SAVAGE J:

Introduction

[1] I have had the advantage of reading the judgment of my colleague Dlodlo J with which I respectfully am unable to agree.

[2] This application arises from two events at the President's State of the National Address ('SONA') on 12 February 2015 in Parliament, which was televised nationally and in respect of which there was considerable public interest. The first of these events was the use by the State Security Agency immediately prior to and at the commencement of the SONA of a device in Parliament that blocked all mobile telecommunication signals. For those people present at Parliament the use of this device had the effect that they enjoyed no telecommunication signal and were unable to communicate using such signal for the period that the device was in use and until the signal was restored. The respondents acknowledge that this was a mistake and the fourth respondent has apologised for it. Nevertheless, the applicants seek a declaration that the use of this device to interfere with telecommunications was unconstitutional and unlawful ('the jamming relief').

[3] The second event arose following restoration of the telecommunication signal. The President commenced with the delivery of the SONA until a 'question of privilege' was raised by a member of the Economic Freedom Fighters ('EFF'). What followed were exchanges between the Speaker and various members of the EFF. The Speaker wished the proceedings to continue while the members of the EFF sought to address certain questions to the President. The Speaker took the view that the members of the EFF were not acting in accordance with the rules of Parliament and asked that they either allow the proceedings to continue or leave the Chamber. The EFF refused to do so and the Speaker called the Sergeant at Arms and then security personnel to

remove the members of the EFF from the Chamber. At this point, with a glimpse of security personnel entering the Chamber, the camera in the Chamber recording proceedings was focused solely on the Speaker and the Chairperson until the members of the EFF had been removed from the Chamber. For members of the public watching the television broadcast the only visuals televised from this point were of the Speaker and Chairperson until the EFF members had been removed after which the ordinary television broadcast resumed. Video recordings of the removal of the EFF members from Parliament, filmed by individuals who had witnessed events in Parliament, were thereafter posted on the internet and made available for public viewing.

[4] Arising from this event the applicants seek relief including:

1. an order declaring that paragraph 8.3.3.2(a) of Parliament's Policy on Filming and Broadcasting of Parliament ('the Policy') and paragraph 2 under the heading 'Treatment of Disorder' of Parliament's Television Broadcasting 'Rules of Coverage' ('the Rule') are unconstitutional, unlawful and invalid;

2. a declaration that the manner in which the audio and visual feeds of the SONA were produced and broadcast by Parliament was unconstitutional and unlawful; and

3. an order directing Parliament to broadcast its proceedings in circumstances of 'grave disorder' and 'unparliamentary conduct' subject to certain provisos.

[5] In the alternative, the applicants seek an order of constitutional invalidity against the Policy as a whole.

<u>Amendment sought</u>

[6] The applicants in three previous notices of motion attacked only clause 8.3.3.2(a) of the Policy and did not raise an attack against the Rule. This caused the respondents in their answering papers to take issue with the relief sought on the basis of mootness in that without an attack against the Rule, it would remain in force even if the challenge to the Policy were to succeed.

[7] Consequently, with less than three weeks before the hearing of the matter, the applicants sought to introduce for the first time a challenge to the Rule. I see no reason why this amendment should not be allowed. The content of the Rule is materially the same as that of paragraph 8.3.3.2(a) of the Policy already attacked. The respondents are therefore aware of the substance of the case that they are called upon to answer and have been provided with an opportunity to do so. No prejudice arises in allowing the amendment and, given the nature of this matter and the public interest in it, there are to me compelling reasons why this Court should exercise its discretion to allow a proper ventilation of the dispute between the parties and consider the matter before it in all of its parts.[1]

[8] I proceed to consider the attack against the Policy and the Rule ('the broadcasting relief') first and thereafter the relief sought relating to the use of the telecommunication signal jamming device ('the jamming relief').

<u>Broadcasting relief</u>

Issues in dispute

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1 *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 177G; *Moolman v Estate Moolman* 1927 CPD 27 at 29; *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 183C–D.

[9] It is necessary at the outset to state what this matter does not concern. It does not concern whether the Constitution obliges Parliament to '*conduct its business in an open manner, and hold its sittings, and those of its committees, in public*'. Sections 59(1) and 72(1) of the Constitution provide as much.

[10] It does not concern whether the Constitution confers on Parliament the power to take '*reasonable measures*' to regulate public access, including that by the media, to the National Assembly ('NA') and National Council of Provinces ('NCOP') in sections 59(1)(b) and 70(1)(b). This matter also does not concern what measures may possibly be reasonable to regulate access to Parliament or the circumstances under which this may be so.

[11] What the matter concerns is whether the measures taken by Parliament in clause 8.3.2.2 (a) of the Policy and paragraph 2 of the Rules of Coverage ('the measures') are reasonable measures within the meaning of sections 59(1)(b) and 72(1)(b) to limit the open and public nature of Parliamentary sittings and whether they comply with the Constitution and the law.

Basis of the applicant's attack

[12] The applicants attack the measures on the basis that they are unreasonable and inconsistent with a right to an open Parliament which they argue arises from the obligation on Parliament to conduct its business in open and in public contained in s 59(1) and s 72(1) of the Constitution. In addition, they rely on Parliament's obligation to facilitate public involvement in its legislative and other processes as creating a right to public participation in Parliament with '*public access to Parliament…a fundamental part of public*

involvement in the law-making process',[2] which right is unduly restricted, they argue, by the measures.

[13] The applicants contend that the right in 16(1) of the Constitution to freedom of expression, which includes freedom of the press and other media, has been emphasised to be a 'cornerstone of democracy' by the Constitutional Court most recently in *Democratic Alliance v African National Congress and another.*[3] As a result they argue that the Constitution recognises that people in our society must be able to hear, form and express opinions freely, and that political speech is at the heart of this right. It follows, they say, that in order to exercise these rights, knowledge of what occurs in Parliament is required.

[14] The applicants ask this Court to interpret the reasonableness of the measures in light of the right to an open Parliament, to public participation in Parliament, given the right to freedom of expression and political rights and against the backdrop of other provisions of the Constitution including the preamble; the founding values of accountability, responsiveness and openness contained in s 1(d); s 36(1) and 39(1) which refer to '*an open and democratic society*'; the requirement that all spheres of government provide transparent and accountable government; and the requirement in s 57(1)(b) and s 70(1)(b) that in making rules Parliament must have '*due regard to representative and participatory democracy, accountability, transparency and public involvement*'. South Africans, the applicants say, have the right to see and hear for themselves what occurs in Parliament and to know how their elected representatives conduct themselves, in order to assure themselves that the proceedings of Parliament are conducted fairly. This right, the applicants say, is unreasonably constrained by the measures adopted.

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[2] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 137
[3] *Democratic Alliance v African National Congress and another* [2015] ZACC 1 at para 122

Respondent's submissions

[15] The respondents rely on Parliament's entitlement in s 59(1)(b) and s 72(1)(b) to take reasonable measures to regulate access to Parliament by the public and the media. They defend the measures as reasonable on the basis that they protect and promote the authority and dignity of Parliament and that Parliament is entitled to such protection.

[16] The respondents' contend that the public is only entitled to have the legitimate business of Parliament broadcast or televised, that the conduct of a member who obstructs or disrupts Parliament's proceedings is not engaged in legitimate parliamentary business and it would be unreasonable to require Parliament to feed broadcasting visuals of such behaviour to the media.

[17] The respondents take the view that the broadcast of instances of grave disorder or unparliamentary behaviour will only encourage further such behaviour, that any limitation imposed by measures is minor in nature and not unreasonable and the measures accord with international best practice.

Applicable legislative provisions

Constitutional provisions

[18] The starting point of the enquiry is section 59 of the Constitution which provides that:

'*(1) The National Assembly must-*
(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-
(i) to regulate public access, including access of the media, to the Assembly and its committees; and
(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.'
(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.'

[19] Section 72 provides the same for the National Council of Provinces.

[20] Sections 57(1) and 70(1) empower Parliament to '*determine and control its internal arrangements, proceedings and procedures*' and '*make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.*'

[21] These provisions exist in the context of section 42(3) of the Constitution which provides:

> '*...(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'*

Policy on Filming and Broadcasting

[22] Section 21(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 prohibits the broadcasting or televising of proceedings of Parliament unless authorised by Parliament.[4]

[23] Parliament's 2009 Policy on Filming and Broadcasting of Parliament provides that '(f)*ilming in the chambers can only be done with the permission of the relevant Presiding Officer*' and does not permit filming for private purposes in Parliament.[5] Only broadcasters accredited by the Presiding Officers may obtain the official composite sound and vision feed provided by

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[4] Section 21(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 provides: *'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.'*

[5] Paragraph 8.2.5(d) and 8.4.3

the Sound and Vision Unit of Parliament[6] and the broadcast and rebroadcast of proceedings of Parliament may be made only from this official composite feed.[7]

[24] Clause 8.3.1.1 of the Policy provides that:

'*Live broadcast and rebroadcast on television of the proceedings and excerpts of proceedings of Parliament may be authorised under the following conditions:*
(a) Only broadcasters accredited by the Presiding Officers may obtain the official composite sound and video feed provided by the Sound and Vision unit of Parliament.
(b) Broadcast and rebroadcast of the proceedings of Parliament may be made only from the official composite sound and vision feed provided by the sound and vision unit of Parliament.
(c) Broadcasting on television must respect the dignity and decorum of Parliament, and must only be used for purposes of fair and accurate reports of proceedings, and must not be used for:
(i) party political propaganda of any kind;
(ii) satire, ridicule or light entertainment; and/or
(iii) commercial sponsorship for advertising;
(d) Fairness and accuracy should be observed, and reports of proceedings must provide a balanced presentation of different views.
(e) Excerpts of proceedings must be placed in context…'

[25] A complete archive of '*the clean feed of the proceedings*' is to be maintained, with authority of the Secretary of Parliament for the supply of copies of proceedings to any other person or organisation [8]

[26] Under the Policy the control of '*broadcasting falls under the Presiding Officers and Chairperson, with the manager of the Sound and Vision Unit as the line function manager*'.[9] It provides that instructions of the Presiding Officers '*in relation to the operation of the Sound and Vision equipment in the chambers*' must be observed, with the instructions of Presiding Officers observed '*in respect to broadcasting of House proceedings*'.[10]

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[6] Paragraph 8.3.1.1(a)
[7] Paragraph 8.3.1.1(b)
[8] Paragraph 8.3.1.4(b)
[9] Paragraph 8.3.1.3(b)
[10] Paragraph 8.3.1.3(c) and (d)

[27] Paragraph 8.3.3 of the Policy concerns the 'Management of Disorder'. Paragraph 8.3.3.2 headed 'Disorder on the floor of the House' states:

'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 guidelines:*

I. *On occasions 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.'

[28] The policy defines '*unparliamentary behaviour*' as '*any conduct which amounts to defiance of the person presiding over the proceedings, but which falls short of grave disorder*'. It does not provide a definition of '*grave disorder*'.

Rules of Coverage

[29] Parliament's 2003 Television Broadcasting Rules of Coverage state at the outset that:

'The camera director should seek, in close collaboration with the Manager of Sound and Vision to give a full, balance (sic), fair and accurate account of proceedings, with the aim of informing viewers about the work of the Houses.

(Note: In carrying out this task, the director should have regard to the dignity of the House and to their functions as working bodies rather than place (sic) of entertainment.)'

[30] Under '*Treatment of Disorder*' the Rules state:

'…2. Disorder on the Floor of the House:

Television 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 on 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] It is these measures that are the subject of the applicants attack.

<u>Are the impugned provisions consistent with the Constitution?</u>

Openness and accountability

[32] A constitutional provision must be construed purposively and in the light of the constitutional context in which it occurs, including our history, the fundamental objectives of our constitutional democracy and in a manner that is compatible with the principles of our democracy. [11]

[33] Parliament's obligation in sections 59(1)(b) and 72(1)(b) to conduct its business in an open manner, in public, exists within the context of the founding values of the Constitution, which include a democratic state based on '*(u)niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness*'. [12] The democratic system of government the values state is to ensure accountability, responsiveness and openness.

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[11] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and others* 2000 (1) SA 661 (CC) at para 44-45 and 48; *Matatiele Municipality v President of the RSA* 2007 (6) SA 477 (CC) at paras 39 and 57

[12] Section 1(d)

[34] In *Minister of Home Affairs v NICRO* the Constitutional Court stated that the founding values must '*inform and give substance to all the provisions of the Constitution'*.[13] With Parliament located centrally in this construction of democratic state, the founding values of openness and accountability must inform and give substance to the obligation that Parliamentary sittings be open and held in public.

