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

CASE NO. 2749/2015

In the matter between:

PRIMEDIA BROADCASTING, A DIVISION OF PRIMEDIA [PTY] LTD	1ST APPLICANT
SOUTH AFRICAN NATIONAL EDITORS' FORUM	2ND APPLICANT
RIGHT2KNOW CAMPAIGN	3RD APPLICANT
OPEN DEMOCRACY ADVICE CENTRE	4TH APPLICANT

AND

SPEAKER OF THE NATIONAL ASSEMBLY	1ST RESPONDENT
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	2ND RESPONDENT
SECRETARY TO PARLIAMENT	3RD RESPONDENT
MINISTER OF STATE SECURITY	4TH RESPONDENT

CORAM: DLODLO, J et HENNEY, J et SAVAGE, J

JUDGMENT DELIVERED ON THURSDAY, 28 MAY 2015

DLODLO, J

[1] On 12 February 2015 the President's annual State of the Nation Address (SONA) was characterised and almost marred by two incidents forming the subject matter of the present application. These incidents are that in the first place the State Security Agency employed a device that jams mobile telecommunication signals. Consequently journalists and MPs attending SONA were rendered unable to use their cellphones in order to inform members of the public not in attendance about the happenings in Parliament. This, however, lasted for a short period as it was swiftly addressed by the relevant authorities. Secondly, the Applicants aver that members of the

public were denied the right to see for themselves events of national importance occurring on the floor of the Parliamentary Chamber when the following took place:

(a) Members of the Economic Freedom Fighters (EFF) sought to ask the President questions relating to payments of some money spent on his Nkandla residence. The First Respondent the (Speaker) refused to allow the questions. However, the EFF MPs refused to obey the directive by the Speaker. Following the order of the Speaker a number of security personnel entered the Chamber and an altercation took place between the security personnel and the EFF MPs. Eventually the security personnel removed the EFF MPs from the Chamber.

(b) The Applicants contend that apart from the initial EFF questions these events of significance were not captured in the official Parliamentary feed. Instead the feed showed only the face of the Speaker and the Second Respondent (the Chairperson) while the MPs were forcefully removed from Parliament.

(c) It is maintained by the Applicants that members of the public who wished to know what occurred relied on subsequently distributed cellphone footage or second-hand accounts from those who had been present.

[2] The application launched had two parts known as Part A and Part B. It is common cause that in Part A the Applicants sought an interdict in respect of all open sittings of the National Assembly or National Council of Provinces, joint sitting of Parliament or open meetings of their Committees pending the outcome of Part B of the application. The second relief sought in Part A was couched as follows:

"The First to Third Respondents are directed to ensure that the audio and visual feeds of such sittings and meetings are not interrupted and that during occurrences of "grave disturbances" or "unparliamentary behaviour", a

wide angle shot of the chamber, including audio, will be broadcast." The urgent application for interim relief (Part A), was, however, unsuccessful and was dismissed by the Court.

[3] There are two issues that arise from the amended Part B relief sought by the Applicants. These are (a) the Constitutional validity of paragraph 8.3.3.2 (a) of Parliament's Policy on Filming and Broadcasting ("the Policy") and (b) whether any order is to be made regarding the jamming incident that occurred shortly before the SONA on 12 February 2015. The Applicants seek an order declaring paragraph 8.3.3.2 (a) of the Policy unconstitutional and invalid. Additionally, the Applicants (in their fourth notice of motion accompanied by Supplementary Replying Affidavit) seek a similar order in respect of the relevant rule contained in Parliament's Rules of Coverage ('the Rules').

[4] In the alternative to the attack on paragraph 8.3.3.2 (a) of the Policy [and the relevant rule], the Applicants seek an order declaring the whole of the Policy to be unconstitutional and invalid. The Applicants also seek an order declaring the use of the jamming device shortly before the SONA unconstitutional and invalid. It may be mentioned that initially the Applicants sought relief of a structural interdict to direct the Respondents' investigations into the jamming incident. This, however, has been abandoned in the fourth notice of motion. The application is of course opposed by the Respondents.

BACKGROUND AND A BRIEF OVERVIEW OF RELEVANT LEGISLATIVE FRAMEWORK

[5] The Speaker of the National Assembly ('NA') is elected in terms of section 52 of the Constitution of the Republic of South Africa, 1996

('Constitution'). She is cited as the First Respondent in these proceedings. In terms of section 3 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("the Powers and Privileges Act"), the Speaker of the NA, together with the Chairperson of the National Council of Provinces ("NCOP"), jointly exercise control over the precincts (as defined in the Powers and Privileges Act) on behalf of Parliament. The Chairperson of the NCOP is cited as the Second Respondent in these proceedings. In terms of section 5 (1) of the Financial Management of Parliament Act 10 of 2009 ("FMPA") the Speaker of the NA and the Chairperson of the NCOP act jointly as the executive authority of Parliament. In terms of section 6 (1) and (2) of the FMPA the Secretary to Parliament is the accounting officer who is accountable to the executive authority for the financial management of Parliament. The Secretary is cited as the Third Respondent in these proceedings.

[6] As highlighted in the introductory portion of this judgment the application arises mainly from the SONA which took place on 12 February 2015. The SONA is called by the President of the Republic of South Africa in terms of section 84 (2) (d) of the Constitution read with Joint Rule 7 (1) of the 6th edition of the Joint Rules of Parliament ("Joint Rules"). The two Houses of Parliament (the NA and the NCOP) convene a joint sitting to afford the President of the Republic of South Africa the opportunity to address the Nation on the State of the Republic of South Africa. Thus for purposes of the joint sitting the Speaker of the NA and the Chairperson of the NCOP are the Presiding Officers.

[7] Parliament applies its Policy on Filming and Broadcasting which was approved and became effective in August 2009. The Policy on Filming

and Broadcasting is described by the Respondents as an administrative document aligned with international best practice of filming and broadcasting in Commonwealth Parliaments. In terms of section 3 of the Policy *"Parliament will allow filming and taking of pictures of its precinct and the recording of proceedings for public broadcasting that is in the public interest and related to the main business of Parliament in conformity with acceptable standards of dignity, appropriate behaviour and conduct."* The main purposes of the Policy are:

(a) "to regulate all filming within the precinct of Parliament and provide guidelines on public broadcasting of proceedings of Parliament and related matters, including the use of flash photography and bright camera lights" (section 1 of the Policy);

(b) "[t]o manage filming, taking pictures of precinct of Parliament and broadcasting of the business of Parliament" (section 4 of the Policy);

(c) "[t]o regulate the recording of proceedings of Parliament for public broadcasting" (section 6 (a) of the Policy);

(d) "[t]o regulate filming and taking of pictures within the precinct of Parliament" (section 6 (b) of the Policy).

Control of broadcasting falls under the Presiding Officers and Chairpersons, with the manager of the Sound and Vision Unit as the line function manager (section 8.2.1.3 (b) of the Policy). The Policy is followed by the Sound and Vision Unit in Parliament to operate the cameras in the Chambers and certain Committee Rooms.

[8] The provision contained in paragraph 8.3.3.2 (a) of the Policy which provides for the broadcasting of proceedings on occasions of *'grave disorder'* (rather than *'grave disturbance'*) and *'unparliamentary behaviour'*, (we are told) mirrors the practices of other commonwealth countries referred to in a paper written by an internationally regarded

authority (Mary Raine of the BBC) on Parliamentary broadcasting, titled *'Broadcasting Parliamentary Spreads Throughout the Commonwealth'* attached to the Respondents' Answering papers marked as "BM3". The Policy is itself informed by the Internal Rules of Coverage. These Rules (as we gather from the papers) of Coverage are designed to regulate the televising of proceedings in Parliament in a manner promoting public access, openness and accountability. The objective of the Rules is reportedly to assist the director in close collaboration with the manager of the Sound and Vision Unit, to give full, fair and accurate account of proceedings with the aim of informing viewers about the work of the Houses of Parliament. These Rules are attached to the Respondents' Answering papers and are marked "MB4". The Rules of Coverage contain guidelines for picture direction that are reasonable and further the aim of informing viewers about the work of the Houses.

