THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 535/2015

In the matter between:

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES **APPELLANT**

And

JULIUS MALEMA **FIRST RESPONDENT**

ECONOMIC FREEDOM FIGHTERS **SECOND RESPONDENT**

Neutral citation: *Chairperson of the National Council of Provinces v Malema* (535/2015) [2016] ZASCA 69 (20 May 2016)

Bench: Ponnan, Leach, Petse, Saldulker and Swain JJA

Heard: 6 May 2016

Delivered: 20 May 2016

Summary: Parliament – suspension of member – for refusal to retract a statement ruled unparliamentary.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek and Cloete JJ sitting as court of first instance): reported *sub nom Malema & another v Chairman National Council of Provinces & another* 2015 (4) SA 145 (WCC).

(1) Subject to para (2) below, the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

(2) The costs of the application for condonation in respect of the respondents' failure to timeously serve and file their heads of argument shall be paid by their attorney, Mr Godla, *de bonis propriis* on the attorney and own client scale.

JUDGMENT

Ponnan JA (Leach, Petse, Saldulker and Swain JJA concurring):

[1] Freedom of speech is a privilege essential to every free council or legislature. As it was put by the English House of Commons, at a conference on 11 December 1667: 'The members must be as free as the houses'.[1] Freedom of speech and debates in Parliament are matters of the highest constitutional importance. Parliament, by its very nature, functions through a deliberative process. Debate is key to the performance of its

[1] The conference resulted in the reversal of the conviction in 1629 of Sir John Eliot and others: 'No man can doubt,' they said, 'but whatever is once enacted is lawful; but nothing can come into an Act of Parliament, but it must first be affirmed or propounded by somebody: so that if the Act can wrong nobody, no more can the first propounding. The members must be as free as the houses; an Act of Parliament cannot disturb the state; therefore the debate that tends to it cannot; for it must be propounded and debated before it can be enacted.' See Lord Campion & T G B Cocks (eds) *Sir Thomas Erskine May's Treaties on the Law, Privileges Proceedings and usage of Parliament* 15 ed (1950) at 46.

functions. That process can only be meaningful if members are afforded sufficient room to freely express themselves. Parliamentary privilege and especially the absolute privilege or immunity in law which it gives, amongst others, to statements made by Members of Parliament is essentially of English origin.[2]

[2] As Corbett CJ pointed out in *Poovalingam v Rajbansi* 1992 (1) SA 283 (A) at 286C-H:

'In 1688 . . . the English Parliament passed the Bill of Rights, which settled the succession to the Crown and declared the "Rights and Liberties of the Subject". The latter included freedom of speech and the Bill of Rights declared (in the ninth article) "(t)hat the freedome of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

The rights and liberties declared are referred to in the Bill of Rights as "auntient" (ancient) and it is clear that as far as freedom of speech in Parliament is concerned the Bill of Rights was merely declaratory of the legal position as it had been for many years . . . . In England there is thus in law an absolute Parliamentary privilege of freedom of speech, the effect of which is to protect Members of Parliament from being sued for damages or being criminally prosecuted in a court of law for words spoken or written in the course of Parliamentary proceedings. The privilege rests upon two bases: (1) that Parliament must have complete control over its own proceedings and its own members and that accordingly matters arising in this sphere should be examined, discussed and adjudged in Parliament and not elsewhere; and (2) that a Member must have a complete right of free speech in Parliament without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter . . . . According to Blackstone's *Commentaries on the Laws of England* 4th ed by R M Kerr (1876) at 132, the privileges of Parliament were principally established in order to protect its members not

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[2] In Campion & Cocks (eds) *Sir Thomas Erskine May's Treaties on the Law, Privileges Proceedings and usage of Parliament* 15 ed (1950), chapter IV on 'Privilege of freedom of speech' the following relevant parts appear on the necessity of freedom of speech in Parliament at 46-52:
'**NECESSITY OF FREEDOM OF SPEECH**
"There could be no assured government by the people, or any part of the people, unless their representatives had unquestioned possession of this privilege. Thus only the House of Commons was concerned in its vindication, and only in its connection with that House could it be a matter of constitutional importance. The Lords, of course, possess the right equally with the Commons, and thus it is considered one of the common privileges of Parliament. But it seems never to have been an issue with the Lords" (White, Eng. Const., p. 440). As Stubbs says, "he would have been a bold king indeed who had attempted to stop discussion in the House of Lords" (Stubbs Const. Hist., III (4th ed.) 507)."'

only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown'.

[3] The first respondent, Mr Julius Malema, is the President and Commander in Chief of the second respondent, the Economic Freedom Fighters (the EFF), a political party registered as such in terms of s 15 of the Electoral Commission Act 51 of 1996. On 17 June 2014, the President of the Republic of South Africa delivered his State of the Nation Address to a joint sitting of the National Assembly (the NA) and the National Council of Provinces (the NCOP). The next day and during the course of a debate on the President's address, which was then chaired by the appellant, the Chairperson of the NCOP (the Chairperson), Mr Malema, the leader of the EFF's delegation in the NA, stated:

'The President said a minimum wage shall be investigated. There is no need to investigate. This House must show leadership and courage. The workers have already shown the way. For five months now, workers in the platinum belt have been on strike, which demonstrates their genuine determination. They were striking for R12 500, when the ANC massacred 34 of them two years ago for doing so. In honour of those who died in Marikana, let this House legislate for R12 500. This will be a sign of remorse and regret for the Marikana massacre. We also demand the establishment of a parliamentary commission on the conditions and salaries of mine workers, including the auditing of the financial books . . .'

[4] Mr BA Radebe, a member of the ruling party, the African National Congress (the ANC), rose on the following point of order:

'The speaker said the ANC government massacred people two years ago. Is that parliamentary? Is there any proof of that? Could you rule on that, Chairperson?'

The unrevised *Hansard* then records:

'The Chairperson of the NCOP: Mr Malema?

Mr JS Malema: I maintain that.

The Chairperson of the NCOP: Mr Malema . . .

Mr JS Malema: The ANC government massacred the people in Marikana. Those police were representing the ANC government.

The Chairperson of the NCOP: Mr Malema!

Mr JS Malema: I am not going to withdraw.

The Chairperson of the NCOP: Morena!

Mr JS Malema: It's not going to happen that.

The Chairperson of the NCOP: Hon Malema, hon Malema . . .

Mr JS Malema: I'm all yours, Chair.

The Chairperson of the NCOP: Hon Malema!

Mr JS Malema: Hon Chair.

The Chairperson of the NCOP: Please accept that this House and all our Houses of Parliament have simple Rules to follow in a debate. The last time we said hold your horses, because we were taking a point of order. I was asked to rule, and even before I gave you the go-ahead you were on. Please do not do that again. The hon member of the ANC raised a point. You contest that point – you said that you were sustaining it. I wish to take this point on advice, hon members, and we will rule on it tomorrow, because it is not an open-and-shut statement that you make and conclude with. There are many implications with it. I would like to be properly advised when I come back to this House with a ruling tomorrow. You may continue, Ntate Malema.'

[5] On 19 June 2014, and as per her intimation of the previous day, the Chairperson ruled:

'Hon members, having perused the *Hansard*, I have arrived at the conclusion that the statements made by hon Malema are unparliamentary and do not accord with the decorum of this House. Although members enjoy freedom of speech during the proceedings of this House, this freedom is subject to limitations imposed by the Constitution and the Joint Rule.

The statements made by hon Malema suggest that the government – which is made up of members of this House – deliberately decided to massacre the people of Marikana. This does

not only impute improper motives to those members of the House, but it also accuses them of murder.

Secondly, I must also indicate that there commission has been set up by the President to enquire into this matter and that that commission has not yet made any findings. It is therefore undesirable to make statements which will second-guess the outcomes of commissions.

I want to further remind hon members of this House that a Ruling made by a Presiding Officer is final. Statements like “I am not going to withdraw” sound contemptuous and are also challenging to the authority of the officer presiding.

Having said that, hon members, I request hon Malema to withdraw his statements which said that the ANC and the ANC government massacred the people in Marikana.’

[6] Not only did Mr Malema refuse to withdraw his previous statement, he added:

‘Chair, when the police reduce crime, you come here and say that the ANC has reduced crime. When the police kill people, you don’t want us to come here and say that the ANC government has killed people. That is inconsistent, hon Chair’

. . .

‘Mr SJ Malema: Chair, I maintain that the ANC government killed people in Marikana.’

He was then commanded by the Chairperson to leave the House.

[7] Aggrieved by the Chairperson’s conduct, Mr Malema (as the first applicant) and the EFF (as the second) applied to the Western Cape Division, Cape Town for, inter alia, an order in the following terms:

‘1.1 The following decisions made by the first respondent [the Chairperson] on 19 June 2014 (the first respondent’s rulings) are reviewed and set aside:

1.1.1 Her decision that statements made by the first applicant “are unparliamentary and do not accord with the decorum of this House.”

1.1.2 Her decision to request and order the first applicant to withdraw his statement that the ANC government had massacred the mineworkers at Marikana in that the police who killed them represented the ANC government.

1.1.3 Her decision to ask the first applicant "to leave the House."

1.2 It is declared that the first respondent's rulings were unlawful and invalid.

1.3 The first respondent is ordered to apologise in public to the applicants for her rulings.

1.4 The first respondent is interdicted from abusing her powers to protect the governing party against lawful criticism in parliamentary debate.'

The Chairperson was cited as the first respondent in the application and the ANC as the second. But the latter took no part in the proceedings.

[8] In opposing the application the Chairperson filed a fairly detailed affidavit. I entertain some doubt as to whether regard can be had to the explanation and elaboration furnished in her affidavit in order to construe her ruling. After all one imagines that her ruling ought to speak for itself and that what was stated before the joint sitting constitutes the exclusive memorial of her ruling – a ruling, which, no doubt, was intended to define and govern the rights and privileges of all the Members of the House not just the respondents. However, the issue not having been raised or properly considered, I shall assume in favour of the Chairperson (without deciding) that such evidence is admissible for present purposes. To the extent here relevant the Chairperson stated:

'15.3 I made it clear that the statements which I considered unparliamentary were those which suggested that the government, which is made up of Members of the House, deliberately decided to massacre the people of Marikana. I went on to say that this did not only impute improper motives to those Members of the House, but also accused them of murder.

15.4 This was the reason for calling on the deponent to withdraw the statements.

. . .

15.11 I wish to emphasise that the deponent was not ordered to leave the House because he maintained that the ANC government had killed people in Marikana, but because he refused to comply with my request and later with my instruction to withdraw the offending statement.

15.12 By refusing to comply with my instruction and request, the deponent was in contempt or disregard of my authority and I was therefore entitled, by virtue of the provisions of Joint Rule 14G, to order him to withdraw immediately from the Chamber for the remainder of the day's sitting, the customary sanction when members decline to withdraw statements that have been ruled unparliamentary.

. . .

18.5 That the deponent claims to have expressed his opinion on a matter of high public interest and that he and his party hold the ANC responsible for what happened at Marikana, is immaterial. It is what he said of the government, not the ANC, that prompted my ruling.

. . .

18.63 In this regard it has to be pointed out that my decision requiring the deponent to leave the House for the remainder of the day's sitting was not punishment for what the deponent had previously said of the government, but involved the exercise of a power in terms of Joint Rule 14G (NA rule 51) to the effect that if a Member is in contempt of or disregards the authority of the Chair, he or she may be ordered to withdraw immediately from the House for the remainder of the day's sitting.

18.64 The Chair's rulings constitute precedents by which subsequent Chairs, Members and Officers are guided and such precedents are noted and, in the fullness of time, may be formulated as principles, or rules of practice.

18.65 It is absolutely imperative that the Chair should be invested with authority to repress disorder and to give effect promptly and decisively to the Rules and Orders of the relevant House.

. . .

23.4 I reiterate that the only reason why I insisted that the deponent should withdraw his offending remarks was because he imputed improper motives to Members of the House and accused them of murder, thereby abusing them verbally and casting reflection on their integrity.

. . .

24.4 In *casu* I carefully weighed the deponent's remarks against the constitutional value of freedom of political speech and concluded that they reflected particularly adversely upon the integrity of Members of the Cabinet who are Members of the NA.

. . .

26.8 Finally, I point out, again, that the offending statement was not one in relation to the governing party but in relation to the government. It was thus not a reference to the governing party that made the statements unparliamentary or objectionable, it was the reflection on Members of the NA that was unparliamentary and underpinned my ruling.

. . .

27.2 It was not his criticism of the ANC that offended against the rules and precedent, it was his criticism of the ANC government.'

[9] The application succeeded before the high court. Bozalek J (Cloete J concurring) issued the following order:

'1. That the following decisions by First Respondent on 19 June 2014 are reviewed and set aside:

1.1 her decision that statements made by first applicant "are unparliamentary and do not accord with the decorum of this House".

1.2 her decision to request and order first applicant to withdraw this statement that the ANC government had massacred the mineworkers at Marikana in that the police who killed them represented the ANC government.

1.3 her decision to ask first applicant to "leave the House".

2. That the Applicants' costs, including the cost of two counsel, are to be paid by first respondent.'

[10] The high court found that there was 'no basis at all' for the Chairperson to 'be ordered to apologise in public to the applicants for her rulings'.[3] Likewise, so held the high court, 'the applicants [had] failed to make out a case for the further order sought, namely that [the Chairperson] be interdicted from abusing her powers to protect the governing party against *"lawful criticism in parliamentary debate"*.'[4] The appeal by the Chairperson is with the leave of the high court.

[11] The constitutional regime which operated when *Poovalingam's* case was decided was the Republic of South Africa Constitution Act 110 of 1983, which had no provisions corresponding with the important provisions of the present Constitution (Constitution of the Republic of South Africa, 1996). South Africa is a constitutional democracy, foundational to which is an open and democratic society based on freedom and equality. The notion of an open and democratic society is 'not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct.' (*Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer Port Elizabeth Prison & others* [1995] ZACC 7; 1995 (4) SA 631 (CC) para 46).

[12] As Sachs J put it in *Democratic Alliance & another v Masondo NO & another* [2002] ZACC 28; 2003 (2) SA 413 (CC) para 42:

'The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to

[3] *Malema & another v Chairman National Council of Provinces & another* 2015 (4) SA 145 (WCC) para 62.
[4] Ibid para 63. (My emphasis.)

construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.'

[13] The first section of the Constitution upon which reliance is placed on behalf of the Chairperson is s 57, which provides that the NA 'may determine and control its internal arrangements, proceedings and procedures; and make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'.[5] There can be no doubt that this authority is wide enough to enable the NA to maintain internal order and discipline in its proceedings. As Mahomed CJ observed in *Speaker of the National Assembly v De Lille* [1999] ZASCA 50; 1999 (4) SA 863 (SCA) para 16:

'This would, for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates.'

[14] The right to freedom of speech in the NA is expressly constitutionalised in s 58(1) *(a)*, which provides that Cabinet Members and Members of the NA have freedom of speech in the Assembly and its committees, subject to its Rules and orders. Section 58(1)*(b)*(i) goes on to provide that such members are not liable to civil or criminal proceedings, arrest or imprisonment or damages 'for anything they have said in, produced before or submitted to the Assembly or any of its committees'. Section 58(2) states that '[o]ther privileges and immunities of the National Assembly . . . may be

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[5] Section 57 provides:
'(1) The National Assembly may—
(a) determine and control its internal arrangements, proceedings and procedures; and
(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
(2) The rules and orders of the National Assembly must provide for—
(a) the establishment, composition, powers, functions, procedures and duration of its committees;
(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy.'
The equivalent constitutional provision applicable to the National Council of Provinces is section 70.

prescribed by national legislation'.[6] Without those immunities, free speech would be severely curtailed. According to the Constitutional Court (*Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC) para 39):

'Immunising the conduct of members from criminal and civil liability during . . . deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.'[7]

[15] But, as Madlanga J observed in *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8 (*DA v Speaker of the NA*) paras 38-39:

'Surely, the privilege contained in sections 58(1)*(a)* and 71(1)*(a)* can never go so far as to give members a licence so to disrupt the proceedings of Parliament that it may be hamstrung and incapacitated from conducting its business. This would detract from the very *raison d'être* of Parliament. . . .

More pertinently, sections 58(1)*(a)* and 71(1)*(a)* of the Constitution make freedom of speech in the two Houses subject to "the rules and orders" envisaged in sections 57 and 70. That must mean rules and orders may – within bounds that do not denude the privilege of its essential content – limit parliamentary free speech.'

[16] Here the respondents do not dispute Parliament's power to self-regulate within constitutional bounds. Nor is the validity of the standing order, which reads: '…Members should not be allowed to impute improper motives to other Members, or cast personal reflections on the integrity of Members, or verbally abuse them in any other way', challenged. What is in dispute is whether the Chairperson lawfully and rationally applied the standing order. The legality and rationality thresholds are not lowered because the

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[6] Section 58(1) provides:
'Cabinet Members, Deputy Ministers and Members of the National Assembly—
(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—
(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.'

[7] This was stated in the context of municipalities, but it is of equal relevance to Parliament.

decisions were made in Parliament.[8] And testing the Chairperson's exercise of what, after all, is a public power against those thresholds falls well within the judiciary's constitutional province.[9]

[17] Mr Malema spoke in Parliament about what has been described as 'a burning issue of immense public interest'. The Constitution guards Parliament's role as an incubator of political speech.[10] There is nothing unparliamentary about robust, emotive language. In *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC) para 133, the Constitutional Court pointed out that:

'Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is not a bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.'

[18] The purpose of the standing order is to ensure that parliamentary debates are not clouded by personal insults. *Ad hominem* attacks do not contribute to democratic discourse, hence they are not protected. But the standing order does not – and constitutionally cannot – go as far as impeding political speech. It does not censor criticism of the government or its ruling party. Importantly, Mr Malema initially referred only to the ANC. It was Mr Radebe who incorrectly attributed the words 'ANC government' to him. The word 'government' was thereafter embraced by Mr Malema. On any reckoning therefore Mr Malema's initial statement was not unparliamentary and did not give cause for Mr Radebe to rise on a point of order. The point of order was plainly based on a misconception of what had initially been stated by Mr Malema.

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[8] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC) para 44; *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 11 (*EFF v Speaker of the NA*) para 98 (the Constitutional Court was rightly unconcerned about the separation of powers when finding that the President's failure to comply with the Public Protector's remedial action was unconstitutional).

[9] *Affordable Medicines Trust & others v Minister of Health of RSA & another* [2005] ZACC 3; 2006 (3) SA 247 (CC) paras 48, 49, 75-77; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) paras 92-93; and most recently *EFF v Speaker of the NA* paras 43 and 45. See also I Mahomed 'The role of the judiciary in a constitutional State' (1998) 115 *SALJ* 111.

[10] *Speaker of the National Assembly v De Lille* [1999] ZASCA 50; 1999 (4) SA 863 (SCA) (*De Lille*) para 29.

[19] In any event, even when regard is had to all of Mr Malema's utterances on the matter, it is plain that his primary target was the ruling party, not members of Parliament. On any sensible interpretation of his words, he was criticising the government and its ruling party for the conduct of the police at Marikana. He did not target Members of Parliament, either individually or collectively. As he explains in his founding affidavit:

> 'My statements had made it clear that I hold the ruling party responsible for the massacre of the 34 mineworkers because the police who had killed them 'were representing the ANC government'. No reasonable person could have interpreted my statement to mean that all the ANC Members of Parliament were guilty of murder.'

[20] The ANC is not the same as the ANC caucus in Parliament. For this reason, the Chairperson has been forced to concede that criticism of the ANC does not contravene the standing order. She says it was rather 'what [the first respondent] said of the government, not the ANC, that prompted my ruling'. But the standing order does not mention the government either. It only talks of Members of Parliament. For the standing order to apply, Mr Malema's words had to have targeted Members of Parliament. And so the Chairperson attempts to build an interpretive bridge between 'ANC government' and 'Members of Parliament'. She does so by reasoning that the government is 'largely comprised of Members of Parliament' and so, to paraphrase her, criticism of 'the government' should be understood as criticism against 'a large component of Members of Parliament'. But it is absurd to link 'the ANC' and 'the ANC government' to ANC parliamentarians. The Chairperson's logic is that 'the government' is largely comprised of Members of the National Assembly. But that is a linguistic leap. Mr Malema makes plain that the police were representing the ANC government. That can only be a reference to the ANC-led executive and it being vicariously liable for the conduct of the police. The fact that Mr Malema initially mentioned 'the ANC' confirms that his criticism was levelled against the ruling party and its policies. In fact, he never mentioned 'the government' without prefixing it with 'the ANC'. His target was thus political, not parliamentary.

[21] The Chairperson's interpretation of the standing order cannot withstand constitutional scrutiny. The implication of that interpretation is that any criticism made against the government is also criticism against individual Members of Parliament who are members of the ANC (or at least the national executive). It means that Members of Parliament may no longer freely accuse the government of any improper conduct. On the Chairperson's interpretation of the standing order, criticism of government would always constitute criticism of Members of Parliament (and/or the Executive). Such an interpretation serves censorship, not free expression. But even if one were to assume that Mr Malema's words did target the ANC caucus, there was no imputation of improper motives or the casting of personal aspersions on the integrity of members. Rather it was the Chairperson who chose to put a gloss on Mr Malema's words, when she attributed the following to him – that the government 'deliberately decided to massacre the people of Marikana'. She further misconstrued his statement as accusing ANC parliamentarians of murder. However, that is not what he said. The ordinary meaning given to his words – heard in context by a reasonable person – is that the ANC-led government is vicariously liable for the conduct of the police. Mr Malema's words cannot sensibly be interpreted to mean that the ANC government planned to kill mineworkers. Nor can they be sensibly interpreted to be a reference to any particular person in government or for that matter any individual member (or class of members) of Parliament.

[22] Sensibly interpreted, Mr Malema's words constituted legitimate criticism of the conduct of the police at Marikana. The police fall under the authority of the ANC-led government. If that criticism reverberated to ANC parliamentarians, it did so because they are members of the ANC, not because they are Members of Parliament. By equating 'the ANC' and 'the ANC government' with ANC parliamentarians, the Chairperson misconstrued her powers under the standing order. The purpose of her powers under the standing order is to ensure that parliamentary debates are not marred by personal insults directed at members (either individually or collectively). Mr Malema

did not name an individual member or a collective group of members. Nor did he cross the bounds of legitimate, if robust, political speech. The Chairperson's decisions were thus not rationally related to the purpose of the standing order.

[23] But even if Mr Malema's words targeted Members of Parliament, they were protected by s 58(1) of the Constitution. While Parliament may be empowered to make rules, its rules must be interpreted in conformity with the crucial guarantee of freedom of speech in Parliament afforded by s 58(1) of the Constitution.[11] That right is a necessary incident of representative government in a democratic society.[12] To once again borrow from *Masondo* (para 43):

'The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, "South Africa belongs to all who live in it"'.

[24] Moreover, s 39(2) of the Constitution requires an interpretation of the standing order that promotes the spirit, purport, and objects of the Constitution. Whatever the standing order means, it cannot be interpreted to prohibit criticism of the government and other species of political speech. That interpretation would be inconsistent with the plain language of the standing order, its purpose, and s 58(1) of the Constitution. For, as it was put in *De Lille* (para 20):

[11] *De Lille* paras 20 and 29.
[12] Ibid para 29.

‘[Freedom of speech in the Assembly] is a crucial guarantee. The threat that a member of the Assembly may be suspended for something said in the Assembly inhibits freedom of expression in the Assembly and must therefore adversely impact on that guarantee.’

[25] It follows that even if Mr Malema had directed criticism at members of parliament, the standing order still did not find application because his words were constitutionally protected political speech. He engaged in robust criticism of government conduct. His words fell in the heartland of political speech, and were therefore protected by section 58(1) of the Constitution. For democracy to flourish, free speech cannot be stifled. Free speech, in parliament, lies at the heart of parliamentary processes. The standing orders cannot be interpreted so as to nullify free speech. The interpretation advanced by the Chairperson has that exact consequence. Recently in *DA v Speaker of the NA* paras 11 and 17, the Constitutional Court emphasized that free speech operates as a bulwark against tyranny. It stated:

‘South Africa is a constitutional democracy. Hard-won democracy that came at a huge cost to many; a cost that included arrest, detention, torture and – above all – death at the hands of the apartheid regime. The importance of our democracy, therefore, cannot be overstated. It is the duty of all – in particular the three arms of state – jealously to safeguard that democracy. Focussing on Parliament, the pluralistic nature of our parliamentary system must be given true meaning. It must not start and end with the election to Parliament of the various political parties. Each party and each Member of Parliament have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making. By its very nature, Parliament is a deliberative body. Debate is key to the performance of its functions. For deliberation to be meaningful, and members effectively to carry out those functions, it is necessary for debate not to be stifled. Unless all enjoy the right to full and meaningful contribution, the very notion of constitutional democracy is warped.

. . .

Parliament is also entrusted with the onerous task of overseeing the Executive. Tyrannical rule is usually at the hands of the Executive, not least because it exercises control over the police and army, two instruments often used to prop up the tyrant through means like arrest, detention, torture and even execution. Even in a democracy, one cannot discount the temptation of the improper use of state organs to further the interests of some within the Executive. Needless to say, for Parliament properly to exercise its oversight function over the

Executive, it must operate in an environment that guarantees members freedom from arrest, detention, prosecution or harassment of whatever nature. Absent this freedom, Parliament may be cowed, with the result that oversight over the Executive may be illusory.'

[26] Lastly, the Chairperson attempts to shift the focus of this appeal to Mr Malema's alleged contempt for her authority. Once she had made a ruling, so her argument goes, he was not entitled to disobey it. But it does not follow from this that the Chairperson necessarily had the constitutional authority to suspend Mr Malema from the proceedings in the circumstances in which she did. It is clear that he was not suspended because his behaviour was obstructing or disrupting or unreasonably impeding the management of orderly business within the House, but rather as some kind of punishment for simply making a speech (which did not obstruct or disrupt the proceedings in the House at the time), but was nevertheless considered objectionable and unjustified by others, particularly, so it would seem, members of the majority party.[13] It is important to emphasise that the former kind of suspension is a necessary protective measure, the latter not.[14] When Mr Malema refused to withdraw his statement that had been ruled unparliamentary by the Chairperson, he did so on pain of sanction. The sanction imposed by the Chairperson was his suspension from the House for the rest of the day. He did – as he was obliged to – comply with the directive of the Chairperson that he leave the House. In that he acted correctly for until that decision was set aside by a court it could not simply be ignored (*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26).

[27] The respondents reviewed both rulings by the Chairperson. If her ruling on his words was unlawful and irrational, then it seems to me, so too must be her consequent ruling that he leave the house. In any event, even if the appellant's ruling on the words used by Mr Malema was not the ultimate reason for him being asked to leave the House, it necessarily played a significant role in that outcome. If, as has been shown, it

[13] Interference and disruption that may be sufficient for the removal of a member must be of a nature that hamstrings and incapacitates Parliament from conducting its business (*Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 8 para 45).
[14] *De Lille* para 17 relying on the Privy Council decision in *Kielley v Carson & others* (1841-1842) 4 Moo PC 63; 13 ER 255 (PC).

was bad, then her consequent ruling that he be suspended from the house likewise falls to be impugned. In this regard it is important to emphasise, as Madlanga J did in *DA v Speaker of the NA* para 44, that:

'It cannot be all conduct that annoys and tests the patience of the presiding officer and some in Parliament that amounts to interference or disruption. Robustness, heatedness and standing one's ground inhere in the nature of parliamentary debate. To warrant removal from the Chamber, interference or disruption must go beyond what is the natural consequence of robust debate. Otherwise the very idea of parliamentary free speech may be eroded. In the heat of a debate one must expect that – from time to time – a member's contributions will not come to a screeching, mechanical halt once the presiding officer has ruled that the member desist from further debate on a subject.'

[28] To sum up: First, the Chairperson's case rests on a false equivalence between 'government' and members of Parliament. However, they are not the same – criticism of government is not criticism of members of Parliament. The standing order only applies when speech targets Members of Parliament. Mr Malema's speech did not. That, in and of itself ought to dispose of the appeal. But, second, even if the linguistic leap contended for by the Chairperson is taken, namely that Members of Parliament were implicated, Mr Malema's speech is protected political speech. On a constitutionally compliant interpretation of the standing order, it was thus inapplicable to his legitimate, if robust, criticism of the government. That too is dispositive of the appeal. It follows that the appeal must fail and it accordingly falls to be dismissed with costs including those consequent upon the employment of two counsel.

[29] One further aspect remains: Leave to appeal was granted by the high court on 2 June 2015. On 2 July 2015 the notice of appeal was filed by the Chairperson's attorney with the registrar of this court in terms of SCA rule 7(1)*(a).* On 30 September 2015 and in terms of SCA rule 8(1) the record of appeal was lodged with this court. An accompanying letter from the attorney for the appellant read: '. . . Kindly note that the record was served on Godla & Partners [attorneys for respondents] in Cape Town. . . We confirm that at this point in time the respondents' Cape Town correspondent did not

appoint a Bloemfontein correspondent to accept all pleadings on their behalf.' On 19 October 2015 the Chairperson's heads of argument was served and filed. In terms of SCA rule 10(1)*(b)* the respondents' heads of argument had to be filed within one month from receipt of the appellant's heads of argument, being 11 December 2015. That did not happen. On 10 February 2016 the attorney for the Chairperson addressed the following letter to the registrar of this Court: 'The respondents have not complied with the rules in that they have not filed their heads of argument despite numerous requests from our offices. Can you please allocate a date for the hearing of this matter?' On 21 March 2016, the registrar served a notice of set down on both parties. On 14 April 2016, the registrar wrote to Mr Godla: 'Kindly confirm if your client abides by the Ruling of this Court since there are no heads of argument filed by yourselves, nor have you appointed a correspondent in this matter. The case is set down but you do not respond. I telephoned your office but no one answers the phone. Kindly contact me to indicate what your client's position is.' When that failed to elicit a response, the registrar once again wrote on 19 April 2016 'I have not heard anything from you. Your response is eagerly awaited.' Only then did Mr Godla reply: 'I have received communication from your goodself and wish to acknowledge same. I have seen the attachment of Notice of Set Down. I have discussed the date with my counsel and he is not available on the 6th May 2016. In the circumstances kindly assist with an alternative date or if it is possible with you I can get the dates of my counsel and forward same to you in order for you to determine the convenient date for all the parties. Kindly indicate if this is acceptable to you.' The next day the registrar wrote: 'You have been notified of the notice of set down on 21 March 2016 by email already. I have sent the notice again on 14 April 2016.The matter has been set down and will proceed. You have neither appointed a correspondent firm in Bloemfontein as per requirement of the Rules, nor have you filed heads of argument and you are far out of time. If you still want to participate in this appeal, you will have to file without delay together with an application for condonation. If a case is set down for hearing of an appeal in this court, the parties must arrange themselves accordingly. If your counsel is not available, you should consider to appoint alternative counsel. Unless you can agree with the opposition for a postponement with an agreement as far as costs are concerned the case will not be postponed.' Eventually

after 4 pm on 4 May 2016 we were furnished with electronic copies of the respondents' heads of argument and a practice note. An application for condonation followed the next day. The explanation tendered by Mr Godla for his failure to comply with the rules of this court is woefully inadequate. In short it amounts to him stating that he did nothing because he did not appreciate that anything had to be done. This court has repeatedly admonished attorneys who purport to practice in this court for their failure to familiarise themselves with and comply with its rules.[15] Although the application for condonation was initially opposed, at the hearing of the appeal Counsel for the Chairperson did not persist in the opposition. We accordingly granted the condonation sought and intimated then that an appropriate order for the costs of the application would be incorporated in the court's order. In his affidavit Mr Godla tendered costs on behalf of the respondents. In my view there can however be no warrant for the respondents to be mulcted with these costs. As Mr Godla accepts that: 'The delay in filing the respondents' heads of argument was my mistake', he should be saddled with these costs. And given what can only be described as a flagrant disregard for the rules of this court, any costs order that issues has to be on the punitive scale. Indeed Counsel for the respondents was constrained to concede that such an order would be just and appropriate in the circumstances of this case.

[30] In the result:

(1) Subject to para (2) below, the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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[15] *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A) at 692H-693A, where Corbett JA held for the unanimous court that a failure on the part of attorneys to perform duties imposed by the rules of this court amounts to a breach of duty of care owed by the attorney to his client; see also *Blumenthal & another v Thomson NO & another* 1994 (2) SA 118 (A); and *Darries v Sheriff Magistrate's Court Wynberg & another* [1998] ZASCA 18; 1998 (3) SA 34 (SCA) and the authorities cited therein. And also see L T C Harms 'What irritates Judges?' *Advocate* (2001) 14(3) 24-25.

(2) The costs of the application for condonation in respect of the respondents' failure to timeously serve and file their heads of argument shall be paid by their attorney, Mr Godla, *de bonis propriis* on the attorney and own client scale.

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V M Ponnan

Judge of Appeal

APPEARANCES:

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The State Attorney, Bloemfontein

For Respondents: T Ngcukaitobi (with him J Mitchell)

Instructed by:
Godla & Partners Inc, Cape Town