA's Heads of Argument 29: 56.

described, is limited to their being liable to being arrested and removed from the precincts.[48]

46. It is not an invariable consequence of an arrest and removal under section 11 that the members concerned will be prosecuted and, if prosecuted, convicted. Those further consequences depend, first, on the exercise of a discretion to prosecute by the National Prosecuting Authority and, second, on the adjudication by a court of the resulting criminal case on the evidence.

47. Finally in this regard, subsequent to the institution of these proceedings, there was an amendment to the NA Rules, by the insertion of Rule 53A.[49]

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[48] Arrest of course does not mean to take into custody. As to what is meant by '*arrest*', see the approach of Ackermann J in **S v Van Vuuren** 1983 (4) SA 662 (T) who held that in determining whether an arrest has occurred '*the central idea is one of physical subjection*', quoting Hoexter J, as he then was, in **R v Mazema** 1948 (2) SA 152 (E) at 154, '*(a) person is under arrest as soon as the police assume control over his movements*', and **Halsbury's Laws of England** 4th ed vol 11 par 99 '*Arrest consists in the seizure or touching of a person's body with a view to his restraint. Words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion*'.

[49] The new Rule 53A provides as follows:

'53A. Removal of member from Chamber

(1) If a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of Rule 51, the presiding officer must instruct the Serjeant-at- Arms to remove the member from the Chamber and the precincts of Parliament forthwith.

(2) If the Serjeant-at-Arms is unable in person to effect the removal of the member, the presiding officer may call upon the Parliamentary Protection Services to assist in removing the member from the Chamber and the precincts of Parliament.

(3) A member who is removed from the Chamber in terms of subrule (2), is thereby immediately automatically suspended for the period applicable as provided for in Rule 54, and may not enter the precincts for the duration of the suspension.

(4) If a member resists attempts to be removed from the Chamber in terms of subrules (1) or (2), the Serjeant-at-Arms and the Parliamentary Protection Services may use such force as may be reasonably necessary to overcome any resistance.

(5) No member may, in any manner whatsoever, physically intervene in, prevent, obstruct or hinder the removal of a member from the Chamber in terms of these Rules.

(6) Any member or members who contravene subrule (5) may, on the instruction of the presiding officer, also be summarily removed from the Chamber and the precincts of Parliament forthwith.

According to the DA's heads of argument, Rule 53A 'largely conforms'[50] to what the DA contends is a constitutionally compatible provision by abandoning arrest and the involvement of security services.[51] The DA further contends that by having Rule 53A, the National Assembly has largely conceded the correctness of the DA's position.[52] None of these submissions is correct:

47.1 As regards the adoption of Rule 53A, it was not adopted as a substitute for section 11 of the Act. Instead, it was adopted (only after Parliament's request that the Court hear this matter on an urgent basis was not acceded to) on 30 July 2015 as an

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(7) If proceedings are suspended for the purposes of removing a member or members, all other members must remain seated or resume their seats, unless otherwise directed by the presiding officer.

(8) When entering the Chamber on the instruction of the presiding officer –
(a) Members of the Parliamentary Protection Services may not be armed; and
(b) Members of the security services may not be armed, except in extraordinary circumstances in terms of security policy.

(9) A members who has been removed from the Chamber will be escorted off the precincts by Parliamentary Protection Services personnel and will not be allowed to enter the House or precincts of Parliament as the Rules prescribe.

(10) If a member offers resistance to being removed from the precincts, members of the security services may be called upon to assist with such removal.

(11) In the event of violence, or a reasonable prospect of violence or serious disruption ensuing in the Chamber as a result of a member resisting removal, the presiding officer may suspend proceedings, and members of the security services may be called upon by the presiding officer to assist with the removal of members from the Chamber and the precincts of Parliament forthwith in terms of Section 4(1)of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No 4 of 2004, or may intervene directly anywhere in the precincts in terms of section 4(2) of the Act when there is immediate danger to the life or safety of any person or damage to any property.

(12) Whenever a member is physically removed from the Chamber in terms of this Rule, the circumstances of such removal must be referred by the Speaker, within 24 hours, to a multi-party committee for consideration.

(13) The House may approve Standard Operating Procedures, recommended by the Rules Committee, for the exercise of this function, in particular in relation to the use of the Parliamentary Protection Services and members of the security services for this purpose.'

[50] The extent to which the DA contends the Rule does *not* conform (and accordingly is suggested itself to be open to challenge by the DA in due course) is not disclosed.

[51] DA's Heads of Argument 22:39.

[52] DA's Heads of Argument 22:39.

immediate interim measure to respond to the continued disruptions of proceedings in the House pending the final determination of this matter.