[9] In sketching this background I must hasten to mention that Parliament has the necessary (own) infrastructure to provide a broadcast feed of the proceedings of the Houses and certain committee venues to accredited media. We are told that at the request of the media, Parliament upgraded its audio-visual equipment during the 2014 financial year to provide for high definition broadcasting. There are, reportedly, eight static cameras in the National Assembly Chamber which houses the joint sittings of Parliament. The cameras (we are told) are aligned to the programme of the proceedings of the day. Members of the media are only allowed to take their own audio-visual equipment into the venues that are not already equipped with audio and visual recording equipment. The constitutional standards for the NA, the NCOP and Committees are set out in sections 59 and 72 of the Constitution. These provisions allow Parliament, when it is reasonable and justifiable to do so, in an open and democratic society,

to exclude the public including the media. The Rules of Parliament have a number of provisions that regulate public access.

[10] Sections 57 (1) and 70 (1) of the Constitution of the Republic of South Africa provide that the NA and the NCOP may determine and control their internal arrangements, proceedings and procedures, and make rules and orders concerning their business. Sections 59 (1) and 72 (1) of the Constitution provide that the NA and the NCOP must conduct their business in an open manner, and hold their sittings in public, but reasonable measures may be taken to regulate public access, including access of the media. Section 21 (1) of the Powers and Privileges Act provides that-

'No person may broadcast or televise or otherwise transmit by electronic means the proceedings of Parliament or of a House or committee, or any part of those proceedings, except by order or under the authority of the Houses or the House concerned, and in accordance with the conditions, if any, determined by the Speaker or Chairperson in terms of the standing rules.'

[11] The standing rules relating to the broadcasting of Parliamentary proceedings are titled 'Rules of Coverage' ('the Rules'). The Rules are for the televising of proceedings of Parliament. Following a participative process the Rules were adopted by the Joint Rules Committee on 19 September 2003, and they are applied in both the NA and the NCOP. It is important to emphasise that the Rules are thus devised for Parliament's functioning by Parliament itself, on a fully cross-party deliberative basis. These are attached as Annexure "BM4" to the Respondents' papers herein. Lastly, in August 2009 the Speaker of the NA and the Chairperson of the NCOP approved a more general policy, the Policy on Filming and

Broadcasting, to regulate all filming within the precinct of Parliament and to provide guidelines on the public broadcasting of Parliamentary proceedings and related matters. The Policy became effective on the date of signature. It is attached to the Applicants' Founding Affidavit as "PG8".

[12] The Rules of Coverage were reportedly tabled before the Joint Rules Committee as a means to regulate the filming and broadcasting of the proceedings of the NA, the NCOP and joint sittings of the Houses. They are based on the Rules of Coverage applied in the UK Parliament. They were initiated by the Joint Subcommittee on Internal Arrangements in 2001, which circulated them to the parties and referred them to the Chief Whips' Forum. This tends to point to what the Respondents call, the cross-party deliberative manner in which the Rules were produced. The Rules, undoubtedly, drew on the cumulative experience of members of Parliament in adjudging what best advance not only the dignity but also the functioning of Parliament.

[13] The specific rule that provides that the camera will focus on the occupant of the chair during the incidents of disorder or unparliamentary behaviour, as I gather from the Answering papers, was extensively discussed by the Joint Rules Committee. A view was expressed that this *'could amount to censoring'* and that it is *'impractical'* but the latter view (as I am advised) was subjected to a debate. Parliament itself was therefore alive to any notion of censorship or secrecy on the one hand, and on the other, the need to ensure that Parliament's dignity and ability to continue functioning were preserved.

DISCUSSION OF IMPUGNED MEASURES AND THE JAMMING DEVICE

(A) BROADCASTING AND TELEVISING

[14] The Policy and the Rules together govern all filming and broadcasting within the precinct of Parliament including live broadcasting of proceedings. Paragraph 8.3.1.1 of the Policy confirms the exclusive right of Parliament's in-house Sound and Vision Unit to film live proceedings of Parliament. Importantly, I set out paragraph 8.3.3.2 (a) of the Policy which the Applicants are attacking in these proceedings. This reads as follows:

"Disorder on the floor of the House:

(a) Televising may continue during continued incidents of grave disorder or unparliamentary behaviour for as long as the sitting continues, but only subject to the following guideline:

i. On occasion of grave disorder, the director must focus on the occupant of the Chair for as long as proceedings continue, or until order has been restored; and

ii. In cases of unparliamentary behaviour, the director must focus on the occupant of the Chair. Occasional wide-angle shots of the chamber are acceptable."

The Policy also prohibits filming of *"disorder in the galleries on the basis that it does not constitute proceedings"*. The Applicants, however, do not challenge the latter aspect of the Policy. Clause 2 of the Rules defines *"grave disorder"* as follows:

"Incidents of individual, but more likely collective, misconduct of such seriously disruptive nature as to place in jeopardy the continuation of the sitting."

Notably both Rules and the Policy define *"unparliamentary behaviour"* as follows:

"[a]ny conduct which amounts to defiance of the person presiding over the proceedings, but which falls short of grave disorder" (See paragraph 2 of the Policy).

[15] The premise of the Applicants' case is that all South Africans have a right to know what happens in Parliament and that includes a right to see and hear for themselves disruptions by members of Parliament. Mr Budlender expanding on the right to know what happens in Parliament contended as follows:

"The Constitution affords all South Africans a right to know what happens in Parliament. They have a right to see and hear for themselves what is said. They have a right to see and hear for themselves what is done, and what is not done. They have a right to know how their elected representatives conduct themselves, whether honourably or dishonourably. They have a right to assure themselves that the proceedings of Parliament are conducted fairly – that all Members of Parliament are treated equally and with respect. Parliament has a concomitant obligation to respect, protect, promote and fulfil that right. Parliament must take all steps necessary to ensure that the proceedings of Parliament are easily and freely available to all those who are interested in them. They must ensure that there is an accurate and complete record of what occurs in Parliament. Particularly given that most South Africans obtain their information from radio and television, Parliament cannot prevent or unreasonably limit media access. Parliament cannot insist on positive coverage, or insist that the media leave out embarrassing details about members who misbehave themselves. It is not entitled to compel positive depiction of its activities; it can only insist on accurate

representation. It is then for South Africans to decide whether their elected representatives conducted themselves appropriately or not. There is no reasonable basis for Parliament to restrict the information which South Africans have available to take that decision."

[16] Mr Budlender also dealt with the right to an open Parliament and the fact that the Constitution's underlying values of openness and accountability is one of the pillars on which the right to an open Parliament rests. I have no quarrel with these submissions. Sections 59 (1) (b) and 72 (1) (b) of the Constitution require the NA and NCOP to *"conduct [their] business in an open manner and hold [their] sittings, and those of its committees in public."* However, they may in terms of sections 59 (1) (b) (i) and 72 (1) (b) (i) take measures to *"regulate public access, including access of the media"* but of course the measures taken must be reasonable. I also agree with the submission that the right to an open Parliament underpins the right to public participation in the law-making and other processes of the NA and NCOP assured in sections 59 (1) (a) and 72 (1) (a) of the Constitution. We have been referred to ***Doctors for Life International v Speaker of the National Assembly*** [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) particularly at paragraph 137 where *inter alia* the following is documented:

"Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarise themselves with the law-making process and thus be able to participate in the future."

Mr Budlender referred us to ***Democratic Alliance v African National Congress and Another*** [2015] ZACC1 at para 122 where the Court expresses itself as follows:

"The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values."

Mr Budlender relied quite heavily on the provisions of section 16 of the Constitution with regard to the right to freedom of speech and its protection. In this regard he referred to the decision of the Supreme Court of Appeal in ***Mthembi-Mahanyele v Mail & Guardian Ltd and Another*** [2004 ZASCA 67; [2004] 3 ALL SA 511 (SCA) where the Court held at paragraph 66:

"The state, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the state do in discharge of their duties. And the public is entitled to call on such officials, or members of government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice."

[17] The above statement was of course made in the context of (untrue) criticism of the executive. I would be slow in accepting that it pertinently applies in the instant matter. I have no difficulty in accepting that the Constitution in section 19 (3) does consider speech as so important that it

provides an absolute immunity from civil or criminal penalties for what members of Parliament say in the Chamber or in Committee Rooms of Parliament. Indeed section 41 of the Constitution sets out the principles of co-operative governance including the command that: *"All spheres of government and all organs of State within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole."* Mr Budlender correctly pointed out that the provisions of the Constitution, some of which I have touched on *supra*, all point to a society that embraces openness over secrecy and transparency over concealment and that where there is doubt about whether a dispute should be resolved in favour of secrecy or openness, the scale will tip in favour of transparency. In this regard the Supreme Court of Appeal remarked as follows in ***City of Cape Town v South African National Roads Authority Limited and Others*** [2015] ZASCA 58 at para 45:

"*Secrecy is the very antithesis of accountability. It prevents the public from knowing what decision was made, why it was made, and whether it was justifiable.*"

[18] This Court was referred to a decision made in the foreign jurisdiction recognising the importance of open legislative proceedings. The decision is by the Canadian Supreme Court (per Cory J) in ***New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*** [1993] 1 SCR 319. The question for determination was whether the Nova Scotia Legislature's decision not to permit broadcasters to set up their own cameras in the legislative Chamber was consistent with the right to freedom of expression. Although the majority decided differently (or did not even reach the question), Cory J found that the decision was

inconsistent with the right and stressed the importance of knowledge about the Parliamentary affairs as follows:

"If Canadians are to have confidence in the actions of their elected representatives, they must have accurate information as to what has transpired in the legislative assemblies and House of Commons. Informed public opinion is the essential bedrock of a successful democratic government. Accurate information can only be obtained by the public through the work of a responsible press which must today include television coverage."

Indeed there is and can never be any denial that the openness of Parliamentary proceedings is not only good for journalists and the media but that it is vital for the Parliament itself. Parliament is an establishment of the Constitution. The Constitutional Court spoke to this openness in the context of the courts in ***Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O'Connell and Others v The State*** [2007] ZACC 3; 2007 (4) SA 611 (CC) at para 26:

"*Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.*"

On the comparative practice it was contended on behalf of the Applicants that while some Commonwealth nations such as the UK, Australia and Canada continue to restrict the broadcasting of Parliamentary disruptions, their approach is not *"best practice"* nor does the exact copying of their approach make Parliament's conduct reasonable. It is indeed true that the Constitutional Court has repeatedly emphasised that comparisons with foreign law and practice, while often illuminating, cannot be determinative of the meaning of the South African Constitution or the

reasonableness of State actions. See in this regard ***Ferreira v Levin NO*** 1996 (1) SA 984 (CC) at para 72; ***Brink v Kitshoff*** 1996 (4) SA 197 (CC) at paras 39-40; ***Minister of Finance v Van Heerden*** 2004 (6) SA 121 (CC) at para 29.

I do not intend to spend much time on this aspect save to say that it may be correct that countries like India and Scotland do have revised broadcasting guidelines that allow televising of scenes of disorder, walk-outs etc. In my view, while it is of importance to compare what obtains in foreign jurisdictions, each country would have its own unique circumstances that ordinarily would talk to the measures to be taken in order to contain scenes of disorder and unparliamentary behaviours.

[19] In Mr Budlender's contention democratic society risk losing faith in the legitimacy of the Legislature when obviously important and controversial events are playing out on the floor of the Assembly but the camera remains trained on the Speaker. I hasten to mention that I shall deal fully with the submissions of Mr Budlender such as the afore-going later on in this judgment. It must be mentioned that the right to an open Parliament is not of course absolute. There are limitations thereto. Section 59 (2) of the Constitution provides thus:

"59(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society." A similar provision is to be found in section 72 (2) except only that this expressly mentions the National Council of Provinces instead of the National Assembly. Of course, Parliament needs to justify any restrictions on the basic rule of access. Exceptions must at all times be reasonable. Indeed while courts will give some deference to the manner in which Parliament has elected to regulate access, ultimately it can and must assess Parliament's actions

against what is reasonable. I accept that reasonableness does include a degree of proportionality. I also accept that all citizens of this country do have a right to know what happens in Parliament and that there is a constitutional duty to ensure that citizens can and do enjoy that right. Accordingly measures taken by Parliament that tends to interfere with the exercise and enjoyment of that right must be justified and reasonable in the circumstances prevailing then.

[20] It is hardly necessary to overburden this judgment about the role of the media. The role the media plays is immeasurable and is fully documented not only in the Constitution but also in numerous decisions of our courts. For instance the Constitutional Court in ***Khumalo and Others v Holomisa*** 2002 (5) SA 401 (CC) at paras 22-24 speaking to this aspect said the following:

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. ...

. . .

In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society...."

Similarly in ***SABC Ltd v NDPP*** 2007 (1) SA 523 (CC) at para 28 the Constitutional Court expressed itself as follows on this aspect:

"The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy. This was also recognised by the House of Lords in McCartan Turkington Breen (A Firm) v Times Newspapers Ltd that '(t)he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring'. A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness."

[21] It is so that in the alternative to the substantive attack on the Disorder clauses, the Applicants challenge the Policy as a whole on the basis that it was adopted through an irrational process. In order to make a determination whether a decision is procedurally irrational, a Court *"must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality"*. See: ***Democratic Alliance v President of South Africa***

and Others [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at para 33. I discuss the alternative attack later on *infra*.

[22] The Applicants contend that both the Policy and the Rules are unconstitutional and that the onus rests on Parliament to justify why any restriction on the basic rule of openness and access is justified. In this regard reliance is placed on ***Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)*** 2001 (4) SA 491 (CC) at para 19 where the Constitutional Court gave the following guiding formulation:

"[19] It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36 (1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but the placing before the Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed this is such a case."

[23] I do differ from Mr Budlender's contention that the Policy (particularly paragraph 8.3.3.2 (a)) and the Rules of Coverage are unconstitutional. I expand on this *infra* later on this judgment. Looking squarely on the Disorder Clauses it is noticeable that there is no prohibition on reporting incidents of grave disorder, nor any provision providing for the removal of journalists or guests during such incidents. Paragraph 8.3.1.1 (c) of the Policy and Rules separately regulate how images and sounds provided as part of the broadcast may be used. They may not be used for instance for *"party-political propaganda"*, *"satire, ridicule or light entertainment"* or *"commercial sponsorship or advertising."*

In terms of the Powers and Privileges Act it is a criminal offence to broadcast material contrary to these limitations. On behalf of the Applicants it is contended that the disorder clauses are unreasonable because preventing the broadcasting of grave disorder is futile as the public has a real interest in such incidents. Mr Budlender made the following submission (I set it out in order to deal with it later on):

"...incidents of grave disorder will be particularly revealing of those who cause it, and of those who are required to regulate it. Moments of high tension provide a window into the true nature and intentions of public representatives and parliamentary officials. The public has a right and an interest to know exactly what occurs at those times so that it can judge the behaviour of those involved.

Public scrutiny and criticism of Parliament is vital to ensure that it operates optimally. If public representatives know that whatever they do in the house will be beamed to television sets across the nation, perhaps they will behave themselves with more decorum and respect for the institution they serve. If they can live safe in the knowledge that grave

disorder will only be fully observed by those present, they may feel more comfortable to act in ways unbecoming of their office."

[23] Mr Budlender contended in his submissions that it may be that some incidents of disorder will affect the dignity of Parliament and may cause members of the public to think less of Parliament, its members or its Presiding Officers but if the dignity of Parliament is demeaned, that is a result of the conduct of its members or officers. He insisted that the public have a right to know what happens in Parliament whether that is embarrassing for Parliament or not. I do not fully agree with Mr Budlender on the above submission. I agree that the public has the right to know what happens in Parliament but that right cannot be absolute. If Parliament has seen it fit in its wisdom to place these limitations for reasons advanced in the Answering papers maybe the only question that should occupy our minds is rather whether these limitations are reasonable regard being had to what they seek to achieve. I deal further with this aspect later on in this judgment.

[24] Notably the Applicants have launched an attack on the Policy and the Rules but they have not attacked section 21 (1) of the Powers and Privileges Act. This section has been fully quoted earlier on in this judgment. The provisions of this section proscribe the broadcasting of Parliamentary proceedings except in accordance with the standing rules. It must be emphasised that Parliament's power to adopt rules and approve policies concerning its business is provided for in the Constitution of the Republic of South Africa. Section 57 (1) (b) and 70 (1) (b) of the Constitution provide that the National Assembly and the National Council of Provinces may make rules and orders concerning their business. Section 45 (1) of the Constitution provides for the making of rules

concerning the joint business of the NA and the NCOP. Failure and/or an omission (apparently made purposefully) by the Applicants to attack section 21 (1) of the Powers and Privileges Act quoted above is of significance. It is important in that it accepts that the Constitution authorises a legislative provision (a) specifically applying to televising broadcasting and electronic media; (b) with the departure point that they are not permitted, save to the extent provided for by Parliament through its own rules; (c) which will be framed by Parliament to ensure its proper functioning and the upholding of its dignity. Paragraph 8.3.3.2 (a) of the Policy (as stated before) is substantially the same as the corresponding rule in the Rules. It is based on that rule. In this regard I set out *infra* the contents of paragraphs 29-30 of the Answering papers which are not disputed by the Applicants in the Replying Affidavit and/or supplementary Replying Affidavit:

"29. The Policy is also informed by the internal Rules of Coverage attached as 'BM4'. The Rules of Coverage are designed to regulate the televising of proceedings in Parliament in a manner that promotes public access, openness and accountability. The objective of the Rules is to assist the director in close collaboration with the manager of the Sound and Vision Unit, to give a full, fair and accurate account of proceedings, with the aim of informing viewers about the work of the Houses.

30. The Rules of Coverage contain guidelines for picture direction that are reasonable and further the aim of informing viewers about the work of the Houses."

[25] In ***Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*** 2001 (4) SA 501 (SCA) at para 7 (quoted with approval in ***MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School*** 2013 (6) SA 582 (CC) at para 55, and ***Head of Department,***

Department of Education, Free State Province v Welkom High School 2014 (2) SA 228 (CC) at para 217), the Supreme Court of Appeal noted that the concept "policy" may cover a wide spectrum: thus from a stated goal (a policy on limiting poverty, or promoting literacy, for instance), to a code which regulates conduct. In the instant case the concept a *'hard'* not *'soft'*, policy, of the latter kind. It is adopted to regulate conduct, by the entity with the power and duty to regulate it. In ***Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (section 21) Inc*** 2001 (2) SA 1 (CC) at para 19 (p14B-D) the Constitutional Court stated:

"It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action" (underlining added). See also ***Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*** 2005 (6) SA 313 (SCA) at para 27 (p325A-C)).

[26] It must be mentioned that the Applicants have only attacked the relevant Rule for the first time in their fourth notice of motion accompanied by the Supplementary Replying Affidavit. I agree with Gauntlett (SC) that this is an impermissible procedure. It is common cause that Parliament had already pleaded a reliance on the Rules in its Answering Affidavit which was served on 26 February 2015. Already at that stage, the Applicants

contemplated the lawfulness of the Rules being determined in Part B of the proceedings. But the Applicants chose not to attack the Rule in their Supplementary Founding Affidavit. Strictly speaking the Applicants are precluded in launching this attack in the Supplementary Replying Affidavit (which is now the fourth set of Affidavits delivered by the Applicants) and from attacking the relevant rule for the first time. Van Loggerenberg D.E. et al, **Erasmus Superior Court Practice** page B1-45 states the following in this regard:

'[a]ll the necessary allegations upon which the applicant relies must appear in his or her founding affidavit, as he or she will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit.'

In ***Shepard v Tuckers Land and Development Corporation (Pty) Ltd*** (1) 1978 (1) SA 173 (W) at p177G the court referred to:

'the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits for the Courts will not allow an applicant to make or supplement his case in his replying affidavits'.

What is troubling is that no explanation is forthcoming from the Applicants except a contention by Mr Budlender that no prejudice is caused to the Respondent. The fact that the Applicants assert constitutional right does not grant them an exemption from procedural compliance. See ***Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*** 2012 (1) SA 256 (CC) at para 52; ***Fischer v Ramalhele*** 2014 (4) SA 614 (SCA) at para 13; ***South African Police Service v Solidarity obo Barnard*** 2014 (6) SA 123 (CC) at para 202.

Applicants must not make out their case as they go along and merely aver lack of prejudice. The Respondents have a legal entitlement to know what case they are called upon to answer. Such case is ordinarily made out in

the Founding Affidavit. The prejudice the Respondents suffer in a matter like the present is predicated by the serial changes the Applicants make as the matter proceeds. It is contended on behalf of the Applicants that the latter are not bound by any elections made in Part A in that they reserved the right to supplement their case in Part B and were afforded that right by the 10 March 2015 court order. In Mr Budlender's submission on this aspect there can be no objection to the Applicants taking advantage of that opportunity.

[27] In any event paragraph 8.3.3.2 (a) of the Policy, in my view, does survive the application of the proper test for reasonableness. The fact of the matter is that sections 59 (1) (b) and 72 (1) (b) of the Constitution do authorise Parliament to take reasonable measures to regulate public access, including access of the media. In other words, the very Constitution the provisions of which are heavily relied on by the Applicants as tending to grant them rights highlighted by Mr Budlender in his submissions, does not contemplate unrestricted access (free for all). It rather expressly reserves for Parliament the power to limit the access of the public, including the media, to its proceedings, provided of course that the limiting measures are reasonable. We derive guidance from the decision of the Constitutional Court in ***Doctors for Life International v Speaker of the National Assembly*** 2006 (6) SA 416 (CC) at para 127 where the Highest Court in this country confirmed that when dealing with the question of reasonableness *'context is all-important'*. Differently put, the particular circumstances relating to the measures in question do play a critical role in determining the reasonableness of the measures taken.

[28] Mr Gauntlett referred this Court to another decision of the Constitutional Court, namely ***Bato Star Fishing (Pty) Ltd v Minister of Environmental***

Affairs 2004 (4) SA 490 (CC) particularly at paras 44-45 regarding the meaning of reasonableness. In ***Bato Star Fishing (Pty) Ltd*** case *supra* the meaning of reasonableness (in the context of an administrative decision) was explained fully. In essence, the test is whether the 'decision' in question was one which a reasonable authority could reach in the circumstances, taking into account (a) the nature of the decision; (b) the identity and expertise of the decision-maker; (c) the range of factors relevant to the decision; (d) the reasons given for the decision; (e) the nature of the competing interests involved; and (f) the impact of the decision on the lives and wellbeing of those affected. The above test should and is applied having regard to the principle of the separation of powers. Importantly, in ***Doctors for Life*** case *supra*, the Constitutional Court guided us further in that it explained that the principle of separation of powers *'requires that other branches of government refrain from interfering in Parliamentary proceedings'* and that Courts must be cautious not to *'interfere in the process of other branches of government unless to do so is mandated by the Constitution.'*

[29] I would agree with Mr Guantlett that even though the above postulated test for reasonableness is formulated with reference to an administrative 'decision' the general principles can appropriately be applied to the measures under discussion in this judgment, namely those set out in para 8.3.3.2 (a) of the Policy and the relevant rule). I need to mention that in any event it was not suggested in ***Doctors for Life*** case *supra*, that reasonableness has a different meaning and test if it is a legislative or executive act which is in issue. On the contrary, the Constitutional Court has repeatedly emphasised that differentiating between legislative, administrative and judicial acts is often difficult, and may in particular cases not be material. See for instance ***Pharmaceutical Manufacturers***

Association of South Africa: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at para 79 and ***Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*** 1999 (1) SA 374 (CC) at paras 23-24.

[30] Paragraph 8.3.3.2 (a) of the Policy has been set out *supra* and the relevant rule under attack must necessarily be set out hereunder and dissected thereafter.The relevant rule reads as follows:

'Disorder on the floor of the House:

Televising may continue during incidents of grave disorder or unparliamentary behaviour for as long as the sitting continues, but only subject to the following guidelines:

(a) On occasions of grave disorder, the director should normally focus on the occupant of the Chair for as long as proceedings continue, or until order has been restored. (By "grave disorder" is meant incidents of individual, but more likely collective, misconduct of such a seriously disruptive nature as to place in jeopardy the continuation of the sitting).

(b) *In cases of unparliamentary behaviour, the director should normally focus of the occupant of the Chair. Occasional wide-angle shots of the Chamber are acceptable. (The phrase "unparliamentary behaviour" is intended to signify any conduct which amounts to defiance of the Chair but which falls short of grave disorder).'*

[31] Of course these measures provide for the televising of incidents of grave disorder and unparliamentary behaviour during Parliamentary sittings. Clearly their effect is to restrict the visual feed that is broadcast in the limited circumstances in which disorder prevails. The identity and

expertise of the adopter of the measures is Parliament. The measures were adopted and approved by Parliament in order to control its internal arrangements, proceedings and procedures in terms of section 57 (1) (a) and 70 (1) (a) of the Constitution. Indeed, (clearly) in this regard the draftsmen of the Constitution found it necessary to include these provisions in the Constitution. Thus the Constitution recognises that Parliament itself is best placed to determine how it will function. Strangely even the Applicants in paragraph 39 of their Supplementary Replying Affidavit at page 714 of the papers do concede that ultimately it is Parliament that must decide what it will broadcast.

[32] The range of factors relevant to these measures can be briefly highlighted. These include but are not limited to the promotion and protection of the dignity of Parliament. The object of limiting bad behaviour during sittings; the object of broadcasting only the legitimate business of Parliament being open to the public and the media. On behalf of Parliament it has been fully explained in the Answering papers the reasons for the measures. Parliament explained that it adopted and approved these measures in order to promote and protect its dignity; to limit bad behaviour during sittings; and to ensure that the legitimate business of Parliament is broadcast, and that Parliament is not closed to the public and the media. I do not understand the Applicants as saying promotion and the protection of Parliament and its dignity do not arise. I do understand them to say *"remove the limitations and measures – we shall ourselves decide what to broadcast under the guardianship and regulations promulgated by ICASA."* That would mean in effect that Parliament hands over to ICASA its own constitutionally enshrined right to regulate and/or control its internal arrangements, proceedings and procedures.

[33] Indeed the competing interests at play in the instant matter are all constitutional imperatives. In Mr Gauntlett's submission the reasons given by Parliament for the adoption and approval of the measures in question outweigh the minor limitations they impose on the openness of Parliament. I agree with the aforementioned submission. This is fully documented in the Answering papers. No attempts have been made to refute these contentions in the Replying papers filed. I am of the view that the actual impact of the measures on the public and the media is minor compared to the damage that may arise in the absence of these measures. It is important to note that during any incidents of grave disorder or unparliamentary behaviour the public, including the media, are not excluded from the House. They remain present to observe the happenings and they do report on this comprehensively. Both the visual and audio feeds do continue but then special guidelines apply to the filming for the purpose of visual feed. *"Occasional wide-angle shots of the chamber"* are still authorised in cases of unparliamentary behaviour.

[34] Parliament undeniably plays an important role in this country's constitutional democracy. Parliament provides a forum of national importance for public consideration of issues pertaining not only to this country but other countries too. It is Parliament that passes legislation and oversees executive action. It provides a national forum for the public's consideration of issues affecting the Provinces. See: **Section 42** of the Constitution; ***Doctors for Life International v Speaker of the National Assembly*** *supra* at para 36. This is in fact admitted by the Applicants. There can be no dispute that Parliament is and shall always remain the principal legislative organ of the State. It therefore must carry out its functions without interference. It should thus not be strange that

Parliament is empowered by the Constitution to determine and control its internal arrangements, proceedings and procedures. See: **sections** 57 (1) (a) and 70 (1) (a) of the Constitution; ***Doctors for Life International v Speaker of the National Assembly*** *supra* at para 36. The Applicants have openly admitted this in their papers. The preamble to the Powers and Privileges Act includes the following:

'AND WHEREAS it is considered essential to provide for such 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' (underlining added).

[35] The above Act expressly recognises the authority, independence and dignity of the legislatures and their members. This too is not denied by the Applicants. They expressly admit this. Parliament strives in the execution of its constitutional mandate to promote and protect its dignity. Responsible broadcasting is and remains the key to maintaining the authority and dignity of Parliament. This too is admitted by the Applicants in their papers. Undoubtedly the measures in question do ensure that incidents of grave disorder or unparliamentary behaviour are acknowledged. Yet in truth the measures under discussion do protect the dignity of Parliament by tempering the especially strong impact that the visuals of disorderly conduct, if broadcast to the world and played repeatedly (as television often does), would have. In ***South African Broadcasting Corporation Ltd v Downer NO*** [2006] SCA 89 (RSA) (an unreported judgment of the Supreme Court of Appeal) at para 21, the special impact of visual images was recognized in that the court highlighted –

'the inescapable fact ... that television has an impact on the viewer unrivalled by any other news medium. It conveys actuality with greater

accuracy and force and visual images tend to impress more readily than a radio transmission or a newspaper article.'

Additionally it to be noted that in ***South African Broadcasting Corporation Ltd v National Director of Public Prosecutions*** 2007 (1) SA 523 (CC) at para 68, the Constitutional Court highlighted what it described as *"the intense impact that television, in particular, has on the viewer, in comparison to the print media"*. The Court emphasised that this, together with the ability to edit the material, *"has the potential to distort the character of the proceedings"* especially in the context of *"edited highlights – packages"*.

[36] The above observations were made in the context of court proceedings though. But they apply with equal force to proceedings depicting disorderliness and unparliamentary behaviour playing itself in Parliamentay Chamber and/or in the Committee Rooms of Parliament. These measures are designed and/or they seek to discourage the occurrences of such incidents in the Chamber or Committee Room. Paragraph 15 of the Respondents' Answering papers (page 577 of the record) talks to this aspect. I deem it necessary to set out paragraph 15 *infra* as follows:

"15. In Addition, the unqualified default position sought by the Applicants can only encourage the worst behaviour in Parliament. This is because Parliament would be obliged, irrespective of the degree of misconduct or grave disorder, to feed it for broadcasting. The Applicants' response is that they too, have duties. Pursuant to these Parliament must decide what is to be provided by live feed in relation to what constitute grave disorder, or conduct which is unparliamentary, in terms of its Rules. Parliament cannot facilitate the undermining of its own dignity as a constitutional institution, or the disruption of its own work. Ensuring

(as the Applicants seek) that even the grossest misconduct and gravest disorder will be viewed without restriction in real time by the nation and beyond can only undermine what section 21 of the Powers Act seek to avoid. This when the Applicants accept that section 21 itself cannot be challenged."

I fully agree with the above exposition. In my view, it is the reflection of the truth such that it cannot be faulted. I also agree with the assertion made in paragraph 52 of the Answering papers (page 590 of the record of proceedings). For completeness sake I also set out *infra* paragraph 52 of the Answering papers:

"52. In this way, the incidents are not ignored, but the consequences that visuals of disorder and defiant conduct would have if broadcast to the world, and played repeatedly, is mitigated. An audience for conduct striking at the heart of Parliament's functioning would be guaranteed, and such ill-discipline would thereby, be encouraged."

Mr Gauntlett contended quite correctly that this is not, as the Applicants would have it, a matter of censorship – as little as it is censorship for courts to restrict (as they do) the live feed of film of a distraught witness or misbehaving counsel. Mr Gauntlett concluding on this aspect submitted thus:

"The function of neither Parliament nor the courts is to sustain a (remunerative) appetite for reality television."

[37] The provisions of sections 57 (1) and 70 (1) of the Constitution empower Parliament to make rules and orders concerning its business. Indeed the various rules and policies adopted and approved by Parliament are essential for its ordered operation. The Applicants admits the afore-going in their Replying papers. I take comfort in accepting that when a member obstructs or disputes Parliament's proceedings or unreasonably impairs

Parliament's ability to conduct its business in an orderly and regular manner acceptable in a democratic society, that member's conduct is not legitimate Parliamentary business. What it does is that it undermines rather than promotes the proper functioning of Parliament and the fulfilment of its constitutional obligations. The Supreme Court of Appeal in ***Speaker of the National Assembly v De Lille*** 1999 (4) SA 863 (SCA) at para 16 held that Parliament's power to control its proceedings includes the power to exclude from the NA 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.'*

[38] Accordingly, there is no obligation on Parliament to broadcast conduct that clearly obstructs or disrupts its proceedings and conduct that unreasonably impairs its ability to conduct its business in an orderly and regular manner acceptable in a democratic society simply because such conduct is not legitimate Parliamentary business. Thus regard being had to all relevant factors, the measures under discussion in the instant matter are 'reasonable measures' employed to regulate public access, including access of the media, to Parliament. When one contrast this with the suggestion by the Applicants in the founding papers that Parliament must feed for broadcasting visuals of the grossest behaviour and gravest disorder without limitation the latter is and remains unreasonable.

[39] Mr Gauntlett was concerned that the extensive relief for a declaration that the whole of the Policy is unconstitutional and invalid is only sought by way of a belated amendment and in the alternative to the Applicants' attack on paragraph 8.3.3.2 (a) of the Policy and the relevant rule. He pointed out that, however, in addition to the fact that the Applicants

previously expressly disavowed any attack on the Policy beyond paragraph 8.3.3.2 (a) there are flaws in the alternative relief. In his submission, the Applicants made a procedural election to which they should be held. Indeed the binding nature of a procedural election is analysed by Hoexter JA in ***Chamber of Mines of South Africa v National Union of Mineworkers*** 1987 (1) SA 668 (A) at 690 D-H. It is not necessary for purposes of this judgment to consider Hoexter JA's analysis. Mr Gauntlett highlighted what he called *"fundamental flaws"* in the alternative relief sought.

[40] Notably, the Applicants' challenge on the whole of the Policy is premised on an alleged failure on the part of Parliament to involve the public, including the media, in the Policy's approval. It is clear though that in terms of section 167 (4) (e) of the Constitution, the Constitutional Court (not this Court) has exclusive jurisdiction and/or competence to make a determination whether Parliament has failed to fulfil a constitutional obligation. The obligations to *'facilitate public involvement in the legislative and other processes'* (as set out in sections 59 (1) (a) and 72 (1) (a) of the Constitution) to the extent that they arise in a particular context are such obligations. In ***Doctors for Life*** case *supra* the Constitutional Court held that:

"[the question whether Parliament has fulfilled its obligation under s 72 (1) (a) therefore requires this Court to decide a crucial separation-of-powers question and is manifestly within the exclusive jurisdiction of this Court under s 167 (4) (e) of the Constitution."

Clearly this Court lacks jurisdiction to determine the Applicants' attack on the Policy as a whole. It is concerning that the Applicants failed and/or omitted to challenge the Policy *"as soon as practicable"* after it was approved. The requirement of *"as soon as practicable"* is articulated in

Doctors for Life case *supra* as a basis on which an Applicant's standing must be found. More than eleven (11) years have passed since the Rules were adopted. The Policy itself has been in operation for almost six (6) years. The Applicants contend that they were not aware of the existence of the Policy. They work in Parliament and they are watchdogs for media freedom. It is difficult to accept that it was only on 27 January 2015 that the Applicants became aware that there is a Policy in place. I point out that the delay is inexcusably long. The papers show, however, that the Applicants have all along been complying with the impugned provisions for so many years. I would not blame Mr Gauntlett in using the maxim "*Dormentibus non succurrit jus: the law does not aid those who sleep*".

[41] Despite the above I proceed to consider the merits of the Application on this alternative challenge. In ***Doctors for Life*** *supra* at paragraphs 128 and 146 the Constitutional Court held that Parliament must act reasonably in giving effect to its obligations – to facilitate public involvement, and that the reasonableness of Parliament's actions must be determined having regard to all relevant factors, including (a) the nature and importance of the legislation in question; (b) the intensity of its impact on the public; (c) any rules (already) adopted by Parliament relating to public participation; (d) the urgency with which the legislation must be enacted; and (e) of particular importance, Parliament's own assessment as to the appropriate level of public involvement that is required in the circumstances. It was in the same ***Doctors for Life*** case *supra* that the Court also confirmed that the Constitution allows Parliament *"significant leeway"* to fulfil its obligation to facilitate public involvement in its processes. See paragraphs 139 of the judgment in ***Doctors for Life*** case *supra*; See also K***ing v Attorneys Fidelity Fund Board of Control*** 2006 (1) SA 474 (SCA) at para 22.

[42] It shall be recalled that in ***Doctors for Life*** case *supra* Parliament had decided that public hearings (in the Provinces) would be held for two of the impugned bills. In the case of one of those bills (six of the nine Provinces failed to hold hearings) and in the case of the other bill (seven of the nine Provinces failed to hold hearings). It was held that Parliament's failure to hold the hearings was unreasonable in the circumstances. But in the case of another bill the Court held that Parliament's failure to hold hearings (or invite written submissions) was not unreasonable given the nature of the bill and Parliament's own assessment that public participation was not required.

[43] In the instant matter the Answering papers reveal that the Rules and Policy were adopted and approved by Parliament following an open, full, cross-party deliberative process. These were adopted and approved after careful consideration – drawing (as it were) on the cumulative experience of members from across the political spectrum – as to which measures would best promote the dignity and functioning of Parliament. In my view, Parliament acted reasonably especially considering that the Rules and Policy relate to its *'internal arrangements'* as described in sections 57 (1) (a) and 70 (10 (a) of the Constitution. See: **Woolman, S et al, Constitutional Law of South Africa**, 2e, Vol 1 at p. 17-97 comments that *'(as [Parliament's] rule making power concerns the inner working of the legislature, the judiciary will rightly be hesitant to intervene.'*

I conclude that the challenge levelled against paragraph 8.3.3.2 (a) and the relevant rule as well as the alternative in terms of which the Policy as a whole is sought to be declared unconstitutional and invalid must fail.

(B)THE JAMMING DEVICE

[44] The Applicants seek a declaration that the use of the jamming device at SONA was unlawful. Ordinarily a device that jams or disrupts a mobile telephone's signal operates by broadcasting a signal at the same frequencies as those used by mobile telephone network service providers, and this prevents the mobile telephone from access to those signals. The use of such broadcasting equipment requires a licence under the Electronic Communications Act 36 of 2005. Such licences are ordinarily issued by ICASA. However, there is an exception which ICASA recognises. It is common cause that the device under discussion was brought and used in Parliament not by the First to Third Respondents and not by the Fourth Respondent but by the State Security Agency. It is so that section 4 of the Powers and Privileges Act provides that members of the security services may enter or remain in the precincts of Parliament for purposes of performing any policing function there only with the permission and under the authority of the Speaker or the Chairperson. Section 4 (2) of the Powers and Privileges Act, however, provides that 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 such permission enter upon and take action in the precincts in so far as it is necessary to avert the danger – in the latter event a report must be made soon to the Speaker and Chairperson. The Applicants rely on the provisions of section 4 of the Powers and Privileges Act to contend that the device employed was without the permission of the Speaker or Chairperson and that therefore it was installed unlawfully.

[45] The Answering papers make it plain that the security for the attendees of the SONA was discussed by the Respondents and the Security Agency. The Speaker and the Minister make it plain that the use of the device was

a matter of detail and that *"[D]etails of the security measures are not discussed with a principal such as the Speaker or the Chairperson; such matters are left to our discretion"*. In fact the Speaker puts it in a rather understandable way in paragraph 58 of the First to Third Respondents' Supplementary Answering Affidavit where she explained thus:

"58. In the days running up to the SONA the Minister informed us at a briefing at Parliament that the national Joint Operational and Intelligence Structure proposed to attend to the security arrangements for the officials who would be attending the event. We were not informed of the specific interventions that would be applied to avert any security threats. Operational details are not disclosed to us. In particular, we were not advised that the jamming of radio signals would take place shortly before SONA."

[46] In any event it is contended on behalf of the Respondents that the jamming relief sought by the applicants is purely academic in that it has been shown that the incident was a once-off occurrence and no reason exists for believing that telecommunications will be hindered during open sittings in the future. In passing it may be mentioned that a High Court's jurisdiction to grant declaratory relief is provided for in section 21 (1) (c) of the Superior Courts Act 10 of 2013 which is substantially the same as section 19 (1) (a) (iii) of the (old) Supreme Court Act 59 of 1959. Mr Budlender contending that the determining of the legality of government conduct remains a live issue relied on ***Buthelezi and Another v Minister of Home Affairs and Others*** [2012] ZASCA 174; 2013 (3) SA 325 (SCA).

However, the above case can be distinguished from the instant matter, in my view. There was no explanation in ***Buthelezi's*** case that tends to show a *bona fide* mistake on the part of an employee like it happened herein.

[47] I have briefly referred to section 4 of the Powers and Privileges Act. In the instant matter clearly prior to the SONA, the Speaker authorised members of the security services to *'enter upon'*, and *'perform'* their policing functions in the precincts of Parliament for purposes of SONA. I cannot see what blame can be apportioned to the First to Third Respondents on the question of the jamming device. Once this was brought to their notice even before the SONA proceedings had begun, they swiftly ensured this was attended to and deactivated and/or removed. In my view, the Applicants have made no case at all against the First to Third Respondents regarding or pertaining to the jamming device. Indeed given the Minister's acknowledgment of the mistake as well as an acknowledgment of a general duty to ensure the openness of Parliament, obtaining declaratory relief to the effect that the continued use of the device was unconstitutional and therefore unlawful, in my view, will serve no purpose whatsoever. Perhaps for purposes of completeness one should briefly explain how this mistake is alleged to have happened.

[48] SONA was classified as major in relation to the risks and security threats. One of the threats to be guarded against was the potential risk of hidden explosive devices which can be activated by the use of a radio signal of a cell-phone (including such devices that may be carried on remote controlled drones). The Fourth Respondent's Supplementary Answering Affidavit makes it plain that the risks posed by such explosive devices were at its highest whilst the President, the Deputy-President and the dignitaries were outside the Parliamentary Chamber. It goes on to explain that once they have entered the Chamber, the potential threat posed by hidden explosive devices which could be remotely detonated by radio or cell-phone signals were no longer relevant because then the Chamber had

been swept prior to SONA session to ensure that no explosive devices were present in the Chamber.

[49] It is important to note that the Agency used signal disrupting devices to ensure that the potential threat posed by such explosive devices (whilst the President, Deputy-President and dignitaries were outside the chamber) was effectively countered. Once they had entered the secured environment of the Chamber, there would have been no further need for the device to remain operational and it should have been switched off. If the device had been switched off as planned, there would have been no interference with cell-phone signals at the start of SONA. The unfortunate error, however, crept in as the individual tasked with the switching off of the signal disruptor inside the Chamber did not switch it off timeously as planned. This was swiftly attended to and the signal disruptor deactivated and/or switched off upon the complaint by members of the House. I accept that (as Mr Blose who deposed to a Supplementary Answering Affidavit on behalf of the Fourth Respondent stated) was indeed an isolated incident. The employment of any means (including the use of signal disruptors) to protect the President, Deputy-President and dignitaries against the potential threat (real or perceived) of a remote controlled explosive device (whilst still outside the Chamber and prior to the start of SONA) under the circumstances explained by Mr Blose, was in my view, entirely justified and was not unlawful.

[50] Mr Jacobs (SC), contending that the issue of jamming device is now moot submitted that there is no live controversy requiring adjudication. In his submission, the effect of a declaration of unconstitutionality and unlawfulness relating to the signal disruptor device would amount to the Court having to provide an advisory opinion on abstract propositions of

law. He relied on two cases by the Constitutional Court, namely ***JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*** 1997 (3) SA 514 (CC) at 526 F where at paragraph [17] *Didcott J inter alia*, held that:

"There can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historic one, than those on which our ruling is wanted have now become." In ***Independent Electoral Commission v Langeberg Municipality*** 2001 (3) SA 925 (CC) at 933 B, para [12] the Constitutional Court held that:

"[12] There is no live controversy between the parties. The elections are over and there is no suggestion that any order we make could have any impact on them."

[51] It is common cause that the Applicants in Part A sought interdictory relief relating to the *"signal jamming"* at the SONA which had taken place on 12 February 2015. This relief was abandoned clearly because the Applicants must have come to a realisation that the interim interdictory relief would have no practical effect – SONA had come and gone – no signal jamming having occurred during the actual SONA debate. Mr Jacobs is, in my view, correct in contending that the declaration of unconstitutionality and unlawfulness in this regard, is confined to the SONA on 12 February 2015 and that the effect of the order sought in Part B is limited to an historic event. At the risk of being repetitive, I highlight that in effect the Applicants contend that although the Security Agency obtained the permission of the Speaker or the Chairperson to perform *"a policing function"*, it failed to specifically obtain permission to employ the device and without such specific permission, its use was unlawful.

[52] The Founding papers do not dispute that members of the Agency had permission to enter and remain in the precincts of Parliament for the purposes of performing any policing function. Policing or policing function was defined by the Supreme Court of Appeal in ***National Lotteries Board v Bruss NO*** 2009 (4) SA 362 (SCA) at 367 E-F para [25]. Section 4 (1) (b) of the Powers and Privileges Act does not require permission in respect of the manner in which and the equipment with which the *"Policing function"* would be performed. Clearly how and what equipment the policing function for which permission was given is to be performed is a matter falling squarely within the discretion of the Security Agency. It must be accepted that the Agency has the necessary knowledge and expertise to decide what equipment is reasonably required to properly fulfil their policing function in the Parliamentary precincts for the purposes of the SONA. The Speaker would have no such knowledge and expertise.

[53] Section 12 of the Intelligence Services Act 65 of 2002 ("the Intelligence Services Act") provides the authority for the acquisition and use of signal disruptor devices by the Agency. It is not necessary that I set out *infra* the provisions of section 12 of the Intelligence Service Act. I am of the view, in any event, that it would be wrong that this Court denies the Agency the use of the devices when circumstances demand same to be used in order to counter any threat or potential threat to national security. It may be mentioned in passing that the Independent Communications Authority of South Africa (ICASA) considered the use of signal disruptors for *"mobile telephone blocking devices"* and published its findings in Government Gazette 24123 general notice 3266 of 28 November 2002. ICASA determined that:

"The National Security Cluster Department (i.e. Defence, Justice, Intelligence, SAPS, Scorpions and Correctional Services) will have alternative legislation to support them in their tireless efforts against organized crime, rehabilitation and State security functions."

ICASA even exempted the Agency from having to obtain a radio frequency spectrum licence as contemplated in section 31 (6) and section 32 (1) of the Electronic Communications Act 36 of 2005. The alternative legislation used by the Agency is the Intelligence Services Act and this Act authorises the acquisition and the use of equipment for the efficient functioning of the Agency, such as signal disruptors.

[54] The Applicants contend differently from what Mr Blose avers. The Applicants are of the view that the security threat was at its highest when all dignitaries including the President and his Deputy were present in the Chamber. They therefore contend that it would have been irrational to have switched off the signal disruptor at the stage. Obviously this contention totally loses sight of and fails to appreciate the reasons given by Mr Blose in his Answering Affidavit and the Supplementary Answering Affidavit as to why the signal disruptor should have been switched off once the President and Deputy-President had entered the Parliamentary Chamber. The explanation Mr Blose gave is fairly straightforward and easy to comprehend. He explained that the operational plan in respect of the SONA was to employ the signal disruptors up and until the stage when the President and the Deputy-President had entered the Parliamentary Chamber. Once that had happened the signal disruptor would be switched off. In simple terms once they had entered the Parliamentary Chamber, the security threat posed by hidden explosive devices (which could be remotely detonated by cellular phones or radio transmitters) decreased as the Chamber had

previously been inspected ("swept") to ensure that no explosive devices were present in the Parliamentary Chamber. It was never intended as part of the operational plan that the signal disruptors would remain in operation once the President and the Deputy-President had entered the Chamber and the SONA had commenced.

[55] Mr Jacobs submitted in conclusion that there is nothing irrational or unlawful in the Agency's decision to have signal disruptors in operation whilst the President and the Deputy-President were not yet in the secured Chamber. There is no denial in the Founding papers as amended and supplemented of the fact that the signal disruptor remained operative beyond the intended time for its use as a result of a regrettable mistake. In fact, all parties (Respondents included) are in agreement that this should not have happened.

CONCLUDING REMARKS

[56] Undoubtedly televising and broadcasting (and now electronic transmitting) are potent in that they have immediacy, and they reach an audience unparalleled in human history. Indeed projecting graphic images and sound and as they happen into homes, offices and public places is undeniably a phenomenon of the age. But the Applicants as shown above conceded the constitutionality of section 21 of the Powers and Privileges Act. This tacit concession of section 21 of the Powers and Privileges Act means and must mean that the Applicants accept this, and that as a consequence there can be no constitutional objection to these forms of media being dealt with differently to print media under our Constitution.

[57] It must also be mentioned that the Applicants indeed further tacitly conceded (as Mr Guantlett pointed out) that there is no constitutional

objection to section 21's departure point: that, in contrast with the position pertaining to the print media, all such communication from Parliament is proscribed except to the extent that Parliament's rules permit it. I hasten to point out that of course Parliament's rules do not do so at whim. The departure point is therefore that Parliament must decide – because it clearly affects its functioning and dignity. It is very important to add that it is for Parliament to decide (not this Court) because its determination is vital to its high and separate place in the structure of the Constitution of the Republic of South Africa. Court control of what Parliament decides as regards the way it functions must always have the most careful regard for this. Subjecting Parliament to the continued control of the Courts is in principle problematical and not justified by the extraordinary single instance sought by the Applicants herein.

[58] To succeed the Applicants needed to show that Parliament's determination regarding televising of gross disorder and unparliamentary conduct is unreasonable. This, in my view, they failed to do. It needs mentioning that unreasonableness has a high standard. That is and must particularly be so when an independent constitutional institution has, through its own internal, cross-party processes, drawing on the experience of its own members and with regard to the practice under other constitutional democracies elsewhere, done exactly what sections 59 (1) (b) and 72 (1) (b) of the Constitution contemplated for all legislatures. It is my finding (as demonstrated earlier on in this judgment) that it was not at all unreasonable for Parliament to decide that visuals of unparliamentary conduct and gross disorders should not be broadcast (as the Applicants demand) in real time, frame by frame, of what may be the most egregious conduct. In my view, it is Parliament's sense that this can only foster such conduct by ensuring an audience for it far beyond

Parliament. It can only weaken discipline in Parliament, undermine and jeopardise its functioning.

[59] The Applicants' argument that they or at least ICASA, by way of backstop – will ensure that some control is maintained on what they disseminate, in my view, misses the point. The fact of the matter is that the Applicants are not concerned with Parliament's dignity or functionality. The Applicants are rightfully concerned with their own audiences. Whilst it must be acknowledged that the Applicants are the very cornerstone on which the community is built in the sense that without the role they play in informing the public about what is happening in every corner of this country, the public would be poorer in knowledge but the Applicants are also involved in their own business. As Mr Gauntlett pointed out that the size of the Applicants' audiences determine their revenue. It is reasonable to accept that the Applicants have every interest in expanding their audiences and not in any way limiting them. ICASA is the Applicants' regulator. ICASA is not Parliament's regulator. Powers, norms and concerns of ICASA are not those of Parliament.

[60] The argument by analogy – the *argumentum e simili* always has limitations. See in this regard ***Die Spoorbond v South African Railways*** 1946 AD 999 at 1012 per Schreiner JA. How, in principle, (asked rhetorically) does the Applicants' claim to an untrammelled entitlement (despite sections 59 (1) (b) and 72 (1) (b) of the Constitution and section 21 of the Powers and Privileges Act) to broadcast the most aberrant behaviour in Parliament differ from what they have not yet felt able to claim for court televising and broadcasting? In televising court proceedings there are always restrictions put in place. The Applicants

have accepted the restrictions which are certainly comparable to those at issue in the instant matter. By accepting the restrictions imposed by various courts on televising and broadcasting of proceedings there (in courts), the Applicants clearly concede that the dignity and functionality of the courts should properly prevail over their insistence on *'showing all'*, however aberrant or even grotesque. Strangely the Applicants clearly are refusing to recognize Parliament's parallel claim to even an approximate consideration in doing its own work.

[61] Lastly, I am of the view that courts should guide against the conduct which amounts to what can be described as an intrusion into the constitutional domain of Parliament which is not only unprecedented but which has obvious major constitutional implications. If I were to grant the order sought by the Applicants herein standing rules and procedures established by the Houses of Parliament in terms of their constitutional obligation to control their internal arrangements, proceedings and procedures would have to be amended. This would certainly amount to the court usurping the constitutional powers of not only Parliament but Houses of Parliament including Provincial Legislatures.

[62] In my understanding, underpinning Parliament's opposition to relief sought by the Applicants is the fact that Parliament is and remains an institution of State of the highest constitutional importance. Parliament is constitutionally entitled to ensure its functioning and to protect its own dignity. I have stated earlier on in this judgment that the impugned measures (in my finding) are reasonable, justifiable and proportionate. Indeed the unqualified default position sought by the Applicants can only encourage the worst behaviour in Parliament. The policy under attack is itself a reasonable regulatory instrument for ensuring that, within its

capacity, Parliament provides information to the public about its business that is fair, accurate (and I would add), comprehensive. The Policy does strike a balance between the rights of the public to be informed about Parliament and the duty to maintain the dignity of Parliament and its Houses. As to the question of costs it is so that the general rule dictates that a successful party becomes entitled to an order of costs against the unsuccessful party. In effect this means that if the Applicants are successful then the Respondents must be ordered to pay costs of this litigation. But this, being constitutional litigation, in keeping with ***Biowatch Trust v Registrar, Genetic Resources*** 2009 (6) SA 231 (CC) at para 21, if this application is dismissed (as it must) each of the parties should pay its own costs. See also ***Tebeila Institute of Leadership Education, Government and Training v Limpopo College of Nursing*** [2015] ZACC 4 (as yet unreported Constitutional Court judgment) at paras 4, 5.

ORDER

In the circumstances I make the following order:

(a) The application for the relief sought in terms of Part B in these proceedings is hereby dismissed.

(b) Each of the parties in these proceedings shall pay its own costs.

DLODLO, J

I agree.

HENNEY, J

I agree.

SAVAGE, J