THE STATE OF PARLIAMENTARY FREE SPEECH

Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 487 (CC)

1 Introduction

The last two years have been challenging for the South African Parliament (comprising the National Assembly (hereinafter "the Assembly") and the National Council of Provinces (hereinafter "the NCOP"). Some of the issues experienced include: wide-ranging disruptions during the President's 2015 State of the Nation Address (hereinafter "SONA"); the forceful removal of Members of Parliament (members) from the parliamentary Chamber by the police; cell-phone signal jamming in the Chamber (*Primedia Broadcasting (A Division of Primedia (Pty) Ltd) v Speaker of the National Assembly* 2017 (1) SA 572 (SCA) (hereinafter "*Primedia"*)); a failure by the Assembly to fulfil its constitutional obligations in terms of sections 55(2) and 181(3) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") by not holding the President accountable to the Public Protector's findings in the Nkandla saga (*Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (hereinafter "*Economic Freedom Fighters"*)); members ignoring the rulings of the Speaker and the Chairperson of the NCOP (*Chairperson of The National Council of Provinces v Julius Malema* 2016 (5) SA 335 (SCA) (hereinafter "*Chairperson of the NCOP"*)); a challenge to the legitimacy of Parliament's broadcasting policy and rules (*Primedia*) and the use of various forms of "unparliamentary" language by members in Parliament (*Chairperson of NCOP*). Whilst confrontation and robust debate in Parliament are not uncommon and to be expected (*Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) (hereinafter "*DA v ANC*"), incidents such as these are becoming more frequent and have required the repeated intervention of the Courts.

The Constitutional Court judgment in *Democratic Alliance v Speaker of the National Assembly* (hereinafter "*Democratic Alliance"*) raises important questions concerning the nature and scope of the parliamentary privilege in section 58(1)(b) of the Constitution. It also demonstrates the difficulty of maintaining a balance between the importance of upholding the guarantee of freedom of speech in Parliament, on the one hand, and the need to ensure internal order and discipline during parliamentary sittings, on the other. There have been a number of recent judgments concerning the internal functioning of Parliament (see *Economic Freedom Fighters*; *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) (hereinafter "*Mazibuko*"); *Primedia* and

Chairperson of the NCOP). These judgments illustrate that the South African Constitution is a work in progress and that our constitutional jurisprudence is maturing. As recently observed by retired Constitutional Court Justice, Sandile Ngcobo, "This is not a bad thing … Our Constitution is still a young one and through constitutional adjudication it will generate constitutional rules and principles that will form the core of our constitutional law" (see Ngcobo *Why Does the Constitution Matter*? 30 June 2016 Human Sciences Research Council Public Lecture Gallagher Estate, Johannesburg). The purpose of this note is to explore the constitutional principles underlying parliamentary privilege, with specific reference to the decision in *Democratic Alliance*.

2 The constitutional framework

The South African courts have consistently confirmed that the goal of the Constitution is the foundation of an open and democratic society (see *Doctors for Life International v The Speaker of the National Assembly* 2006 (6) SA 416 (CC) par 110–111 (hereinafter "*Doctors for Life*"); *Primedia* par 1, 24; *Chairperson of the NCOP* par 11). To this end, and as explained in *Minister of Health v New Clicks South Africa (Pty) Ltd* (2006 (2) SA 311 (CC) par 111–113), "The Constitution calls for open and transparent government and requires … deliberative legislative assemblies." In *Doctors for Life* Ngcobo J, added that the constitutional commitment to the principles of accountability, responsiveness and openness demonstrates that the South African constitutional democracy is both representative and participatory, and that the "basic objective" of the constitutional scheme "is the establishment of a democratic and open government" (par 111, 116). Parliament must therefore conduct its business in accordance with the tenets of the democracy to ensure meaningful parliamentary deliberation during debates and law-making, and to allow the citizenry the opportunity to be and "to feel themselves to be" part of the political process (par 116).

Two key constitutional rights underpin the principle of an open, representative and participatory parliament. These are: the protection of freedom of speech in Parliament and the promotion of public involvement in the parliamentary processes. Although both rights advance democratic governance (*Dikoko v Mokhatla* 2006 (6) 235 (CC) par 1 (hereinafter "*Dikoko*")), the focus in this note is on freedom of speech.

Section 58(1)(a) of the Constitution guarantees members of the Cabinet and the Assembly freedom of speech in the Assembly and its committees, subject to its rules and orders. Section 58(1)(b) immunizes members from civil or criminal proceedings, arrest, imprisonment or damages for anything said, produced or revealed in the Assembly or its committees. Section 71 of the Constitution extends this right to delegates of the NCOP in almost identical terms: references in this note to s 58 should be read to include s 71. Section 28(1) of the Local Government: Municipal Structures Act (117 of 1998) provides that representatives of municipal councils also enjoy these rights. For this reason, the Constitutional Court judgments in *Dikoko* and *Swartbooi v Brink* (2006 (1) SA 203 (CC) (hereinafter "*Swartbooi*")), both decided under this Act, apply equally to the parliamentary privilege.

The right to freedom of speech in Parliament is considered to be of "the highest constitutional importance" in a representative and deliberative democracy (*Chairperson of the NCOP* par 1; *Speaker of the National Assembly v Patricia de Lille MP* 1999 (4) SA 863 (SCA) par 29 (hereinafter "*De Lille*"); *Chairperson of the NCOP* par 11). The right and the associated parliamentary privilege, also called parliamentary immunity, are of English origin and are aimed at ensuring that members are "as free as the houses" (*Chairperson of the NCOP* par 2). Free and robust debate in Parliament promotes meaningful parliamentary deliberation, and ensures that both law-making and executive-government action are subjected to critical deliberation by all role-players in Parliament (*Democratic Alliance* par 14–17; *Chairperson of the NCOP* par 1). This, in turn, advances the democracy and effective governance (*Swartbooi* par 20). Accordingly, freedom of debate in Parliament must be promoted vigorously to ensure that Parliament is able to fulfil its functions (*Democratic Alliance* par 11, 17; *Primedia* par 25). The parliamentary privilege is equally important. Thus, in *Dikoko*, Mokgoro J, held that:

> "Immunising the conduct of members from civil and criminal liability … 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 repercussions for what is said. This advances effective democratic government" (par 39).

In *De Lille* the Supreme Court of Appeal (the SCA) characterized the right to freedom of speech in Parliament as "a crucial guarantee", and held that the balance of section 58 (s 58(2) authorizes the enactment of legislation to regulate other privileges and immunities of the Assembly), should not be interpreted so as to detract from the guarantee (par 20, confirmed in *Chairperson of the NCOP* par 38–39). The privilege has therefore been held to apply to all "legitimate business" of Parliament, including resolutions, later declared unlawful and set aside (*Swartbooi* par 19–20). The outer limits of the privilege have not, however, been subjected to direct judicial scrutiny (see *Swartbooi* par 22, where the Court left undecided the question of whether types of speech "at odds with the values mandated by our Constitution" should fall within the scope of the privilege and *Dikoko* par 40, where the Court raised the question of whether the privilege covered statements made in the course of legitimate parliamentary or municipal business outside the formal parliamentary setting). As discussed below, *Democratic Alliance* was the perfect opportunity for the Constitutional Court to address the extent of the immunity afforded to members of Parliament, but the matter was unfortunately left unresolved.

Despite the free-speech guarantee, the Assembly and the NCOP need mechanisms to maintain control of their proceedings to ensure effective internal order and discipline, especially during debates (*De Lille* par 16, where the SCA held that the Assembly could exclude members who disrupt its proceedings or unreasonably prevent the Parliament from carrying on business in an orderly fashion as is required in a democratic society). To this end, sections 57 and 70 of the Constitution provide that the Assembly and the NCOP may determine and control their internal arrangements, proceedings and procedures and make rules and orders concerning their

business. These rules must, however, be promulgated and implemented with due regard to the essence of the democracy. Additionally, Parliament's authority to make rules "is limited to the regulation of process and form, as opposed to content and substance" (*Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC) par 61 (hereinafter "*Oriani-Ambrosini*")).

Whilst the Constitution affords Parliament a substantial measure of discretion in determining how best it should facilitate free speech in Parliament (*Doctors for Life* par 123–124; *Mazibuko* par 31), the courts are regularly tasked with determining whether Parliament has fulfilled its constitutional obligations. When this occurs, the courts are often accused of abusing their authority and failing to respect the doctrine of separation of powers. The reality, however, is that the courts are the "ultimate guardians of the Constitution" and are duty bound to ensure that the other branches of government exercise their powers within the limits of the Constitution (*President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) par 25). The courts are therefore obliged to scrutinize the conduct and mechanisms of both the executive and the legislature, but must be careful not to impinge unduly upon the authority of these bodies. In particular, the courts should remain sensitive to the legitimate constitutional powers of the other branches of Government and ensure that their intrusion is as limited as possible (*Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC); *Doctors for Life* par 32–37).

Having placed the relevant constitutional framework in perspective, the issues arising from the majority and concurrent judgments in *Democratic Alliance* are now addressed.

3 The *Democratic Alliance* Judgment

3 1 *Facts*

The facts of this matter were widely publicized. In February 2015 President Zuma delivered the annual SONA address at a joint-session of the two Houses of Parliament. During the address, various members from the Economic Freedom Fighters (the EFF), a political party, interrupted the President by rising to ask questions concerning the upgrades to the President's Nkandla residence. At the time, the Speaker was in the chair. She refused to answer the questions (the joint-session was convened for the purpose of SONA only) and asked the members to take their seats. The EFF members persisted. The Speaker eventually lost her patience and asked the EFF members to leave the Chamber. They defied this order and were then forcibly removed from the Chamber by security personnel, the Speaker invoking section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (4 of 2004 (hereinafter "the Powers Act")). Following a question from the parliamentary leader of the Democratic Alliance (the DA), it was ascertained that the security services included police officers, whereupon the DA members staged a walkout of the Chamber in protest (par 5–7, 84–86).

3 2 *Section 11 of the Powers Act*

This provision provides as follows:

> "A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services."

Section 1 of the Act defines a "disturbance" as "any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee".

3 3 *The Court a quo*

The High Court declared section 11 of the Powers Act unconstitutional on the grounds that it infringed the privilege of parliamentary free speech by permitting a member to be arrested for conduct protected by the immunity (see *Democratic Alliance v Speaker of the National A*ssembly 2015 (4) SA 351 (WCC)). The Court held that the word "person" in section 11 could be construed to include a member and that, when coupled with the over-breadth of "disturbance", the provision permitted a member to be arrested for constitutionally-protected conduct. The section was thus impermissibly broad and impeded parliamentary discourse. The Court ordered a "notional severance", leaving the text of section 11 unaltered, but limiting its application to non-members. It gave Parliament 12 months to remedy the defect.

The DA sought *inter alia* confirmation of the High Court's order in the Constitutional Court (par 3).

3 4 *The majority judgment*

Madlanga J, writing for the majority of the Constitutional Court, identified a number of issues requiring resolution. These were: a) whether section 11 applied to all persons, including members; b) how the term "disturbance" should be interpreted; c) what the arrest of a person entailed; and d) whether an Act of Parliament was the appropriate mechanism to regulate internal order and discipline of debates in Parliament (par 10).

The majority confirmed the importance of free speech in Parliament, stressing the imperative that Parliament function in an environment conducive to freedom from arrest, prosecution, or detention, failing which, parliamentary oversight becomes "illusory" (par 17). This position notwithstanding, the majority recognized that the right to parliamentary free speech is not absolute. Section 58(1)(a) of the Constitution does not give members a free reign to disrupt the proceedings of Parliament so as to render it "hamstrung" (par 38). Thus, section 57 of the Constitution gives the Assembly the authority to make rules and orders concerning its business in order to maintain effective order during debates (see too *De Lille* par 16).

The majority conducted both a purposive and contextual interpretative analysis of the meaning of section 11 of the Powers Act (par 19, 27–28). The first question was whether the word "person" included a member within its ambit. In summary, the majority found that the cumulative effect of the grammatical meaning of "person"; the context of the Act in its entirety; the fact that other provisions in the Act containing the word "person" primarily include members within their ambit; section 11's purpose (to prevent members from causing a disturbance and impeding parliamentary proceedings), and the absurdity of interpreting section 11 to exclude a member, meant that section 11 should be interpreted to include a member (par 19–24, 28).

The Madlanga majority then considered the type of "disturbance" that would trigger a section-11 removal from the Chamber. They accepted that, although the limitation of a member's free speech is constitutionally permissible, a broad threshold test of the term "disturbance" would erode the right to parliamentary free speech. Not all conduct testing the patience of the presiding officer should be included within the ambit of a disturbance. Instead, to warrant removal from the Chamber, the disruption would need to constitute more than mere robust debate and argument. The majority concluded that the term "disturbance" should be interpreted narrowly to mean an interference that prevents Parliament from conducting its business, with little possibility of a resumption of business within a reasonable time, and that section 11 did not apply to an interference falling short of this threshold (par 45).

The majority thus interpreted section 11 of the Powers Act to permit the removal and arrest of a member for creating or participating in a disturbance (narrowly defined) in Parliament. They added that section 11 had to be read with section 7(e), which prohibits the creation of or participation in a disturbance in the precincts of Parliament when the House is sitting, and section 27, which creates a concomitant criminal offence (par 36). So, "arrest" meant one directed at possible prosecution and detention for commission of an offence, as opposed to "any forcible restraint, even if not for the purpose of prosecution" (par 36, 40–41, 54). This possibility, added the majority, had a profoundly chilling effect on parliamentary free speech and rendered section 11 constitutionally impermissible.

The majority also held that it was unconstitutional for parliamentary free speech to be regulated by means of an Act of Parliament, as opposed to the rules of Parliament (par 47). Here, the Court distinguished sections 58(1)(a) and 71(1)(a) of the Constitution with sections 58(2) and 71(2) thereof, which provide that *other* parliamentary privileges and immunities (those not related to free speech) may be prescribed by national legislation (which happens to be the Powers Act). The majority correctly, and self-evidently, concluded that it is impermissible for freedom of speech in Parliament to be limited by way of legislation. The reason is obvious. This type of limitation would involve the participation of the executive, permitting it to intervene in matters falling within Parliament's exclusive jurisdiction (par 51).

The majority cured the constitutional defect by reading in the words "other than a member" after the word "person" in section 11 so that the provision

applied to non-members only. The majority then invited Parliament to develop constitutionally-appropriate rules to address cases where members cause disturbances in the Chamber (par 60).

3 5 *The concurring judgment*

The concurring judgment, delivered by Nugent AJ, raises a number of contentious issues concerning the ambit of the parliamentary privilege. Nugent AJ, agreed with the majority that the use of legislation to permit the physical restraint and removal of members for what they say in Parliament is unconstitutional, but disagreed with the majority's interpretation of the term "arrest" (par 72). He preferred, for both section 11 of the Powers Act *and* section 58(1)(b) of the Constitution, to give "arrest" its ordinary and broad meaning, namely the "mere act of seizure or forcible restraint, for whatever purpose" (par 73 – own emphasis). He found that an arrest in terms of section 11 of the Powers Act was not confined to an arrest for the purpose of prosecution and that the section did not create a criminal offence. The provision was enacted merely as a mechanism to remove persons from the precincts of Parliament forcibly if they create or participate in a disturbance (par 78), although this alone would have a chilling effect on freedom of debate in Parliament, even without the threat of a criminal prosecution (par 75). Nugent AJ, concluded that legislation authorizing the forcible removal of a member from Parliament contravened the parliamentary immunity created by section 58(1)(b) of the Constitution and that section 11 of the Powers Act was constitutionally illegitimate (par 79).

The majority disagreed with Nugent AJ's, interpretation of "arrest". They countered this construal by reasoning that a broad interpretation of "arrest" would mean that the forcible removal of a member from the Chamber could *never* be permitted, even in terms of parliamentary rules legitimately created by section 57(1)(b) of the Constitution to manage disturbances. Any rule authorizing the forcible removal of a member from the Chamber would infringe the immunity from arrest in section 58(1)(b) of the Constitution (par 54–56). Nugent AJ, overcame this obstacle by finding that, although the immunities in section 58(1)(b) may not be limited by legislation, they may be restricted by the rules of the House in accordance with section 58(1)(a), which provides that members have freedom of speech in the Assembly, *subject to its rules and orders* (own emphasis). According to Nugent AJ, therefore, the express limitation to free speech in section 58(1)(a) of the Constitution applies implicitly to the immunities in section 58(1)(b), which may be limited by the parliamentary rules to permit the arrest of a member in the form of a forcible removal from Parliament (par 80).

The Madlanga majority differed here too. They acknowledged the link between parliamentary free speech and the immunities, but held that the parliamentary immunities are absolute. Only parliamentary free speech can be limited by the parliamentary rules, for example by requiring a member to apologise for "offensive or unbecoming language" or to leave the Chamber (par 56). The immunities, however, cannot be limited by means of parliamentary rules. Thus, the arrest of a member for something said in

Parliament is impermissible, even if authorized by Parliament's rules (par 56–58).

4 Analysis

4 1 *Broad overview*

The judgment contains a number of key constitutional principles relevant to the conduct of proceedings in Parliament and Parliament's power to regulate its internal arrangements. First, it is important to note that a member's right to freedom of speech in Parliament can only be limited by way of the relevant House's rules and orders and not by way of legislation (par 47, 72, 121). The latter is constitutionally impermissible.

Second, Parliament is authorized to make appropriate rules and orders in terms of section 57 of the Constitution to maintain effective internal order and discipline (par 38, 118–121). These rules, however, may not denude the right to freedom of speech and the associated privilege of its core content. Here, the majority stressed that the removal of a member from the parliamentary Chamber would be justified only in circumstances where he / she creates or becomes involved in a disturbance which completely incapacitates the business of Parliament (par 44–45). Vigorous debate, persistence with an argument and "heatedness" are inherent in parliamentary debate and would not warrant removal from the Chamber. The internal parliamentary rules must reflect this injunction. The matter is not academic. Rules 70 and 73 of the recently published Rules of the National Assembly (9th edition, 26 May 2016) deal specifically with the removal of a member from the Chamber. Rule 70 provides that if, in the opinion of the presiding officer, a member deliberately contravenes a rule, or disregards the authority of the Chair, or engages in grossly disorderly conduct, the presiding officer may order the member to leave the Chamber. This rule is overbroad. The current circumstances justifying the removal of a member from Parliament fall short of a disturbance, as defined by the Madlanga majority. The rules should therefore be reformulated to reflect that a member's removal from the Chamber is permissible only where his or her disorderly or defiant conduct debilitates the business of Parliament, rendering it "hamstrung".

Third, the judgment illustrates that, even though the doctrine of separation of powers contemplates that the legislature should be free to regulate its own internal affairs, rules that are inconsistent with the Constitution and are not exercised with due regard to the tenets of the participatory and representative democracy, are subject to judicial review.

The interesting question raised by the qualified concurrence is whether the forcible restraint and removal of a member from the Chamber for anything said in Parliament, constitutes an arrest and violates the parliamentary privilege. As discussed, the Rules of the National Assembly permit the presiding officer to order a member to leave the Chamber. The member must then immediately withdraw from the precincts of Parliament. Should a member refuse to do so, rule 73 provides that the presiding officer

may instruct the Serjeant-at-Arms to remove the member from the Chamber forthwith, and if unable to do so, the presiding officer may instruct the Parliamentary Protection Services (the PPS) to assist in removing the member. If a member resists, the Serjeant and the PPS may use reasonable force to overcome any resistance.

It is clear that if the term "arrest" bears the meaning given to it by Nugent AJ, namely the mere act of seizure or forcible restraint, then the internal rules regulating the removal of a member, as outlined above, permit a member's arrest. It follows that, should this procedure be used to remove a member from the precinct for something said in Parliament, the removal will contravene the constitutional immunity. According to Nugent AJ, however, the parliamentary immunities may be limited by the rules of Parliament. The majority, of course, disagreed and held that the immunities are absolute. So, the majority and concurrent judgments pose two core questions, namely: a) are the parliamentary immunities guaranteed in section 58(1)(b), absolute? May they be lifted by Parliament's rules? And, b) does the forcible removal of a member from the Chamber constitute an arrest? Phrased differently, where a rule allows for the forcible removal of a member from Parliament for something said in Parliament, would the rule be constitutionally defective as permitting the member's arrest? The majority judgment acknowledges this dilemma, but fails to resolve it.

4 2 *The scope of the Parliamentary Privilege*

It is interesting to note that neither the majority nor the concurrent judgment provides authority for their pronouncements on the question of whether the immunities are absolute (par 54–56, 80). Despite the obvious conflict between the two judgments, the majority correctly identifies that the constitutional text of section 58(1)(b) renders Nugent AJ's construal unlikely. The omission of the phrase "subject to the rules …" in the provision is important. The interrelationship between sections 57 and 58 of the Constitution is also noteworthy. In *De Lille* the SCA held that the authority given to Parliament in terms of section 57 to determine its internal arrangements is wide enough to empower the Assembly to use any mechanism it considers appropriate to maintain order. It could, for instance, suspend members from the Assembly if they impair "unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society." Absent such mechanisms, the "Assembly would be impotent to maintain effective discipline …" (par 16–18). Significantly, the Court did not include a limitation to the immunities as a potential disciplinary tool for recalcitrant members. Even more significantly, the Court stressed that the right to free speech in Parliament "is a fundamental right crucial to representative government in a democratic society", and that its purpose must inform all other provisions in the Constitution relating to the conduct of parliamentary proceedings (par 29). These *dicta* support the contention that the free-speech immunities are absolute.

It is unfortunate that the Constitutional Court did not engage constructively with the nature, purpose and scope of the parliamentary privilege in *Democratic Alliance*. A rich analysis would have strengthened the judgment.

The fact is that a determination of the scope of the parliamentary privilege cannot be conducted in a vacuum. Its purpose plays a critical role in the analysis. Parliamentary privilege is an essential component of a modern, democratic Parliament, and a limitation of the parliamentary privilege through the means of Parliament's own internal disciplinary rules could impact detrimentally on the independence of Parliament.

The justification for parliamentary immunity has become a topical issue in many jurisdictions. Recently, the legitimacy of a broad concept of parliamentary privilege has been questioned, and many national parliaments have evaluated and reformulated their privilege rules. These countries include Australia, Canada, New Zealand and the United Kingdom (see generally Joint Committee on Parliamentary Privilege *Parliamentary Privilege Report of Session 2013–14* HL Paper 30 HC 100 (3 July 2013) (hereinafter "the UK Report"); Senate Canada *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century* January 2015 (hereinafter "the Canadian Discussion Paper")). Moreover, the Council of Europe has also conducted a comprehensive review of the immunity of members of the EU parliaments, and has released a comprehensive report describing the scope of the immunities, while recommending reform (Council of Europe, European Commission for Democracy through Law (Venice Commission) *Report on the Scope and Lifting of Parliamentary Immunities* CDL-AD 11 March 2014 (hereinafter "the Venice Report")).

The Venice Report deals specifically with the question of whether parliamentary privilege is absolute, and provides valuable guidance. It records that parliamentary privilege, and immunity is an integral component of constitutional democracies worldwide, but originated in the Parliament of England. The right to freedom of speech in parliamentary debates and proceedings was affirmed in the Bill of Rights of 1689 (providing that "[t]he freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any Court or place out of Parliament …"), whereupon a tradition was established, entitling members of parliament to freedom from arrest, mainly in respect of civil cases. This tradition eventually developed into the modern-day concept of parliamentary privilege (Venice Report 5).

One of the most authoritative writers on parliamentary procedure, Erskine May, defined parliamentary privilege as: "[t]he sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of the House individually, without which they could not discharge their functions …" (Jack, Hutton, Johnson, Millar, Patrick and Sandall (eds) *Erskine May*: *Parliamentary Practice* (2011) 203). This definition illustrates that the underlying purpose of parliamentary privilege is one of dual functionality. First, privilege enables the legislature, as a representative assembly, to perform its constitutional and democratic duties without external influence. Non-liability promotes freedom of speech in Parliament and maintains the separation of powers to the extent that it prevents the other two branches of Government from calling into question the proceedings of Parliament. Second, individual parliamentarians, as

elected representatives of the people, derive their privilege only as a means to discharge their parliamentary functions and to fulfil their mandate effectively without fear of harassment from the executive or their political opponents (Hardt *Parliamentary Immunity* (2013) 3–4, 15; Venice Report 3–4, 8). Thus, parliamentary immunity is not treated as a member's personal privilege, but as a guarantee underlying the independence of Parliament and its members as a whole so as to ensure Parliament's integrity as a representative institution (*A v United Kingdom* App. No. 35373/97 17 December 2002 par 85).

Within the wider concept of parliamentary immunity, there are two clear categories of immunities, namely the non-accountability, non-liability or parliamentary-privilege model and the inviolability model. In many countries, including South Africa, the first model is the only type of parliamentary privilege that applies. In other jurisdictions, both forms of parliamentary immunity find application (Venice Report 4).

The non-accountability model, which originated from the Westminster-type parliamentary system, protects members' freedom of speech in Parliament and provides that members are not legally liable for their speech or voting behaviour in Parliament. This form of privilege has been codified in South Africa by sections 58(1)(b) and 71(1)(b) of the Constitution, which provide immunity for "anything" said, produced or submitted in Parliament or revealed as a result thereof. The extent of this type of privilege differs from jurisdiction to jurisdiction, however. For example, in some countries the non-liability extends only to statements made in Parliament, whereas in other countries the immunity extends to political statements expressed outside Parliament, but in the exercise of the parliamentary mandate. In some countries, certain types of speech, such as hate speech, are not covered by the immunity (Venice Report 15; see too Inter-Parliamentary Union "PARLINE database on national parliaments" (undated) http://www.ipu.org/parline-e/parlinesearch.asp (accessed 2017-01-24)).

This position notwithstanding, the norm is that non-accountability is absolute. This means that all types of legal action for speech falling within the exercise of the parliamentary mandate are barred, and that the immunity may not be limited by Parliament or renounced by an individual member (Hardt *Parliamentary Immunity* 4; Venice Report 14–15). The *rationale* for the rule is that parliamentary non-liability is regarded as a public privilege, intended not for the protection of individual parliamentarians, but to promote freedom of political debate in Parliament (Venice Report 16–17; Canadian Discussion Paper 49–50). However, in those countries where the immunity is relative, this is usually subject to very specific restrictions, either in terms of the types of speech excluded, or by way of strict rules regulating the way in which the immunity may be lifted. The competence to lift the immunity rests either with Parliament itself in terms of established criteria or alternatively, with the courts, which then have the authority to decide whether the immunity may be lifted (Venice Report 14–15 – note that in the UK a member is entitled to waive the privilege in defamation cases). Yet, in all respects, a distinction is drawn between the rules on non-liability and Parliament's own internal disciplinary rules. It is trite that most parliaments

worldwide have rules of procedure or disciplinary house rules, which are used to regulate and sanction the behaviour of members of parliament during parliamentary proceedings. These rules are *not* included within the concept of parliamentary immunity, and are normally used against members to sanction contempt against Parliament or acts that interfere with Parliament's business (Venice Report 12–13; Hardt *Parliamentary Immunity* 253–254; Canadian Discussion Paper 58, 65–66). This means that the rules regulating privilege should not be conflated with Parliament's own disciplinary rules. Similarly, it is inappropriate to use Parliament's internal rules of order to limit the extent of the parliamentary privilege.

The second model of privilege, which provides for inviolability, originated in the French National Assembly in 1789 and is also sometimes called the "continental model". This model adds another dimension to the more basic non-accountability form of parliamentary privilege. Members are provided with immunity from legal action (civil and criminal, except when apprehended *flagrante delicto*), detention, arrest or prosecution *beyond* the scope of their parliamentary activities (for example, immunity from traffic offences). So, parliamentarians who enjoy the protection of this system of privilege, benefit from both non-accountability and inviolability (Venice Report 4; Hardt *Parliamentary Immunity* 4). Whilst the non-accountability model applies in most democratic countries and is regarded as an indispensable component of Parliament's functions, the inviolability, model is not universal. Furthermore, the inviolability rules differ quite substantially amongst the various national parliaments in both form and application (Hardt *Parliamentary Immunity* 4; Venice Report 5). There has also been a growing tendency to limit the scope of the inviolability and many countries have reformed their inviolability models so as limit political corruption (Venice Report 6; Canadian Discussion Paper 42–43).

As mentioned earlier, many national parliaments have recently conducted comprehensive reviews examining the scope of their parliamentary immunity. Most of the review committees recognize that the law of parliamentary privilege has become cumbersome (requiring codification), restricts the right of access to Court and requires development to reflect Parliament's role in a modern democracy. Despite this acknowledgment, the preponderant conclusion emanating from the reviews is that parliamentary privilege should be retained as a necessary and legitimate component of constitutional law (Venice Report 15, 16–17; UK Report par 12–13, 19; Canadian Discussion Paper 49). Various *rationales* were advanced to support this view, but the overriding sentiment was that freedom of speech in Parliament remains an essential part of the effective functioning of Parliament, and that the objective of parliamentary non-liability is to protect Parliament as a democratic institution and not to safeguard the interest of individual members (Venice Report 16). It is also worth noting that another common recommendation was the endorsement of the functional approach (or doctrine of necessity) for the reform of parliamentary privilege (UK Report par 24; Canadian Discussion Paper 79; Venice Report 16). The Canadian Supreme Court summarized the essence of this doctrine in *Canada: House of Commons v Vaid* (2005 SCC 30 par 46) as follows:

> "In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency."

The Venice Commission dealt specifically with the question of whether the system of absolute parliamentary non-liability should be retained. It concluded that "parliamentary non-liability may in principle be absolute and unlimited", and that this is especially desirable in emerging democracies where there is sometimes a threat of political pressure. However, in jurisdictions where lifting is permissible, the Commission recommended the construction of strict rules to regulate the manner in which lifting occurs. The preferable approach is to regulate specific exemptions by way of legislation, subject to judicial review (Venice Report 6–7; 17–18; Canadian Discussion Paper 3). In other words, the Courts are given the authority to determine whether an individual case falls within a defined exemption. An alternative method is to permit Parliament to lift the immunity, but here best practice dictates that Parliament's competence be exercised with restraint and in accordance with tightly-defined rules. This method, although legitimate, cautioned the Commission, has the tendency to become "a politicised process" (Venice Report 6–7, 17–18).

This analysis demonstrates that the South African model of parliamentary privilege provides its members with a fairly limited level of immunity. The inviolability model does not apply and members are only entitled to immunity for "anything said, produced or revealed in the Assembly or its committees" or "anything revealed as a result" thereof. It may, however, be necessary to conduct a comprehensive review of South African parliamentary privilege to consider whether the extent of the immunity should be reformed. It is worth considering whether the functionality approach should be adopted so that only statements linked to the exercise of the parliamentary mandate are privileged. Despite this recommendation, it is submitted that that any further limitation of the privilege would undermine the objective of parliamentary immunity. Given South Africa's status as an emerging constitutional democracy and the current parliamentary *status quo*, where the courts regularly hold Parliament to account for failing to uphold its constitutional obligations, it would be untenable to suggest that the immunity is not absolute and can be limited in terms of Parliament's internal rules. A relative system cast in these terms would defeat the objective of parliamentary privilege and undermine the functioning of Parliament, as well as ultimately the integrity of the representative democracy. This method of limitation also fails to take into account that Parliament's disciplinary rules should be confined to matters of process and form, as opposed to substance (*Oriani-Ambrosini* par 61) and that Parliament's internal disciplinary rules should not be conflated with the parliamentary immunity. Accordingly, Nugent AJ's, suggestion that the parliamentary immunity in section 58(1)(b) of the Constitution can be limited by Parliament's internal disciplinary rules is not endorsed.

4 3 *The meaning of "arrest"*

The next issue is whether the mere forcible restraint and removal of a member from Parliament constitutes an "arrest", and thus whether the removal procedure listed in the parliamentary rules, undermines the parliamentary immunity. In this respect, the majority judgment correctly held that sections 7(e), 11 and 27 of the Powers Act should be read together to create a criminal offence, and that section 11 authorized the arrest and consequential detention and prosecution of a member (par 41–42, 77–78, 117). According to Nugent AJ, however, because the power to arrest, detain and prosecute persons for involvement in disturbances is already provided for elsewhere in the Act, section 11 was enacted with a different objective, namely the arrest of a person for the purpose of seizing and removing him or her from the precincts of Parliament. This reading, said Nugent AJ, supports the broader definition of the term "arrest", as used in *both* (own emphasis) the constitutional immunity and section 11, namely the mere forcible seizure and removal of a member from Parliament, and which is not confined to arrest for the purpose of prosecution (par 73, 77–78). In further support of this contention, Nugent AJ, refers to the ordinary dictionary meaning of "arrest" (a seizure or forcible restraint) and various others forms of arrest in law, all of which envisage "seizure or forcible restraint" without the possibility of prosecution, such as an arrest to confirm civil jurisdiction or the arrest of a vessel in Admiralty Law (par 73–74).

The problem with the Nugent AJ's approach is that it fails to address the meaning of "arrest" with reference to relevant jurisprudence around the term. In South African criminal procedure, the effect of an arrest is that the arrestee shall be in lawful custody (s 39(3) of the Criminal Procedure Act 51 of 1977). Similarly, the purpose of an arrest is to secure the presence of the arrestee in court to answer a criminal charge (*Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) 818F–819E; *Ex Parte Minister of Safety and Security: In Re S v Walter* 2002 (4) SA 613 (CC) par 49–50). Thus, in *Minister of Safety and Security v Sekhoto* (2011 (5) SA 367 (SCA) (hereinafter "*Sekhoto*")) the SCA held that: "The word 'arrest', which translates into Afrikaans as 'in hegtenis neem', has in this and related contexts always required an intention to bring the arrested person to justice" (par 19). So, the four jurisdictional requirements of a lawful arrest are: a) the arrest must be authorized; b) the arrester must exercise some form of physical control over the arrestee; c) the arrestee must be informed of the reasons for the arrest and d) the person arrested must be taken to the appropriate authorities as soon as possible (ss 39 and 50(1)(a) of the Criminal Procedure Act 51 of 1977; Kruger *Hiemstra's Criminal Procedure* (2016) 5–3).

Although Nugent AJ, refers to section 39(1) of the Criminal Procedure Act in support of his contention that an arrest should be defined as the mere forcible restraint of the arrestee, he argues that this is because the only situation in which the forcible restraint of a person is authorized by the section is for criminal prosecution (par 74). This reasoning conflates the manner of arrest with the purpose and effect of the arrest (ss 39(1) and (3) of the Criminal Procedure Act 51 of 1977). Both requirements are inherent in

an arrest – the arrestor must exercise control over the arrestee and intend to bring him or her to justice. Thus, when a person is arrested, he or she is not merely seized with the aim of removal from a place, but with another very specific objective, namely to secure his or her presence in court to answer to a charge. (Note that the term "arrest" in section 35(1) of the Constitution, which guarantees to a person arrested for allegedly committing an offence various procedural rights, is defined in accordance with these provisions. An analysis of the meaning of "arrest" in International Law falls beyond the ambit of this note.)

It is true, as Nugent AJ states, that the physical seizure and restraint of a person is also definitive of a civil arrest. In *Minister of Law and Order v Parker* (1989 (2) SA 633 (A)) the erstwhile Appellate Division conducted a thorough analysis of the various types of physical arrest at Common Law. The Court recorded that in Roman-Dutch Law a creditor could secure the arrest of a debtor on two grounds, namely a) *suspectus de fuga*, and b) to found the jurisdiction of the court (*ad fundandam iurisdictionem*). In both cases, the creditor was required to petition the court for a *mandament van arrest* in order to secure the person of the debtor with the objective of bringing him before court without delay to answer the civil claim (par 9–10). In South African Law section 19(1) of the Supreme Court Act (56 of 1959) authorized the arrest of a person to found or confirm jurisdiction. In *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* (1969 (2) SA 295 (A) 306H–307A) the Court traced the history of the practice of arrest *ad fundandam jurisdictionem*, and found that it was introduced with "some purpose and was never a mere symbolic act." Relying on this authority, the SCA in *Bid Industrial Holdings (Pty) Ltd v Strang* (2008 (3) SA 355 (SCA) par 29, 36) held that the "crucial jurisdictional purpose" of an arrest *ad fundandam jurisdictionem* was to enable an effective judgment to the extent that the process entailed the physical deprivation of the arrestee's freedom with the aim of founding the court's jurisdiction. In other words, the arrest entailed more than the mere physical restraint of the arrestee and the deprivation of his or her liberty. The purpose was to establish the court's jurisdiction in order that it could give effect to its judgment by rendering the foreigner amenable to its jurisdiction. (See too *Ewing McDonald & Co Ltd v M & M Products Company* 1991 (1) SA 252 (A); *Tsung v Industrial Development Corporation of South Africa Ltd* 2006 (4) SA 177 (SCA) par 4–5. Note that in Admiralty Law the arrest of a vessel also founds jurisdiction for a maritime claim). The Court therefore declared this provision unconstitutional. Similarly, in *Malachi v Cape Dance Academy International* (2010 (6) SA 1 (CC) the Constitutional Court declared sections 30(1) and (3) of the Magistrates' Court Act (32 of 1944) unconstitutional. These provisions empowered an arrest *tanquam suspectus de fuga* (an order for the arrest and detention of a debtor where the debtor intended fleeing the country to evade a debt). The Court confirmed that the purpose of such an arrest was not to force the debtor to pay the claim, but to ensure that the debtor remains within the Court's jurisdiction to enable the creditor to obtain a valid judgment. The debtor is therefore arrested "to abide the judgment of the Court" (par 21–22).

It is clear therefore that both a civil and criminal "arrest" comprise more than the mere forcible restraint and removal of a person from a place. The correct position is that an arrest involves two elements, namely a) the physical restraint of a person, and b) the objective of bringing the arrestee before a competent authority to answer a criminal or civil "charge".

The meaning of the term "arrest" should also be addressed within the context of parliamentary privilege. It is significant that, while the original English concept of parliamentary privilege included freedom from arrest, this was confined to arrest in civil matters, such as the enforcement of a debt or to secure a person's attendance before a court. The *rationale* for the privilege was that an arrest would undermine the functioning of Parliament, which required the continued attendance of its members in Parliament (Hardt *Parliamentary Immunities* 65–66). The privilege of freedom from arrest became less relevant during the mid-1800's when imprisonment in civil cases (specifically for debt) was abolished. Today, whilst the privilege from freedom of arrest is not wholly obsolete in the UK, it has become "largely a historical artefact", and its complete abolition has been recommended as serving "little value" (Hardt *Parliamentary Immunities* 65–66, 119–120). Likewise, in Canada and Australia, the privilege of freedom from arrest is confined to arrest for civil actions (and the recommendation in Canada is that this form of privilege be abolished). Again, the justification for the immunity is to protect the interests of Parliament by ensuring the attendance of members "who are not to be restrained or intimidated by means of legal arrest in civil process" (Canadian Discussion Paper 39, 68, 70; s 14 Australian Parliamentary Privileges Act 1987). In the UK, Canada and Australia the immunity does not extend to criminal process, but in parliaments where the parliamentary-inviolability model applies, freedom from arrest protects parliamentarians from arrest *and* prosecution for criminal charges (Canadian Discussion Paper 68; *R v Chaytor* [2010] UK SC 52; Hardt *Parliamentary Immunities* 120).

This analysis demonstrates that immunity from arrest within the broader concept of parliamentary privilege usually relates either to protection from civil arrest or in countries where the inviolability model applies, freedom from arrest on a criminal charge. There is no comparative support for the contention that freedom from arrest entails the mere protection from forcible restraint and removal from Parliament, as contemplated by Nugent AJ. In the South African context, and given the status of a civil arrest (see too *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC)), it is submitted that the immunity from arrest in section 58(1)(b) of Constitution protects members from arrest on a potential criminal charge arising from anything said, produced or revealed in Parliament. Thus, the majority was correct in finding that section 11 of the Powers Act authorized the arrest and potential prosecution of a person who had created or participated in a disturbance in Parliament. Moreover, the parliamentary rules authorizing the removal of a member from Parliament do not contravene the parliamentary immunity guaranteeing members' freedom from arrest.

5 Conclusion

The judgment in *Democratic Alliance* affirms the importance of parliamentary free speech and the associated parliamentary privilege in a representative and participatory democracy. Robust political debate is constitutionally protected and must be promoted. Indeed, as the Constitutional Court reminded us in *DA v ANC*, whilst politics in South Africa is often "loud, rowdy and fractious", democratic deliberation on issues in the public interest enhances democratic participation, and is instrumentally useful to the extent that it enables informed decisions by an informed electorate (par 122, 133 – 135, confirmed in *Primedia* par 27).

The *Democratic Alliance* judgment also acknowledges that Parliament is constitutionally empowered to make its own rules and orders to govern its internal processes. To withstand constitutional scrutiny, however, these rules must be framed and applied in accordance with sections 57 and 58 of the Constitution. In particular, Parliament's rules must not undermine the free-speech privilege and must reflect the principles of the representative and participatory democracy (*Oriani-Ambriosini* par 61). It may have become increasingly difficult for Parliament to maintain formality and order during parliamentary proceedings, but nonetheless Parliament should, as a matter of urgency, reframe its rules to ensure that a member is not removed from the Chamber for speech or conduct falling short of a disturbance, as defined in *Democratic Alliance*.

It is unfortunate, however, that the Court did not address the ambit of the parliamentary privilege. It is acknowledged that the majority dealt with the issue indirectly as a response to the concurrent judgment, but this was an ideal opportunity for the Constitutional Court to address the outer limits of the South African model of privilege. A full analysis would have demonstrated that: a) the parliamentary immunity guaranteed by section 58(1)(b) of the Constitution is absolute and cannot be lifted by Parliament's internal disciplinary rules; b) a review of the extent of the immunity should be conducted, specifically to consider whether members should be granted immunity for *anything* said in Parliament; c) the immunity from arrest protects members from arrest on a potential criminal charge arising from anything said, produced or revealed in Parliament; and d) this part of the immunity does not extend to the mere forcible restraint and removal of members from Parliament. The removal procedure in Parliament's rules is therefore constitutionally legitimate, provided, of course, that the rules do not undermine the core of the privilege and the tenets of the democracy.

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