47.2 The Speaker's powers in relation to section 4 of the Act (to which there is no challenge) remain intact.

47.3 Rule 53A does not exclude the involvement of the security services. Yet anomalously (regard being had to its argument relating to s11) the DA raises no objection to this on the grounds of a separation of powers argument. It accordingly appears that the DA recognises that the involvement of security services does not constitute an automatic infringement of separation of powers.

47.4 While Rule 53A does not expressly refer to a power of arrest, if this Court is to find that section 11 is constitutionally compliant, the power of arrest will derive from section 11.

47.5 Rule 53A contemplates a removal from the Chambers and the precincts of Parliament. The precincts of Parliament are defined in section 2 of the Act and include the Chambers. The DA is

accordingly wrong in its suggestion that the precincts do not include the Chambers.[53]

[53] DA's Heads of Argument 21: 37 and 38.3.

SUSPENSION OF ANY ORDER OF UNCONSTITUTIONALITY?

48. Parliament contends that if, contrary to our submissions above, section 11 of the Act is found to be inconsistent with either the principle of separation of powers in the Constitution or with sections 58(1)(b) and 71(1)(b) of the Constitution, the declaration of unconstitutionality should be suspended for a period of twelve months.

49. This court has held that where there exists a number of possibilities for curing the constitutional invalidity and a court is able to provide appropriate interim relief to the affected litigant, it will generally be best to permit the legislature to determine in the first instance how the unconstitutionality should be cured.[54] We submit this would be an *a fortiori* case to do so, concerning as it does measures to maintain order in Parliament – *par excellence* its "pre-eminent domain", in the phrase repeatedly used by this Court.

50. We submit that there are several possibilities for curing constitutional invalidity in the event that this court finds for the DA on the merits. For instance: (a) the definition of '*disturbance*' might be amended; or (b) members might be excluded from arrest and removal in respect of

[54] **Dawood and Another v Minister of Home Affairs and Others; Shalabi v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs** 2000 (3) SA 936 (CC) at par 64.

certain types of disturbance; or (c) removal only (and not the arrest) of members might be provided for; or (d) the involvement of the security services might be substituted with a parliamentary agency and/or specifically stated to be a last resort. The legislature ought to be afforded a reasonable period of time (twelve months we submit) within which to adopt an appropriate legislative response to a finding of unconstitutionality.

CONCLUSION

51. The case is, by choice of the DA, not about a particular decision of the Speaker and Chairperson during any particular event in Parliament. It is about the constitutionality of section 11 of the Act itself.

52. Members of Parliament are, no less than members of the judiciary, subject to constraints of law. Their oath of office itself declares this: to "*obey, respect and uphold the Constitution and all other law of the Republic"*[55]. They are not free of consequences if they do not do so.

53. The DA is wrong in its two main contentions on the merits.

54. Section 11 does not offend the separation of powers.

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[55] Section 2(4) of Schedule 2 to the Constitution.

55. Nor does it infringe the protection under the Constitution accorded to what members say in the discharge of their functions. The privilege does not accord impunity for acts which impede Parliament's ability to function. The privilege is an immunity against civil and criminal consequences outside Parliament for what members say in proceedings. It is not an elevation of some, without regard for whatever members do in, and to, proceedings. It is a protection (that is the true meaning of *privilegium*), to secure constitutional democracy, not a private perk of office. It is functional, to ensure that members can speak without external repercussion, not internal consequences, whether disciplinary or order-rulings by a presiding officer. This is not to indulge individuals set on mayhem; it is to achieve free debate and law-making. The constitutional notion echoes enduring legal policy reflected in the old Latin maxim: *privilegium non valet contra rempublicum.*[56] The values of the Constitution now reflect the public good.[57]

56. The Respondents accordingly ask that their appeal be upheld, and the DA's cross-appeal dismissed, the order of the High Court to be replaced with an order dismissing the DA's application. No order is sought as to costs.

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[56] "A privilege does not avail against the public good".

[57] **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at par 28.

JJ Gauntlett SC

AM Breitenbach SC

Karrisha Pillay

Counsel for the Respondents

Chambers
Cape Town
9 September 2015

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2. **International Trade Administration Commission v SCAW South Africa (Pty) Ltd** 2012 (4) SA 618 (CC)

3. **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC)

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16. **S v Mhlungu** 1995 (3) SA 867 (CC)

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18. **Swartbooi v Brink** 2006 (1) SA 203 (CC)

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24. **S v Van Vuuren** 1983 (4) SA 662 (T)

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26. **Halsbury's Laws of England** 4th ed vol 11 par 99

27. **Dawood and Another v Minister of Home Affairs and Others; Shalabi v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs** 2000 (3) SA 936 (CC)

28. **Barkhuizen v Napier** 2007 (5) SA 323 (CC)