**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2021/00493

In the matter between:

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| **SWARTBOOI BERNADUS** | **1st APPLICANT** |
| **HENNY HENDLY SEIBEB** | **2nd APPLICANT** |
| **LANDLESS PEOPLE'S MOVEMENT** | **3rd APPLICANT** |

and

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| **THE SPEAKER OF THE NATIONAL ASSEMBLY** | **1st RESPONDENT** |
| **THE ATTORNEY-GENERAL** | **2nd RESPONDENT** |
| **GOVERNMENT OF THE REPUBLIC OF NAMIBIA** | **3rd RESPONDENT** |
| **MCHENRY VENAANI N.O.** | **4th RESPONDENT** |
| **NATIONAL ASSEMBLY OF THE REPUBLIC OF NAMIBIA** | **5th RESPONDENT** |

**Neutral citation:** *Swartbooi v The Speaker of the National Assembly* (HC-MD-CIV-MOT-REV-2021/00493) [2024] NAHCMD 323 (14 June 2024)

**Coram:** MASUKU J, *et* B USIKU J *et* RAKOW J

**Heard:** **30 August 2023**

**Delivered:** **14 June 2024**

**Flynote:** Legislation – Powers, Privileges and Immunities Act of Parliament Act 17 of 1996, ('the Act') – Whether the courts are totally excluded from dealing with all matters involving Parliamentary 'domestic affairs' – Standing Rules and Orders and

Internal Arrangements of the National Assembly and compliance therewith in matters of disruptive behaviour – The effect of a failure to comply with the said Rules and whether that failure grants the court the right to intervene when approached by a Member of Parliament affected thereby – Constitutional Law – Articles 1, 5, 79(2) and 80(2) of the Constitution and their impact on s 21 of the Act.

**Summary:** The first and second applicants are members of the Landless Peoples Movement, (LPM), a political party duly registered in terms of the applicable law. LPM is cited as the third respondent in the application. The first and second applicants were ordered by the Speaker of the National Assembly, ('the Speaker'), to withdraw from the proceedings of the National Assembly on 15 April 2021 for disruptive behaviour during the State of the Nation Address by the President. The Speaker informed them subsequently, that they would remain withdrawn from the House 'for the time being'. They challenged that decision before this court, which found for the Speaker. That decision was set aside on appeal, the Supreme Court finding that the Speaker did not have power to suspend members of Parliament indefinitely as he had purported to do. The applicants bring a challenge before this court dealing with whether the proper procedures had been followed by the Speaker in meting out the punishments imposed by him in the light of the disruptive behaviour in question. The applicants submitted that the Speaker had not followed the provisions of the Rules in dealing with the disruptive behaviour and that for that reason, the court, because the failures of the Speaker, impacted on the Constitution and the doctrine of legality, was at large to intervene and to set aside the decisions of the Speaker.

*Held*: That the legislature must, in line with the doctrine of separation of powers, be allowed the liberty to carry out its functions without interference.

*Held that*: There are certain circumstances in which notwithstanding the operation of the doctrine of separation of powers, the courts are entitled in terms of the Constitution, to intervene in legislative domestic matters and this is where the actions appear to violate the Constitution, including of art 1(1) thereof.

*Held further that*: S 21 of the Act applies in so far as there is no violation of the Constitution or evidence suggesting that the doctrine of legality is implicated. Furthermore, the application of s 21, is subject to the provisions of Arts 1, 5, 79(2)

and 80(2), meaning that if the exercise of the rights in s 21 result in a violation of the articles mentioned above, then the jurisdiction of the courts is not excluded by s 21 of the Act.

*Held*: That the Rules Committee, in the instant matter, referred the investigation of the applicants' case to the Privileges Committee, which was an abdication of their powers and as such, the procedures and decisions following after that unlawful referral, should be set aside as they do not comply with the provisions of the Rules.

*Held that*: For the reason that the court had found that the Rules Committee had impermissibly referred the matter to the Privileges Committee, it had to that extent acted outside its powers and this implicated the doctrine of legality, thus entitling this court to intervene in the dispute notwithstanding the provisions of s 21 of the Act.

*Held further that*: In view of the finding that the Rules Committee had acted improperly and contrary to its designated power, the court is empowered to intervene and as such, it is not necessary, for the decision of the case, to decide on the constitutionality of s 21 of the Act.

*Held*: That the Speaker was central to the decisions made that resulted in the withdrawal of the two applicants. His subsequent involvement in the Parliamentary Committees, which dealt with the applicants' matter, was improper as he had an interest in the matter, having made the decision that triggered the entire case. He should have recused himself and as such, his involvement was inimical to the interests of justice and fairness and an affront to the doctrine of *nemo judex in causa sua,* thus entitling this court, in any event, to intervene in the proceedings.

*Held further that*: The body empowered by the Constitution to make rules, is the National Assembly in terms of Art 59. It was therefor unlawful for the Privileges Committee to arrogate upon itself the *ad hoc* rules subsequently applied to the applicants.

*Held*: That rule 111 does not state what types of behaviour amount to gross misconduct thus warranting the Speaker to order the withdrawal of a member. To that extent, it was held that the said provision is unconstitutional for vagueness.

The applicants' application was granted with costs.

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**ORDER**

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1. The decision of the Rules Committee purportedly taken on 21 April 2021 to refer the applicants' matter to the Privileges Committee is hereby reviewed and set aside;

2. The decision of the Privileges committee of 26 April 2021, to *suo motu* investigate the conduct of the applicants of 15 April 2021 is hereby reviewed and set aside;

3. All the meetings and or decisions of the Privileges Committee, subsequent to its meeting of 26 April 2021, and which meetings and/or actions were in pursuance of the decisions of the meeting of 26 April 2021, and which meetings and/or actions were in pursuance of the decisions of the Privileges Committee to investigate the conduct on 15 April 2021 of the first and second applicant, is hereby reviewed and set aside.

4. The decision of the National Assembly to adopt the report of the Privileges Committee entitled, 'Investigation Into the Conduct of Hon. Bernadus Swartbooi and Hon. Henny Seibeb on 15 April 2021 During the State of the Nation Address' is hereby reviewed and set aside.

5. The phrase 'grossly improper' occurring in rule 111, is declared to be vague and therefor unconstitutional.

6. The declaration of unconstitutionality in paragraph 5 above, is to operate prospectively with effect from the date of this order. Its operation, is however, suspended for a period of 24 months to afford the National Assembly an opportunity to remedy the defect giving rise to the unconstitutionality.

7. The *ad hoc* Rules Governing Procedure made by the Privileges Committee on 18 May 2021 be and are hereby declared null and void and of no force or effect.

8. The first, second, third and fifth respondents, are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved and such costs are consequent upon the employment of one instructing and one instructed legal practitioner.

9. The matter is removed from the roll and is regarded as finalised.

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**JUDGMENT**

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THE COURT:

Introduction

[1] The autonomy and separateness of the three different organs of State, regardless of the oneness of the government as an institution, is under scrutiny in this judgment. The quintessential question falling for determination in this matter acuminates to this - how and to what extent, if at all, is the Judiciary in Namibia, allowed by law, to intervene in the 'domestic affairs' of the Legislature?

[2] If the answer returned to the question above, is that there are certain circumscribed circumstances in which the Judiciary can by law, legitimately intervene in the domestic affairs of the legislature, the question is whether the instant case is an appropriate one in which this court can and should, by law, intervene. If the court should decide that it should intervene, the next question is - would that not be in violation of the foundational doctrine of separation of powers encapsulated in or Constitution?

[3] Caught in the throes which generate almost palpable tension, regarded by Constitutional Law scholars as healthy and necessary between and among the organs of State, (in this particular case, between the Legislature and the Judiciary),

are two members of the Legislature, Messrs Swartbooi and Seibeb. They stand before this court claiming in unison, together with their political party, the Landless People's Movement (LPM), that they have been treated in an illegal manner and following flawed processes by the Legislature. They have accordingly approached this court, seeking an order setting aside the allegedly flawed processes of Parliament, which resulted in them being censured for their misdemeanours in Parliament which are dealt with immediately below.

[4] 15 April 2021, will go down in the annals of Namibia's legislature's history, as a sad and lamentable day. It appears common cause that scenes in the august House, the National Assembly, which were unprecedented, went awry and ugly, in front the Namibian public, which was glued to their television screens. Namibians were watching the late President of the Republic, delivering what is known in common parlance as the State of the Nation Address, SONA. This is an annual monumental address by the President, which owing to its significance to the individual members of the population in Namibia, and as a collective, draws the ear and eye of all Namibians, regardless of the political, religious, ethnic and other persuasions.

[5] It is common cause and was accepted in argument by the applicants' legal practitioners that the two MPs behaved in a depraved manner, ill-befitting the stature of the National Assembly on that fateful day. The applicants' legal practitioners accepted that the their clients were liable to censure for their unprecedented and inimical conduct, captured in real time and seen by many Namibians. What the applicants do, however say additionally, is that notwithstanding their aforementioned deplorable conduct, the punishment meted to them by officials and the bodies of the Legislature, is unlawful and must therefor, be set aside.

