

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO:** \_\_\_\_\_

In the matter between:

**UNITED DEMOCRATIC MOVEMENT**

Applicant

and

**SPEAKER OF THE NATIONAL ASSEMBLY**

First Respondent

**PRESIDENT JACOB ZUMA**

Second Respondent

**AFRICAN NATIONAL CONGRESS**

Third Respondent

**DEMOCRATIC ALLIANCE**

Fourth Respondent

**ECONOMIC FREEDOM FIGHTERS**

Fifth Respondent

**INKATHA FREEDOM PARTY**

Sixth Respondent

**NATIONAL FREEDOM PARTY**

Seventh Respondent

**CONGRESS OF THE PEOPLE**

Eighth Respondent

**FREEDOM FRONT**

Ninth Respondent

**AFRICAN CHRISTIAN DEMOCRATIC PARTY**

Tenth Respondent

**AFRICAN INDEPENDENT PARTY**

Eleventh Respondent

**AGANG SOUTH AFRICA**

Twelfth Respondent

**PAN AFRICANIST CONGRESS OF AZANIA**

Thirteenth Respondent

**AFRICAN PEOPLE'S CONVENTION**

Fourteenth Respondent

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I, the undersigned,

**BANTUBONKE HARRINGTON HOLOMISA**

do hereby make oath and state that:

- 1 I am the leader of the United Democratic Movement and Member of Parliament representing it in the National Assembly. I am authorised to depose to this affidavit on behalf of the applicant.
- 2 The facts herein contained are both true and correct and save where otherwise stated within my own personal knowledge.
- 3 Where I make legal submissions I do so on the advice of the applicant's legal representatives.

**THE PARTIES**

- 4 The applicant is the United Democratic Movement (the UDM), a political party registered with the Independent Electoral Commission and having representation in the National Assembly with its address at 1<sup>st</sup> Floor, CPA House, 101 Du Toit Street, corner Proes Street, Pretoria.
- 5 The UDM brings this application in its own interest, on behalf of its members and in the public interest, all in accordance with section 38 of the Constitution.
- 6 The first respondent is the Speaker of the National Assembly elected in terms of section 52(1) of the Constitution as the presiding officer of the

National Assembly. The Speaker is cited in her official capacity as Speaker and as nominal respondent on behalf of the National Assembly in terms of section 23 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act of 2004, read with section 23 of the State Liability Act 20 of 1957, with her offices situated at Parliament Street, Cape Town, c/o the State Attorney, Johannesburg, which address is within 25 kilometres of this Court at North State Building, 95 Market Street, Johannesburg. Service will also be effected on the Speaker via e-mail due to the urgency of this matter.

- 7 The second respondent is President Jacob Zuma who is the President of the Republic of South Africa, care of the State Attorney, Johannesburg with its address at North State Building, 95 Market Street, Johannesburg. Service will also be effected on the President via e-mail due to the urgency of this matter.
- 8 The third to fourteenth respondents are the political parties who are represented in the National Assembly, arranged in the order of the size of their representation. Given the urgency of this matter, they will all be served via e-mail.
- 9 The second to fourteenth respondents are cited for such interest as they have in these proceedings. No order for costs is sought against them, save in the event of opposition to this application. In view of the urgency of this matter, they will be served with this application via e-mail.

## THE NATURE AND PURPOSE OF THE APPLICATION

- 10 This is an urgent application relating to requests made by the applicant, the EFF and the DA for the convening of parliament before the scheduled date of 9 May 2017 for them to move a motion of no confidence in the President in terms of section 102(2) of the Constitution.
- 11 This application arises from the fact that the Speaker has refused the UDM's request to have the voting on these motions be conducted by way of secret ballot. A copy of the UDM's request is attached as **UDM1** and the Speaker's response as **UDM2**.
- 12 The motions of no confidence are currently scheduled to be determined by the National Assembly on 18 April 2017. However, as I explain below:
  - 12.1 It is imperative that this Court hear and determine this application before that occurs; and
  - 12.2 Accordingly, to the extent that this Court is not able to do so before 18 April 2017, the applicant will seek a short postponement of the motions of no confidence for that purpose.
- 13 The UDM's case is that, on a proper construction of the relevant constitutional provisions and the Rules of the National Assembly, a secret ballot is required in respect of the motions of no confidence concerned.
  - 13.1 The UDM's first and primary contention is that a motion of confidence is always required to take place by secret ballot.

13.1.1 This is necessary in order to give effect to the objects of this unique mechanism, as those objects have been explained by this Court. Without a secret ballot, these objects are fatally undermined.

13.1.2 It is also necessary in view of the fact that the Constitution expressly recognises (in item 6(a) of Part A to Schedule 3) that whenever the members of the National Assembly are called upon to elect the President, this must take place via secret ballot. It follows by implication that when those members are to express a lack of confidence in the President and remove him from that position, a secret ballot must similarly be used.

13.2 The UDM's second and alternative contention is that the Speaker at least has a discretion regarding whether to permit a motion of no confidence to take place via secret ballot. That discretion must be exercised by the Speaker applying her mind to the facts of each case.

13.3 The UDM's third contention is that the Rules of the National Assembly do not preclude a secret ballot being used for a motion of no confidence or, in the alternative, that the Rules are constitutionally invalid to the extent that they purport to preclude this.

14 In the present case, the Speaker has adopted exactly the opposite approach. Her position is apparently that a motion of confidence may never take place

via secret ballot, irrespective of the circumstances. The UDM contends that this approach is unconstitutional and unlawful. To the extent that the Speaker's decision to reject the UDM's request is based on the abovementioned erroneous approach it stands to be reviewed and set aside on the grounds of unconstitutionality, unlawfulness and irrationality.

- 15 This application does not seek to prescribe to the National Assembly how to run its affairs. It merely seeks to establish that the decision of the Speaker that the Constitution and Rules prohibit a motion of no confidence being determined by secret ballot is not sustainable or consistent with our Constitution. Accordingly, save for the question of remedy, no difficulty of separation of powers arises.

- 16 In what follows, I deal with the following issues in turn:

16.1 Urgency;

16.2 Jurisdiction;

16.3 The background facts;

16.4 The decision at issue;

16.5 The UDM's legal contentions; and

16.6 Remedy.

## THE URGENCY OF THIS MATTER

- 17 At 12:14am on 31 March 2017, the President announced his cabinet re-shuffle. These changes included the removal from office of a number of key Ministers and Deputy Ministers. A copy of his statement is attached as **UDM3**.
- 18 The response of opposition parties was swift. Three parties – the EFF, the DA and UDM, respectively indicated their desire to table motions of no confidence in the President. A copy of the UDM's request is annexed hereto marked **UDM4**. All three parties requested that the motions should be dealt with urgently.
- 19 The Speaker correctly recognised the urgency of these matters and designated that the Motion of No Confidence debate and vote will take place on 18 April 2017.
- 20 Indeed, the urgency of the motions of no confidence is critical in view of:
- 20.1 The ongoing risk to our state institutions (and country as a whole) of enduring a President in whom the National Assembly may have lost confidence;
- 20.2 The economic and political crisis facing South Africa at present. In this regard, I emphasise the following:
- 20.2.1 On Monday, 3 April 2017, the ratings agency S&P Global downgraded South Africa's long-term foreign currency



sovereign credit rating from investment grade status to “junk” status. This affects the R263 billion in South Africa’s total net loan debt which is denominated in foreign currency in 2017/18 – that is approximately 11% of South Africa’s total loan debt. In doing so, their reasons make clear that the President’s recent cabinet reshuffle played a material role in this downgrade decision. I attach a copy of their statement, marked **UDM5**.

20.2.2 Also on Monday 3 April 2017, a second ratings agency – Moody’s – placed the Baa2 long-term issuer and senior unsecured bond ratings of the government of South Africa on review for downgrade. This means that it is considering a downgrade to junk status and will decide this in June 2017. Their statement too makes clear that it is the President’s conduct that is a key concern for them. I attach a copy of their statement, marked **UDM6**.

20.2.3 On Friday 7 April 2017, the third of the three major ratings agencies – Fitch – also downgraded South Africa to junk status. It did so by downgrading both South Africa’s foreign and local currency denominated bonds. Fitch too emphasized that its concern is that *“recent political events, including a major cabinet reshuffle, will weaken standards of governance and public finances.”* A copy of its statement is attached as **UDM7**.

20.2.4 To be clear, a downgrade by the ratings agencies does not have implications only for those who participate in the heights of the financial economy. Its effects will be felt, arguably worse than by anyone else, by ordinary people.

20.2.5 Indeed, this was confirmed by National Treasury itself. On 4 April 2017, it distributed via Twitter a document entitled “*Junk status – what does it mean for South Africans*”. A copy is attached as **UDM8**. It states:

*“More South Africans will pay more on interest*

*Food, electricity and petrol prices increase*

*Unemployment increases due to retrenchments and factory shut downs*

*Government will be forced to spend less on social programmes*

*Low confidence and therefore low investments and no job creation*

*The Rand will be worth much less making imported goods more expensive”*

20.3 To understand the severity of the crisis, the following facts bear emphasis:

20.3.1 Presently, Government debt and private sector debt stands north of R3 trillion.

20.3.2 The likely effect of the downgrades is that R30 billion per year, or R300 billion over the next 10 years in extra money will now have to be found (mostly by Government) and spent on servicing debt, rather than and before applying it to programmes that benefit all the South African people and

more particularly the poorest section of society which are almost entirely dependent on government support and spending.

20.3.3 It is thus hardly surprising that ordinary South Africans are angry and that many are demanding the removal of the President as recently witnessed in countless nationwide “Zuma must go” marches. One need only think about how R300bn could radically transform the lives of those who need it most.

21 It is thus extremely urgent that the no-confidence motion(s) be determined by the National Assembly urgently.

22 However, it is also obviously absolutely imperative that this application be determined by this Court before the no-confidence motions are decided.

22.1 If this does not occur:

22.1.1 The debate and vote on the motion of no confidence will take in a manner which this Court may ultimately find to be inconsistent with the Constitution;

22.1.2 ANC MPs who support the motion will be placed in an intolerable and unconstitutional position. If they follow their conscience and vote for the motion of no confidence, they will almost certainly be disciplined and likely expelled from the ANC and lose their seats in Parliament. This will not merely

have adverse consequences for them personally but will mean that the National Assembly and the public are deprived of their services and contribution going forward.

22.2 Moreover, it is also not a viable option for the motions of no confidence to be postponed for any material length of time. The motions of no confidence are all based on the notion that South Africa is facing an urgent economic and political crisis due to the conduct of the President, which has begun to have real effects on ordinary South Africans. If this is not resolved swiftly, the position will worsen. It is imperative that it must be resolved peacefully, lawfully and by constitutional means, such as section 102(2) of the Constitution.

23 In all the circumstances, this matter is extremely urgent. Therefore:

23.1 The applicant seeks ideally to have this matter heard and determined by this Court before 18 April 2017, when the motions of no confidence are presently scheduled to be determined.

23.2 If, however, this Court considers that it is impossible for this to occur, the applicant will then seek to postpone those motions of no confidence by a week to 25 April 2017, to allow this Court to determine this application. While such a delay in the motions of no confidence would be far from ideal, given the urgency of having them determined, I reiterate that it is more important that the motions of no confidence be determined after this Court has pronounced on the application. In that event the applicant respectfully seeks to have this

matter heard and determined at the convenience of the Court, but if possible during the week 18-21 April 2017.

23.3 The applicant respectfully requests the Chief Justice to at least issue directions before 18 April 2017 regarding when the matter will be heard. This will allow the applicant, if necessary, to seek the necessary postponement of the motions of no confidence.

23.4 The most important considerations which the applicant would, with respect, wish to place before the court are:

23.4.1 the urgency of the matter, as dealt with above;

23.4.2 the convenience of the court, bearing in mind that the court is expected to schedule a hearing, hear extensive arguments, deliberate and issue a written judgment all before the vote of no-confidence debate and vote takes place;

23.4.3 the convenience of the parties which must all be given an opportunity to consider the papers and fashion an attitude which must be reduced to writing;

23.4.4 the fact that intervening period between now and the 18 April 2017 includes the Easter weekend; and

23.4.5 the interest of the public in a truly democratic outcome weighed against insisting on the date 18 April about which there is nothing magical except that it came as a result of requests made by the parties which were all not

contemplating this application. The UDM sought and received legal advice from Senior Counsel on this aspect of the issue only after sending its own request but shortly before the date was determined.

- 24 Regarding the issue of what might be the inevitable postponement of the date of the vote by at most one week, the UDM will do everything in its power to secure the agreement of all the relevant parties, including the Speaker's, failing which the matter will have to be determined by the court only as a last resort and failing such agreement.

## **JURISDICTION**

- 25 The UDM approaches this Court on two alternative bases: exclusive jurisdiction and direct access.

### ***Exclusive jurisdiction***

- 26 Section 167(4)(e) of the Constitution provides that only this Court may "*decide that Parliament ... has failed to fulfil a constitutional obligation*".

- 27 The requirements to be met in this regard were helpfully summarised in the *EFF* matter.<sup>1</sup> The judgment of Mogoeng CJ makes clear that:

27.1 A would-be applicant must plead both a constitutional obligation and that Parliament failed to fulfil that obligation;<sup>2</sup>

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<sup>1</sup> *Economic Freedom Fighters & others v The Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* 2016 (3) SA 580 (CC).

<sup>2</sup> *EFF* at para 16

27.2 The obligation must be one specifically imposed on Parliament – an obligation that is shared with other organs of state cannot fall under the purview of section 167(4)(e);<sup>3</sup>

27.3 Where obligations are “readily ascertainable and are unlikely to give rise to disputes”, this will not fall within section 167(4)(e).<sup>4</sup> By contrast:

*“[W]here the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this Court to exercise its exclusive jurisdiction would have been met.”<sup>5</sup>*

28 In the present case, the question that arises is whether the Speaker, on behalf of the National Assembly, is obliged by the Constitution to allow for a secret ballot on a no-confidence motion, either in all cases or at the very least in a case such as the present.

29 As I explain below, the UDM contends that there is indeed such a constitutional obligation resting on the Speaker. Yet, in response to the UDM’s request, she has ruled to the contrary.

30 I submit that this is a matter which falls within this Court’s exclusive jurisdiction.

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3 EFF at para 18

4 EFF at para 18

5 EFF at para 18

30.1 This is an obligation that rests only on the National Assembly, and the Speaker who heads the National Assembly.

30.2 Moreover, this is a case where the Constitution – in the words of this Court in the EFF matter – “imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate”.

31 In the circumstances, I am advised that this is a matter that falls within this Court’s exclusive jurisdiction based on all the case authority relevant to that issue, which will be invoked during argument.

### ***Direct access***

32 In the alternative and in the event that this Court concludes that this matter does not fall within its exclusive jurisdiction, I submit that the matter is nevertheless deserving of direct access to this Court. This is for three reasons.

33 First, this application raises not only a pure constitutional issue, but what this Court has described as “*a constitutional issue that has a grave bearing on the soundness of our constitutional democracy*”.<sup>6</sup>

33.1 This Court has described a motion of no confidence in the President as “a vital tool to advance our democratic hygiene”.<sup>7</sup> Never has this

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<sup>6</sup> *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) at para 36

<sup>7</sup> At para 42



been more apt than the economic and political crisis in which South Africa presently finds itself.

33.2 Yet, the applicant contends that unless a secret ballot is used, then at least in the present circumstances, this “vital tool” will be rendered blunt, ineffective and pointless. Whenever there is a reasonable threat of that occurring that is plainly a matter deserving of the attention of this Court.

34 Second, the matter is extremely urgent.

34.1 I have explained the urgency of the matter in detail above.

34.2 What that urgency makes clear is that it is certainly not sustainable for the motions of no confidence to be postponed while this matter is decided in the High Court and only thereafter proceeds to this Court, as will inevitably be the case. It is therefore essential that this matter be resolved via direct access to this Court. The stakes are so high that an appeal to this court is almost a matter of certainty.

35 Lastly and critically, a Full Bench of the Western Cape High Court has already pronounced on a number of the core issues involved, in the *Tlouamma* matter.<sup>8</sup>

35.1 In that case, the applicants sought various relief in relation to the secret ballot issue in relation a motion of no confidence in the President. The Full Bench dismissed the application.

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<sup>8</sup> *Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* 2016 (1) SA 534 (WCC) at paras 117-121

35.2 The arguments presented here and the relief sought are not identical to those in *Tlouamma*. But to put it at its lowest, the reasoning of the *Tlouamma* judgment places considerable obstacles in the path of the present application succeeding in the High Court. As the Speaker explained in her letter to the applicant:

*“[I]n the matter of Tlouamma and Others v The Speaker and Another where the Western Cape High Court (the Court) dismissed an application which sought, amongst others, to compel the National Assembly to vote on a motion of no confidence by secret ballot. The Court ruled, inter alia, that there is no implied or express constitutional requirement for voting by secret ballot in respect of a motion of no confidence in the President.”*

35.3 I respectfully submit that, as the arguments set out below demonstrate, a number of the principles set out in *Tlouamma* are incorrect. However, because *Tlouamma* is a decision of the Full Bench, it will be binding on even another Full Bench of the High Court unless that Court considers that it has passed the high bar of being clearly wrong. There is thus no realistic prospect of the applicant obtaining effective relief from the High Court in light of the *Tlouamma* judgment.

35.4 The *Tlouamma* judgment is critical for a further reason. One of the key reasons that this Court grants direct access so sparingly is that it is not generally in the interests of justice for this Court to bypass other courts and thus determine a matter as a court of first and final instance.<sup>9</sup>

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9 Mazibuko at paras 34-35

35.5 But that is not the case here. This Court already has the benefit of the judgment of the Full Bench in *Tlouamma*. It would accordingly not be considering the secret ballot issue as a court of first and final instance. This militates strongly in favour of direct access being granted.

35.6 In the correspondence between the UDM and the Speaker both parties have sought to distinguish or rely on *Tlouamma*, respectively.

36 In the circumstances, even if this Court were to conclude that this matter does not fall within its exclusive jurisdiction, it is in the interests of justice for direct access to be granted in the light of all the surrounding circumstances set out in this affidavit.

## **THE SALIENT BACKGROUND FACTS**

### ***The decision to reshuffle***

37 On 31 March 2017 shortly after midnight, the President appeared in a televised statement in which he announced extensive changes to Cabinet. These changes included the removal from office of a number of key Ministers and Deputy Ministers including:

37.1 Minister of Finance Mr Pravin Gordhan; In the immediate aftermath the response of those within and outside of the ANC was to condemn the reshuffle and, in particular, the removal of Finance Minister Pravin Gordhan and Deputy Finance Minister Mncebisi Jonas

37.2 Deputy Minister of Finance Mr Mncebisi Jonas;

37.3 Minister of Energy Ms Tina Joemat-Peterson,

37.4 Minister of Transport Ms Dipuo Peters

37.5 Minister of Public Service and Administration Minister Ngoako  
Ramatlhodi and

37.6 Minister of Tourism Minister Derek Hanekom.

38 In addition, there were 14 other changes to cabinet and Deputy Minister positions. These are reflected in the full statement by President Zuma, which has already been attached.

### ***The aftermath***

39 The immediate and overwhelming reaction from those within and outside of the ANC was to condemn the reshuffle and, in particular, the removal of Finance Minister Pravin Gordhan and Deputy Finance Minister Mncebisi Jonas. This included senior leaders within the ANC.

40 Some of the facts contained in this part are so notorious that the court would be able to take judicial notice thereof. Nevertheless and in case any party may wish to take a technical point on hearsay, the applicant will do its best to secure confirmatory affidavits from some of the *dramatis personae*, including but not limited to affected persons who participated in or received briefings about the real reasons advanced for the specific reshuffles affecting the Treasury. I am aware that there is specific litigation in which declaratory relief

is sought that the reshuffle was done irrationally. Accordingly, no such finding is required or necessary in the present application. The matter is merely dealt with herein as part of the relevant factual background and not necessarily to vouch for the truth or otherwise of the utterances but merely to establish that such utterances were made. Accordingly, I am advised that it will be argued that the hearsay rule is not strictly applicable.

- 41 On 31 March 2017 ANC secretary general Gwede Mantashe said in an interview on Radio 702 that President Zuma did not consult ANC leaders about the changes to Cabinet and only notified them of his decision. He said the reshuffle did not reflect the party's wishes. Mantashe also said that: *"We were given a list that was complete and my own view as the secretary general, I felt like this list has been developed somewhere else and it's given to us to legitimise it."* A copy of the relevant press report is annexed marked **UDM9**.

- 42 On the same day, ANC Deputy President Cyril Ramaphosa and the Deputy President of the country was quoted in the media as saying:

*"The president has effected his Cabinet reshuffle. Before doing so, he met ANC officials. It was just a process of informing us of his decision...It was not a consultation because he came with a ready-made list. I raised my concern and objection on the removal of the Minister of Finance, largely because he was being removed based on an intelligence report that I believe had unsubstantiated allegations about the Minister of Finance and his deputy going to London to mobilise financial markets against our country."*

- 43 Ramaphosa is further quoted as saying that this reminded him of when he had been allegedly smeared by a fake intelligence report by President Thabo

Mbeki. He also alluded to a number of other colleagues within the ANC who were unhappy about the situation. A copy of a press report encapsulating this is attached marked **UDM10**. Should this be denied video evidence will be tendered for mutual viewing by all the parties and/or for the subsequent presentation to the court of agreed transcripts.

44 On 31 March 2017 a group of stalwarts of the ANC described the reshuffle as a “factional move”. In a media statement, the stalwarts indicated that they believed successful ministers were targeted, while the president turned a blind eye on underperforming portfolios. A copy of the media statement is attached as **UDM11**.

45 The deep divisions within the ruling party featured prominently in the news. On the same day, the Mail and Guardian reported that the “anti-Zuma faction” within the ANC warned they would join forces with opposition parties in Parliament and vote for a motion of no confidence against the President and that the “Zuma faction” had threatened the former with expulsion from the party and parliament. A copy of the report is attached **UDM12**.

46 By the evening of 31 March 2017, the South African Communist Party (an ANC alliance partner) held an unprecedented media briefing in which it described President Zuma’s decision to reshuffle as “regrettable” and “frankly outrageous”. It stated that “This recklessness has provoked widespread concern and anger within the ANC itself, and across all sectors of our society. We have reached a decisive moment in which, in the considered

view of the SACP leadership, Zuma must now resign.” A copy of the SACP statement is attached marked **UDM13**.

- 47 There are several ANC Members of parliament who are simultaneously members of the SACP and are accordingly bound by the pronouncements and positions of both organisations.
- 48 There was also an immediate outcry from business leaders who expressed grave concern with the move. On the morning of 31 March 2017, the Banking Association of South Africa issued a statement that the removal of Mr Gordhan and Mr Jonas creates a “dire loss of institutional knowledge and raises legitimate and alarming concerns regarding issues of fiscal discipline, protection of institutions and indeed the scope [of] state capture”.
- 49 On 1 April 2017 ANC Treasurer-General Zweli Mkhize also voiced his dissatisfaction with the decision to reshuffle. Mkhize issued a statement saying that “unlike previous consultations which take place with senior officials of the ANC during such appointments and changes to the composition of the national executive, the briefing by the president left a distinct impression that the ANC is no longer the centre and thus depriving the leadership collective of its responsibility to advise politically on executive matters”. A copy of a press report reflecting this is annexed marked **UDM14**.
- 50 On 4 April 2017 a group of ANC stalwarts at a media briefing called for the party to recall President Jacob Zuma. They called on the ANC to recall

President Zuma and stated that his necessary exit from the Presidency should not come down to a vote in parliament.

- 51 On the same day, COSATU, another ANC alliance partner, held a media briefing in which stated that it no longer believed that President Zuma was the right person to lead the ANC, the alliance and the country. A copy of COSATU's statement is attached marked **UDM15**. Some of the current ANC Members of Parliament were seconded to Parliament by COSATU albeit via ANC selection processes.
- 52 Apart from the outcry from members of the public, opposition parties were also quick to condemn the decision. As already stated, the EFF, DA and the UDM addressed requests to the Speaker of Parliament requesting a sitting of Parliament in order to debate a vote of no confidence on the President. All these requests were premised on the issue of the reshuffle and its ongoing aftermath.

***The ANC's clampdown on perceived dissent***

- 53 On Sunday, 2 April 2017, Ms Baleka Mbete, the first respondent who is also the National Chairperson of the ANC and accordingly the third highest ranking ANC Official after the President and Deputy President, held a press conference and informed journalists that she had cut a working trip to Bangladesh short because of receiving requests for Parliament to hold a vote of no confidence from both the Economic Freedom Fighters and the



Democratic Alliance. She, correctly, indicated that this was an important and serious matter.

54 During that press conference (which was reported in **UDM16**), Ms Mbete declined to share her view on the cabinet reshuffle. Instead she appeared to be unhappy with how some of the 6 highest ranking officials of the ANC (colloquially known as the Top 6) had spoken out against the cabinet reshuffle. She asserted that people within the ANC always express disquiet and unhappiness about ANC leaders differing in public. She said that the unhappiness around the Cabinet reshuffle would be discussed at the ANC's imminent National Working Committee meeting, adding that after that meeting the party would speak in an organised voice. She also indicated that she would indicate her view on the request by opposition parties after the process of consultation had been concluded.

55 The meeting of the National Working Committee of the ANC took place on Tuesday, 4 April 2017. This meeting followed a closed session of the national officials of the ANC held on 3 and 4 April 2017. In the wake of its chairperson's return from Bangladesh and the subsequent meetings of the national officials of the ANC and its NWC, the ANC seems committed to ensuring that its members toe the party line in defending President Zuma and his cabinet reshuffle. Speaking at a media briefing on the outcomes and decisions of the extended NWC meeting, the secretary-general of the ANC Mr Gwede Mantashe:

- 55.1 said that the party's top six officials who publicly disagreed with President Jacob Zuma's Cabinet reshuffle had acknowledged that their public dissonance was a mistake that should not be committed again;
- 55.2 ominously, warned that party MP's risk being fired if they vote with the opposition in the motion of no confidence against President Zuma; and
- 55.3 confirmed that the ANC caucus in parliament would not vote with opposition parties in a motion of no confidence against President Jacob Zuma. He stated that "No army in the world will allow its soldiers to be controlled by an enemy general. No ANC MP will vote with opposition". Presumably this would be so even if the "enemy general" was correct;
- 55.4 distastefully, drew an analogy between an abused woman and the members of the ANC. He stated that even if there are fights happening behind closed doors, once ANC members were in public they would say that the bruises were as a result of walking into a door. In other words it was all right to lie to the public merely to preserve the façade of a united party even if this were not the case.

