REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Case No: 12189/2014

In the matter between:

JULIUS MALEMA **1st Applicant**

ECONOMIC FREEDOM FIGHTERS **2nd Applicant**

And

THE CHAIRMAN OF THE NATIONAL COUNCIL OF PROVINCES **1st Respondent**

THE AFRICAN NATIONAL CONGRESS **2nd Respondent**

Coram: **BOZALEK et CLOETE JJ**

Heard: **24 NOVEMBER 2014**

Delivered: **15 APRIL 2015**

JUDGMENT

BOZALEK J:

[1] This application involves a review of a ruling made by the presiding Speaker during a joint sitting of the National Assembly and the National Council of Provinces in June 2014 in the course of the debate on the President's State of the Nation address.

[2] First applicant is a Member of the National Assembly and the President and Commander–in-Chief of the Economic Freedom Fighters, a registered political party represented in Parliament and which is also the second applicant.

[3] First respondent is Ms Thandi Modise, the Chair of the National Council of Provinces in her capacity as the presiding officer or Speaker in the joint sitting which was held on 18, 19 and 20 June 2014.

[4] Second respondent is the African National Congress, a registered political party. It is cited only for any interest it might have in the matter and no relief is sought against it. Only first respondent opposes the application.

[5] Applicants seek an order that the following rulings handed down by first respondent during the debate be declared unlawful and invalid and be reviewed and set aside:

5.1 her decision that certain statements made by first applicant *'are unparliamentary and do not accord with the decorum of this House'*;

5.2 her decision to request and then order first applicant to withdraw his statement that the ANC government had massacred the mine workers at Marikana in that the police who killed them represented the ANC government; and

5.3 her decision to ask first applicant *'to leave the House'*.

[6] In addition applicants seek orders that first respondent apologise in public to them for her rulings and interdicting her from *'abusing her powers to protect the governing party against lawful criticism in the parliamentary debate'*.

[7] In due course the record of the proceedings, namely, transcripts from Hansard, were furnished and first respondent filed a full opposing affidavit.

LEGAL FRAMEWORK AND APPLICABLE LEGAL PRINCIPLES

[8] In terms of sec 43(a) of the Constitution of the Republic of South Africa, 1996 the legislative authority of the national sphere of government is vested in Parliament which consists of the National Assembly and the National Council of Provinces. Joint sittings of these Chambers are governed by the Joint Rules of Parliament and presided over by either the Speaker of the National Assembly of the Chairperson of the National Council of Provinces. By arrangement with the Speaker of the National Assembly, and pursuant to Joint Rule 10, first respondent presided at the joint sitting during which first applicant made the remarks which resulted in the rulings which applicants now challenge.

[9] In *Lekota and Another v The Speaker of the National Assembly and Another*[1] a Full Bench of this division was seized of a case similar to the present in which the rulings of the Speaker of the National Assembly, made in response to statements by a Member in a debate which were highly critical of the President, were challenged by way of review.

[10] In that matter the Court observed what it referred to as the trite principle that the Speaker *'although affiliated to a political party, is required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament'*. It continued that '*(w)hen presiding, …the Speaker has to maintain order and apply and interpret its rules, conventions, practices and precedents. In so doing, the Speaker should jealously guard and protect the members' rights of political expression entrenched in the Constitution'*.[2]

[1] [2012] ZAWCHC 385
[2] at paras [11] and [12]

[11] In considering issues concerning the exercise of the right to freedom of speech in Parliament, regard must be had in the first place to the applicable provisions of the Constitution. One of the most important is sec 58(1)(a) which provides that Cabinet Members, Deputy Ministers and Members of the National Assembly *'have freedom of speech in the Assembly and in its committees, subject to its rules and orders'*. Similar provisions relating to the National Council of Provinces are to be found in sec 71(1) of the Constitution. Other central provisions of the Constitution relating to Parliament are found in sec 42(3) which provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution which it does inter alia *'by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action'*.

[12] As was pointed out in *Lekota,* Rule 44 of the Rules of the National Assembly echoes the constitutional guarantee of the right to freedom of speech and debate in the National Assembly (and no doubt a similar Rule applies in the National Council of Provinces), when it states that *'… there shall be freedom of speech and debate in or before this House and any joint committee of Parliament, subject only to the restrictions placed on such freedom in terms of or under the Constitution, any other law or these Rules'*.[3]

[13] Underpinning these provisions are other equally fundamental provisions of the Constitution including sec 1(d) which entrenches as a founding value *'a multi-party system of democratic government, to ensure accountability, responsiveness and openness'* and sec 16(1) of the Bill of Rights which guarantees the right to freedom of expression including the right to receive or impart information or ideas.

