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**A critical analysis of political independence in the role and
responsibilities of the Speaker of the National Assembly**

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Masters in Constitutional Theory, Law and Litigation

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Abstract

The former Speaker of the National Assembly, Ms Baleka Mbete, was the subject of numerous accusations of showing partisanship towards the ruling party culminating in a case before the High Court. This permitted the ruling party to control debate in Parliament while limiting the oversight potential of Members of Parliament belonging to different political parties. The Office of the Speaker could better serve the people of South Africa if the incumbent were to be politically independent by surrendering their party membership upon election. In the British Westminster model of Parliament, upon which the South African parliamentary system is based, the Office of the Speaker is characterised by indomitable autonomy and respect. An examination into the history and origin of the Office of the Speaker in Great Britain shows that the independence of the Office is crucial in preventing the abuse of state power. A partisan Speaker is dangerous to the separation of powers as it allows the needs of the ruling party to usurp the interests of the people. Adopting a model closer to that of the British Westminster system would allow for greater accountability of the executive by allowing opposition parties to perform their constitutional oversight obligations and it would restore public faith in the legislature.

Keywords

Constitutional law; electoral reform; Parliament; Speaker of the National Assembly; Westminster model

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CHAPTER ONE: INTRODUCTION

“I therefore have sympathy with the speaker. She has to serve two conflicting masters – something that is currently impossible to do.”¹

1. Background

The Government of the Republic of South Africa is divided into three branches: the executive, the judiciary, and the legislature. The power of government is therefore distributed between these branches, with each branch is assigned duties and functions through the Constitution² and legislation. This separation of powers allows for a system of checks between each branch, ensuring there is accountability in government. Without accountability and where an abundance of power is vested in one organ or person, it may entice an abuse of power or maladministration.³

The legislative authority of the country is vested in the National Parliament. The South African Parliament is bicameral; it contains two Houses. The Upper House of Parliament is the National Council of Provinces, while the Lower House is the National Assembly. The National Council of Provinces is designed to utilise co-operative governance to enhance the representation of provinces in the national legislative process⁴ and represent the interests or concerns of provinces and local government in this process.⁵ Despite the title of the Lower House, the National Assembly is the more powerful of the two Houses.⁶ The Assembly represents the concerns and interests of the people while also mandated to scrutinise and oversee executive action. The National Assembly is, therefore, charged with holding the executive branch of government accountable.⁷ The National Assembly is also responsible for ensuring that South Africa remains a constitutional democracy by providing and guarding a government by the people.⁸ Section 42(3) of the Constitution states that the National Assembly performs these functions by electing the President, by providing a national forum for public consideration of

¹ P de Vos ‘The Speaker’s Dilemma’ available at <https://constitutionallyspeaking.co.za/the-speakers-dilemma/>, accessed on 2 March 2020.

² Constitution of the Republic of South Africa, 1996 (hereafter the ‘Constitution’).

³ GE Devenish *A Commentary on the South African Constitution* (1998) 13.

⁴ GE Devenish *A Commentary on the South African Constitution* (1998) 126.

⁵ W Freedman *Understanding the Constitution of the Republic of South Africa* (2013) 65.

⁶ K Padayachee *Advanced Constitutional Law: Assignment 2* (unpublished LAWS8ACH1 assignment, University of KwaZulu-Natal, 2020) 5-6.

⁷ Ibid. See also section 55(2)(b)(i) of the Constitution.

⁸ W Freedman *Understanding the Constitution of the Republic of South Africa* (2013) 54-55.

issues and by promulgating legislation. The National Assembly is presided over by the Speaker of the National Assembly (the Speaker), who is assisted by a Deputy Speaker.

The Speaker is elected at the first sitting of the National Assembly following the election of that National Assembly, or when there is a vacancy in the Office of the Speaker.⁹ The Speaker is elected from among the members of the National Assembly.¹⁰ The Speaker is the spokesperson and representative of the National Assembly, and it is their duty to ensure that the rights, powers and privileges of the members of the National Assembly are protected.¹¹ Devenish has described the Office of the Speaker as one “of exceptional distinction and esteem”¹² and other writers have indicated that the Speaker is critical to both the political and administrative functioning of Parliament.¹³ Control and authority over the parliamentary precincts falls under the joint responsibility of the Speaker and the Chairperson of the National Council of Provinces.¹⁴ It should also be noted that the Speaker is one of the office-bearers designated by the Constitution to fulfil the functions of the President if the office of the President is vacant, or the President is unable to perform the functions of the office.¹⁵ The National Assembly may remove the Speaker through a resolution that has been adopted by the majority of its members.¹⁶

The Speaker holds an office in a difficult and “pivotal”¹⁷ position which has been described as one that serves two masters.¹⁸ On one hand, the office requires service to the South African people in ensuring that elected Members of Parliament may voice their views and concerns. On the other hand, as an elected member of a political party, the holder may feel obligated to serve their party; and this may be required by their party’s constitution.¹⁹ There is the problem that the Speaker may choose to honour party loyalty over their loyalty to the country’s population. The majority party in Parliament thus holds a great deal of sway, as they could use their numbers to elect both the head of the executive branch (the President) and the head of the

⁹ Section 52(1) of the Constitution.

¹⁰ Ibid.

¹¹ W Freedman *Understanding the Constitution of the Republic of South Africa* (2013) 60.

¹² GE Devenish *A Commentary on the South African Constitution* (1998) 121.

¹³ PAH Labuschagne and CJ Napier ‘The Role of the Speaker in Post-Apartheid South Africa: Political Impartiality or Partisanship?’ (2015) 40(1) *Journal for Contemporary History* 41 at 41.

¹⁴ Section 3 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

¹⁵ Section 90(1)(d) of the Constitution.

¹⁶ Section 52(4) of the Constitution.

¹⁷ *Tlouamma v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa* 2016 (1) SA 534 (WCC) para 75.

¹⁸ P de Vos ‘The Speaker’s Dilemma’ available at <https://constitutionallyspeaking.co.za/the-speakers-dilemma/>, accessed on 2 March 2020.

¹⁹ Ibid.

legislative branch of government (the Speaker); thus, placing a strain on the doctrine of separation of powers, as two of the three branches of government would fall under a single political party. The Speaker as the head of the National Assembly could steer the debate away from holding the executive to account, thereby shielding the executive from scrutiny. Where the Speaker promotes the needs of his or her political party above the needs of the people, executive oversight could be obstructed, and corruption could be facilitated.

2. Speakers of Democratic Parliaments

Since South Africa's first democratic elections in 1994, the African National Congress (ANC) has managed to secure the majority of seats in the National Assembly.²⁰ With a majority of seats, the ANC has the power to nominate and elect any Member of Parliament they wish to the Office of Speaker. As a result of this, every Speaker of the National Assembly since 1994 has been a member of the ANC party.

The first democratic Speaker, Frene Ginwala, is recognised as one who maintained the traditional impartiality of the Speakership, and Parliament under her leadership between 1994 and 2004 has been described as being a "golden era."²¹ Ginwala is also credited with opening parliament to the public, thereby encouraging transparency. Despite this, she was accused of using her position to interfere with the Standing Committee on Public Accounts investigation into the arms deal which implicated ANC members.²²

Ginwala's decade in Office was followed by her deputy, Baleka Mbete. Mbete's first term (2004-2008) in Office was relatively uncontroversial, although she was accused of shielding the executive from opposition questions.²³ Further, during this term, Mbete dismissed the Westminster tradition of impartiality, arguing that the South African system allows her to remain a member of the ANC caucus even when elected Speaker.²⁴ This stance was likely further complicated by her election to the ANC National Executive Committee in 2007,²⁵

²⁰ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 27.

²¹ C Dodds 'Breakdown of a parliament in peril' *Independent Online* 7 December 2014 available at <https://www.iol.co.za/news/politics/breakdown-of-a-parliament-in-peril-1791866>, accessed 13 June 2021.

²² Ibid.

²³ Ibid

²⁴ PAH Labuschagne and CJ Napier 'The Role of the Speaker in Post-Apartheid South Africa: Political Impartiality or Partisanship?' (2015) 40(1) *Journal for Contemporary History* 41 at 53.

²⁵ Ibid.

allowing her to be involved in the policy making of the party. Mbete's first term came to an end when she was appointed Deputy President of South Africa.²⁶

Gwen Mahlangu-Nkabinde succeeded Mbete in the Office of the Speaker and is, to date, the only Speaker of the National Assembly to have no accusations of bias made against her.²⁷ Her short eight-month tenure as Speaker (2008-2009) is remembered as a time where any Member of Parliament could challenge the executive; where even ANC members would speak out.²⁸ Her term as Speaker was uneventful and brief, though it must be noted that Mahlangu-Nkabinde later went on to serve in the executive branch as a Minister.²⁹

Following the 2009 National Elections, Max Sisulu was elected Speaker of the National Assembly. Sisulu commanded respect similar to the manner in which Ginwala had before; like Ginwala he had the ability to diffuse tension within the chamber and maintain control of the Assembly.³⁰ Opposition Members of Parliament attributing his ability to control the House to his "natural authority" and charm.³¹ However, Sisulu was accused of bias and shielding the executive when opposition parties attempted to table a motion of no confidence in the President and Sisulu declared that the Rules of the National Assembly did not allow him to do so. The matter eventually made its way to the Constitutional Court which found that Sisulu had applied the Rules correctly as they stood, but the Rules were themselves unconstitutional.³² A further concern raised by Graham is that Sisulu was summoned to meet with the top officials of the ANC in 2014 after he permitted an *ad hoc* committee to be established to investigate the validity of submissions by then President Zuma regarding Nkandla; the assumption being that the officials wanted to know why Sisulu had permitted the formation of a committee without seeking permission from the ANC.³³

With the National Elections of 2014, Sisulu was replaced as Speaker and Baleka Mbete returned to the Office for her second term. This term as Speaker of the fifth democratic

²⁶ C Dodds 'Breakdown of a parliament in peril' *Independent Online* 7 December 2014 available at <https://www.iol.co.za/news/politics/breakdown-of-a-parliament-in-peril-1791866>, accessed 13 June 2021.

²⁷ Ibid.

²⁸ Ibid.

²⁹ South African Press Association 'Zuma announces cabinet reshuffle' *Independent Online* 31 October 2010 available at <https://www.iol.co.za/news/politics/zuma-announces-cabinet-reshuffle-690238>, accessed 13 June 2021.

³⁰ C Dodds 'Breakdown of a parliament in peril' *Independent Online* 7 December 2014 available at <https://www.iol.co.za/news/politics/breakdown-of-a-parliament-in-peril-1791866>, accessed 13 June 2021.

³¹ Ibid.

³² *Mazibuko NO v Sisulu NO* 2013 (6) SA 249 (CC).

³³ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 32.

Parliament was by far the most controversial term of a Speaker to date. Mbete was faced with a much more difficult situation compared to her predecessors. A new political party, the Economic Freedom Fighters (EFF), had won seats in the National Assembly and their behaviour in Parliament often led to disruptions.³⁴ Mbete's inability to control the House is perhaps epitomised by her decision to allow South African Police Force personnel into the chamber of the National Assembly to remove the EFF members. Outside of Parliament, the President (among other members of the executive) was facing numerous accusations of corruption, and the findings of the Public Protector indicated that there was some truth to these allegations.³⁵

Mbete faced claims that she had chosen to uphold party loyalty at the expense of Constitutional compliance³⁶ and prevented the opposition party from carrying out their constitutional obligations of holding the executive to account.³⁷ The result was a loss of trust in the Speaker by opposition political parties.³⁸ The issue was deemed concerning enough that the opposition parties united in tabling a motion to remove Mbete from the position of Speaker of the National Assembly³⁹ which is permitted in terms of the Constitution.⁴⁰ The motion was, however, trounced by the majority party voting in favour of the Speaker. In agreement with the allegation that the Speaker was preventing the National Assembly from holding the executive accountable, there were claims that the Speaker would use any means necessary to protect the executive as she ordered the "forceful and violent"⁴¹ removal of members of opposition parties from Parliament. As a show of mistrust of Ms Mbete, and the belief that the removal of opposition members was excessive, other opposition parties walked out of the session as a form of protest.⁴²

³⁴ C Dodds 'Breakdown of a parliament in peril' *Independent Online* 7 December 2014 available at <https://www.iol.co.za/news/politics/breakdown-of-a-parliament-in-peril-1791866>, accessed 13 June 2021.

³⁵ SM Madue 'The Role of the Speakers of Parliament in Ensuring and Sustaining Executive Accountability- the South African Experience' (2017) 9(9) *African Journal of Public Affairs* 131 at 140.

³⁶ *Economic Freedom Fighters v Speaker of the National Assembly* [2018] 2 All SA 116 (WCC) para 10.

³⁷ Ibid.

³⁸ SM Madue 'The Role of the Speakers of Parliament in Ensuring and Sustaining Executive Accountability- the South African Experience' (2017) 9(9) *African Journal of Public Affairs* 131 at 139.

³⁹ PAH Labuschagne and CJ Napier 'The Role of the Speaker in Post-Apartheid South Africa: Political Impartiality or Partisanship?' (2015) 40(1) *Journal for Contemporary History* 41 at 42.

⁴⁰ Section 52(4) of the Constitution.

⁴¹ SM Madue 'The Role of the Speakers of Parliament in Ensuring and Sustaining Executive Accountability- the South African Experience' (2017) 9(9) *African Journal of Public Affairs* 131 at 139.

⁴² Ibid.

