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

CASE NO: 2749/15

In the matter between:

PRIMEDIA BROADCASTING, A DIVISION OF PREMEDIA (PTY0 LTD	First Applicant
SOUTH AFRICAN NATIONAL EDITOR'S FORUM	Second Applicant
RIGHT2KNOW CAMPAIGN	Third Applicant
OPEN DEMOCRACY ADVICE CENTRE	Fourth Applicant
MEDIA 24 LTD	Fifth 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 HOME AFFAIRS	Fourth Respondent

FILING NOTICE: First to Third Respondents' Supplementary Answering Affidavit

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DOCUMENT FILED HEREWITH: First to Third Respondents' Supplementary Affidavit

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DATED AT CAPE TOWN ON THIS 27th DAY OF MARCH 2015

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

Case number 2749 / 2015

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

FIRST TO THIRD RESPONDENTS' SUPPLEMENTARY ANSWERING AFFIDAVIT

I, the undersigned,

BALEKA MBETE

hereby declare under oath

1. The facts deposed to in this affidavit fall within my own knowledge, unless the context indicates otherwise, in which case they are true to the best of my information, knowledge and belief, based on records and documents in Parliament's possession and under my control. Where I

make legal submissions, I do so on the advice received from the first to third respondents' legal representatives, which I believe to be correct.

A. INTRODUCTION

2. This affidavit is deposed to as a supplementary answering affidavit, as authorised by the order of court dated 10 March 2015, and in opposition to the amended part B relief sought by the remaining applicants (the fifth applicant having withdrawn as a party) against the first to third respondents (*'Parliament'*). I shall refer to the remaining applicants as *'the applicants'*.

3. I am authorised to oppose the relief sought and to depose to this affidavit on behalf of the second and third respondents.

4. In this affidavit

   4.1. first, I set out the part B relief sought by the applicants in their further amended notice of motion;

   4.2. second, I provide an overview of Parliament's opposition to the relief sought;

   4.3. third, I explain the genesis, application and justification of Parliament's rules, policies and procedures relating to the filming and broadcasting of parliamentary proceedings;

4.4. fourth, I deal with the applicants' remaining complaints regarding the jamming issue;

4.5. fifth, I respond where necessary to specific paragraphs contained in the applicants' affidavits filed to date in this matter.

B. RELIEF SOUGHT

5. The applicants now seek the following part B relief (following delivery of their third notice of motion, on 18 March 2015):

5.1. A declaration that paragraph 8.3.3.2(a) of Parliament's Policy on Filming and Broadcasting (*'the Policy'*) is unconstitutional, unlawful and invalid;

5.2. An order directing the first to third respondents to ensure that

5.2.1. the audio and visual feeds of open sittings are not interrupted;

5.2.2. during occurrences of *'grave disorder'* or *'unparliamentary behaviour'* on the floor of the House, a wide angle shot of the chamber, including audio, will be broadcast;

5.3. Alternatively (to both of the above paragraphs),

5.3.1. a declaration that the Policy is unconstitutional, unlawful and invalid;

5.3.2. an order that the declaration be suspended for nine months;

5.3.3. an order that pending the enactment of a new policy, the relief sought in paragraph 5.2.2 above is applied;

5.4. A declaration that the manner in which the audio and visual feeds of the State of the Nation Address were produced and broadcast by Parliament was unconstitutional and unlawful;

5.5. A declaration that the use of the jamming device at the State of the Nation Address was unlawful;

5.6. An order directing the first to fourth respondents to

5.6.1. investigate the use of the device;

5.6.2. report on the investigation within 14 days, the report to include

5.6.2.1. who was responsible for the use of the device;

5.6.2.2. whether the first to third respondents were aware that the device would be used;

5.6.2.3. if they were aware, why they permitted its use;

5.6.2.4. the disciplinary actions that will be taken against the responsible officials;

5.7. An order authorising the applicants to comment on the report;

5.8. An order that this Court will retain its jurisdiction to make any further orders it deems appropriate.

C. OVERVIEW OF THE FIRST TO THIRD RESPONDENTS' OPPOSITION

6. The applicants' case is that there is an absolute obligation on Parliament to broadcast a visual feed of whatever is happening on the floor of the Chamber, at least by way of a wide-angle camera shot. They say that the Policy, by not so providing, infringes the rights to freedom of expression and access to Parliament.

7. However, the right to freedom of expression is not absolute; it can be limited. As I explain below, the limitations placed on the broadcasting of the visual feed of parliament's proceedings serve to protect the dignity of Parliament; they amount only to a minor interference with the right to freedom of expression; and their legitimate purpose could not be achieved through less restrictive means.

8. In addition, Parliament is specifically authorised by the Constitution to take reasonable measures to regulate public access, including access of the media.

9. Importantly, section 21 of the Powers Act specifically prohibits any person from broadcasting the proceedings of Parliament, except in accordance with the conditions as determined by the Speaker of the NA and/or the Chairperson of the NCOP in terms of the standing rules.

10. In this regard, quite apart from the Policy, the *Rules of Coverage* (to which I revert in paragraph 20 below) provide for only two exceptions (also considered below) to the otherwise unrestricted broadcasting of the visual feed of Parliament's proceedings. Both exceptions address the extraordinary situations of unparliamentary behaviour and grave disorder. Each threatens the dignity and potentially the functioning of Parliament. The lesser of these two restrictions is tempered by authorising occasional wide-angle shots of the Chamber.

11. Thus section 21 of the Powers Act, and the Rules of Coverage adopted pursuant to it, authorise restrictions in terms squarely at odds with the orders the applicants seek. Yet, as I have noted, neither is impugned in this application; only the Policy is. The consequence is that the attack on the Policy is moot, because even were it to succeed, section 21 and the Rules will remain *in esse* and authorise restrictions on coverage in terms other than those the applicants seek.

12. The respondents pleaded a reliance on the Rules in their answering affidavit (record, pages 188 to 189, paragraphs 29 and 30). To this the applicants replied, asserting that the Rules themselves *'are not binding'*,

and that their lawfulness *'can be determined, together with the lawfulness of the Policy in part B of these proceedings'* (record, pages 282 to 283, paragraph 98). But, despite filing a third notice of motion, the applicants have elected not to impugn the Rules – nor section 21 of the Powers Act. The respondents hold the applicants to this election.

13. The applicants moreover explicitly in their replying affidavit recorded their further election not to *'challenge the decision to adopt a broadcasting policy; we only attack the part of the policy that prevents the broadcasting of disruptions'* (record, page 285, paragraph 107, underlining added). I am advised that this, too, constitutes a clear election by the applicants, to which they are held. They are not now permitted – as they have purported to do – to add an alternative attack on the entirety of the Policy (as indicated in paragraph 5.3 above).

14. Underpinning Parliament's opposition to relief sought by the applicants is the fact that Parliament is an institution of State of the highest constitutional importance. It is entitled to ensure its functioning and to protect its dignity. The impugned measures are reasonable, justifiable and proportionate.

15. In addition, the unqualified default position sought by the applicants can only encourage the worst behaviour in Parliament. This is because Parliament would be obliged, irrespective of the degree of misconduct or grave disorder, to feed it for broadcasting. The applicants' response is

that they, too, have duties. Pursuant to these Parliament must decide what is to be provided by live feed in relation to what constitutes grave disorder, or conduct which is unparliamentary, in terms of its Rules. Parliament cannot facilitate the undermining of its own dignity as a constitutional institution, or the disruption of its own work. Ensuring (as the applicants seek) that even the grossest misconduct and gravest disorder will be viewed without restriction in real time by the nation and beyond can only undermine what section 21 of the Powers Act seeks to avoid. This when the applicants accept that section 21 itself cannot be challenged.

D. THE BROADCASTING OF PARLIAMENTARY PROCEEDINGS

16. In this section

16.1. first, I set out the legislative framework relating to the filming and broadcasting of parliamentary proceedings;

16.2. second, I provide some background to the Rules of Coverage and Parliament's Policy on Filming and Broadcasting;

16.3. third, I explain why the challenged portion of the Policy is indeed appropriate, reasonable and justifiable.

(a) *Legislative framework*

17. Sections 57(1) and 70(1) of the Constitution of the Republic of South Africa, 1996 (*'the Constitution'*) provide that the National Assembly (*'NA'*) and the National Council of Provinces (*'NCOP'*) may determine and control their internal arrangements, proceedings and procedures; and make rules and orders concerning their business.

18. Sections 59(1) and 72(1) of the Constitution provide that the NA and the NCOP must conduct their business in an open manner, and hold their sittings in public, but reasonable measures may be taken to regulate public access, including access of the media.

19. Section 21(1) of the Powers Act provides that

> *'No person may broadcast or televise or otherwise transmit by electronic means the proceedings of Parliament or of a House or committee, or any part of those proceedings, except by order or under the authority of the Houses or the House concerned, and in accordance with the conditions, if any, determined by the Speaker or Chairperson in terms of the standing rules.'*

20. The standing rules relating to the broadcasting of parliamentary proceedings are titled *'Rules of Coverage'* (*'the Rules'*). The Rules are for the televising of proceedings of Parliament. Following a participative process the Rules were adopted by the Joint Rules Committee on

19 September 2003, and they are applied in both the NA and the NCOP. It is important to emphasise that the Rules are thus devised for Parliament's functioning by Parliament itself, on a fully cross-party deliberative basis. They are attached to my first affidavit as '**BM4**'.

21. Lastly, in August 2009 the Speaker of the NA and the Chairperson of the NCOP approved a more general policy, the Policy on Filming and Broadcasting, to regulate all filming within the precinct of Parliament and to provide guidelines on the public broadcasting of parliamentary proceedings and related matters. The Policy became effective on the date of signature. It is attached to the applicant's founding affidavit as '**PG8**'.

22. The applicants challenge section 8.3.3.2(a) of the Policy. This section, as well as the corresponding rules, are explained below.

(b) *Background to the Rules and Policy*

(i) *Adoption of the Rules*

23. The Rules of Coverage were tabled before the Joint Rules Committee as a means to regulate the filming and broadcasting of the proceedings of the NA, the NCOP and joint sittings of the Houses. They are based on the Rules of Coverage applied in the UK Parliament. They were initiated by the Joint Subcommittee on Internal Arrangements in 2001, which circulated them to the parties and referred them to the Chief Whips'

Forum. This again points to the cross-party, deliberative manner in which the Rules were produced. The Rules drew on the cumulative experience of members of Parliament, in adjudging what would best advance the dignity and functioning of Parliament.

24. Following a presentation by Parliament's Sound and Vision Manager, the Chief Whips' Forum agreed to the Rules without proposing any amendments. The Joint Subcommittee on Internal Arrangements then recommended to the Joint Rules Committee that the Rules be adopted. A copy of the progress report of the Joint Subcommittee on Internal Arrangements is annexed, marked '**BM5**'.

25. The Rules were then considered by the Joint Rules Committee at a meeting on 18 March 2003. At this meeting the progress report of the Joint Subcommittee on Internal Arrangements was considered. In addition, the specific rule that provides that the camera will focus on the occupant of the Chair during incidents of disorder or unparliamentary behaviour was debated. One view that this *'could amount to censoring'* and that it is *'impractical'* was voiced and debated, as too the contrasting view that it was a *'reasonable'* measure, and that the Rules would preserve the dignity of Parliament. The concern that Parliament needed to be *'open'* was also specifically raised for consideration. It is thus apparent that Parliament itself was alive to any notion of censorship or secrecy on the one hand, and on the other, the need to ensure that Parliament's dignity and ability to continue functioning were preserved.

26. It was then agreed that the Rules would be referred back to the parties for further deliberation at the Chief Whips' Forum, after which they would be referred back to the Joint Rules Committee. A copy of the minutes of the Joint Rules Committee meeting is annexed, marked '**BM6**'.

27. The Chief Whips' Forum met on 11 June 2003. At the meeting they agreed to recommend to the Joint Rules Committee that the Rules be adopted and monitored. A copy of the recommendations of the Chief Whips' Forum is annexed, marked '**BM7**'. The chief whips of the parties in Parliament of course bring particular experience and insights to bear as regards maintaining Parliament's functioning.

28. At the following meeting of the Joint Rules Committee (on 19 August 2003) members from two parties confirmed their parties' support for the Rules; another party indicated that it was still considering the matter. It was highlighted that the Chief Whips' Forum had considered the Rules and had agreed to them in principle. A copy of the minutes of the Joint Rules Committee meeting is annexed, marked '**BM8**'.

29. A special meeting of the Joint Rules Committee was then held on 19 September 2003. After further deliberation, it was agreed that the Rules would be adopted, and that their application would be monitored. A copy of the minutes of the special meeting of the Joint Rules Committee is annexed, marked '**BM9**'.

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30. It is thus apparent that the Rules were adopted after careful consideration, various perspectives having been expressed regarding televising during disorder or unparliamentary behaviour, and a result arrived at which members across the political spectrum considered best addressed Parliament's functioning.

(ii) *Approval of the Policy*

31. In April 2005 the Secretary to Parliament established the Policy Management Unit (*'PMU'*) to co-ordinate and facilitate the re-writing and refining of existing policies, and the development of new policies.

32. The Policy on Filming and Broadcasting was one of the policies developed by the PMU. As stated above, its scope is broader than the Rules: not only does it cover the filming of parliamentary proceedings for broadcasting, but it also regulates the filming and taking of pictures within the precinct of Parliament, generally.

33. A draft of the Policy was prepared in May 2007. The parts of the Policy challenged in these proceedings are identical to the corresponding parts of the draft.

34. The PMU held workshops on their draft policies on 9 and 10 September 2008. Input on the Policy was received from Parliament's Office of the Secretary; the Legislation and Oversight Division; the Human Resources Division; the Strategic and Business Planning Division; the Financial

Management Office; and the Parliamentary Communication Services section and the Information and Communication Technology section of Parliament's Corporate Services Division.

35. It is also relevant to highlight that the Policy was prepared and approved at the same time as Parliament's Policy on Media Relations Management (*'the Media Relations Policy'*). The main purpose of the Media Relations Policy is to ensure that the business of Parliament is conducted in an open and transparent manner – by, amongst other things, providing reasonable access to the media – and to manage the relationship between Parliament and the media. It specifically allows and disallows the media access to certain areas and meetings of Parliament. The Media Relations Policy and the Policy on Filming and Broadcasting together promote the openness of Parliament to the media.

36. Thus the Policy, too, was adopted after an open, all-party process, and in the result reflects Parliament's own assessment of how the need for televising is to be balanced against the preservation of its dignity and ability to function.

37. The Policy has been in operation uninterruptedly since its adoption in 2009. I find it astonishing that the applicants suggest, now, in their supplementary affidavits for the first time, that they were not aware of its existence. On the version now advanced in the supplementary founding affidavit, the applicants contend that the Policy was *'first brought ... to*

SANEF's attention' (record, page 542, paragraph 15) on 27 January 2015. Yet they themselves admit that they made no mention in their founding affidavit deposed to three weeks later, on 16 February 2015, of what (it is now suggested) had been a startling revelation to them: that the Policy had operated for six years without their knowledge. I submit that the explanation offered for the failure to mention their unawareness is not to be accepted. Had the applicants truly been unaware of the Policy, they would have raised this, no doubt vigorously, at the workshop on 27 January 2015. They would certainly have asserted the contended fact in their founding affidavit, which was clearly prepared after they had had the opportunity to consult with the attorneys and counsel who represent them.

38. The new assertion that the applicants have conducted filming and broadcasting is unacceptable for several other reasons. Firstly, they overlook the fact that in their replying affidavit they *admitted* that the Policy has been in operation already for six years (record, page 285, paragraph 111). I am advised that this admission cannot be obliquely withdrawn – more accurately, simply contradicted – as the applicants here contrive to do. Secondly, since its approval the Secretary to Parliament has, on a day-to-day basis, authorised or refused requests made to Parliament to conduct activities covered by the Policy. Thirdly, the Policy is available on *Faranani*, which is the intranet platform used by Parliament, and when copies are requested, they are freely given.

39. Moreover, the applicants' own conduct from 2009 indicates their awareness of the requirements of the Policy. They themselves have applied for accreditation (for which paragraph 8.3.1.1(a) provides). They themselves have known that broadcasting may be made only from the official feed (paragraph 8.3.1.1(b)). Similarly, they have respected the restrictions imposed by other provisions (for instance, paragraphs 8.3.2.1 to 8.3.2.3, 8.4.2 and 8.4.3).

40. Fifthly, the Policy has been applied whenever there has been unparliamentary behaviour or disorder. The applicants themselves confirm that there have been such instances since 2009; they refer in their founding affidavit specifically to the events of 21 August 2014 and 13 (not 14) November 2014 – and now in the supplementary affidavit (by Mpumelelo Mkhabela) (record, page 541, paragraph 9) also to a *'heated exchange'* (constituting unparliamentary behaviour).

41. I deny that the applicants have accurately described what happened to the official feed on the occasions of 21 August 2014 and 13 November 2014 in paragraphs 92.1 and 92.2; I deal with this further in traversing those paragraphs.

42. Accordingly the attempt now to suggest that the Policy has been kept secret from those who have operated under it is not true. The endeavour is made only now – I shall show – in an attempt to support what the applicants have been driven to introduce as a means to attack the whole

Policy. This *in the alternative* to their original attack on the two pertinent restrictions – and in conflict, I show, with the clear statement made by the applicants that only these are in issue.

(c) *The Rules and Policy are appropriate, reasonable and justifiable*

43. At the outset, the following points relating to the relevant rule and section 8.3.3.2(a) of the Policy should be highlighted:

43.1. First, they relate only to the context in which there is disorder on the floor of the House. In other words, they apply only in the limited circumstances in which disorder prevails.

43.2. Second, during any incidents of grave disorder or unparliamentary behaviour, the public, including the media, are not excluded from the House. In other words, they are present to observe the happenings and report responsibly on them.

43.3. Third, during any such incidents *'televising may continue'*. The broadcasting of parliamentary proceedings encompasses two components; namely, a visual feed and an audio feed. Both feeds continue, but special guidelines apply to the filming for the purposes of the visual feed.

43.4. Fourth, *'grave disorder'* is treated more seriously than *'unparliamentary behaviour'*. In this regard, *'occasional wide-*

angle shots of the chamber' are authorised in cases of unparliamentary behaviour.

44. It is also relevant to highlight section 3 of the Policy, which states that

> *'Parliament will allow filming and taking of pictures of its precinct and the recording of proceedings for public broadcasting that is in the public interest and related to the main business of Parliament in conformity with acceptable standards of dignity, appropriate behaviour and conduct'* (underlining added).

45. In other words, the departure point for Parliament is that filming *is* allowed – subject only to it being in the public interest; relating to the main business of Parliament; and not compromising the dignity of the institution.

46. The main justification for the special guidelines contained in section 8.3.3.2(a) of the Policy is twofold: first, they acknowledge and preserve the *'dignity'* of Parliament; and second, in any event, incidents of grave disorder or unparliamentary behaviour do not form part of the legitimate business of Parliament.

(i) Parliament's dignity

47. Parliament plays an important role in our constitutional democracy: it provides a national forum for public consideration of issues; it passes

legislation; it oversees executive action; and it provides a national forum for the public consideration of issues affecting the provinces.

48. Parliament is the principal legislative organ of the State. It must carry out its functions without interference. For this reason, it is empowered to determine and control its internal arrangements, proceedings and procedures.

49. The preamble to the Powers Act expressly recognises the authority, independence and dignity of the legislatures and their members, which it seeks to protect.

50. For these reasons, Parliament strives in the execution of its constitutional mandate to promote and protect its dignity. In this regard, responsible broadcasting is key to maintaining the authority and dignity of Parliament.

51. Accordingly, both the relevant rule – which, I stress, is not challenged in the relief sought – and section 8.3.3.2(a) of the Policy provide that

51.1. when there is disorder in Parliament televising may continue, but the visual feed should focus on the Chair;

51.2. when members conduct themselves in poor manner and in defiance of authority, the visual feed should focus mostly on the Chair.

52. In this way, the incidents are not ignored, but the consequences that visuals of disorder and defiant conduct would have if broadcast to the world, and played repeatedly, is mitigated. An audience for conduct striking at the heart of Parliament's functioning would be guaranteed, and such ill-discipline would thereby be encouraged.

(ii) *Parliament's business*

53. As I set out above, sections 57(1) and 70(1) of the Constitution empower Parliament to make rules and orders concerning its business. The various rules and policies adopted and approved by Parliament are essential for its ordered operation.

54. When a member obstructs or disrupts Parliament's proceedings, or unreasonably impairs Parliament's ability to conduct its business in an orderly and regular manner acceptable in a democratic society, that member's conduct is not legitimate parliamentary business; rather, it is the antithesis thereof – it undermines, rather than promotes, the proper functioning of Parliament and the fulfilment of its constitutional obligations. Accordingly, there is no obligation on Parliament to broadcast such conduct, and no legitimate purpose is served through serving a constant feed in respect of it.

E. JAMMING

55. It appears that only two of the applicants' remaining complaints regarding the use of the jamming device shortly before the President's State of the Nation Address (*'SONA'*) relate to Parliament. Those complaints relate to how the device was employed in light of sections 3 and 4 of the Powers Act, and who was responsible for switching the device off.

56. In this section

56.1. first, I provide some background relating to the preparations for the SONA;

56.2. second, I clarify our role in relation to the cessation of the jamming;

56.3. third, I confirm our stance on the use of the jamming device at the SONA.

(a) Background to the SONA

57. Large events like the SONA happen within the parliamentary precincts at least once or twice a year. The standard practice for events of this nature is for the Minister of State Security, or a representative from his/her office (*'the Minister'*), to inform us that they propose to attend to the security arrangements for the high-ranking officials who will be present at the event.

58. In the days running up to the SONA the Minister informed us at a briefing at Parliament that the National Joint Operational and Intelligence Structure proposed to attend to the security arrangements for the officials who would be attending the event. We were not informed of the specific interventions that would be applied to avert any security threats. Operational details are not disclosed to us. In particular, we were not advised that the jamming of radio signals would take place shortly before the SONA.

(b) *Our role in the cessation of the jamming*

59. The jamming of the radio signal shortly before the SONA came as a surprise to us. As I set out in my first affidavit as soon as I became aware of the issue, I requested the Secretary to Parliament to investigate the cause of the interference. He then left the Chamber.

60. While he was outside, he was informed by parliamentary staff members that the problem had been resolved. He then returned to the Chamber and advised me accordingly. At that point, I advised the joint sitting that the issue had been resolved, and we continued with the proceedings.

(c) *Our stance on the use of the jamming device at the SONA*

61. As I highlight in my first affidavit, we seek to ensure that the proceedings of Parliament are conducted in an open and accountable manner. We

also acknowledge that during open sittings, members, the public and the media rely on telecommunications services.

62. The fourth respondent has explained that the device ought to have been switched off when the President entered the chamber, but that the member who was responsible for its operation, in error, failed to do so. We are satisfied that the incident was a once-off occurrence. We accordingly have no reason to believe that telecommunications will be hindered during open sittings in the future. In the circumstances, the declaratory relief sought by the applicants as against Parliament would be purely academic. Parliament and the applicants have no true dispute in relation to it, despite the endeavours in the supplementary affidavits to contrive one.

63. I also highlight in my first affidavit that Parliament initiated an investigation (at its own instance) into the use of the device before these proceedings were even brought. In addition, the first to third respondents have responded to all of the questions set out in paragraphs 5.6.2.1 to 5.6.2.4 above. There is no basis whatsoever for the applicants to set the parameters of, or to dictate the timeframes for, the investigation. They are free to assess the report – when it is released – and to consider at that stage such response as might then be thought appropriate. Subjecting Parliament to the continued control of the courts is in principle problematical and not justified by the extraordinary single instance which the applicants seek to invoke for a structured interdict.

F. *AD SERIATIM* RESPONSE

64. To the extent that any averments made by the applicants differ from what I have stated above and in my first affidavit, they are denied. Accordingly, it is not necessary for me to respond to every paragraph contained in the applicants' affidavits delivered to date. I respond only where necessary.

(a) *Applicant's founding affidavit – Phaledi Gwangwa (16 February 2015)*

65. Ad paragraph 34.1

I deny that there was any misdirection of the visual broadcast during the SONA. Parliament's Sound and Vision Unit operated in accordance with the Rules and Policy.

66. Ad paragraph 35

The facts set out in this paragraph are dealt with in paragraphs 69 and 70 below.

67. Ad paragraphs 36 and 37

I deny, for the reasons set out above, that Parliament has an obligation to broadcast visuals of disorder in the Chamber, and that the public has a corresponding right to view such visuals.

68. Ad paragraph 91

I deny that the audio and visual feed that was broadcast during the SONA deprived the public of meaningful information on what was happening in the Chamber. For a short interlude, and in accordance with the Rules and Policy, the camera focused on the occupants of the Chair, thereby not showing *'disorder'* in the House and disregard towards the presiding officers. The audio and visual feed continued, and the media representatives who were present reported extensively on the incident.

69. Ad paragraph 92.1

The applicants are correct to admit that the events of 21 August 2014 amounted to disorder, such that I was obliged to suspend the sitting. It is indeed correct that what ensued was not *'captured on the official parliamentary feed'*. This is precisely because the Rules and the Policy were applied. There was no expression of surprise by the applicants at the time. Clearly to my mind they were fully aware of the applicable restrictions, and accepted their application.

70. Ad paragraph 92.2

The applicants do not record accurately what happened on 13 (not 14) November 2014. In fact, the proceedings had to be suspended on no less than three occasions before the House adjourned. Pursuant to the Rules and Policy, filming and broadcasting ceased during those periods.

Again, the applicants displayed no surprise or unawareness in relation to the restrictions. They accepted that they applied in circumstances of disorder. The suggestion for the first time now (paragraphs 40 to 44 of the supplementary founding affidavit) that they were unaware prior to January 2015 of the restrictions cannot be accepted.

71. Ad paragraph 103

I deny that the application of the Rules and Policy results in an inaccurate reflection of the proceedings of Parliament.

72. Ad paragraphs 128 and 129

I deny, for the reasons set out above, that Parliament has an obligation to broadcast visuals of disorder in the Chamber, and that the public has a corresponding right to view such visuals.

73. Ad paragraphs 130, 132 and 133

I deny, for the reasons set out above, that the Rules and Policy are unconstitutional.

(b) *Applicants' replying affidavit (2 March 2015)*

74. Ad paragraphs 31 to 37

I deny, for the reasons set out above, that Parliament's explanation regarding the jamming issue is contradictory.

75. Ad paragraph 66

I deny, for the reasons set out above, that the Rules and Policy are inconsistent with the rights and values as contained in the Constitution.

76. Ad paragraph 71.5

I deny, for the reasons set out above, that Parliament failed to apply its mind to the Rules and Policy when they were adopted and approved.

77. Ad paragraph 98.3

I deny, for the reasons set out above, that the Rules are inconsistent with the Constitution.

(c) *Applicants' supplementary affidavit – Phaledi Gwangwa (18 March 2015)*

78. Ad paragraphs 22 to 25

I deny, for the reasons set out above, that Parliament failed to act in accordance with sections 3 and 4 of the Powers Act. In compliance with

the Powers Act we permitted the Minister to perform policing functions in the precincts of Parliament for the purposes of the SONA.

79. Ad paragraph 29

79.1. As I set out in my first affidavit, Parliament has a general duty to ensure that its proceedings are conducted in a manner that promotes openness, transparency and accountability. Parliament encourages the public and the media to attend and report on its proceedings.

79.2. As I also set out in my first affidavit, we did not anticipate the use of a jamming device. In addition, according to the Minister its continued – but temporary – use after the President entered the Chamber was not intended.

79.3. Given the Minister's acknowledgment of the mistake, as well as our acknowledgment of a general duty to ensure the openness of Parliament, obtaining declaratory relief to the effect that the continued use of the device was unconstitutional and therefore unlawful, will serve no purpose whatsoever.

80. Ad paragraphs 30 and 31

As I confirm above, Parliament immediately ordered an investigation into the use of the jamming device. The investigation is still pending.

However, there is no basis for the applicants to set the parameters of the investigation already ordered, or to dictate the timeframes for the investigation. As regards the knowledge and involvement of myself and the second and third respondents in relation to the device and its switching off, I have already addressed this. I do not accept that our explanation contradicts that of the Minister. I also deny that *'Parliament ... abdicated all responsibility ... to the security agencies, contrary to the provisions of ss 3 and 4 of the [Powers] Act'*.

81. Ad paragraph 32

I deny that there are material inconsistencies, or that Parliament has not been *'entirely forthright'* with the Court.

82. Ad paragraph 34

To the extent that the applicants suggest that the investigation Parliament has ordered is not coherent or honest, this suggestion is denied.

83. Ad paragraph 35

For the reasons stated, it is denied that the unique event in relation to the device *'has exposed a tension between the executive and [legislature]'*, and that there is no *'consistent story'* (as the applicants describe it). I

also deny that the single event demonstrates any *'worrying tendancy to allow the security services free reign [sic]'*.

84. Ad paragraphs 39 to 41

84.1. In these paragraphs the applicant's seek to impugn the Policy based on what they do *not* know about the process through which it was approved. It is correct that what the applicants set out here manifests that they *'do not have complete knowledge of how the Policy was adopted'*. I have addressed this fully in paragraphs 23 to 41 above.

84.2. Based on their incomplete knowledge they assert that the Policy was passed in a procedurally unfair manner and that it is therefore irrational and invalid.

84.3. It is not apparent what the deponent means by his reliance on *'what we have been able to determine from the personal experience of our journalists'*. This allegation is too vague for me to address, other than to deny it. It is also, I am advised, clear hearsay – this in an application which is no longer being heard on an urgent basis. I also do not know what is meant by *'the publically available records'* on which the deponent purports to rely. For the reasons set out above I deny these contentions.

84.4. Moreover, I am advised that given the time that has passed since the Policy was approved – namely, six years – it is no longer open to the applicants to challenge it on the basis of a contended lack of consultation. As I have demonstrated, the Policy has been applied to the applicants throughout this period. They have sought accreditation under it. The contention that they first learnt of its existence on 27 January 2015 – yet were not moved by the suggested revelation to make it a central allegation in their founding affidavit – cannot be accepted. In their replying affidavit the applicants admit that Parliament has been following the Rules since 2009 (record, page 285, paragraph 111).

84.5. In addition, the recent shift in the applicants' case, as well as their sudden attack on the Policy as a whole – for the sake of two visual broadcasting exceptions they do not like – is in itself unreasonable and opportunistic. It is opportunistic because it is purely the result of the fact that in argument for the respondents at the hearing relating to the part A relief, it was pointed out that there was no reasonable prospect that the Court could grant final relief in the form of interdicting two provisions in the Policy, while leaving the Policy itself *in esse*.

85. Ad paragraph 42

I deny that what the deponent admits was an assumption made in his founding affidavit was at all reasonable. I have pointed to the facts which demonstrate the applicants themselves have acted for nearly six years within the ambit of the Policy. I also have shown that the prior events of disorder, most recently on 27 August 2014 and 6 and 13 November 2014, support this.

86. Ad paragraph 43

86.1. It is inconceivable that the applicants (as the deponent suggests) first *'had the opportunity'* to investigate the existence of the Policy after the hearing for part A relief. It cannot be credited that the applicants responsibly acted within the four corners of the Policy for nearly six years without knowledge of the specific constraints it imposed. This is hardly consistent with their stance of being a watchdog. Moreover, even if the applicants had by coincidence simply acted within the Policy for six years, on their own showing the disorderly events of last year, and the consequences for the feed, would have prompted consideration as to what constraints existed.

86.2. Once again the deponent resorts to hearsay. I do not accept, moreover, for the reasons already stated, that at the meeting on

27 January 2015 *'none of the journalists present were [sic] aware of the Policy's existence'*.

86.3. The deponent seeks to make much of the fact that the Policy *'is not presently available'* on Parliament's website. I have already drawn attention to the fact that the two provisions material to the applicants' complaint are not in substance different from those in the Rules. It has never until now been the complaint that the applicants are unaware of the restrictions applied to visual and audio broadcasting. Section 21 of the Powers Act expressly authorise these. No surprise was expressed at the meeting of 27 January 2015 in relation to the Policy, or Rules. These were always available on request. I cannot credit that the applicants would have acted for six years in compliance with requirements of which they were unaware.

87. Ad paragraphs 45 to 55

For the reasons stated, the assumption on which the applicants contend for the irrationality and invalidity of the Policy is denied. I am advised that, in any event, the argumentative material regarding procedural and substantive irrationality is unfounded for reasons which are properly a matter for legal argument. I would note that the applicants confuse (particularly in paragraph 48) the Rules for the Policy. I reiterate that, having kept silent while acting consistently within the constraints of both

the Rules and the Policy for six years, the applicants have only been driven now to assert that the Policy, as an entirety, is procedurally and substantively irrational. They have resorted to this because of the evident difficulty they face in their original attack on the two visual broadcasting exceptions. Hence, the need to find a means – significantly, in the alternative – of attacking the entirety.

88. Ad paragraphs 56 to 63

88.1. I am advised that this is again a matter for legal argument. It is not accepted that what are or are not *'the duties of broadcasters'* determines the issue of what Parliament may restrict by way of visual broadcasting – pursuant to section 21 of the Powers Act, the Rules which give effect to it (neither of which is challenged), and the Policy.

88.2. As I set out above, the two main reasons for the two visual broadcasting exceptions are to acknowledge and preserve the dignity of Parliament, and to broadcast only the legitimate business of Parliament. It is for Parliament, not the media, to apply Parliament's own Rules and Policy.

G. CONCLUSION

89. In the circumstances, the first to third respondents ask that the application for the relief sought in part B of the applicants' amended notice of motion be dismissed.

.....
BALEKA MBETE

I certify that–

(a) the deponent–
  (i) acknowledged that she knows and understands the contents of this declaration;
  (ii) informed me that she does not have any objection to taking the prescribed oath;
  (iii) informed me that she considers the prescribed oath to be binding on her conscience;

(b) the deponent then uttered the words, 'I swear that the contents of this declaration are true, so help me God';

(c) the deponent signed this declaration in my presence at

CAPE TOWN on the .....27... day of MARCH 2015.

Sgt. 0532522-6
WM W.J. BARNES
.....
Commissioner of oaths

Full name: William BARNES

Business address: Belvedere Bldg Cape Town - Plein Street.

Designation: SERGEANT

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