

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

Case number:

In the matter between:

MARIO GASPARE ORIANI-AMBROSINI, MP

Applicant

and

MAXWELL VUYISILE SISULU, MP

Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

FOUNDING AFFIDAVIT

I, the undersigned

MARIO GASPARE ORIANI-AMBROSINI

do hereby make oath and say that:

I. INTRODUCTION

1. I am an adult male Member of Parliament and member of the Inkatha Freedom Party (“the IFP”). I am the Applicant in this matter.

2. The facts deposed to hereinafter are within my personal knowledge, save where the context indicates otherwise, and are true and correct. Where I make legal submissions, I do so on the basis of my professional experience and knowledge, as well as on the basis of legal advice I have received which I verily believe to be correct.

3. This application is brought to obtain three inter-related remedies:
 - 3.1. The review and setting aside of a decision by the Respondent to refuse to introduce in the National Assembly the National Credit Act Amendment Bill (“the Bill”);

 - 3.2. An order that the Respondent must introduce the Bill in the National Assembly on the basis of the same procedures and under the same conditions applicable to Bills introduced by a Cabinet member or a Deputy Minister; and

 - 3.3. A declaration that that any Rule of the National Assembly which prevents any of its members from introducing a Bill in the National Assembly violates the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and is accordingly invalid and unlawful.

4. These three remedies are all required to deal with different facets of the same problem, namely that the Rules of the National Assembly (“the Rules”) violate the provisions of the Constitution by preventing and/or fettering the constitutional power and duty of a Member of Parliament, as set out in section 73(2) of the Constitution, to introduce a Bill in the National Assembly.

5. In support of the relief that I seek, this affidavit deals with the following:

5.1. The parties;

5.2. Background facts;

5.3. The constitutionality of the Rules;

5.4. The decision of the Respondent; and

5.5. Conclusion and remedies sought.

II. THE PARTIES

6. I am the Applicant. I am a Member of the National Assembly as contemplated in sections 42 and 47 of the Constitution. I bring this application in my individual capacity, and not on behalf of the IFP.

7. As a Member of the National Assembly, my place of work is in Parliament, within the jurisdiction of this Honorable Court.
8. The Respondent is the Speaker of the National Assembly, Maxwell Vuyisile Sisulu, MP, cited in his official capacity.
9. Respondent has offices in Cape Town, within the jurisdiction of this Honorable Court.

III. BACKGROUND FACTS

10. My term of office as a Member of the National Assembly began on 6 May 2009.
11. As a Member of the National Assembly, I exercise – and am obliged to exercise – certain functions set out in sections 42(3), 53, 55, 56 to 58 and 73 to 78 of the Constitution.
12. As a Member of the National Assembly, my primary function is the introduction of legislation and participating in the process through which the National Assembly formulates, deliberates on and passes legislation. My only other additional function is that of participating in the oversight which the National Assembly exercises on how legislation is implemented by the Executive.

13. Section 73(2) of the Constitution provides:

“(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill; or

(b) a Bill which provides for legislation envisaged in section 214.”

(Emphasis added.)

14. In terms of this section, I have the power to introduce legislation in the National Assembly. This is perhaps the only function I have as a Member of the National Assembly which I can exercise individually. In respect of the others, my functions are part of a collegial deliberative process. Current practice and conventions are ambivalent and vary from committee to committee as per whether the oversight function can be exercised by a Member of Parliament individually, or is to be conducted collegially through a committee.

15. At the commencement of my term of office, I detected an inconsistency between my duties and obligations as a Member of the National Assembly as contained in the Constitution, and the Rules of the National Assembly, as will be set out below.

16. For this reason, on 15 May 2009, I wrote to the Respondent requesting that the Rules of the National Assembly be readopted. I did so in the firm

belief that under the Constitution each National Assembly carries the responsibility to adopt or readopt its own rules, and cannot be bound by the Rules adopted by its predecessor elected through a previous election which is *functus officio* together with all its actions, as it is the accepted case in respect of pending Bills and non-adopted reports. The other chamber of Parliament, the National Council of Provinces, readopts its Rules after each election.

17. In that correspondence, I specifically pointed out that certain Rules of the National Assembly deprive me of my right to introduce Bills in the National Assembly, and were therefore in conflict with the Constitution and could not be part of the Rules readopted by Parliament. A copy of this letter is attached hereto as annexure “**MGOA1**”.

18. The Respondent’s reply to my letter is attached hereto as annexure “**MGOA2**”. He stated that each successive Parliament needs not to readopt its Rules, and he made certain further points about the constitutionality of the Rules.