[14] The primacy of a Member of Parliament's right to freedom of speech has been consistently recognised by our courts as is illustrated by the following extracts from the

[3] at para [15]

judgment of the Supreme Court of Appeal in *Speaker of the National Assembly v De Lille and Another*[4] where Mahomed CJ stated the following of the guarantee of freedom of speech to Members of Parliament in sec 58 (1) of the Constitution:

> *'It is a crucial guarantee. The threat that a Member of the Assembly may be suspended for something said in the Assembly inhibits freedom of expression in the Assembly and must therefore adversely impact on that guarantee'.*
>
> and
>
> *The right of free speech in the Assembly protected by s 58(1) is a fundamental right crucial to representative government in a democratic society. Its tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament'.*

[15] As noted, the right of Members of the National Assembly to freedom of speech entrenched by sec 58(1)(a) of the Constitution is subject to the *'rules and orders'* of the Assembly. Section 57(1)(b) stipulates in turn that *'the National Assembly may … make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'*. Section 70(1)(b) vests an identical power in the National Council of Provinces. It is noteworthy that such rules and orders may only be made by the National Assembly itself (or by the Council), and not by the Speaker nor anyone else. Thus not only is the power to make rules and orders the preserve of the National Assembly (or the Council), and not that of the Speaker, it is also constrained by the democratic values enumerated in the sub-section.

[16] Also of relevance is the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 which provides, in sec 6, that Members (of both houses) of Parliament have the same privileges and immunities in a joint sitting of

[4] 1999 (4) SA 863 (SCA) at para [20] and [29]

the National Assembly and the National Council of Provinces as they have before the National Assembly or the National Council of Provinces.

[17] It is common cause that first respondent ultimately invoked Rule 14G of the Joint Rules of Parliament in ordering first applicant to withdraw from the House. The Rule provides that '*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 sitting'*. Joint Rule 12 regulates discipline when the Houses sit jointly and provides that the respective Chambers' Rules on discipline remain applicable to members during joint sittings.

[18] The paramountcy of the Constitution in regard to proceedings in Parliament and the role of judicial scrutiny thereof has been authoritatively emphasised, both in *Lekota* and, as appears from the following statement by Mahomed CJ, in De Lille[5]:

> *'No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.'*

[19] This does not mean, however, in matters such as these, that the Courts, using their powers of judicial review, should readily substitute their opinions for those of Parliament or parliamentary officials in relation to matters entrusted to them. As was

[5] At para [14] and quoted with approval in Lekota at para [20]

stated by Davis J in *Mazibuko*[6] *'… An overreach of the power of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the State deal with these matters, can only result in jeopardy for our Constitutional democracy'*.

FACTUAL BACKGROUND

[20] Against the above framework I proceed to set out the excerpts from Hansard which contain and contextualise the remarks made by first applicant for which he was censured.

[21] The President delivered his State of the Nation Address at the joint sitting on 17 June 2014 whereafter it was debated by the two houses sitting together. First applicant participated in the debate on 18 June 2014 and said the following during the course of his speech:

> *'For five months now, workers in the platinum belt have been on strike, which demonstrates their genuine determination. They were striking for R12 500, when the ANC massacred 34 of them two years ago for doing so.'*

[22] A point of order was then raised by a Cabinet Member, Mr B A Radebe, in the following terms:

> *'Chairperson, on a point of order: the speaker said the ANC government massacred people two years ago. Is that parliamentary? Is there any proof of that? Could you rule on that, Chairperson?'*
>
> To which first applicant responded:
>
> *'I maintain that'*
>
> And virtually immediately thereafter:

[6] *Mazibuko v The Speaker of the National Assembly and Others* 2013 (4) SA 243 (WCC) 256H-I

'The ANC government massacred the people in Marikana. Those police were representing the ANC government'.

[23] In short order first applicant made it clear that he would not withdraw the statement complained of and, after being reprimanded by first respondent for not pausing to allow points of order to be dealt with, was allowed to proceed but not before first respondent advised that she would rule on the objection the following day:

'…because it is not an open and shut statement that you make and conclude with. There are many implications with it. I would like to be properly advised when I come back to this House with a ruling tomorrow'.