56 Press reports confirming this is attached marked **UDM17A** and **UDM17B**.

- 57 It was only the day after the NWC meeting had been concluded that the Speaker announced the date for the no confidence debate and vote. This was on Wednesday, 5 April 2017. This was peculiar behaviour.
- 58 On 7 April 2017, ANC chief whip, Mr Jackson Mthembu endorsing the above, issued a media statement via a spokesperson stating that *"We reiterate that as ANC members of parliament we derive our political mandate from the organization. We will abide by the decision of the ANC National Working Committee as announced by ANC Secretary General comrade Gwede Mantashe that the ANC does not and will not support this motion."*
- 59 In that same statement, however Mthembu specifically lamented that people within the ANC had made threats to ANC members of parliament, suggesting that they will be removed if they vote in support of the motion of no confidence against President Zuma. A copy of the press report is attached marked **UDM18**.
- 60 The impact of the flagrant coercion by the ANC of its members of parliament to toe the party line and not vote in accordance with their consciences must be viewed against a broader culture of violence, fear and intimidation within the ANC. On 7 April 2017 and in the midst of all this, the Mail and Guardian carried a report that ANC national executive committee member and Human Settlements Minister Ms Lindiwe Sisulu, had received death threats for daring to question President Jacob Zuma during internal meetings. Furthermore ANC secretary general Gwede Mantashe and chief whip Jackson Mthembu were also receiving threatening SMS's. A copy of the Mail

and Guardian article is attached marked **UDM19**. The ongoing threats of expulsion from the party (including as mentioned any disciplinary proceedings) and from jobs in Parliament has only been dwarfed by death threats. The ANC is no stranger to incidents of violence and assassination of members by other members.

61 For his part, former President of South Africa and former ANC Secretary General and Deputy President Kgalema Motlanthe has expressed the view that ANC MP's voting in favour of the Motion of No Confidence to be tabled by the opposition would not amount to misconduct. A copy of the relevant article is annexed hereto and marked **UDM20**. Further in the week and on the international television channel known as Bloomberg, former President Motlanthe had stated that he believed that President Zuma should no longer occupy the office of the President.

62 Previously, and about a year ago, the well-known ANC stalwart Ahmed Kathrada had also expressed the sentiment that President Zuma should resign, a statement which has been constantly invoked by others in the ANC, including members of the Kathrada family, in the context of the current reshuffle.

63 On Sunday 9 April 2017, City Press reported that an ANC Member of Parliament had told it *"that no member of the party's caucus would vote against the party line openly, 'but give us a secret ballot, and Zuma will not be the president on the 19th'"*. A copy of the article is attached as **UDM21**.

- 64 In the same edition of the City Press, and in an article penned by the ANC's immediate past Treasurer-General and member of the Top 6, Dr Matthews Phosa, the following is stated:

*"We are all proud South Africans, but recent events have seen the state being eroded by nefarious characters, by nepotism being enacted at presidential level and by an influential unelected family being given carte blanche to raid our institutions.*

*Now it seems as if Treasury is being targeted by these evil forces. Treasury's director-general, Lungisa Fuzile, resigned this week.*

*It is clear that the state has been captured. South Africans are in despair and parliamentarians are being held ransom by threats of ANC members losing their jobs if they defy Zuma.*

*...*

*I call on Zuma show that he has respect for the poor and go....."*

- 65 A copy of newspaper article is attached as **UDM22**.
- 66 Also on Sunday, members of the ANC Youth League displayed high levels of intra-party political intolerance and went so far as to disrupt the Durban memorial for Ahmed Kathrada and sought to prevent both Treasurer-General Dr Zweli Mkhize and former Minister of Finance, Pravin Gordhan, from speaking. It would seem that every passing day there is new evidence of intimidation within the ANC.

## **THE IMPUGNED DECISION**

### ***The request from the UDM***

- 67 On 6 April 2017, attorneys acting on behalf of the applicant addressed a letter to the first respondent requesting a ruling from the Speaker that the

motion of no confidence which will be moved at a special sitting of the National Assembly on 18 April 2017 be determined by way of secret ballot. I have already attached this letter.

68 The reasons provided for the request were, *inter alia*, the following:

68.1 Due to the obvious importance of the matter it is in the public interest that a truly democratic outcome be guaranteed;

68.2 In the prevailing circumstances, there is a high likelihood that the vote would otherwise be tainted by the fear of adverse and career-limiting consequences rather than the free will of the voters;

68.3 The South African Constitution contains, *inter alia*, the underlying values of democracy, accountability and freedom, all of which operate in favour of seeking to obtain the most democratic outcome in relation to this particular vote; and

68.4 All members of the National Assembly have taken an oath or affirmation to the “*faithful to the Republic of South Africa and (to) obey, respect and uphold the Constitution and all other laws of the Republic*”. The applicant has reason to believe that the outcome of the vote might be unduly tainted by allegiance to extraneous considerations and fear of reprisal rather than “*faithfulness to the Republic and obedience to the Constitution*.” In other words, there is a threat that voters might exercise their votes in such a manner as to breach their solemn oath of office to God or their consciences, naturally creating an ethical crisis of epidemic proportions.

### ***The decision***

**69** On 7 April 2017, the Speaker addressed a letter to the UDM declining the request for a secret ballot. In that response the Speaker pointed out, amongst others, that:

69.1 Voting procedures are determined by the Constitution and the Rules of the Assembly;

69.2 There is no provision in the rules or the Constitution for a vote on a motion of no confidence to be conducted by way of secret ballot;

69.3 The Speaker has no authority in law or in the rules to determine that voting on a motion of no confidence is not one of these instances;  
and

69.4 The applicant's demand for a secret ballot cannot be acceded to as it does not have any basis in law.

69.5 The issues raised by the UDM were decisively resolved in the *Tlouamma* case.

**70** I refute in particular the last three grounds advanced by the Honourable Speaker.

## THE UDM'S PRIMARY ARGUMENT: A SECRET BALLOT IS REQUIRED FOR ALL MOTIONS OF NO CONFIDENCE

- 71 Section 102(2) of the Constitution deals with votes of no confidence in the President. It provides:

*"If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign."*

- 72 The section is silent on the question of whether the motion of no confidence must be voted on by secret ballot or open ballot. We submit that that for three reasons a secret ballot is in fact required for all motion of no confidence:

72.1 First, the Constitution expressly requires the use of a secret ballot when the President is elected by the National Assembly. It must follow that when the President is to be forced by the National Assembly to resign from that position, the same procedure must be adopted.