19. On 10 June 2009, after having given, out of courtesy, verbal notice to both the Respondent and the Chief Whip of the African National Congress (“the ANC”) of my intention to do so, I raised a point of order pointing out that the National Assembly had no Rules in that it had failed to readopt those adopted by the previous National Assembly. Therefore I requested the re-adoption of the Rules and that the Rules which deprive me of my power

and duty of introducing legislation be expunged from the Rules so readopted because unconstitutional..

20. The Respondent ruled rejecting my point of order, as set out in the Hansard report attached hereto as annexure “**MGOA3**”.

21. On October 20 2009, I wrote to the Hon. Adv. M.T. Masutha, MP, the Chairman of the Sub-Committee on the Review of the National Assembly Rules (“the Chairman”), and copied the Respondent in his capacity as the *ex officio* Chairman of the Rules Committee. I requested that the issue of the unconstitutionality of the Rules be tabled before the Rules Committee. I attached to said letter a legal opinion provided by Advocate Anton Katz, detailing the grounds of such unconstitutionality. Both documents are attached hereto as annexure “**MGOA4**” and annexure “**MGOA5**” respectively.

22. Neither the Respondent nor the Chairman gave an answer to my letter, nor did they cause the issue to be tabled in and discussed by the Rules Committee or in any other venue.

23. On 14 February 2010, I wrote to the Respondent tabling the Bill and requested that the Bill be introduced in terms of the Constitution, rather than in terms of the aforesaid unconstitutional Rules. My letter and the Bill are attached hereto as annexure “**MGOA6**” and annexure “**MGOA7**”

respectively. Again, I attached to my letter the aforesaid legal opinion by Advocate Katz.

24. The Respondent again gave no response.

25. He did not cause the Bill to be introduced in the National Assembly as required by the Constitution, nor did he refer it to the Private Members' Committee as contemplated in the Rules as they stand.

26. Not having received any answer, reply or action by the Respondent, on 23 March 2010 I requested via letter that he provide me with the reasons, in terms of section 5 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), for his failure to introduce the Bill in the National Assembly. The letter is attached hereto as annexure "**MGOA8**".

27. The Respondent again failed to respond and provide the reasons for his action and/or failure to act.

28. After three months had passed with no response from the Respondent, I had no option but to approach this Court to protect my rights and to strike down those parts of the Rules which violate the Constitution.

IV. THE CONSTITUTIONALITY OF THE RULES

29. I now set out, in brief, the scheme of the Rules and the basis of my submission that they are unconstitutional insofar as they prevent individual Members from introducing Bills in the National Assembly.

30. I attach hereto as annexure “**MGOA9**” a copy of the Rules. Large portions of the Rules are irrelevant for the purposes of this application; I deal with what is relevant below.

31. In terms of Rules 234 to 237, a Member of the National Assembly may not introduce a Bill in the National Assembly unless he receives prior “permission” to do so by the National Assembly itself, in which the ANC, as the majority party, has a preponderance of seats and votes.

32. This is obtained in the following manner:

32.1. first, in terms of Rule 234(1), the Member seeking to introduce a Bill must produce a memorandum on the Bill;

32.2. this memorandum goes to the Committee on Private Members’ Legislative Proposals and Special Petitions (“the Private Members’ Committee”) in terms of Rule 235(1);

32.3. after various consultations, the Private Members’ Committee must recommend to the National Assembly that permission to introduce the Bill either be granted or refused;

32.4. the Assembly, in terms of Rule 236, must consider the recommendation of the Private Members' Committee and the memorandum and either grant or refuse permission to introduce the Bill; and

32.5. as a matter of constant practice, Private Members' Committee's reports are "below the line" in the Order Paper of the National Assembly, which means that they are not deliberated upon by the Assembly and that effectively the Private Members' Committee has final say on matters before it.

33. This means that a Member of the National Assembly may not introduce a Bill unless previously authorized to do so by the Private Members' Committee, which in turn is dominated by the majority party. However, Cabinet members and Deputy Ministers are, in terms of Rule 233, excepted from complying with the above process.

34. The requirements listed above expressly violate the right and indeed the duty, as contained in section 73(2) of the Constitution, of every member of the National Assembly to introduce Bills in the National Assembly.

35. The only proviso contained in 73(2) is that it is only the Cabinet member responsible for financial matters who may introduce money Bills.

This clearly means that a Member of the Assembly has an unfettered constitutional power to introduce any other Bill.

