



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

[Reportable]

Case No: 2153/18

In the matter between:

PATRICIA DE LILLE

Applicant

and

DEMOCRATIC ALLIANCE

First Respondent

**THE SPEAKER OF THE MUNICIPAL COUNCIL
OF THE CITY OF CAPE TOWN**

Second Respondent

THE CITY OF CAPE TOWN

Third Respondent

JUDGMENT: 14 FEBRUARY 2018

Henney, J

Introduction

[1] This is an interlocutory application brought on an urgent basis, pending the hearing of Part B of this application to be heard on a later date. In this application, the Applicant (“the Mayor”) seeks the following relief:

- 1.1 Interdicting and restraining members of First Respondent's ("the Party") caucus for the City of Cape Town ("the caucus") from participating in the motion of no-confidence proceedings they instituted for the removal of the Mayor as Third Respondent's ("the Council") Executive Mayor, which motion is to be considered on 15 February 2018 ("the motion"), other than on the basis that each member of the caucus shall be free to vote for or against the motion in accordance with the dictates of his or her own conscience.
- 1.2 Interdicting and restraining Second Respondent ("the Speaker") and the Council from proceeding with the voting on the motion unless it is by way of secret ballot.
- 1.3 Interdicting and restraining the Party's Federal and Provincial office bearers from influencing members of the caucus on the manner they should vote in respect of the motion.

[2] The relief that the Mayor would be seeking in Part B is a declaration that Clause 6.7 of the DA Caucus Regulations for the City of Cape Town be declared unconstitutional and inconsistent with the Local Government: Municipal Structures Act¹ ("the Structures Act"). Furthermore, that the Rules of Order Regulating the Conduct of Meetings of the Municipal Council of the City of Cape Town ("Rules of

¹ Act 117 of 1998

Order”) be deduced inconsistent with the Structures Act to the extent that it does not confer a discretion on the Speaker to rule that voting on a motion of no-confidence shall take place by secret ballot. Lastly, that Clause 3.5.1.12 of the Party’s Federal Constitution be declared unconstitutional and invalid for being inconsistent with the Constitution of the Republic of South Africa² and the Structures Act. There is no dispute that this application, due to the pending motion of no-confidence in the Mayor scheduled for 15 February 2018, is urgent.

[3] Mr Mpofu SC, assisted by Mr J de Waal, appeared for the Mayor. Mr Jamie SC, assisted by Mr Michael Bishop, appeared for the Party. Mr Rosenberg SC, assisted by K Reynolds, appeared for the Speaker and the Council.

Background Facts and Circumstances

[4] The Party instituted an investigation into the conduct of the Mayor. After a report was submitted to the Party, the so-called Steenhuizen report, which made adverse findings against the Mayor, she was required to make representations to the Party as to why she should not resign from her post, or why the Party ought not to move a motion of no-confidence in her. After she made representations to the federal executive (“FedEx”) of the Party, the FedEx determined not to support any motion of no-confidence in the Mayor, until the Party and the City’s investigations had been concluded.

² Act 108 of 1996

[5] The ANC, however, placed a motion of no-confidence on the agenda of the council, against the Mayor. This led to a caucus meeting, held on 24 January 2018, where the members of the caucus were to decide, by means of a secret ballot, whether a motion of no-confidence should be instituted against the Mayor.

[6] A decision was taken by the caucus with 84 votes in favour of such a motion and 59 votes against such a motion. It was further decided that the matter be referred to the FedEx, so as to decide the best course of action. This resulted in a further caucus meeting, held on 29 January 2018, which was attended by Mr James Selfe ("Mr Selfe"), the chairperson of the FedEx and also a member of the National Assembly of the Parliament of the Republic.

[7] During this meeting, he told caucus members that they are bound by the majority decision that the caucus has no-confidence in the Mayor, whether they agree or not. Later, after taking cognizance of the UDM decision³ (to which I will refer to at a later stage), he qualified the statement by saying: "*You are bound to the caucus position unless you can compellingly demonstrate that the conscience vote would demonstrably be for the advancement of good governance through quality service delivery and accountability.*"

[8] At a further caucus meeting on 29 January 2018, which was attended by Mr Selfe and other senior leaders of the Party, he said that the FedEx had decided that the caucus must be instructed to vote with the ANC in support of the motion of no-

³ United Democratic Movement v Speaker of the National Assembly and Others 2017 (5) SA 300 (CC)

confidence. He once again reiterated that the caucus decision was binding on all members of the caucus.

[9] According to the Mayor, many members raised objections to voting with the ANC. Some indicated that the branches were unhappy and would not have been consulted. The counter argument was that the decision was binding. Later on in that meeting, it was announced that the ANC had withdrawn the motion, so the discussion was moot. Mr Selfe then said that the instruction was for the caucus to bring a separate motion of no-confidence, at the first opportunity.

[10] It is further common cause that in two further press statements on 31 January 2018, released by the FedEx, the Party caucus in Cape Town was authorised to lodge a motion of no-confidence in the Mayor. The Mayor contends that the Party councillors should be entitled to a free vote, which implies a secret vote, whether or not to support the motion of no-confidence which has been tabled against her.

[11] According to her, since the ANC has decided to withdraw the motion of no-confidence in her, there is every chance that some ANC councillors would vote against the motion of no-confidence. And she believes that other opposition members of the council would also vote against the motion. She also believes that councillors representing other political parties, including the ANC, would allow a conscience vote.

[12] The position in respect of councillors representing the Party, however, is different in this regard, due to the existence of clause 3.5.1.12 of the Party's Constitution, which reads:

"3.5.1 A member ceases to be a member of the Party when he or she:

...

3.5.1.12 being a public representative of the Party in a legislative body, in any meeting of that legislative body, moves, seconds, votes in favour of or in any other manner supports a motion of no-confidence against a member of the Party or member of another Party with which the Party is in coalition in that legislative body, except with the leave of the Federal Executive;

...."

This clause should be read with clause 6.7 of the caucus regulations, which provides that:

*"All decisions made by the caucus are binding on all members of the caucus. On issues on which the Party allows a free vote, no caucus decision may derogate from that. (Currently, only the issue of abortion and the death penalty allow a free vote)."*⁴

[13] The Mayor submits that this must also be read with clause 19 of the caucus regulations, which allows for the amendment of the caucus regulations by a two thirds majority vote; however clause 6.7 has not been amended. According to her clause 6.7 is entirely inconsistent with the motion of no-confidence procedure provided in section 58 of the Structures Act, and the principle of accountability, as

⁴ This document could not be obtained on either the Democratic Alliance website, or the City of Cape Town website.

explained by the Constitutional Court in the UDM matter.

[14] In order to get some assurance from the Party, the Mayor's attorneys, on 5 February 2018, addressed a letter via email to the Party's attorneys, regarding whether it would permit caucus members to exercise a free vote on the motion of no-confidence. The Party replied that the FedEx cannot instruct caucus members on what decisions to take and that the Party was not aware that the caucus had taken a view on whether its members should have a free vote on the motion. It stated, however, that the FedEx would communicate its position to the caucus that its members should be allowed to vote according to their conscience and that no person would be disciplined on how they voted on this motion.

[15] The Party further stated that from their perspective, there was no need for a secret ballot to be used when the motion was voted on. Also, that this is a matter for the council to decide in terms of its rules. As a result of this, the Mayor's attorneys, on 6 February 2018, addressed a letter, via email, to the chairperson of the caucus of the City of Cape Town, Ms Suzette Little, wherein she was requested to confirm by 7 February 2018 whether the caucus had committed itself to seek a free vote, failing which she would be forced to institute proceedings against the Party.

[16] This letter was also sent, via email, to Mr Selfe. In response to this, Ms Little replied via email, which was also sent to Mr Selfe, in the form of an attachment that she had already sent to the Mayor on 30 January 2018, that she had previously

advised the Mayor: *"that James Selfe was of the opinion that in terms of section 9.3.5 of the Party's constitution, all caucus members are bound by the caucus decision, even those who did not vote on that day. This is a majority decision and that is what the caucus is bound to."* It is common cause that after this communication was sent to the Mayor these proceedings were instituted.

[17] The Mayor in my view was clearly justified in bringing this application, as a result of the fact that it was the Party's position at that stage that councillors were not permitted to vote according to their conscience. Mr Selfe, in his Answering Affidavit, in response to these allegations by the Mayor, states that at the meetings of 29 January 2018 he informed the members of the caucus that they were bound to support the motion, unless the Party indicated otherwise, and he understood that to be the correct legal position in terms of clause 9.3.5 of the Party's Constitution. Also that he repeated that view at the meeting 31 January 2018.

[18] He further states that subsequent to the Party receiving further legal advice, it reconsidered its position. He says the leadership at the time then resolved that it would afford the members of Council a conscience vote on the motion. This fact was communicated to the Mayor in the letter dated 6 February 2018.

[19] He further states that although they did not purport to speak on behalf of the caucus, in the time available to respond to the letter it was not possible to confirm the caucus' position. And that it appears the Mayor had accepted that that was the Party's position and then she approached the caucus to ascertain its position. When

she did this, unfortunately the chairperson of the caucus did not ascertain what the caucus' position was, in the light of the Party's decision that there should be a free vote. Instead, she forwarded an email reflecting the previous position of the members of the caucus, regarding support of the motion.

[20] He further stated that since 6 February 2018, the first caucus meeting only took place on 12 February 2018, where they were informed that members would have a free vote and that no steps would be taken against members, whichever way they voted. What I find strange about this explanation, however, is that when Ms Little replied to the Mayor's attorneys in the email dated 7 February 2018, which was also sent to him, where it was stated that according to his (Mr Selfe's) opinion in terms of section 9.3.5 of the Party's Constitution all caucus members are bound by the caucus decision, even though they did not vote on that day, he did not correct Ms Little or state that the Party, after having received legal advice, did not hold that position any more.

[21] What I also find astonishing was how Mr Selfe, as a member of the National Assembly of Parliament, who may have taken part, and his Party has indeed taken part, in a motion of no-confidence against the president of the Republic South Africa, after the court in the UDM case made a decision that members of Parliament have a right to vote with their conscience, would have been ignorant thereof when he on 29 January 2018 told members of his Party that they do not have the right to vote with their conscience and that a caucus decision binds all members of the caucus, whether they agreed with it or not.

[22] He had to know, or ought to have known, that not only members of the National Assembly, but also councillors in a local government, should vote with their conscience, rather than on the instructions of how their political party expects of them to vote, as happened when the ANC at national government level gave their members no choice but to vote on the instructions or wishes of the Party. And it is difficult to accept that when he, on 29 January 2018 and 31 January 2018, told the Party caucus members that they were not permitted to vote freely and with their conscience, he acted in the belief that that was the correct legal position.

[23] In the light of this, in my view, the Mayor was justified in bringing this application, because up until the afternoon before this application was heard in this Court, she was under the belief and impression that members of the caucus of the City of Cape Town could not exercise their vote freely and with their conscience. The Party was therefore, and rightly so, constrained to accept that members of the City Council caucus are by law entitled to vote freely and with their conscience, without having to acquire the permission of the Party.

[24] A motion of no-confidence constitutes a threat of the ultimate sanction, which in this case, a council can impose on a Mayor should she fail or be perceived to have failed to carry out her constitutional obligations. (Paraphrasing from paragraphs 10 and 43 of the UDM case where *Mogoeng CJ*, held: *"...These are crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests..."* and *"... It constitutes one of the*

severest political consequences imaginable - a sword that hangs over the head of the President [in this case the Mayor] to force him or her to always do the right thing.”)

[25] In my view the resort to such a motion should be reserved for very serious and extreme cases and should be exercised with due care to the rights of the person against whom it is directed, in this case the Mayor. In my view, given the circumstances preceding and leading up to the decision to proceed with the motion of no-confidence in the Mayor, she has made out a case that she has a prima facie right.

[26] The only question to consider is whether the motion of no-confidence vote should be exercised or executed by means of a secret ballot. The Mayor argues that it would defeat the whole purpose of having a free vote if such vote were not by means of a secret ballot. She argued that members would still be subjected to victimisation by Party bosses and they would not be able to exercise their vote freely, effectively and in accordance with their conscience, and without undue influence, intimidation or fear of disapproval by others.

[27] The Mayor is seeking the following relief from this Court: she asks that this court should order that the Party instruct its members of the caucus to support the vote by a secret ballot, in respect of the motion to be considered and voted on in the council meeting on 15 February 2018.

[28] I am not convinced that this Court is permitted in law to issue such an order. I disagree with Mr Mpofu that it will not breach the separation of powers, and that it will not cross into the terrain of the legislature in the local government sphere. Mr Mpofu argued that the order would not be directed at the Council, but at a political party. I disagree, because it will direct or order a political party to exercise a specific function in the legislative sphere of local government.

[29] The Party, even though they are not in principle opposed to a vote by means of secret ballot, argued that it would not be necessary, and further stated that voting by public representatives should, as far as possible, be open and transparent. They in any event argued that in terms of the rules, the Council should make a decision whether a vote should be by means of a secret ballot. That is also the position of the Speaker, as well as the Council. The Speaker, however, contends that it is up to the Council in terms of the Rules of Order to make such a decision.

[30] Neither the Structures Act nor the Rules of Order makes provision for a vote to be held by means of a secret ballot. In terms of the Structures Act⁵, the election

⁵ “55. Election of executive mayors.—(1) If a municipal council chooses to have an executive mayor it must elect an executive mayor and, if the MEC for local government in the province so approves, also an executive deputy mayor, from among its members at a meeting that must be held—

(a) within 14 days after the council’s election;

(b) if it is a district council, within 14 days after the last of the local councils has appointed its representatives to the district council; or

(c) within 14 days after the date with effect from which the type of the municipality has been changed from any of those mentioned in section 8 (a), (b), (c) or (d), 9 (a), (b), (e) or (f) or 10 (a) or (c) to any of those mentioned in section 8 (e), (f), (g) or (h), 9 (c) or (d) or 10 (b).

(2) A vacancy in the office of executive mayor or executive deputy mayor must be filled when necessary.

(3) The procedure set out in Schedule 3 applies to the election of an executive mayor and executive deputy mayor.”

Read with Schedule 3: “6. Election procedure.—If more than one candidate is nominated—

of the Mayor should take place by means of a secret ballot, just as in the case of the election of the President of the Republic of South Africa, where the Constitution of the Republic provides that such election takes place by means of secret ballot. There is, however, just like in the case of the President, no provision made that a motion of no-confidence in the Mayor should take place by means of a secret ballot. The Party, as well as the Speaker and the City Council, argues that rule 15.5 of the Rules of Order should be used when the council is faced with a motion of no-confidence. Rule 15.5 states: "*Where there is opposition to any proposal to be decided, voting must be by a show of hands or by means of an electronic voting system when available, unless otherwise resolved.*"

[31] The Court was at pains to point out that if the decision – as to whether a motion of no-confidence should take place through the mechanism of the secret ballot - were left to the Council, where the majority of the members of the Council, if they were opposed to such a voting mechanism, would obviously vote against such a procedure, and in such a case, a minority would never be able to secure a vote by means of the mechanism of a secret ballot.

[32] The Court also pointed out to counsel that, given the interpretation which the Constitutional Court in the UDM case adopted to address this lacuna, which was a purposive interpretation that would give effect to the values enshrined in the

(a) a vote must be taken at the meeting by secret ballot;

(b) each councillor present at the meeting may cast one vote; and

(c) the person presiding must declare elected the candidate who receives majority of the votes."

Constitution, of dignity, equality, freedom, openness, accountability and transparency, and if a similar approach is to be applied to the Rules of Order, it would be similar to the procedure used in the National Assembly, when dealing with motions of no-confidence by means of secret ballot.

[33] The Court, when interpreting legislation, which includes the Rules of Order as well as the Structures Act, must have regard to the following statement from the Hyundai case⁶:

"[21] Section 39(2) of the Constitution provides a guide to statutory interpretation under this constitutional order. It states:

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

⁶Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smith NO and Others 2001 (1) SA 545 (CC)

[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

[34] In coming back to this case, where there is an apprehension on the part of the Mayor, and on the part of some of the caucus members, that by voting against the wishes of the Party, even though the Party at the very last moment changed tack and decided that each councillor may exercise a free vote and may vote with their conscience, that notwithstanding this assurance, Councillors would still be hesitant not to exercise their free vote in accordance with their conscience.

[35] And one should have regard to the further concern raised, that should it be left open to the full Council, that is made up of a majority of DA members, it will be difficult if not impossible to make a fair, rational and constitutionally compliant decision whether the no-confidence motion should be voted on by means of a secret ballot. There is a high probability that such a decision would not be a balanced and a fair one, if it is not taken by a non-partisan person like the Speaker, who has to exercise his or her duty in a rational and constitutionally compliant manner. An

interpretation similar to that adopted in the UDM case, must be given to the Rules of Order and the Structures Act, which would render a fair, balanced and constitutionally compliant decision as to whether such a vote should take place by means of a secret ballot.

This court is therefore of the view that the person or authority that would be best suited to make such a decision would be the Speaker.

[36] In this regard, the Court is of the view that the speaker has a discretion, where he or she is called upon to interpret the rules, in terms of rule 4, which states: *"The ruling of the Speaker in regard to the application or interpretation of these Rules and other procedural matters not dealt with in the Rules of Order is, once he/she has given his/her reasons, final and binding."*

[37] This particular rule, in my view, would grant the Speaker the necessary discretion to make a decision whether a motion of no-confidence should be decided by means of a secret ballot, until the relief which the Mayor seeks in part B, has been determined.

[38] The only difficulty the Court has at this stage, is that although an argument was advanced along similar lines in the papers of the Mayor filed of record, no relief in such terms have been requested by the Mayor. The Respondents though, in their papers filed of record, as well as their heads of argument, have adequately responded to the submissions made by the Mayor in this regard.

[39] When this issue was raised, Mr Mpofu argued that they have prayed for alternative or further relief and the Court would be permitted to grant such relief. He further argued that this being a Constitutional matter which the court is deciding, the Court within its power in terms of the provisions of section 172 (1) (b) of the Constitution of the Republic, "*may make any order that is just and equitable*".

[40] Mr Jamie cautioned that the Court should be mindful of the unintended consequences such an order may have. Mr Rosenberg, on behalf of the Speaker, also cautioned that the Court should resist the temptation to legislate in granting the alternative relief.

In deciding what the appropriate relief would be in this case, especially where it deals with a constitutional matter, the answer once again lies in the Constitution.

[41] In this regard the following was stated in the *Fose*⁷ case:

"[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."

⁷ Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

...

Further also in the *Hoffmann*⁸ case:

"[45] The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'."

(See also *Du Toit v Minister of Transport*⁹ and *Park-Ross and Another v Director: Office for Serious Economic Offences*¹⁰.)

[42] In my view, given the fact that none of the Respondents have expressed any definitive and firm objection to a vote being held by means of a secret ballot, there is no reason why the Court should not grant such interim relief. The exercise of such a discretion is an onerous one, where regard should be had to the particular facts and circumstances under which such a motion of no-confidence will be taking

⁸ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

⁹ 2006 (1) SA 297 (CC) at para 33

¹⁰ 1995 (2) SA 148 (C) at 161 B-H

place. In this regard *Mogoeng CJ*, in the *UDM* case, at para [86] - [88] had the following to say:

*"[86] More importantly, the power that vests in the Speaker to determine the voting procedure in a motion of no-confidence, belongs to the people and must thus not be exercised **arbitrarily** or **whimsically**. Nor is it open-ended and unguided. It is exercisable subject to constraints. The primary constraint being that it must be used for the purpose it was given to the Speaker - facilitation of the effectiveness of Parliament's accountability mechanisms. Other constraints include the need to allow Members to honour their constitutional obligations, regard being had to their sworn faithfulness to the Republic and irrevocable commitment to do what the Constitution and the laws require them, for the common good of all South Africans.*

[87] The Speaker is chosen from amongst Members of the National Assembly. That gives rise to the same responsibility to balance party interests with those of the people. It is as difficult and onerous a dual responsibility as it is for Members, perhaps even more so, given the independence and impartiality the position requires. But Parliament's efficacy in its constitutional oversight of the Executive vitally depends on the Speaker's proper exercise of this enormous responsibility. The Speaker must thus ensure that his or her decision strengthens that particular tenet of our democracy and does not undermine it.

*[88] There must always be **a proper and rational basis for whatever choice the Speaker makes** in the exercise of the constitutional power to determine the voting procedure. **Due regard must always be had to real***

possibilities of corruption as well as the prevailing circumstances and whether they allow Members to exercise their vote in a manner that does not expose them to illegitimate hardships. Whether the prevailing atmosphere is generally peaceful or toxified and highly charged, is one of the important aspects of that decision-making process.” (Emphasis added)

[43] In coming back to this particular case, the Speaker of the Cape Town City Municipality should be mindful, in exercising his/her discretion, that in the City Council Party caucus, there is no unanimity as to whether the Mayor should face a motion of no-confidence and that there could be members that would be inclined to vote against the wishes of their own Party. Further, that that situation would affect their ability to exercise a vote freely in accordance with their conscience, without fear and the disapproval of other members of the Party.

[44] In my view, there could also be no objection to an interim order, pending the finalisation of Part B of the proceedings instituted by the Mayor, that the Speaker should, in terms of the rules, exercise his/her discretion after taking into consideration all the facts and circumstances, as to whether the motion of no-confidence should be decided by the mechanism of a secret ballot. In my view, the Mayor has also established a well-grounded apprehension of irreparable harm if the interim relief is not granted.

[45] The Mayor has also established the balance of convenience in her favour for the granting of such relief, in that she will suffer more harm, if there is not a realistic chance (to be decided upon by the Speaker) that at the very least the motion of no-confidence is voted on by means of a secret ballot, than the Respondents, who in principle have no objection to a vote by means of a secret ballot. And furthermore, they would not be suffering substantially more prejudice than her, should a vote by means of secret ballot take place.

[46] It is common cause, given the circumstances and facts surrounding the case, that the Mayor had no other satisfactory remedy other than to come to this Court for the relief that she is seeking. She was in constant contact with the Party to enquire whether the members of the caucus would be allowed to exercise a free vote, by means of a secret ballot. On the papers, at the very least until 7 February 2018, she was placed under the impression that the members of the caucus would not be permitted to exercise a free vote and had to come to this Court for relief. In my view therefore, the Mayor has satisfied the requirements for interim relief.

Costs

[47] In an ordinary case, the usual cost order would be that the costs should follow the cause, which means that costs would be awarded to the Mayor. In this case, although up to the stage when the Founding Affidavit was filed and just immediately before the proceedings were about to commence on 13 February 2018, the Party in its Answering Affidavit, and further on during the morning of the proceedings, made it clear that they do not oppose the relief which the Mayor is

seeking (that the councillors should be allowed to exercise a free vote and vote with their conscience), they also had no objection that the motion of no-confidence to be scheduled on 15 February 2018 should not be voted on through the mechanism of a secret ballot. It would therefore not be inappropriate to order them to be responsible for the cost of the Mayor up to the time when they filed their Answering Affidavit. The Speaker and the Council did not fundamentally oppose any of the relief that was sought by the Mayor.

[48] In the result therefore, I make the following order:

1. By agreement between the Applicant and the First Respondent, for the purpose of the motion of no-confidence in the Applicant scheduled for 15 February 2018 ("the MONC"), the members of the First Respondent's caucus of the City of Cape Town shall be free to vote for or against the motion, in accordance with the dictates of their own consciences, and no member will face any adverse consequences from the First Respondent no matter how they vote on the motion.
2. It is further ordered that pending the determination of Part B, that the Second Respondent is hereby ordered to exercise his/her discretion as to whether the motion of no-confidence scheduled to be considered and voted on at the Council meeting to be held on 15 February 2018, should be voted on by means of a secret ballot.
3. That the First Respondent pays the costs of two counsel up to the time when it filed its Answering Affidavit.

4. I make no costs order against the Second and Third Respondents.
5. That Part B of this application shall be heard on a date to be allocated by the Judge President, alternatively, the first available date on the semi-urgent roll.

R.C.A. HENNEY

Judge of the High Court