[24] First respondent duly gave the ruling on the following day, 19 June 2014 in the following terms:

'At the Joint Sitting of 18 June 2014, hon Member Radebe raised a point of order against the statement made by hon Malema during his speech. The statement reads:

They –

referring to the mineworkers –

were striking for R12 500, when the ANC massacred 34 of them two years ago for doing so.

After the point of order was stated, hon Malema maintained his statement and reiterated:

The ANC government massacred the people in Marikana. Those police were representing the ANC government.

Despite an attempt to call hon Malema to order, he insisted that he was not going to withdraw.

I indicated yesterday that I would make a ruling on this matter.

Hon Members, having perused the Hansard, I have arrived at the conclusion that the statements made by hon Malema are unparliamentary and do not accord with the decorum of this House. Although Members enjoy freedom of speech during the proceedings of this House, this freedom is subject to limitations imposed by the Constitution and the Joint Rules.

The statements made by hon Malema suggest that the government – which is made up of Members of this House – deliberately decided to massacre the people of Marikana. This does not only impute improper motives to those Members of the House, but it also accuses them of murder.

Secondly, I must also indicate that there commission (sic) *has been set up by the President to enquire into this matter and that that commission has not yet made any findings. It is therefore undesirable to make statements which will second-guess the outcomes* (sic) *of that commission.*

I want to further remind hon Members of this House that a Ruling made by a Presiding Officer is final. Statements like 'I am not going to withdraw' sound contemptuous and are also challenging to the authority of the officer presiding.'

[25] First respondent thereupon requested first applicant to withdraw his statements *'which said that the ANC and the ANC government massacred the people in Marikana'*. First applicant responded:

'Chair, when the police reduce crime you come here and say that the ANC has reduced crime. When the police kill people, you don't want us to come here and say that the ANC government has killed people. That is inconsistent, hon Chair'.

First applicant refused to withdraw his statements. He was thereupon instructed to do so, after which the following exchange took place:

'Chairperson of the NCOP: *hon Malema I will ask you again to withdraw those statements.*

Mr SJ Malema: *Chair I maintain that the ANC government killed people in Marikana.*

Chairperson of the NCOP: *Hon Malema you leave me no choice but to ask you to leave the House.*

Mr SJ Malema: *No problem.'*

[26] Thereupon first applicant and all other representatives of second applicant proceeded to leave the Chamber.

APPLICANTS' CASE

[27] The applicants' case is that first respondent's ruling that first applicant's statements had been unparliamentary was unlawful and accordingly that he was justified in refusing to withdraw them; further, that his consequent expulsion was unlawful. First applicant contends further that his remarks were his opinion on a matter of high public interest and was a statement about the ANC as the government of the day, saying nothing about any particular individuals.

[28] Apart from the constitutional protection which first applicant contends his statements enjoyed, his case is further that he did not transgress any of the Joint Rules (or any standing order) which were applicable to the debate; more particularly he disputes that his statement directly or by implication accused all or any of the ANC Members of Parliament themselves of murder. First applicant reasoned that his statements had made it clear that he held the ruling party responsible for what he termed the massacre of the 34 mineworkers *'because the police who had killed were representing the ANC government'* and that no reasonable person could have interpreted his statement as meaning that individual ANC Members of Parliament were guilty of murder. First applicant also took issue with first respondent's other reason for her ruling, namely, that relating to anticipating the findings of a commission of inquiry.

[29] Applicants also contend that first respondent's rulings were unlawful under the provisions of the Promotion of Administrative of Justice Act, No 3 of 2000 (*'PAJA'*) inasmuch as first respondent was clearly biased, her decision was based on a material error of law in that first applicant's statements had not been unparliamentary and, that she had acted in bad faith for an ulterior purpose, namely, to protect second respondent against legitimate criticism.

[30] Finally, first applicant contends that first respondent could not reasonably have held the opinion that he was in breach of Rule 14G of the Joint Rules and thus subject to expulsion since her opinion had been based on the incorrect and unlawful premise that his statements had been unparliamentary.

[31] In justification for the further relief sought, namely, the apology and the interdict, first applicant contends that he and his party have been embarrassed and harmed by first respondent's rulings in that they created the impression that his criticism of the ANC had been unlawful, hence the need for a public apology. Secondly, he contends, an interdict is necessary to prevent first respondent from abusing her power in future in order to protect the governing party, of which she is a member, against lawful criticism in parliamentary debate.

