

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

BERNARDUS SWARTBOOI

First Appellant

HENNY HENDLY SEIBEB

Second Appellant

and

SPEAKER OF THE NATIONAL ASSEMBLY

PETER HITJITEVI KATJAVIVI

Respondent

Coram: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 21 July 2021

Delivered: 4 August 2021

Summary: The appellants are elected members of the National Assembly. During the State of the Nation Address by the President at Parliament on 15 April 2021, the Speaker of the National Assembly (the Speaker/the respondent) in terms of rule 111 of the Standing Rules and Orders and Internal Arrangements of the National Assembly (Standing Rules) ordered the appellants to withdraw from the Assembly Chamber on account of disruptive behaviour. The few days later (ie on 19 April 2021), the Speaker in writing informed the appellants that he had reported the matter to the Committee on Standing Rules and Orders (the Committee) for consideration. Further, the Speaker informed the appellants that he had invoked rule 124(a) of the Standing Rules and made a ruling that they 'remain withdrawn from the House for the time being'. The Speaker indicated that this

ruling would 'remain in force until it is set aside on the recommendation of the Standing Committee'.

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. In opposition, the Speaker contended that the unprecedented nature of the disruption and the prospect of further disruptions, gave rise to a situation not foreseen by the rules, thus entitling him to invoke rule 124(a). The Speaker further contended that in the absence of the Standing Rules providing the power to suspend members of Parliament pending the finalisation of disciplinary proceedings, rule 124(a) vested him with the discretion to act in the interim and rule that the suspensions remain in place pending the determination by the Committee. In addition, the Speaker took the point that s 21 of the Powers, Privileges and Immunities of Parliament Act 17 of 1996 (the Act), precluded the appellants' challenge to the exercise of the power invoked with reference to rule 124(a).

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. The appeal is against the whole judgment and order of the court *a quo*.

The issues on appeal for determination: whether the Speaker has the power to suspend members of Parliament indefinitely within the context of the separation of powers and parliamentary privilege and the right of the National Assembly to make rules of procedure for the conduct of its business and proceedings; and, whether s 21 precludes the jurisdiction of the courts?

The appellants, in brief, contended that the conditions precedent for the Speaker to invoke the power under rule 124 were not present. They further argued that the Standing rules (ie rules 111, 112, 113 and 115) provide authority for the appellants to be disciplined and that it was not open to the Speaker to invoke rule 124.

The respondent on the other hand submitted that the principle of separation of powers, at the root of Namibia's Constitution, meant that the National Assembly was entitled to make its own rules as to privileges and its conduct of business and procedures and that s 21 precluded the courts from passing upon Parliament's action in respect of internal affairs under its rules in the absence of a constitutional challenge upon s 21. Respondent further contended that the suspension of the appellants is an internal affair of Parliament covered by s 21. In addition, the respondent maintained that his interpretation of rule 124 was sound because there was no other power in the rules to suspend members pending an enquiry and due to the disruptive actions of the appellants, necessity required a power of this nature to be implied in rule 124. Respondent contended that the court should adopt a contextual and purposive interpretation to rule 124 to afford him the power to suspend the appellants pending their disciplinary proceedings.

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.

Held that, the Speaker's role under the Standing Rules in relation to the conduct of members thus does not include taking disciplinary action - the Speaker has no power to do so – but rather to maintain order in the House.

Held that, rule 124, relates to matters for which the Standing Rules do not provide – this means eventualities not having been foreseen in the sense of not being provided for in the rules. Suspension in this sense is an eventuality which is expressly provided for in the Standing Rules (ie rule 112 read with s 13 of the Act).

Held that, the rule-giver could not have intended rule 124 to be invoked to afford the Speaker with powers where an item is expressly provided for.

Held that, the provisions of s 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– making it clear that it cannot preclude this court from enforcing the Constitution.

This court finds that the decision to suspend the appellants indefinitely was not made in accordance with the Standing Rules or the Act and that the decision to suspend was not made by Parliament, but by the Speaker, as a consequence s 21 of the Act does not find application in this matter, given the absence of the necessary jurisdictional facts for its invocation to oust the court's jurisdiction.

It is thus found that the decision to suspend the appellants was outside the Speaker's powers and it is thus unlawful, of no effect and is set aside.

Appeal is upheld.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and FRANK AJA concurring):

[1] At issue in this appeal is the power of the Speaker of the National Assembly to suspend members of Parliament indefinitely within the context of the separation

of powers and parliamentary privilege and the right of the National Assembly to make rules of procedure for the conduct of its business and proceedings.

[2] The appellants are both duly elected members of the National Assembly. During the State of the Nation Address by the President at Parliament on 15 April 2021, the Speaker ordered the appellants to withdraw from the Assembly Chamber on account of disruptive behaviour. In doing so, the Speaker invoked rule 111 of the Standing Rules and Orders and Internal Arrangements of the National Assembly (the Standing Rules). Rule 111 provides:

‘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.’

[3] A few days later and on 19 April 2021, the Speaker in writing informed the appellants that he had reported the matter to the Committee on Standing Rules and Orders (the Committee) for consideration. He further informed them that he had invoked rule 124(a) of the Standing Rules and made a ruling that they ‘remain withdrawn from the House for the time being’. This ruling, he said, would ‘remain in force until it is set aside on the recommendation of the Standing Committee’.

Proceedings in the High Court

[4] The appellants challenged this effective indefinite suspension in an urgent application launched on 21 April 2021. They did so on the basis that the Speaker lacked the power to so suspend them under rule 124(a). They sought an order to declare unlawful and set aside the Speaker’s ruling as conveyed to them on 19

April 2021. They also 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.

[5] When the matter was originally called, the High Court postponed the application to 26 April 2021 to afford the Speaker the opportunity to answer on the merits of the application and for the application to be determined finally. The need to seek interim relief thus fell away.

[6] In his opposition to the application, the Speaker at some length referred to the conduct of the appellants which led to him ejecting them from Parliament. He described the conduct as disruptive and involving physical violence and completely subversive of the authority of Parliament. His ruling to eject them on 15 April 2021 is not in issue in these proceedings.

[7] What is in issue is his decision to invoke rule 124(a) on 19 April 2021 to suspend them indefinitely. The Speaker asserts that he was justified in doing so because the unprecedented nature of the disruption and the prospects of further disruptions gave rise to a situation not foreseen by the rules, thus entitling him to invoke rule 124(a). The Speaker stated that he had been approached by various members of Parliament who 'seriously fear for their safety if the (appellants) were to be permitted to return to Parliament before the disciplinary proceedings are finalised'. The Speaker also said that the appellants had after 15 April 2021 publicly and yet defiantly declared that they will, going forward, continue with what they did on 15 April 2021.'

[8] The Speaker also contended that the Standing Rules do not make provision for a suspension pending the finalisation of disciplinary proceedings. In the absence of a power to provide for suspension pending proceedings before the Committee, the Speaker asserted that rule 124(a) vested him with the discretion to act in the interim and rule that the suspensions remain in place pending the determination by the Committee which can recommend that those suspensions be set aside. The Speaker also stated that he had 'directed' that the Committee 'move with speed to finalise the matter in order not to prolong the [appellants'] withdrawal to stay out of Parliament'. He further pointed out that the Committee had referred the matter to the Committee on Privileges. Despite the passage of more than three months, we were informed by counsel at the hearing that, although a meeting was scheduled for the day before the hearing (20 July 2021), the matter remained unresolved and the appellants remained suspended.

[9] The Speaker further took the point that s 21 of the Powers, Privileges and Immunities of Parliament Act 17 of 1996 (the Act) precluded the appellants' challenge to the exercise of the power invoked with reference to rule 124(a) to suspend the appellants indefinitely.

Approach of the High Court

[10] The High Court declined the appellants' application with costs. It did so on essentially two bases. It found 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. The Speaker's referral of the appellants' conduct to the Committee, the High Court found, fell within the domain of Parliament. The

court found that s 21 of the Act precluded it from usurping the proceedings then pending before the Committee and that this approach of not intervening in the internal affairs of Parliament accorded with the principle of separation of powers.

[11] The court below also found that the relief sought was in the nature of a declaratory order which is a discretionary remedy. The court referred to the fact that the Committee was seized of the matter and that the appellants could raise the issues in the application before the Committee where their remedies would lie and not with the High Court.

[12] The court's written reasons for dismissing the appellants' application were provided with appropriate expedition on 5 May 2021. The appellants prosecuted their appeal with urgency, filing the notice of appeal on 12 May 2021 and the record on 18 May 2021. They directed an application to the Chief Justice for this appeal to be heard outside the prescribed terms under rule 3(5) of the rules of this court. That application was not opposed and was granted, resulting in the early hearing of this appeal on 21 July 2021.

Submissions on appeal

[13] Counsel for the appellants argued that the Speaker's decision to suspend the appellants indefinitely is not good in law on several grounds.

[14] Counsel contended that the conditions precedent for the Speaker to invoke the power under rule 124 were not present. It was argued that the Standing Rules (in rules 111, 112, 113 and 115) provide authority for the appellants to be disciplined and that it was not open to the Speaker to invoke rule 124.

[15] It was also submitted that the Speaker impermissibly invented a further power for himself not provided for in the rules. Counsel also argued that the Speaker's intention to take punitive action is not supported by the Standing Rules. Appellants' counsel also submitted in their written argument that the Speaker's decision should be set aside because he had abdicated his powers to the Deputy Director: Security and Risk Management Services at the National Assembly who filed a report on 19 April 2021 upon which the Speaker acted.

[16] Appellants' counsel further argued that s 21 of the Act did not preclude the courts' jurisdiction to subject Parliament to constitutional control, given the supremacy of the Constitution. It was also contended that s 21 in any event did not apply because it could not oust the jurisdiction of the court in respect of action taken by the Speaker as the section only related to Parliament as defined which includes committees and not the Speaker.

[17] Counsel for the Speaker on the other hand supported the judgment of the High Court. Counsel submitted that the principle of separation of powers, at the root of Namibia's Constitution, meant that the National Assembly was entitled to make its own rules as to privileges and its conduct of business and procedures and that s 21 precluded the courts from passing upon Parliament's action in respect of internal affairs under its rules in the absence of a constitutional challenge upon s 21. It was argued that the suspension of the appellants is an 'internal affair' of Parliament covered by s 21. In their well-researched argument, counsel argued with reference to Canadian, English and Indian authority that matters relating to parliamentary privilege are to be regulated by Parliament alone.

Counsel also referred to authority from South Africa, Zimbabwe Rhodesia, Canada and Australia in support of the proposition that the internal affairs of Parliament are not subject to court scrutiny.

[18] Counsel for the Speaker also contended that the discretionary remedy (seeking a declarator) sought by the appellants related to an internal remedy available to the appellants in proceedings before the Committee and that the High Court was entitled to exercise its discretion to decline the relief for that reason as well.

[19] Counsel for the Speaker also argued that the Speaker's interpretation of his powers under rule 124 was sound. There was no other power in the rules to suspend members pending an enquiry and that necessity required a power of this nature be implied in rule 124 and that the Speaker was accordingly entitled to suspend the appellants indefinitely under that rule pending the finalisation of disciplinary proceedings.

The Constitutional and statutory framework

[20] The starting point with reference to the statutory setting relevant to this appeal is the Constitution. Article 1(3) establishes at its very outset the principle of separation of powers and the supremacy of the Constitution. The legislative power is under Art 44 vested in the National Assembly (to pass laws with the assent of the President and subject to the powers and functions of the National Council).

[21] Article 1 also makes it plain that the rule of law is a foundational principle of the Constitution. The doctrine of legality, which is an incident of the rule of law,

means that the legislature and executive are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law.¹

[22] 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'.² The legislature's control over its own 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.³ These principles, with reference to the role of Parliament and the Courts, were aptly summarised by the South African Constitutional Court:⁴

[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 to 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 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

¹ *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) para 23; *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC) para 47. See also *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 49.

² *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) paras 108-109.

³ *Glenister v President of the Republic of South Africa & others* 2009 (1) SA 287 (CC) paras 33-34; *South African Association of Personal Injury Lawyers v Heath & others* 2001 (1) SA 883 (CC).

⁴ *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC) paras 36-38.

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.

[38] But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament “must act in accordance with, and within the limits of, the Constitution”, and the supremacy of the Constitution requires that “the 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 fulfil their constitutional obligations’
(Footnotes excluded).

[23] These principles apply with equal force to Namibia’s constitutional democracy.

[24] It is in this context that the pertinent Constitutional and statutory provisions are to be considered in giving effect to these principles.

[25] Article 59(1) of the Constitution empowers the National Assembly to make rules of procedure for the conduct of its business and to establish committees and formulate standing orders. Article 60 provides for duties, privileges and immunities of members. The duties of members include maintaining the dignity and image of the National Assembly. Article 60(3) further provides that rules providing for the privileges and immunities of members be made by an Act of Parliament.

[26] Pursuant to these powers, the Act was passed and the Standing Rules were adopted by the National Assembly. These together thus comprise the legislative framework within which the conduct of members is addressed and is inherent in the principle of separation of powers which presupposes that parliament controls its own proceedings.

[27] The Act provides for privileges and immunities from legal proceedings in connection with parliamentary debates. As a deliberative body, debate, where members enjoy freedom of speech, is an essential component in order for those deliberations to be meaningful and ensure that the principle of representation of all the people embodied in Art 45 is met. The Act, in following the tradition of democracies elsewhere, provides for privileges and immunities for parliamentarians to speak freely in those debates without fear of legal liability or other reprisal. The Act also embodies the principle of Parliament having full powers to control, regulate and dispose of its internal affairs without interference as set out in s 21.

[28] The Act also provides for the establishment of a Committee of Privileges to investigate the conduct of members and to report and make recommendations to

the House (National Assembly). Under s 12 of the Act, that committee may investigate – either of its own accord or upon a complaint - the conduct of a member within the precincts of Parliament for a breach of the Standing Rules. That Committee is then to report and make recommendations to the House as to its findings. The Act thus contemplates that the House consider reports and recommendations of the Committee of Privileges in s 13 and the House is then empowered to take disciplinary action against members. Section 13 provides:

‘The House –

- (a) shall, in accordance with its Standing Rules and Orders, consider a report and recommendation made to it under section 12(d); and
- (b) may take such disciplinary action against the member concerned as it may deem appropriate in accordance with its Standing Rules and Orders.’

[29] The power to take disciplinary action against members on ground of conduct are thus to be found in s 13 read with the Standing Rules.

[30] The House (and not the Speaker) is enjoined and empowered under s 13(b) to take disciplinary action against members in accordance with the Act and Standing Rules.

[31] The Standing Rules deal with the internal workings and procedural arrangements of the National Assembly. Chapter XI concerns the conduct of members. Of relevance to these proceedings are rules 111, 112 and 113.

[32] Rule 111, already referred to, was invoked by the Speaker when ordering the appellants to leave the House Chamber on 15 April 2021 for the remainder of

that sitting day. That rule empowers the Speaker to order a member to withdraw from the Assembly Chambers for the remainder of a day's sitting.

[33] Rule 112 would appear to inform the Speaker's decision to report the appellants' to the Committee. It reads:

'Suspension of Member

If the Presiding Member deems the power 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 a third occasion for twenty-one days.'

[34] Rule 113 sets out the consequences of a withdrawal or suspension in terms of rules 111 and 112 in these terms:

'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 Serjeant-at-Arms.'

[35] Rule 114 affords suspended members the opportunity to submit a written expression of regret to the Speaker and if he or she approves of it, he or she can lay it before the Assembly which can lead to the discharge of suspensions.

[36] In addition to these powers in Chapter XI, dealing with conduct of members, the Speaker is accorded the power to adjourn the National Assembly in the event

of grave disorder. This power is contained in rule 115 headed 'Grave disturbance, Powers of Speaker'. It provides:

'In the event of grave disorder as a whole the Speaker may adjourn the Assembly without the question put, or suspend any sitting for a period to be stated by him/her'.

[37] Rule 124, invoked by the Speaker for the indefinite suspensions of the appellants, is to be found in a separate chapter (Chapter XII) entitled 'General Provisions'. Rule 124's heading is 'Unforeseen circumstances'. It reads:

- '(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.'

[38] Significantly a ruling contemplated under rule 124 is to remain in force until set aside on the recommendation of the Committee and not the Standing Committee on Privileges – the latter Committee being charged with addressing disciplinary issues.

[39] The Standing Committee on Privileges is empowered under Standing Rule 68 'to deal with matters relating to the conduct of members, including the misuse or abuse of Rules of the Assembly' and to investigate and report on any matter relating to the Standing Rules, the Code of Conduct or 'any other Rule of the Assembly'. The Committee (on Standing Rules and Orders) does not enjoy or

possess any powers relating to conduct or the investigation of matters relating to conduct.

[40] The Speaker's powers under the Standing Rules relating to disciplining members are accordingly limited to the following. In Chapter XI governing the conduct of members, the Speaker as presiding member is authorised to order members to withdraw from the Assembly Chamber.⁵ If the Speaker deems this to be inadequate, he can report the matter to the Committee which is empowered to recommend a seven day suspension and on a second occasion, suspension for 14 days and on a 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. It would then report and make recommendations under s 13 of the Act to the House which is vested within the power to take disciplinary action against members after considering that Committee's report and recommendation.

[41] The Speaker's role under the Standing Rules in relation to the conduct of members thus does not include taking disciplinary action – he has no powers to do so - but rather to maintain order in the House.

[42] Neither the rules nor the Act provide for the suspension of members pending committee hearings in express terms. The Speaker contends that rule 124 is to be construed to empower him to take such action. In his affidavit, he refers to the appellants' conduct and the need to take action as constituting 'unforeseen circumstances' – seeking to reply on the term employed in the heading of rule 124.

⁵ Under Standing Rule 111.

[43] Counsel for the Speaker also relies upon these words employed in the heading as authorising the Speaker to act against the appellants. Reliance is placed upon a *dictum* in an insurance case⁶ on the meaning given to the term 'unforeseen circumstances' in a policy of insurance as 'sudden', 'happening or coming without a warning or premonition, taking place or appearing all at once'.⁷

[44] Not only is this judgment of little assistance, given its entirely different setting and context, but the reliance on the term 'unforeseen' is wrenched out of its own legislative context by the Speaker and counsel on his behalf. Firstly, the term is in the heading accorded to the rule and is not contained in the text of the rule itself. As to the weight to be given to a heading employed by a lawgiver, Innes, CJ stated the following:

'[We] are therefore fully entitled to refer to it for elucidation of any clause to which it relates. It is impossible to lay down any general rules as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the legislature, and the heading is an element in the process.'⁸

and further

'Where the intention of the lawgiver in any particular clause is clear then it cannot be overridden by the words of a heading'⁹

[45] A reliance upon the heading can only essentially arise when there is ambiguity in the provision itself when it can then become of some importance.¹⁰

⁶ *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA).

⁷ Para 14.

⁸ *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431.

⁹ Page 431.

¹⁰ See also G E Devenish *Interpretation of Statutes* (1992) at 107-108 and the authorities collected there.

[46] Rule 124 in its terms however relates to matters for which the Standing Rules do not provide. In that confined sense, the heading has been employed – to mean not being foreseen in the sense of not being provided for in those rules. The rule itself does not give rise to any ambiguity. It merely relates to matters not provided for. Unforeseen is used and to be understood in that confined sense and not for sudden events, coming without warning.

[47] The term ‘unforeseen’ in the heading thus does not provide any assistance in interpreting the provision. It is irrelevant as that rule 124 can only be invoked for an eventuality not provided for in the rules.

[48] Suspension is however an eventuality which is expressly provided for in the Standing Rules (read with s 13 of the Act). The Speaker is limited to order a member to withdraw in rule 111 for the sitting day in question. That action is not referred to as a suspension in the rules but rather as being instructed to withdraw in both rule 111 and rule 113. Suspension is dealt with in rule 112. Where an instruction to withdraw is in the Speaker’s view inadequate, he may then report the matter to the Committee to make the recommendations as set out in rule 112. The Committee itself is not empowered to suspend, but to recommend a suspension. Although not spelt out in the Standing Rules, that recommendation would appear goes to the House under s 13 if referred to it by the Committee on Privileges, given the structure of the Act. The House is empowered to take the disciplinary action in question under s 13.

[49] Counsel for the Speaker further urged this court to adopt a contextual and purposive interpretation to rule 124 to afford the Speaker the power to suspend pending disciplinary proceedings to justify the action he took to prevent future grave disturbance to the Assembly, given what was termed by him to be a volatile situation. He argued that the power to suspend the appellants was reasonably incidental to the proper carrying out of the Speaker's powers to maintain order and protect the personal safety of other members. Reliance was placed upon *Makoka v Germiston City Council*¹¹ for implying such a power where the following was stated:

'Whatever is reasonably incidental to the proper carrying out of an authorized power, is considered as impliedly authorized.'¹²

and

'It is settled law that whatever is reasonably incidental to the proper carrying out of an authorized power, is considered as impliedly authorized. (*Johannesburg Consolidated Investment Co. Ltd v Marshalls Township Syndicate Ltd.*, 1917 AD 662 at p. 666; *Randfontein Estates G. M. Co. Ltd v Randfontein Town Council*, 1943 AD 475 at p. 495). It is clear, however, that only such powers will be implied as are reasonably ancillary to the main purpose.

"A power would be regarded as reasonably ancillary to the main power conferred if the true object which the Legislature had in mind in conferring that power, would be defeated if the ancillary power is not implied (*Johannesburg Municipality v Davies & another*, 1925 AD 395 at p. 403 or if the power conferred cannot in practice be carried out in a reasonable manner unless the ancillary power is implied (*City of Cape Town v Claremont Union College*, 1934 AD 414 at pp. 420, 421)."¹³

¹¹ 1961 (3) SA 573 (A) at 581H-582B and applied by the High Court in *Trustco Group International (Pty) Ltd v Katzao* I 3004/2007 delivered on 24.11.2011 para 11.

¹² *Makoka* at 581H-582B.

¹³ *Supra* at 581H-582B. See *Amabhungane Centre for Investigative Journalism NPC & another v Minister of Justice and Correctional Services & others* 2021 (3) SA 246 (CC) paras 63-71.

[50] In effect, we are urged to interpret rule 124 to afford the Speaker the power to suspend members indefinitely on the basis that this is reasonably incidental to his power to maintain order in proceedings. The difficulty which this approach encounters is that the power to suspend provided for in the Standing Rules is not accorded to the Speaker at all, let alone the power to do so indefinitely. In maintaining order, the Speaker is authorised to report ejected members to the Committee and only the House would be vested with the power to suspend under s 13 of the Act on the Committee of Privileges' recommendation.

[51] The power to suspend indefinitely can in no sense be reasonably ancillary to the Speaker's powers when taking into account how the legislature intended disciplinary powers to be wielded. In circumstances of a grave disorder, the Speaker is authorised by rule 115 to adjourn the Assembly for a period to be stated by him. This would afford the Committee to refer the issue to the Committee of Privileges to attend to it with due speed and make a recommendation to the House.

[52] Suspension is furthermore specifically provided for in the rules (read with the Act) in this very manner. It is accordingly not a matter which is not provided for as is required for rule 124 to apply and thus does not meet the internal requirement for the invocation of that rule.

[53] Rule 124 can accordingly not apply to the suspension of members. If provisions in the Standing Rules concerning suspension are deemed by the Speaker to be insufficient, then the solution would be for those rules to be

amended. The intention in rule 124 is to accord the Speaker a power where the rules do not provide for an eventuality. Rule 124 could not have been intended by the rule-giver to be invoked to afford the Speaker powers where an item is expressly provided for elsewhere in the rules. The authority for the National Assembly to adopt a rule to expand the powers of temporary suspension pending disciplinary proceedings to maintain internal order would be envisaged by Art 59. An appropriately drafted provision could thus exclude members from temporary participation if disruption or obstruction of proceedings is reasonably apprehended or threatened to enable Parliament to conduct its affairs in a reasonably orderly manner.¹⁴

Does s 21 preclude the jurisdiction of the courts?

[54] The Speaker contends that s 21 of the Act precludes the High Court (and this court) from determining the issue in dispute. Section 21 under the heading 'Powers of Parliament' reads:

- '(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.'

¹⁴ See *De Lille* para 16; See also *Democratic Alliance v Speaker National Assembly & others* 2016 (3) SA 487 (CC) para 38.

[55] This provision in the form of an ouster clause seeks to oust the jurisdiction of the courts in respect of proceedings or decisions taken by Parliament in accordance with the Standing Rules or the Act.

[56] 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.

[57] But the questions as to whether it has a power and as its lawful limits are questions under the separation of powers are for the courts to determine.¹⁵

[58] It is not necessary for the purpose of this judgment to delineate the ambit of the opening clause in subsection (2) and the extent to which it excludes the court's jurisdiction in the constitutional framework of the rule of law in the context of the principle of separation of powers which would mean that Parliament would be free

¹⁵ *R (on the application of Miller) v The Prime Minister; Cherry & others v Attorney-General of Scotland* [2019] UVSC 41 para 36.

to determine and apply its internal procedures with autonomy and without interference. It is not necessary to further consider this question because s 21 would only apply in respect of an internal proceeding or decision of Parliament done and taken in accordance with the relevant Standing Rules or the Act. Those jurisdictional facts must be present before the section can apply.

[59] It is well-established that an ouster clause does not preclude the courts from investigating whether the necessary jurisdictional facts exist for its invocation.¹⁶ 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 upon the rule of law.¹⁷

[60] The Speaker faces two insurmountable obstacles which preclude a reliance upon s 21 before the impact of the constitutional provisions embodying the separation of powers and the imperative for Parliament to control its internal affairs without undue interference would be considered. Firstly, our finding that the decision taken to suspend indefinitely was not in accordance with the Standing Rules or the Act precludes reliance upon s 21 as Parliament would need to be acting within its powers for s 21 to apply. Secondly, the decision itself was not one of Parliament but the Speaker. Parliament is defined in the Act as meaning ‘the

¹⁶ *Hurley & another v Minister of Law and Order & another* 1985 (4) SA 709 (D) at 723H-I (per Leon ADJP). See generally *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. *R (on the application of Privacy International) v Investigatory Powers Tribunal & others* [2019] UKSC 22.

¹⁷ As lucidly summarised in paras 130-132.

Assembly or the Council and includes any committee'.¹⁸ Section 21 furthermore does not apply to a decision taken by the Speaker.

[61] It follows that s 21 does not find application in this matter, given the absence of the necessary jurisdictional facts for its invocation to oust the jurisdiction of the courts.

[62] Counsel for the Speaker placed heavy reliance upon South African, Zimbabwe Rhodesian and English authority for the proposition that the courts had no power to intervene in the internal management of Parliament. The decision of the erstwhile South African Appellate Division in *Poovalingham*¹⁹ referred to this proposition in English law in an *obiter* reference to *Bradlaugh v Gossett*.²⁰ The court in *Poovalingham* was however confronted with the issue of parliamentary privilege relating to freedom of expression and conducted a detailed survey of English law on that issue and not the related principle of exclusive cognisance.²¹ As is pointed out by Mohamed CJ in *Speaker of the National Assembly v De Lille & another*,²² *Poovalingham* was decided prior to South Africa's democratic constitutional order which included the right to freedom of speech being guaranteed under that country's Constitution and where the Constitution and not Parliament was supreme, holding:²³

'This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no

¹⁸ Section 1 of the Act.

¹⁹ *Poovalingham v Rajbansi* 1992 (1) SA 283 (A).

²⁰ (1884) 12 QBD 271

²¹ See *R v Chaytor & others* [2010] UKSC 52 paras 63-68.

²² 1999 (4) SA 863 (SCA) paras 21-22.

²³ Para 14.

President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.'

[63] Similar considerations arise and apply 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 an Act of Parliament. The Act incorporates s 21 which accords Parliament 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 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 and powers which applied in England.²⁴ This is not the case in Namibia where the Constitution is in any event supreme. The penetrating analysis of McLaughlin, J in the Canadian Supreme Court in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the National Assembly)*²⁵ is to be viewed within the historical constitutional context of Canada which differs from Namibia in the respects I have pointed out. The issue in that matter relating to the exclusion of media representatives from televising proceedings is furthermore

²⁴ In South Africa in pre-Union legislation and then in Act 19 of 1911 and later in Act 32 of 1961 Act of 1963 and Act 110 of 1983, which imported the privileges immunities and powers of the House of Commons in England as set out by Corbett, CJ in his exhaustive survey in *Poovalingam* at 285 – 291. This legislation was not in any event made applicable to Namibia. In Zimbabwe Rhodesia see the legislative survey by MacDonald, CJ in *Chikerema* at 264.

²⁵ [1993] 1 SCR 319 (CC).

distinguishable from this matter. I agree with Mohamed CJ in *De Lille*²⁶ that the approach in *New Brunswick Broadcasting* does not support the proposition that a purported exercise of power, not authorised by the Constitution, is immune from judicial scrutiny.

[64] It follows that this court is not precluded by s 21 from considering the validity of the Speaker's ruling to indefinitely suspend the appellants pending the finalisation of disciplinary proceedings.²⁷

[65] The suspensions were outside of the Speaker's powers and thus unlawful, of no effect and should be set aside.

The refusal by the High Court to exercise its discretion on grounds of a discretionary remedy.

[66] Counsel for the Speaker supports the approach of the High Court to describe the relief sought as discretionary and then decline to exercise its discretion upon considerations of separation of powers and the availability of an unspecified remedy to the appellants to appear before the Committee.

[67] In support of this approach, the High Court relied upon what was said by this court in *Minister of Finance & another v Hollard Insurance Co of Namibia & others*²⁸ in determining whether a declaratory order was an appropriate remedy. In that matter a declaratory order was sought in both final and coercive terms in

²⁶ Para 32.

²⁷ *R (in the application of Miller) v The Prime Minister & others* [2019] UKSC 41 paras 66 and 69.

²⁸ 2020 (1) NR 60 (SC) para 60.

proceedings described by this court as interim. This court exercised its discretion against the granting of the declaratory order sought.

[68] The facts and relief sought in that matter are wholly distinguishable.

[69] Whilst the appellants sought an order declaring their suspension unlawful, that was coupled with an order to set aside those very suspensions. It is a mischaracterisation of that relief to describe it as discretionary. The appellants sought the setting aside of their suspensions on the basis that they were unlawful, seeking the declarator as a precursor to the actual relief sought by them.

[70] This form of order is frequently sought in review applications and is also encountered when a declaration is sought that a provision is unconstitutional. These declarators are usually coupled to relief directed at striking down a provision or setting aside an unlawful act. That does not render the resultant remedy discretionary. If a decision is unlawful and found and declared to be so, the default position is for a court to set it aside.

[71] In this matter, if the appellants can show that their suspensions were unlawful, then they would ordinarily be entitled to have those suspensions set aside. The mischaracterisation of the relief sought as discretionary, because it included a declaratory order in part, cannot avail the Speaker.

Conclusion and costs

[72] It follows that the appeal succeeds with costs.

[73] Both sides engaged two counsel who appeared on their behalf and were instructed by another (third) legal practitioner and a cost order was sought in those terms.

[74] It would follow that that cost order should reflect this, being the engagement of three legal practitioners, two of whom appeared to argue the appeal.

Order

[75] The following order is made:

- (a) The appeal is upheld with costs, to include the costs of three legal practitioners, two of whom appeared in court and one who performed the role of instructing legal practitioner.

- (b) The order of the High Court is set aside and replaced with the following order:
 - ‘(i) The decision of the respondent to suspend the appellants indefinitely as set out in the letter dated 19 April 2021 is declared unlawful and a nullity and set aside.

 - (ii) The respondent is directed to pay the applicants’ costs, to include the costs of one instructing and one instructed legal practitioner.’

SMUTS JA

SHIVUTE CJ

FRANK AJA

APPEARANCES

APPELLANTS:

P Kauta and G Narib

Instructed by Dr. Weder, Kauta &
Hoveka

RESPONDENT:

S Namandje (with him A J Janke)

Of Sisa Namandje & Co Inc.