[6] In the alternative, the applicants seek a declarator that the provisions of s 21 of the Powers, Privileges and Immunities of Parliamentary Act 17 of 1996, ('the Act'), are, to the extent that they preclude and countermand the Judicial Organ from intervening in this matter, unconstitutional and must be so declared.

[7] The million dollar question then acuminates to this - should the court incline its ear and decisional processes to the resounding cries of the applicants and grant the

relief sought or should it turn its face against the applicants, especially in view of their ugly behaviour and draw a line in the sand and find the Legislature was well within its right to curb the cancerous practice they engaged in? Or further alternatively, should the court raise its hands in surrender, saying to the applicants unequivocally, that 'We cannot intervene in your domestic parliamentary disputes!! Sort yourselves out!?'

The answer to these all-important questions follows below.

The parties

[8] The applicants are Messrs Bernadus Swartbooi and Henry Seibeb, both adult males and duly elected members of the 7th Parliament of Namibia National Assembly. Mr Swartbooi is the leader and Chief Change Campaigner of the Landless People's Movement (LPM) political party and Mr Seibeb is the deputy Leader and Chief Strategist of the same political party. The third applicant is the Landless People's Movement, a political party duly registered as such in accordance with the laws of the Republic of Namibia. The first and second applicants are members of the third applicant and hold positions as set out above in the third applicant and were duly elected from the party list of the third respondent.

[9] The first respondent is the Speaker of the National Assembly, duly appointed as such pursuant to the provisions of Article 51 of the Constitution of Namibia, 'the Constitution'. He is cited in these proceedings as Chairperson and Speaker of the National Assembly, pursuant to the provisions of rule 76(1) and also pursuant to the same rule, in his capacity as the Chairperson of the Committee of Privileges of the National Assembly. He is further cited in his capacity as the Chairperson of the Standing Committee on Standing Rules and Orders and Internal Arrangements ('the Rules Committee'), as well as in his capacity as the person who took or caused the decisions and actions sought to be impugned in these proceedings, to be taken and communicated to the applicants.

[10] The second respondent is the Attorney-General of the Republic of Namibia, duly appointed as such pursuant to the provisions of Article 32(3)(1)(cc) of the Constitution. He has been cited in these proceedings pursuant to Article 87(c) of the Constitution. No particular relief is sought against the second respondent. The third

respondent is the Government of the Republic of Namibia. The fourth respondent is Mr McHenry Venaani *NO*, an adult male, cited in his official capacity as the deputy chairperson and member of the Committee of Privileges of the Nation Assembly and on account of the interest he may have in the matter. No specific relief is sought against Mr Venaani. The fifth respondent is the National Assembly of the Republic of Namibia contemplated in Chapter VII of the Constitution.

[11] For the purposes of this judgment, the first and second applicants, who feature prominently in this matter, shall be jointly referred to 'the applicants'. To the extent that LPM is involved, it shall be referred to as such. The first respondent shall be referred to as 'the Speaker'. The other respondents, where it becomes necessary to refer to them, shall be referred to in the manner in which they have been cited in these proceedings.

The purpose of the application

[12] The purpose of the application is firstly to call upon the respondents to show cause, pursuant to the provisions of rule 76(2) of this court's rules, why the following decisions and/or actions of the National Assembly, the Rules Committee and the Privileges Committee, should not be reviewed and corrected or set aside, namely:

(a) the decision of the Rules Committee purportedly taken on 21 April 2021 to refer the applicants' matter to the Privileges Committee;
(b) the decision of the Privileges Committee of 26 April 2021, so suo motu investigate the conduct of the applicants (sic) of 15 April 2021;
(c) all the meetings and or decisions of the Privileges Committee subsequent to its meeting of 26 April 2021, and which meetings and or actions were in pursuance of the decisions of the Privileges Committee to investigate the conduct on 15 April 2021 of the first and second applicant; and
(d) the decision of the National Assembly to adopt the report of the Privileges Committee entitled 'Investigation into the Conduct of Hon. Bernadus Swartbooi and Hon. Henry Seibeb on 15 April 2021 during the State of the Nation Address.'

[13] Alternatively, the applicants seek an order that the above decisions and/or actions be declared to be unlawful, unconstitutional, null and void, and setting same aside.

[14] Secondly, applicants seek an order that the following statutory provisions, rules and/or standing orders be declared unlawful, unconstitutional, null and void *ex tunc*:
(a) the provisions of Rule 111 of the Standing Rules and Orders and Internal Arrangements (the Rules) of the National Assembly;
(b) the provisions of Section 21 of the Act, in so far as it seeks to restrict access to Courts for determination whether actions and decisions of the National Assembly and its Committees are consistent with any provisions of the Constitution (in particular Articles 1, 5, 12, 17,18, 22, 45 and 46 thereof); and
(c) the *ad hoc* Rules Governing Procedure made by the Privileges Committee on 18 May 2021.

Background

[15] On 15 April 2021 during the State of the Nation address by the late President, Dr Hage Geingob, the Speaker, whilst presiding over a Joint Sitting of the National Assembly and the National Council, made a ruling in terms of rule 111 of the Rules, ordering the withdrawal of the applicants from the Assembly Chamber. Initially, the ruling was resisted by the applicants but eventually they left the Assembly Chamber. The first applicant, was escorted out of the chamber by the Sergeant-at-Arms, whereas the second applicant was forcefully removed from the chamber by members of the Namibian Police and the bodyguards of the President.

[16] On 19 April 2021 the applicants received letters under the hand of the Speaker, in which they were informed that the Speaker had invoked Rule 124(*a*) of the Standing Rules and Orders, ('the Rules') and that they will remain withdrawn from the House for the time being. They were further informed that the ruling shall remain in force until it is set aside on the recommendation of the Rules Committee.

[17] On 21 April 2021, the Speaker convened a meeting of the Rules Committee of which he was the chairperson. The Rules Committee took a resolution to refer the

matter as one of urgency to the Privileges Committee for further investigation. The Privileges Committee was instructed to allow for the applicants to be heard in that investigation. The applicants were notified of a meeting with the Privileges Committee on 26 April 2021. After this notification the applicants decided to bring their first application in this court on an urgent basis, essentially challenging their withdrawal.

[18] The first applicant was later informed in writing by Mrs Kandetu, the Secretary of the National Assembly, to nominate a person to take his place on the Committee on Privileges. The next meeting of that committee, was to take place on 5 May 2021. The first applicant was then informed via a WhatsApp message of a media release that a hearing regarding the incident of 15 April 2021, was scheduled on 18 May 2021. He further received a summons to appear at this meeting on 11 May 2021.

[19] On 18 May 2021, the applicants attended to the Privileges Committee hearing as they were summonsed to do. They pointed out that they were attending the meeting with full reservation of their rights and that the meeting was improperly constituted. The applicants questioned the propriety of the Privileges Committee establishing its rules for the conduct and establishing rules to conduct its procedures as it goes along. The Speaker indicated that it was the first case since 1990 that the Committee was asked to investigate such a case and therefore has drafted Rules Governing the Procedure relating to the hearing. The applicants were invited to approve these rules, which they refused to do.

The urgent application in the High Court[1]

[20] As indicated in para 16 above, the applicants' urgent application was heard by Miller AJ on 26 April 2021. He found that the applicants before him, who are also the applicants in the present matter, did not challenge the decision by the Speaker to withdraw from the Assembly Chamber in terms of Rule 111 of the Rules of the National Assembly nor the fact that their acts were reported to the Rules Committee, in terms of Rule 112 of the Rules. Neither were they challenging the events, which led to the Speaker to take those decisions. The learned Judge found that what they,

[1] *Swartbooi & other v The Speaker of the National Assembly:* HC-MD-CIV-MOT-GEN-2020/00149 [2021] NAHCMD 207 (06 May 2021).

in fact did challenge during those proceedings, was the lawfulness of the decision taken by the Speaker to invoke the provisions of Rule 124 of the Rules, which reads as follows:

'(a) In any matter for which these Standing Orders do not provide or that is not provided for by a Sessional Order or other Order, the decision of the Speaker or the Chairperson of the Whole House, as the case may be, shall be final, and in arriving at such decision he/she may take as his/her guide the relevant practices in other jurisdictions.

(b) A ruling framed by the Speaker shall remain in force until it is set aside on recommendation of the Standing Committee on Standing Rules and Orders and Internal Arrangements.'

[21] The learned Judge was further required to make a finding on whether the court should decide the issue at that stage or whether the lawfulness of the Speaker's decision is an internal matter that should be determined by the parliamentary organ as a first step.