FIRST RESPONDENT'S CASE

[32] In broad outline first respondent's case is that, since the government is largely comprised of Members of Parliament, more particularly Members of the National Assembly, first applicant's statement to the effect that the ANC massacred the people in Marikana reflected on those Members and was therefore unparliamentary. First respondent contends further that when she ordered first applicant to withdraw the offending remarks she acted in accordance with well-established precedent and a National Assembly standing order which is routinely followed. First respondent contends that, by refusing to withdraw his remarks, first applicant disregarded her authority as chair and she was accordingly entitled to order him to withdraw immediately from the Chamber for the remainder of the day's sitting.

[33] First respondent denied that her rulings were subject to the provisions of PAJA or, if they were, that there was any basis for her ruling to be set aside on any of the grounds relied upon by the applicants. Finally, first respondent contended that the Courts should not interfere with a bona fide exercise on her part of a discretionary

power which, in the present instance, had been exercised consistent with well-established precedents.

DISCUSSION

[34] It was recognised in *Lekota*[7] that the codified rules of Parliament may be augmented by occasional orders and resolutions adopted by the National Assembly and that *'such occasional orders and resolutions endure beyond the session during which they were adopted and accordingly have the status of so-called 'standing orders'*. These continue to apply until repealed or amended.

[35] As was the case in *Lekota,* a particularly important standing order, relevant for the purposes of the present application as well, was adopted by the National Assembly on 16 September 1997 and continues to apply. That standing order followed a statement to the House made by former Speaker of the National Assembly, Dr F N Ginwala, on 17 September 1996 which reads as follows:

> *'Section 55(2) of the Constitution* [the precursor to the current s58] *establishes that there shall be freedom of speech in or before this House subject only to the restrictions placed on such freedom in terms of the Constitution any other law and Parliament's own Rules.*
>
> *Rule 96* [the precursor to NA Rule 63] *states that no Member shall use offensive or unbecoming language. It is the function of the presiding officer to judge whether a particular remark made in debate is offensive and contrary to the Rules. In arriving at a decision, the presiding officer will also be guided by any precedent Parliament has set for itself.*
>
> *There have already, since 1994, been a number of rulings from the Chair that Members may not impute improper motives to other Members or cast personal reflections on their integrity as Members, or verbally abuse them in any other way. This approach is also in keeping with the practice in many other Parliaments. If such accusations, whether made directly or by inference, were to be generally allowed in debate in this House, they would not only seriously undermine members in the performance of their duties, but they would*

[7] at para [17]

also undermine the image and effectiveness of Parliament itself to function as the Constitution intends.

Accusations are equally offensive and damaging if they are made indirectly by reference to views held by others, or even if they are put forward by way of a question, because then clearly no substantiation is being offered which could give credence to this allegation. That is not to say that if a Member has good reason to believe that another Member may be engaged in corrupt practices or may be improperly influenced in his or her actions for personal financial gain, such matter should not brought to the attention of the House.

Action should, however, be taken in the proper manner. In such circumstances, it is sound practice to require that a Member institute a charge against the Member concerned by way of a separate, substantive motion which admits of a distinct vote of the House...

For such a charge to be brought before the House, by way of substantive motion, the charge would, incidentally, have to be clearly formulated and properly substantiated. Once the Register of Members' Interest is in operation, a complaint may, when appropriate, also be lodged with Committee on Members' Interests.'

[36] It is first respondent's case that Speaker Ginwala's aforesaid ruling, inter alia through the adoption of the recommendations in the so-called Jana Report, resulted in the status of a standing order being conferred upon it in the following terms:

'1. A Member who wishes to bring any improper conduct on the part of another Member to the attention of the House, should do so by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge; and

2. Except upon such a substantive motion, Members should not be allowed to impute improper motives to other Members, or cast personal reflections on the integrity of Members, or verbally abuse them in any other way'.

[37] First respondent stated that this standing order *'in part'* informed her decision to request first applicant to withdraw the offending remarks but at another point in her opposing affidavit, stated that, in effect, this was the *'only reason'* why she insisted he withdraw his remarks. In regard to the second reason which she gave for her ruling in her original motivation viz anticipating the findings of a judicial commission of inquiry,

first respondent conceded in her opposing affidavit that the findings of a judicial commission of enquiry are not judicial decisions and that the sub-judice rule embodied in Joint Rule 14Q was not applicable. First respondent went further by disavowing any reliance on her statement that the matter was being investigated by a commission of inquiry as a reason for finding that first applicant's statements were unparliamentary. This does not detract, however, from the fact that, on a plain reading of her ruling, first respondent appeared to offer this factor as a further reason why first applicant's statements were unparliamentary.

[38] Insofar as first applicant's remarks referred to a collective, first respondent relied on a series of rulings made by previous Speakers which, according to first respondent, established the principle that remarks referring to the '*ANC leadership'* were in fact remarks about individual Members of the House because a large part of the leadership of the ANC were Members of the House. One such ruling was made on 12 September 2013 when the then Speaker of the National Assembly, Mr M V Sisulu, ruled that remarks concerning the *'democratic government of the ANC'* were a reference to *'members of the executive as a collective since they, in terms of the Constitution, comprised the government at national level'* and *'members of the executive in the National Assembly enjoy the same protection under the Rules as other members of the House'.* Inasmuch as these were merely Speaker's rulings, as opposed to *'rules and orders'* of Parliament, they cannot, in my view, carry anything approaching the same weight. A ruling in this context is nothing other than an interpretation of a "rule" or "order". To the extent that Mr Sisulu's ruling is to be regarded as a precedent, it is plain from the statement of Dr Ginwala that such "precedents" shall be for guidance only. Accordingly, each case nonetheless falls to be determined on its own particular facts against the legal framework to which I have already referred.

[39] Mr Sisulu had also relied on the *'firmly established practice'* that a member who wishes to impute improper motives to another member of the House, including members of the executive, must do so by way of a substantive motion, supported by prima facie evidence. As it happened that ruling also concerned a statement that the ANC government was complicit in the killing of workers at Marikana. First respondent stated in her affidavit that her ruling relied on, and was consistent with, the aforesaid ruling and an earlier ruling in similar circumstances.

[40] First respondent also emphasised that first applicant was not prohibited from saying what he had but was required to say so in the context of a debate on a substantive motion; furthermore, that the sanction imposed, i.e. exclusion from the House for the remainder of the day's sitting, was not punishment for what he had previously said, but involved the exercise of a power in terms of Joint Rule 14G which stipulates that if a Member disregards the authority of the Chair he or she may be ordered to withdraw immediately from the House for the remainder of the day's sitting.

[41] Central to first respondent's ruling was her understanding, expressed in her opposing affidavit, that the concept *'government'* refers, at national level, not to the governing party but to the executive authority of the Republic which is vested in the President, who exercises it together with other Members of the Cabinet, coupled with the constitutional requirement that no more than two Ministers and two Deputy Ministers may be selected by the President from outside the Members of the National Assembly. *'It is clear therefore'*, she reasoned, *'that the vast majority of Members of the government are Members also of the NA and, in any event, those who are not Members also enjoy the protection of the Rules when they participate in the business of the NA and a Joint Sitting'* (para 18.74).

[42] First respondent conceded that first applicant could not, in keeping with her ruling, have moved a substantive motion at the joint sitting but stated that he would have been at liberty to do so in the National Assembly.

[43] Insofar as first respondent relies upon the ruling of Speaker Dr F N Ginwala on 17 September 1996 which has since acquired the status of a standing order, its validity is not challenged by the applicants. Nor, as I understand the applicants' case, do they dispute the validity of the Rules and practice which prescribe the consequences of a Member failing to abide a ruling of the Speaker. Their case is, rather, that first respondent's ruling that first applicant's statement was unparliamentary was unlawful with the result that her directions that he withdraw the statement and, when he failed to do so, that he leave the House, were consequently also unlawful.

