THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 784/2015

In the matter between:

PRIMEDIA BROADCASTING (A DIVISION OF PRIMEDIA (PTY) LTD)	**FIRST APPELLANT**
SOUTH AFRICAN NATIONAL EDITORS' FORUM	**SECOND APPELLANT**
RIGHT2KNOW CAMPAIGN	**THIRD APPELLANT**
OPEN DEMOCRACY ADVICE CENTRE	**FOURTH APPELLANT**

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**

Neutral Citation: *Primedia Broadcasting v Speaker* (784/2015) [2016] ZASCA 142 (29 September 2016)

Coram: Lewis, Cachalia, Tshiqi, Swain and Zondi JJA

Heard: 7 September 2016

Delivered: 29 September 2016, corrected 23 November 2016

Summary: Constitutional law: Parliament: The rules and policy adopted by Parliament governing the broadcast of disorder in the Parliamentary Chamber violate the public's right to an open Parliament and are unconstitutional and unlawful. The disruption of the cell phone signal in Parliament during the State of the Nation address was in contravention of the s 4(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 and was unlawful.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Dlodlo and Henney JJ concurring and Savage J dissenting, sitting as court of first instance): reported *sub nom Primedia Broadcasting Ltd & others v Speaker of the National Assembly & others* 2015 (4) SA 525 (WCC) .

1 The appeal is upheld with the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'(a) It is declared that clause 8.3.3.2 of Parliament's Policy on Broadcasting and Rule 2 of Parliament's Television Broadcasting Rules of Coverage headed 'Disorder on the Floor of the House' are unconstitutional and unlawful in that they violate the right to an open Parliament.

(b) It is declared that the manner in which the State of the Nation proceedings in February 2015 was broadcast was unconstitutional and unlawful.

(c) It is declared that the use of a telecommunication signal jamming device in Parliament, without the permission of the Speaker of the House of Assembly and the Chairperson of the National Council of Provinces, is contrary to s 4(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 and is unlawful.

(d) The respondents are ordered to pay the costs of the application, including the costs of two counsel.

JUDGMENT

Lewis JA (Cachalia, Tshiqi, Swain and Zondi JJA concurring)

[1] Democracy in South Africa is predicated on open government in which all citizens participate. The Constitution thus affords all South Africans the right to see and hear what happens in Parliament. Section 59 of the Constitution deals with

'Public access to and involvement in National Assembly' and s 72, in identical terms (but with reference to the Council), deals with public access to and involvement in the National Council of Provinces. Section 59 reads:

'(1) The National Assembly must—

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but *reasonable measures* may be taken—

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and where appropriate, the refusal of entry to, or the removal of, any person.

(1) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.' (My emphasis.)

[2] Of course not all members of the public are able to attend sittings of Parliament. But the media is able to bring to their attention what happens in sittings by virtue of radio and television broadcasts, through newspapers and now also through social media such as Twitter. In so far as television and radio broadcasts are concerned, s 21 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (the Powers Act), provides for regulation of the broadcast feed. It reads:

'(1) 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.

(2) No person is liable to civil or criminal proceedings in respect of the broadcasting, televising or electronic transmission of proceedings of Parliament or a House or committee if it has been authorized, under subsection (1) and complies with the conditions, if any, determined under that subsection.'

[3] Parliament has adopted both a broadcasting policy and rules pursuant to s 21 of the Powers Act: the constitutional validity of certain provisions of the rules and policy is challenged in this matter. I shall deal with their precise terms in due course.

The trigger for the constitutional challenges is the events that took place in Parliament on 12 February 2015 when the President of the Republic, Mr Jacob Zuma, was scheduled to address a joint sitting of Parliament, delivering the State of the Nation Address (SONA).

[4] The appellants are a broadcasting company, Primedia Broadcasting, A Division of Primedia (Pty) Ltd (Primedia); the South African National Editors' Forum (SANEF), a non-profit organization whose members are editors and journalists; the Right2know Campaign, and the Open Democracy Advice Centre, both of which are civil society organizations that promote openness and public awareness of the right of access to information in the public domain. The appellants maintain that the respondents, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces, the Secretary to Parliament and the Minister of State Security violated the public's rights to see and hear what was said and done in Parliament on 12 February 2015 in two ways.

[5] First, the State Security Agency (the Agency), without seeking the authority of Parliament, employed a device that disrupted – jammed – telecommunication signals when the sitting began. Second, when there was a disruption of the proceedings at the start of the sitting, the parliamentary television broadcast feed was limited to showing the face of the Speaker, Ms Baleka Mbete, and showed nothing of a scuffle that broke out between members of the Economic Freedom Fighters (EFF) and security officials as they tried to force EFF members of Parliament out of the Parliamentary chamber.

[6] The use of the jamming device precluded Members of Parliament (MPs) and journalists from using their cell phones to inform the public, outside Parliament, what was happening at a significant national event, the SONA. When there was loud and angry protest by those in the House about the jamming, the Speaker asked the Secretary to investigate what was happening and the signal was restored. The explanation for the jamming, which was that it was inadvertent, shall be discussed later. The appellants sought an urgent order in the Western Cape Division of the High Court that the jamming of the signal was unlawful and unconstitutional. A

majority of the full court that heard the application (Dlodlo and Henney JJ, Savage J dissenting) refused that relief, but gave leave to appeal to this court.

[7] The second violation complained of by the appellants is that members of the public were deprived of the right to see and hear what happened in Parliament when members of the EFF asked the President when he would pay back the money that had been spent on his private homestead in KwaZulu-Natal, Nkandla. The Speaker refused to allow the questions. The EFF MPs refused to back down. The Speaker ordered them to leave the Chamber. They refused. She requested the Serjeant-at-Arms to remove the MPs. She then called in a large number of men whom she referred to as 'the parliamentary protection services', and a violent altercation ensued. The EFF MPs were forcibly removed from the Chamber.

[8] When the members of the protection services entered the Chamber, the broadcasting feed was focused on the Speaker and the Chairperson of the Council. People outside the Chamber could thus not see the interaction between the EFF MPs and the security staff through official means. Journalists who took videos or photographs of the scuffle in fact did broadcast the activity in Parliament, but against the provisions of s 21 of the Powers Act, and in violation of the rules and the policy of Parliament on broadcasting. The public accordingly had to rely on poor and unauthorized cell phone broadcasts or second-hand information on what had happened. The appellants had thus also applied for an order (at the same time as they applied for the order that use of the jamming device was unlawful) that the respondents should ensure the openness of Parliament and that the manner in which the live broadcast had been made was unlawful. In Part A of the application they had sought an urgent order that the post-SONA debate in Parliament be open, but that was refused, and the appellants persisted only with Part B of the relief asked for.

[9] As the proceedings developed in the Western Cape Division, the applicants discovered the existence first of the broadcast policy and later of the rules. They amended the relief sought to include an order that the rules and policy that precluded coverage of the scuffle between the security staff and the EFF MPs were unconstitutional. (Initially the appellants had also asked for an order that the respondents investigate the use of the jamming device, but had abandoned that by

the time of the hearing a quo.) The majority of that court refused all the relief sought in this regard as well, but granted leave to appeal to this court.

The procedural issue

[10] Parliament has made much of the late attack, in the course of the proceedings in the court a quo, by the appellants on the policy and the rules. The appellants, argues Parliament, should not be permitted to make up their case as they go along. While that is, of course, the usual rule, it must be borne in mind that the application was brought as one of urgency. At the time of instituting the application, the policy was not well-known, although it was adopted in August 2009. The policy was brought to the attention of SANEF only in late January 2015, when a meeting between representatives of Parliament and members of SANEF was held to discuss events of the previous year, and the coverage that SANEF considered inadequate.

[11] The broadcasting rules were adopted in September 2003. Primedia and the other appellants were made aware of the existence and content of the rules only when Parliament filed its answering affidavit in Part A of the application. The appellants contend that since the rules inform the policy, and they are in substantively the same terms, Parliament is not prejudiced by the late amendment to the notice of motion that seeks to challenge both the policy and then the rules.

[12] While Parliament is skeptical about the professed ignorance of the appellants, given that they have covered Parliamentary proceedings since the dawn of democracy in 1994, the fact is that the rules in question deal with grave disorder and unparliamentary behaviour. It was only on 21 August 2014 that the rules and policy were first invoked by Parliament to prevent the broadcasting of EFF MPs being forcibly removed from Parliament. The sitting was suspended. On 6 November 2014 a heated exchange between an EFF MP and the Speaker occurred. The broadcast heard and shown was focused on the Speaker and the incident was not broadcast.

[13] SANEF wrote to Parliament on 12 November 2014 referring to these events and expressing its concern about the impact on media freedom of cutting the live feed when there were disruptions of the proceedings. They asked for a meeting to be held as a matter of urgency. That meeting, with representatives of Parliament, SANEF and the Press Gallery Association, was held only on 27 January 2015.

SANEF became aware of the policy on broadcasting and its contents only then. It recorded its concerns about the policy on 30 January 2015, stating that it was probably 'in conflict with the constitutional values of transparency, accountability and openness that should underpin the activities of the legislature'.

[14] In my view, the explanations proffered by the appellants for the late attack on the policy and the rules are reasonable. No prejudice was suffered by Parliament since the same principles underlying the demand for an open and transparent Parliament underlie the attack on the constitutional validity of the policy and rules. I shall accordingly consider the appellants' complaint about the lack of constitutional compliance in the policy and rules, and I shall do so together since, save for one definition in the rules that the policy does not contain, they are in the same terms.

The provisions of the policy and the rules

[15] As Parliament points out, the appellants do not attack the validity of s 21 of the Powers Act, pursuant to which the policy and rules were adopted. It accepts that Parliament may determine the rules regulating the broadcasting of Parliamentary proceedings. But, they argue, the rules must be framed in such a way as to ensure that the public may see for itself, and hear, precisely what happens in Parliament. People are entitled to see the disruptive behaviour of public representatives and the response to it by forcible removal of them from the Chamber by security staff. Measures to ensure that the broadcast meets the constitutional requirements of openness and public participation must be reasonable, and not amount to censorship. Indeed, ss 59(1) and 72(1) of the Constitution expressly state that reasonable measures may be taken to regulate public access; and ss 59(2) and 72(2) provide that the public may not be excluded from sittings of committees 'unless it is reasonable and justifiable to do so in an open and democratic society'.

[16] The general policy statement in para 3 of Parliament's Policy on Filming and Broadcasting is that:

'Parliament will allow filming and the taking of pictures of its precinct and the recording of proceedings that is in the public interest and related to the main business of Parliament in conformity with acceptable standards of dignity, appropriate behavior and conduct.' Paragraph 8.2.5 (d) provides that filming in

chambers can be done only with the permission of the Speaker or the Chairperson presiding. The broadcast and rebroadcast of Parliamentary proceedings may be made only from the official composite sound and visual feed provided by the Sound and Vision Unit (SVU) of Parliament (para 8.3.1.1(b)). Broadcasting on television must respect the 'dignity and decorum of Parliament' and must be used only for the purposes of fair and accurate reporting or proceedings (para 8.3.1.1(c)).

[17] Paragraph 8.3.2.2 of the policy deals with 'Style and Presentation'. The Director of the SVU is given guidelines for filming and subpara(d) requires that the Director, as a matter of general practice, must 'switch to a picture of the occupant of the Chair whenever he or she addresses the House: the principle must be applied all the more strictly during any incidents of disorder or altercations between the Chair and other Members'. The paragraph deals generally with how proceedings are to be filmed.

[18] Paragraph 8.3.3 of the policy deals with the 'Management of disorder'. The first subpara relates to disorder in the public galleries. Paragraph 8.3.3.2 regulates the filming of disorder on the floor. It reads:

'Disorder on the floor of the House:

(a) Televising may continue during continued incidents of grave disorder or unparliamentary behaviour for as long as the sitting continues, but only subject to the following guidelines:

(i) On occasions of grave disorder, the director must focus on the occupant of the Chair for as long as proceedings continue, or until order has been restored; and

(ii) In cases of unparliamentary behaviour, the director must focus on the occupant of the Chair. Occasional wide-angle shots of the chamber are acceptable.'

Paragraph 2 of the policy defines unparliamentary behaviour as 'any conduct which amounts to defiance of the person presiding over the proceedings, but which falls short of grave disorder'. The appellants argue that para 8.3.3(a) is unconstitutional and thus unlawful.

[19] Rule 2 of the Rules of Parliament regulating 'Television Broadcasting: "Rules of Coverage", headed 'Treatment of Disorder', is virtually identical to para 8.3.3, save that it includes a definition of grave disorder. Rule 2(a) states that '[b]y "grave disorder" is meant incidents of individual, but more likely collective misconduct of

such a seriously disruptive nature as to place in jeopardy the continuation of the sitting'. And rules 2(a) and (b) differ from the policy in that they state that in cases of grave disorder or unparliamentary behaviour 'the director should normally focus on the occupant of the Chair', whereas the equivalent provisions of the policy require that the director 'must focus' on the occupant of the Chair. The rules are thus less restrictive than the policy and confer a discretion on the director. I shall refer generally to the provisions of both the rules and the policy attacked by the appellants as the 'disruption provisions'.

[20] Any contravention of the rules or the policy constitutes an offence, by virtue of s 27 of the Powers Act, which makes a breach of s 21 (under which the rules and policy are determined) a criminal offence punishable and liable to a sentence of a fine or imprisonment not exceeding 12 months, or both. That imposes serious consequences for anyone broadcasting information other than that obtained via the live feed of Parliament. Since many, if not most, of the journalists (and possibly MPs too) were not aware of the restrictions on broadcasting they would have been ignorant of the penalties to which they were subjected when sending out cell phone footage in respect of the grave disorder and unparliamentary behaviour that preceded the 2015 SONA. Yet but for those unlawful 'broadcasts', the public would have remained in the dark.

The right to public participation in the proceedings of Parliament

[21] The appellants argue that the Constitution creates a 'default' position that Parliamentary proceedings are open to the public and to the media. Dealing with freedom of expression and the right to open justice, Moseneke DCJ said in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masethla v President of the Republic of South Africa & another* [2008] ZACC 6; 2008 (5) SA 31 (CC) (para 39) that:

'There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice.'

And, more importantly (para 40):

'This systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the

sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of State function.' (Footnote omitted.)

[22] The founding provision of the Constitution, to which Moseneke DCJ referred, and which is significant in this matter, is s 1*(d)*:

'The Republic of South Africa is one, sovereign, democratic State founded on the following values:

. . .

(d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

[23] Referring to *Independent Newspapers*, this court in *Cape Town City v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 16, said, in relation to open justice, that the Constitutional Court had 'confirmed that the default position is one of openness'. That was said in relation to court proceedings. The same must, however, be even more true of proceedings in Parliament. The default position must be that the public has access to proceedings unless there is strong justification for departing from it. That flows too from the provisions of ss 59 and 72 of the Constitution.

[24] In *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC) paras 111-113) Chaskalson CJ explained the goal of the Constitution – the foundation of a democratic and open society. He said, after quoting the provisions of ss 59 and 195: 'The Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.'

[25] Ngcobo J approved this statement in *Doctors for Life International v Speaker of the National Assembly & others* [2006] ZACC 11; 2006 (6) SA 416 (CC) para 138, and emphasized the importance of public access to Parliament (para 137):

'Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarize themselves with the law-making process and thus be

able to participate in the future. The opportunity to submit representations and submissions ensures that the public has a say in the law-making process.'

[26] Earlier, Ngcobo J described the importance of openness in the law-making process. He said (para 115):

'The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of . . . . It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counter-weight to secret lobbying and influence-peddling.'

[27] The appellants argue that it is just as important for those who do not make submissions to Parliament, and who do not have the privilege of being in the public gallery, to know what is happening in Parliament – hence the need for media reports and broadcasting. Freedom of expression that inheres in the media (s 16(1)*(a)* of the Constitution) is of primary importance. In *Democratic Alliance v African National Congress & another* [2015] ZACC 1; 2015 (2) SA 232 (CC), Cameron J said in the majority judgment (para 122):

'The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, *encouraging debate and enabling folly and misgovernance to be exposed*. It also helps the search for truth both by individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. *Open debate enhances truth-finding and enables us to scrutinize political argument and deliberate social values*.' (My emphasis, footnote omitted.)

[28] The appellants argue that political speech is at the heart of the media's and the public's right to freedom of expression. This was the view expressed by this court in *Mthembi-Mahanyele v Mail & Guardian Ltd & another* [2004] ZASCA 67; 2004 (6) SA 329 (SCA) para 66:

'The State, and its representatives, by virtue of the duties imposed on them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties.'

The behaviour of MPs in Parliament is something which the public has the right to see and hear. It is political speech of the first order. And freedom of speech in Parliament is fundamental to an open and democratic State: *Chairperson of the National Council of Provinces v Malema & another* [2016] ZASCA 69; [2016] 3 All SA 1 (para 11).

[29] The right to vote held by all adult citizens in the country can be exercised meaningfully only if voters know what their representatives do and say in Parliament. And since the vast majority of people are not actually in Parliament, they must rely on public reports and broadcasts. As Cameron J also said in *Democratic Alliance* (above, para 135), the right of individuals to make political choices is 'made more meaningful by challenging, vigorous and fractious debate'. Whether the broadcasts relayed to the public in the manner dictated by the rules and the policy are sufficiently informative and accurate, is the essential question.

The test of reasonableness

[30] The right to see and hear what happens in Parliament is not unlimited. The appellants accept this. But, they argue, the limitations must be reasonable. Sections 59 and 72 of the Constitution expressly say so. Any measure adopted by Parliament must be objectively reasonable. If it is not, it may be subject to review and constitutional challenge. In considering whether a measure is reasonable, a court must balance parliamentary autonomy with the right of the public to participate in public affairs: *Doctors for Life* para 146.

[31] The test to be applied is not only whether the limitation is proportionate to the end sought to be achieved, but also whether other measures would better achieve the end, or would do so without limiting others' rights. This is the test in the limitations provision in the Constitution (less restrictive means to achieve the purpose – s 36(1)*(e)*). In *S v Manamela & another (Director-General of Justice Intervening* 2000 (3) SA 1 (CC), O'Regan J and Cameron J said (para 66) in a dissenting judgment, but the particular passage was approved by the majority of the court):

'The approach to limitation is, therefore to determine the proportionality between the limitation of the right considering the nature and importance of the infringed right, on the one

hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.'

[32] In determining the reasonableness of a limitation in so far as an administrative decision is concerned, where the power conferred identifies a goal to be achieved, but does not dictate a method of achieving it, a court should pay due respect to the route chosen by the decision-maker: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 24; 2004 (4) SA 490 (CC) para 48. O'Regan J, expressing this principle, continued:

'This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reason given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision . . .'.

The same principle must apply to the adoption by Parliament of measures under s 21 of the Powers Act.

The appellants' arguments that the disruption clauses are unreasonable

[33] The appellants argue that the disorder clauses are unreasonable for various reasons. First, they serve no purpose: not showing scenes of grave disorder and unparliamentary behaviour is futile. The events are reported by other means; journalists in Parliament at the time of disorder are not precluded from reporting on it. Thus the prohibition on broadcasting actual shots of disorder will not prevent the public from knowing that it has occurred. Second, although the public may learn about the incidents of grave disorder or unparliamentary behaviour, they will not learn about it through the most direct and accurate means – a television broadcast. The public may receive inaccurate or unbalanced accounts of what has happened.

[34] Thus the public is deprived of being able to see exactly what has happened, and must rely on second-hand accounts. In *Dotcom Trading 121 (Pty) Ltd v King NO & others* 2000 (4) SA 973 (C) at 987C, Brand J said that a visual recording 'most probably provides the ultimate means of communication'. And in *Multichoice (Pty) Ltd & others v National Prosecuting Authority & another: In re S v Pistorius; Media 24 Ltd & others v Director of Public Prosecutions, North Gauteng & others* 2014 (1) SACR 589 (GP), Mlambo JP, in dealing with the live television broadcasting of the (by now notorious) trial of Oscar Pistorius, said (para 21):

'I have found merit in the argument on behalf of the applicants [broadcasters], that acceding to an objection by Pistorius [to the extent of the broadcast] fully will perpetuate the situation that only a small segment of the community is able to be kept informed about what happens in courtrooms, because of this minority's access to tools such as Twitter. Acceding to that argument will also perpetuate the reality that the community at large remains dependent, for news on what happens in the courtroom, on the summarised versions of the journalists and reporters who follow these proceedings. These summarised versions or accounts have, in my view, been correctly categorised as second-hand, liable to be inaccurate, as they also depend on the understanding and views of the reporter or journalist covering the proceedings.'

[35] The appellants contend that accurate reporting is not only desirable but also necessary. The media has a 'responsibility to report accurately' because the consequences of inaccurate reporting can be harmful: In *Brummer v Minister for Social Development* & others [2009] ZACC 21; 2009 (6) SA 323 (CC) Ngcobo J said that access to information is fundamental to the rights guaranteed by the Constitution. He said (para 63):

'[A]ccess to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to impart information or ideas. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic State. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.' (Footnotes omitted.)

[36] The Broadcasting Policy itself requires fair and accurate reports of proceedings (clause 8.3.1.1(c) above). The appellants argue that preventing the public from seeing and hearing scenes of grave disorder and unparliamentary behaviour must give rise to inaccurate or less accurate reporting. They rely in this regard also on a dissenting judgment in a decision of the Canadian Supreme Court in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 403*e-g*, where Cory J said:

'If Canadians are to have confidence in the actions of their elected representatives, they must have accurate information as to what has transpired in the legislative assemblies and House of Commons. Informed public opinion is the essential bedrock of a successful democratic government. Accurate information can only be obtained by the public through the work of a responsible press which must today include television coverage.'

Cory J continued (at 408*i*-409*a*):

'The video camera provides the ultimate means of accurately and completely recording all that transpires. Not only the words spoken but the tone of voice, the nuances of verbal emphasis together with the gestures and facial expressions are recorded. It provides the nearest and closest substitute to the physical presence of an interested observer.

So long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it. How can it be said that greater accuracy and completeness of reporting are to be discouraged? Perhaps more Canadians receive their news by way of television than by other means. If there is to be informed opinion in today's society, it will be informed in large part by television reporting.'

[37] The appellants point out that the majority of that court differed with Cory J only because it held that a decision to remove strangers from Parliament was part of Parliament's privilege that originated in English rules. The South African constitutional provisions requiring public participation in an open Parliament are very different.

[38] The third ground for contending that the disorder provisions are not reasonable limitations on the right to an open Parliament is that the public has an interest in knowing about incidents of grave disorder. It has the right to know who causes it and who regulates it. The disorderly conduct of MPs – public representatives of the people – is a matter of public concern. South Africans have a right to know how Parliamentarians and parliamentary officials behave. It is not only proper behaviour that is of concern: 'loud, rowdy and fractious' political life is good for democracy, said Cameron J in *Democratic Alliance* (para 133), above. The public has a right to witness it. And the public has a right to know not only what the Speaker or the Chairperson says during moments of disorderly behaviour, but also to see how MPs are treated by security staff who forcibly evict them from the Chamber. The public has a right to know how the legislative arm of government operates.

[39] The fourth reason advanced by the appellants in contending that the limitations are unreasonable is that broadcasting what happens in Parliament does not constitute support for or encouragement of disorder. Viewers are not going to embark upon disorderly conduct just because they see it. They will decide for themselves whether MPs have behaved appropriately, whether the presiding officer manages the situation properly or whether security staff use undue force.

[40] Another ground for contending for unreasonableness, in my view, is that the decision to train the camera on the face of the presiding officer when there are incidents of grave disorder or unparliamentary conduct is not that of the person responsible for a sitting: it is the Director of the SVU who decides what constitutes grave disorder or unparliamentary conduct. The Director is given a discretion to make a distinction on the basis of rules that are not clear. It is he or she who decides whether or when there is grave disorder or merely unparliamentary behaviour. On what basis? The policy and rules are not clear. The limitation on the right to an open Parliament should be clear in order to be reasonable.

The justifications for limitation

[41] Of course Parliament has tried to gainsay these grounds for claiming that the disruption clauses constitute unreasonable limitations on the right to an open Parliament. The majority of the court a quo accepted Parliament's defences. Parliament claims that just as a court has the power to tailor the manner in which proceedings are published and broadcast, as in *Multichoice*, above where Mlambo JP issued very specific directions (para 30) as to what parts of the proceedings could be broadcast and what not, so Parliament has the power to tailor the manner of the broadcast of sittings. The appellants point out, however, that in this matter we are dealing with the public's right to know what their public representatives say and do in Parliament. Any limitation on that right must be reasonable in that context. We are not concerned here with fair trial rights and an accused's right to a fair trial. A court's power to limit the broadcast of any evidence or conduct that might jeopardize a fair trial must invariably be different from Parliament's power to limit the public's right to an open Parliament. In my view that is correct.

[42] The first justification of the limitations advanced by Parliament is that the disruption provisions are necessary to protect and promote the dignity of Parliament. On the assumption that Parliament enjoys dignity, it is argued that the conduct of some MPs will cause the public to think less of the institution or its presiding officers. If the public sees such incidents, the dignity of the institution will be impaired. The contention fails to recognize that it is not the broadcast that may impair Parliament's dignity but the behaviour of MPs and parliamentary officials that do so. In any event, as Savage J observed in her dissenting judgment, members of the public in the gallery of Parliament would witness disorder and Parliament's dignity, if impaired, would suffer in any event.

[43] The appellants argue that if the Speaker or Chairperson deals lawfully and fairly with those who disrupt proceedings, and the proceedings are broadcast, the dignity of the institution would be enhanced rather than impaired. Parliament's argument, on the other hand, is that the disruption provisions temper the strong impact that a television broadcast would have. This was accepted by the majority in the court a quo. In my view, that is contrary to the right of the public to know what is happening in Parliament during a sitting. It is not for Parliament to determine how people will react to what happens in the Chamber. The public is entitled to know exactly what happens and individuals may themselves evaluate how their elected representatives fare. This justification for the limitation on the right to an open Parliament has no basis.

[44] Secondly, Parliament contends that the public has a right to view only the legitimate business of Parliament. Incidents of disruption and disorderly behaviour are the antithesis of legitimate Parliamentary business. They undermine the proper functioning of Parliament rather than promote it. Thus, goes the argument, there is no parliamentary obligation to foster such conduct by providing an unlimited audience for it. It is reasonable thus to preclude the televising of disorderly MPs, for they are not engaged in the legitimate business of Parliament.

[45] However, the appellants ask only that the events while Parliament is in session be broadcast. The fact that MPs or the Speaker or Chairperson may act in an unacceptable manner does not mean that the business of Parliament becomes

illegitimate. And members of the public have the right to see and hear elected members of Parliament misbehave. They are entitled to know what happens in the legislature. I consider that this justification for the disruption provisions must fail.

[46] Thirdly, Parliament contends that the limitations to the right to an open Parliament resulting from the disruption provisions are minor in nature. Only serious disruptions may not be broadcast and other reporting and public access are not prevented. The appellants argue, rightly in my view, that because broadcasting provides greater accuracy than other forms of reporting, it is necessary, in order to discharge the duty to report accurately, to ensure the broadcast of the scenes of disruption in the Chamber. And the public is entitled to see and hear scenes of disruption so that it can call MPs to account for their conduct.

[47] The appellants argue further that 'it is at the margins where speech is disruptive, offensive and controversial that the right to freedom of speech has real practical value'. If the right to an open Parliament were limited to proceedings that do not involve controversy and bad behaviour, the right would be meaningless. Moreover, the fact that disruption is reportable by other means does not detract from the fact that most people obtain their information from watching television: precluding broadcasts of disruption thus deprives most of the general public from gaining that information. The finding by the majority of the court a quo that the limitation of the right to an open Parliament is of a minor nature, 'compared to the damage that may arise in the absence of these measures' is thus to be rejected.

[48] The fourth argument for the reasonableness of the limitations raised by Parliament is put thus in the Speaker's answering affidavit: she said that the disruption provisions are such that '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.'

[49] The court a quo accepted the contention, despite the fact that it was not substantiated. Savage J, on the other hand, held that even if broadcasting did

increase disorder, the justification amounted to 'an authoritarian approach to openness and media freedom, one similar to that adopted by the apartheid State'. She added that 'It is an approach that is not condoned by our Constitution and is out of keeping with the fundamentals of our constitutional democracy.' I agree.

[50] Moreover, the prohibition on publication on the assumption that it may cause harm, is lawful only where the prejudice that it would cause is demonstrable. 'Mere conjecture or speculation that prejudice might occur will not be enough': *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; 2007 (5) SA 540 (SCA) para 19. Parliament did not show that the broadcast of disorderly conduct would in any way cause harm, let alone encourage further disorder.

[51] The last argument raised by Parliament in relation to the reasonableness of the limitations is that they amount to international best practice. It asserted in its papers that the disruption provisions are drawn directly from the rules of Parliament in the United Kingdom. That may be correct, but that does not mean that the rules are consonant with our Constitution. Parliament referred to parliamentary rules around the world that are similar. The appellants, on the other hand, referred to rules of the Scottish Parliament and of the Indian lower house, the Lok Sabha, as well as the European Union. Those legislatures allow uncensored broadcasts of proceedings. The comparative analysis is interesting, but in the end, this court must determine the constitutionality of the disruption provisions in the context of the nature of our democracy and the provisions of the Constitution referred to earlier.

[52] I consider, therefore, that the justifications offered for the limitation of the right to an open Parliament do not survive scrutiny, and conclude that the disruption clauses are unconstitutional and thus unlawful, and that the manner in which the SONA 2015 proceedings was broadcast was unconstitutional.

[53] In view of the conclusion to which I have come it is not necessary to consider the appellant's alternative argument that the entire policy is unlawful since it was concluded through an irregular process.

The jamming issue

[54] The appellants sought an order in the court a quo that the use of a device that disrupted all cellular telephone signals during the SONA sitting was unlawful. The majority held that the relief sought was moot as the incident was isolated and a mistake had been made. Savage J, on the other hand, considered that the issue was live and that the use of the device by the State Security Agency was unlawful.

[55] In response to the application for a declaration that the use of a device to disrupt the signal in the Chamber of Parliament was unlawful, the Minister of State Security stated that the disruption when the sitting commenced was accidental. The Agency, said the Minister, was empowered to fulfill national counter-intelligence responsibilities. Counter-intelligence is defined in the National Strategic Intelligence Act 39 of 1994 as 'measures and activities conducted, instituted, or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information, to conduct vetting investigations and to counter any threat or potential threat to national security'.

[56] The Agency had determined that the risks and security threats attendant on the 2015 SONA were major. One of the threats it sought to guard against was the risk of hidden explosive devices in the precincts of Parliament that could be activated by a radio signal or a cell phone, including devices that might be carried on remote controlled drones. The Agency considered that these risks were at their highest when the President, the Deputy President and other important people were outside the Parliamentary Chamber. The Chamber itself was secure since it had been 'swept' prior to the SONA session to ensure that there were no explosive devices in the Chamber. The Agency had used the signal disrupting device to ensure that there were no threats before the President and his entourage entered the Chamber. The device was supposed to have been switched off before the session began. The technician charged with this duty had forgotten to switch the device off, something which his superior noticed as soon as he saw the protests of MPs and journalists on television. He issued an instruction to the technician to switch it off, which was done, and the signal was restored. The entire incident had been a mistake that would not be repeated, said the Minister.

[57] The Speaker, on the other hand, had professed ignorance of the device and did not know that it was in the building. She too had reacted to the protests in Parliament and asked the Secretary to Parliament to investigate. The Minister claims, and the majority of the court a quo found, that the issue was no longer live. But the appellants contend that the lawfulness of the use of a jamming device is still an issue and ask for an order that it be declared unlawful.

[58] Even if a mistake had given rise to the disruption of signals during the parliamentary session, the question remains whether the use of the device was ever lawful. If not, the issue is far from moot, and needs to be determined. In *Buthelezi & another v Minister of Home Affairs & others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA), this court held that the legality of the conduct of the Minister of Home Affairs in failing to take a decision on whether to grant a visa to the Dalai Lama, even though the purpose of the visit had long passed by the time the case was heard in the high court, remained a live issue. Nugent JA said (para 4) that 'whether or not the authorities had acted lawfully was and remains a live issue'.

[59] And in *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) (the Omar al Bashir matter), this court held that the question whether Al Bashir was immune from arrest in South Africa, even though he had already left the country, should be decided. First, because the question whether Al Bashir was immune from arrest remained a live issue and secondly because it was a matter of public importance. In my view, since the Minister has not undertaken that the device will not be used again, but instead contends that its use was lawful and that he may use it again, without Parliament's authority, the question must be determined.

[60] The appellants argue that the use of the jamming device when Parliament was in session was a breach of the right to an open Parliament, and that it was in violation of s 4 of the Powers Act. The first breach is acknowledged by the Minister. He says that it was a mistake. I shall deal only with the question whether the use of the device was also in breach of the Powers Act.

[61] Section 4 of the Powers Act, which deals with the presence of members of security services (defined in accordance with s 199 of the Constitution – that is, defence force, police and intelligence services) in the precincts of Parliament, reads:

'(1) Members of the security services may—

(a) enter upon, or remain in, the precincts for the purpose of performing any policing function; or

(b) perform any policing function in the precincts,

only with the permission and under the authority of the Speaker or Chairperson.

(2) When there is immediate danger to the life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger. Any such action must as soon as possible be reported to the Speaker and the Chairperson.'

[62] The plain purpose of s 4(1) is to protect the independence of Parliament. Only the presiding officers may decide what the security services may do on its precinct. The Speaker, as I have said, professed ignorance as to the existence of the jamming device. She had obviously not consented to its use. But she and the Minister maintain that it is but a matter of detail. She had had a meeting about security arrangements for the SONA with members of the Agency before the SONA. How it went about securing the precinct and the Chamber was not for her to determine. The Speaker knew that security arrangements would be put in place. The majority in the court a quo, although it had held that the matter was moot, found that the details of security measures were left to the discretion of the Agency.

[63] The appellants argue, however, that any action that might interfere with the ordinary functioning of Parliament, and which might threaten the openness of Parliament, would have to be specifically authorized. If the security services are entitled to take any action, or use any device it thinks fit, then s 4(1) has no purpose. They contend that the use of a signal disrupting device was not merely a detail. It was a measure implemented that could, and did in fact, interfere with communication in Parliament. The permission of the Speaker was thus required before the device was set up in Parliament. Savage J found that the use of the jamming device was contrary to the provisions of s 4(1) of the Powers Act. I agree.

[64] In the circumstances, the use of the signal disrupting device both before and during the SONA was unlawful. This judgment must not be read to suggest, however, that the use of any device or equipment by security services to execute a legitimate policing function, without the permission of Parliament, is unlawful. It is sufficient for present purposes to hold that the use of a telecommunications signal disrupting device was unlawful in the circumstances in which it was used prior to the SONA in February 2015.

[65] Accordingly, I consider that the appeal must be upheld. Although the appellants asked that this court craft broadcasting provisions for Parliament that would be lawful, I consider that that would be to intrude on the Legislature's domain. It is Parliament's prerogative and right to determine its own rules and policy, provided that the measures it adopts are reasonable limitations of the right to an open Parliament. It is sufficient that the disruption provisions be declared unconstitutional and unlawful.

[66] In the circumstances:

1 The appeal is upheld with the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

(a) It is declared that clause 8.3.3.2 of Parliament's Policy on Broadcasting and Rule 2 of the Parliament's Television Broadcasting Rules of Coverage, headed 'Disorder on the Floor of the House' are unconstitutional and unlawful in that they violate the right to an open Parliament.

(b) It is declared that the manner in which the State of the Nation proceedings in February 2015 was broadcast was unconstitutional and unlawful.

(c) It is declared that the use of a signal jamming device in Parliament, without the permission of the Speaker of the House of Assembly and the Chairperson of the National Council of Provinces, is contrary to s 4(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 and is unlawful.'

(d) The respondents are ordered to pay the costs of the application including the costs of two counsel.

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C H Lewis

Judge of Appeal

APPEARANCES

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