[22] The learned Judge referred to the rights and duties of members of the National Assembly as set out in Articles 45, 46 and 60(1)(a) of the Constitution and found that:

'(t)he rights mentioned in Article 45 have the concomitant duties mentioned in Article 60(1)(a). On the facts placed before me and at least on a *prima facie* basis, the applicants failed in their obligations imposed upon them by Article 60(1)(a). The right of the applicants to attend parliamentary sessions may in given circumstances be curtailed and they may be legitimately ordered not to attend parliamentary sessions for given periods of time. It is in that sense that the fundamental right they claim can be curtailed as provided for in Article 32 of the Constitution.'

[23] The court found that in essence, the nature of the relief sought by the applicants was declaratory in nature and as such, a discretionary remedy. It further found that there are other remedies available to the applicants and that they are not prohibited from raising the issues raised before court in the course of the internal proceedings pending against them in Parliament. The court refused to grant a declarator and dismissed the application with costs.

The case before the Supreme Court

[24] Unhappy with the outcome of the case in the High Court, the applicants appealed to the Supreme Court. The summary of the Supreme Court judgment describes the proceedings in the High Court quite adequately. It states the following:[2]

'Appellants launched an urgent application on the basis that the Speaker lacked the power to suspend them under rule 124(a). They sought an order declaring the Speaker's decision as unlawful and for the Speaker's ruling to be set aside. They further sought an interim interdict restraining the Speaker from interfering with their rights as National Assembly members to attend to their parliamentary duties and attend at Parliament.'

[25] The findings of this court were summarized as follows:

'The High Court dismissed the application on two bases: that Parliament is empowered by the Constitution to control, regulate and dispose of its internal affairs and has the necessary organs to achieve that broad purpose. Further, the court found that due to the principle of separation of powers, s 21 of the Act precluded it from usurping the proceedings pending before the Committee.'

It is against this finding, as a whole, that the appeal was lodged.

[26] The Supreme court found the following:

'This court upon consideration of the constitutional and statutory framework, found that the powers of the Speaker under the Standing Rules relating to disciplining members is limited as follows: Chapter XI governing the conduct of members, the Speaker as presiding member is authorised to order a member to withdraw from the Assembly Chamber. If the Speaker deems this inadequate, he can report the matter to the Committee which is empowered to recommend a seven day suspension and on second occasion, suspension of 14 days and on third, a 21 day suspension. Any investigation into misconduct would need to be made by the Committee on Privileges under s 12 of the Act read with rule 68. The Committee on Privileges would then report and make recommendation under s 13 of the Act to the House which is vested with the power to take disciplinary action against members.'

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[2] *Swartbooi v Speaker of the National Assembly* (SA 38/2021).

[27] The Supreme court further held that the Speaker's role under the Standing Rules in relation to the conduct of members does not include taking disciplinary action, as the Speaker has no power to do so. His role rather, was to maintain order in the House. It further held that Rule 124 relates to matters for which the Standing Rules do not provide and that suspension is provided for. It also held that the provisions of section 21 of the Act, seeking to oust the jurisdiction of the courts in respect of proceedings or decisions taken by Parliament, are subject to Articles 5, 79(2) and 80(2) of the Constitution and the rule of law. For that reason, the Supreme Court found, s 21 of the Act, cannot preclude the courts from enforcing the Constitution.

[28] The Supreme Court further found that the decision to suspend the applicants was not made in accordance with the Rules or the Act and as such that the decision was not made by Parliament but by the Speaker and as a consequence s 21 of the Act did not find application. The decision to suspend the applicants was therefor outside the Speaker's powers and was set aside. The applicants' appeal was thus upheld on 4 August 2021.

The applicants' application

*Review relief*

[29] On 8 December 2021, the applicants launched the present application, seeking the relief set out in paras 12, 13 and 14 above. The applicants submit that the decision of the Rules Committee to refer their disciplinary matter to the Privileges Committee is inconsistent with the provisions of rule 112, and therefor unlawful. The applicants contend that, on 15 April 2021 the Speaker invoked the provisions of rule 111 and ordered them to withdraw from the Assembly Chamber for the remaining period of the sitting, for grossly improper conduct. Subsequently, in his letter[3] to the applicants dated 19 April 2021, the Speaker indicated that he had invoked the provisions of rule 112 and had deemed it necessary to report the matter to the Rules Committee for consideration.

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[3] Review Record: FA Annexure 'BS1' at p 49.

[30] The applicants contend further that, once the Speaker had exercised his powers in terms of rules 111 and 112, both the Speaker and the Rules Committee were bound by the contents thereof. Rule 112 makes it clear that the Rules Committee is the only committee that has a role to play in respect of a matter referred to it in terms thereof. The applicants argue that when the matter was referred by the Speaker to the Rules Committee in terms of rule 112, it was incumbent on the Rules Committee to act in terms of that rule, instead of referring it to the Privileges Committee as it did.

[31] The applicants thus submit that the purported referral of the matter by the Rules Committee to the Privileges Committee is a nullity and unlawful and should be set aside by this court.

[32] In response to the aforegoing contentions, the respondents submit that the Rules Committee is not prohibited from referring any matter of discipline to the Privileges Committee. The respondents argue that it would be absurd for the Rules Committee not to have power to refer the matter as it did, particularly in view of the Supreme Court's finding that it does not have power to conduct investigations. The respondents submit further that, if a matter of investigation were to land before the Rules Committee, it would be appropriate for the latter to refer it to the body that has power to investigate, namely, the Privileges Committee.

[33] In their attack on the decision of the Privileges Committee, taken on 26 April 2021, to *suo motu* investigate their conduct, the applicants submit that the said decision is a nullity because it was taken at an improperly constituted meeting. On this aspect, the applicants argue that the Speaker suspended the applicants from the National Assembly on 15 April 2021. The first applicant is a member of the Privileges Committee. The effect of the suspension was that, during its subsistence the first applicant was precluded from participating in the affairs of the Privileges Committee. On 4 August 2021, the Supreme Court's judgment in *Swartbooi*[4] invalidated the Speaker's decision to suspend the applicants, on the basis that the Speaker's conduct was not authorized by the Rules.

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[4] *Swartbooi v Speaker of the National Assembly* (SA 38 of 2021) [2021] NASC 33 (4 August 2021).

[34] The applicants contend further that, the effect of the Supreme Court judgment is that in the intervening period between 15 April 2021 and 4 August 2021, the Privileges Committee was improperly constituted. They argue further that, by excluding the first applicant, the Speaker and/or Privileges Committees operated unlawfully, to the extent that the Committee was not properly constituted.

[35] In response to the aforegoing contentions, the respondents submit that the first applicant was invited, in terms of rule 68(3*)* to nominate a member from the third applicant to act as a member of the Privileges Committee, because the conduct that was being investigated was that of the first applicant. The first applicant did not nominate such a member. The respondents argue further that the meeting of the Privileges Committee held on 26 April 2021, was properly constituted in that it had a quorum.

[36] The applicants also seek this court to set aside all meetings and/or decisions of the Privileges Committee subsequent to its meeting of 26 April 2021 and which meetings were in pursuance of the decision of the Privileges Committee to investigate the conduct of the applicants on 15 April 2021. The reason for seeking this relief are the same as, or similar to, the reasons set out above.

[37] A report of the Privileges Committee titled 'Investigation Into the Conduct of Hon Bernardus Swartbooi and Hon Henny Seibeb on 15 April 2021 during the State of the Nation Address,' was tabled in the National Assembly on 8 September 2021 and was adopted by the National Assembly on 19 October 2021.

[38] The above report recommended, among other things, that the House finds the conduct of the applicants constitutes a breach of clause 3(1)*(b)* of the Code of Conduct and Article 60(1)*(i)* of the Constitution, for conducting themselves in a manner that does not maintain the dignity and image of the National Assembly. As a penalty for the aforesaid transgression, the report recommended that the House reprimands the applicants, in terms of clause 7.5*(a)* of the Code of Conduct, which reprimand is to be entered into the Minutes of the Proceedings of the House.[5]

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[5] Review Record: Annexure 'SFA 12.2', p 282.

[39] The applicants attack the decision of the National Assembly to adopt the report on the basis that the report was not put to vote, despite various voices having expressed reservations about the lawfulness of the process, which was followed. The applicants assert that more than three members called for the rejection of the report, and it was while Mr Kavekotora was still on the floor, making a point why the report should be rejected, and some members of the Assembly were interrupting him, that the Speaker, all of the sudden, ruled that the report was adopted.

[40] The applicants submit that the Speaker had no basis on which to rule that the motion for the adoption of the report was carried, without dividing the House. The applicants, therefor, argue that the manner in which the Assembly purported to adopt the report was unlawful.

[41] The respondents assert that there is no truth in the above allegations. They submit that a number of members, including the applicants, made contributions to the debate on the report and that the report was adopted in accordance with the Rules. In this connection, the respondents urged the court to dismiss the relief sought by the applicants in this regard.

*Alternative relief (declaratory relief)*

[42] In the alternative to the review relief, the applicants seek an order declaring the above decisions and/or actions as unlawful, unconstitutional and null and void. The applicants contend that the breaches identified in respect of prayer 1 also qualify as a sufficient basis for the court to grant prayer 2 (alternative relief) of the notice of motion.

[43] In response, the respondents submit that the relief sought by the applicants both in the main and in the alternative, must fail.

*Constitutional relief*

[44] The applicants contend that in the event that this court finds that it has no jurisdiction to entertain this application on account of the provisions of s 21 of the Act, they seek an order that the provisions of s 21, insofar as they seek to restrict access

to courts for determination, whether actions and decisions of the National Assembly and its committees, are inconsistent with the provisions of the Constitution, in particular articles 1, 5, 12, 17, 18, 22, 45 and 46. Thus, the applicants only persist with this relief as a conditional attack, should the court rely on s 21 as a basis to refuse to entertain the applicants' application.

[45] On this aspect, the respondents contend that, provided that the doctrine of legality has been complied with, it is within the powers of the National Assembly to control, regulate and dispose of the internal disciplinary matters against its members. The respondents submit that there is nothing unconstitutional in s 21, as it does not entirely oust the jurisdiction of the courts.

[46] The applicants further attack the constitutionality of rule 111. That rule empowers a presiding member to order a member whose conduct is 'grossly improper' to withdraw immediately from the Assembly Chamber for the remaining period of the sitting day in question.

[47] The applicants argue that rule 111 constitutes a limitation on the fundamental rights entrenched in article 17 of the Constitution, namely, the right of the applicants, as elected representatives, 'to participate in the conduct of public affairs, whether directly or through freely chosen representatives.'

[48] The applicants further contend that rule 111 does not conform to the requirements of article 22 of the Constitution, in that:

a) it is not a law of general application, and that it is a rule which is not duly gazetted;
b) 'grossly improper conduct' is not properly described and circumscribed, which may lead to a discriminatory application of the rule;
c) the rule is vague as it is not properly described and circumscribed, and does not specify the ascertainable extent of the limitation, contrary to the 'proscription' in article 22*(b)* of the Constitution; and that,
d) the rule does not identify an article of Chapter 3 of the Constitution, on which the authority to enact it is claimed to rest.

[49] The respondents, on the other hand, deny that rule 111 is unconstitutional. The respondents argue that the rule is an ever-present tool at the disposal of the Speaker to effectively maintain order and ensure safety of members and the dignity of Parliament during proceedings.

[50] On 18 May 2021, the Privileges Committee adopted 'Rules Governing the Procedure'[6] relating to the hearing into the conduct of the applicants on 15 April 2021. The applicants contend that neither the Constitution, the Act, nor the Rules, empower the Privileges Committee to adopt *ad hoc* rules and that the *ad hoc* rules be set aside as legally incompetent.

[51] On the aforegoing aspect, the applicants argue that in terms of article 59(1) of the Constitution, rules of procedure relating to an investigation of the conduct of any member must be prescribed by the National Assembly.

[52] Regarding the *ad hoc* rules, the respondents assert that those rules are merely an explanation of what constitutes 'principles of natural justice', which is provided for in terms of clause 7(3)*(d)* of the Code of Conduct. The respondents argue that there is nothing untoward about the *ad hoc* rules that were aimed at ensuring that the proceedings at the hearing are free and fair.

[53] The last point of attack by the applicants is a failure by the Speaker to recuse himself from participating in the proceedings of the Privileges Committee and from chairing the Assembly, during the investigation into the conduct of the applicants and consideration of the Privileges Committee's report.

[54] The applicants argue that, the Speaker:

a) had ruled, on 15 April 2021, that the applicants' conduct was grossly improper and that they should withdraw from the Assembly Chamber;
b) chaired the Rules Committee, on 21 April 2021, when it decided to refer the matter to the Privileges Committee;'
c) deposed to a supplementary affidavit, on 23 April 2021, in opposition to a previous matter brought before court by the applicants, in which he,

[6] A copy of the *ad hoc* Rules appears at p 69 of the Review Record, FA, Annexure 'BS12'.

among other things, expressed opinion that the conduct of the applicants amount to a criminal act[7];

d) chaired, the proceedings before the Privileges Committee when it carried out investigations into the conduct of the applicants; and;

e) chaired the National Assembly when it considered and adopted the report of the Privileges Committee.

[55] The applicants argue that the conduct of the Speaker as outlined above is inconsistent with the provisions of rules 11*(a)* and 68*(3)* and clause 4.1 to 4.4 of the Code of Conduct, and seek an order declaring the same as such.

[56] The respondents admit that the Speaker chaired the abovementioned bodies, but deny that he was compelled to recuse himself. The respondents argue that the duties of the chairperson of the Privileges Committee are not determinative in nature. The privileges Committee simply investigates and interviews witnesses and make recommendations to the National Assembly in terms of the relevant provisions of the Act. In view of the nature of its investigative work and the lack of adjudicative and determinative power, the respondents submit that the Speaker ought not recuse himself as chairperson of the Privileges Committee. The respondents further argue that the question whether or not the Speaker should have recused himself, is one that cannot be decided by this court by virtue of s 21 of the Act.

[57] On the issues of costs of suit, the applicants argue that, if they fail, the court should not make a costs order against them, as they seek to vindicate important constitutional principles before this court. If they are successful, then this court should grant them costs.

[58] The respondents pray that the applicants' application be dismissed with costs, including costs of one instructing and one instructed counsel.

Determination

[59] It is, in our considered view, important to note that although the relief sought by the applicants is primarily geared to reviewing and setting aside certain decisions

[7] Review Record FA p 26.

made by certain committees of Parliament, as recorded in para 12 above, a reading of the heads of argument of the respondents who opposed the matter, makes it plain that their main contention is that this court should not, by law and in keeping with the constitutional doctrine of separation of powers, intervene and consider reviewing or the setting aside of the impugned decisions of the legislature and its organs.

[60] It thus becomes plain that before this court can embark upon an exercise to review and set aside the impugned decisions set out in the notice of motion, the court must be convinced that it is within its constitutional and judicial remit to entertain the questions of reviewing and setting aside the decisions of the legislative committees in question. This accordingly calls upon this court to first determine the question whether the provisions of s 21 of the Parliamentary Privileges Act, referred to earlier, preclude this court from entertaining the review and setting aside of the decisions in question.

[61] If the court finds either that the provisions of s 21 of the Act, as they stand, do not inhibit this court from considering the decisions of the legislature or that if they do prevent this court from interrogating those decisions, the said provisions are however unconstitutional, which is the relief sought by the applicants in the alternative, then the court will be within its rights to interrogate the decisions complained of and to decide on each decision, if necessary, whether it should be allowed to stand or stands to be impugned for one or other of the reasons advanced by the applicants.

[62] In support of their position that the instant matter is one that traditionally falls squarely within the remit of the legislature, ousting the jurisdiction of the courts, the respondents referred to the report of the Joint Committee of the House of Lords on the Parliamentary Privilege dated 3 July 2013, where it states the following at p 7:

'15. The corollary of Parliament's immunity from outside interference is that those matters subject to parliamentary privilege fall to be regulated by Parliament alone. Parliament enjoys sole jurisdiction – normally described by the archaic terms "exclusive cognizance" – over all matters subject to parliamentary privilege. As Sir William Blackstone famously noted in his Commentaries on the Laws of England, the maxim underlying the law and custom of Parliament is that "whatever matter arises concerning either house of parliament, ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere.'

[63] Useful and instructive as this quotation may be, what we need to consider primarily, is what the law in Namibia requires when it comes to the doctrine of separation of powers. We cannot, of course, close our eyes to the tradition and practice in other jurisdictions. But to willy-nilly adopt the prevailing approach in other jurisdictions to the extent that we only pay lip service to the constitution of this Republic and thereby repose no fidelity to the law of this Republic, would be a scandalous dereliction of judicial duty imposed and reposed in us.

[64] A good starting point in that regard, is to perhaps have regard to the *Swartbooi* judgment, wherein the Supreme Court at para 22, quoted with approval excerpts of a judgment of the Supreme Court of Appeal of South Africa in *Doctors for Life International v Speaker of the National Assembly & Others*,[8] where the following pertinent remarks were made, namely that:

'[36] Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the State. With due regard for that role, it must be free to carry out its functions without interference. To this extent, it has the power to "determine and control its internal arrangements, proceedings and procedures". The business of Parliament might well be stalled while the question of what relief should be granted is being argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers.

[37] The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised". Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

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[8] *Doctors For Life International v Speaker of the NA* 2006 (6) SA 416 (CC), p 438, paras 36-38.

[38] But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of governments and no less on Parliament. When it exercises its legislative authority, Parliament "must in accordance with the limits, of the Constitution", and the supremacy of the Constitution requires that "obligations imposed by it must be fulfilled". Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfill their constitutional obligations . . .'

[65] The above sentiments appear to resonate largely with the respondents' contentions. What must, however, not sink into oblivion, from what is quoted above, and which because of the rounding endorsement of the above excerpts by the Supreme Court, is that even in Namibia, the obligation to ensure that all organs of State act within the law and perform their constitutional obligations, rests with the courts. In performing that 'supervisory role', if we may loosely call it that, the courts must however, ensure that they do not stray into the domain of the other branches being checked upon.

[66] This is particularly plain in view of what the Supreme Court, in the same judgment, stated in the following lapidary remarks:

'Inherent in the principle of separation of powers, upon which the Constitution is premised, is the recognition "of the functional independence of branches of government", subject to the supremacy of the Constitution which "prevents the branches of government from usurping power from one another." The legislature's control over its proceedings, an incident of the separation of powers, is however subject to the Constitution, with the Courts having the constitutional obligation to ensure that its powers are exercised in accordance with the Constitution. In exercising this constitutional control, the courts are required to observe the limits of their powers.'

[67] We now return to s 21 of the Act. It provides the following:

'(1) Subject to subsection (2), Parliament shall have full powers to control, regulate and dispose of its internal affairs.
(2) Subject to Articles 5, 79(2) and 80(2) of the Namibian Constitution, no proceedings of, or decision taken by, Parliament in accordance with the relevant Standing Rules and Orders or this Act shall be subject to any court proceedings.'

[68] Article 5 protects fundamental rights and freedoms. The article provides that the enforcement of these rights and freedoms, shall be carried out by the courts. Article 79(2), on the other hand, deals with the Supreme Court. It states that the appeals involving the implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed under it, including appeals regarding the interpretation, implementation and upholding of fundamental rights and freedoms, lie with the Supreme Court. Lastly, Art 80(2) deals with the jurisdiction of this court and provides in sum, that this court has the original jurisdiction to adjudicate upon all civil disputes and criminal prosecutions involving the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed under the Constitution.

[69] The import of this provision, it would appear to us, is that notwithstanding the right of the legislature to deal with its domestic issues and processes, where the question however, touches on the interpretation, upholding and implementation of human rights and freedoms, that is the domain of the courts. In that event, the legislature cannot claim exclusive rights, so to speak, to deal with matters even properly in its domain, where the above listed issues are implicated. In the event that issues of protection, implementation and interpretation of human rights, s 21 shall not serve to preclude the courts from exercising their constitutional powers in that regard.

[70] Having said this, it is important to however, have particular regard to what the Supreme Court said in *Swartbooi* at para 56 regarding s 21. That court said:

'This provision is however subject to Arts 5, 79(2) and 80(2) of the Constitution, making it clear that it cannot preclude this court from enforcing the Constitution. It is not however clear quite why this clause (making it subject to these identified constitutional provisions) was included in sub-section (2) because the provision is in any event subject to the Constitution and the rule of law which would retain the courts' power to determine questions of legality. The intention of the legislature with s 21 is to give effect to the principle, inherent in the separation of powers, of privileges and immunities for Parliament which includes Parliament having full control over its internal affairs. In doing so, it would appear that the legislature intended that the internal affairs would not amount to administrative action contemplated by Art 18 but remain subject to legality given the supremacy of the

Constitution. This would mean that Parliament would be free to carry on its constitutional role freely and without interference.' (Emphasis added).

[72] Properly interpreted, this means that s 21 applies in respect of the control the legislature has over its internal affairs. That control does not, however, extend to matters that implicate questions of legality, provided for in the Constitution, which is the Supreme Law of the land. Where issues of legality arise, the courts have a constitutional duty to deal with those issues. To that extent, parliament's right to deal with those external matters, is not given supremacy but the Constitution is.

[73] The following remarks at para 59, by the Supreme Court are important. It reasoned as follows:

'It is well-established that an ouster clause does not preclude the courts from investigating whether the necessary jurisdictional facts exist for its invocation. This approach is trenchantly reinforced by the supremacy of the Constitution and the rule of law entrenched in Art 1. The more recent approach to ouster clauses articulated by the UK Supreme Court in *R (on the application of the Privacy International)* has evolved since *Anisminic* and has effectively moved away from the concepts of jurisdiction, *ultra vires* and/or nullity to a more flexible approach based on the rule of law.'

[74] The Supreme Court proceeded to quote from *Speaker of the National Assembly v De Lille & Another*,[9] which dealt with among other issues, with the right to freedom of speech being guaranteed under that country's constitution and where the Constitution and not Parliament was supreme. The Supreme Court concluded that matter in the following compelling terms at para 63:

'Similar considerations arise in Namibia, given the supremacy of the Constitution and the way in which privilege and immunity for Parliament is provided for. The Constitution provides for the National Assembly to make its own rules of procedure and for privileges and immunities to be provided for in the Act of Parliament. The Act incorporates s 21 which accords with full powers to control and regulate its internal affairs without interference which is to be interpreted in the light of the Constitution, unlike the position in the pre-democratic South Africa and in erstwhile Zimbabwe Rhodesia. In those jurisdictions and in Canada, earlier legislation had either referred to or incorporated parliamentary privileges, immunities

[9] *Speaker of the National Assembly v De Lille and another* 1999 (4) SA (SCA).

and powers which applied in England. This is not the case in Namibia where the Constitution is in any event supreme.'

[75] The Supreme Court accordingly concluded that in considering the actions of the Speaker, in suspending the first and second applicants herein, that court was not precluded by s 21 from considering the validity of the Speaker's decision. It found that the Speaker's actions were unlawful, of no force or effect and should set aside, which it proceeded to do.

[76] What is the upshot of the above decision by the Supreme Court in the context of this matter? We are of the view that the Supreme Court decision, makes it plain that although there is some prerogative left to the legislature, to regulate its internal or domestic affairs, as affirmed by s 21, that provision is not to be understood to affect and impinge on the courts' powers to redeem the doctrine of legality and the general powers of the courts to enforce the Constitution generally, and the rule of law, in particular. This is so notwithstanding the doctrine of separation of powers.

[77] In this regard, it must be stated without equivocation, as we hereby do, that the legislature's exercise of its powers, immunities and privileges in terms of s 21 of the Act, is not totally untrammelled. The exercise of all those powers, is subject to the courts' overriding constitutional imperative of, whilst ensuring that the constitutional doctrine of separation of powers is observed, there are no excesses committed by the legislature, as it conducts its internal affairs, which serve to pervert the Constitution itself, and the foundational principles that undergird it, including the principle of legality.

[78] This critical observation requires this court to consider what the applicants' complaints in the instant case are. Are they complaining about matters that fall exclusively within the domain of s 21, or there are aspects of their complaints, which implicate the supremacy of the Constitution, the rule of law or the doctrine of legality? If the applicants' complaints implicate any one or more of the aforestated category of matters, then it is our considered view that the courts' hands are not tied and it can properly exercise its powers and interrogate the actions of the legislature.

[79] It must be understood that where a provision, such as s 21, which subjects parliament's exercise of domestic jurisdiction to other provisions, in this case, certain articles of the Constitution, this generally means that the application of the provisions of s 21 is conditional and therefor contingent or dependent upon the constitutional provisions cited therein. In other words, this means that the applicability, operation or enforcement of the provisions of s 21, is contingent on certain conditions or limitations provided by the articles of the Constitution cited.

[80] In essence, s 21 highlights the legislature's dependencies and sets out boundaries within which it can properly exercise authority and power over its internal affairs. Where that exercise clashes with, is incongruent to or is inconsistent with the provisions of the Constitution mentioned, then to that extent, the courts have a constitutional duty or obligation, when approached, to intervene even though parliament may parochially contend that the matter otherwise falls within its domestic jurisdictional domain.

[81] In order to decide the question whether this court's powers to intervene and decide this dispute are precluded by s 21, one needs to consider the nature of the complaints leveled by the applicants against the decisions of the respondents, which are sought to be impugned. I do so presently.

[82] The first relief sought by the applicants relates to an argument that the Rules Committee, is not empowered by the relevant legal framework to refer a matter to the Privileges Committee. It is, in this connection argued by the applicants that that the Rules Committee, is a creature of statute and it cannot, that being the case, exercise powers it does not have in law.

[83] I am not at this stage, required to consider and decide on the sustainability of the applicants' contentions in this regard. All that can be seen from the applicants' complaint, is that their complaint is one where they allege that what was done by the Rules Committee, was a contravention of the applicable law and thus falling neatly within the realms of the principle of legality. This accordingly falls within the precincts of *Swartbooi's* binding authority and results in this court not being precluded, on first principles, from exercising it's jurisdiction notwithstanding that this is a matter that

relates to the legislature, which vociferously alleges that it is one falling within its exclusive domestic jurisdiction.

[84] The second remedy sought by the applicants relates to the referral of the applicants' matter to the Privileges Committee. It is the applicants' case that the referral was vitiated by the adoption of *ad hoc* rules, which are not envisaged by the applicable rules. It was also contended for the applicants in this regard that the National Assembly was not entitled in law to adopt the report emanating from the flawed process.

[85] On any construction, it appears to us that the complaint, whether it will be upheld or not, at the end of the day, is one that relates to the principle of legality, it being contended that the process followed violated the applicable rules and that all that followed therefrom was thus a nullity at law. We are of the considered view, regard being had to what has been stated before, that this renders the matter one that does not fall within the bar or exclusion of s 21 so to speak. This court is thus eminently qualified and required by the behests of the Constitution to deal with the matter. Section 21 accordingly does not, in the circumstances, serve to oust this court's jurisdiction.

[86] The third complaint relates to rule 111. It is the applicants' case that the said rule is void for vagueness. Where a rule is alleged to be void for vagueness, that clearly suggests that the said provision does not conduce to proper comprehension and application and is thus void. That is a contention, which if upheld, would bring this matter without the realms of s 21.

[87] It is accordingly not necessary, in our considered view, to traverse all the contentions by the applicants in this regard. We are of the considered view that properly considered, all the complaints raised by the applicants against the actions or decisions of the respondents relate to matters that appertain to issues of legality and the rule of law and which perforce place their interrogation beyond the countermand, so to speak, of s 21.

[88] In the light of these conclusions, we are of the considered opinion that this court is indeed qualified and required to exercise its supervisory jurisdiction that

enables it to ensure that the constitutional duties and imperatives of ensuring compliance with the constitution, the rule of law and the doctrine of legality, are not sacrificed on an altar that the legislature, for parochial or other reasons, may consider and regard as falling within its exclusive domestic domain, or what has been referred to in other jurisdictions as exclusive cognisance.[10]

[89] It would not be out of place to remark, as we draw this issue to a close, that the dogged attempt by the respondents to prevent this court from interrogating the conduct complained of in this matter, by relying on s 21, has not curried favour even in the United Kingdom, where Parliament appears to be supreme and not the written Constitution, which they in any event, do not have. In *R v Chaytor and Others,*[11] the UK Supreme Court rejected a claim of potential criminal conduct in respect of MP's expenses being un-actionable by the police on the alleged basis of parliamentary privilege. There are other cases where the same approach was adopted by the court in the UK.[12]

[90] With the above conclusion in place, it occurs to us that this court should thus proceed to consider the question whether the applicants' complaints are endowed with legal merit. The fact that we have found that the relief sought by the applicants falls beyond the scope of s 21, renders it unnecessary and in a sense superfluous for the court to consider the constitutionality of s 21. It is not necessary, regard had to the manner in which the questions arising have been addressed, to consider whether s 21 should be declared unconstitutional. That is, in our view, an unnecessary exercise to engage in, given the particular circumstances of the instant case. An occasion may present itself in the future when this question may be confronted head on. The instant case does not present a proper case or occasion to engage in that exercise.

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[10] *R v Chaytor and others* [2010] UKSC 52, para 26.

[11] *Ibid.* At para 78, the court reasoned as follows: 'In summary, extensive inroads have been made into areas that previously fell within the exclusive cognisance of Parliament. Following *Ex p Herbert* there appears to have been a presumption in parliament that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary. That presumption is open to question.' At para 83, the court stated that, 'Thus the House does not assert exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in the committee or in the House. Where it is considered appropriate the police will be invited to intervene with a view to prosecution in the courts. Furthermore, criminal proceedings are unlikely to be possible without the cooperation of Parliament.'

[12] *R v (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 and *R (Miller) v Secretary for Exiting the European Union* [2017] UKSC 5.

[91] We now turn, as we should, to consider individually, the bases upon which the applicants contend that the decisions of the respondents should be set aside. These have been hazarded above but we shall deal with them in greater detail presently. This will include a determination of the question whether the applicants have succeeded in making a proper and compelling case for the review and setting aside of the said decisions. In this regard, we commence with the argument that it was a violation of the applicable rules for the Rules Committee to refer the matter of the first and second applicants to the Privileges Committee.

Referral of the applicants' matter to the Privileges Committee

[92] It is common cause that when the Speaker suspended the applicants, he purported to invoke rule 111, 112, 113(*b*) and 124(*a*) of the Rules. Those rules read as follows:

> **'Rule 111 – Member directed to leave Assembly Hall**
> The Presiding Member shall order a Member whose conduct is grossly improper, to withdraw immediately from the Assembly Chamber for the remaining period of the sitting day in question.
>
> **112 Suspension of Member**
> If the presiding Member deems the powers conferred by Rule 111 inadequate, the Speaker may report it to the Standing Committee on Standing Rules and Orders and Internal Arrangements and that Committee may recommend that the Member concerned be suspended for seven days, on the second occasion for fourteen days, and on the third occasion for twenty-one days . . .
>
> **113 Member to withdraw from Precincts of Assembly**
> (a) A member who is suspended in terms of Rule 112 or instructed in terms of Rule 111 to leave the Assembly Chamber shall forthwith withdraw from the precincts of the Assembly.
> (b) Any Member who fails to withdraw from the Chamber when instructed in terms of Rule 111 by the Presiding Member, shall be escorted from the Chamber by the Sergeant-at-Arms.
> . .
> **124 Unforeseen Circumstances**

(a) In any matter for which these Standing Orders do not provide or that is not provided for by a Sessional Order or other Order, the decision of the Speaker or the Chairperson of the Whole House, as the case may be, shall be final, and I arriving at such decision he/she may take his/her guide the relevant practices in other jurisdictions.

(b) A ruling framed by the Speaker shall remain in force until it is set aside on the recommendation of the Standing Committee on Standing Rules and Orders and Internal Arrangements.'

[93] It may be necessary to mention for the sake of clarity and completeness, that the reference to 'Presiding Member' in the Rules, according to the definition in Rule 1, also includes the Speaker. We mention this lest one thinks that if the intention had been to mention the Speaker, the rule-maker would have done so. To that extent, it is therefor clear that rule 111, where it refers to Presiding Member, includes the Speaker. We presently turn to deal with the first complaint by the applicants, namely that the decision by the Rules Committee, made on 21 April 2021, to refer the applicants to the Privileges Committee, must be reviewed, corrected and set aside.

Referral of matter to the Privileges Committee by the Rules Committee

[94] On 21 April 2021, the Speaker convened a meeting of the Rules Committee, the minutes of which are included in the papers.[13] It is recorded in the minutes of that meeting that two decisions were taken. First, the meeting took note of the synopsis of the report from the Speaker. Secondly, that the urgency of the matter required that it be referred to the Privileges Committee for further investigation.[14]

[95] It is the applicants' contention that the decision to refer the matter, as recorded above, is inconsistent with the provisions of rule 112 and must, to that extent, be set aside. In order to arrive at a decision on this aspect, it is necessary to have regard to rule112, which has already been quoted above. As recorded above, rule 111 prescribes that the Speaker may issue a summary withdrawal of a member for the remaining period of the session, if that member exhibits grossly improper behaviour.

[13] Page 16 of the record of proceedings.
[14] Page 53 of the record of proceedings.

[96] According to Rule 112, if the presiding member takes the view that the withdrawal of a misbehaving member in terms of rule 111, is not adequate, the Speaker may report it to the Rules Committee. This Committee may in that event, recommend that the misbehaving member be suspended for seven days in case of improper conduct for the first time. If there is a second case of improper conduct, the member must be suspended for 14 days, whereas a third infraction should attract a suspension of 21 days.

[97] It is the applicants' case that it was, in view of the foregoing, improper for the Rules Committee to refer the matter to the Privileges Committee as it did. We are in unqualified agreement with the applicants that any issues of misconduct, which were viewed by the Speaker to be grossly improper, had to be reported to the Rules Committee, to deal therewith. In terms of rule 112, this Committee could recommend the suspension of the errant member for 14 days for a second infraction and to 21 days for a third infraction.

[98] A close reading of the said rule does not grant the Rules Committee the power or liberty to refer the matter to the Privileges Committee. It does not appear, from the wording of the rule that there are any circumstances, whether urgent or exceptional, that would warrant the referral of the matter by the Rules Committee to the Privileges Committee. It accordingly follows, as night follows day, that the resolution of the Rules Committee to refer the matter to the Privileges Committee, is not envisaged by the Rules. The urgency touted to attach to the matter did not imbue the Rules Committee with the power to make such referral.

[99] To that extent, we are in agreement with the applicants that the referral of the matter to the Privileges Committee for further investigations, was therefor in violation of the clear and unambiguous language employed by the rule-maker. A reading of the relevant rule would seem to suggest that the buck stopped with the Rules Committee, which appears to have washed its hands of the matter, illegally referring it to the Privileges Committee. The first prayer for the setting aside of the decision of the Rules Committee of 21 April 2021, is thus reviewed and set aside for want of compliance with the relevant and applicable rules. We now move on to deal with the decision of the Privileges Committee of 26 April 2021.

The decision of the Privileges Committee of 26 April 2021

[100] It is unclear whether the respondents say the referral of the matter was done by the Rules Committee or referral was done *suo motu* by the Privileges Committee. The latter proposition appears from a letter written on behalf of the Speaker by his legal practitioners where they claim that the decision to investigate the matter was one of the Privileges Committee, without any referral by the Rules Committee.[15]

[101] It is unclear what the position of the Speaker is in this regard. Perhaps the use of the word *suo motu* was not well understood or is a product of terminological inexactitude. From the minutes of the Rules Committee, it is plain that a resolution was made by that Committee to refer the matter to the Privileges Committee. That in my considered view, was unlawful and not envisaged or provided by the Rules. The duty to make the appropriate recommendation was solely that of the Rules Committee. It could not lawfully abdicate its responsibilities in that regard and refer them for action by a Committee that is not tasked to carry out the responsibilities of the Rules Committee.

[102] To this extent, we are of the considered view that the decision of the Rules Committee was flawed and not in line with the applicable law. In this connection, it is further doubtful whether the Privileges Committee could take a lawful decision when the referral of the matter to it, was not in line with the applicable law. It appears to us that the decision made by the Privileges Committee was also flawed on the basis that the matter served before it following a process that was not contemplated and in violation of the applicable rules.

[103] It should be stated that the invocation of rule 112, as appears from the text, is resorted to in cases where the Presiding Member 'deems the powers conferred by Rule 111 inadequate'. We are of the considered view that in any event, where the presiding member decides to invoke the provisions of rule 112, the circumstances which influence the decision to invoke rule 112, must be clearly articulated. The invocation of rule 112 cannot just be an exercise solely confined to the recesses of

[15] At p 325 para 30, the Speaker states that 'I further admit the fact that on 21 April 2021 the Rules Committee had a meeting and in fact it referred the matter concerning the 1at and 2nd applicants' conduct to the Privileges Committee.' At para 110, the Speaker says that, 'This will enable the Privileges Committee, upon considering the matter, *suo motu* to commence investigation.'

the mind of the presiding member and merely issued as an edict. It should be possible for interested parties to question the referral and the reasons why it is claimed that rule 111 is inadequate. To that extent, the reasons for the triggering of the application of rule 112 should be provided. In this connection, the Speaker merely mentioned that it was 'deemed necessary to report the matter to the Rules Committee', with no reasons or considerations taken into account in arriving at that important decision, provided.

[104] It should also be stated unequivocally that rule 112 does not, when properly considered, make reference to referral of the matter to the Privileges Committee at all. Its powers are confined to recommending the imposition of the length of suspension consequent upon findings of grossly improper behaviour by a member. This conclusion, in our considered view results in a finding that the referral of the matter to the Privileges Committee was, for this reason as well, in contravention of the rules and thus invalid.

[105] It thus follows as day follows night, that every decision that was made by the Privileges Committee appertaining to the applicants' matter, was null and void. This is so for the reason that the applicable rules do not envisage the Rules Committee referring a matter of grossly inappropriate conduct to the Privileges committee on any basis. That being the case, it appears to us that any decision made by the Privileges Committee in pursuance of a matter illegally placed before them in contravention of the applicable rules, can only yield a nullity.

[106] For that reason, any decision made and in this case by the National Assembly, to adopt the report of the Privileges Committee regarding the conduct of the applicants and pursuant to an illegal referral of the matter to it, cannot in law stand. It therefor follows that the decision of the National Assembly, is not consistent with the applicable law and accordingly violates the doctrine of legality. This finding accords this court's the constitutional the licence to deal with this matter and in the event, to set aside the decision of the National Assembly as well.

[107] It is fitting to observe in this regard, that the powers of the Privileges Committee, to investigate a matter of its own accord, are to be found in s 12(*b*) of the Act. It provides that 'The Committee of Privileges . . . may, subject to Part III,

investigate, either of its own accord, or upon a complaint made by . . . the House, any matter relating to the conduct of any member within the precincts of Parliament or an alleged breach by any member of the relevant Standing Rules and Order.'

[108] It appears incontrovertible that the House did not, at any stage, refer the applicants' matter to the Privileges Committee for investigation. The matter reached that Committee after the Speaker had made his decision in terms of Rule 111. There is no evidence that the Privileges Committee ever made a decision to investigate this matter of its own accord. The contrary, rather is true. It is the Rules Committee that appears to have referred the matter to the Privileges Committee and this was after the Speaker had made his decision in terms of Rule 111, which as found by the Supreme Court, was invalid because the Speaker could only order the withdrawal of a member for the remainder of the session at which the grossly improper conduct takes place.

[109] What appears plain is that the decision to refer the applicants' case to the Privileges Committee by the Rules Committee is the source of all the illegalities in this matter. It would appear that that decision, which was made without any basis or support in the Rules, developed some poison that ran in its veins. This poison was debilitating in its effect such that wherever the matter subsequently went for deliberation and decision after the unlawful referral, it carried with it the poison that infected every decision made in pursuance of the illegal referral.

[110] The Rules Committee was excised or excised itself from dealing with the matter is contravention of the behests of the relevant rules and from which no departure is authorised. This effectively seals the fate of the respondents' decisions and renders them liable to be set aside. The result of that is that the recommendations were made to the House by a wrong body, namely, the Privileges Committee. The adoption of the said recommendations by the House also results in the decision of the House being illegal for want of complying with the applicable Rules.

The adoption of *ad hoc* Rules

[111] It is also plain that the Privileges Committee, on 18 May 2021, adopted *ad hoc* Rules in dealing with the matter. These Rules were put in place in order to deal with the applicants' misdemeanours. The respondents argue that the said rules were necessary and were nothing out of the ordinary, save to provide for the rules of natural justice. We are of the considered opinion that matters are not as simple as the respondents perceive them. It is our considered opinion that following that calamitous course, the Privileges Committee overstepped its mandate. This is so for the reason that s 59(1) of the Constitution reposes the power to make Rules in the National Assembly.

[112] The said provision reads as follows:

'(1) The National Assembly may make such rules of procedure for the conduct of its business and proceedings and may make such rules for establishing, functioning and procedures of committees, and formulate such standing orders, as may appear to it expedient or necessary.'

[113] It is thus clear in our considered view that regardless of the unprecedented nature of the matter that faced the Speaker and the House, it was incorrect to set up rules on an *ad hoc* basis and by a body that is not mandated to do so by law. Issues of urgency and convenience should not be the reason why the procedure stipulated in any law must be avoided. If any urgency attached to the matter, the Speaker had the wherewithal to call the House on an urgent basis, in terms of the applicable procedures, to expeditiously craft the applicable rules. If the Rules invoked were improperly brought into being, this materially affects the finding of guilt of the applicants, pointing to a setting aside of the decision by the National Assembly to adopt the Privileges Committee' recommendations.

The Speaker's involvement

[114] There is a matter that we need to comment on that was pertinently raised by the applicants. This relates to the involvement of the Speaker in all the Committees that sat in deliberation of the applicants' matter. It is common cause that the Speaker

made the decision to withdraw the applicants and which the Supreme Court subsequently reversed and set aside. The effect of the decision to withdraw the applicants was that they could not participate in the subsequent deliberations of the Committees in which they served. In particular, the first applicant could not serve in the Privileges Committee as a result of the indefinite withdrawal imposed by the Speaker. That fact could not, however, result in the decisions taken by the said Committee being unlawful because the first applicant was not present, even illegally so, as the Supreme Court found.

[115] The decision to exclude them, it would seem to us, remained valid up to the time that it was set aside by the Supreme Court. We do not agree with the applicants that the said decision should result in rendering the respondents' decisions made where the applicants would have otherwise been entitled to participate, unlawful therefor. In any event, the first applicant was conflicted and would it not have been seemly for him to attend and partake in the deliberations relating to his misconduct as found by the Speaker. The decision to request him to depute a member of his party to stand in his stead commends itself to us as having been appropriate in the circumstances.

[116] We now turn to the Speaker. It appears to us that the Speaker, having made the decision in terms of rule 111, and the damning conclusions he made against the applicants, should not have participated in the subsequent processes relating to the applicants' case, especially in the Rules Committee, the Privileges Committee and the National Assembly, where he chaired all those proceedings. In his supplementary affidavit on 23 April 2021, he described the applicants' conduct as 'an orgy of chaos, disruption violence and gross misconduct . . .'[16] He also described their conduct as 'a serious act of unlawful disturbance and disruption of parliamentary proceedings that can never be countenanced by any peace-loving person. In fact, their conduct amounted to a criminal act.'[17]

[117] These are, on any construction, damning findings, which in our view, served to preclude the Speaker from participating in processes that were designed to deal with

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[16] Page 102, para 48.4 of the Speaker's affidavit.
[17] Page 91 of the Speaker's affidavit, para 17.

the innocence or guilt of the applicants. By his strong condemnatory words, the applicants were guilty and their hands dripping in blood as it were.

[118] In his defence, the Speaker states, and we have no reason to doubt his *bona fides*, that he is a democrat and would not be offended even if his decisions relating to the applicants were to be later set aside by the relevant bodies. In this wise, it was submitted on his behalf that his decisions were not adjudicative or determinative of the guilt of the applicants and as such there was nothing amiss or odious in his presiding over the applicants' fate at the subsequent *fora* where the applicants' case served.

[119] We are of the opinion that the nature and impact of the decisions made by the Speaker and the propriety of his involvement in subsequent processes involving the applicants, must be viewed not from his own subjective view. The question must be viewed from the prism of an objective person, properly apprised of the Speaker's previous words and actions towards the applicants. The question must be whether that officious by-stander could agree that the Speaker could, notwithstanding his actions and utterances relating to the applicants, still be considered to be independent and impartial and one who could bring an independent and unbiased mind to bear on the applicants' fate?

[120] We are of the considered opinion that in view of the central position he took and the apparent personal affront he appears to have taken at the applicants' behaviour, he should have recused himself from the proceedings subsequent to his decision in terms of rule 111. It should be remembered in this regard that Rule 11(*a*) provides that if for any reason the Speaker is 'not able to fulfill his/her functions, the Deputy Speaker acts as Speaker . . .'

[121] We are of the considered opinion that he had a conflict of interest in this matter, having excluded the applicants from the House and subsequently made excoriating remarks about them in court proceedings. It was accordingly comely that he should have recused himself so that an independent and neutral person, who had not already made some adverse decisions against the applicants, would proceed to preside over the subsequent investigations and decisions to be made against the applicants. This is what justice, as envisaged by Art 12 of the Constitution, would

have envisaged – a chairperson who was independent and impartial and more importantly, seen by an officious by-stander to be so.

Vagueness

[122] Another challenge by the applicants, related to the constitutionality of the provisions of rule 111. It was their contention that the said provision is bad for vagueness and must therefor be struck out as unconstitutional. The said provision has been quoted above. The offending portion, according to the applicants, relates to the words 'whose conduct is grossly improper'. They argue that the underlined words are on any construction vague. The result is that a person, to whom these words apply, would not know for certain what conduct he must not engage in in order not to fall foul of the said provisions.

[123] We are of the considered view that the challenge by the applicants cannot be considered to be vexatious. It is common cause that the conduct of Members of Parliament is subject to censure in cases where they are considered to have engaged in 'grossly improper conduct'. Accordingly, they have to be constantly on guard and ensure that they stay on the straight and narrow, lest the Sword of Damocles descend upon them and they are found to have fallen foul of the said provision.

[124] It is one of the standard rules that provisions which impinge on people's rights and licence an imposition of punishment, must be clear in their terms so that those to whom they apply will know what they need to do or not do in order to avoid falling foul of the said provisions. In the instant case, the impugned words are vague and wide in scope. As they presently read, they are open to various interpretations, with that of the presiding officer, being the operative one as there is no standard against which conduct is to be measured, especially by the party to whom they may be applied.

[125] It is our considered view that although not every type of behaviour can be listed that can be regarded as falling within the prohibition in this case, Parliament must take it upon itself to identify the types of conduct that would require the invocation of this sanction. This is particularly so when regard is had to the fact that Parliament consists of persons from different political parties. Where this power

remains as vague as it is, those on the receiving end may legitimately feel that the power is being exercised in an arbitrary manner, perhaps with untoward intentions to prejudice the members of the party concerned.

[126] There are certain jurisdictions, for example, where an equivalent of this provision is detailed in regard to the conduct that is regarded as falling foul of the said provision. This, in our view is necessary both for clarity of the Speaker as to the offending behaviour, for the one part, and the members, of the other part. This ensures that the rules of the game, so to speak, are clear and admitting of little or no ambiguity.

[127] It is our considered opinion that listing the offensive conduct in the relevant rule can also serve to relieve this court of having to interrogate the domestic matter of the legislature. It must be recorded that the impact of the exercise of this right by the Speaker, has the debilitating effect of debarring a member from participating in the business of the House and in exercise of that member's political rights. This is not to mention the responsibility of the member to represent his or her constituency, which may be prejudicially affected by the exercise of the right in circumstances where the length and breadth of the withdrawal is unclear and possibly expansive or may be parochial, depending on who is at the helm.

[128] We are accordingly of the considered view that the applicants' contention in this regard, has a lot of merit. If acted upon, this would remove the uncertainties and ensuing debates that may rage regarding what is permissible and impermissible conduct that crosses the Rubicon as it were.

[129] The Supreme Court in *Africa Personnel of Namibia (Pty) Ltd v Government of the Republic of Namibia*[18] the Supreme Court expressed itself as follows:

'Conferment of discretionary power to be exercised by administrative bodies or functionaries is unavoidable in modern state. However, where the legislature confers discretionary power, the delegation must not be so broad or vague that the body or functionary is unable to determine the nature and scope of the power. Broad discretionary powers must be accompanied by some restraint on the exercise of the power so that people

[18] *Africa Personnel of Namibia (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 506 (SC) para 63.

affected by the exercise of the power and the circumstances in which they may seek relief from adverse decisions. Generally, the constraints must appear from the provisions of the empowering statue as well as its policies and objectives.'

[130] Although the Supreme Court was dealing with a different set of facts, properly considered, the underlined portion, in our considered view, applies with equal force to the application of rule 111. This is especially so because the exercise of the powers imbued in the Speaker by that provision, are discretionary. He should know without doubt when to invoke the powers and concomitantly, the one feeling the brunt of the exercise of the powers by the Speaker, must know what to do or not do, in order to avoid the unleashing of those powers. The latter can only be achieved by clarifying in the said rule what types of conduct attract a sanction under the said rule.

[131] In view of the foregoing conclusion, we are of the view that the said offensive portion of the rule, is unconstitutional for vagueness. It must thus be submitted to parliamentary processes so that clarity and certainty are achieved and members of parliament are not unaware of how to behave when they are in the august House. More importantly, it must be clear to them what type of behaviour falls foul of the said provisions.

Conclusion

[132] Having due regard for the foregoing conclusions, we find it unnecessary to consider the alternative relief sought by the respondents. We are of the considered view that the applicants have made out a case for the setting aside of the impugned decisions, all triggered by the unlawful referral of the matter by the Rules Committee to the Privileges Committee, in violation of the applicable Rules. The main relief the applicants seek should, in the premises, be granted as prayed.

Costs

[133] The general rule is that costs follow the event. There is no reason, in our considered view, why the respondents, excluding the fourth respondent, should not pay the costs of the application. The applicants have succeeded in the case they

prosecuted and should, for that reason, be reimbursed for the costs they have incurred, resulting in the success they have achieved.

[134] There can be no debate about the fact that this was a very complicated matter and one that touched on very important constitutional and legal issues of great moment in a democracy. Whereas there was a special costs order sought against the Attorney-General, this does not appear to have been followed at all, let alone with any vigour in argument by the applicants. There is no dispute that this is a matter which on account of its complexity, deserves a costs order for one instructing counsel and one instructed counsel, as prayed for.

Order

[135] In view of the foregoing considerations, findings and conclusions, we are fortified that the applicants should succeed in their application. For that reason, we hold the view that the following order should ensue:

1. The decision of the Rules Committee purportedly taken on 21 April 2021 to refer the applicants' matter to the Privileges Committee;

2. The decision of the Privileges committee of 26 April 2021, to *suo motu* investigate the conduct of the applicants of 15 April 2021 is hereby reviewed and set aside;

3. All the meetings and or decisions of the Privileges Committee, subsequent to its meeting of 26 April 2021, and which meetings and or actions were in pursuance of the decisions of meeting of 26 April 2021, and which meetings and or actions were in pursuance of the decisions of the Privileges Committee to investigate the conduct on 15 April 2021 of the first and second applicant is hereby reviewed and set aside.

4. The decision of the National Assembly to adopt the report of the Privileges Committee entitled, 'Investigation Into the Conduct of Hon. Bernadus Swartbooi and Hon. Henny Seibeb on 15 April 2021 During the State of the Nation Address' is hereby reviewed and set aside.

Swartbooi and Hon. Henny Seibeb on 15 April 2021 During the State of the Nation Address' is hereby reviewed and set aside.

5. The phrase 'grossly improper' occurring in rule 111, is declared to be vague and therefor unconstitutional.

6. The declaration of unconstitutionality in paragraph 5 above, is to operate prospectively with effect from the date of this order. Its operation, is however, suspended for a period of 24 months to afford the National Assembly an opportunity to remedy the defect giving rise to the unconstitutionality.

7. The *ad hoc* Rules Governing Procedure made by the Privileges Committee on 18 May 2021 be and are hereby declared null and void and of no force or effect.

8. The first, second, third and fifth respondents, are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved and such costs are consequent upon the employment of one instructing and one instructed legal practitioner.

9. The matter is removed from the roll and is regarded as finalised.

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TS MASUKU
Judge

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B USIKU
Judge

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E RAKOW
Judge

APPEARANCES

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|---|---|
| 1st, 2nd & 3rd | |
| Applicants: | K Premhid (with him P Kauta) |
| Instructed by: | Dr Weder, Kauta & Hoveka Inc, Windhoek |
| | |
| 1st, 2nd, 3rd & 5th | |
| Respondents: | V Maleka SC (with him S Namandje) |
| Instructed by: | Sisa Namandje & Co. Inc., Windhoek |