

The law of privilege and the Economic Freedom Fighters in South Africa's National Assembly: the aftermath of the 7th of May 2014 national elections¹

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OPSOMMING

Die reg insake privilegie en die Ekonomiese Vryheidsvegters in die Nasionale Vergadering in Suid Afrika – die namaal van die 7de Mei nasionale verkiesings

Hierdie artikel ondersoek die omvang van die fundamentele beginsel van parlementêre privilegie – met spesifieke verwysing na die Suid-Afrikaanse Nasionale Vergadering (NV) se bevordering van die demokratisering van die parlement se outonomie. Die oogmerk is om 'n institusionele beleid vir die NV te bepaal aangaande die afdwinging van die parlement se magte in die bevestiging van die parlement se grondwetlike identiteit, nie deur eksterne inmenging nie, maar deur die afdwinging van interne kontroles – veral in die bestuur van die ope debatte in die evolusie van die beginsel van privilegie. Die fokus is nie bedoel om die operasionele kant van die NV te bespreek nie, maar die bevordering van die beginsel van privilegie in die Vergadering self sonder om dit te onderskei van die komitees, aangesien die beginsel van vryheid van spraak ook daaroorheen strek om parlementêre privilegie te bevestig. Die artikel argumenteer dat die miernes van politieke aktiwiteite in die NV die funksionaliteit van die parlement lamlê en dat dit die oneffektiwiteit van die parlement as spreekbuis vir die sisteem van verteenwoordigende demokrasie bevorder. Die bedoeling is nie om 'n volledige evolusie van die geskiedenis en die reg met betrekking tot parlementêre privilegie te gee nie en erkenning word gegee dat die VN nie in 'n vakuum funksioneer nie, maar in die politieke konteks waarin dit bedryf word.

Die fokus is gemotiveer deur die geboorte van die nuwe politieke party: die Ekonomiese Vryheidsvegters (EJV) na die 7 Mei 2014 nasionale verkiesings, wat die ontwikkeling van die beginsel van parlementêre privilegie in die konteks van die nuwe grondwetlike bedeling in die kollig gestel het. Hierdie beginsel is die basis vir die regulering van die institusionele outonomie van die VN deur die verteenwoordigers van die algemene publiek, en is gegrond op die regs- en grondwetlike konstruksie van Suid-Afrika se grondwetlike bedeling. Die grondwetlike status van parlementêre privilegie het geblyk om 'n fassinierende onderwerp vir konstitusionele reg te wees – veral sedert die aankoms van die EJV in die

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parlement. Die fassinering word egter pertinent wanneer die indruk geskep word dat die NV beheer verloor oor die bestuur van die debatte oor aangeleenthede van nasionale belang. Hierdie stand van sake dryf 'n dringendheid om die manier hoe die VN sy interne kontroles reguleer bepaal.

1 Introduction

The year 2014, – South Africa's twentieth year of democracy – marked an important milestone in the development of the principle of parliamentary law of privilege. Such importance relates to the democratisation of the South African Parliament, which, after the 7 May 2014 national elections, included a notable, new political party: the Economic Freedom Fighters (EFF). The arrival of the EFF in the South African Parliament – an opportunity, endorsed by section 19 of the Constitution,² that allows anyone to form or join a political party – delivered a new constitutional landscape in terms of the application of the law of parliamentary privilege in South Africa. It has also resulted in a dramatic increase in political contestations in the National Assembly (NA/House) – which have led to legal wrangles in consolidating South Africa's democracy. This provides an opportunity for the examination of the 1996 Constitution as a 'source of inspiration in shaping the principle of privilege'.³ The principle is the basis for the regulation of the institutional autonomy of the NA by the representatives of the general populace, and is grounded on the legal and constitutional structure of South Africa's constitutional dispensation.⁴

The constitutional status of parliamentary privilege has proven to be a fascinating topic for constitutional law – especially since the arrival of the EFF in Parliament. The fascination becomes pertinent, because there is the impression that the NA is losing control of the management of debates on issues of national interest. This state of affairs is driving the urgency of determining the manner in which the NA regulates its internal controls.

This article examines the scope of the fundamental principle of parliamentary privilege – with particular reference to South Africa's NA in the furthering of its autonomy in the democratisation of Parliament.

2 The Constitution of the Republic of South Africa 1996 (hereafter the Constitution). S 19 of the Constitution entitles anyone to form, join a political party, hold public office if elected, and represent the vision and mission of the people who voted them into office. This is linked to the inter-relationship of parliamentary members comprised of political party members, as they strive towards establishing a common ground in fulfilling their constitutional role for an effective and democratic representation of the general electorate.