[35] The constitutional commitment to a democratic system of government ensuring openness and accountability follows the preamble which states that the Constitution lays *'the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'*. Other constitutional provisions provide for openness and accountability.

[36] Section 41(1)(c) requires that all spheres of government must '*provide effective, transparent, accountable and coherent government for the Republic as a whole*'. Sections 57(1)(b) and 70(1)(b) enable Parliament to make rules and orders concerning its business emphasising that in doing so there must be '*due regard to representative and participative democracy, accountability, transparency and public involvement*'. Sections 59(2) and 72(2) state that Parliament may not exclude the public and the media from a committee sitting '*unless it is reasonable and justifiable to do so in an open and democratic society*'. Similarly, section 36(1) permits rights in the Bill of Rights to be limited only '*to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…*'.

[37] The value placed by the Constitution on accountability, responsiveness and openness arises from our history and the foundations and objectives of our constitutional democracy. The Constitution records our

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[13] *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) at para 21

country's move to an open society in which institutional checks and balances limit state power, there is accountable and responsive government, open participation, freedom of expression and a commitment to human dignity, equality and freedom. In *S v Makwanyane*[14] Sachs J states that:

> '*Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance.*'

[38] In *Doctors for Life International v Speaker of the National Assembly and others* it was noted that '*...we live in an open and democratic society in which everyone is free to criticise acts and failure of government at all stages of the legislative process*'.[15] On similar lines in *Executive Council, Western Cape Legislature and others v President of the Republic of South Africa and others*[16] it was stated that:

> '*The reason why full legislative authority, within the constitutional framework...is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to on going press and public criticism...are regarded as essential features of the open and democratic society contemplated by the Constitution*'.

[39] The commitment to accountability, responsiveness and openness in government presupposes a democracy that is not only representative but participatory. [17] Participation occurs within a context of openness and accountability, with the democratic imperative requiring that the electorate is entitled to know what happens in Parliament, why this is so and to hold elected representatives to account. It is this openness and accountability that enables the public to exercise its democratic rights and hold its elected representatives to account.

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[14] 1995 (3) SA 391 (CC) at para 368

[15] *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC) at para 229

[16] 1995 (4) SA 877 (CC) at para 205

[17] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) at 625

Nature of Parliament

[40] Parliament consists of those persons elected by the people to ensure government by the people under the Constitution, serving as the '*national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action*'.[18] As was stated by Davis J in *Mazibuko v The Speaker of the National Assembly and Others:*[19]

> *'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... pressing importance'.*

[41] Given the importance of deliberation to the work of Parliament sections 58(1) and 71(1) provide that members of the executive and the legislature have freedom of speech in Parliament, subject to its rules and orders without the risk of civil or criminal liability.[20] The freedom of speech guaranteed in Parliament gives meaning to the section 16 right to freedom of expression and media freedom and the right in section 19 to make political choices, with the Constitution recognising that people in our society must be able to hear, form and express diverse opinions freely.

[42] Controversial and unpopular views are often expressed in Parliament. Debate often mirrors public debate which '*has if anything become more heated and intense since the advent of democracy*':[21]

> *'Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and*

[18] Section 42(3)
[19] 2013 (4) SA 243 (WCC) 255E-F
[20] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1 at para 122: *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at para 7
[21] *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) at para 100

> *good for individuals to permit as much open and vigorous discussion of public affairs as possible.'*[22]

[43] Although disagreement may be inevitable, more so in a society with the disparities of ours, as the national forum representative of the people Parliament is entitled to use its rules to take action against its members in cases of ill-discipline.

[44] The constitutional provisions applicable to Parliament are those detailed in Chapter 4 of the Constitution. No institution may accord rights to itself and any reference such as that in the preamble to the Powers Act which refers to the dignity of Parliament, is not to be interpreted to mean that Parliament holds a right to dignity in the manner intended by section 10. Parliament as an institution, while it may be afforded respect as a sphere of government, holds no right under the Constitution to dignity such as the right to human dignity protected in section 10 of the Bill of Rights or expressed in the founding value of human dignity in section 1(a).

Are the measures taken to regulate access to Parliament reasonable?

[45] Reasonableness is an objective standard used throughout the Constitution.[23] Insofar as it relates to sections 59(1)(b) and 72(1)(b) it is a non-Bill of Rights constitutional doctrine under which it is for Parliament to explain how the measures it has taken to limit openness and public access including access by the media to Parliament are 'reasonable'.[24]

[46] What is 'reasonable' in limiting the obligation that Parliament conduct its business openly and in public is to be construed in light of values of

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[22] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1 at para 133.
[23] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at 37 &126; *Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863* (SCA) at para 14; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 127
[24] *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC) at para 19.

openness and accountability in section 1 of Constitution and their democratic imperative.

[47] The reasonableness of the measures is a matter of context, impact and degree and may involve, a question of balance and proportionality to be worked out on the facts of the case.[25] This requires a consideration of the nature and importance of the measures, the intensity of their impact on the public, relevant practical considerations and Parliament's own assessment as to the measures required.[26] In *Doctors for Life International v Speaker of the National Assembly*[27] it was stated in the context of public participation in the legislative process that:

> '*The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process....In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency.*'

[48] However, in determining whether the measures taken by Parliament to regulate access are reasonable, this Court should not readily substitute its opinions for those of Parliament or parliamentary officials in relation to matters entrusted to them.[28] Courts must recognise the proper role of the other branches of government under the Constitution and treat their decisions with the appropriate respect, with the proviso that:

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[25] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 661

[26] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at paras 128 and 146

[27] 2006 (6) SA 416 (CC)

[28] *Malema and another v Chairman of the National Council of Provinces and Another* [2015] ZAWCHC 39 (15 April 2015)

'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'.[29]

[49] Whether more desirable or favourable measures could have been adopted by Parliament in a wide range of possible measures and whether these may meet the standard of reasonableness required is not before this Court for determination.[30]

[50] To be constitutionally compliant, measures taken must fall within the band of reasonable options available, as those reasonably likely to advance the achievement of the required goal. In considering whether the measures meet the objective standard of reasonableness required, consideration must be given to the respondent's justifications provided as to the reasonableness of the measures.

i. Dignity of Parliament

[51] The respondents defend the measures as reasonable on the basis that they preserve and protect the authority and dignity of Parliament. As stated above the Constitution does not confer rights on institutions of government and Parliament holds no right to dignity in the manner of the right to human dignity in sections 1(a) or 10 of the Constitution. While Parliament may act where appropriate to defend its position and status as a sphere of government, whether in acting against its members or in other respects it is not reasonable to do so in the name of preserving its dignity when, given its nature and composition, it holds no constitutional entitlement to have its dignity preserved. Given the authority that Parliament enjoys as the constitutionally mandated legislative

[29] *Mazibuko v The Speaker of the National Assembly and Others (supra)* at 256E-F
[30] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) at para 48

sphere of government, it is difficult to understand why measures taken to limit openness and public access would enhance its authority.

[52] While the Constitution requires organs of state to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of the courts,[31] there is notably no similar constitutional obligation in relation to Parliament. The authority and respect that Parliament enjoys is that which arises from its pivotal position in our constitutional order, as a sphere of government made up of those persons elected by the people to ensure government by the people under the Constitution.[32]

[53] While scenes of disorder or 'unparliamentary' behaviour may impact upon public respect for Parliament, its members or their political parties, it remains the elected national forum of the people. Furthermore, other forms of speech and conduct permitted by Parliament and which are broadcast and televised may also have such impact.

[54] Difficulties arise in the impact of the measures on members of the public who are present in the public gallery at Parliament and those who are not. If members of the public have the right to sit in the public gallery, then so does any member of the public in spite of the fact that they may be unable to exercise such right. Yet, the impact of the measures is materially different depending on whether a person is present in the public gallery or unable to attend parliamentary proceedings. If the dignity and authority of Parliament is impaired by the behaviour, it is difficult to understand why the impairment of dignity would not arise whether the public was present in the public gallery of Parliament or not. Without an acceptable justification for this, in this respect alone I consider the measures to be unreasonable.

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[31] Section 165(4)
[32] Section 42(3)

[55] Similar considerations arise in the context of permitting continued print media coverage of the conduct while barring the broadcast of visual images of events. If journalists may continue to report in the print media as to events in Parliament yet are restricted to do so in visual images, it is unclear why the one medium necessarily impacts negatively on Parliament while the other does not.

[56] Moreover, knowing what members of parliament do is important to inform the decisions of voters who choose their representatives. The manner of conduct of elected representatives is not a reasonable basis on which to restrict the openness of Parliament, even if the conduct may give rise to disapproval. Given that section 19(1) grants to every citizen the freedom to make political choices, considering the actions and conduct of elected representatives is inherent to making such political choices in a democratic state. This is the reason that our Constitution places value on accountability and openness.

[57] In considering whether the measures taken are reasonable, a further difficulty arises regarding what conduct constitutes 'grave disorder' or 'unparliamentary behaviour' and what does not. The fact that the Policy fails to define grave disorder, with only the Rules doing so, leaves the Policy without a definition of conduct which it seeks to regulate.

[58] If the grave disorder arose as a result of the removal of the members of the EFF from Parliament, which occurred at the instance of and pursuant to a ruling made by the Speaker, it is difficult to understand how the dignity or authority of Parliament would be impaired in the broadcast and televising of the enforcement of a decision of the Speaker if she had acted within her powers under the Constitution and the rules. It is equally plausible that in the public having sight of the exercise by the Speaker of her powers to control the House, respect for the position of Parliament would be promoted and

preserved. If however the Speaker had acted unlawfully in exercising her powers to control the House, the dignity and authority of Parliament cannot be preserved by concealing from the public the consequences of an unlawful act and in denying the public access to the broadcast of footage relating to it given the nature of Parliament.

ii. Legitimate business of Parliament

[59] The respondents defend the measures adopted on the basis that it is reasonable to restrict access by the public and media only to the broadcast of the legitimate business of Parliament and that grave disorder and unparliamentary behaviour do not fall within the scope of Parliament's legitimate business.

[60] I am not satisfied that the measures comply with the reasonableness standard on this basis, illustrated by the following example. Repeated points of order may constitute part of the legitimate business of Parliament and yet may be disruptive to the point of 'grave disorder'. If access to footage of grave disorder is barred when it forms part of the legitimate business of Parliament then the measures cannot be reasonable on this basis.

[61] Difficulties also arise regarding who it is who determines what conduct has reached the point of grave disorder or unparliamentary conduct and what has not. The measures are silent in this regard and in a robust and contested environment be a question of degree and could occur repeatedly even in the same sitting. Fundamental to our constitutional order is the principle of legality: that the exercise of public power is legitimate only where it is lawful.[33] Without knowledge as to where the power to make a decision lies or the identity of the decision maker, it is not apparent whether or not the decision maker failed to take into account a factor that he or she was bound to take into

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[33] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras 56 and 58.

consideration or whether the resulting decision was that of a reasonable decision maker.[34] The Constitutional Court in *Masetlha v President of the Republic of South Africa and Another*[35] emphasised the requirement of the rule of law that public power not be exercised arbitrarily. If it is not known who takes and how a decision is taken that conduct has reached the point of grave disorder or unparliamentary behaviour, it is indeterminable whether the power has been exercised lawfully or rationally in circumstances in which the consequences for the public are immediate and restrictive.

[62] The fact that Parliament has the power to take the appropriate disciplinary steps against its members for misconduct can only strengthen respect for Parliament, where such action taken is appropriate and lawful, thereby building its legitimacy in the eyes of the public. Broadcast limitations are not required to bolster Parliament's power to act against misconduct under its rules.

iii. Broadcast encourages further disorder

[63] The respondents defend the measures as reasonable on the basis that the broadcast of grave disorder or unparliamentary behaviour will serve to encourage further such disorder and breed an appetite for reality television at the expense of Parliament. No evidential support for this proposition is provided and consequently little store can be placed on it. But even if this were true, it could not justify broadcasting the business of Parliament as the democratically accountable institution elected by the people in a censored or restricted manner. This is so in that members of Parliament are, as elected representatives of the people, accountable to the public and may not shield themselves from public scrutiny.

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[34] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at 511

[35] 2008 (1) SA 566 (CC) at para 189

[64] In addition, the view I take of the matter is that the proposition that disorder breeds disorder when it is broadcast and televised is an authoritarian approach to openness and media freedom, one similar to that adopted by the apartheid state, for example in legislation that existed for much of the 1980's and which restricted the reporting of *inter alia* political unrest. It is an approach that is not condoned by our Constitution and is out of keeping with the fundamentals of our constitutional democracy.

[65] While it may be that where disorder is created in Parliament as part of a political strategy to draw attention to a particular political party or its members, televising such disorder may indeed draw such public and media attention to the conduct of the members of that party. The fact of such publicity does not however provide a reasonable basis on which to restrict the access of the public to the conduct of all representatives, particularly given the foundational values of openness and accountability.

iv. The limitation on public access is minor

[66] The respondents defend the measures on the basis that the limitation on public access and that of the media imposed by the measures is minor and therefore reasonable. Minor restrictions are capable of causing significant results and may impose unreasonable limitations on constitutional rights or freedoms.

[67] Given that the impact of the measures taken by Parliament restricts the right to openness and accountability, such restriction is neither minor nor insignificant. It bars the public the right to have sight of the conduct of elected representatives of the people in Parliament and to exercise their rights under the Constitution in response to what they see. For those members of the public watching the televised broadcast of the SONA the impact of the measures were that they were censored from viewing the consequences of the Speaker's order

and left unenlightened as to the events that were developing in Parliament. The measures in their application sought to ensure positive coverage of Parliament's proceedings by restricting the public's right to see and know what was occurring. By its nature such a restriction is not minor and its impact and effect is not to be minimised.

v. International best practice

[68] The respondents rely on examples from foreign jurisdictions in which similar measures to restrict access have been imposed. Reference was made to the measures adopted by the House of Commons and those adopted by the Canadian, Australian and New Zealand Parliaments as providing support for the reasonableness of the measures taken by our Parliament.

[69] The applicants rely on jurisdictions such as India, Scotland and Kenya, as well as the parliament of the European Union, to indicate a trend towards greater transparency and openness in the broadcasting of parliamentary disruptions in these jurisdictions.

[70] It is equally of interest that the United States House of Representatives provides that the Speaker administers, directs, and controls a system for complete and unedited audio and visual broadcasting and recording of the floor proceedings of the House[36].

[71] Foreign law and practice, while often illuminating, cannot be determinative of the meaning of the South African Constitution or the reasonableness of its state actions.[37] The text of our Constitution is the starting point for the determination by this Court and cannot be materially affected by international best practice. The clear distinctions in the form and nature of

[36] Rules of the U.S. House of Representatives, January 6, 2015

[37] *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.

political institutions in other countries, as well as their different histories makes the wholesale adoption of their approach to considerations of Parliamentary openness and accountability unattractive.

Conclusion

[72] The constitutional value placed on openness and accountability arises within the context of and as a consequence of our authoritarian and undemocratic past:

> *'The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it.'*[38]

[73] While it is so that when it comes to matters falling within the heartland of Parliament, our Constitution contemplates a restrained approach to intervention in those matters by the Courts, intervention is permissible if it is undertaken to uphold the Constitution because our courts are the ultimate guardians of the Constitution.[39]

[74] The measures arise in the regulation by Parliament of its constitutional obligation to conduct its business in an open manner and in public with the public holding a concomitant entitlement to an open Parliament and one in which its members, and those members of the executive who appear in it, may be held accountable for their actions. This is apparent from the founding values of the Constitution, the right to free expression and media freedom, the nature of and purpose of Parliament, the obligation that it be open and its sittings held in public and the obligation upon Parliament to facilitate public

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[38] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para 49

[39] *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC) at para 135 (per Japhta J)

involvement in its processes.[40] In restricting the public's right to view what occurs in Parliament the measures are not constitutionally compliant. The measures do not accord with the test for reasonableness and the respondents have not shown differently.

[75] Openness repels the exercise of secret power and ensures accountability to the people. The measures unreasonably limit public access to a visual broadcast of important events involving elected representatives in a manner which requires such information to be obtained only from the print media or, as is increasingly the case, from social media. Given our country's torrid history of censorship and media restriction, the measures are unreasonable in their impact on openness, accountability, free expression and media freedom.

[76] For all of these reasons, I find the measures to be inconsistent with the Constitution and unlawful. In these circumstances it is not necessary to consider the alternative relief sought by the applicants. In terms of section 172(1)(a) an order of constitutional invalidity is not discretionary and must follow.

Jamming relief

[77] Given that the exercise of public power is constrained by the principle of legality, whether public authorities have acted unlawfully or not remains a live issue.[41]

[78] The Respondents accept that the permission and authority of the Speaker or Chairperson was not obtained under section 4 of the Powers Act by the security services to use the device jamming telecommunications at

[40] Sections 59(1) and 72(1)

[41] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras 56 and 58; *Buthelezi and Another v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA) at para 4

Parliament.[42] It is not suggested that the device was used under the provisions of section 4(2) of the Act, namely in circumstances of immediate danger to the life or safety of any person or damage to any property on the basis that its use would later be reported to the Speaker or Chairperson.

[79] The conduct of the fourth respondent and the State Security Agency was unlawful and the applicants have an interest in the adjudication of the constitutional issue at stake on the basis that unlawful conduct is inimical to the rule of law.[43] The defence of mistake does not cure the unlawfulness of the conduct. In both *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [44] and *Kruger* v *President of the Republic of South Africa and Others*[45] the Constitutional Court declared *bona fide* mistakes of the President in bringing legislation into force irrational and invalid:

> '*The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.*'[46]

[80] Without the permission of the Speaker or Chairperson to perform '*a policing function*' in employing the device, its use on the Parliamentary precinct was unlawful. It restricted telecommunications and curtailed both the

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[42] Section 4 of the Powers Privileges Powers Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 provides that:
'*(1) Members of the security services may-*
(a) enter upon, or remain in, the precincts for the purpose of performing any policing function; or
(b) perform any policing function in the precincts,
only with the permission and under the authority of the Speaker or the Chairperson.'
[43] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) at para 32.
[44] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)
[45] *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC).
[46] *Pharmaceutical Manufacturers (supra)* at para 89

constitutional rights of the public and the media. Its use was unjustifiable and unlawful in the circumstances and there is a compelling purpose served in declaring this to be so to deter any future such unlawful conduct.

[81] The applicants are accordingly in this respect entitled to the relief sought and a declaration that the use of a device to interfere with telecommunications during the SONA on 12 February 2015 was unconstitutional and unlawful must follow.

Remedy

[82] The applicants seek an order that the manner in which the audio and visual feeds of the SONA on 12 February 2015 were produced and broadcast by the first to third respondent was unconstitutional and unlawful. I see no reason as to why such order should not be granted.

[83] The applicants seek further the direction of this Court that the audio and visual feeds of open parliamentary sittings and meetings are into the future not interrupted pending the enactment of any new measures that Parliament may deem to be necessary and reasonable. They propose that this Court venture into the terrain of an order encompassing the angle at which Parliament's cameras would be positioned when unparliamentary behaviour arises. A restrained approach on the part of this Court is called for on this aspect, in that to make such an order would be to delve into the area of regulation that is not the Court's domain. For these reasons no directions should be made in this regard in the manner sought by the applicants.

[84] There is no reason as to why costs should not follow the result, including the costs of two counsel.[47]

[47] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paras 21-25. *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* [2015] ZACC 4

<u>Order</u>

[85] In the result, I would propose an order in the following terms:

1. It is declared that paragraph 8.3.3.2 (a) of Parliament's Policy on Filming and Broadcasting of Parliament is unconstitutional, unlawful and invalid.

2. It is declared that paragraph 2 under the heading 'Treatment of Disorder' of Parliament's Television Broadcasting "Rules of Coverage" is unconstitutional, unlawful and invalid.

3. It is declared that the manner in which the audio and visual feeds of the State of the Nation address in Parliament on 12 February 2015 were produced and broadcast by the first to third respondents was unconstitutional and unlawful.

4. It is declared that the use of a device by the fourth respondent and the State Security Agency to interfere with the telecommunication signal at Parliament during the State of the Nation address on 12 February 2015 was unconstitutional and unlawful.

5. The respondents are to pay the applicants' costs, including the costs of two counsel.

KM SAVAGE

JUDGE OF THE HIGH COURT