The conduct of Mbete while in the office of Speaker gave rise to the *Tlouamma* case;⁴³ in which the applicants argued that the Speaker had acted in a manner that violated the “laws, norms, conventions and practices”⁴⁴ of the office of the Speaker, and thus had lost the confidence of all opposition parties.⁴⁵ The applicants further asked the court to declare that the Speaker was not a fit and proper person and thus should not be able to hold office as the Speaker;⁴⁶ or alternatively, the court should order that the Speaker cannot simultaneously hold office as the Speaker and hold a high office in a political party.⁴⁷ In response, the Speaker claimed that case law had overstated the role of the Speaker in discharging their duties impartially and that the Constitution permits the Speaker to retain their party membership.⁴⁸ In considering the arguments, the Court noted that the Constitution does utilise the principle of separation of powers, even if it is not explicitly stated.⁴⁹ Further, the Court investigated the powers, duties and functions of the office of the Speaker in South Africa;⁵⁰ noting that the South African Constitution and the Rules of Parliament do not provide a position on the role of impartiality in the discharge of duties by the Speaker.⁵¹ The Court ruled that the Constitution did not apply the standard of a “fit and proper” person for members of the National Assembly and thus the Court may not read in standards that were not imposed by the Constitution.⁵² The Court went on to state that the Constitution did not provide any limits on the positions a Speaker may hold in their political party while in office, and thus it would also be improper for the Court create such a limit.⁵³ The removal of the Speaker is the duty of the National Assembly under the Constitution⁵⁴ and the courts must therefore be wary of encroaching on Parliament’s Constitutional domain⁵⁵ as this would amount to overreach. The Court thus dismissed the application as the Constitution did not apply the same standards as the applicants, and the applicants had prayed for relief that exceeded the jurisdiction of the court.

⁴³ *Tlouamma v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa* 2016 (1) SA 534 (WCC).

⁴⁴ *Ibid* para 1.

⁴⁵ *Ibid* para 26.

⁴⁶ *Ibid* para 5.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* para 39.

⁴⁹ *Ibid* para 62.

⁵⁰ *Ibid* paras 75-82.

⁵¹ *Ibid* para 82.

⁵² *Ibid* para 135.

⁵³ *Ibid* para 144.

⁵⁴ Section 52(4) of the Constitution.

⁵⁵ *Tlouamma v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa* 2016 (1) SA 534 (WCC) para 155.

It is therefore important to investigate the role of the Speaker, and what responsibilities they have towards the people of South Africa. The Speaker's role is critical to the functioning of Parliament and protection of democratic ideals, especially the separation of powers. If the Speaker is acting in a partisan manner and not exercising impartiality, then the separation of the executive and the legislature may become blurred, and the legislature may fail in its duty to hold the executive accountable. It may be time for South Africa to consider a different model for the office of the Speaker or modifying our Constitutional position.

3. Research Questions

The Office of the Speaker of the National Assembly is one of the highest offices in South Africa, the purpose of this dissertation is to investigate the nature and role of political independence in this Office following the judgments passed in the *Kilian* and *Tlouamma* cases.

As part of this investigation, this dissertation will examine the origins of the position of the Speaker in South Africa. The election procedures for choosing a Speaker, the duties of the Speaker and the regulations the Speaker has to abide by will be studied and analysed. Using these inquiries, this dissertation will determine if any actions taken by South Africa's Speakers has justified a change in model for the Office of the Speaker and what alternative systems are available for such an Office.

4. Research Methodology

This study will adopt a qualitative research methodology of a doctrinal approach, making use of both primary and secondary sources. The primary sources include the Constitution of the Republic of South Africa, 1996, legislation and law reports (case law). The secondary sources include academic books, published journal articles and newspaper articles. Further, this study will compare the different models for the Office of the Speaker of the lower houses of the legislature in South Africa and the United Kingdom. Therefore, an aspect of comparative law methodology will be employed. The United Kingdom is selected as the comparator nation since South Africa's parliamentary model is derived from the United Kingdom's Westminster model, which has a strong tradition of independence in the Office of the Speaker.

5. Structure of The Study

Chapter One: Introduction

The introduction will include the background for this study, including a brief overview of the South African structure of government and the position of the Speaker of the National Assembly. This chapter also explains the problem the rational for the study as well as details regarding the research methodology that will be utilised and the purpose of the study.

Chapter Two: Constitutional and Statutory Framework

This chapter will begin with an exploration of the history of the Office of the Speaker, from its roots in the English parliament, the creation of the Office in South Africa up until the present-day position of the Office under the democratic dispensation. Under the democratic Constitution, the standing of the Office will also be considered in terms of legislation, rules and documents which apply to the Speaker to understand the role, duties, powers, and functions of the Speaker.

Chapter Three: Jurisprudence

There have been several cases dealing with the position and conduct of Speakers at different levels of government. These cases will be examined to provide context and understand the judiciary's expectation regarding the role of impartiality in the conduct of the Speaker.

Chapter Four: Comparative Analysis

Given the grievances expressed regarding the South African Speaker of the Lower House, the role of the Speaker in other jurisdictions should be looked to. The most important of these is the Westminster model for the Speaker of the House of Commons in the United Kingdom as it is this model from which South Africa has derived its own rules and traditions from. The focus of the chapter will be the independence of the office of the Speaker, how the Speaker must give up their political party association to act impartially and control the debate within the House of Commons. The chapter concludes with a comparison of the Westminster and South African systems.

Chapter Five: Analysis, Recommendations and Conclusion

Considering the historical position and the conduct of democratic Speakers, this final chapter will analyse previous suggestions for increasing the independence of the Speaker. Recent developments in case law and non-government organisation proposals will also be considered in order to make a recommendation for change to the South African parliamentary model. This recommendation will be justified based on not just the duties, powers, and functions of the Speaker, but also, the role of the Speaker in relation to the effectiveness of Parliament.

CHAPTER TWO: HISTORY AND LEGISLATIVE FRAMEWORK

1. Office of the Speaker: A Historical Background

In 1910, the Parliament of the Union of South Africa sat for the first time. This Parliament, which was established in terms of Section 19 of the South Africa Act,⁵⁶ was divided into two houses, namely the Senate and the House of Assembly.⁵⁷ Presiding over the first sitting of the House of Assembly was James Molteno, who was elected as Speaker in terms of Section 46.⁵⁸ The origins of the Office of the Speaker of the House of Assembly, however, did not originate with the South Africa Act. Instead, they may be traced back to the Office of the Speaker in the United Kingdom House of Commons.

As Kilpin points out, the position of the Speaker in the House of Commons is almost as old as the House itself and was established before the House began to keep official records.⁵⁹ The first person to have the powers of the Speaker was a knight, Sir Peter de la Mare, who attended the ‘Good Parliament’ in 1376 as a knight for the county of Herefordshire.⁶⁰ As the officer elected to preside over the House, de la Mare presented the demands of the Commons to the King in a speech that is noted as “vigorous and independent.”⁶¹ He was soon imprisoned for speaking against the monarch, and replaced by Sir Thomas Hungerford of the ‘Bad Parliament,’ who is the first person to hold the title of ‘Speaker.’⁶² However, the pattern by which future incumbents were elected from among the members of the House and were expected to gather the views of the House and make them known to the monarch was set by de la Mare.⁶³ Kilpin theorises that the Speaker had to balance their relationship with their peers in the House against their relationship with the reigning monarch.⁶⁴

⁵⁶ South Africa Act 1909, 9 Edw. VII c. 9 (Hereafter the ‘South Africa Act’).

⁵⁷ Section 19 of the South Africa Act provided that “[t]he legislative power of the Union shall be vested in the Parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly”.

⁵⁸ Section 46 of the South Africa Act provided, *inter alia*, that ‘[t]he House of Assembly shall, before proceeding to the dispatch of any other business, choose a member to be the Speaker of the House, and, as often as the office of the Speaker becomes vacant, the House shall again choose a member to be the Speaker’; See also Kilpin RP *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 173-175 for roll of Speakers.

⁵⁹ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 161.

⁶⁰ M MacDonagh *The Speaker of the House* (1914) 120-121.

⁶¹ *Ibid* at 122.

⁶² M MacDonagh *The Speaker of the House* (1914) 115 read with 122.

⁶³ de la Mare was later freed and re-elected Speaker in 1377 (M MacDonagh *The Speaker of the House* (1914) 115 read with 123).

⁶⁴ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 161.

Despite the pattern set by de la Mare, the independence of the Office of the Speaker was only entrenched over 250 years later when William Lenthall was elected as Speaker of the ‘Long Parliament’⁶⁵ in 1640.⁶⁶ As the Speaker, Lenthall asserted that his first allegiance was to Parliament and not to the King. This assertion was tested on 4 January 1642 when King Charles I entered the House of Commons with an escort of 400 soldiers with the goal of arresting five members he accused of treason.⁶⁷ Usurping the chair of the Speaker, the King asked Speaker Lenthall where the men were. Lenthall knelt before the King and famously replied “May it please your Majesty, I have neither eyes to see nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here.”⁶⁸ This would lead directly to the English Civil War (1642-1651) and the execution of King Charles.⁶⁹ Charles remains the first and only monarch to have entered the House.⁷⁰

While the independence of the Office of the Speaker was entrenched by Lenthall, the impartial nature of the Office was only established nearly a century later when Arthur Onslow was elected as Speaker.⁷¹ Apart from introducing important administrative reforms in the House of Commons, Onslow recognised the importance of maintaining the impartiality of the Office of the Speaker.⁷² He thus ensured that all members were regarded as equal regardless of their party affiliation.⁷³ Onslow developed high standards for the Office of the Speaker which earned him a reputation for his integrity.⁷⁴ Under his leadership procedures of the House were strictly followed as they protected members against interference by their own parties and by Ministers. Graham recognises Onslow as the Speaker who restored credibility to the Office, and as the Speaker who ensure future speakers would renounce their party affiliations to maintain impartiality and integrity while in Office.⁷⁵

Although the South Africa Act established a separate and largely independent Parliament for the Union, its structure, offices, procedures, and traditions were based on the Westminster

⁶⁵ M MacDonagh *The Speaker of the House* (1914) 212.

⁶⁶ Ibid.

⁶⁷ Ibid at 214.

⁶⁸ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 161-162.

⁶⁹ M MacDonagh *The Speaker of the House* (1914) 221-222.

⁷⁰ Ibid at 215.

⁷¹ Onslow remains the longest serving Speaker the House of Commons has seen, serving 33 continuous years since his first election (M MacDonagh *The Speaker of the House* (1914) 89).

⁷² M MacDonagh *The Speaker of the House* (1914) 272.

⁷³ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 162.

⁷⁴ H Walpole *Memoirs of the Reign of King George III: Volume 1* (2000) 35-36.

⁷⁵ W Graham *The Speaker of the National Assembly: Ways to Strengthen and Enhance the Independence of the Speaker's Office* (unpublished LLM thesis, University of Cape Town, 2016) 13.

parliamentary model. Like the Parliament of the United Kingdom, the Union Parliament was divided into an Upper House (the Senate) and a Lower House (the Assembly)⁷⁶ representing different constituencies in different ways.⁷⁷ The Governor-General would appoint the leader of the largest party in the House of Assembly as Prime Minister and, in turn, the Prime Minister would appoint the members of the Cabinet from among the members of the House.⁷⁸ The House of Assembly itself would be presided over by the Speaker⁷⁹ who, it was imagined, would continue the Westminster tradition of an independent and impartial presiding officer.

Insofar as the Office of the Speaker was concerned, Section 46 of the South Africa Act provided that they should be elected from among the members of the House of Assembly at the first sitting of the House following the vacation of the Office. After the Speaker was elected, Kilpin argues, they were required to cut ties with political parties and not to visit any person unless it was for a special occasion or ceremony.⁸⁰ The duties of the Speaker remained similar to that of the Speaker of the House of Commons. They included duty to protect the rights of other members of the Assembly,⁸¹ and ensure that the proceedings of the Assembly were fair and impartial.⁸² In addition, the Speaker was required to preside over discussions and debates of the House, while enforcing the rules to maintain order.⁸³ The Speaker was also required to protect the rights of the minority parties in the Assembly and failing to do so would be grounds for a motion of censure.⁸⁴ As the spokesperson of the House, the Speaker is the person designated to sign correspondence on behalf of the House⁸⁵ and represented “the House itself, in its powers, its proceedings and its dignity”⁸⁶

Following a referendum in 1960 in which the majority of White citizens voted in favour of establishing a Republic, the South Africa Act was repealed and replaced by a new Constitution, namely the Republic of South Africa Constitution Act of 1961.⁸⁷ Although this Constitution changed the legal status of the country from a Dominion to a Republic, and replaced the Office

⁷⁶ South Africa Act Section 19.

⁷⁷ Sections 24-26 and Sections 32-44 of the South Africa Act.

⁷⁸ Section 14 of the South Africa Act.

⁷⁹ Section 46 of the South Africa Act.

⁸⁰ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 167.

⁸¹ HJ May *The South African Constitution* (1955) 111.

⁸² PAH Labuschagne and CJ Napier ‘The Role of the Speaker in Post-Apartheid South Africa: Political Impartiality or Partisanship?’ (2015) 40(1) *Journal for Contemporary History* 41 at 47.

⁸³ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 168.

⁸⁴ HJ May *The South African Constitution* (1955) 111.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Republic of South Africa Constitution Act 32 of 1961 (hereafter the ‘1961 Constitution’).

of the Governor-General with the Office of the State President, it did not make significant changes to structure, offices, procedures and traditions of Parliament. The provisions governing the Office of the Speaker thus remained essentially the same as before.⁸⁸ While the shift to a Republic reinforced the National Party's support among White voters and ensured its dominance in the Assembly,⁸⁹ Suzman points out that National Party Speakers continued to uphold the ideal of a neutral office by being courteous,⁹⁰ allowing opposition parties time to speak and ruling against their own party at times.⁹¹

The dominant position the National Party enjoyed in the House of Assembly allowed it to implement its policy of apartheid. The cruel and racist nature of this policy, however, undermined the authority of the government and the legitimacy of the 1961 Constitution and by the early 1980s, the apartheid state was under enormous pressure from internal and external forces. In an attempt to restore its authority and legitimacy, the government resolved to include Coloured and Indian South Africans in previously all-White institutions of government, while continuing to exclude Black South Africans. In order to achieve this goal, the 1961 Constitution was repealed and replaced by the Constitution of the Republic of South Africa, 1983.⁹² This Constitution made major changes to the structure, offices, procedures, and traditions of Parliament. The most significant of these was the introduction of a separate House for each race group,⁹³ namely: a House of Assembly for Whites;⁹⁴ a House of Representatives for Coloureds;⁹⁵ and a House of Delegates for Indians.⁹⁶ Despite these changes, the nature, power, and functions of the Office of the Speaker in each House remained essentially the same as before.⁹⁷

Although the goal of the 1983 Constitution was to restore the authority of the National Party government and the legitimacy of the apartheid constitutional order, it proved to be a dismal failure. Instead of gaining the support of the Coloured and Indian communities, the 1983

⁸⁸ Section 48 of the 1961 Constitution. Section 48(1) provided that "[t]he House of Assembly shall, before proceeding to the dispatch of any other business, choose a member to be the Speaker of the House, and, as often as the office of Speaker becomes vacant, the House shall again choose a member to be the Speaker."

⁸⁹ See H Suzman *In No Uncertain Terms* (1993) 58; where it is noted that some opposition members remained silent in Parliament rather than oppose the National Party.

⁹⁰ H Suzman *In No Uncertain Terms* (1993) 249.

⁹¹ See R Renwick *Helen Suzman: Bright Star in a Dark Chamber* (2014) 46-47.

⁹² Constitution of the Republic of South Africa Act 110 of 1983 (hereafter the '1983 Constitution').

⁹³ Given that it created three separate Houses, this Constitution is commonly referred to as the 'Tricameral Constitution'.

⁹⁴ Section 41 of the 1983 Constitution.

⁹⁵ Section 42 of the 1983 Constitution.

⁹⁶ Section 43 of the 1983 Constitution.

⁹⁷ Section 59 of the 1983 Constitution.

Constitution intensified opposition to apartheid among all race groups and resulted in the formation of a multi-racial mass democratic movement in the form of the United Democratic Front (UDF). Together with exiled political parties such as the African National Congress (ANC) and the South African Communist Party (SACP),⁹⁸ the UDF increased the pressure on the National Party Government throughout the rest of the 1980s and into the early 1990s. With the Cold War coming to an end, and Western governments withdrawing support,⁹⁹ the National Party was unable to resist the pressure from the UDF, despite imposing three successive states of emergency. Eventually, in 1990, the government announced the unbanning of liberation movements, including the ANC and SACP among others, and begin negotiations for a new constitutional dispensation.¹⁰⁰

The negotiations for a new constitution were divided into two stages. During the first stage a multi-party convention was organized and tasked with negotiating and adopting an interim Constitution¹⁰¹ which was enacted by the Tricameral Parliament. The transitional Constitution of the Republic of South Africa¹⁰² made provision for a democratically elected interim government and a Constitutional Assembly.¹⁰³ The second stage entrusted this newly elected Constitutional Assembly to negotiate and adopt the final Constitution.¹⁰⁴ The Constitutional Assembly was limited by 34 constitutional principles which had been agreed upon by the multi-party convention and had been included in the interim Constitution.¹⁰⁵ These principles could not be amended and the newly created Constitutional Court had to certify that the final Constitution did in fact comply with these principles before it could come into operation.¹⁰⁶

The interim Constitution dissolved the three Houses of the Tricameral Parliament and replaced them with a single National Assembly. The Upper House under the interim Constitution remained the Senate which was renamed by the final Constitution to become the National Council of Provinces.¹⁰⁷ In terms of the Speaker, the interim Constitution and final Constitution

⁹⁸ A Jeffery *People's war: New light on the struggle for South Africa* (2009) 59-61.

⁹⁹ See D Mosenke *My own liberator: A memoir* (2016) 233 for a description of the erosion of Western support for the National Party government.

¹⁰⁰ J Meiring 'The genesis of South Africa's Constitution' in J Meiring (ed) *South Africa's Constitution at twenty-one* (2017) 3.

¹⁰¹ P de Vos and W Freedman (eds) *South African constitutional law in context* (2014) 19.

¹⁰² Constitution of the Republic of South Africa Act 200 of 1993 (hereafter the 'interim Constitution').

¹⁰³ The Constitutional Assembly was comprised of both the Upper and Lower Houses of the First Democratic Parliament.

¹⁰⁴ Constitution of the Republic of South Africa, 1996.

¹⁰⁵ Schedule 4 of the interim Constitution.

¹⁰⁶ A Sachs *We, the people: Insights of an activist judge* (2016) 48-49.

¹⁰⁷ GE Devenish *A Commentary on the South African Constitution* (1998) 126.

provided for many of the same traditions and powers of previous constitutions, including the tradition of political neutrality.¹⁰⁸

2. Constitutional Framework

The constitutional framework governing the Office of the Speaker is relatively thin. The Constitution focuses primarily on the election and removal of the Speaker rather than the nature, powers, functions, and duties assigned to the Office.

Insofar as the election of the Speaker is concerned, section 52(1) provides that the National Assembly must elect, from among its members, a Speaker and a Deputy Speaker who will preside over the House. This election of the Speaker is presided over by the Chief Justice of South Africa and occurs at the first sitting of the National Assembly following a national election or when the Office of the Speaker becomes vacant.¹⁰⁹ Once elected, the Speaker presides over the election of the Deputy Speaker.¹¹⁰

The Speaker or Deputy Speaker may be removed from office through a resolution passed by the majority of the members of the National Assembly in terms of Section 52(4) of the Constitution. Devenish suggests that there must be good reason to propose and adopt such a resolution.¹¹¹ In order for such a resolution to be accepted, a majority of the members of the National Assembly must be present when the resolution is adopted.¹¹²

Apart from the provisions set out above, the Constitution also provides that the Speaker of the National Assembly is one of the officials designated to fill the Office of the Presidency should the President be absent from the country, unable to fulfil the duties of the Office, or if the Office becomes vacant.¹¹³

The Constitution does not prescribe any qualifications for a member to fulfil before taking the seat of the Speaker of the National Assembly, rather the Speaker simply needs to fulfil the qualification requirements to be a member of the National Assembly as set out in section 47(1) of the Constitution.

¹⁰⁸ GE Devenish *A Commentary on the South African Constitution* (1998) 121.

¹⁰⁹ Section 52(2) of the Constitution.

¹¹⁰ *Ibid.*

¹¹¹ GE Devenish *A Commentary on the South African Constitution* (1998) 121.

¹¹² Section 52(4) of the Constitution.

¹¹³ Section 90(1) of the Constitution.

The procedure for the election of the Speaker of the National Assembly is set out in Part A of Schedule 3 of the Constitution. Nominations must be submitted by a prescribed form which has been signed by two members of the Assembly and the member must accept the nomination by signing the nomination or in another written form. The person presiding¹¹⁴ must announce the names of the nominees, however, where there is only one nominee, the person presiding must declare the candidate elected. Where more than one person has been nominated, the election must take place through secret ballot in which each member of the Assembly who is present may cast one vote. The rules further prescribe procedures for when no member receives a majority of the vote, then the nominee with the lowest number of votes is eliminated and the Assembly votes again; this process will continue until a nominee receives a majority of votes.

3. Statutory Framework

3.1. Introduction

Given that the constitutional framework is relatively thin, especially when it comes to the nature and the powers, functions, and duties of the Office of the Speaker, it is not surprising that there are a number of other sources which address these issues, including legislation, rules, and guides. These sources clearly indicate that the Speaker is more than simply a presiding officer or spokesperson; he or she holds an office which is key to maintaining democratic rule. These sources are discussed in more detail below.

3.2. Powers, Privileges and Immunities of Parliament Act

The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act¹¹⁵ provides that the Speaker of the National Assembly (the Speaker), together with the Chairperson of the National Council of Provinces (the Chairperson), exercise control and authority over the parliamentary precincts on behalf of Parliament.¹¹⁶ Security personnel or services may not enter the parliamentary precincts without permission from these representatives¹¹⁷ unless there is an imminent threat to life or property, in which case they should report their actions to the Speaker and Chairperson as soon as possible after intervention.¹¹⁸ Arrests may only take place within the parliamentary precincts with the

¹¹⁴ Under Section 52(2) of the Constitution, the Chief Justice or a judge designated by the Chief Justice must preside.

¹¹⁵ Act 4 of 2004 (hereafter the 'PPI Act').

¹¹⁶ Section 3 of the PPI Act.

¹¹⁷ Section 4(1) of the PPI Act.

¹¹⁸ Section 4(2) of the PPI Act.

permission of the Speaker or the Chairperson.¹¹⁹ Where a person creates a disturbance within a House or in a committee meeting, the Presiding Officer is empowered to order the removal of such a person by either a member of staff or security services.¹²⁰

3.3. Rules of the National Assembly

The Rules of the National Assembly (the Rules) contain a specific rule for the “General Authority and Responsibility of Speaker,”¹²¹ under which there are four subrules. The principal duty of the Speaker of the National Assembly is to ensure that the National Assembly fulfils its constitutional duty. These obligations include providing a national forum for public consideration of issues, promulgating legislation, and conducting executive oversight.¹²² As part of public representation in Parliament, the Speaker is to ensure that all parties elected to the Assembly participate in the proceedings of the Assembly; including discussion, debates, committees and the facilitation of public involvement in proceedings.¹²³ To promote an effective administration and democracy, the Speaker should consult with other office-bearers of Parliament to ensure efficient governance, which is transparent and accountable.

Under Rule 26(2) the Speaker is required to “maintain and preserve” both the order and the decorum of the Lower House. The dignity and the good name of the House is left in the Speaker’s hands to be defended and upheld.¹²⁴ The Speaker presides over the National Assembly and thus it is their responsibility to ensure the rules are obeyed by the members of the House.¹²⁵ Any questions of order and practice is to be answered by the Speaker, and the ruling provided by the Speaker is final.¹²⁶

The final subrule under Rule 26 is perhaps the most important for an open and democratic country. Rule 26(4) states that the Speaker of the National Assembly “must act fairly and impartially” and that the Rules of the National Assembly must be applied fairly and consistently to all members of the Assembly. This subrule also reiterates that the Speaker is to ensure participation by all members of the National Assembly, thus allowing each member to act as a voice for their electorate.

¹¹⁹ Section 5 of Act 4 of 2004.

¹²⁰ Section 11 of Act 4 of 2004.

¹²¹ Rule 26 of the Rules of the National Assembly 9ed.

¹²² Rule 26(1)(a) of the Rules of the National Assembly 9ed.

¹²³ Rule 26(1)(b) of the Rules of the National Assembly 9ed, read with Sections 57 and 59 of the Constitution.

¹²⁴ Rule 26(2) of the Rules of the National Assembly 9ed.

¹²⁵ Rule 26(3) of the Rules of the National Assembly 9ed.

¹²⁶ Ibid.

While Rule 26 specifies the general responsibilities of the Speaker, there are other rules which also provide additional powers to the Speaker by virtue of their position as presiding officer of the House.

Where the Speaker is unable to attend a sitting of the National Assembly, they may request that the Deputy Speaker¹²⁷ or a House Chairperson¹²⁸ act as the presiding officer. This ensures the presiding officer will be the Speaker or an Acting Speaker and thus allow the House to conduct business without delay.

The Rules provide the Speaker with the power to discipline members of the National Assembly. Such powers are required as debates and discussions among members of the Assembly can become quite intense and the Speaker needs to maintain the order and decorum of the House.¹²⁹

Where the conduct of a member of the Assembly amounts to gross misconduct,¹³⁰ the Speaker may order that the contravening member remove themselves from the House for the remainder of the sitting.¹³¹ If the Speaker deems the contravention serious enough, they may suspend the member from attending sittings of the National Assembly for a period of time¹³² as provided for under the Rules.¹³³ When an Acting Speaker is presiding instead of a Speaker, the Acting Speaker may name the contravening member and order them to leave the House until the Acting Speaker consults with the Speaker to determine what action is to be taken with the Speaker being given a two day limit to announce their decision.¹³⁴ In line with the principles of transparent governance, once the Speaker has made a decision in terms of Rule 71(b), they are required to announce the action to be taken against the contravening member to the House.¹³⁵ If the contravening member refuses to leave the parliamentary precinct, the Speaker, or Acting Speaker, may order the Serjeant-at-Arms to remove the member.¹³⁶ Following the suspension or naming of a member, that member may tender a written expression of regret to the Speaker; if the Speaker approves of such an expression, they may pardon or reduce the

¹²⁷ Rule 24(1) of the Rules of the National Assembly 9ed.

¹²⁸ Rule 24(2) of the Rules of the National Assembly 9ed.

¹²⁹ Rule 26(2) of the Rules of the National Assembly 9ed.

¹³⁰ As defined under Rule 69 of the Rules of the National Assembly 9ed.

¹³¹ Rule 70(1) of the Rules of the National Assembly 9ed.

¹³² Rule 71(a) of the Rules of the National Assembly 9ed.

¹³³ The periods of suspension are provided under Rule 74 of the Rules of the National Assembly 9ed.

¹³⁴ Rule 71(b) of the Rules of the National Assembly 9ed.

¹³⁵ Rule 72 of the Rules of the National Assembly 9ed.

¹³⁶ Rule 73(1) of the Rules of the National Assembly 9ed.

suspension or any other disciplinary action against the member.¹³⁷ The Speaker is again required to inform the House of their decision.¹³⁸

Grave disorder at a meeting of the National Assembly may result in the meeting being adjourned or suspended by the Speaker (or Acting Speaker) for a period determined by the presiding officer.¹³⁹

3.4. Joint Rules of Parliament

Further rules regarding the office of the Speaker are contained in the Joint Rules of Parliament (the Joint Rules).¹⁴⁰ As the focus of this dissertation is the Speaker of the National Assembly and these rules apply to joint sittings of the Houses of Parliament, it should be noted that the powers described in this section require the Speaker and the Chairperson to act jointly rather than the Speaker alone.

Under these rules, the Speaker is given the power to create rules not provided for under the Joint Rules;¹⁴¹ and rules or rulings created this way remain in force until a meeting of the Joint Rules Committee, which will determine if such a rule should stand.¹⁴²

Acting jointly, both of these presiding officers, the Speaker and the Chairperson, have the authority to call for a joint sitting of the Houses of Parliament when they deem it necessary.¹⁴³ Either one of these officials may preside over the joint sitting, depending on arrangement between them.¹⁴⁴ At the joint sitting, the Speaker is one of the officials from whom permission must be sought before speaking at the sitting.¹⁴⁵

Further Rules that refer to the Speaker mirror those included in the Rules of the National Assembly, and thus will not be repeated here. It can be said that the Joint Rules of Parliament empower the Speaker to conduct themselves similarly to as they would when presiding over the National Assembly when they are presiding over a joint sitting of the Houses, with the proviso that they act jointly with the Chairperson rather than alone.

¹³⁷ Rule 75(1) of the Rules of the National Assembly 9ed.

¹³⁸ Ibid.

¹³⁹ Rule 77 of the Rules of the National Assembly 9ed.

¹⁴⁰ Joint Rules of Parliament 6 ed.

¹⁴¹ Rule 2(1) of the Joint Rules of Parliament 6 ed.

¹⁴² Rule 2(2) of the Joint Rules of Parliament 6 ed.

¹⁴³ Rule 7(2) of the Joint Rules of Parliament 6 ed.

¹⁴⁴ Rule 10 of the Joint Rules of Parliament 6 ed.

¹⁴⁵ Rule 13 of the Joint Rules of Parliament 6 ed.

3.5. National Assembly Guide to Procedure

The final document to consider under this section is the National Assembly Guide to Procedure (the Guide).¹⁴⁶ This Guide notes that the Speaker is the joint head and representative of the Legislature.¹⁴⁷ Chapter 2 of the Guide is focused on the procedures and duties of presiding officers and other office bearers. It is immediately noted in the introduction to the section on the Speaker that while the Speaker associated with a political party, they are required to “perform the functions of that office fairly and impartially”¹⁴⁸

The document further describes a number of duties that the Speaker of the National Assembly will be required to perform. As presiding officer of the Assembly, the Speaker is required to chair the meetings of the Assembly. This includes maintaining order, interpreting, and applying the Rules of the National Assembly, ensuring compliance with these rules, and ensuring the effective and efficient proceedings within the House.¹⁴⁹ The rules are to be interpreted objectively and applied fairly across all members of the Assembly.

The Guide explains that the Speaker is required to act impartially and fairly despite their membership to a particular party to ensure the rights of all members of the Assembly are protected. Regardless of the number of seats a party holds or the political affiliation of the members, the Speaker is to offer the same degree of protection to all members of the House. Correspondingly, where the Speaker offers equal safety for members, then all members may offer support for the Speaker, again regardless of their political party membership.¹⁵⁰

In keeping with the image of impartiality, the Speaker traditionally does not participate in the discussions or debate of the House unless the topic involves Parliament and its administration.¹⁵¹

The Speaker is a representative of both the National Assembly and Parliament. When there is a meeting with representatives of the other branches of government, the Speaker is the spokesperson for the Lower House. The Speaker is bound to uphold the authority of the House as the elected representatives of the people, while protecting the rights and privileges associated with the House.¹⁵²

¹⁴⁶ Parliament of the Republic of South Africa *National Assembly Guide to Procedure* (2004).

¹⁴⁷ *Ibid* at 17.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid* at 17-18.

¹⁵⁰ *Ibid* at 20.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* at 21.

Official correspondence from the House is signed off by the Speaker, and correspondence to the Assembly must be addressed to the Speaker. In more ceremonial roles, the Speaker is the person who receives visitors to parliament on behalf of the House.¹⁵³ When the National Assembly is suing a party or being sued, it is the Speaker who is cited in legal proceedings.¹⁵⁴ As the presiding officer of the House, the Speaker is not accountable to the State Executive, regardless of their political affiliation. In their relationship with the executive branch of government, the Speaker must maintain the independence of the House as servants of the people, and never servants of the executive.¹⁵⁵

Due to their position of presiding officer, the Speaker also serves as the chair for the main internal committees of the Assembly as listed in the Guide.¹⁵⁶ The Speaker's position is comparable to that of a cabinet minister, while the daily running of Parliament would fall to the Secretary of Parliament.¹⁵⁷

4. Conclusion

The South African Office of the Speaker has maintained much of the nature and powers passed down from the traditions of the United Kingdom House of Commons in Westminster despite over a century of self-governance and five different constitutions.

Under the current democratic dispensation, the traditions of the Westminster model were envisioned to continue. While the Constitution does not prescribe the powers and functions of the Office, legislation, the Rules of the National Assembly, and the Guide to Procedure do provide for the nature and duties of the Speaker. As the presiding officer and representative of the National Assembly, the Speaker holds a role critical in ensuring accountability and the sustenance of a democratic government.

¹⁵³ Ibid.

¹⁵⁴ W Freedman *Understanding the Constitution of the Republic of South Africa* (2013) 61.

¹⁵⁵ Parliament of the Republic of South Africa *National Assembly Guide to Procedure* (2004) 21.

¹⁵⁶ Ibid at 22.

¹⁵⁷ Ibid.

CHAPTER THREE: JURISPRUDENCE

1. Introduction

As we have already seen, the nature and role of the Office of the Speaker has been considered in three key judgments, namely *Gauteng Provincial Legislature v Kilian*,¹⁵⁸ *Brummer NO v Mvimbi*,¹⁵⁹ and *Tlouamma v Mbete, Speaker of the National Assembly*.¹⁶⁰ In *Killian* and *Brummer*, the Supreme Court of Appeal and the High Court respectively held that the Speaker is required to exercise her powers and carry out her functions in an impartial and non-partisan manner. Despite the fact that this requirement was set out in expansive terms in both judgments, in *Tlouamma* the High Court narrowed its scope and held that it applies only when the Speaker is acting in her official capacity and not when she is acting in her private capacity. She was, therefore, entitled to occupy a leadership role in her party, to participate in caucus meetings and to campaign on behalf of her party. Each case will be discussed in turn.

2. *Gauteng Provincial Legislature v Kilian*

2.1 The Facts

In this case, the respondents were members of minority parties in the Gauteng Provincial Legislature. They petitioned the Speaker of the Provincial Legislature to refer a dispute over the constitutionality of certain provisions of the Gauteng School Education Bill to the Constitutional Court in terms of section 98(2) of the interim Constitution. The Speaker duly did so, and the Constitutional Court subsequently found that the Bill was constitutionally valid and dismissed the referral.

Prior to embarking on this litigation, the respondents approached the Speaker and asked for an assurance that the Provincial Legislature would cover their legal costs. After the Speaker gave the respondents this assurance, the majority party submitted a note to the Speaker in which it objected to his decision on the ground that it would be inappropriate for the Legislature to finance litigation which is “contrary to the democratic wishes of the vast majority of MPLs and the constituencies they represent”.

¹⁵⁸ *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA) (hereafter “*Killian*”).

¹⁵⁹ *Brummer NO v Mvimbi and Others* [2011] ZAWCHC 385 (WCC) (hereafter “*Brummer*”).

¹⁶⁰ *Tlouamma v Mbete, Speaker of the National Assembly* 2016 (1) SA 534 (WCC) (hereafter “*Tlouamma*”).

After he received this note, the Speaker wrote a letter to the respondents in which he stated that he would leave it to the Constitutional Court to decide whether it was appropriate for the Provincial Legislature to pay their costs. The Constitutional Court, however, refused to deal with this issue and made no order as to costs. Following this decision, the Speaker declined to accept liability for the respondent's costs.

Not surprisingly, the respondents were aggrieved by the Speaker's decision and applied to the High Court for an order compelling the Provincial Legislature to pay their costs. The High Court granted the order and the Legislature then appealed to the Supreme Court of Appeal.

2.2 The Reasoning of the Court

The Supreme Court of Appeal found in favour of the respondents and dismissed the appeal. The key issue that the SCA had to determine was whether the Speaker had the authority to make such an assurance or if he had acted *ultra vires* when he did so.

Insofar as the authority of the Speaker was concerned, the SCA began its analysis by pointing out that Sir William Holdsworth in his *A History of English Law*¹⁶¹ stated that the Speaker of the House of Commons "is the representative and spokesman 'of the House in its collective capacity'", and that the "position of the Speaker in relation to the law 'is strikingly similar to the relation of a judge to the common law and to the rules of his court'". Closer to home, Kilpin in his *Parliamentary Procedure in South Africa*¹⁶² noted that the "Speaker is the interpreter and custodian of the rights and privileges of the members of the House" and that his "duties are too numerous to set out in detail."¹⁶³

Apart from these common law powers to regulate the business of the legislature, the SCA held, the interim Constitution¹⁶⁴ read together with the Powers and Privileges of Parliament Act¹⁶⁵ also conferred on the Speaker the power to control the expenditure and appropriation of moneys for the service of Parliament and this his authorisation for such expenditure was, subject to the provisions of the PPP Act, in all respects "good, valid and effectual". Given that the same powers were conferred on the Speakers of the provincial legislatures, the SCA held further, it

¹⁶¹ W Holdsworth *A History of English Law - Volume IV* 3ed (1945) 176 footnote 6.

¹⁶² RP Kilpin *Parliamentary Procedure in South Africa* 3ed (1955) 153.

¹⁶³ *Killian* para 26.

¹⁶⁴ Section 98(2)(d) of the interim Constitution.

¹⁶⁵ Section 31(1) of Act 91 of 1963 (hereafter 'PPP Act').

followed that the Speaker in the case at hand did have the authority to make such a promise to the respondents.¹⁶⁶

The Speaker's subsequent refusal to carry out his valid promise, the SCA concluded, appears to have been motivated by the political pressure placed on him. Despite the fact that a Speaker may be removed by the legislature or that his decisions may be overridden by it, he should not submit to political pressure. "He is required by the duties of his office to exercise, and display, the impartiality of a judge."¹⁶⁷

3. *Brummer NO v Mvimbi*

3.1 The Facts

In the case the applicant was the Speaker of the Bitou Municipal Council and a member of the Democratic Alliance (DA). The respondent was a member of the same Municipal Council and a member of the African National Congress (ANC). Together with the Congress of the People (COPE), the DA held a slim majority of seats in the Council. A dispute arose between the applicant and the respondent during a meeting of the Council and as a result of this dispute, the applicant, *inter alia*, instructed the respondent to leave the Council Chamber. When the respondent refused to do so, the applicant adjourned the meeting. Unfortunately, this dispute continued to rear its head and several subsequent Council meetings also had to be adjourned.

The applicant then applied to the High Court for an order compelling the respondent and the other members of the Council to comply with directions issued by him in terms of the Rules and Orders Regulating the Conduct of Meetings of the Bitou Municipal Council, as well as an order instructing the Municipal Law Enforcement Unit to remove members of the Municipal Council from the Council Chamber when requested to do so by him. In response to this application, the respondent counter-applied for an order declaring that the applicant had not exercised his powers as the Speaker in an impartial manner and that his direction instructing the respondent to leave the Council Chamber was *ultra vires* and unlawful.

3.2 The Reasoning of the Court

The High Court found in favour of the respondents. It thus dismissed the application and granted the counter-application.

¹⁶⁶ *Killian* paras 28-29.

¹⁶⁷ *Ibid* para 30.

In arriving at this decision, the High Court began its analysis by noting that the Rules and Orders conferred very broad powers on the Speaker to control the conduct of councillors at meetings of the Municipal Council, including the power to remove members who disregard his or her directions.¹⁶⁸ While the applicant conceded that these powers had to be interpreted in light of the Constitution, he argued that they empowered the Speaker to act in an autocratic manner to maintain order, especially when members were being disorderly and unruly.¹⁶⁹

In order to determine whether the applicant's argument was correct, the High Court pointed out, it was necessary to examine the nature of the Office of the Speaker and, in particular, the extent which the Speaker is expected or required to be impartial and non-partisan. Given that the origins of the Office of the Speaker may be traced back to the Westminster model of government, it would be helpful to investigate the manner in which this issue is dealt with in the United Kingdom.¹⁷⁰

The leading British authority on parliamentary practice, the High Court pointed out further, is Erskine May's *Parliamentary Practice*.¹⁷¹ In this work, the authors stress that "a Speaker is required to be an impartial moderator and that '[c]onfidence in the impartiality of the Speaker is an indispensable condition.'"¹⁷² Exactly the same point was made by Boothroyd in a journal article on the Role of the Speaker.¹⁷³ In this article she noted that "[f]or the past two centuries the [House of Commons] has expected the Speaker to abandon all party loyalties and to be outside the battle in the Chamber. If he is to bring complete impartiality and fairness to his work, this requirement is an absolute necessity."¹⁷⁴

The same approach, the High Court went on to point out, was followed by Harris in a report on the role of the Speaker in Australia,¹⁷⁵ where he argued that the "essential element of chairing any meeting is that the person in the role of the chair must ensure that the rules governing the conduct of the meeting are applied fairly to all participants" and if a presiding

¹⁶⁸ *Brummer* para 42.

¹⁶⁹ *Ibid* para 44.

¹⁷⁰ *Ibid* para 51.

¹⁷¹ W McKay, M Hutton, A Sandall, M Robertson and S Patrick (eds) *Erskine May Parliamentary Practice* 23ed (2004) 6.

¹⁷² *Brummer* para 50.

¹⁷³ B Boothroyd 'The Role of the Speaker in the 20th Century' (2010) 29(1) *Parliamentary History* 136. Baroness Boothroyd was the first woman elected as Speaker of the House of Commons, serving between 1992-2000; She also holds the distinction of being the first Speaker to be elected from opposition rather than the majority party (National Democratic Institute for International Affairs *Legislative Research Series Paper #1- Presiding Officers: Speakers and Presidents of Legislatures* (1996) 3).

¹⁷⁴ *Brummer* para 51.

¹⁷⁵ Ian Harris Question time; impartial Speakers and dissent from rulings - some comments on Dr Coghill's paper in Democratic Audit (March 2006).

officer fails to do so, “he or she cannot be regarded as impartial.”¹⁷⁶ And in similar vein, the Supreme Court of Appeal held in *Killian* that the Speaker “is required by the duties of his office to exercise, and display, the impartiality of a judge.”¹⁷⁷

The High Court thus found the Speaker had acted *ultra vires*¹⁷⁸ and misconceived his role as Speaker.¹⁷⁹ The Speaker does not rule the Council Chamber and members of the Chamber are not there to serve the Speaker; this would not be consistent with democratic constitutional rule. The Speaker him or herself is a member of the chamber, and thus must abide by the same rules of procedure as other members.¹⁸⁰

4. *Tlouamma v Mbete, Speaker of the National Assembly*

4.1 The Facts

In this case the applicants were the leaders of three opposition parties in the National Assembly, namely Agang, the Congress of the People (COPE) and the United Democratic Movement (UDM). The respondent was the Speaker of the National Assembly and Chairperson of the African National Congress’s (ANC) National Executive Committee.

The applicants applied to the High Court for an order removing the respondent from her position as Speaker on the ground, *inter alia*, that she had “acted contrary to the law, norms, conventions and practices that require a legislative Speaker to maintain scrupulous neutrality and keep an impeccable reputation for fairness and neutrality” and, consequently was not a fit and proper person to be the Speaker.¹⁸¹

In terms of the Westminster tradition, the applicants argued, the Speaker is required to be “completely impartial, unbiased and non-partisan, both inside and outside the Council Chamber.”¹⁸² An important consequence of this requirement is that the Speaker should not take part in the debates of the legislature and should not play an active role in party politics. Although this approach originated in the United Kingdom, in *Killian* and *Brummer* the SCA and High Court that the Westminster requirement of utmost impartiality also applies in South Africa.

¹⁷⁶ *Brummer* para 52.

¹⁷⁷ *Ibid* para 53.

¹⁷⁸ *Ibid* para 94.

¹⁷⁹ *Ibid* paras 48 and 94.

¹⁸⁰ *Ibid* para 82.

¹⁸¹ *Tlouamma* para 26.

¹⁸² *Brummer* para 48.

Apart from issuing a series of patently biased and unfair rulings in the National Assembly, the applicants went on to argue, the respondent had violated the Westminster requirement of utmost impartiality by participating in political matters, attending meetings of her political party and actively canvassing voters on behalf of her party during election campaigns. In addition, she had failed to distance herself from her party after being elected Speaker by remaining in her position as Chairperson of the National Executive Council (NEC) of the ANC. The respondent had also made disparaging remarks about opposition parties, allowed members of the National Assembly to be removed from the Chamber and shielded the President from legislative oversight.

In response to these arguments, the respondent contended that the requirements for the Office of the Speaker in South Africa must be derived from the Constitution and not the Westminster tradition. Given that South Africa's constitutional system is different from Britain's, it follows that the extent to which the South Africa Speaker is required to be impartial is different from the extent to which the British Speaker is required to be impartial. The approach adopted in Killian and Brummer, therefore, is overstated. The Office of the Speaker is not the same as the Office of a judge. Unlike a judge, the Speaker is required by the Constitution to be and to remain as a member of his or her political party.

The fact that the Speaker is required by the Constitution to be and to remain a member of his or her political party, the respondent argued further, means that the Speaker is not required to sever his or her political ties and the position, therefore, is not inherently non-partisan. The Speaker's right to participate in the political affairs of his or her party is also protected by the political rights guaranteed in Section 19 of the Constitution. A distinction, therefore, must be drawn between the functions of the respondent as the Speaker and as the Chairperson of the NEC. While she is required to act in an impartial and non-partisan manner while carrying out her functions as the Speaker, there is nothing in the Constitution or the law that requires her to do so while carrying out her functions as the Chairperson. She was entitled, therefore, to advance the interests of the ANC, to attend meetings of the ANC and to campaign for the ANC in her capacity as Chairperson, although not in her capacity as Speaker.

4.2 The Reasoning of the Court

The High Court found in favour of the respondent and dismissed the application. In arriving at this decision, the Court began by setting out and discussing the powers, functions and responsibilities of the Speaker, one of which is to preside over sittings of the National

Assembly, maintain order, interpret and apply the rules of the National Assembly, respond to members' points of order and give rulings when necessary.¹⁸³ When she exercises these powers, the Speaker "is required to show complete impartiality and give a completely objective interpretation of the rules and practices."¹⁸⁴

Our legal system, the High Court held, has also developed a strong set of traditions that govern the Office of the Speaker and many of these traditions have been retained from the Westminster system of government. According to these traditions, the Speaker is required to "maintain the neutrality of the Office, must act with fairness, without favouritism and with impartiality". The 2004 Guide to National Assembly Procedure specifically provide that the Speaker must exercise her powers and perform her functions in "a manner that displays fairness, impartiality, protects the rights of all parties and advances the interests of Parliament."¹⁸⁵

Although the Speaker is required to exercise her powers and perform her functions in a fair and impartial manner, the High Court held further, the Constitution does not provide that a person must be "fit and proper" to be eligible to be elected as the Speaker. Instead, it simply provides that a person must be a member of the National Assembly and in order to be elected as a member of the National Assembly a person simply has to be over 18 years of age and a South African citizen. While English parliamentary law or even South African common law may have included a "fit and proper" requirement, as the applicant's argued, neither of these sources can impose a requirement that is inconsistent with the Constitution. If the drafters of the Constitution wanted to impose a fit and proper requirement, they would have done so explicitly.¹⁸⁶

After arriving at this conclusion, the High Court turned to consider whether the Westminster requirement of utmost impartiality also applies in South Africa. In this respect, the Court began its analysis by pointing out that although some features of the Westminster system of government have been retained in South Africa's parliamentary system, not all of them have. This is because South Africa's parliamentary law and practice are derived from the Constitution, from applicable legislation and from the rules and orders of Parliament, which differ in many important respects from the Westminster system.¹⁸⁷

¹⁸³ *Tlouamma* para 75.

¹⁸⁴ *Ibid* para 76.

¹⁸⁵ *Ibid* para 79.

¹⁸⁶ *Ibid* paras 124-135.

¹⁸⁷ *Ibid* para 141.

The most important differences, the High Court pointed out further, are as follows:

First, unlike the United Kingdom, South Africa's system of government is based on a supreme constitution and not on a supreme parliament. A system of parliamentary sovereignty is incompatible with a system of constitutional supremacy.¹⁸⁸

Second, also unlike the United Kingdom, South Africa's Constitution provides for a closed-list proportional representation electoral system and not a constituency based electoral system. In terms of this system, the Speaker has to belong to and remain as a member of one of the political parties represented in the National Assembly.¹⁸⁹

Third, there is nothing in the Constitution or in the Rules and Orders of Parliament that prohibits the Speaker from caucusing and canvassing for her party outside the National Assembly. The mere fact that a person has been elected as Speaker does not require him or her to sever their ties with their political party.¹⁹⁰

Fourth, apart from caucusing and canvassing, there is also nothing in the Constitution or the Rules and Orders of Parliament that prevents a Speaker from holding a high office in his or her party. In fact, the practice has been the exact opposite. Every Speaker since 27 April 1994 has been a member of the ANC's NEC.¹⁹¹

After making these points, the High Court summed up its findings as follows:

“To sum up, there is no constitutional or statutory impediment to the Speaker occupying any leadership position within her political party, or participating in the activities of the political party. The Speaker is entitled to remain as an office bearer of a political party, participate in its activities and campaign for political rights. Affiliation to a political party cannot in itself point to a lack of objectivity and impartiality. The Speaker's membership of the NEC does not render her incapable or biased in performing her duties as Speaker. Similarly attending meetings of the ANC caucus does not translate into a failure to conduct duties impartially as the Speaker. Consequently there is no legal basis to find that the Speaker cannot continue to hold the position of Chairperson of the National Executive Committee of the ANC as well as that of Speaker.”¹⁹²

The High Court thus drew a distinction between the roles the Speaker may hold. While sitting as the Speaker of the National Assembly and chairing meetings of the Assembly, the Speaker is required to “show complete impartiality” and provide “completely objective interpretation

¹⁸⁸ Ibid para 141.

¹⁸⁹ Ibid para 142.

¹⁹⁰ Ibid paras 142-143.

¹⁹¹ Ibid para 143.

¹⁹² Ibid para 144.

of the rules.”¹⁹³ The Speaker has a duty to protect the rights of all members of the National Assembly, regardless of their party membership.¹⁹⁴ These duties are reinforced through the Guide to National Assembly Procedure.¹⁹⁵ The Court reiterated the *Kilian* judgment in stating that the Speaker should not be swayed by political pressures.¹⁹⁶ This impartiality is only required while conducting the affairs of the House, however. The Court found that outside the chamber, there is no constitutional or statutory requirement that prevents the Speaker from occupying an office within their political party, they may thus remain a member of their party and continue participation with political activities, including campaigning for votes.¹⁹⁷ The affiliation to a political party does not inherently render a Speaker partisan,¹⁹⁸ the duties to their party are different to those conducted as Speaker of the House and therefore do not need to meet the requirement of impartiality.

This ruling thus moves away from the position held in *Kilian* and *Brummer NO*, that the Speaker be completely impartial and non-partisan both while acting in their capacity as Speaker, and when out of chamber.

5. Other Case Law

The Speaker is charged with controlling the debates of the House, and this requires the skill and experience that comes with practice. The Court in *Lekota v Speaker of the National Assembly*¹⁹⁹ noted that when the Speaker exercises their discretion, they are required to do so in a manner which is consistent with the Constitution; more specifically, in terms of the principle of legality.²⁰⁰

In this case, the Deputy Speaker had presided over the session of the National Assembly and had ruled that the applicant had made comments out of order. The applicant was thus asked to withdraw his comments or withdraw from the session. The applicant eventually withdrew from the session but brought action against the Speaker (as the representative of the National Assembly) and the Deputy Speaker, claiming that the Deputy Speaker had acted unlawfully.

¹⁹³ Ibid para 76.

¹⁹⁴ Ibid para 77.

¹⁹⁵ Ibid para 79.

¹⁹⁶ Ibid para 81.

¹⁹⁷ Ibid para 144.

¹⁹⁸ Ibid para 144.

¹⁹⁹ 2012 (4) SA 133 (WCC) (hereafter '*Lekota*').

²⁰⁰ Ibid para 29.

The Court rejected this claim. In considering the applicable rules and guides, the Court found that the Deputy Speaker had acted consistently with them and the Constitution. Perhaps most notably, the Court held that the Speaker is required to perform the functions and duties of the office fairly and impartially, despite being affiliated to a political party.²⁰¹ The Deputy Speaker had applied her discretion in a manner which was fair and objective, and as long as this was true, the Courts should not interfere with the rulings of the Speaker (or Deputy Speaker).²⁰²

This ruling has been confirmed in the *Tlouamma* judgment and in the case of *Malema v Chairman of the National Council of Provinces*.²⁰³ In the *Malema* case the Chairman of the National Council of Provinces had presided over a joint sitting of the Houses of Parliament. As the presiding officer, the Chairman made rulings that by the applicant were unparliamentary and that he should leave the House. These statements concerned the involvement of members of the ruling party in the Marikana massacre. The applicant claimed that the Chairman, as Acting Speaker, was acting in a partisan manner and defending the ruling party, of which they were a member.

The Court agreed with the ruling in the *Lekota* judgment that the presiding officers of parliamentary houses need to be shown respect as presiding over the Houses is their area of expertise,²⁰⁴ but found that the Chairman had made an irrational ruling and thus set aside their decisions. There was no conduct from the Chairman that showed an intention to act in a partisan manner, rather the transcript indicated that the Chairman conducted themselves “in a measured and dignified manner, as befits the office of Speaker.”²⁰⁵ However, the Chairman had misconstrued the reach of the National Assembly standing order regarding improper conduct,²⁰⁶ as they had held that the applicant’s statements had “imputed improper motives to those members of Parliament who were members of cabinet or reflected on their integrity by literally accusing them personally of murder.”²⁰⁷

To date, the South African Speaker of the National Assembly, or those acting in their stead, have all been members of the ruling party. These two cases (*Lekota* and *Malema*) emphasise how simple it is for the Speaker to appear biased and partisan when carrying out their parliamentary duties.

²⁰¹ Ibid para 12.

²⁰² Ibid para 31.

²⁰³ 2015 (4) SA 145 (WCC) (hereafter ‘*Malema*’).

²⁰⁴ Ibid para 60.

²⁰⁵ Ibid para 63.

²⁰⁶ Ibid para 60.

²⁰⁷ Ibid.

6. Conclusion

The case law regarding the Speaker in *Kilian* and *Brummer* show support for a truly neutral Speaker in South Africa. In both judgments the courts analysed the history of the Speaker as well as the duties of the Speaker in the Westminster system and under the South African system with both courts endorsing the independence and impartiality shown under the Westminster model. In terms of these judgments, the Speaker should maintain their neutrality regardless of the role they are fulfilling, whether in the chamber they preside over, or outside of their chamber. The role of the Speaker is akin to that of a judge, and they are to ensure that they treat other members of their respective chambers equally regardless of political affiliation.

The court in *Tlouamma* deviated from this view by differentiating between the duties and conduct of the Speaker while acting in her official capacity as Speaker of the National Assembly and her conduct outside of the House. This is not a distinction made by the previous judgments as they maintain that the Speaker has a duty to remain neutral regardless of what duty they are fulfilling. *Tlouamma* thus rejects many of the principles of the Westminster model.

The *Lekota* and *Malema* cases reiterate the duty of the Speaker to remain impartial and independent while conducting their business as Speaker of the Lower House, however, they reveal how opposition parties may construe the Speaker as acting in a partisan manner by virtue of their political party membership.

CHAPTER FOUR: COMPARATIVE ANALYSIS

1. Introduction

As explained in Chapter Two, the origins of the Office of the Speaker of the National Assembly may be traced back to the Office of the Speaker of the House of Commons and the Westminster system. Given this fact, it is important to consider that nature of the Office of the Speaker of the Commons, as well as the Speaker's powers and functions. This will locate the analysis of the independence and impartiality of the Speaker of the National Assembly in an appropriate context. After a brief discussion of the manner in which the Speaker of the Commons is elected, the role, powers, and functions of the Speaker as well as the importance of the impartiality of the Speaker will be examined.

2. Election of the Speaker of the House of Commons

The Speaker must be elected from among the members of the House of Commons following a general election, or following the retirement, resignation, or death of the sitting Speaker or if the sitting Speaker ceases to be a Member of Parliament (MP). The election of the Speaker is usually the first item of business for a newly elected House.²⁰⁸

Although a Speaker must be elected following every general election, in those cases in which the sitting Speaker decides to stand for Parliament again, none of the political parties will field a candidate in his or her constituency and the sitting Speaker will not campaign on any political issues. Instead, he or she will simply stand as "the Speaker seeking re-election". If the sitting Speaker is successfully re-elected to the House (which is almost guaranteed), he or she will simply be asked to return to the Speaker's Chair.²⁰⁹

In those cases in which the sitting Speaker decides not to stand for Parliament again or in those cases in which the sitting Speaker declines to take the Office again, a new Speaker will be elected by secret ballot.²¹⁰ Members of the House are entitled to nominate other members as candidates for the Office. However, each member may nominate only one candidate and to be eligible a candidate must receive at least 12 nominations, but not more than 15. Out of the 12

²⁰⁸ M MacDonagh *The Speaker of the House* (1914) 1.

²⁰⁹ Standing Order No. 1A of the House of Commons - Public Business 2018; See also M MacDonagh *The Speaker of the House* (1914) 2-3.

²¹⁰ Standing Order No. 1B of the House of Commons - Public Business 2018.

nominations at least three must come from member of a party other than the candidate's or no party.²¹¹

If there is only one candidate nominated, then there will be no election and the House will make a motion to appoint the nominee to the Office. Where there are multiple nominees, the House will vote for their preferred candidate on ballot papers. Where a candidate receives more than 50% of the votes, the House will make a motion to appoint that candidate Speaker. If no candidate receives more than half the votes, then further ballots are required. After each voting round, candidates who received the fewest votes in the previous round are eliminated, as are any candidates who received less than 5% of the votes.²¹² Rounds continue to be held until one candidate receives over 50%, or until only one candidate remains. That candidate is then elected Speaker.

The Speaker-elect must then receive royal approbation or approval. The monarch is represented by the Lords Commissioners from the Upper House of Parliament, the House of Lords. The presiding Lord Commissioner confers the Crown's approval and confirmation of the new Speaker of the House of Commons. The Speaker then withdraws to the lower house to begin their work.²¹³

3. The Role and Functions of the Speaker of the House of Commons

The powers and functions of the Speaker of the House of Commons can be divided into three broad categories. First, the Speaker presides over sessions of the House. Second, the Speaker represents the House as an institution. Third, the Speaker is responsible for the efficient administration of the House. While the latter two roles have changed significantly in modern times, the role of the Speaker as the presiding officer has not changed over time²¹⁴

As the presiding officer of the House of Commons, the Speaker chairs the sessions of the House. In this role, they have the power to determine who shall speak and for how long.²¹⁵ The

²¹¹ Hansard Society 'Leadership and Governance: How is the Speaker elected in the House of Commons?' available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-election>, accessed on 3 July 2021.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Hansard Society 'Leadership and Governance: What are the Speaker's role and powers in the House of Commons?' available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-role>, accessed on 3 July 2021.

²¹⁵ National Democratic Institute for International Affairs *Legislative Research Series Paper #1- Presiding Officers: Speakers and Presidents of Legislatures* (1996) 4.

Speaker also has the power to maintain order within the House by interpreting and enforcing the rules, or standing orders, of the House. The Speaker may suspend or adjourn a sitting and recall Parliament if they deem it to be within the public interest.²¹⁶ Motions put before the House are only debated with the Speaker's permission and the Speaker may end the debate by forcing the House to vote on a motion.²¹⁷ MacDonagh describes the Speaker as the supreme ruler of the House;²¹⁸ the Speaker is the "director of debate, the preserver of order, the protector of the rights of Members. His word is law within the Chamber."²¹⁹ These quotes emphasise the power placed in the hands of the Speaker.

When it engages with other bodies, including the Crown and the House of Lords, it is the Speaker who represents the House of Commons. The Speaker may be summoned to the House of Lords as the spokesperson for the Commons. If the monarch sends written messages to the House of Commons, it is the Speaker's duty to convey the message to the House; the same applies to messages from foreign legislatures. Messages of condolence, sympathy, thanks, or reprimand by members are also conveyed to the House by the Speaker.²²⁰ The Speaker thus represents the House as an institution and has the duty of managing the relations of the House with external authorities.

The administrative duties of the Speaker have become increasingly demanding as modern laws place greater responsibilities on the Speaker.²²¹ The Speaker chairs the House of Commons Commission; this Commission employs and manages all permanent staff of the House and its departments.²²² The Speaker is also the chairperson of the Boundary Commissions.²²³ These commissions are tasked with redrawing constituency boundaries to reflect changes in the population of areas. The Speaker may grant exemption certificates in terms of the Freedom of

²¹⁶ Hansard Society 'Leadership and Governance: What are the Speaker's role and powers in the House of Commons?' available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-role>, accessed on 3 July 2021.

²¹⁷ Ibid.

²¹⁸ M MacDonagh *The Speaker of the House* (1914) 56.

²¹⁹ Ibid.

²²⁰ Hansard Society 'Leadership and Governance: What are the Speaker's role and powers in the House of Commons?' available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-role>, accessed on 3 July 2021.

²²¹ Ibid.

²²² National Democratic Institute for International Affairs *Legislative Research Series Paper #1- Presiding Officers: Speakers and Presidents of Legislatures* (1996) 4.

²²³ Hansard Society 'Leadership and Governance: What are the Speaker's role and powers in the House of Commons?' available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-role>, accessed on 3 July 2021.

Information Act 2000, and acts as the final arbiter in deciding to grant such exemptions.²²⁴ At the request of government, the Speaker has the power to convene Speaker's Conferences consider matters of parliamentary elections and election law among other topics.²²⁵

4. The Importance of Impartiality in the Westminster Model

As noted by Kilpin, the Speaker's Office dates back to before the existence of the party system in Great Britain.²²⁶ Originally, the Lord Chancellor of the Upper House would direct the Lower House to elect a "wise and learned man to be your Speaker" from among its members on direction from the Crown.²²⁷ This created the impression that the Speaker was the servant of the Crown, until Speaker Lenthall sided with the House rather than the Crown. This began the tradition of an independent Speaker, which was maintained by Speaker Onslow when the party systems did develop.²²⁸

The impartiality of the Speaker has been described as the most valuable skill or "most precious attribute" the Speaker can have.²²⁹ This impartiality is necessary for the running of the House of Commons as the rulings of the Speaker creates precedent for later Speakers.²³⁰ If a Speaker were to act in a partisan manner, their rulings would not be accepted by the House as it would bind future Speakers to side with specific parties.

To ensure the impartiality of the Speakership, each newly elected Speaker is required to sever all ties with their political party and to withdraw from active participation in party politics. To limit the Speaker from mixing with politicians in public places or meeting with politicians secretly, the Speaker is provided with apartments in the palace of Westminster.²³¹ The Speakership is also final position a politician is anticipated to hold, and they are expected retire

²²⁴ United Kingdom Parliament 'Freedom of Information Act: Practice Note for Committee Clerks' available at <https://www.parliament.uk/globalassets/documents/foi/foi-staff-guide-detailed-guidance-2.2017.docx>, accessed on 3 July 2021.

²²⁵ Hansard Society 'Leadership and Governance: What are the Speaker's role and powers in the House of Commons?' available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-role>, accessed on 3 July 2021.

²²⁶ Kilpin RP *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) at 162.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Austen AA 'The impartiality of the speaker of the House of Commons' (1960) 23(2) *The Journal of the Rutgers University Libraries* 48 at 49.

²³⁰ National Democratic Institute for International Affairs *Legislative Research Series Paper #1- Presiding Officers: Speakers and Presidents of Legislatures* (1996) 5.

²³¹ Ibid at 4.

from politics at the end of their term and not seek another office.²³² This removes the temptation for a Speaker to side with a particular party for future rewards or offices.²³³

While the Speaker holds the power to cast a deciding vote should there be a tie in the House, their impartiality, and tradition, dictates that the Speaker should avoid doing so. The Speaker may avoid casting the deciding vote by asking the House to continue the debate. If the debate regards the amendment of a law, the Speaker will vote to leave the law in its un-amended state if the votes are tied.²³⁴ The final option is for the Speaker to abstain from voting. This tradition dictates that where the votes are tied in the House, the Speaker cannot cast their vote in favour of a change as change should occur with the support of a majority of members and not a single tie-breaking vote. Further, while the Speaker directs debate within the House, they do not participate in the debate to maintain impartiality and ensure they express no bias.²³⁵ Finally, to ensure separation from their party, the Speaker stands for general election simply as the ‘Speaker seeking re-election’ and not as a member of their party or their party’s campaign.²³⁶

As the Speaker has many duties, the House of Commons elects three deputy Speakers to assist the Speaker. To ensure fairness, the first Deputy Speaker must be elected from the same party as the Speaker; while the second and third Deputy Speakers must be elected from the opposition.²³⁷ These Deputy Speakers are not required to resign from their parties,²³⁸ but they are required to act impartially within the House.

Where a member of the House feels the Speaker has acted in a biased manner, they may call for the House to vote on the conduct of the Speaker, and the House may pass a motion censuring²³⁹ the Speaker if they deem the Speaker to have acted in a biased manner.²⁴⁰

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Hansard Society ‘Leadership and Governance: What are the Speaker’s role and powers in the House of Commons?’ available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#speaker-role>, accessed on 3 July 2021.

²³⁶ Ibid.

²³⁷ Standing Order No. 2A of the House of Commons - Public Business 2018.

²³⁸ Hansard Society ‘Leadership and Governance: How are the Deputy Speakers elected in the House of Commons?’ available at <https://www.hansardsociety.org.uk/publications/guides/leadership-and-governance#deputy-speakers-election>, accessed on 3 July 2021.

²³⁹ A motion of censure is the equivalent of the South African motion of no confidence.

²⁴⁰ MacDonagh M *The Speaker of the House* (1914) at 57.

5. Derivations of the Westminster Model

The Westminster model has influenced not only South Africa, but other countries as well and especially those that are members of the Commonwealth of Nations. As Laban has pointed out, Speakers across the Commonwealth generally share a common job description: they preside over sittings of the Lower House; they represent the Lower House as an institution in its dealings with other bodies; and they are responsible for the efficient administration of the Lower House.²⁴¹

While Commonwealth Speakers are also expected to conduct themselves in an impartial and non-partisan manner, he points out further, an important difference between the Speaker of the House of Commons and the Speakers of other Commonwealth nations is that the latter are not required to give up their party membership and party politics for life in order to distance themselves and project neutrality and impartiality.²⁴²

In Australia, for example, the Speaker of the House of Representatives may run for other offices if their term of Speaker has been completed. Laban notes that the Speaker in Australia often is of the same party as the government. A former Speaker of an Australian state legislature argued that with the loss of impartiality in the Australian parliamentary culture, the country has also lost an important element of democracy itself.²⁴³

The Canadian legislature has experienced the same situation where Speakers have resigned to take up other government office;²⁴⁴ this creates doubt as to whether rulings made in the House were influenced by their goal of attaining other positions. Laban claims that Canada is the only Commonwealth nation which had attempted to adopt the Westminster tradition of an independent Speaker when Speaker Lamoureux²⁴⁵ resigned from his party and ran as an Independent.²⁴⁶ His successors failed to continue this tradition however, and Canadian Speakers have continued to hold party memberships when elected.

The reason why Commonwealth Speakers are not required to give up their party membership or politics for life, Laban argues, may possibly be traced back to the fact that the United Kingdom has two major parties, with very diverse political philosophies, contesting against

²⁴¹ Laban M 'More Westminster Than Westminster? The Office of Speaker Across the Commonwealth' (2014) 20(2) *The Journal of Legislative Studies* 143 at 143–144.

²⁴² Ibid at 144.

²⁴³ Ibid at 144.

²⁴⁴ Ibid at 145.

²⁴⁵ In Office 1966–1974.

²⁴⁶ Laban M 'More Westminster Than Westminster? The Office of Speaker Across the Commonwealth' (2014) 20(2) *The Journal of Legislative Studies* 143 at 145.

each other and therefore an impartial officer is needed due to the diverse views these parties represent.²⁴⁷ In addition, he argues further, the House of Commons has a much larger number of seats than most other Commonwealth nations and this allows a wide range of views to be presented in the House. Even a country as large as India has fewer seats in its Lower House (the Lok Sabha) than the House of Commons.²⁴⁸

It may also be argued, Laban notes, that in smaller legislatures, it becomes more difficult for Speakers to leave their parties or “divorce” themselves from party politics.²⁴⁹ With fewer seats available for parties, the political parties see every seat as important and, therefore, are unwilling to give up even one of their seats for a neutral Speaker.²⁵⁰ In constituency based electoral methods, such as the United Kingdom, having a larger number of members allows for fewer voters to feel disenfranchised if their Member of Parliament is elected to become Speaker.²⁵¹ In a smaller legislature, a larger fraction of people are likely to feel disenfranchised if the Speaker is to resign from their party.

6. Conclusion

The Speakers of the National Assembly and the House of Commons share many common duties. Both act as the representatives of their respective Parliaments. They may each act as the spokesperson for the Lower Houses and host the representatives of foreign legislatures or governments. In both Parliaments, the House may vote to remove the Speaker if they have lost confidence in their ability to lead the House or have acted in a partisan manner.

As presiding officers, they control their chambers and ensure that the rights of each member of the House is protected, regardless of their political affiliation. They ensure order is maintained within the chambers and that the dignity of the House is preserved. While as administrators, they each chair a number of internal committees for their respective Parliaments, ensuring that Parliament sees to the business of the day.

Many of these similarities exist as a result of the fact that the South African Office of the Speaker is derived from the United Kingdom’s Speaker of the House of Commons. However,

²⁴⁷ Ibid.

²⁴⁸ Ibid at 146.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

differences have developed between the models used by each nation, especially following South Africa's transition to democracy.

In the United Kingdom, the Speaker is supreme as the presiding officer of the House, as MacDonagh described, “[h]is word is law within the Chamber. His decision is final. Once the Speaker has ruled, there is no more to be said.”²⁵² The same is not true in the South African context, as indicated in the *Brummer* judgment. The Speaker is not the supreme ruler of the National Assembly; rather the Constitution is supreme, and the Speaker must apply constitutional values. This difference has its roots in the fact that the United Kingdom does not have a written or codified constitution, while South Africa went to great lengths to ensure that the Constitution was written and codified, enshrining constitutional principles and values.

The Speaker in the United Kingdom is required to become completely impartial; they give up party membership and forgo serving in other political offices (such as Cabinet). Where the Speakership is the final Office a member may hold, it removes the temptation for the Speaker to act in a biased manner in the hope of securing another political leaving the Speakership. In South Africa, the Speaker is not restricted in this manner. Speaker Mbete ended her first term as Speaker when she was appointed as the Deputy President of the Republic, while both Speaker Mahlangu-Nkabinde and Speaker Modise were appointed to the Cabinet following their terms of office as Speakers of the National Assembly.

The standard of impartiality of the South African Speaker of the National Assembly, as of the *Tlouamma* judgment, is far more relaxed than that of the Speaker of the House of Commons. The South African Speaker is only required to act impartially when acting in their capacity as the Speaker and they are not required to resign from their party. The implications of the *Tlouamma* decision allow the Speaker to act in a partisan manner outside of the National Assembly and involve themselves in party politics. They may campaign for their party and attend party meetings where policy may be decided. Having attended such meetings, they then return to preside over the Assembly knowing what the goals of their party are.

The Speaker of the House of Commons, on the other hand, could be described as a “recluse;”²⁵³ even when not acting in their official capacity as Speaker, they maintain their image of impartiality by not visiting others or acting for any political party.

²⁵² M MacDonagh *The Speaker of the House* (1914) 56-57.

²⁵³ RP Kilpin *Parliamentary Procedure in South Africa: A Short Guide to the Rules and Practice of the Union House of Assembly* 2 ed (1950) 167.

This system used in South Africa seemingly encourages friction between the Speaker and members of opposition political parties, at times leading to disruptions and an adjournment of the legislature. If South Africa would adopt an approach closer to that of the Speaker of the House of Commons, it would allow for a more functional Parliament.

CHAPTER FIVE: ANALYSIS, RECOMMENDATIONS AND CONCLUSION

1. Introduction

At the time of writing, the *Tlouamma* case remains the only judgment regarding the impartiality of the Speaker of the National Assembly. The judgment can be summarised as follows: the High Court drew a distinction between the official duties of the Speaker when conducting the business of the National Assembly and the affairs she carries out beyond the Assembly. While conducting the affairs of the Assembly, the Speaker is required to “show complete impartiality.” However, the Court did not extend this requirement to when the Speaker is conducting business outside the chamber, thus the Speaker is not required to be completely impartial. This decision was based on two grounds. The first of which is the electoral system used in South Africa; as the country uses a party list proportional representation system, it was not possible for a member to be elected Speaker without being, and remaining as, a member of a political party represented in the National Assembly. The second ground was that the Constitution, legislation, and the rules and orders of the Assembly did not require the Speaker to act impartially outside of the House. This distinction drawn by the High Court allows the Speaker to not only remain a member of their political party, but also hold a high office within her political party. The Speaker, while not conducting the business of the Assembly, may participate in political activities for her party, including canvassing during elections and caucusing with other party members in the National Assembly. Such activities would not automatically render the Speaker partisan because the duties she owed to their party were different from those owed to her office as the Speaker.

The High Court ruling is problematic. Given the party list proportional representation system that was applied at the time, the Court correctly rejected the Westminster principle of the Speaker resigning from their political party. However, the Court went further and rejected several other Westminster principle and traditions. Instead of seeking to retain as much of the Westminster model as possible, the Court embraced a less demanding system of impartiality and non-partisanship on the part of the Speaker.

The approach adopted by the Court is inconsistent with the previous judgments of *Kilian* and *Brummer*, in which the respective courts analysed and discussed the Westminster system with approval. While they dealt with different issues, the courts maintained the high standard of impartiality as used by Westminster and advocated for its adoption in South Africa. Neither court suggested a less demanding system be adopted. Given that the Court in *Tlouamma* recognised the conflict created by the Speaker holding a high office within her party while

holding the office of the Speaker,²⁵⁴ it is perplexing that the Court did not draw a distinction between occupying a high office and being an ordinary member of a political party. The retention of party membership is much less likely to infringe the principle of impartiality than occupying a high office and participating in the political activities of a party. This approach of differentiating between the Speaker conducting official duties in Parliament and the Speaker conducting duties to her party is unsustainable. Partisan political party activities conducted by Mbete while Speaker and, simultaneously, Chairperson of the ANC NEC created the strong impression among opposition parties that she was biased both within and outside the Chamber. This resulted in very acrimonious relationships in the National Assembly and ultimately in an unsuccessful motion of no confidence against her.

Given the negative consequences that the decision in Tlouamma has had for the principle of impartiality and non-partisanship, it is not surprising that commentators, such as Graham, have made a number of proposals aimed at enhancing the independence and impartiality of the Speaker. Graham's proposals are discussed below.

2. Graham's Proposals

2.1 Introduction

In his 2016 thesis, Graham identifies several different ways in which the independence and impartiality of the Speaker can be enhanced. These are: immunity from the anti-defection clause; modifying the Speaker nomination process; Speaker and Deputy-Speakers; and excluding party office-bearers. Each of these methods is discussed in more detail below.

2.2 Immunity from the 'Anti-Defection' Clause

The anti-defection clause states that if a member of the National Assembly resigns from their party, or is expelled from it, they also lose their membership of the Assembly.²⁵⁵ On the one hand, it has been argued that this suppresses freedom of speech and association. On the other hand, the Constitutional Court has held that it encourages party loyalty and, therefore, is constitutionally valid.²⁵⁶ While this reasoning should apply to ordinary members of the

²⁵⁴ 2016 (1) SA 534 (WCC) para 143.

²⁵⁵ Section 47(3) of the Constitution.

²⁵⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) para 183.

Assembly, Graham argues that it should not apply to the Speaker.²⁵⁷ This is because the Speaker should not be encouraged to stand by their party, rather they should be encouraged to act in an impartial manner.

Graham bases his argument on the approach followed in India. Like the South African Constitution, the Indian Constitution contains an anti-defection clause, which provides that if a member of the Lower House resigns from their political party or joins another political party, then they will be disqualified as a member of the House.²⁵⁸ However, the Indian Constitution goes on to exempt certain elected officials, including the Speaker and the Deputy Speaker from the provisions of the anti-defection clause in those cases in which they have resigned from their political parties.²⁵⁹ The Indian Speaker or Deputy Speaker, therefore, may continue to hold office even where they have resigned.

Although the Constitution and the Rules of the National Assembly would have to be amended in order to adopt a similar approach in South Africa, it would undoubtedly strengthen the independence of the Office of the Speaker.²⁶⁰ Unlike the Indian Constitution, which protects the Speaker only when he or she has resigned and not when he or she has been expelled, Graham argues that the South African clause should apply to both resignations and expulsions. This would protect the Speaker from their own party and allow them to retain their Office if expelled.²⁶¹

Graham does note, however, that the protection provided by such an exemption clause will need to be limited. In cases in which a political party has expelled the member (who is also the Speaker) for corruption or gross insubordination then the members should lose his or her seat in the National Assembly and consequently his or her Office as Speaker.²⁶² The change would likely encourage support for the Speaker from opposition political parties as the independence of the Speaker is protected and they would appear less biased.

Graham's suggested amendments offer the Speaker much needed protections from their own party. The culture of the current majority party seems to encourage its members to adhere to

²⁵⁷ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 53.

²⁵⁸ Paragraph 2(1)(a) and 2(2) of the Tenth Schedule of the Constitution of India.

²⁵⁹ Paragraph 5 of the Tenth Schedule of the Constitution of India.

²⁶⁰ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 53.

²⁶¹ Ibid at 54.

²⁶² Ibid.

party policy,²⁶³ which would create fear for any member of the party that serves in the Assembly, including the Speaker, that they may be removed if they speak or rule against the party. I feel that this protection would not necessarily need to be limited as proposed by Graham. Where a Speaker would be expelled from their party for corruption or gross insubordination, the Assembly could remove the Speaker utilising their own constitutional powers²⁶⁴ and the motion would likely draw cross party support, with the party that expelled the Speaker joining the motion for their removal.

2.3 Modifying the Speaker Nomination Procedure

As Devenish states, “[i]n an authentic liberal democracy, parliament should never become the monopoly of one particular party, nor of the executive authority of the time.”²⁶⁵ Unfortunately, this is not exactly what has happened in South Africa over the past 25 years and South Africa’s current system of democracy may correctly be described as a dominant party democracy.²⁶⁶ An important consequence of this state of affairs is that the ruling party has managed to “colonise” many, if not most, of the great offices of state, including the Office of the Speaker by preventing members of other parties from being elected to this position.²⁶⁷

In order to ensure that candidates from opposition parties have a greater chance of being elected, Graham argues that the current procedure for nominating candidates for the Office of the Speaker should be amended. Instead of the current procedure, which simply requires a candidate to be nominated by any two other members of the National Assembly, the procedure followed by the House of Commons should be adopted in South Africa. As we have already seen, this procedure provides that a candidate must be nominated by at least 12 other members of the House of Commons, three of whom must be from members who belong to political parties other than the candidate.²⁶⁸

The great advantage of this procedure, Graham points out, is that it encourages cross-party support for the Speaker, while also preventing the majority party from barring non-members from taking the Office and allowing only their own members to dominate the nominations.

²⁶³ See N Ngatane ‘Magadzi: When ANC says this is the route we’re going to take, you can’t deviate’ available at <https://ewn.co.za/2021/02/09/magadzi-when-anc-says-this-is-the-route-we-re-going-to-take-you-can-t-deviate>, accessed on 10 February 2021.

²⁶⁴ Section 52(4) of the Constitution.

²⁶⁵ GE Devenish *A Commentary on the South African Constitution* (1998) 121.

²⁶⁶ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker’s office* (unpublished LLM thesis, University of Cape Town, 2016) 27.

²⁶⁷ Ibid at 60

²⁶⁸ See Chapter 4.2.1

This instils confidence in the person elected as Speaker and encourages other parties to participate in Parliament rather than disrupt it. For the Assembly to function and protect the interests of the people, mutual respect is required.²⁶⁹ This change would require an amendment to Part A of Schedule 3 of the Constitution, specifically Item 3(2)(a).

2.4 Offices of the Speaker and Deputy Speaker

There are no eligibility limitations placed on the Offices of the Speaker and Deputy Speaker in South Africa. The Constitution simply provides that they must be members of the National Assembly. Apart from arguing that procedure for nominating candidates for the Office of the Speaker should be amended, Graham also argues that the eligibility criteria for the Office of the Speaker and Deputy-Speaker should also be amended to ensure that they represent different parties in the National Assembly.

In this respect, Graham argues once again, that South Africa should follow the approach adopted by the House of Commons. Apart from the Speaker, the House of Commons also elects three Deputy-Speakers. As we have already seen, in order to maintain a balance, the Speaker and one Deputy are elected from one party, while the other two Deputies are elected from different parties. If South Africa applied a similar model, the Speaker and the Deputy-Speaker would have to members of different parties.

The Constitution provides that the Republic of South Africa is founded on the values of “a multi-party system of democratic government.”²⁷⁰ Thus, Graham argues, there should be an equal balance of party representatives elected to presiding officers.²⁷¹ This would be a method to ensure power is distributed and ensure the Speaker is assisted by a member who does not necessarily have the same policies to follow, allowing for greater discussion and consideration of different points of view.

2.5 Making a Compromise

Due to the closed list proportional representation electoral system that South Africa uses, in order to become a member of the National Assembly a person must be a member of a political party and be placed on the list of candidates of that party to be assigned a seat in the House. It was based on this that the Speaker argued that she could not be independent from her party as

²⁶⁹ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 58.

²⁷⁰ Section 1(d) of the Constitution.

²⁷¹ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 60.

was implied by the applicants in the *Tlouamma* judgment. Graham reiterates this in his piece, stating that the Speaker cannot be expected to resign from their party,²⁷² if they do so they would no longer be a member of the National Assembly.²⁷³ The Electoral Act²⁷⁴ read with the Constitution left no provision for an independent Speaker; while this position has changed,²⁷⁵ it is important to examine Graham's suggestion of a compromise.

Graham proposes that while the Speaker cannot be asked to resign from their party, steps could be taken to ensure that the Speaker is not placed in a position that is conflicting, such as holding a high office within their political party while holding the Office of the Speaker. High-ranking members of a political party should be excluded from contending election for the Speaker of the National Assembly, thus excluding party leaders, senior officials within political parties, or Cabinet Ministers from the Speakership.²⁷⁶

By creating a list of people to be excluded from standing for election to the Speaker's Office, the Chief Justice could ensure that the Speaker of the National Assembly is not won by a high placed politician.²⁷⁷ Graham views this as a compromise as it will allow a member to take office without giving up their party allegiance while blocking senior party members from running for office.²⁷⁸ This is based on the approach used in the Canadian House of Commons, in which the Speaker is not expected to sever ties with their party, but excludes ministers and party leaders from the election process.²⁷⁹ According to Graham, there is an indication that the Canadian House includes this order to enhance the independence of the Speaker and thus encourage support for the Speaker from other parties.²⁸⁰

If this suggestion was to be applied in South Africa, it would only require a change to the Rules of the National Assembly. Had this been implemented, this would have prevented the scenario we have today, in August 2021. On the 5th of August 2021, the President made changes to his Cabinet and appointed the then Speaker of the National Assembly as the Minister of Defence

²⁷² Ibid at 51.

²⁷³ Section 47(3) of the Constitution

²⁷⁴ 73 of 1998.

²⁷⁵ Discussed below.

²⁷⁶ W Graham *The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker's office* (unpublished LLM thesis, University of Cape Town, 2016) 51.

²⁷⁷ Ibid.

²⁷⁸ Ibid at 52.

²⁷⁹ Ibid at 51-52.

²⁸⁰ Ibid at 52.

and Military Veterans.²⁸¹ With the Speaker moving to Cabinet, the Office of the Speaker fell to the Deputy Speaker until Parliament reconvened to elect a new Speaker. The candidate that was nominated, and elected, by the ruling party is the former Minister of Defence and Military Veterans who was replaced during the changes to Cabinet.²⁸² Under Graham's proposed change, the candidate would not be eligible to contend elections for the Speakership due to previously holding office as a Minister and being a senior official within their party, thus enhancing the independence of the Office.

3. Electoral Reform

Part of Graham's reasoning for creating a compromise was that the electoral system in South Africa only allows for members of political parties to be elected to the National Assembly. This rationale also formed part of the Speaker's argument in the *Tlouamma* judgment. As only members of political parties can become members of the National Assembly, and only members of the National Assembly can be nominated for election to the Office of the Speaker; it follows that only a member of a political party can run for the Office of the Speaker.

This argument is no longer valid, however, as in June 2021, the Constitutional Court delivered judgement in the *New Nation Movement NPC* case²⁸³ and declared the Electoral Act²⁸⁴ unconstitutional. Prior to the judgment, the Electoral Act only permitted members of political parties to run for election to the National Assembly and Provincial Legislatures, preventing independent candidates from standing for election.

The decision of the apex court encouraged civil society to reconsider a report drafted by the 2002 Electoral Task Team (the van Zyl Slabbert Commission). The report included a majority view which deemed it necessary to reform the electoral system in South Africa, and a minority view which held the view that the current closed list proportional representation system did not require changing.

²⁸¹ Business Tech 'Ramaphosa's big cabinet reshuffle: here are all the changes – including a new finance minister' available at <https://businesstech.co.za/news/government/511356/ramaphosas-big-cabinet-reshuffle-here-are-all-the-changes-including-a-new-finance-minister/>, accessed on 6 August 2021.

²⁸² T Mokone 'National Assembly to elect new Speaker on August 19' available at <https://www.timeslive.co.za/politics/2021-08-11-national-assembly-to-elect-new-speaker-on-august-19/>, accessed on 13 August 2021.

²⁸³ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC)

²⁸⁴ 73 of 1998.

The majority suggested that the country be divided into a number of multi-member constituencies, where each constituency would elect a number of representatives (between three and seven) to the National Assembly depending on the size of the constituency. These constituent representatives would fill 300 of the 400 seats available in the Assembly. The remaining 100 seats would be filled by representatives who are elected through a closed list proportional representation system in order to restore overall proportionality to the House.²⁸⁵ As no comment was made by government about the report and the electoral system was not changed, government tacitly adopted the minority view.²⁸⁶

Following the *New Nation Movement NPC* judgment, two reports were submitted by the Inclusive Society Institute (ISI) and the Helen Suzman Foundation (HSF). Both reports attempt to offer a solution for Parliament to utilise when remedying the Electoral Act as required by the order of the Constitutional Court.

The ISI relied heavily on the work of the van Zyl Slabbert Commission, with their goal being to find a model that would allow for independent candidates to run for elections while minimising changes to the Constitution.²⁸⁷ The ISI first considered a full constituency-based system and a national proportional representation system but ruled both of these out. A full constituency-based system does not reflect the constitutional requirement of proportional representation,²⁸⁸ while a national proportional representation system that allows for individual candidates would be impractical where there are a large number of independent candidates and political parties to include on a single ballot paper.²⁸⁹

The ISI thus proposed a hybrid system similar to that of the van Zyl Slabbert Commission, with the country being divided into constituencies and each constituency electing between three and seven representatives.²⁹⁰ These representatives would form the majority of the National Assembly, with 300 of the 400 seats.²⁹¹ A closed list proportional representation system would be used to fill the remaining 100 seats and ensure overall proportionality.²⁹²

Similarly, the HSF report also relied on the work of the van Zyl Slabbert Commission and proposes a mixed member proportional representation electoral system. As in both the report

²⁸⁵ Electoral Task Team *Report of the Electoral Task Team: January 2003* (2003) 30-31.

²⁸⁶ Helen Suzman Foundation *National Assembly electoral reform* (2021) 2.

²⁸⁷ Inclusive Society Institute *Proposed electoral model for South Africa* (2021) 22.

²⁸⁸ Section 46(1)(d) of the Constitution.

²⁸⁹ Inclusive Society Institute *Proposed electoral model for South Africa* (2021) 22.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

of the Commission and the ISI report, the HSF proposed the establishment of constituencies, each represented with three to seven Members of the National Assembly.²⁹³ However, the HSF proposal becomes more complicated than the other options.

Each voter will receive two ballot papers, one with candidates and the other with political parties listed.²⁹⁴ The number of seats available to parties through the closed list proportional representation system would be equal to double the number of constituencies in the country. The report provides an example that if there were 55 constituencies, then there would be 110 seats of the National Assembly reserved for party list representatives, with the remaining 290 seats being filled by constituency representatives.²⁹⁵ As voters select both an individual and a party, an algorithm will be used to assign two party list members to each constituency with the likelihood that at least one of these members belong to the party that won that constituency.²⁹⁶ Party caucuses in Parliament would be left to decide on the allocation of individual party list members to constituencies.²⁹⁷

With independent candidates being eligible to run for elections to the National Assembly, there is now the possibility that an independent candidate may be elected not only to the Assembly, but also the Office of the Speaker. Changes to the electoral system along the lines of any of the above reports would create constituencies, thus creating another level of accountability as the representative, or Speaker, will have to explain their conduct to their constituency or risk being voted out. This would only apply if the Speaker was elected from among the constituency members of the National Assembly. Thus, to ensure a high level of accountability of the Speaker, the Constitution could be amended to state that the Speaker must be elected from among the constituency members of the Assembly thus making the Speaker answerable to their constituents, to their political parties if they belong to one and to the other members of the National Assembly.

4. Conclusion

The Speaker of the National Assembly holds an extremely important office upon which a democratic South Africa depends. Parliament is the structure of government charged with

²⁹³ Helen Suzman Foundation *National Assembly electoral reform* (2021) 7.

²⁹⁴ *Ibid* at 10.

²⁹⁵ *Ibid*.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid*.

ensuring that a “government of the people, by the people [and] for the people”²⁹⁸ remains in power by ensuring accountability through scrutinization and oversight of executive action. The Speaker, as the representative of Parliament must ensure they do not hinder the National Assembly from conducting its duties. Only one political party has won a majority in every national election since the dawn of democracy in South Africa, and every Speaker of the National Assembly has been elected from this party. With the Office being dominated and “colonised” in this manner, the need for the Speaker to be impartial is perhaps more dire than ever before.

The judgment of the Court in the *Tlouamma* case is problematic as it limits the duty of the Speaker to act impartially to only when conducting business as the Speaker. While conducting themselves in other capacities that are not associated with the Office, then they are not required to act impartially or display independence. This is not in the interests of the Office or in the interests of democracy. To the public, the Speaker is the representative of Parliament and its powers, thus if the Speaker is seen to conduct themselves in a biased manner, then it would appear that Parliament itself is biased. This conflict is emphasised by the fact that Mbete, while Speaker of the Fifth Parliament, actively campaigned for her political party giving rise to the *Tlouamma* case.

I therefore believe that it is time for the Speaker to distance themselves from party politics when they are elected to the Office, similar to the position of the United Kingdom’s Speaker of the House of Commons. However, as emphasised through case law, the legal position of the Speaker of the House of Commons and the Speaker of the National Assembly are not exactly the same. Thus, for South Africa to adopt aspects of the Westminster Model, those features must be brought in line with South African constitutional values and principles.

Firstly, as recognised in the *Brummer NO* case, the Speaker in South Africa may not rule their chamber with an iron fist or as it’s autocratic head; instead, they are to issue orders and rulings that are consistent with democracy and constitutionalism. The limitation on the powers of the Speaker can be found in the Constitution, the Rules of the National Assembly, the Joint Rules of Parliament, and the National Assembly Guide to Procedure.

Secondly, the Speaker of the House of Commons is required to resign from their party upon taking office. The recent *New Nation Movement NPC* case allows individuals who are not

²⁹⁸ A Lincoln ‘Transcript of the Gettysburg Address (1863)’ available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=36&page=transcript>, accessed 12 August 2021.

affiliated to a political party to be members of the National Assembly and thus would allow a Speaker to hold office as an independent. However, if the elected Speaker is a member of a political party, they cannot resign from their party as the ‘anti-defection’ clause of the Constitution²⁹⁹ would render them ineligible to hold Office.

There are two possible solutions to this, one option is to remove the anti-defection clause and the other option is to adopt Graham’s proposal with a similar provision to the Indian Constitution. Removing the anti-defection clause is dangerous; it allows members to change parties while keeping their seats and thus opens up the possibility of ‘floor crossing’ in the South African Parliament. Without the anti-defection clause, members of the National Assembly can change to any other political party (or become independent members under the *New Nation Movement NPC* case) while retaining their seat in the Assembly.³⁰⁰ disenfranchises the voters who voted towards a particular party³⁰¹ and is open to corruption as parties may offer bribes to entice other members to switch parties. Thus, Graham’s proposal of adopting provisions which make only the Speaker and Deputy Speaker immune to the clause is preferred. It will allow the Speaker to distance themselves from the influence of political parties if required and present themselves as an independent and impartial presiding officer.

This is a compromise as it does not require that the Speaker resign from their party, but rather leaves the option open to the Speaker to resign if they think it would be best to resign. Such an amendment would enhance the independence of the Office of the Speaker but relies on the office holder displaying integrity and standing up to their own party when required. This is not impossible, Speakers in the past have done it such as the Speakers of the apartheid era, and Ginwala and Mahlangu-Nkabinde of the democratic era.

However, where the Speaker is made immune to the anti-defection clause, the requirement that the Speaker resign from their party could also be included through the amendment, creating the Office of the Speaker as one that is truly independent. With such amendments to Section 47(3)(c) of the Constitution, South Africa can also emulate the independence of the Speaker of the House of Commons.

²⁹⁹ Section 47(3)(c) of the Constitution.

³⁰⁰ South African Press Association ‘Buthelezi: “Floor-crossing is like the HI virus”’ *Mail and Guardian* 15 January 2006, archived version available at https://web.archive.org/web/20071001020950/http://www.mg.co.za/articlepage.aspx?area=%2Fbreaking_news%2Fbreaking_news__national&articleid=261355, accessed 14 August 2021.

³⁰¹ Ibid.

Thirdly, expanding the nomination process contained in Schedule 3 of the Constitution to require a larger number of nominations and require cross party nominations would increase support for the Speaker as other political parties will be empowered to have a say in the election of the Speaker. This will prevent the majority party from automatically being able to elect their own member to the Office of the Speaker. Even where the member is required to resign from their party when elected, it is important that the Speaker draws support from as many political parties as possible to ensure there is confidence in their ability and their impartiality.

If these changes are made, then there would be no reason to apply Graham's last two proposals. Where the Speaker resigns from their party and is independent, then there would be no need for the Deputy Speaker to be from a different party than the Speaker. As the Deputy Speakers are permitted to remain members of their parties when elected as Deputy, the Deputy Speaker in South Africa should also be permitted to remain a member of their party.

Graham's compromised solution is also not necessary, with the Speaker being required to resign from their party, it is unlikely that party leaders or senior officials will want to run for the Office of the Speaker. Further, the *New Nation Movement NPC* case allows independent candidates to run for seats in the National Assembly, applying Graham's proposal would prevent an independent candidate from becoming Speaker as they are effectively the leader of a one-person party.

Requiring the Speaker to resign from their party to take office, similar to the Westminster model, creates other issues. If the Speaker resigns from their party and remains in Office until the next national election, they will only be able to run for membership to the Assembly again as an independent, they cannot return to their former party as they may have made decisions against that party while Speaker; or knowing that they will be returning to their party may influence their decisions while Speaker. Thus, to run for membership to the Assembly again, the Speaker will have to run as an independent candidate, or like the Westminster model, campaign as a 'Speaker seeking re-election.' This is not easily done using the current closed list proportional representation model that South Africa utilises presently, and thus a change in electoral system is required and already under investigation.

The hybrid constituency systems that have been proposed by the van Zyl Slabbert Commission, the ISI and the HSF provide options for different electoral systems to use going forward. Personally, the model proposed by the ISI is preferable as it requires minimal constitutional amendments and is simple to understand. The ISI report also makes allowance for expansion

of the system from a closed list to an open list system when the voters become used to the new model. A Speaker running as an independent candidate will have a much simpler campaign to run if they are seeking election or re-election by their constituency, compared to the scenario of the Speaker running as an independent having to campaign nationwide. The cost of a nationwide campaign itself would act as a deterrent and prevent any Speaker from attaining re-election and thus only allowing for a series of single term Speakers. The constituency system allows a Speaker to be voted out by their constituency where the constituents feel that the Speaker is not acting in the interests of democracy or the people, thus providing a form of direct accountability. Simultaneously, this will protect the Speaker from the fear of being removed by their former political party.

Finally, I believe that it would be beneficial for South Africa to adopt the Westminster tradition of the Speakership being the final Office that a member of the National Assembly can hold. South Africa has seen a Speaker appointed to the Office of Deputy President, a Speaker that was later appointed to be a cabinet minister and in 2021, we saw the Speaker of the National Assembly appointed as a Cabinet Minister, with the Minister that she was replacing then being nominated to become the next Speaker. Where the Speaker has incentive to be granted a later Office through a political party, then the temptation to act in a manner favouring that party exists and the Speaker may be biased.

In conclusion, the independence of the Office of the Speaker is critical to ensuring an accountable government and democracy in South Africa. As mentioned in the *Brummer NO* and *Kilian* judgments, the Speaker should remain impartial and not display bias when acting in any capacity. The independence of the Office can be achieved by requiring the Speaker to resign from their political party upon election to the Office. This will require an amendment to the anti-defection clause of the Constitution to allow the Speaker and Deputy Speaker to keep their seats despite resigning from their political party. Finally, the required changes to the electoral system under the *New Nation Movement NPC* case would allow for greater accountability, independence, and impartiality of the Speaker.

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Mr Kama an Padayachee (214558641)
School of Law
Howard College

Dear Mr Kama an Padayachee,

Protocol reference number: 00007919

Project title: A Critical Analysis of Political Independence in the Role and Responsibilities of the Speaker of the National Assembly

Exemption from Ethics Review

In response to your application received on 01/11/2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
Research and Higher Degrees Committee
School of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: [http://research.ukzn.ac.za/Research Ethics/](http://research.ukzn.ac.za/Research%20Ethics/)