3 Klug 'Constitutionalism, democracy and denial in post-apartheid South Africa' (2012) University of Wisconsin Law School, Legal Studies Research Paper Series No 1204 available from <http://ssrn.com/abstract=2141310> (accessed 2015-02-12).

4 *Idem* p 4.

The objective is to determine an institutional response of the NA in terms of asserting its powers in affirming its constitutional identity, not from external interference, but in the enforcement of its own internal controls – especially on the management of free debates in the evolution of the principle of privilege. The focus is not meant to discuss the operational side of the NA but the advancement of the principle of privilege in the House itself, without distinguishing it from its committees because freedom of speech extends to them in the affirmation of parliamentary privilege. The article argues that the hive of political activity in the NA leads to functional inactivity, which fosters the ineffectiveness of Parliament as a mouthpiece of the system of representative democracy. It does not intend to be a comprehensive evolution of the history and law in relation to the principle of parliamentary privilege and acknowledges that the NA does not operate in a vacuum, but in the broader political context as a whole.

2 Parliamentary Privileges

2.1 Privilege: The Central Feature of Representative Democracy

Drawing from May, parliamentary privilege is:

the sum of the peculiar rights enjoyed by each House collectively ... and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.⁵

From this, it is deduced that parliamentary privilege has long been recognised in many countries and emanates from the struggles that sought to develop it over a number of years in ensuring that Parliament was free from undue influence. Privilege, therefore, is the constitutional and legal basis for the protection of the institutional status and members of Parliament and its committees from any action, legal or otherwise, that could arise from an opinion expressed in the House. It entails the personal and institutional independence that is enjoyed by Parliament and its members in the performance of their duties without fear of intimidation or any barriers that may impede the fulfilment of their functions.⁶

This means that privilege is an affirmation of the enabling environment that encourages the exercise of duties and functions without interference from other branches, including the members of the

5 May 'Parliamentary practice' 1997 5 in *National Assembly Guide to Procedure* (2004) Parliament of the Republic of South Africa.

6 Macreadie 'An introduction to parliamentary privilege' 2010 9 available from http://www.academia.edu/3841322/An_Introduction_to_Parliamentary_Privilege (accessed 2016-04-12).

House themselves. This is the reinforcement of the maintenance of authority and independence that allows Parliament to undertake its core business of making legislation and reviewing the activities of the executive and to go further by holding the latter accountable if it is found to have failed to fulfil its duties. As expressed by Devenish, privilege should be considered as a 'necessity for the dignity and proper functioning of the institution in ensuring the fulfilment of the member's parliamentary duties and not for their personal benefit.'⁷ It is opined that privilege seeks to ensure the assertion of Parliament's integrity and independence while at the same time being free from undue influence. This is the centrality of the principle of privilege that is meant to ensure the prevention of tyranny and protection of liberty of Parliament in the endorsement of its specialist function of law-making as a branch of government. Mojab similarly contends that parliamentary privilege is framed in such a way that it:

secures the proper dignity, efficiency and independence of the legislature and not to protect individuals from due process. This legal institution is not a personal immunity; it is an occupational immunity, which is provided to ensure that the duties of representatives may carry out perfectly. This immunity is not meant to place a Member of Parliament above the law, but to protect him from possible groundless proceedings or accusations that may be politically motivated; thus it is not a discriminatory institution.⁸

In the South African context, the evolution of the concept of parliamentary privilege should be understood against its archaic history which was characterised by strife, 'tumultuous and epic conflict' before the attainment of democracy in 1994.⁹ The uniqueness of parliamentary privilege that has emerged through the protracted history of a political struggle for freedom, underpins the independence of Parliament. This is given credence by the adoption of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act,¹⁰ which signifies the principle of the independence of Parliament as it provides that:

The President and members have the same privileges and immunities in a joint sitting of the National Assembly and the National Council of Provinces as they have before the Assembly or the Council.¹¹

This has its roots in section 58 of the Constitution, which regulates free speech in the NA and provides that:

7 Devenish 'The "imperial presidency" and the powers and privileges of parliament' 2012 *SA Public Law* 170.

8 Mojab 'A review of parliamentary privilege with an approach to Iranian legal system' 2004 available from law.bepress.com/cgi/viewcontent.cgi?article=1863&context=expresso (accessed 2016-04-12).

9 Devenish 2012 *SA Public Law* 172.

10 4 of 2004 (hereafter the Privileges Act).

11 This is also the approach of the Kenyan Parliament on the importance of parliamentary privileges, when it adopted the Parliamentary Powers and Privileges Bill 2014 as entrenched in s 8 – to ensure the affirmation of the day-to-day activities of the House in the management of its internal affairs.

- (1) Cabinet members, Deputy Ministers and members of the National Assembly:
 - (a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders, and
 - (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for:
 - (i) anything that they have said in, produced before or submitted to the Assembly or any of its committees ;or
 - (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.
- (2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.¹²

Section 58 was contextualised by Mahomed CJ in *The Speaker of the National Assembly v Patricia De Lille*¹³ when he held that:

the right of free speech in the Assembly protected by section 58(1) is a fundamental right crucial to representative government in a democratic society. Its tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament.¹⁴

The Court gave content and meaning to freedom of speech as a 'highly esteemed parliamentary privilege that is essential for members to enjoy absolute immunity from the threat of defamatory actions in order that they are able to express their minds on the affairs of the nation and the body politic without inhibition'.¹⁵ The court had further given substance to freedom of speech in *Swartboo v Brink*.¹⁶ Although this case emanates from the local sphere of government, the principle it developed is directly linked to the advancement of parliamentary privilege. The court determined the 'scope of liability and the nature of the protected conduct of local government councillors in the advancement of the principle of privilege as entrenched in section 28(1)(b)¹⁷ of Local Government: Municipal Structures Act 117 of 1998'.¹⁸ Without going into an extensive analysis of the judgement, the court held that the 'conduct complained of must be directly linked to the business of the council whether it is through statements, documents produced and the submissions that are made to the council'.¹⁹ The court then endorsed that section 28 is 'wide

12 See also ss 71 & 117 of the Constitution on the protection of the Provincial Assembly's privileges.

13 1998 (3) SA 430 (C).

14 *Idem* par 29.

15 Devenish 2012 SA Public Law 169.

16 2003 (5) BCLR 502 (CC).

17 The section provides that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for: (i) anything that they have said in, produced before or submitted to the council or any of its committees; or (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.

18 *Swartboo v Brink supra* n 15 at par 10.

19 *Ibid.*

enough to exempt members of a municipal council from liability for their participation in deliberations of the full council and its committees'.²⁰

The court had further cautioned against the intrusion of the court a *quo* into the domain of the other two branches by 'seeking to punish the councillors instead of determining whether their conduct was inconsistent with the Constitution in line the doctrine of separation of powers'.²¹ This reasoning is supported by the Constitutional Court when Kriegler J in *S v Mamabolo*²² held that courts have to be cautious and exercise some 'form of restraint, [and] self-discipline which is defined by various factors that had developed over a number of centuries'.²³

This is an affirmation of the legal and constitutional foundation supporting the legitimacy of parliamentary privilege in safeguarding the autonomy of the NA. It is an assertion of privilege as an essential principle for the respect of the legitimate sphere of the NA in the exercise of its constitutional mandate. This means that the concept of privilege is incorporated within the framework of the constitutionality in the function of the NA. Such a function is derived from the Constitution in ensuring that the NA exercises its role in a more meaningful way.²⁴ In essence, the constitutional prescription of privilege, supports the NA in affirming its constitutional purpose and autonomy in ensuring the effectiveness of the institution in regulating its internal controls.²⁵

The constitutional purpose of the NA enables the exercise of its privilege in ensuring that parliamentary members are given 'an opportunity to go beyond merely opposing, to [engage] constructively in a national forum, another way of doing things [and] serves as an avenue

20 *Idem* parr 16-17.

21 *Idem* par 25.

22 2001 (5) BCLR 449 (CC).

23 *Idem* par 18.

24 See section 57 of the Constitution which provides that:

- (1) The National Assembly may –
 - (a) determine and control its internal arrangements, proceedings and procedures; and
 - (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
- (2) The rules and orders of the National Assembly must provide for–
 - (a) the establishment, composition, powers, functions, procedures and duration of its committees;
 - (b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
 - (c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
 - (d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

25 Fox-Decent 'Parliamentary privilege, rule of law and the Charter after the Vaid case' 2007 *Canadian Parliamentary Review* 35.

for articulating positions ... on how a particular issue can be addressed or regulated better'.²⁶ This means that privilege:

- is central to the deliberative, multiparty democracy envisioned in the Constitution.
- implicates the values of democracy, transparency, accountability and openness.
- is perhaps the most important mechanism that may be employed by [the NA to scrutinise its own internal processes].²⁷

Given that privilege is foundational to the functioning of the NA and that the latter is the central focus in the democratisation of the parliamentary system, this is the framework of South Africa's constitutional design. It seeks to ensure that all parliamentary members are given equal voices on deliberating issues of national interest. It reinforces the internal and robust debates in advancing the inter-relationship of privilege with representative democracy – in line with the values of accountability and transparency.²⁸ The importance of representative democracy creates space in the NA for all members to engage constructively, in consolidating hard-earned democracy in South Africa. It anchors the NA practices, which enhance vigorous interaction in dispelling the myths about the marginalisation of minority parties in terms of national debates. It seeks to eliminate any countervailing force to the power-driven logic of political society in the NA.²⁹ In sum, representative democracy encapsulates the principle of privilege by:

- promoting and advancing the interests of the Republic of South Africa;
- protecting and promoting the rights of South Africans;
- discharging the duties of parliamentary members with all their strength and talents, to the best of their knowledge and ability, and with truthfulness with regard to the dictates of their consciences.
- doing justice to all; and
- devoting themselves to the wellbeing of the Republic and its entire people.³⁰

The above-mentioned factors provide a framework that is geared towards giving effect to the assertion of the constitutional identity of the NA. They further give due recognition to:

26 Moegoeng CJ in *Oriani-Ambrosini v Sisulu MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC) par 57.

27 *Mazibuko v Sisulu* 2013 (11) BCLR 1297 (CC) par 44.

28 Suttner 'Democratic transition and consolidation in South Africa: the advice of the "Experts"' 2004 *Current Sociology* 755-773; Tushnet 'New forms of judicial review and the persistence of rights – and democracy-based worries' 2003 *Wake Forest Law Review* 813-838.

29 Heller 'Democratic deepening in India and South Africa' 2010 *Journal of Asian and African Studies* 125; Crum & Fossum 'The multi-level parliamentary field: a framework for theorizing representative democracy in EU' 2009 *European Political Science Review* 249-271.

30 *Lekota v Speaker, National Assembly* (14641/12) [2012] ZAWCHC 385 par 36.

the long history of “deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination”, the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government.³¹

The importance of the history on the law of privilege in parliament is driven by the acknowledgement that the process of democratising the NA cannot be undertaken in isolation – without considering the context it emanates from. Hence, Moegoeng CJ emphasised the damage to the functioning of parliament caused by the history of South Africa, when he held that:

the inherent value of representative and participatory democracy and dissenting opinions was largely inspired by this nation’s evil past and our unwavering commitment to make a decisive break from that dark history. South Africa’s shameful history is one marked by authoritarianism, not only of the legal and physical kind, but *also of an intellectual, ideological and philosophical nature*. 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 ... It is in this context that the [principle of privilege] must be understood [own emphasis].³²

It is this history that failed to ensure that Parliament ‘became a role model for good governance and the country’s main representative institution’.³³ It is in this regard that a proper and meaningful understanding of the application of the law of privilege becomes crucial in the assessment of its enforcement by the NA. This is essential in maintaining the constitutional balance between the enabling of free debates and the scrutiny of its internal processes. This balance is an important principle sustaining South Africa’s maturing democracy which has to be determined within the ambit and content of the principle of privilege in the new dispensation with reference to applicable legislation – which, in this instance, refers to the Privileges Act and the Constitution.³⁴

31 *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) (6 September 1996) par 10.

32 *Oriani-Ambrosini v Sisulu MP, Speaker of the National Assembly supra* n 26 at par 49.

33 Nijzink & Piombo ‘The institutions of representative democracy’ 2004 University of Cape Town, Centre for Social Science Research Working Paper No 85; Currie & De Waal *The new constitutional and administrative law* (2001) 50.

34 Gay ‘The regulation of parliamentary standards: a comparative perspective’ 2002 University College London, The Constitution Unit, School of Public Policy 64.

3 Construing the Constitutional Identity of the National Assembly in the Application of the Law of Privilege

3.1 Privilege: The 'Chronic Ailment' of Representative Democracy?³⁵

The *De Lille* judgment had long settled the supremacy of the Constitution, when it reviewed the application of the parliamentary law of privilege. The bone of contention in this matter was the suspension of Ms De Lille – for 15 days – from Parliament. Ms De Lille was at the time, a member of the opposition party: the Pan Africanist Congress (PAC). She had alleged that certain members of the ruling party, the African National Congress (ANC), were 'apartheid spies'. The *ad hoc* Committee was constituted to investigate the remarks and recommended that Ms De Lille apologise and be suspended for 15 days from the NA. The recommendations were duly adopted by the NA. In turn, Ms De Lille was aggrieved by the decision – alleging that the Committee was biased against her, did not act in good faith and did not allow for a fair hearing before the adoption of the recommendations.³⁶