36. Section 57 of the Constitution provides:

- “(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.”**

37. Section 57 does not, in any way, suggest that the procedures created by the National Assembly may trammel the constitutional powers and duties of Members of the National Assembly.

38. It certainly does not permit the exercise of those constitutional powers and duties to be dependent on the discretion of another body, in this case the majority party of the National Assembly; on the contrary Section 57(2)(b) requires that the Rules protect the participation in the proceedings of the Assembly and its committees of minority parties, in a manner consistent with democracy, exactly to avoid what is known as “majoritarianism” which is the power of the majority to have exclusive control of the agenda with no dialectic relationship with the minorities.

39. Furthermore, the Private Members’ Committee has operated for several years. I have studied its activities as they emerge from its minutes and records. Once it receives a proposal for a Bill from a Member of the National Assembly, it solicits the views of the Executive on whether or not such Bill should receive permission to be introduced in the Assembly. Customarily and routinely The Private Members’ Committee, and consequently the National Assembly, proceeds to decide in conformity with the advice received from the Executive. Practically and effectively, this means that the Executive decides whether or not a Member of the National Assembly may introduce legislation..

40. This subverts the doctrine of separation of powers in which Parliament carries the sole responsibility of making laws and the Executive is limited to implementing such laws. It departs from the principle set out in section 43(a) of the Constitution that Parliament exercises national legislative

function and further constitutes an abdication of the role provided for the National Assembly in section 42(3) of the Constitution, which provides:

“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.”

41. I found it shocking that Parliament has not brought its Rules into compliance with the Constitution fourteen years after its adoption. The Rules now in force have been carried over from the pre-democratic order with only a few amendments. For this reason, with leave from my party, I became a Member of the Rules Committee and the Committee on the Revision of the Rules of the National Assembly, a standing committee established in terms of Rule 121.

42. I firmly believe that neither of these committees will deal with the revision of the unconstitutional Rules of the National Assembly in an effective and prompt manner. The Rules Committee has not met for more than 9 months and has a huge backlog of agenda items. The Committee on the Revision of the Rules of the National Assembly has also not met for 9 months and is yet to focus systematically on the revision of the Rules.

43. In the text published and circulated by the National Assembly, the Rules openly recognize that they are not consistent with the Constitution, as in respect of rules 20(1), 30, 39, 44, 330 they indicate the need of being

brought into compliance with a Constitution adopted 14 years ago, as set out in MGOA9.

1. For this reason, in order to facilitate and accelerated the process, I took it upon a first draft of a possible revision of the Rules so as to bring them into compliance with the Constitution and address the most pressing issues within the public debates relating to Parliament.
2. Such draft and its cover letter are annexed hereto as “**MGOA11**” and “**MGOA10**” respectively.
3. More than one fifth of the term of this Parliament has already lapsed and with it more than one fifth of my opportunity, as well as the opportunity of my colleagues, to exercise our power and fulfill our duty of introducing legislation.
4. There is no indication that either the Respondent, the Rules Committee or the ANC intends changing the Rules to enable Members of Parliament to introduce legislation as contemplated in the Constitution. On the contrary, the Respondent’s statements and the statements made by other representatives of the ANC make it clear that it is their intention to maintain the present situation. Parliament is in recess until August and no meeting of the Rules Committee has been scheduled even though other committees have scheduled meetings during such recess.

5. I submit that:

5.1. in terms of section 73 of the Constitution a Cabinet member, a Deputy Minister and myself have the same right to introduce legislation without first having to seek and obtain the “permission” of certain of our colleagues;

5.2. the power of introducing legislation is essential to my function as a Member of Parliament who is not part of the governing majority, for if a Bill introduced by me has merit the governing majority will either pay a political price by rejecting it or will have to recognize my contribution by accepting it, both of which are relevant and valuable actions in terms of political accountability;

5.3. in all democratic legislatures known to me members of at least the higher chamber have the right of introducing legislation, which submission I make on the strength of several years of comparative constitutional studies and my direct involvement in the workings and procedures of the legislatures of Italy, the United States of America and the Commonwealth of Virginia;

5.4. allowing members the democratic power to introduce legislation, as our Constitution does, has no adverse impact on the functioning of Parliament, for according to standard parliamentary procedures, each parliamentary committee which has expertise

on the Bill's subject matter has the power to dispose of the Bill in a matter of minutes through a simple vote declaring the Bill's non-desirability and without having to analyze its provisions; and

5.5. the possibility of demonstrating to the electorate that I have introduced legislation on critical issues and of canvassing public opinion is vital for my parliamentary role and the growth of democracy, which, *inter alia*, requires that the approval or rejection of a Bill must be conducted within the committee with the expertise in the Bill's subject matter where the Bill's merits can be fully evaluated, rather than by a generalist committee like the Private Members' Committee with no specific expertise;

5.6. my right to provoke debate on national issues with the competent portfolio committee which has the competence and role to legislate on them is vital to protecting my role as a member of political minority as contemplated in section 57(2)(b) of the Constitution, also in consideration of the fact that under present practice a member of a committee who is not a member of the majority party has no right to otherwise place matters on a committee's agenda.

6. I submit that the correspondence and other attachments referred to in this founding affidavit demonstrate that:

6.1. I have taken reasonable steps to avoid litigation; and

6.2. the Respondent and the ANC's representatives have not acknowledged this problem and have denied the need to redress it, in spite of having had ample time and opportunity to do so.

7. As this problem impairs the exercise of my parliamentary functions as well as the exercise of democracy, I submit that the intervention of this Court is both ripe and necessary. I further submit that I have made out a proper case for the declaration of constitutional invalidity sought in the notice of motion.

V. THE DECISION OF THE RESPONDENT

8. I seek the review and setting aside or correction of the refusal of the Respondent to introduce the Bill in the National Assembly in accordance with the Constitution.

9. Section 6 of PAJA provides that judicial review of administrative action may be granted, *inter alia*, if:

“(d) the action was materially influenced by an error of law;

(e) the action was taken—

...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

- (iv) because of the unauthorized or unwarranted dictates of another person or body;
- (v) in bad faith;
- ...
- (f) the action itself—
contravenes a law or is not authorized by the empowering provision;
- ...
- (g) the action concerned consists of a failure to take a decision”.

10. Section 5(3) of PAJA provides:

“If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.”

11. All of the above are grounds upon which I seek the review of the Respondent’s decision.

12. In particular, I contend that:

12.1. The Respondent’s decision is based on material misconception of the law, namely that the Rules for the introduction of Bills to the National Assembly are *intra vires* the Constitution; and

12.2. The Respondent's failure to provide me with reasons for his decision demonstrates that the decision was taken without good cause.

13. My reasons for contending that the Rules are inconsistent with the Constitution are set out above and I will not repeat them here.

14. The history of my correspondence is also set out above. The Respondent has failed, despite frequent reminders, to respond within 90 days to my request for reasons.

15. Accordingly I submit that there is good cause for the review and setting aside of the Respondent's decision.

VI. CONCLUSION AND REMEDY

16. In terms of section 172(1)(a) of the Constitution, a court considering a constitutional matter within its power has no discretion but must declare any unconstitutional law invalid to the extent of its inconsistency.

17. After having made the declaration of invalidity, a court may then, in terms of section 172(1)(b) of the Constitution, make any order that is just and equitable.

18. In terms of section 172(1)(a), therefore, I submit that this Court must, on the basis of the reasons set out above, make an order declaring those parts of the Rules which prevent a Member of the National Assembly from exercising his or her constitutional powers to be unlawful and invalid. This is the third, alternatively the fourth, prayer contained in the notice of motion to which this affidavit is annexed.

19. In terms of section 172(1)(b) of the Constitution, should this Court find that the Rules are unconstitutional, it may grant me just and equitable relief.

20. I submit that the first and second prayers in the notice of motion constitute such relief, and should be granted by this Court.

21. If the Rules are unconstitutional, the Respondent's decision, which was based upon the Rules, is clearly unlawful and falls to be set aside in terms of the first prayer.

22. In such a circumstance, however, there would be no Rules in place permitting me to introduce the Bill, and accordingly my constitutional power and obligation to introduce Bills would still be infringed. I submit that the most effective method to undo this infringement would be to permit me to act on the basis of the same procedures and under the same conditions applicable to Bills introduced by a Cabinet member or a Deputy Minister. This is the second prayer.

23. Cabinet members and Deputy Ministers are, in terms of Rule 233, exempted from the procedural requirements of the Rules. I could therefore introduce the Bill in a constitutional manner while remaining within the confines of a procedure recognised by the National Assembly.

24. For the reasons set out above, I submit that I have made out a case for the relief contained in the notice of motion to which this affidavit is annexed, and I pray for an order incorporating its terms.

MARIO GASPARE ORIANI-AMBROSINI

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and solemnly affirmed to before me at CAPE TOWN on this the 19th day of June 2010, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS