IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO 2749/2015
PH NO 154

In the matter between:

PRIMEDIA BROADCASTING, A DIVISION OF PRIMEDIA (PTY) LTD	First Applicant
SOUTH AFRICAN NATIONAL EDITORS' FORUM	Second Applicant
RIGHT2KNOW CAMPAIGN	Third Applicant
OPEN DEMOCRACY ADVICE CENTRE	Fourth Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
SECRETARY TO PARLIAMENT	Third Respondent
MINISTER OF STATE SECURITY	Fourth Respondent

REPLYING AFFIDAVIT

I, the undersigned

PHELADI GWANGWA

state under oath that:

I INTRODUCTION

1. I am an adult female station manager of 702, which is operated by the First Applicant. I am authorised by the applicants to represent them in these proceedings and to depose to this affidavit on their behalf. I deposed to the earlier affidavits in this matter on behalf of the Applicants.

2. The facts contained in this affidavit, unless the context indicates the contrary, are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

3. I make all submissions of law on the basis of the advice given by the Applicants' legal representatives, which advice I accept has been correctly given.

4. In this affidavit, I address the following topics:

   4.1. The failure to challenge the Rules of Coverage and s 21 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("**Privileges Act**");

   4.2. The investigatory relief; and

   4.3. Ad seriatim responses to the Answering Affidavits.

II THE RULES OF COVERAGE AND SECTION 21 OF THE PRIVILEGES ACT

5. Parliament complains that the Applicants' failure to challenge the Rules of Coverage and/or s 21 of the Privileges Act renders the application moot. The

argument appears to be that, because the Rules repeat verbatim the provisions of the Policy that the Applicants do challenge, the challenge would be ineffective even if it was successful. This defence is unsustainable for a number of reasons.

6. First, it is not necessary to challenge the Rules of Coverage directly. If the relevant clauses of the Policy are declared unconstitutional then, substantively, the Applicants would have been successful. Parliament, knowing that the identical provisions in the Policy had been struck down as unconstitutional, would no longer be able to lawfully rely on the same provisions in the Rules of Coverage. Parliament does not, and could not, suggest that different factors would inform an evaluation of the two identical provisions, merely because one appears in the Policy, and the other in the Rules. If the one is unconstitutional or unlawful, so too is the other.

7. Second, the status of the Rules of Coverage has been, until Parliament filed its Answering Affidavit, entirely unclear to the Applicants. The Applicants were unaware that the Rules existed until they were mentioned in Parliament's Answering Affidavit in Part A of this application. For that reason, they are not mentioned at all in the Founding Affidavit.

8. In its Answering Affidavit in Part A, Parliament explained the role of the Rules as follows: "*The Policy is also informed by the internal Rules of Coverage… . The objective of the Rules is to assist the director in close collaboration with the manager of the Sound and Vision Unit*" (Answering Affidavit in Part A, para 29). Parliament did not plead, as it now does, that the Rules are the primary basis for the restrictions the Applicants attack. Nor did it allege that the Applicants' failure to attack the Rules directly was problematic.

9. Instead, it pleaded that the Rules "*informed*" the Policy, and that they were meant to "*assist*" the director. Given that the Rules are not publicly available and are not part of the ordinary standing rules of Parliament or its Houses, there was no clue in Parliament's papers that the Rules, in fact, were the primary source of the restrictions on broadcasting Parliament's proceedings.

10. It was in that context (and in response to Parliament's argument that interim relief was incompetent because the Applicants had not challenged the Policy) that the Applicants pleaded that the rules were not binding. They were relied on as a subsidiary, rather than a primary set of rules. Nonetheless, the Applicants also pleaded that Rules of Coverage "*suffer from precisely the same flaws as the Policy*" and "*are not consistent with the Constitution, are not reasonable and do not promote public access, openness and accountability.*" (Part A Replying Affidavit at paras 100.2-100.3)

11. Parliament now wishes to change its tune regarding the Rules of Coverage and treat them as the primary document, and the Policy as the secondary document that provides more detail. That is directly contradictory to its earlier approach.

12. Third, in Part A, Parliament took the point that the Applicants were not entitled to interim relief because they had failed to challenge the validity of the Policy. At no point did Parliament suggest that the absence of a challenge to the Rules was relevant. It was therefore perfectly reasonable for the Applicants to assume that the Rules were (as Parliament had described them), a subsidiary document.

13. Fourth, although titled "Rules of Coverage" (and referred to by Parliament as "*internal Rules of Coverage*" (Part A Answering Affidavit at para 29), the Rules

are not included in any of the ordinary standing rules of Parliament, the National Assembly or the National Council of Provinces. Their status as rules separate from the standing rules is questionable. Even if they can legitimately exist as a separate document that is not public, the Applicants cannot have been expected to have divined their import.

14. In short, the complaint about the Rules of Coverage is a transparent attempt to avoid the substance of the Applicants' challenge to the Policy. It is self-serving and relies on Parliament's own lack of transparency and shifting explanations for the role of the Rules.

15. In any event, and in order to avoid a technical defence when the substantive merits of Parliament's position have been fully ventilated, the Applicants will file a notice together with this affidavit amending their notice of motion so that it also challenges the relevant provisions of the Rules. The reasons why this prayer was not included earlier have already been explained.

16. Parliament can suffer no prejudice by this amendment. The substance of the challenge is identical to that already advanced by the Applicants. Parliament has fully explained the history of the adoption of the Rules in its Answering Affidavit. It is fully prepared to meet a challenge to the Rules of Coverage.

17. Lastly, there is also a suggestion that the failure to challenge the validity of s 21 of the Privileges Act is somehow relevant. This is false. The Applicants accept that Parliament can, as s 21 entitles it to do, regulate the broadcasting of its proceedings. Our complaint is that the way in which they have regulated broadcasting is unconstitutional. That regulation appears in the Policy (and the Rules), not in the Privileges Act.

III THE INVESTIGATORY RELIEF

18. The Applicants have sought relief compelling the Respondents to investigate the events of 12 February 2015 and to submit the results of those investigations to the court. We have decided to abandon that relief. We have done so for two reasons:

    18.1. The Respondents have given an account of what occurred. While the Applicants persist in contending that the version is unsatisfactory and demonstrates that the use of the device was irrational and unlawful, they have stated under oath what role they, as individuals, played.

    18.2. Both Respondents have instituted investigations. We hope that both Parliament and the Ministers will release the results of those investigations publicly, we no longer believe that it is appropriate for this Court to compel them to do so.

19. Accordingly I will not reply directly to those parts of the Answering Affidavits that concern this part of the relief, as it is no longer sought.

IV AD SERIATIM RESPONSES

Parliament's Affidavit

Ad paras 1-5

20. I note the contents of these paragraphs.

Ad para 6

21. I deny that the Applicants argue for an absolute obligation. The Applicants' case is that the current restrictions are not "*reasonable and justifiable*" as required by ss 59(2) and 71(2) of the Constitution. It may be that other restrictions are reasonable and justifiable. But the present restrictions are not.

Ad para 7

22. I admit that the right to freedom of expression is not absolute. In the context of access to Parliament, any limitation must be "*reasonable and justifiable ... in an open and democratic society*".

23. I deny that the limitations serve to protect Parliament's dignity.

24. I deny that the limitations amount to only a minor interference.

25. I deny that their purpose is legitimate, or that it could not be achieved by less restrictive means.

Ad para 8

26. I admit that Parliament may take reasonable and justifiable measures to regulate media access, but deny that the prohibition on broadcasting grave disorder is reasonable and justifiable.

Ad para 9

27. I admit the contents of this paragraph.

Ad para 10

28. I deny that the Rules of Coverage only provide for two exceptions to unrestricted broadcasting. In addition to a range of guidelines, the Rules also

provide the following absolute restrictions or exceptions on unrestricted broadcasting:

28.1. No close-up shots of Members' or Officers' papers are allowed (rule 1(d));

28.2. "*Dead shots*" of empty benches or other shots that are not relevant to proceedings are not permitted (rule 2(h)); and

28.3. Broadcasting of proceedings must be "*fair and accurate*" and may not be used for "*party-political propaganda*", "*satire, ridicule or light entertainment*" or "*commercial sponsorship or advertising*" (Conditions of Authority to Broadcast, rule 1(b)).

29. The Applicants do not challenge these restrictions, or other reasonable restrictions and guidelines in the Rules or the Policy. We argue only that the absolute prohibition on depicting grave disorder is unconstitutional.

30. I deny that broadcasting unparliamentary behaviour and grave disorder threatens the dignity of Parliament.

Ad para 11

31. I have dealt with this issue above. I deny that the Applicants' challenge is moot for the reasons already advanced.

Ad para 12

32. I deny the contents of this paragraph. I have dealt with this issue above.

Ad para 13

33. I admit the contents of my Replying Affidavit quoted in this paragraph, but deny that the Applicants are not entitled to add an alternative attack. The statement on which Parliament relies was made in the context of the urgent

relief sought in Part A. The Applicants were entitled to amend the relief sought and the basis for that relief when they supplemented their founding papers in terms of this Court's order of 10 March 2015. Parliament has suffered no prejudice as a result of the addition of the procedural challenge to the Policy at this stage.

Ad para 14

34. I admit that Parliament is an institution of the highest constitutional importance and that it is entitled to protect its dignity. I deny that the impugned measures are reasonable, justifiable and proportionate.

Ad para 15

35. I deny that the Applicants argue for an "*unqualified default position*". We argue simply that Parliament should treat incidents of grave disorder in the same way that it handles unparliamentary behaviour.

36. I deny that this will "*encourage the worst behaviour in Parliament*". The deponent offers absolutely no factual foundation for this assertion. It does not hold for several reasons:

    36.1. Parliament accepts that it cannot prevent media access to Parliament during incidents of grave disorder and therefore cannot prevent reporting on those incidents. Those who wish to gain publicity from creating disorder in Parliament do not have to rely on the broadcasting of that disorder to achieve their aims.

    36.2. A visual feed of what occurs is likely to deter the worst behaviour because all members will know that their exact conduct will be broadcast to the nation. They will not be able to hide behind claims

that the events or statements have been reported out of context, or that the reporting of events by the media or other political parties is otherwise inaccurate or biased. The precise events will be captured as they occurred.

36.3. The experience of the Scottish Parliament (related in annexure **PG27** to the Replying Affidavit in Part B) is exactly the opposite. While the same concern was raised when that Parliament elected to allow broadcasting of incidents of disorder, those incidents did not increase. There is no reason to expect a different result in this country.

37. In any event, even if fair and accurate broadcasts of what occurs in Parliament incentivised more disruptions, that would not be a reason to prohibit the broadcast of those disruptions. The public is entitled to know how its representatives behave. Parliament is not entitled to deny the public that knowledge because it may encourage misbehaviour.

38. The Applicants do not rely on their broadcasting duties to address the risk of encouraging misbehaviour. They rely on those duties to meet the concern (raised at the hearing on 6 March 2015) that incidents of hate speech, violence or nudity might be broadcast.

39. I admit that Parliament must decide what will be provided by live feed. The Applicants' contention is that the current decision is unconstitutional.

40. I deny that requiring that incidents of grave disorder are broadcast in the same way as unparliamentary behaviour will undermine Parliament's dignity, or undermine the purpose of s 21 of the Privileges Act. Fuller access to, and knowledge of, Parliament's proceedings can, in the long run, only enhance Parliament's dignity.

41. I deny that the Applicants accept that s 21 "*cannot be challenged*". It is simply not necessary to challenge it for the purposes of the relief the Applicants seek.

Ad paras 16-19

42. I note the contents of these paragraphs.

Ad para 20

43. As noted earlier, this is part of the confusion that Parliament has (intentionally or unintentionally) created regarding the status of the Rules. The standing rules of Parliament and its two Houses are generally integrated into a single document. There are three such documents: the Joint Rules; the National Assembly's Rules; and the National Council of Provinces' Rules. None of those documents contain the Rules of Coverage. They are in a separate document that was not, until this litigation, publicly available. It is by no means clear that the Rules of Coverage amount to "*standing rules*" envisaged in s 21.

44. I deny that the process of developing the Rules was participative. Again, Parliament only consulted internally. It never invited comment from those who would be affected by the Rules – the public and broadcasters. The fact that the Rules were adopted on a "*cross-party deliberative basis*" does not cure that defect.

Ad paras 21-22

45. I note the contents of these paragraphs. The intended relationship between the Policy and the Rules remains unexplained by Parliament.

Ad paras 23-30

46. I note the contents of these paragraphs. I have dealt with the process by which the Rules were adopted above. I wish to add the following observations on the process followed in adopting the rules:

46.1. When the Joint Rules Committee decided to adopt the Rules and monitor them, the express purpose of the monitoring was "*to ensure that there is no censoring and that openness is not compromised.*"

46.2. What is notably absent from the deliberations is any consideration of facilitating the views of the public or of broadcasters.

Ad paras 31-33

47. I note the contents of these paragraphs.

Ad para 34

48. I note the admission that the PMU did not obtain input from any person or institution outside of Parliament.

Ad paras 35-36

49. I note the contents of these paragraphs. I have dealt with the utter inadequacy of Parliament's explanation of how the Policy was adopted above. To repeat:

49.1. Parliament does not point to any participation by the public or media in developing the Policy; and

49.2. Parliament cannot explain how or when a decision was made to adopt the Policy.

Ad para 37

50. I admit that the Policy has been in operation in 2009. However, I repeat my position that the Applicants were unaware of its existence. Parliament has no basis to deny that the Applicants were not aware of the Policy. They have pointed to no time at which it was provided to the Applicants, or made publicly available.

51. I deny that the Second Applicant (SANEF) would have raised their lack of awareness at the workshop on 27 January 2015. SANEF was not in a position, having just received the Policy, to know whether it was lawfully adopted or whether its members were aware of it. It was therefore not possible for it to object at that time. There is nothing improper about raising a complaint after consulting with one's lawyers.

Ad para 38

52. I deny that it is a "*new assertion*" that Primedia and the members of SANEF conduct filming and broadcasting. That has always been the Applicants' position.

53. The admission that the Policy was in operation for six years was based on the date on which the Policy appeared to have been adopted, not our knowledge of its operation.

54. While I accept that the Secretary has authorised or refused requests based on the Policy, the fact that the Secretary was relying on the Policy was not clear to the First and Second Applicants. Knowing that the Secretary could grant or refuse access does not imply knowledge of the policy guiding the Secretary's decision.

55. The fact that the Policy is available on an internal, parliamentary portal does not make it available to the public or broadcasters. If a person does not know that a document exists, they cannot ask for it. I note that Parliament can point to no instance in which the Policy was in fact requested by or provided to the Applicants or any other broadcaster.

Ad para 39

56. The fact that Primedia and members of SANEF have applied for accreditation and that they know they are limited to the official feed does not imply that they are aware of the existence of the Policy. More importantly, it does not indicate that they were involved in the development and drafting of the Policy.

Ad para 40

57. It was precisely in response to those incidents that SANEF sought the meeting with Parliament that was eventually held on 27 January 2015. It was at that meeting that they were first provided with the Policy and informed why the feed had been cut.

58. I pause to note that Parliament itself states that, it was "*the Policy*" that was applied in these instances, not the Rules. This exposes its reliance on the Applicants' failure to challenge the Rules for what it is – a litigation tactic designed to avoid meeting the substantive merits of the Applicants' argument.

Ad para 41

59. I note the contents of this paragraph.

Ad para 42

60. I deny the contents of this paragraph. The Applicants have not alleged that the Policy was intentionally kept secret. What we alleged was:

60.1. The Policy was developed without any public or industry participation;

60.2. There is no clear indication of when it was adopted for approval by the Speaker and the Chairperson; and

60.3. They were not aware of its existence until 27 January 2015.

61. None of these assertions has been rebutted by the Respondents. It would be easy for it do so. It could provide minutes of meetings including public and industry participation. It could provide the minutes of a committee in fact adopting the Policy. It could demonstrate that it made the Policy publicly available or provided a copy to the Applicants or another broadcaster. It has not.

Ad para 43

62. I admit the contents of this paragraph, but wish to highlight the following:

62.1. The fact that the public and the media are not excluded from the chamber highlights the unreasonableness of the Policy. Those people will still see what occurs in Parliament and will still report on it. They may do so in a way that maintains the dignity of Parliament, or they may do so in a way that undermines the dignity of Parliament. Parliament has no control over how the incidents are reported. The refusal to broadcast visual footage of what, in fact occurred, can only fuel misinformation, opportunism and speculation. Providing the feed will ensure more accurate public understanding of what occurred. That

can only be better for the dignity of Parliament than attempting to hide what occurs.

62.2. The fact that the feed continues with sound and a visual of the presiding officer is precisely the problem. The suggestion that this ameliorates the limitation is false. A viewer will see only the presiding officer's face, and her voice without being able to understand what she is reacting to, and therefore to assess whether her conduct is reasonable or unreasonable.

62.3. The distinction between unparliamentary behaviour and grave disorder is difficult to understand. Parliament does not explain why wide-angle shots of the former will not undermine the dignity of Parliament, while wide-angle shots of the latter will.

Ad paras 44-46

63. I note the contents of these paragraphs. The purpose of the Policy is not, however, the standard against which the Policy must be judged. It must be judged against the Constitution. In any event, there is public interest in incidents of disorder in Parliament, if they happen during an open session it is part of Parliament's main business, and broadcasting those incidents will not undermine Parliament's dignity.

Ad para 47

64. I admit the contents of this paragraph. That is precisely why Parliament must be open and subject to public scrutiny. The members of Parliament are public representatives. The public is entitled to know what they do when they are representing them.

Ad paras 48-49

65. I admit the contents of these paragraphs save to point out that Parliament, like all organs of state, is bound by the Constitution. That includes ss 59 and 72 which create a default rule of open proceedings, and requires any limitation to be "*reasonable and justifiable*".

Ad para 50

66. I admit the contents of this paragraph. But I deny that censoring the broadcasting of incidents of grave disorder serves to protect or advance the dignity of Parliament. The key to maintaining the dignity of Parliament is for its members to behave in such a way that maintains that dignity, not to attempt to prevent the public from knowing when its members fail in that task.

Ad para 51

67. I admit the contents of this paragraph save to state that the Applicants have now amended the relief sought to challenge the relevant rule.

Ad para 52

68. I deny the contents of this paragraph. More particularly:

    68.1. The consequences are not mitigated, they are exacerbated. Accounts of disorder that occurs in Parliament will be repeated in the media whether or not the events are broadcast. The consequence is only that the account will be informed by personal observations, instead of an official feed of what occurred.

    68.2. The Policy and the Rules already prohibit the use of the feed for "*satire, ridicule or light entertainment*". The Applicants have not challenged

those provisions. That will apply equally to the visuals of grave disorder.

68.3. The fact that some people may find incidents of grave disorder entertaining, does not mean that they are not of public interest. People may find a speech made in Parliament, or the conduct of the presiding officer amusing, but that is not a reason not to broadcast it.

68.4. Again, I deny that broadcasting incidents of grave disorder would encourage ill-discipline. In addition, it is puzzling that Parliament believes that televising unparliamentary behaviour will not encourage ill-discipline, but broadcasting incidents of grave disorder will. Given that the line between the two is vague it is difficult to understand how the present position would deter any conduct.

68.5. There is already an audience for incidents of ill-discipline or disorder in Parliament: interested and active citizens who want to know how their elected representatives behave. That audience exists whether or not the events are broadcast.

Ad para 53

69. I admit the contents of this paragraph.

Ad para 54

70. I deny the contents of this paragraph insofar as it suggests that there is no public interest in obstructive or disruptive conduct in Parliament and therefore no obligation to broadcast it. Disruptive conduct by members may well be deserving of censure. The Privileges Act and the Rules make ample provision for that. They allow the presiding officer to adjourn or suspend

proceedings, or suspend the offending member. Parliament is empowered to hold offending members in contempt of Parliament and to impose punishments.

71. But it is precisely because that conduct may affect the orderly conduct of Parliament that the public is entitled to see it. They are entitled to make their own assessment of whether the conduct was deserving of censure, or whether it was a legitimate exercise of their representatives' parliamentary rights. They can only make that assessment if they can see what happened.

72. The purpose that is served is to allow the public to hold both disruptive members and presiding officers responsible and accountable for their conduct.

Ad paras 55-56

73. I admit the contents of these paragraphs.

Ad paras 57-58

74. I note the contents of these paragraphs. I find it surprising that Parliament would not be interested in operational details. For example, as Parliament controls its own security, it would have to decide what equipment members of the security forces would be entitled to bring onto the precinct. Unless the security forces are simply afforded free reign to do as they please, without any parliamentary oversight.

75. I also stress that, while operational details may not have been disclosed, in terms of s 4(1) of the Privileges Act, for as long as the security services were on the parliamentary precinct, they operated "*only with the permission and*

under the authority of the Speaker or the Chairperson". The Speaker and the Chairperson are, ultimately, responsible for what occurred.

Ad paras 59-60

76. I note the contents of this paragraph. It is somewhat different from the version provided in the Answering Affidavit in Part A. In that affidavit, the Speaker and the Chairperson took credit for having the device turned off. The Speaker stated: "*When the signal scrambling was brought to our attention, we acted swiftly to ensure that the jamming was removed, and that the free flow of information was fully restored.*" (Part A Answering Affidavit at para 18). The Speaker now asserts that, the matter was resolved without any intervention on the part of the First to Third Respondents.

Ad para 61

77. I note the contents of this paragraph.

Ad para 62

78. I deny that the relief sought would be academic. Parliament has the ability to control what devices are used on its precinct and in what circumstances. Parliament appears unwilling to allege that it will not permit a jamming device to be used in Parliament again. It has also not admitted that its use was unlawful. Instead, it seems to leave the use of the device in the hands of the Minister. The Minister asserts his right to use the device if it is deemed necessary. An order declaring its use unlawful would ensure that it was not used again similar circumstances.

Ad para 63

79. The Applicants are no longer pursuing the relief in this paragraph.

Ad para 64

80. I note the contents of this paragraph.

Ad para 65

81. I deny the contents of this paragraph. The fact that the misdirection occurred in terms of the Policy and the Rules does not mean it is less of a misdirection.

Ad paras 66-67

82. I note the contents of these paragraphs, but repeat that Parliament has an obligation to broadcast disorder, and the public has a right to see it.

Ad para 68

83. I deny the contents of this paragraph. I repeat that the presence of the media renders the prohibition on broadcasting less explicable, not more. In addition, the best form of information of what occurred is the illegal mobile phone footage taken by members of the press. The broadcasting of that footage is a barred by ss 21 and 27 of the Privileges Act. There is no guarantee that similar footage will be available for future incidents of disorder.

Ad paras 69-70

84. I note the contents of these paragraphs, save to deny that the Applicants were aware of the Policy or the Rules.

85. SANEF did express surprise at these events. It was precisely in response to these two incidents that SANEF sought a meeting with Parliament to discuss the provision of the feed. That meeting occurred on 27 January 2015.

Ad paras 71-77

86. I note the denials contained in these paragraphs.

Ad para 78

87. I note the denial in this paragraph. I repeat that the Speaker and the Chairperson retain ultimate authority – and therefore ultimate responsibility – for the actions of the security services within the Parliamentary precinct.

Ad paras 79.1-79.2

88. I admit the contents of these paragraphs.

Ad para 79.3

89. I deny that the declaration will serve no purpose. I repeat that there is a difference between an acknowledgment that the use of the device was a mistake, and a finding that it was unlawful and unconstitutional.

Ad para 80

90. I note that the investigation is still pending. I hope that Parliament will release the results of the investigation when it is complete.

Ad paras 81-83

91. The Applicants are no longer pursuing this relief.

Ad para 84.1

92. I note the contents of this paragraph. The Speaker's version of how the Policy was adopted fails to answer the Applicants' attacks on the process that was followed.

Ad para 84.2

93. I admit the contents of this paragraph. The version advanced by Parliament has done nothing to alter the conclusions drawn from the Applicants' incomplete knowledge.

Ad para 84.3

94. I note the contents of this paragraph, but they are irrelevant to the determination of the matter. Parliament has not put up an answer to the Applicants' complaint. It has purported to fully explain the process by which the Policy was adopted. On its own version, that process remains unlawful.

Ad para 84.4

95. As the Applicants only became aware of the Policy's existence on 27 January 2015, the six-year delay is irrelevant. I have already explained that the original affidavit in Part A of this application was prepared under extreme time pressure. It was directed at the events of 12 February 2015, not the adoption of the Policy. It was only later, after further consultation between the Applicants and their legal representatives that the flaw in the adoption of the Policy became apparent.

Ad para 84.5

96. I deny the contents of this paragraph. I deny the deponent's recollection of the hearing of 6 March 2015 (at which she was, in any event, not present).

The argument presented at the hearing was that the court would not grant interim relief if the relevant provisions of the Policy had not been challenged. That argument was not upheld by the court in its judgment of 10 March 2015. I attach a confirmatory affidavit of my attorney Duncan Wild who was present at the hearing.

97. I therefore deny that the procedural attack is unreasonable or opportunistic. It is well-founded in fact and in law. It was raised later because of new information that arose after the application was initially launched as a matter of urgency.

Ad para 85

98. I note the contents of this paragraph. I do not understand why Parliament would deny that my assumption that the Policy was adopted following a proper process was reasonable. I repeat that the fact that Primedia and the members of SANEF operated within the ambit of the Policy does not mean that they were aware of the Policy.

Ad para 86

99. I deny the contents of this paragraph. The events of August and November 2014 did "*prompt consideration as to what constraints existed.*" It was as a result of those events that SANEF sought a meeting with Parliament. It was at that meeting that it received the Policy.

Ad para 86.2

100. I deny the contents of this paragraph. The Speaker was not present at this meeting. Mr Mkhabela, who deposed to an affidavit supporting my Supplementary Affidavit, was.

Ad para 86.3

101. I note the contents of this paragraph subject to the following:

101.1. The Speaker does not deny that the Policy is not available on Parliament's website. The Rules are also not available on the website or elsewhere.

101.2. The complaint is not that the Applicants were not aware of the Policy. The complaint is that they were adopted following an irrational and unlawful process.

101.3. It is not possible to request a document if you do not know it exists.

Ad para 87

102. I deny that the procedural attack is motivated by any difficulty with the substantive attack, or that the fact that the procedural attack is in the alternative is significant in any way.

103. I deny that not challenging a policy that one did not know existed is a bar to challenging it at a later stage.

Ad para 88.1

104. The Speaker has misunderstood the Applicants' case. It is not our case that the duties of broadcasters determine what Parliament may or may not restrict. That question is determined by reference to the Constitution. The duties of broadcasters were raised solely to address a concern about broadcasting visuals that not only reflected disorder, but also obscenities, hate speech, violence or nudity.

Ad para 88.2

105. It is for Parliament to apply its Policy and Rules; it is for this Court to determine whether the Policy and the Rules are constitutional.

Ad para 89

106. I note the contents of this paragraph.

The Minister's Affidavit

Ad paras 1-7

107. I note the contents of these paragraphs.

Ad paras 8

108. I note the Minister's apology and the acceptance of responsibility by the Agency. However, that is not the same as an acknowledgement of unlawfulness.

Ad para 9

109. The fact that the use of the signal disruptor was an isolated incident does not affect the lawfulness of its use. The Applicants seek an order to determine not only whether the use of the device was isolated, but whether it was lawful.

Ad para 10

110. I note the contents of this paragraph.

Ad para 11.1

111. I accept that the Agency took responsibility for deploying the device. The Minister is, however, ultimately responsible for the conduct of the Agency. He has not argued that the Applicants should, instead, have cited the Agency.

Ad paras 11.2-11.3

112. I note the contents of these paragraphs.

Ad para 11.4

113. I did not intend to imply that the Minister was personally involved in the details of planning the security measures for the SONA. He is, however, ultimately responsible and exercises ultimate authority over the security services.

Ad para 12

114. I note the contents of this paragraph. Ms Blose was deposing to an affidavit on behalf of the Minister. It is proper to attribute his statements to the Minister for the purposes of determining the Minister's position in this litigation.

Ad para 13.1

115. I note the denial in this paragraph.

Ad paras 13.2-13.6

116. I note the contents of these paragraphs. However, the explanation merely confirms the irrationality of the proposed use of the device. The Chamber was inspected "*prior to the SONA session*". Presumably, this means it was swept prior to any of the MPs, guests and media arriving for the SONA, not

that it was inspected after they had arrived, but before the President and Deputy President arrived. In that case:

116.1. It is unclear why the device was needed at all given that the security services had confirmed there were no explosives present; and

116.2. There is no reason why the risk would decrease when the President and Deputy President arrived. The risk of a bomb being present would remain constant no matter who entered the chamber. The risk of a bomb being activated could only increase when the President and Deputy President arrived.

Ad paras 13.7-13.10

117. I admit that the plan was devised by NATJOINTS. However, the Minister (as the responsible authority for the police and the intelligence services) would have played a role in developing that plan and would know its contents.

118. The Applicants do not seek to have the entire operational plan disclosed. We accept that there are legitimate security concerns related to the plan and that its disclosure would defeat future security goals. All the Applicants seek is a description of the measures that were to be used once the device was turned off and an explanation for why those measures could not have been deployed earlier. The Minister has not explained why that disclosure would threaten future security plans.

119. I stress that a bald reliance on national security cannot be relied on to excuse what otherwise appears on its face to be irrational conduct.

120. I note that the Minister has already divulged part of the operational plan – that the Chamber was swept for explosives, that the device was used, that it

should have been switched off, and that it was not. Those disclosures have not caused any security risk.

121. If the Minister wishes to, the Applicants invite him to make the disclosure subject to any confidentiality regime he deems appropriate.

Ad paras 13.11-13.13

122. I note the contents of these paragraphs. What remains unexplained is why those other measures were insufficient prior to the arrival of the President and Deputy President, and became sufficient once they arrived.

123. I deny that the threat of a remote controlled explosion no longer existed when the President and Deputy President arrived. This is illogical.

Ad para 14

124. I note the contents of this paragraph. In particular, I note that the Minister has states that the "*signal disruptors were purchased in order to assist the Agency,* inter alia*, in combating a threat posed by remote controlled devices.*" The Minister now relies on a different basis to support the legality of the use of the signal disruptors. Previously, he argued that they constituted "*security equipment*" as defined in the Intelligence Services Act. Now he relies on his general power to acquire equipment in s 12(2)(c). This is not permissible. Further argument on this score will be made at the hearing of this matter.

Ad paras 15-16

125. I note the contents of this paragraph.

Ad para 17

126. I note the contents of this paragraph. It is disturbing that the Agency did not discuss the use of the device with the Speaker or the Chairperson. The Agency knew that the device would interfere with telecommunications in Parliament. Even if the device would have been switched off when the President and Deputy President arrived, its effect on members, guests and the media prior to that point must have been anticipated. The failure to confirm with the Speaker and Chairperson that it could employ the device renders its use unlawful as it interfered with the openness of Parliament. Based on Parliament's current position, it is likely that they would have refused permission to use the device at any stage.

Ad para 18

127. I note the contents of this paragraph, but deny that Parliament was open. The use of the device plainly interfered with the openness of Parliament. It is important to stress that the interference continued even once the session began. Journalists and others in the Chamber were unable to communicate about what was happening in the Chamber. That means Parliament was not open.

Ad para 19

128. I note the contents of this paragraph.

Ad para 20

129. I note the contents of this paragraph. I am surprised that the Agency's investigation has not been completed. According to the Minister, the cause

has already been identified. The Applicants hope that the Minister or the Agency will release those portions of the report that are not classified.

Ad paras 21-29

130. The Applicants are no longer pursuing this relief.

Ad para 30

131. I note the contents of this paragraph.

PHELADI GWANGWA

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at ROSEBANK on 03 APRIL 2015, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

7001870 7 SGT, 15
MOSIBUDI M.S MAAKE

COMMISSIONER OF OATHS

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SOUTH AFRICAN POLICE SERVICE
SUPPLY CHAIN MANAGEMENT
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