[44] In determining the lawfulness of first respondent's ruling the question arises as to which legal principles must be applied. In *Lekota* Fourie J, writing on behalf of the Court, stated[8] that in determining whether the Speaker had the lawful authority to make the impugned ruling, the starting point is the Constitution. As I indicated earlier, the relevant provisions of the Constitution are obviously pre-eminent, particularly insofar as they establish a National Assembly elected by the people as part of a system of democratic government to ensure accountability, responsiveness and openness and insofar as they afford a guarantee of freedom of speech in Parliament subject to that body's *'rules and orders'* and legislation enacted by Parliament in that regard. As was said by Davis J in *Mazibuko*[9] *'The public, in effect, own the national forum, parliament. It is the body of the citizens of South Africa in that it is comprised of the people's representatives, and the people are entitled, as citizens of South Africa, to hear what our national representatives have to say about a matter of such pressing importance'.*

[8] in para [13]
[9] at 255E-F

[45] A second important constitutional principle is that arising from, or being a manifestation of, the doctrine of the separation of powers, namely, that the courts must recognise the proper role of the other branches of government under the Constitution and treat their decisions with the appropriate respect. This principle enjoins a court, in a matter such as this, to not freely and lightly interfere with the decisions of Parliament, including officials such as the Speaker, in so doing attributing to itself superior wisdom in matters which have been entrusted to Parliament. It was for this reason that Davis J stated in *Mazibuko,* in the context of warning against the danger of the judiciary in South Africa being drawn into all manner of political disputes, that *'…judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business'*[10].

[46] On the other hand, regard being had to the courts' fundamental duty in terms of sec 172(1)(a) of the Constitution to '*declare that any law or conduct that is inconsistent with the Constitution' … 'invalid to the extent of its inconsistency',* they must not shirk their responsibility of ensuring that organs of State, including the legislative branch, operate *'within a constitutionally compatible framework'*. To quote again from *Mazibuko*[11] *'Courts do not run the country nor were they intended to govern the country. Courts exist to police the constitutional boundaries … where the constitutional boundaries are breached or transgressed, courts have a clear and express role; and must then act without fear or favour'*.

[47] The parties were not in agreement as to whether first respondent's rulings could be challenged under the provisions of PAJA. This issue raises two constituent questions: firstly, whether first respondent's rulings constituted *'administrative action'* as defined in sec 1 of PAJA or whether they were excluded from this definition by virtue of the exemption provided in the Act for *'the legislative functions of Parliament';* secondly,

[10] See in this regard the remarks of the court in *Lekota* at paras [22] and [23]
[11] *at 256E-F*

it raises the question of whether first respondent's rulings had *'a direct external legal effect'*. In the view that I take of this matter, however, I consider that it is unnecessary to determine the applicability of PAJA since it was common cause that first respondent's rulings were, at the very least, subject to review under the principle of legality[12].

[48] In determining the test to be applied in reviewing the Speaker's rulings, the Court in *Lekota* held[13] that the question was whether the Speaker had acted *'in a manner consistent with the Constitution and the rights and values for which it provides. Put differently, she has to perform her functions in accordance with the constitutional principle of legality which requires her to act within the powers conferred upon her by the law and, in particular the Constitution'* ... *'What it effectively boils down to, is that applicants are required to show that, in making her rulings, second respondent exercised a power which she did not legally have or that she materially misconstrued the power afforded to her. Put differently, it requires proof that second respondent acted unlawfully or irrationally to the extent that her rulings should be set aside'*.

[49] I respectfully associate myself with these dicta. It must also be borne in mind that first respondent, as Speaker, has a duty to maintain order during debates and to this end has to apply the applicable rules and standing orders. Importantly, furthermore, this being a review and not an appeal, the question is not whether first respondent was right or wrong in her ruling or whether the Court would have come to a different conclusion. Again, to cite Lekota[14], *'(u)ltimately the question remains whether second respondent misconstrued her discretion to the extent that the court should interfere by setting her rulings aside.'*

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[12] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at paras [58] and [59]*.
[13] at paras [29] and [30]
[14] at para [31]

[50] *Lekota* offers valuable guidance for the present matter inasmuch as it concerned remarks ruled unparliamentary by the Speaker on the basis of the same standing order as that relied upon by first respondent in the present matter. In that case the remarks were directed by the applicant at the State President and their central thrust was that he had failed to observe his oath of office through the manner in which he had dealt with a certain public controversy in which he was indirectly embroiled. The Court analysed the contents of the President's oath of office and concluded that the remarks in question constituted a serious attack on his integrity, inter alia, in that they clearly conveyed that he was not an honest person and did not have strong moral principles. As such, the Court held, the remarks cast a serious reflection on his integrity as a member of the National Assembly.

[51] Before analysing the remarks made by first applicant in this matter and the reasoning behind first respondent's rulings that they were in breach of the standing order, some attention needs to be given to the rationale behind the standing order. It will be seen from the statement originally made by Speaker Ginwala that the primary rationale for what became the standing order is that debate in Parliament should not, without proper procedures being observed, be allowed to descend to personal invective where improper motives are imputed to Members, personal reflections are cast on their integrity or they are verbally abused. In order to ensure that the right to freedom of speech is not unduly fettered by any such ruling, provision is made for the Member intending to cast such aspersions to do so only by way of a substantive motion, clearly formulated and properly substantiated. As Mr Trengove colloquially put it in argument on behalf of the applicants, the standing order says *'don't get personal'*.

[52] Both Speaker Ginwala's statement and the terms of the recommendations of the parliamentary committee which encapsulated the ruling of the Speaker primarily envisage a situation where slights or aspersions are cast against the integrity of

individual Members of the House. This is not to say that the standing order can have no bearing on statements which reflect on the integrity or motives of a number or group of Members of the National Assembly or the National Council of Provinces. In my view, however, in determining whether the standing order is applicable to such a statement, sight must not be lost of the rationale for the original ruling, nor of the overall constitutional background and framework, namely, the right of every Member to freedom of speech having due regard to *'representative and participatory democracy, accountability, transparency and public involvement'*.

[53] Against this background consideration must be given to the reasoning underlying first respondent's ruling that first applicant's statement was unparliamentary. The core of first respondent's reasoning, as expressed in her ruling, was that first applicant's remarks suggested that the government, which is made up of Members of the House, deliberately decided to massacre the people of Marikana and this was an allegation which not only imputed improper motives to certain individual Members of the House but also accused them personally of murder.

[54] In her opposing affidavit first respondent shed further light on her reasoning which, in a nutshell, was that the concept *'government'* refers to the executive authority of the Republic which is vested in the President together with other members of the Cabinet. National Assembly rules continue to apply to the President whilst taking his or her seat in the House and apply also to the members of his or her Cabinet. The conclusion which she reached was[15]:

> *'It is clear therefore*, *that the vast majority of Members of the government are Members also of the NA and, in any event, those who are not Members also enjoy the protection of the Rules when they participate in the business of the National Assembly and a Joint Sitting.'*

[15] Summed up in para [18.74] of first respondent's opposing affidavit

[55] First respondent's case is then that first applicant's statement meant that individual Members of Parliament, i.e. members of the executive, had *'deliberately decided to massacre the people of Marikana'* and were guilty of murder. To arrive at this conclusion, not only must no allowance be made for rhetoric or hyperbole, but one has first to assume that first applicant's remarks were directed or could reasonably be understood to be directed at the President and all members of the Cabinet and, secondly, that they denoted that such persons had *'deliberately decided to massacre the people of Marikana'*. These, however, are far-reaching assumptions which, on the face of it, do not appear to be borne out by first applicant's statements.

[56] Firstly, seen in its proper context, first applicant's statement appeared rather to express his view that he held the ruling party responsible for the killing of the 34 mineworkers because the police who had killed them *'were representing the ANC government'*. In fact his initial remark, and which elicited the objection, made no mention of the government but assigned responsibility for what he termed the *'massacre'* to the ANC. When Minister Radebe rose on a point of order and incorrectly attributed to first applicant the statement that the *'ANC government'* had massacred the people, first applicant responded, in part, by stating that those police were representing the ANC government, which appeared to imply no more than that he held *'the government'* vicariously liable for the actions of the police.

[57] Secondly, as was contended on behalf of applicants, it was a somewhat contrived interpretation of first applicant's statement to suggest that its meaning was that '*the government deliberately decided to massacre the people of Marikana'*, i.e. literally accusing certain individual Members of murder. It is noteworthy that first applicant made no allegation concerning any particular person in 'government', which tends to belie the imputation relied upon by first respondent, namely, that first applicant was accusing particular Members of Parliament of mass murder.

[58] Furthermore, as was argued by counsel on behalf of the applicants, the term '*government*' can bear different meanings in different contexts. It might, in different contexts, refer to the National Executive, the civil service or even to all Members of the ruling party in Parliament. Moreover, if the term *'government'* is automatically assumed to be a reference to the President and all members of the Cabinet the effect would be to severely limit robust debate in Parliament. On such an interpretation it would not be open to a member of the National Assembly to contend that *'the government squanders tax-payers money'*, *'the government is callous about the plight of the poor'* or that *'the government misleads the public'*. All of these allegations would fall to be ruled in breach of the standing order and unparliamentary because they refer to those individual Members of the national executive who sit in Parliament.

[59] In my view one of the principal assumptions underlying the Speaker's ruling, namely, that first applicant's reference to *'the government'* must be construed as a reference to the Cabinet and therefore a reference to individual Members of the National Assembly was, in the circumstances of this matter, unwarranted. What is more, adopting such an expansive interpretation of both the term *'government'* and Speaker Ginwala's ruling, potentially at least, places a severe limitation on the scope of debate in Parliament. What previously might have been commonplace assertions in debate would now amount to unparliamentary speech, and could only be made upon the tabling of a substantive motion but which, in many circumstances, could not feasibly be placed in such a form. Furthermore, even if feasible, the requirement of such a motion being tabled in itself would not only amount to a significant restriction on the freedom of speech of Members of Parliament but, on occasion, would effectively be an absolute one. In the present instance first respondent herself admits that first applicant could not have moved a separate motion in a joint sitting of Parliament. The result is that he was

precluded altogether from making the challenged remarks during the debate on the President's state of the nation address.

[60] Reverting to the test adopted in *Lekota* and making due allowance for the deference which must be shown by the courts to the decisions of the Speaker in their area of expertise and responsibility, I nonetheless consider that, in invoking the provisions of the standing order, and in finding that first applicant's statements were unparliamentary, first respondent materially misconstrued the order's reach. The irrationality underlying the ruling lay principally in first respondent holding that first applicant's statement imputed improper motives to those Members of Parliament who were members of Cabinet or reflected on their integrity by literally accusing them personally of murder. The finding of irrationality is also informed by first respondent's partial reliance, at the time of making her ruling, on an invalid reason viz that first applicant's statement anticipated the findings of a judicial commission of inquiry. In the light of the far-reaching implications of first respondent's interpretation of the standing order and its application to first applicant's statement, I consider that the Court has no alternative but to hold that first respondent's initial ruling and those that followed therefrom, were unlawful.

REMEDY

[61] Flowing from the above findings the Court must consider what remedy, if any, must be afforded to the applicants. In doing so the Court is guided by the provisions of sec 172(1) of the Constitution which provides that a court must '*declare that any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency'* and may make *'any order that is just and equitable'*. Given the finding that first respondent's rulings were unlawful, the primary relief sought by the applicants must be granted, namely, that the various decisions made by first respondent on 19 June 2014 fall to be reviewed and set aside. As far as the further related relief

sought by the applicants is concerned, viz that these rulings be declared unlawful and invalid, the very rationale for setting such decisions aside is that they were unlawful and I therefore regard such further declaratory relief as unnecessary.

[62] The applicants also seek an order that first respondent be ordered to apologise in public to the applicants for her rulings. I can see no basis at all for any such relief. Applicants have not succeeded in making out a case that first respondent acted *mala fide* in making her rulings. In my view there is nothing on the record to suggest that first respondent did not hold the *bona fide* view that first applicant's statements were unparliamentary by reason of breaching the standing order.

[63] Similarly, the applicants have failed to make out a case for the further order sought, namely, that first respondent be interdicted from abusing her powers to protect the governing party against *'lawful criticism in parliamentary debate'*. Once again there is nothing in the record to suggest that first respondent did not intend to act impartially and in keeping with her *bona fide* view of what her powers and duties as Speaker required of her. In fact the transcript of the proceedings as set out in Hansard indicated that first respondent sought to perform her duty in a measured and dignified manner, as befits the office of Speaker. The relief in question cannot be granted.

COSTS

[64] As regard the question of costs the applicants have obtained substantial relief insofar as they have established that first respondent's rulings were unlawful and fall to be set aside. In these circumstances costs must follow the result.

ORDER

[65] For these reasons the following order is made:

1. ***The following decisions by first respondent on 19 June 2014 are reviewed and set aside:***

    1.1 Her decision that statements made by first applicant 'are unparliamentary and do not accord with the decorum of this House'.

    1.2 Her decision to request and order first applicant to withdraw his statement that the ANC government had massacred the mineworkers at Marikana in that the police who killed them represented the ANC government.

    1.3 Her decision to ask first applicant to 'leave the House'.

2. ***The applicants' costs, including the cost of two counsel, are to be paid by first respondent.***

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BOZALEK J

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CLOETE J

APPEARANCES

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