72.2 Second, a motion of no confidence is no ordinary motion or parliamentary decision. This Court has described it as the "most important mechanism that may be employed by Parliament to hold the executive to account". Yet, as I explain in what follows, without a secret ballot a motion of no confidence cannot properly fulfil its function as a tool to ensure the maximum accountability of the



President to the National Assembly. As provided in section 1(d), accountability is a key value of the South African constitution.

72.3 Third, at least when it comes to a motion of no confidence, members of the National Assembly owe their first duty to the Constitution, not a political party. A secret ballot enables them to carry out this duty without fear of reprisals and removals and enables them to stay true to their prescribed oath.

73 I deal with each in turn.

#### ***A secret ballot is required to elect the President***

74 Section 86 of the Constitution deals with the election of the President. It provides that at the first sitting of the National Assembly and whenever necessary to fill a vacancy, the National Assembly must elect the President following the procedure set out in Part A of Schedule 3 to the Constitution.

75 Item 6(a) of Part A of Schedule 3 in turn provides: *“If more the one candidate is nominated ... a vote must be taken at the meeting by secret ballot”* (emphasis added)

76 In the process prescribed for the election of the President there is no provision for voting by any method other than secret ballot. In terms of item 5 of Part A of Schedule 3, if there is only one candidate nominated, the President is elected by the declaration of the Chief Justice and not by so-called open vote. The open vote is foreign to the election of a President.

77 The constitutional scheme thus recognises that the position of President is not something that should be determined by members of the National Assembly as mere extensions of their political parties. If this were the case, there would be no need for a secret ballot. It would, for example, be absurd and unlawful for a political party to demand that the voting member of the National Assembly should subsequently disclose how she or he had voted. This would defeat the whole purpose of the constitutionally prescribed secret ballot.

78 I am advised that it will be argued that the situation must surely be analogous in relation to the secret ballot prescribed in section 19(2) of the Constitution, which prescribes that:

*“Every adult citizen has the right to vote in elections for any legislative right body established in terms of the Constitution, and to do so in secret.”*

79 Rather, the constitutional scheme is intended to achieve a situation where each member of the National Assembly being able to apply his or her mind and conscience freely as to who would be elected as President, without fearing recriminations or punishment thereafter from a political party. There can be no other conceivable reason why the constitution provides the extra protection of a secret ballot.

80 In a sense, like voting which takes place in a motion of no confidence is a logical extension of the section 19 of the political rights of citizens which placed the MPs in the National Assembly in the first place. Given this fact the

self-serving aversion and hostility of the Speaker towards secret ballots is perplexing, illogical and downright irrational in a constitutional democracy.

81 I submit that if this is the scheme that applies when the President is elected by the members of the National Assembly, it must equally apply when those same members force the President to resign by adopting a vote of no confidence against him. It is difficult to conceive of any legitimate or sensible purpose that would be achieved by having such different procedures apply to these two situations.

82 Indeed, the Speaker's position, as articulated in her letter gives rise to the following anomaly. On her approach:

82.1 When the President is elected by the members of the National Assembly, this gets done by secret ballot whenever there is more than one nomination.

82.2 When the members of the National Assembly consider whether to adopt a vote of no confidence against him or her, no secret ballot may be used – irrespective of the circumstances.

82.3 But if the vote of no confidence were to succeed, meaning that the President has to resign, his successor will again have to be appointed using a secret ballot procedure, in the event of a contest.

82.4 This position, which mirrors the Speaker's decision is absurd and legally unsustainable.

83 I can conceive of no proper basis for this anomalous and, ultimately, incoherent approach.

***The absence of a secret ballot undermines the purposes of the no confidence motion***

84 In *Mazibuko*, this Court considered at length the importance and purpose of a no confidence vote.

84.1 The Court began by explaining what a vital tool it was:

*“A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action. ... The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him.”<sup>10</sup>*

84.2 The Court added it is was “the most important mechanism” by which Parliament can hold the executive to account:

*“The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution. It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance.”<sup>11</sup>*

84.3 The Court went on to hold that the right to seek a no confidence vote is not merely vested in the majority and minority parties represented in the National Assembly, but that the “better view” is that it is vested in each individual member of the National Assembly:

*“[T]he right to initiate a motion of no confidence is accorded to every member of the Assembly who is entitled to seek, by a*

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10 *Mazibuko* at para 43

11 *Mazibuko* at para 44

*motion of no confidence, to garner support for a majority vote of the Assembly.”<sup>12</sup>*

85 Each of these aspects and purposes of the no confidence mechanism are fatally undermined when the vote of no confidence is required to take place without a secret ballot.

86 Without a secret ballot:

86.1 There is no realistic possibility that the motion of no confidence will succeed, unless the majority party decrees that it must. The “ever present possibility” referred to by this court is accordingly denuded of all meaning and members are accordingly unable to use it “to keep the President accountable to the Assembly”

86.2 The no confidence mechanism effectively becomes a dead letter – which can operate only when the majority party decides so. This “most important mechanism ... to hold the executive to account” thus fails to fulfil its function.

86.3 The right accorded to “every member of the Assembly ... to garner support” from a majority of members in respect of the no-confidence vote is rendered illusory. Every member will know that they will be unable to garner the necessary support from their fellow members unless they persuade the majority party to support it.

87 It is only by allowing a secret ballot that this can be remedied.

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12 Mazibuko at para 45

87.1 Doing so in no way guarantees that the no confidence motion will succeed. Nor does it put the majority party at any disadvantage. The majority party still has its majority and will still be entitled to give guidance to its MPs as to how they should vote.

87.2 But the critical difference is that it will ultimately be for each MP to exercise that right in a manner that reflects his or her conscience, without fear that voting the “wrong” way will lead to dismissal from the party, removal from Parliament and the loss of his or her means of livelihood.

87.3 An interpretation which places party loyalty above the dictates of the Constitution will in any event offend the Constitution.

88 This Court held in *Mazibuko* that “*It would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that Committee.*”<sup>13</sup>

89 I submit that it would similarly inimical to the vital purpose of section 102(2) to accept that a motion of no confidence can never succeed without the generosity and concurrence of the majority party instructing its MPs to support it.

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13 At para 57

90 Indeed, the inappropriateness of allowing the majority party to pre-determine the outcome of the vote of no confidence is also made clear by the minority judgment of Jafta J in *Mazikbuko*.

