IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.36 OF 1998

HON. AUGUSTINO LYATONGA MREMA..... APPLICANT

Versus

1.THE SPEAKER OF NATIONAL ASSEMBLY
2.THE ATTORNEY GENERAL ... RESPONDENTS

R U L I N G

SUBJECT: Application for stay, of implementation of resolution to suspend the Applicant, from the on-going Parliamentary Session pending the determination of the Petition.

KATITI, J.

Before this Court, is an application by the Hon. M.P. AUGUSTINO LYATONGA MREMA, hence to be called, the applicant, petitioning and suing the Hon. Speaker of the National Assembly, and the Attorney General, as first and second respondents respectively, seeking this Court to issue a stay order, against the full implementation of the Parliamentary resolution, suspending him from further attending, the on-going Parliamentary Budgetary Session. In the prosecution of this application, the said applicant is being represented, by a Dar es Salaam based Advocate Mr. Mnyele, as the learned State Attorney Mr. Salula, represented the Respondents.

The antecedents to this application, for illuminating for our purposes, as we go from hence, are undefiably as follows. The applicant is as above said, an Hon. Member of Parliament, representing Temeke Constituency, and was at the material time, representing his such constitutency in Parliamentary Sessions, going on at Dodoma. The scanty facts as so designed, show that it came to pass, that as the Parliamentary deliberations were going on, on 24th day of June, 1998, the National Assembly passed a resolution suspending the Applicant, from further attending the on-going on budget session, [illegible]. It has variably been said, that history, or the making of it, can be designed, can be invented, it may be thrown on you, or you may step on it and rapture it as a landmine, but make it all the same. Here, as fate would have it, we have Augustino Lyatonga Mrema, the applicant, untimorously, tulmultously and agitatingly, seeking what he considers his rights, and for the first time, challenging the extent of Parliamentary competence, under the leadership of the Hon. Speaker, and hence the Petition filed, and this application pending the determination, of the substantive Petition.

The petition, that has given birth to this application avers, among other things, the transgression of Rules 50(2), 43, 45, of the Parliamentary Proceedings Rules of 1998, and consequently therefore Article 13(b), 21(1), and 26 of the Constitution, that guarantee, equality before the law, freedom of association, participation in Public Affairs, contrary to the duty, to guard and obey the Constitution. The applicant's application, did provoke a Notice of Preliminary objection, to wit:-

1. That under Article 100(1) of the Constitution of the United Republic, the Court has no Jurisdiction to question the Parliamentary Proceedings.
2. That as a single Judge, he cannot determine any matter under the Basic Rights and Duties Enforcement Act, 1994, save for what is provided under section 10 of the said Act.

For the prosecution, of their respective areas of contestial arena, the learned Counsels, took their respective positions, as expected, to fight their respective battles. Mr. Salula, in support of his preliminary objection, submitted basically on three areas, namely: -1- that this Court has no Jurisdiction, to entertain a matter that pertains to what has happened within the four Walls of the National Assembly, as to do so, (1) would be contravening Article 100(1) of the Constitution of the United Republic, and Section 12 of the Parliamentary Privileges Act No.3 of 1988, citing the case of BRADLAUGH vs GOSSETT (1884) 12 QBD 271. -2- That the Court would be messing up with the doctrine of seperation of powers, and -3- that as a single Judge, this Court lacks Jurisdiction to hear the petition, therefore ipso facto, lacked Jurisdiction to entertain this application. On the other hand, learned Counsel Mr. Mnyele, submitted, that they had no quarrel, with the cited Constitutional provisions, but that his contention, was that the said constitutional provisions were inapplicable. He maintained that, whatever the Parliament or any body does, must be within the permitting parameters of, and subject to the Constitution, and that the Parliament in suspending the Applicant, it had infringed the applicant basic rights, and therefore contravened the Constitution, and that what the Speaker and his House committed, was not an irregularity in procedure, but a transgression of basic right, a matter of substance, and of constitutional transgression, as suspending of a member of the House was not allowed. He submitted, that in such circumstances, the Court has Jurisdiction to make such order, or orders, or directions, as my be appropriate for enforcing, or securing the enforcement of basic rights, of participating, and representing his Constituency.

It is logical and meet, and expected, that I dispose of a preliminary objection, by the learned State Attorney, Mr. Salula. As we have to sail herefrom, and have therefore to adjust our rudder, with our destination in mind, we must have our route plan. Therefore in my view, the issues to guide me, are approximately as follows: -1- whether the Court in inquiring into the suspension of the applicant, as seeks the applicant is a breach of the doctrine of seperation of powers, -2- whether the National Assembly has the power to suspend a Member of Parliament, -3- whether in this case the suspension, contravened Parliamentary Proceedings Rules and the Constitution, and -4- whether this Court has Jurisdiction to inquire into such suspension. Perhaps I would start, with what I would call, an objection, of less weight, paraded, by the learned State Attorney, and by implication countered by Mr. Mnyele, that this Courts entertainment, of this application, in the applicants favour, would amount to grossly transgressing, upon the doctrine of seperation of powers, in my view as readable from Article 4 of the Constitution, in that the Judiciary would be encroaching upon Parliament's exclusive Jurisdictional territory. It would first, be professionally sanctimonious on my part, just to be only loud, that the doctrine of seperation of powers, is based on the proposition that functions of state, should be placed in different organs, so as to act, as restraint on each other, to avoid tyranny, without assistance from other Jurisdictions. To be fair to myself and the subject, I shall proceed by exploring and sounding, how other Jurisdictions, fair, in dealing with this doctrine of seperation of powers, as it defines, in particular the role of the Court, in relation to Parliament, on the question of separation of powers. In this area, my application for assistance, goes to the case of, DUPORT STEELS LTD. vs STRS [1980] IWLR 142 (HL), which is not in my view in-opportune, in the appreciation of this matter. The learned Judge Lord DIPPLOCK, had on the matter this to say:

> "My Lords, at a time when more and more cases involve the application of legislation, which gives effect to policies, that are the subject of bitter public, and Parliamentary controversy, it cannot be too strongly emphasised, that the British Constitution, though largely unwritten, is firmly based upon the seperation of powers; Parliament makes the law; the Judiciary interpretes them. When Parliament legislates, to remedy what the majority of its members at the time percieve to be a defect, or a lacuna in the existing law, (whether it be written law, enacted by existing statute, or the unwritten common law, as it has been expounded by the Judges in decided cases.) The role of the Judiciary, is confined to escertain from the words, that Parliament has approved, as expressing its intention, what that intention was, and to give effect to it. Where the meaning of the statutory words is plain, and

> unambiquous, it is not for the Judges to invent funcied ambiguities, as an excuse for failing to give effect, to its plain meaning because they themselves consider, that the consequences of doging so, would be inexpedient, or even unjust or immoral."

Not evangelizing anything different, but actually concurring with his learned brother, Lord SCARMAN, in the same case had this, inter alia, to say, and I quote:-

> "Within these limits, which cannot be said in a free society possessing elective legislative institutions, to be narrow, or constrained, Judges, as the remarkable Judicial career of Lord Denning himself shows, have a genuine creative role. Great Judges are in their different ways Judicial activists. But the Constitution's seperation of powers, or more accurately functions must be observed, if Judicial independence, is not to be put at risk. For if people, and Parliament come to think, that the Judicial power, is to be confined by nothing, other than the Judges sense of what is right, (or as Seldon put it, by the length of the Chancellors foot), confidence in the Judicial system, will be replaced by fear of it, becoming uncertain and arbitrary, in its application. Society will then be ready for Parliament, to cut the power of the Judges. Their power to do Justice, will become more restricted by law, than it need be, or is to day."

And may I, respectfully, with your permission, feed on you an equally inclined dose. JR Lucas, commenting on the above case, (The Times, 17 September, 1980), inter alia observed:

> "The Judges should not take it on themselves, to decide the law independently of Parliament, but only to interprete Parliaments enactments, as sensibly as they can. It is not the Judges task to say what Parliament should have enacted, but only to say, given that Parliament has enacted a general law, what its decision would have been, in an individual case, if it had been appraised, of all the particular circumstances of the case."

The above, it is my submission, is a proponent of pure seperatist view, of the doctrine of seperation of power, - typical of English sense of Constitution, which is unwritten, and therefore without entrenchment of human rights, which would have diluted their Parliamentary omnipotence, a serious hangover, from Dicecy, a committed preacher of Parliamentary Sovereignty, - see the Law of the Constitution 39 - 40, and for which ATRS ALLAN in his book, "Law, Liberty and Justice," laments, that "the scope of restriction on Parliaments legislative competence is admittedly difficult, and largely untested, our Jurisprudence has been impoveriched by lawyers uncritical adherence to dogma of Parliamentary omnipotence". And from a very unlikely quarter to vindicate ATRS ALLAN, is a temorous statement from no less a distiguished Judge, like Lord Denning who in what he thought he would protect Judicial independence, and public confidence in the Courts, he said:

"One has to see in the greate Constitutions of the United States of America and of India, the conflicts which arise from time to time between the Judges and the Legislature. I hope we shall not have such conflicts in this Country. The independence of our Judges and their reputation for imparliality depend on their obeying the will of Parliament and on their being independent. The independence of the Judges is the other pillar of our Constitution." - 369 HL Del 25 March, 1976 Cols 797 - 8 opposing a Bill of Rights)

All the same, the English Common Law and the Court, have not lacked the armoury and ammunition in the name of the doctrine of ultravire, for defending rights and liberties of individuals, by strictly construing against statutes, interfering with such liberty - see the case of HILL vs CHIEF CONSTABLE OF SOUTH YORKSHIRE [1990] IWL. R 946, 952.

My confident reaction would seem to be that, the English approach is Parliamentary supremacist and I shall not seek assistance therefrom, in the restructuning of our jurispudence on this area. However while indeed, Judges should shy away, from substitution of their views of the public interest, or justice, in the clear expression of Parliament's will, we, should not be appologetic, and timerous, of noting as we should, that, unlike the British Constitution which is unwritten, our Constitution is written, with stress on human rights and which must be given a proper dynamic. In my view, it is in that light, right and a duty, that our Judges here have regard to the broad objective, of any statutory obligation, and also more importantly, have regard to the Constitution we are operating under, to uphold the fundamental rights of any party aggrieved, if very transgressed by any organ of State, even Parliament. In my view, shoul that the doctrine of seperation of powers, is more than a number of three branches of Government, it has to presuppose, that, the authority conferred upon the Judge, is to decide disputes and legal principles, also subject to substantiation of transgression of rights, the said doctrine of seperation of powers, with a facet of upholding the rule of law, and fundamental rights, means sodeciding without bias, I can see no hurdle for the Judge, to entertain any aggrieved party, and such aggrieved party, to persue his, or her rights, however high, the authority involved is, under the cover of the doctrine.

I think, this is not opportune time, to lecture anybody, on the doctrine of seperation of powers, if it suffices for us, to now know, that the values once strictly associated, with the doctrine of the formal seperation of, legislative, Executive and Judicial powers, in a compartmentalized manner, is no longer, as it equally suffices, to know that seperation of pwers, may now be represented, by the pluralist arrangement of a modern state, in which the powerful pillars of Central Government, operate in a world of counterveiling powers, exercised by Parliament, Courts, and Executive and even others, and if we know that the whole idea of seperation of powers, one of the facets being the rule of law, should

find its fullest expression in the Constitutional role of the Courts, in upholding the rights of the individual, against the misuse of power, by the Executive, or even Parliament, or any authority of State. I would extend this to mean, that this Judicial function, is carried out in reviewing, the exercise of power by the Executive, or public authorities, at the instance of individuals, whose interestes are affected, and to this extent, I should be understood, to mean, that that ipso facto seperation of powers, supports the rule of law, that, all power however plenary in form,"is given for a purpose, and that, if it is exercised for any other purpose, it is abused,"and that if for abuse, wherever it has occurred, the Court should not send back the party, claiming to have been aggrieved, without hearing him. And subject to other factors, being equal, the applicant should otherwise, feel at home. Mr. Salula's objection, on this score fails.

The second area of contention is whether or not, the National Assembly has power to suspend a Member of Parliament. While the learned State Attorney maintained, that, what goes on in Parliament, fall outside the jurisdiction of the Court, the Counsel for the applicant submitted, that Parliament had exceeded its powers, by suspending the applicant, thereby contravening the Parliamentary Proceedings and the Constitution. He submitted, that the House had no power of suspension, and that in suspending the applicant it arrogated to itself, the power it did not have, hence injury to the applicants fundamental rights. Bound by the pleadings as I am, if the Counsel is saying that the Parliament has no power to suspend a Member of Parliament, he obviously could not canvass against the extent thereof, and hence render in opportunity for the other party to offer a challenge, which would in my view, have been ~~fascinating~~. I shall, with respect, find no difficult in answering this issue, as it is dryly clear, for both blind, and naked eye to see. It is Rule 60 of the Standing Rules 1988, that among others punishments provide for suspension for different periods depending on the gravity of the offence. As I said above, as the extent thereof, was not pleaded and contested, I would rather not extend my fishing gear, into uninviting waters.

Are such powers of suspension and therefore the Standing Rules, unconstitutional, my I pose, as to contravene human rights? It is my view, that, an act, or rule, so long as the possibility, of its being applied, to purposes not sanctioned by the Constitution, cannot be ruled out, it must be held wholly - unconstitutional, and void. Our Constitution confers upon this Court power of Judicial review, it has been assigned the role of a sentinel on the quivive's on human rights issues, and it cannot abdicate from that duty, see Article 30(3) of the Constitution and Basic Rights and Duties Enforcement Act, 1994. But I would be fast to add, this power of review, while exercisable in many areas like -1- contravention of mandatory provision of the Constitution, imposing limitations on the legislature, -2- State operating beyong State boundaries, -3- Legislating on subject not

assigned to the Legislature, important for our purposes here, is the alleged contravention of fundamental rights in this case. I have, in that direction, cultivated myself to think, that in determining the constitutionality of a provision, or conduct alleged to be violative of a fundamental right, the Court must weigh the substance, the real effect, and the impact thereof on the fundamental right alleged. See Re KERALA EDUCATION BILL A 1958 SC 956 (981) and ABUKI & ANOTHER vs ATTORNEY GENERAL by, Ugandan Constitutional Court. While on this area, I find it fascinating to pose a question, as to what extra fundamental, or human rights, the applicant gained, by being a Member of the National Assembly rights the violation of which, he is now seeking remedy. I hold a confident view, that, the test in adjudging the constitutional validity, or otherwise, of action of state, or authority, on the cornerstone of fundamental rights, is, what the object of the authority in taking the action, what is the subject matter of the action, and to which fundamental rights, does it relate. With respect, our Constitution Part III Articles 12 - 24, provide for human rights generally, but none in particular for the inside of the National Assembly, when constitutionally on duty, the violation of which should ache the applicant. But we know, and should know, that human rights are the premedial rights, necessary for the development, and expression of human beings. And the rights are fundamental, because they enable a man, to chalk out of his own life, in the manner he likes, of course subject to other factors. They are in my view natural rights, but since they did not exist, an ordered mode, for the enjoyment of such rights, in a pre-political order, men expected a guarantee of these rights, in an ordered society. They are the rights, the inviolability whereof, is the duty of all Civil Governments must insure. As the Supreme Court of Pakistan, has explained in the case, of NAWAZ SHARIF vs PRESIDENT OF PAKISTAN PLD 1993 SC 473 pointed out:

> "..... basic or fundamental rights of individual which presently stand formally, in corporated in the modern constitutional documents, derive their lineage from, and are traceable to the ancient law of Nature, which the passage of time, and the evolution of civil society, great changes occur in the Political, Social and economic conditions of Society."

It would seem to me, that these rights being almost as old as man in origin, they could not have been discovered, and earned by the applicant in, and from the National Assembly. It follows in my view, that the applicants basic human rights were not as such violated in parliament. While the applicants had his human rights intact, and unviolated, being in Parliament, and as a legitimate member thereof, he thereby, and ipso facto had to enjoy rights and privileges, in the Parliment but also be subject to the rules, that pertain to the functioning of Parliament, under the jurisdiction of the Speaker, but equally guaranteed by the Constitution. As a follow up, it seems to be uncontestable that, that the Act, and the Standing Orders, 1988, under which the Speakers, has vast powers, were promuglated

through legislative competence of the Parliament, and particularly the Standing Orders, promuglated under Article 89(1) of the Constitution "kuweka utaratibu wa kutekeleza shughuli zake" - "to lay down the procedure for the proper and functioning of the Parliaments business." The Standing Rules, or orders, Order 60, includes suspension of a Member of Parliament, as a punishment, obviously for cause, see Orders 58, 59 etc. And my view, it is this constitutionally permitted procedure, freedoms and privileges, including suspension - as a punishable under Rule 60 in Parliament, that the Constitution says, shall not be questioned by the Court of Law, it should follow that suspension was according to law and the Constitution.

Whether the Court has jurisdiction to inquire into the said suspension emanates from the complaints, charges that his rights, as a Member violated, by the Speaker of the National Assembly, his Counsel cited, the South African case - High Court of South Africa -1- PATRICIA DE LILLE -2- THE PAN AFRICANIST CONGRESS OF AZANIA vs THE SPEAKER OF THE NATIONAL ASSEMBLY of 8/5/1998 to vindicate the applicant's position, while the learned State Attorney said or submitted, that, what took place within the four Walls of Parliament, was exclusively for Parliament, under the control of the Speaker, and that the Court has no jurisdiction to inquire into the same, under the ousting Article 100(1) of the Constitution, citing the case of BRADLAUGH vs GOSSETT (1884) 12 XBD, and other authorities. The question for determination, is whether this Court would otherwise have jurisdiction to entertain the suspension act that took place within the four Walls of Parliament in the course of its business. And it this issue of jurisdiction having disposed of, other aspects above, that brings us here. I have always imagined, that the inventer of Constitution, was initially troubled with power, and the distribution thereof, for while the authority of any ruler, should ultimately rest upon law, but it must also have the power, but law does not extend beyond power, and law without power, in, IHERING's phrase is, "a lamp that does not burn." It is here, that we have to decide, where power and the law reside, on matters in Parliament, bearing in mind, that in this Country we have, the supremacy of the Constitution, the distributor of such powers, "the heir of the past, and testator of the future," and, the creator of the organs of State.

The cited Article of the Constitution, as ousting the Courts Jurisdiction in the matter is, 100(1) of the Constitution, section 3 and 12, of the Parliamentary Immunities, Powers, and Privileges Act, 1988 heneed to be called the Act. The curiousity and anxiety, I suppose, is what do they provide, and hereunder is what they loudly say:

"Ibara 100(1)

Kutakuwa na uhuru wa mawazo, majadiliano, wa utaratibu katika Bunge, na uhuru huo hautavunjwa, na chombo chochote, katika Jamhuri ya Muungano, au katika Mahakama, au Mahali pengine nje ya Bunge."

In my very humble modesty, I have made an equally modest attempt, at a free translation thereof, as follows:-

"Article 100(1)

The shall be freedom of, expression, speech participation, and procedure, and such freedom shall not be interferred with, nor questioned by any authority, in the United Republic, or in Court, or anywhere, outside the National Assembly."

And coming to the Act, the section 3 has this to say:-

"Sect. 3:

There shall be freedom of speech, and debate in the Assembly, and such freedom of speech, and debate shall not be liable to be questioned, in any Court, or place outside the Assembly."

And for purposes of Jurisdiction, and procedure in relation to breaches of Parliamentary privileges, section 12(1) and (2) of the Act, has this to say:

"Sect.12(1): It is hereby declared for the avoidance of doubt, that subject to the Constitution, and the Standing Orders of the Assembly, the Assembly has all the powers and jurisdiction, as may be necessary for inquiring into, judging, and pronouncing upon the Commission of any act, matter or thing, not amounting to an offence under this Act, which is a breach of Parliamentary privileges.

(2) The Speaker, shall have the power, subject to the Standing Orders of the Assembly, to determine whther or not, any act, matter or thing is one into which the Assembly may inquire, judge and pronounce upon."

So far for the authority above, and what is sought to be protected, is what goes on in the National Assembly, while on active duty. But allow me to pose, a mischievous question, for the National Assembly to deserve immunity, what goes in there? I am sure, the MPs know better, but we reasonably know, that, the National Assembly, is the power-house for the legislation of law, see Article 64 of the Constitution, and a moulder of policy of State, under the guiding Parliamentary Standing Order, 1988, promulgated under Article 89(1) and (2) of the Constitution, under the Chairmanship of the Hon. Speaker, who in this case, is the impleaded party. And the Speaker thereof is impleaded, or impleadable, because by virtue of Article 84 of the Constitution, and Section 12(2) of the Act, I view him, to have such duties, as follows: -1- he is first,

the spokesman and representive, of the National Assembly, -2- he is the custodian of the Powers and Privileges of the Assembly, -3- Chief functionary and Constitutional head, -4- he is required under Section 12(2) of the Act, to discharge duties of a Judicial, or interpretative character, having finality attached to the same, and -5- the Speaker is the Chairman of the Assembly, and in that capacity, he maintains order in its debates, decides such questions, as may arise, on points of order, puts the questions, and declares, the determination of the Assembly. The speeches, participation, debates, immunised, being the base of the essence of Parliamentary system of Government, that MPs express themselves without fear of legal consequences, - but the orders and rules of parliament being under control of the Speaker of the Assembly. Objectively observed, this is no mean port folio, though the said Speaker should not shelter thereunder, where human rights are involved.

On reflection, it is at this relevant juncture I relevantly redall the South African case - PATRICIA's case, a case against a South African Assembly Speaker, that Mr. Mnyele, Counsel for the applicant brought to my attention as applicable here. I thank him, for dutifully and professionally, giving such assistance to the Court. The summary of what happened to culminate into the case, is as follows: Patricia De Lille, was and perhaps still is a Member of the National Executive Council of the Pan Africanist Congress of Azania, the second applicant therein, and she was Chief Whip of the Party, in the South African National Assembly. While in the National Assembly, she alleged that her party had information, that twelve members of ANC, had been spying for the then Apartheid Regime, and called upon the Government to publish their names, as they had been betraying their cause. Couregiously, she mentioned eight of them, thereby provoking accusations by the Speaker and other members of the House, that, she had been unparliamentary in her language. She was forced to withdraw the allegations, and this she did, and yet an ad hoc committee, appointed hurriedly recommended her suspension and she was suspended by the House, and hence the application she filed. In the said application challenging her suspension by the House, and therefore the Speaker, she complained, among other things, -1- that the ad hoc Committee had more ANC Members, and hence conspicuous bias, -2- that the ad hoc Committee Chairman, was mysteriously replaced, -3- that already there was a pre-judgment against her, showing bias, -4- that the Sanctions against her, were pre-judged and considered, even before she was found guilty, -5- that, the appointment of ad hoc committee, was done as a Political weapon for political reprisal, -6- that she had even been excluded from attending, ad hoc commette meetings, -7- that her suspension was executed even after she had withdrawn the allegations, meaning that technically the National Assembly had no material on which to base the suspension. Exercise of any privileges, by the National Assembly, including the speaker within the four walls was rejected, the Court maintaining that it had jurisdiction to inquire into the suspension of the MP by the National Assembly, in the judgment hereunder.

The learned judge in condemning the suspension, as unconstitutional, inter alia, observed and I quote:-

> "In my judgment it is important, that our courts should borrow wisely, from other Jurisdictions, comperative research is generally valuable, and is all the more so, when dealing with problems new, to our jurisprudence, but well established in other Jurisdictions. Nevertheless we should be careful and borrow wisely because our Constitution is the produce of South African history, and must be interpreted accordingly..... Thus any privilege inconsistent, or incompatible with the Constitution is invalid. Surely the extent of privilege, is inextricably bound with the exercise thereof. In other words, the determination of the extent of privilege must surely relate to its exercise. The contrary view is untenable. Otherwise Parliament would have a blank cheque to set the limits of its own powers, The constitution, particularly section 2, thereof enjoins us, to ensure that the obligations imposed by the Constitution, which is the supreme law, - must be fulfilled.
>
> There are many cases, where the Courts, including ours, have not hesitated to interfere with the exercise of powers by Parliament, in conflict with Constitutionally guaranteed rights. For example, in the land mark case , of Minister of the Interiour vs Harris, where Parliament 1950s attempted to convet itself into the "High Court of Parliament," the appellate Division had no hesitation, in striking down the relevant legislation, as being unconstitutional, as it unlawfully interferred with a constitutional guaranteed right, to vote of the Cape Coloureds ..... In short, the SMITHS case, is certainly authority for the view, that, the Court has power to interfere with the exercise of parliamentary privilege, which conflicts with Constitutionally guaranteed rights. A claim of Parliamentary privilege, does not defeat an action for redress of an infringed right."

I have had the advantage, of thoroughly reading the South African case, - or the PATRICIA DE LILLE judgment, brought to my notice by Counsel for applicant, and for that, I do express my appreciation. I agree that even in our country the Constitution is Supreme Law. The above case is instructive, and deserves alot of respect, but shallowly treated, it would seem to be perfectly on fours, with the case at hand. But with respect, while human rights, are perhaps universal, their protection, or treatment, may differ from jurisdiction to jurisdiction, depending on the presentation of the case, Constitutional history, or development of the country, as the cases from England, India and South Africa demonstrate. In the South African case, first, it is very clear that chicanery, negative political bias, were from the word, so deliberately manufactured, and put on the Parliamentary Assembly plant line, which from the little I know in our case, is absent, second the facts in that case, were exhaustively disclosed to the Court by the applicant, while in this case, as per applicant's affidavit, the facts are not only scanty by design, but only start by the date of suspension,- 24/6/1998, the genesis of it all under black cover, and third it does seem, that the South African Constitution,

does not have provision, similar to our Article 100(1) of our Constitution, which has to be complied with. Further while in that case, bias was conspicuously manufactured, and by a single party majority, in this case bias is just read, from sheer fact of majority, but this does not ipso facto mean bias, or impatiality, or the facts in that direction are lacking. I agree principally, that the majority, the applicant complains against may be partial, may err as grossly, as the few, and I further concede, that the tyranny of the majority in democracies is not unheard of. The writers on democracy, regard the majority, as an essential to democracy, and Lincoln said: "A majority is the only true sovereign of the people." But when all is said, we must accept, that the dangers of trannical use of the power of the majority, still remains one of the problems of Governments, and an area remedable by the electorate and the Courts cannot be substitutes thereof. Third, as HLOPHEJ pointed out, their constitution is a product of the South African history, in my view, with an extra snake-bitten sensibility. Fourth, unlike the South African position, which does not provide for suspension, our, - see Rule 60, does provide for such suspension, principally and as for the extent, that as aforesaid, is not the concern of the pleadings. Fifth, the South African Constitution does not seem to have the claw-back provision, see Article 30 of the Constitution, that such freedom shall be subject, to the freedom of others, the public generally and interest of state in particular. And sixth, in the South African case, the Assembly went ahead, caring less, even after the applicant had withdrawn allegations, so that the Assembly had nothing, no material, before them, and convicted without a charge, which is obviously not the case here. With respect this case, shows how the Parliamentary rules were conspiratorially trodden on, how she was sentenced un charged, unheard, without material to base the judgment on, how persecution took dominion from the word go, breaching a totality of her rights, within the National Assembly, which is not the case here. Thus while I have respect for the case, its pursuasive base is so dilute, that, with respect, it will be no guide to me.

All said and done, there is no way, one can temper with any weighing scale, to trivialise this jurisdictional matter. Regardless, of the cause for suspension, which is not disclosed anyway, one objectively looking at the matter, would agree, that the suspension of a Member of the National Assembly, is a serious matter both for the Member, and his Constituency, important debates and votes, may take place during his absence, even if the period is short, he may not be able to present his view point, or that of the group, or that of the Constituency he represents, but even worse, depending on the cause for suspension, the relevant Member of Parliament, may loose credibility, and be judged as an irresponsble, delinquent representative. However the respondent maintain that the Court has no jurisdiction. The solution to this issue, is indeed far to seek, as it is the first time, it has emerged, and I cannot boast of having a local precedent, on the matter. I have above demonstrated why PATRICIA's case has failed to persuade me, of course with respect.

Having however considered, the pros and cons of submissions, Article 100, Section 12 of the Act and of-course Patricia's case, I think both learned and illiterate, will concede that, for most of its activities, and by their nature, the National Assembly is the sole judge of its own privileges, duties in its business. This is, not to say, that Parliament cannot be questioned on anything, regardless of its constitutional limits, afterall as creature of the Constitution it cannot in my view, claim immunity if the proceedings are held without jurisdiction, e.g. in defiance of the mandatory provision of the Constitution, or by exercising power, which the Parliament does not under the constitution possess. As I did point out above, the novelty of controversy at hand, in this Country, does not mean, the same issue has not happened elsewhere, apart from the South African case. I shall now consider, the case cited by the learned State Attorney, - BRADLOUGH vs GOSSETT, to seek more experience on the matter, and evaluate how persuasive it is, even if in relative terms. I have anxiously, if not also studiously examined, the case, and relevantly at p.275, Lord Coleridge, inter alia, said:

> "What is said, or, done within the Walls of Parliament, cannot be inquired into by a Court of Law. On this point all the Judges in the two great cases, which exhaust, the learning of the subject - Burdett vs Abbott (9), and Stockbate vs Hansard (2) - are agreed and are emphatic. The jurisdiction of the Houses, over their own members, their right to impose discipline, within their Walls is absolute, and exclusive. To these words of Lord Ellenborough [added] "They would sink into utter contempt, and inefficiency without it."
>
> Whether in all cases, and under all circumstances, the Houses are the sole judges of their own privileges, in the sense that, a resolution of either, on the subject, has tht same effect for a Court of Law as an Act of Parliament, is a question which it is not now necessary to determine. No doubt, to allow any review of Parliamentary privilege, by a Court of Law, may lead, has led, to very grave complications, and might in many supposable case end in the privileges of the Commons being determined by the Lords. But to hold the resolutions of either, House, absolutely beyong inquiry in a Court of Law, may land us in the conclusions, not free from grave complications too."

The case above, may have the character of entiquity, but the excerpted principle, that the Parliamentary proceedings and procedure are excluded from review by the Court, seems to maintain a vitality, that has defied the passage of time, and still rings. And DWORKINS, "Political Judges and the Rule of Law, (1978), 64 Proceedings of the British Accademy 259), similarly inclined says:

> "The Courts may, not question what takes place in Parliament, as was declared long ago, in Article 9 of the Bill of Rights 1689. That the freedom of speech and debates, or proceedings in Parliament ought not to be impeached, or questioned in any Court or place, out of Parliament."

And near and not far from today, in 1993, Lord Rees - Mogg, brought legal proceedings, in the English Court, to challenge the ratification of the Maastricht Treaty, at the same time, there was a Bill before Parliament, to make provisions consequential, on the ratification of the Treaty, there was a complaint, that the proceedings, would involve the questioning of debates, or proceedings, in the House, contrary to Article 9 of the Bill of Rights. Although the House did not react, the Speaker delivered, a warning (HC Deb Vol.229, Col.353, 21 July, 1993) thus:

> "I ..... take with great seriousness, any potential questioning of our proceedings. There has of course, been no amendment of [Article 9] of the Bill of Rights and that, Act places a statutory prohibitiohn on the questioning of our proceedings .....
>
> I am sure, that the House, is entitled to expect when the case [R. vs Secretary of State for Foreign and Commonwealth Affairs, exp Rees Mogg] begins, to be heard on Monday, that Bill of Rights will be respected, by all those appearing before the Court."

My duty, in this regard will not be derogated from, I hope, if I dutifully add another demonstration. In the case of, R. vs HER MAJESTY'S TREASURY, Exp. SMEDLEY [1985] QB 657 (CA), where Counsel for the Treasury argued, that for the Court, to give any remedy to Mr. Smedly, at that stage, would constitute, an unjustifiable interference, with the procedure of Parliament, and, SIR JOHN DOMALDSON MR, observed thus:

> "Before considering Mr. Smeddley's objection to the [Proceedings so far taken], and to the obvious intention, to advice Her Majesty to make an order in Council, in the same terms, if the draft is approved by both Houses of Parliament, I think, that, I would say a word about, the respective roles of Parliament, and the Courts. Although the United Kingdom, has no written Constitution, it is a Constitutional Convention of highest in importance, that the legislature, and the Judicature, are separate, and independent of one another, subject to certain ultimate rights of Parliament, over the Judicature, which are immaterial for present purposes. It therefore behoves, the Courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament, or so far as this can be avoided, even appearing to do so. Although, it is not a matter for me, I would hope and expect, that Parliament, would be similarly sensitive,

to the need to refrain, from trespassing upon the province of the Court.

Against that background, it would clearly be a breach of Constitutional Conventions, for this Court, or any Court, to express a view, let alone take any action concerning the decision to lay this draft Order In Council, before Parliament, or Concerning the wisdom, or otherwise of Parliament approving that draft."

It is not out of place, in my view to spread our curiousity to other Jurisdictions, to see the Constitutional practice, on a similar matter. This time, I shall take a flight to the Republic of India. In the case of, RAS MARAIN SINGH vs ATAMARAM GOVIND Air 1954, ALL 319 page 327, the learned Judge said:

"I have considered it desirable to state the law, relating to privileges, before grappling with the questions, which this case raises, as I think, that much of the argument in this case, on behalf of the applicant, is based on the assumption, that an erroneous decision by Mr. Speaker, or the House in respect of a breach of privilege, can be the subject matter of scruting by a Court of Law. There is nothing startling, in the proposition, that finality attaches where under cover of it, no new privilege is created by the House, to a decision of the House in respect of the matter, relating to its privileges.

.....

On the question whether it was wise, and statesman like, to pursue the matter after Shri Raj Marain Singh, had been ejected from the House, it would be improper for me to express an opinion. Obviously this Court is not, in any sense whatever a Court of Appeal, or revision, against such legislature, or against the rulings of the Speaker, who as the holder of an office, of the highest distinction, has the sole responsibility cast upon him of maintaining the prestige, and the dignity of the House. Parliamentary Government, receives for its successful working, a spirit of reasonableness, and accommodation, on the part of those, whether belonging to a majority, or minority, who have been elected by the people, to be their chosen representantives, in our legislatures. A perusal of Article 121, would show that, the founding fathers have protected judges from critisism in Parliament, by laying down that there shall, except on motion of misbehaviour, be no discussion in Parliament, on the conduct of any Judge, or Court of Law having Jurisdiction, in any part of India in the exercise of his, or its Judicial functions."

The learned Judge went on to observe:

"The resolution suspending the applicant from the House was a thing done, "within the Walls of the House" of a matter concerning its proceedings, the Legislature is the sole Judge. The matter in issue is a proceeding of the House of Common, in the House, and therefore, "it is part of the course of its own proceedings" and subject therefore to its exclusive Jurisdiction."

Perhaps not for, or out of fear of monotony, but for exhaustiveness, I would add another voice, from the Indian Supreme Court, - See Case MSM SHARMA vs DR SHREE KRISHNA SINHA AND OTHERS AIR 1960, 1187 vide, which, the then Chief Justice, held:

> "It was contended, that the procedure adopted, inside the House, of the Legislature, was not regular, and not strictly in accordance with the law. There are two answers, to this contention, firstly that according to the previous decision of this Court, the petitioner has not the fundamental right claimed by him. He is therefore out of Court, Secondly the validity of the proceedings inside the legislature of a State cannot be called into question, on the allegation that, the procedure laid down by the law, had not been strictly followed. Article 212, of the Constitution, is a complete answer to this part of the contention, raised on behalf of the petitioner. No Court can go into these questions which are within the special Jurisdiction of the Legislature itself, which has the power to conduct its own business. Possibly, a third answer to this part of the contention, raised on behalf of the petitioner, is that it is yet premature to consider the question of procedure, as the committee is yet to conclude its proceedings. It must also be observed, that once it has been held, that the legislature has the Jurisdiction to control the publication of its proceedings, and to go into the question whether there has been any breach of its privileges, the legislature, is vested with complete Jurisdiction to carry on its proceedings, in accordance with its rules business. Even though, it may not have strictly complied with, the requirement of procedural law, laid down for conducting its business, that cannot be a ground for interference by this Court, under Art. 32 of the Constitution. Courts have always recognised, the basic difference between want of Jurisdiction, and improper, or irregular exercise of Jurisdiction. Mere non-compliance with rules of procedure, cannot be ground for issuing a writ under Article 32 of the Constitution: vide JANARDAN REDDY vs STATE OFHG DERABAD, 1951 SCR 344 AIR 1951 SC 217."

The Indian cases, are in obedience to the Indian Constitutional Article 212(1) and (2) that stipulate:-

> "121(1): That the validity of any proceedings in the Legislature of State shall not be called into question on the ground of any alleged irregularity procedures.
>
> (2) No officer, or member of the Legislature of State in whom powers are vested, or under this Constitution, for regulating procedure, or the conduct of business or for maintaining order in the Legislature shall be subject to the jurisdiction of any Court in respect of exercisely him of those powers."

As per this article, and the authorities above cited, it is clear, that the Indian Courts would not be entitled to question the validity of, "any proceeding" in Parliament on ground of irregularity of procedure. Thus the above immunity, from Judicial interference, is confined to matters of irregularity of procedure,

not to matters done without jurisdiction, or done in defiance, of mandatory provisions, of the Constitution, or exercising powers not granted by the Constitution. It would seem to me, that, the above articles are in substantive contends, not very different from what Article 100(1) of our Constitution ordains, and I cannot see how, suspension of the applicant, as a punishment can be described, other than a culmination of procedure within the House. It is here that, on recapitulating and dutifully digesting the cases above, and seeking their relevance to the circumstances of our country, that I am more and better persuaded by the Indian cases. In our case Rule 60 of the 1998 Standing Rules made, under the Article 89(1) of the Constitution, allows in principle the suspension of a Member of Parliament, of course for causes, on matters happening in the House, and therefore it cannot be unconstitutional, and it is not, when it is imposed. Further, although the suspension, did not come upon the applicant, like a hail stones, and the applicant did not rell us, what happened as to make him liable, to deserve the suspension, I shall assume, that such suspension, is a punishment, resultant from disciplinary action, within the Parliament, under the powers authorised by the Constitution, and exercised by the Assembly, in its own business, in the course of its own proceedings, to maintain the dignity of the House, in its serious business, to maintain its relevance to its business, and the rights, of Parliament as peoples institution, the preservation of whose interests, must be given precedent, otherwise, as Lord Coleridge said: "They sink into utter contempt, and inefficiency without it." The applicant is entitled to hide, what led to his suspension, actually complying with Article 100(1) of the Constitution, that proceedings in Parliament shall not be inquired into by a Court of Law, such disciplinary action within the House, falls within the House, and the Court Jurisdiction is ousted, as Article 100(1) of the Constitution loudly says. The rules and orders, are for business in Parliament, and the vast powers exercisable within such Parliament, have the protection of the Constitution, for successful business of Parliament, the freedom within which must be circumscribed and consistent for the success of the Parliament. And I am yet to hear, I contend, of an authority, holding that staying in the Bunge on Sessions, is at any costs, under any circumstances, as a constitutional right, and therefore sending one out, or suspending him, being labelled unconstitutional. I cannot with respect see the right violated. One does not have to philosophise, even if there is any rights as alleged, that such rights have inherent limitations, that such rights shall be enjoyed, all things being equal, if other rights are not trodden upon. It is my view, that that when one becomes a Member of a Society, or group, or even organ of state,

he necessarily parts with some rights, or privileges, which as an individual, are not affected by his relations to others, he might retain, he has to conduct himself, so as not unnecessarily to injure, or interfere, with the rights of others. If follows, that whatever rights, privileges, the applicant had, or has in the House, they should definately be consistent, with the obtaining order therein. So that, even if there were no rule for suspension, there is implied power for suspension, however short, if lack of peace in the House, is for some reason occasioned by an MP, in the House, and if so suspended, the said MP cannot be heard to complain of denial of partipation, if he was the author of the circumstances, for suspension. I contend, that there is no such thing, as enjoying rights in the abstract, - for instance, an MP cannot play Disco in House, and be allowed to shelter under Constitutional right, he will be sent out, you cannot murder and claim right to life, you will suffer death by hanging, you cannot claim right to work, if there is no work you, will die of hunger, or right to food you will perish, if there is no food, simply because, there are itimized in the Constitution. As Walter Lippiman emphasized:-

> "To maintain a Constitutional Order, men must be more truthful, reasonable, just and honourable than the letter of the Laws."

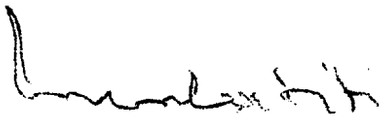
And even be more serious, we should claim our liberties with the caution, as given by, de Tocqueville: "That nothing is more futile in prodigies, than the art of being free, but there is nothing more arduous than the apprenticeship of liberty."

All the same, fifty years of human rights declaration, as standard achievement of all people, and of all nations, and they being designed to limit power, to counterbalance a utilirarian use of power, with an ethical requirement setting a limit to power, so that any action, even with a semblance of challenge to power, abuse, like that the applicant did, is a welcome course of inspiration, on the extent of such rights. And wisely, I think with respect, and more and better persuaded by the Indian authorities, and distinguishing the South African case which is a product of a Constitution and circumstances not close to our own, I am confidently convinced therefore, that the suspension was resultant from disciplinary action by the Assembly, for matters committed with the Assembly which has exclusive Jurisdiction to deal the same, within the four Walls of the same, to maintain the dignity, and integrity of the Assembly, and the members themselves, the said suspension was part of the proceedings in the Assembly, it was part

of the course of its own proceedings. I therefore hold that the suspension was within the Constitutional Powers of Parliament, as exercisable for purposes of its business. In obedience to Article 100(1) of the Constitution, I shall hereby declare, that this Court has no Jurisdiction to hear the petition, and therefore the application unmaintainable, and I shall not by illegal force break into that Parliamentary Castle. The second objection is therefore pre-emptied, and its treatment is therefore rendered superflous.

But even it were otherwise, I would be reluctant to issue the stay, sought for the conditions thereof, not being weightly satisfied -1- a Private Members motion, has no time circumscription, the present Parliamentary life, is five years, and a Tanzania is not dying tomorrow, nor are Tanzanians planning an exodus from this Country. And as for the Temeke Constituency voters, and other voters generally, truancy from the House even to the extent of denying the Hon. Speaker the working quorum, is so common, and whether as a result of truancy, or Speakers suspending order, the effect is non-representation, and a violation of voters rights all the same, for which the electorate will be the judges, either when they know the effect of truancy, or cause for suspension. The application fails therefore, with costs.

Delivered this 27th day of July, 1998.

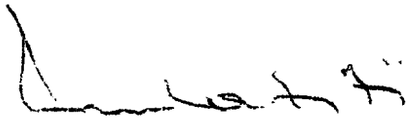


E.W. KATITI

JUDGE

Parties: Mr. Mnyele for Applicant

Mr. Salula for the Respondents.



E.W. KATITI

JUDGE