The Court pointed out that the case impinged on the backbone of South Africa's Constitution – because the latter 'is the ultimate source of lawful authority in the country and not Parliament'.³⁷ It held that:

no Parliament, however, bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution... any citizen adversely affected by any decree, order or action of official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.³⁸

The judgment constitutionalised the process of the application of the law of privilege and entrenched its enforcement. The process should consider the:

- circumstances of each case;

35 Obiyo 'The South African parliamentary committee system: the constitutional parameters and structure' 2006 53 available from http://wiredspace.wits.ac.za/bitstream/handle/10539/2197/ObiyoRE_Chapter%203.pdf; jsessionid = 10F1B88ED490DAA494178E7760B18DD4?sequence = 4 (accessed 2016-04-12); Swinton 'Challenging the validity of an Act of Parliament: the effect of enrolment and parliamentary privilege' 1976 *Osgoode Law Journal* 345-405.

36 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at parr 1-10.

37 *Idem* par 14.

38 *Ibid.*

- nature of the decision;
- identity and expertise of the decision-maker;
- range of factors relevant to the decision;
- reasons given for the decision;
- nature of the competing interests involved; and
- impact of the decision on the lives and well-being of those affected.³⁹

The application of these principles in the exercise of the law of privilege is strengthened by section 57 of the Constitution, which empowers the NA to determine its own internal processes in line with Rule 44 of the Guide to Procedure. Section 57 is the cornerstone of the application of the law of privilege, because it limits any ‘impotence of the [NA] in maintaining effective discipline and order during [Parliamentary debates]’.⁴⁰ Of equivalence is the corresponding responsibility of the NA to align such undertaking with due regard to representative and participatory democracy, accountability, transparency and public involvement.⁴¹ This provision does not only regulate the way in which Parliament should function, but equally controls the manner in which the NA exercises its authority. It democratises the application of the law of privilege in advancing its procedural and substantive conceptions, in compliance with the Constitution. It closely guards ‘any failure that may lead to running the risk of eroding the unique principles of democracy which are encapsulated in the representative form of democracy’.⁴²

The importance of section 57 on the application of the law of privilege was given effect in the *Lekota* judgment, when the Court considered the rulings made by the Speaker for the withdrawal of a statement made by Mr Lekota during parliamentary debates. Mr Lekota alleged that the President violated his office by keeping quiet about the conduct of the ANC and its Alliance Partners in relation to a painting by the artist Brett Murray at the Goodman Gallery in Johannesburg. The painting resembled the President and had exposed genitalia.⁴³ The Court analysed the impact of the statement on the office of the President and Mr Lekota’s refusal to withdraw it, and the reasonableness of the sanction imposed. It held that the statement ‘did not only point to the serious dereliction of duty on the part of the President, but convey[ed] that the latter failed to uphold the oath of his office’.⁴⁴ The Court upheld the decision of the Speaker, and held that:

[Mr Lekota’s] remark clearly conveys to others that the President is not an honest person and does not have strong moral principles [and] did not only

39 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) par 45.

40 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at par 16.

41 S 57(1)(b) of the Constitution.

42 Malherbe & Van Eck ‘The state’s failure to comply with its constitutional duties and its impact on democracy’ 2009 *TSAR* 214.

43 *Lekota v Speaker, National Assembly supra* n 30 at par 1-5.

44 *Idem* par 36.

suggest that the President is guilty of improper conduct but also casts a serious reflection on his integrity as a member of the National Assembly.⁴⁵

However, the affirmation of the standard required on the application of the law of privilege – as evidenced in *Lekota* and which has a negative impact on the importance of section 57 – was underscored by the manner in which the NA handled the enforcement of the discipline of the institution in line with the requisites of the Privileges Act.⁴⁶ This was against the members of the EFF who ‘allegedly’ disrupted the President’s address to Parliament on 21 August 2014. The so-called disruption was caused by a question put to Mr Zuma – when was he going to ‘pay back the money’ as per the recommendations of the Public Protector’s Report on the Nkandla spending?⁴⁷ The EFF was of the opinion that the President’s response to the question was ‘unintelligible’ and ‘meaningless’, as it was required to obtain a proper or meaningful response from the President.⁴⁸ The response also caused its members to bang on the benches to voice objections – even to the manner in which the Speaker handled the issue. Members of the EFF were ordered out of the NA by the Speaker. The Powers and Privileges Committee was then constituted to investigate the allegations that were brought by the Speaker against the EFF, for transgressing the rules of the NA. The Committee investigated the matter and recommended that members of the EFF should be suspended for 30 days without pay based on the extent of the alleged contraventions which they have committed.⁴⁹ In essence, the Committee recommended:

- A withdrawal of benefits equal to 14 days salary (Category C: fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty first.);
- Suspension from membership of the National Assembly without pay for a period of 14 days (Category B: eighth, ninth, tenth, eleventh, twelfth and thirteenth applicants); and

45 *Idem* par 37.

46 See s 12(1), which provides that ‘subject to this Act, a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared by or under section 13 to be contempt of Parliament by a member, and taking the disciplinary action provided therefore’.

47 The Public Protector ‘Secure in Comfort: Report on an investigation of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in KwaZulu-Natal’ 2013 available from http://www.gov.za/sites/www.gov.za/files/Public%20Protector's%20Report%20on%20Nkandla_a.pdf (accessed 2015-04-16).

48 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2014] ZAWCHC 206 (hereafter *EFF and Others*) pp 8 & 9.

49 See Powers and Privileges Committee of the National Assembly ‘Report on the hearing into allegation of misconduct constituting contempt of Parliament by members of the National Assembly’ 2014 par 20 available from <https://pmg.org.za/committee-meeting/17844/> (accessed 2015-04-16).

- Suspension without pay as a member of the National Assembly for a period of 30 days (Category A: second, third, fourth, fifth, sixth and seventh applicants).⁵⁰

In turn, the EFF lodged an application to the Western Cape High Court for an interdict against the implementation of the recommendations of the Committee. The Court was asked to ‘prevent the Speaker from implementing the decision of the NA’, which meant the ‘imposition of the sanction of suspension without remuneration or a fine in respect of the 02nd to the 21st applicants’.⁵¹

In addressing this matter, the tone and language of the Court has put the conduct of the NA under intense scrutiny, on how the application of the law of privilege was used in dealing with dissenting voices.

First, the Court remarked on South Africa’s history and its infancy status in developing the ‘contours of democracy’.⁵² The Court held that the move from ‘political warfare’ to ‘legal warfare’ has put enormous pressure on the judiciary to craft innovative theories that will guide it on whether to accede or refuse demands for what often appear to be heavy ‘political lifting’.⁵³ Although this might seem heavy on the judiciary, the ‘political brawl’ helps to transform South African politics in a manner that gives effect to the underlying values of the new dispensation. It helps in the determination of the impact of the guise of the political activity – which reduces constitutional debates to the dearth of privilege relationships in the NA. It eliminates any manifestation of redundancy in ensuring adherence to the live and robust debates in a manner that consolidates the strides that the NA has sought to achieve. Of further importance, it enables the gauging of the transformative nature of the South African jurisprudence of the law of privilege. It also helps determine the quality of the capacity of the judiciary and its judges in not repeating and falling prey to the pre-democratic history of succumbing to the political will – instead of to the Constitution, as the supreme law of the Republic. The contention was endorsed by Ngcobo J in *Doctors for Life International v Speaker of the National Assembly*⁵⁴ judgment and affirmed the primary duty of the courts when this Court held that:

if in the process of performing their constitutional duty, [they] intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.⁵⁵

50 *EFF and Others supra* n 47 at p 7.

51 *Idem* p 1.

52 *Idem* p 3.

53 *Ibid.*

54 2006 (12) BCLR 1399 (CC).

55 *Idem* par 70.

Second, the Court considered the dominance of the ruling party in the Committee and analysed the way in which it conducted the hearings which had a direct impact on representative democracy as envisaged in section 19 of the Constitution alongside section 7 of the Privileges Act.⁵⁶ The intersection of the two provisions envisages the co-responsibility over the manner in which the members of the NA and the Speaker adhere to the democratic principles of the new dispensation. They seek to ensure an affirmation of the democratisation of the NA in eliminating the 'historic bridge between a past which was based on conflict ... [and] ... a future which is stated to be founded on the recognition of a ... constitutionally protected culture of openness and democracy ..., which is based on what, is 'justifiable in an open and democratic society based on freedom and equality'.⁵⁷

Third, of further concern is the punishment of members of the EFF, which was imposed contrary to the basic rules of the law of privilege, as endorsed in the Privileges Act. Section 12(5) of the Privileges Act requires lesser measures for the application of instilling discipline, before the harsher sentence that was meted out to EFF members could be imposed. The discipline includes:

- a formal warning;
- a reprimand;
- an order to apologise to Parliament or the House or any person in a manner determined by the House;
- the withholding for a specified period of the members' rights to use or enjoyment of any specified facility provided to members of Parliament; and
- a fine not exceeding the equivalent of one month's salary and allowances.

These principles embody the 'fundamental rules of natural justice which entail the application of the law in an unbiased and impartial manner'.⁵⁸ As the Court pointed out in *Lesapo*, the NA as a constitutional institution:

should be exemplary in its compliance with the fundamental constitutional principle that [advances measures that are just and equitable which are] crucial for a ... sustainable democracy, [especially] in a country like ours

56 Section 7 provides that a person may not improperly interfere with or impede the exercise or performance by Parliament or a House or committee of its authority or functions: (a) Improperly interfere with the performance by a member of his or her functions as a member; (b) threaten or obstruct a member proceeding to or going from a meeting of Parliament or House or committee; (c) while Parliament or a House or committee is meeting, create or take part in any disturbance within the precincts.

57 *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) parr 25 & 26; *Bennett v The Speaker of the Parliament of Zimbabwe* No SC 75/05, Civil Application No 16/05, Supreme Court of Zimbabwe.

58 *Lesapo v North West Agricultural Bank* 1999 (12) BCLR 1420 par 5.

where [there is no room for justified punitive measures], which, as in this case, is inimical to a fundamental principle such as that against the exertion of [political authority].⁵⁹

It is evident that the Committee was motivated by arbitrariness, which attests to the argument made by the EFF that the establishment of the Committee was nothing more than a ‘sugar-coating’ exercise of the political authority of the ruling party (the ANC). As the Court further contended, the punishment was designed as a ploy to limit the powers of ‘the parliamentarians who are dispatched to Parliament to articulate the needs, views, political and economic attitudes of their constituency, the people who voted for them’.⁶⁰ The suspension did not consider the long-term effects of the short-term decision, as it sought to weaken the EFF’s ability to represent its constituency.⁶¹ The Court further pointed out that the EFF members were handicapped in their constitutional role because they were not just ordinary aggrieved employees, but:

public representatives who represent 6.35% of the elected; that is of those who cast their vote in the 2014 elections. They are paid to represent these constituents. Failing to pay them does not only mean hardship for themselves personally in respect of their pension payments, mortgage bonds, vehicle finance and other costs that they must incur, but it weakens their financial ability for the period of the suspension to do the job for which they are paid. Similarly, a suspension which bars them from access to their offices can surely not be dependent on when the sanction was imposed. It prevents applicants to do what their political opponents are certainly able to do, that is to access their facilities, which they have of right as public representatives.⁶²

The whole fracas is traced to the conduct of the Speaker when she could not retain her composure and deal with the ‘alleged’ disruption without the appearance of bias. By her own admission on the evidence presented before the Committee, when members of the EFF did not adhere to her instructions to leave the Chamber, ‘she lost it’. This is evident in the language of the Speaker when trying to calm events in the NA, when she held that: ‘Honourable Shivambu, *I will throw you out of the House. I will throw you out of the House if you don’t listen ... Honourable Holomisa, please*’.⁶³ The repeated call was nothing more than exertion of the authority of the politically empowered Speaker. This type of conduct was earlier characterised in the *De Lille* judgment, which equally applies in this matter as ‘evidence of being driven by some kind of punishment for the statements [(the EFF)] made on the days preceding the sitting of the Assembly which was considered objectionable and unjustifiable’.⁶⁴

59 *Idem* par 17.

60 *EFF and Others supra* n 47 at p 19.

61 *Idem* p 34.

62 *Idem* p 45.

63 *Idem* p 17 [own emphasis].

64 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at par 17.

This was the 'lack of candour'⁶⁵ in a tortuous process of finding some justification for the removal of EFF members, while in turn the Speaker was more anxious to protect the vested interests of the ruling party – as she happened to be its National Chairperson.⁶⁶ The Speaker reduced her constitutional role to a partisan political power in the NA and negatively impacted on the development of the principles of accountability and transparency in relation to the development of the law of privilege.⁶⁷ This means that the importance of constitutional partisanship in the regulation of the internal controls in the NA, raises questions about the credibility of the office of the Speaker. The Speaker is required to manage any issue that emanates from the NA as objectively as possible – irrespective of affiliation to any of the political parties. The contention was given meaning in the *Lekota* judgment, when the Court held that the Speaker:

- is required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament;
- has to maintain order and apply and interpret its rules, conventions, practices and precedents; and
- should jealously guard and protect the member's rights of political expression entrenched in the Constitution.⁶⁸

These principles reinforce the manner in which the Speaker should handle the application of the law of privilege and were further validated in *Malema v Chairman of the National Council of Provinces*.⁶⁹ This case emanated from the remarks that were uttered by the applicant (Malema) during parliamentary sittings that the ANC government 'massacred people in Marikana'.⁷⁰ The applicant was then requested to withdraw the statement by the Respondent (Chairperson of the NCOP) and he refused. He was then ordered to leave the House as the remark was considered to be 'unparliamentary'. He then lodged an application requiring the Court to have the Respondent's ruling's declared unlawful and invalid, reviewed as well as to set aside her decisions:

- that certain statements made by first applicant 'are unparliamentary and do not accord with the decorum of this House';
- to request and then order the first applicant to withdraw his statement that the ANC government had massacred the mine workers at Marikana in that the police who killed them represented the ANC government; and
- to ask the first applicant 'to leave the House'.⁷¹

65 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC) par 84.

66 *The Speaker of the National Assembly v Patricia De Lille supra* n 12 at par 20.

67 Nijzink & Piombo *supra* n 33 at 4.

68 *Guide to Procedure supra* n 4 as quoted in *Lekota v Speaker, National Assembly supra* n 30 at par 12.

69 (12189/2014) [2015] ZAWCHC 39.

70 *Idem* par 22.

71 *Idem* par 5.

The Court invalidated the rulings made by the Speaker and thoroughly examined the application of the law of privilege by determining the impact it has on this case as it drew lessons from the *Lekota* and *De Lille* judgments as discussed above. The Court affirmed the legitimacy of the Constitution as foundational to the establishment of the NA which is 'elected by the people as part of a system of democratic government to ensure accountability, responsiveness and openness and insofar as they afford a guarantee of freedom of speech in Parliament subject to that body's "rules and orders" and legislation enacted by Parliament in that regard'.⁷² The Court further consolidated the application of the law of privilege in line with the principles of the right to freedom of speech as it analysed it through the concept of representative democracy which is characterised by accountability, transparency and public involvement'.⁷³ The Court then found the rulings of the Speaker to be irrational, establishing that she misconstrued the interpretation of the alleged 'unparliamentary' remark as a reference to the 'Members of Parliament who were members of Cabinet and reflected on their integrity by literally accusing them personally of murder'.⁷⁴

The enforcement of the law of privilege has been a 'thorn' in the functioning of the NA, and with respect to the office of the Speaker, it is clear that the manner in which the Speaker handled the 'alleged' disruptive behaviour was 'disingenuous' because it did not fall within the tenor of the 'legal culture of accountability and transparency [where the law of privilege could have been applied in a manner] that gives effect to the purpose which it seeks to advance by its enactment'.⁷⁵ As mentioned above, the law of privilege is closely linked and founded on the values of accountability, and the Speaker created an impression of bias which clouded the importance of transparency in the NA processes.⁷⁶

As matters stand, it appears that the NA has not learnt the lesson from the *De Lille* judgment – on how it enforces its rules and procedures within the broader framework of the principle of privilege. The whole process of enforcing the rules of parliamentary privilege has been reduced to a *chronic ailment*⁷⁷ of South Africa's history that undermines the reasonableness of the application of the law of privilege. The NA has reduced itself to being the reactionary machinery in the maintenance of order and discipline in the House.

In summary, the aftermath of the 2014 elections has exposed the manipulation of the law of privilege in the NA at the hands of the majority party (ANC). The aftermath tested the impact of the Constitution in regulating the manner in which the NA constitutionalises its processes in

72 *Idem* par 44.

73 *Idem* par 52.

74 *Idem* par 55.

75 *Shabalala v Attorney-General, Transvaal supra* n 56 at par 26.

76 Ngcobo CJ in *Br?mmer v Minister for Social Development* 2009 (6) SA 323 (CC) par 62.

77 Swinton 1976 *Osgoode Law Journal* 345-405.

advancing the law of privilege. It also legitimises the mushrooming of various political parties as a force to be reckoned with on how the NA conducts its business. It is an eye-opener to the general public in terms of how Parliament functions, and its response to the challenges it is faced with in managing dissenting voices. It seeks to bridge the gap between 'us and them' – ensuring an inclusive approach in the regulation of state authority.

4 Conclusion

The draconian handling of the EFF's alleged disruptive behaviour – in maintaining the discipline of the NA – has developed a perception of an institution that is ruled by instilling fear in its dissenting voices. South Africa's constitutional framework has enabled the courts to be at the forefront of the creation of a space for constitutional debates in ensuring that contestations are resolved in a manner that will give confidence to the general public and generate debate around the manner in which the NA, as the mouthpiece of the democratic processes, advances the constitutional law of privilege. Therefore, there is a clear need for sensitivity on how the NA projects itself to the general public, and it should not reduce itself to being a 'political umbrella' for any of the political parties.