90.1 The minority judgment held that for various reasons, it disagreed with the conclusions reached by the majority on the issues regarding scheduling motions of no confidence.

90.2 But in doing so, it held that it is incorrect to view the issue through the lens of parties:

*“Notably the power to pass the motion is vested in the Assembly, acting as a collective, through its members. The section does not empower political parties to pass a motion of no confidence in the President. It is therefore incorrect to analyse the process followed in pursuing motions of this kind by making reference to political representation. That process must be seen in the context of membership of the Assembly and not of the parties represented in it. This is so because it is the Assembly, and it alone, which is the repository of the power to pass motions of no confidence in the President. Where a power is conferred on individual members of the Assembly, the Constitution expressly says so. But because the Assembly can only act through its members, these members have a right in terms of section 102 to table a motion of no confidence in the Assembly for the exercise of the power.”<sup>14</sup>*

90.3 A refusal to allow a secret ballot for a no confidence vote produces precisely the problem to which Jafta J referred. It means that the outcome of the no confidence vote will inevitably be determined by the majority party – and the role of individual members is denuded of any meaningful content.

90.4 When exercising their vote to install or remove a president the members of parliament are not necessarily and/or exclusively

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14 Para 90

wearing their party hats. No doubt each political party has its own mechanisms to hold its members, including the President, to account. Section 102 has a different purpose.

***Members of Parliament must be able to freely give effect to their oath and duty to the Constitution***

91 All members of the National Assembly have taken an oath or affirmation to be *“faithful to the Republic of South Africa and (to) obey, respect and uphold the Constitution and all other laws of the Republic ...”*.

92 This is oath is a compulsory prerequisite to membership of the National Assembly, in that section 48 of the Constitution provides that:

*“Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution.”*

93 In the context of no-confidence votes, the absence of a secret ballot puts members of the National Assembly in an impossible and intolerable position. Take a member of the ANC who believes that the President has violated the Constitution and that it is the best interests of South Africa that he support the motions of no confidence.

94 If she follows her conscience and votes in favour of the motions of no confidence:



- 94.1 She will then be acting contrary to the likely instruction issued by the ANC's National Working Committee and conveyed via the Chief Whip;
- 94.2 If , as seems inevitable, she is expelled from the ANC she will then lose her membership of the National Assembly in accordance with section 47(3)(c) of the Constitution;
- 94.3 She will consequently lose her livelihood and her means of supporting her family; and
- 94.4 If on the other hand she votes against the motion, she will have saved her job but breached her oath of office.
- 95 This applies with particular force to force to the members of the of the National Assembly who are members of the Cabinet, Deputy Ministers or Chairs of Portfolio Committees. There are approximately 85 ANC members who fall into this category – that is more than 20% of the 400 members who will be called upon to vote. If a secret ballot is not used and they are publicly to vote in favour of the no confidence motion they will lose their positions and, in respect of the members of Cabinet, the President will no doubt fire them due to an *“irretrievable breakdown in the relationship”* – the latest explanation for his decision to dismiss Pravin Gordhan. In this regard, the ANC has 249 members in the National Assembly and the combined opposition has 151 members. This means that only approximately 50 ANC members would need to support the motion for it to carry – making it is self-

evident that these 85 members are more than capable of being determinative of the outcome.

- 96 The converse is also true. Should there be an opposition member of the National Assembly who is persuaded that the President should continue to enjoy his or her confidence, that member too should be protected from his or her (opposition) party. He or she should not face the Hobson's choice of having to lose his or her seat or violating his or her oath of office.
- 97 It is not consistent with our constitutional scheme for a member of the National Assembly to be placed in this position – at least not in the context of motions of no confidence. Whilst it might be tenable for a party to require their MPs to vote for a policy issue in a specific way (such as land reform or criminal justice), a motion of no confidence is quite different. It is a debate about whether individual members of Parliament continue to have confidence in the President or whether they wish to withdraw their support from him.
- 98 In this regard, I reiterate that calls for the President to resign have been made by former Top 6 leaders, namely former President Kgalema Motlanthe and former Treasurer-General, the Matthews Phosa; a preeminent ANC stalwart, Ahmed Kathrada; 100 other ANC veterans; the South African Communist Party and COSATU. In those circumstances, it is inconceivable that there are none of the 249 ANC members of the National Assembly who would consider that the President had lost their confidence. In these circumstances, the notion peddled by the ANC party apparatus that to vote in

favour of the motion will necessarily represent “voting with the opposition” is untenable.

- 99 That is a matter to be determined freely by the individual member concerned – not by the party apparatus that sits behind her.

**THE UDM’S ALTERNATIVE ARGUMENT: THE CONSTITUTION PERMITS A SECRET BALLOT FOR NO CONFIDENCE MOTIONS**

- 100 I have set out above the applicant’s primary argument – that the Constitution requires a secret ballot for no confidence motions.

- 101 In the event that this Court is not persuaded by this argument, the applicant’s alternative argument is then that the Constitution at the very least permits a secret ballot for no confidence motions in appropriate circumstances.

- 102 In this regard, what is crucial is that there is nothing in the Constitution that precludes a secret ballot being used for no confidence motions. At best for the Speaker, the Constitution is silent on the issue.

- 103 Together with this must be considered the three points I have raised above. Even if these contentions are not considered sufficient to justify a conclusion that a secret ballot will always be required for motions of no confidence, they at the very least demonstrate that in appropriate circumstances a secret ballot will be required.

104 Thus, what is necessary is that the Speaker apply her mind to the facts of the particular case and then determine whether to grant the request for a secret ballot.

105 In the present case, of course, the Speaker did exactly the opposite. Her letter makes clear that she does not accept that a secret ballot can ever be used for a motion of no confidence. She accordingly rejected the request out of hand and without applying her mind.

106 I submit that on this basis her decision was unconstitutional, unlawful and falls to be reviewed and set aside on one or more of the following grounds:

106.1 First, the Speaker failed to apply her mind at all to whether a secret ballot was required. She misconstrued her powers and considered wrongly that she was precluded from granting the request.

106.2 Second, there is no rational connection between the Speaker's decision and the reasons given for it in that:

**106.2.1** In terms of section 57(1)(a) of the Constitution the National Assembly may determine its internal arrangements, proceedings and procedures.

106.2.2 In *Oriani-Ambrosini v Sisulu*, The Speaker of the National Assembly this Court held that this power must be exercised with due regard to representative and participatory democracy, accountability, transparency and public involvement. The rules also had to cater for the participation

in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy.

106.2.3 Rule 102 of the parliamentary rules deals with the casting of votes. This rule provides that, unless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104. Rule 103 (1) provides that at a sitting of the House held in a Chamber where an electronic voting system is in operation, unless the presiding officer directs otherwise, questions are decided by the utilisation of such system in accordance with a procedure predetermined by the Speaker and directives as announced by the presiding officer.

106.2.4 Rule 103(1) therefore expressly empowers the presiding officer (who is the Speaker in a vote of no confidence) to direct a mode of voting other than through the electronic voting system described in rule 103. This manual voting procedure (provided for in rule 104) may or may not reflect the identities of members. This is accepted in rule 103(3) which provides that: “If the manual voting procedure permits, members’ names and votes must be printed in the Minutes of Proceedings.

106.2.5 The import of this is that the Speaker is empowered to rule on a manual voting procedure which requires that

members' names and votes not be reflected in the Minutes of Proceedings. This is precisely what the applicant sought in its request for a secret ballot.

106.2.6        Alternatively, to the extent that the Rules are silent on the circumstances in which the Speaker may rule that a vote takes place by secret ballot, the Speaker is empowered by Rule 8(2) of the rules of Parliament to do so.

106.2.7        The Speaker therefore committed a fundamental error of law when she reasoned that she does not have the power to rule that the vote of no confidence proceed by secret ballot.

106.2.8        In the alternative, to the extent that this Court finds that the Rules do not empower the Speaker to direct that a vote of no confidence can take place through a secret ballot, then I submit that the Rules are inconsistent with the Constitution.

106.3    Third, the Speaker failed to respond rationally to concerns that the provisions of the Constitution which provide for a vote of no confidence in the President would be abrogated if ANC members of parliament were intimidated and compelled by the party to vote according to the party line and not in accordance with their consciences.

106.4    Fourth, in reaching her decision, the Speaker ignored relevant factors including:

106.4.1 That she had the power to rule that the motion of no confidence could proceed by way of secret ballot;

106.4.2 That there was undue pressure being placed on ANC members of parliament to toe the party line and not to vote according to their consciences.

106.5 These factors required that the Speaker rule that the motion of no confidence would proceed by way of secret ballot or according to some other system that guaranteed that members' names and votes not be reflected in the Minutes of Proceedings.

106.6 Fifth, the Speaker acted *mala fide* and/ or for an ulterior purpose in that:

106.6.1 Immediately upon her return from Bangladesh the Speaker intimated that she was unhappy that members of the top 6 of the ANC were openly critical of the decision of the President. She asserted that henceforth the ANC would speak in a more organized voice;

106.6.2 The Speaker was part of the meeting of the national officials of the ANC and the meeting of the NWC. In those meetings 'dissonance' amongst ANC members was discussed and a decision was taken that this should be eschewed.

106.6.3 The decision reached by the Speaker to decline a secret ballot is consistent with her earlier stated view that the ANC should speak in a more organized voice. It also is

consistent with the outcome of the meetings of the ANC's national officials and national working committee that members must be expected to toe the party line.

106.6.4 The Speaker therefore failed in her duty under the Rules and the Constitution to be independent, impartial and fair.

107 The applicant therefore submits that the Speaker's decision unconstitutional, unlawful and invalid.

108 In the circumstances of this case, no useful purpose can be served by sending the matter back to the Speaker for her reconsideration. This is so in view of:

108.1 The Speaker's proven inability to differentiate between her two roles;

108.2 The facts of the present situation, which cry out for a secret ballot;

108.3 The urgency of the situation – which requires that the motions of no confidence proceed now using a secret, rather than risking the Speaker again ruling against the secret ballot which would result in further review proceedings and a resultant delay in the resolution of the no confidence motions; and

108.4 The public interest in certainty regarding whether or not the President continues to enjoy the confidence of the National Assembly.



**THE UDM'S FURTHER ARGUMENT: IF THE NATIONAL ASSEMBLY RULES  
PURPORT TO PRECLUDE A SECRET BALLOT, THEY ARE  
UNCONSTITUTIONAL**

109 A reading of the Speaker's letter suggests that she contends that the National Assembly Rules in fact preclude a secret ballot from being used for no confidence votes. She does not, however, point to any specific rule requiring this conclusion.

110 The UDM contends that the Speaker's position is untenable for two reasons.

111 First, her contention must be based on an incorrect interpretation of the National Assembly Rules.

111.1 Rule 102 deals with the casting of votes and provides:

*"Unless the Constitution provides otherwise, voting takes place in accordance with Rules 103 or 104."<sup>15</sup>*

111.2 Rule 103 deals with an electronic voting system. Rule 103(6) provides that:

*"Members' names and votes must be printed in the Minutes of Proceedings."*

111.3 Rule 104 deals with manual voting procedure. Rule 103(3) provides that:

*"If the manual voting procedure permits, members' names and votes must be printed in the Minutes of Proceedings."<sup>16</sup>*

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15 Emphasis added

16 Emphasis added

111.4 I am advised and submit that the provisions of the Rules do not preclude secret ballots for no confidence motions and do not stand in the way of the relief sought by the UDM.

111.5 Rule 102 makes clear that the voting procedure in Rules 103 and 104 applies "*unless the Constitution provides otherwise*". Thus, if the Constitution requires or permits secret ballots for no confidence votes, as I have submitted above, then Rules 102-104 do not preclude this. To illustrate this point, one would have to postulate the situation where there were two or more nominations for the position of President, in which case a secret ballot is prescribed by the Constitution. In that eventuality, one could not sustainably argue that the Rules supersede the constitutional provisions.

111.6 In any event, a secret ballot would be able to take place as a manual vote under Rule 104. Rule 104(3) makes clear that members names and votes are only to be printed in the minutes "*if the manual voting procedure permits*". A secret ballot would not permit such printing of names and votes and thus Rule 104(3) would not require it.

112 Alternatively, to the extent that this Court were to conclude that properly interpreted Rules 102-104 (or any other Rules) do preclude secret ballots being used on a motion of no confidence, the applicant will argue that the rules are to this extent inconsistent with the Constitution in that such rules would be in conflict with section 57(1)(b) of the Constitution and, in any event, conflict with the procedures required by the Constitution.

112.1 I have explained in detail above why the Constitution requires or, at least, permits secret ballots in a no confidence motion.

112.2 Once this is so, the Rules cannot validly preclude this and, to the extent that they purport to do so, they are to this extent unconstitutional and invalid and the UDM seeks a declaration to this effect.

## **CONCLUSION**

**113** The applicant accordingly seeks an order in terms of the Notice of Motion.

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**BANTUBONKE HARRINGTON HOLOMISA**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ on this the \_\_\_\_ day of APRIL 2017, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

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COMMISSIONER OF OATHS

Full names:

Address:

Capacity: