

A applies to anyone whether he be a ten-cell-leader. So the non-intervention by PW2 does not prove him a liar.

B It is also argued that the appellant should have complained to PW2 instead of going home and then reporting to the police. There was no need to report to PW2, as the latter was present when PW1 was beaten. It was natural for the appellant to go home and report to his relatives and then to the police after seeing PW2 taking no steps despite the assault being committed in his presence. So had both Lower Courts properly directed themselves on the evidence of the appellant, PW2, the ten-cell-leader, and the PF.3 report these would have sufficed to arrive at a conviction. As I pointed out earlier, the fact that the respondent had a claim of right, apparently better than the appellant's over the grazing field does not justify him to assault the appellant.

E For these reasons I allow this appeal and quash both Lower Courts judgments and set aside the respondents acquittal. Instead I find him guilty of assault causing actual bodily harm as charged. I sentence him to TZS. 5 000 fine or six months jail in default. The respondent to pay the appellant TZS. 5 000 as compensation.

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**AUGUSTINO LYATONGA MREMA v. SPEAKER OF
THE NATIONAL ASSEMBLY AND THE ATTORNEY
GENERAL**

HIGH COURT OF TANZANIA
AT DAR ES SALAAM

(Katiti, J.)

MISCELLANEOUS CIVIL APPLICATION No. 36 OF 1998

I *Constitutional Law – Separation of Powers – Court action to enquire into a decision taken by the National Assembly in the course and as part of*

parliamentary proceedings – Whether the action contravenes the doctrine of separation of powers. A

Parliament – Powers, privileges and immunities of Parliament – Whether Court may question an action taken by the National Assembly – Article 100(1) of the Constitution and section 12 of the Parliamentary Immunities, Powers and Privileges and Immunities Act 1988. B

High Court – Jurisdiction of the High Court – Jurisdiction of the High Court to enforce basic rights guaranteed under the Constitution – Whether High Court sitting with a single judge has jurisdiction to hear and determine any matter relating to the enforcement of basic rights guaranteed under the Constitution – Section 10 of the Basic Rights and Duties (Enforcement) Act 1994. C

D The applicant, a Member of Parliament, was attending and participating in the deliberations of the budget session of the National Assembly when, on 24 June 1998, the assembly passed a resolution suspending him from further attendance at and participation in the budget session going on. He filed a petition in the High Court challenging the competence of the assembly, led by the Speaker, to suspend him from Parliament. The petition averred, *inter alia*, that the suspension contravened rules 50(2), 43 and 45 of the Parliamentary Proceedings Rules 1988 and, therefore, also contravened articles 13(1), 13(6)(b), 21(1) and 26 of the Constitution that guarantee equality before the law, freedom of association, the right to participate in public affairs, the duty to guard and obey the Constitution and the right to institute proceedings to safeguard the law and the Constitution. While the petition was pending, he filed this application seeking an order to stay the implementation of the resolution to suspend him from Parliament pending hearing and determination of the petition. A preliminary objection was raised against the application advancing the grounds that under article 100(1) of the Constitution, the High Court had no jurisdiction to question parliamentary proceedings, and that a single judge of the Court could not determine any matter under the Basic Rights and Duties (Enforcement) Act 1994, save for what is provided for under section 10 of the said Act. E F G H

I **Held:** (i) Unlike the British Constitution which is not written, our Constitution is written and stresses on human rights; it is therefore a right and a duty of our judges to have regard to the broad objective of any statutory obligation and also to have regard

A to the Constitution we operate under in order to uphold the fundamental right of any party aggrieved if transgressed by any organ of the state, even Parliament;

B (ii) Separation of powers is represented by an arrangement wherein the pillars of the state operate in a world of countervailing powers of Parliament, the Courts, and the Executive, and one of its facets is the rule of law which should find its fullest expression in the constitutional role of the Courts in upholding the rights of individuals against misuse of power by the Executive, or even Parliament, or any other authority of the State;

C (iii) Under the doctrine of separation of powers, judges are conferred with authority to decide disputes without bias and there is nothing to prevent a judge from hearing any aggrieved party or to prevent any aggrieved party from pursuing his or her rights against any authority, however high placed it may be;

D (iv) Order 60 of the Parliamentary Standing Orders 1988 [or rule 60 of the Parliamentary Standing Rules 1988], made under article 89(1) of the Constitution, allows the suspension of a Member of Parliament on matters happening in the House;

E (v) As Order 60 of the Parliamentary Standing Orders 1988 provides for suspension of a Member of Parliament as a punishment, the National Assembly had the power to suspend the applicant;

F (vi) In compliance with Article 100(1) of the Constitution which precludes the courts from questioning any proceedings of the National Assembly, the applicant is entitled to hide from the court what led to his suspension by the assembly and as the suspension was a disciplinary action by and within the National Assembly, the jurisdiction of the court to question it is ousted by the provisions of the said article;

G (vii) The suspension of the applicant was within the constitutional powers of Parliament, exercisable for the purposes of its business and, in obedience to Article 100 of the Constitution, this court has no jurisdiction to hear the application.

H **Application dismissed**

Cases referred to:

(1) *Bradlaugh v. Gossett* (1884) 12 QBD 271

I (2) *Duport Steels Ltd v. STRS* [1980] 1 W.L.R. 142 (HL)

(3) *Hill v. Chief Constable of South Yorkshire*, [1990] 1 W.L.R. 946 at page 952 A

(4) *Re: Kerala Education Bill*, A 1958 S.C. 956

(5) *Abuki and another v. Attorney General*, Uganda Constitutional Court B

(6) *Nawaz Sharif v. President of Pakistan*, P.L.D. 993 S.C. 474

(7) *Patricia De Lille and Pan Africanist Congress of Azania v. Speaker of the National Assembly*, High Court of South Africa, 8 May 1998 C

(8) *R. v. Her Majesty's Treasury, ex parte Smedley*, [1985] QB 657 (CA)

(9) *Ras Marain Singh v. Atamaram Govind*, AIR 1954 All. 319

(10) *MSM Sharma v. Dr. Shree Krishna Sinha and others*, AIR 1960, 1187 D

(11) *Janardan Reddy v. State of Hyderabad*, 1951 SCR 344; AIR 1951 SC 217

Statutory provisions referred to:

(1) Constitution, article 13(b), 21(1), 26 and 100(1) E

(2) Basic Rights and Duties (Enforcement) Act 1994, section 10

(3) Parliamentary Proceedings Rules 1988, rules 50(2), 43 and 45

(4) Basic Rights and Duties (Enforcement) Act 1994, section 10 F

(5) Parliamentary Privileges Act Number 3 of 1988, section 12

(6) Parliamentary Immunities, Powers and Privileges Act, 1988, sections 3 and 12 G

Mr Mnyele, for the Applicant

Mr Salula, for the Respondents

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RULING

(Delivered 27 July 1998)

KATITI, J.: Before this court is an application by the Hon. Augustino Lyatonga Mrema M.P., henceforth to be called "the applicant," against the 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 and the learned Senior State Attorney, Mr Salula, represents the respondents.

The antecedents to this application are as follows. The applicant is, as above stated, a Member of Parliament representing Temeke Constituency, and was at the material time representing his said constituency in Parliamentary Sessions going on in Dodoma. The facts show that as the Parliamentary deliberations were going on, 24 June 1998 the National Assembly passed a resolution suspending the Applicant from further attending the on-going budget session. Here, as fate would have it, we have Augustino Lyatonga Mrema, the applicant, seeking what he considers his rights, and for the first time challenging the extent of parliamentary competence under the leadership of the 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 articles 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 the learned Counsel 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 would be contravening article 100(1) of the Constitution of the United Republic, and section 12 of the Parliamentary Privileges Act Number 3 of 1988, citing the case of *Bradlaugh v. Gossett* (1). -2- That the court would be messing up with the doctrine of separation of powers, and -3- that as a single Judge, this court lacks jurisdiction to hear the petition and, *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 his contention was that the said constitutional provisions were inapplicable. He maintained that whatever the Parliament or anybody does, must be within the permitting parameters of, and subject to, the Constitution and that the Parliament in suspending the applicant had infringed the applicants 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 rights, a matter of substance and of constitutional transgression, as suspending 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 may 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 off 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

A in mind, we must have our route plan. Therefore in my view the issues to guide me are 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 separation of powers; -2- whether the National
B 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.

C I would start with the objection that this court's entertainment of this application would amount to gross transgression of the doctrine of separation of powers, in that the judiciary would be encroaching upon Parliament's exclusive jurisdictional territory. The doctrine
D of separation 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. In the case of *Duport Steels Ltd v. STRS (2)* the learned Judge Lord
E Dipplock had 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
F that the British Constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the law; the Judiciary interprets them. When Parliament legislates, to remedy what the majority of its members at the time perceive to be a defect, or a lacuna in the existing law (whether
G it be written law, enacted by existing state, or the unwritten common law, as it has been expounded by the judges in decided cases) the role of the Judiciary is confined to ascertain from the words that Parliament has approved as expressing its intention, what that intention was, and to give
H effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities, as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or
I immoral.

Lord Scarman, in the same case had this 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.
B But the Constitution's separation 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
D than it need be or is to day.

J.R 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 interpret Parliament's enactments as sensibly as they can. It is not the Judge's task to say what Parliament should have enacted but only to say, given that Parliament has enacted a general law,
F 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 is a proponent of the pure separatist view of the doctrine of separation of powers typical of the 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 Dicey, a committed preacher of Parliamentary Sovereignty, - see his *The Law of the Constitution* 39-40, and for which Allan in his book, *Law, Liberty and Justice*, laments that
H "the scope of restriction on Parliament's legislative competence is admittedly difficult and largely untested, our Jurisprudence has been impoverished by lawyer's uncritical adherence to the dogma of Parliamentary omnipotence." And from a very unlikely quarter to
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A vindicate Allan is a timorous statement from no less a distinguished judge than Lord Denning who, in what he thought would protect judicial independence and public confidence in the courts, said:

B One has to see in the great 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 impartiality depend on their obeying the will of Parliament and on their being independent.

C The independence of the judges is the other pillar of our Constitution. – 369 HL Deb.25 March 1976 Cols 797 – 8 opposing a Bill of Rights.

D All the same, the English common law and the courts have not lacked the armoury and ammunition in the name of the doctrine of *ultravires* for defending rights and liberties of individuals by strictly construing against statutes interfering with such liberty – see the case of *Hill v. Chief Constable of South Yorkshire* (3) at page 952.

E My confident reaction would seem to be that the English approach is Parliamentary supremacist and I shall not seek assistance therefrom in the restructuring of our jurisprudence in 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

F will, we should not be apologetic and timorous of notice, 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.

G In my view it is in that light a 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 transgressed by any organ of State, even Parliament. In my view,

H should be that the doctrine of separation 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

I rights, the said doctrine of separation of powers with a facet of upholding the rule of law and fundamental rights means so deciding without

A bias, I can see no hurdle for the judge to entertain any aggrieved party and such aggrieved party to pursue his or her rights, however high the authority involved is, under the cover if the doctrine.

B I think this is not opportune time to lecture anybody on the doctrine of separation of powers, if it suffices for us to now know that the values once strictly associated with the doctrine of the formal separation of Legislative, Executive and Judicial powers in a compartmentalized manner is no longer; it equally suffices to know that separation of powers 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 countervailing powers exercised by Parliament, courts, and the Executive, and even others, and if we know that the whole idea of separation 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 the 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 interests are affected, and to this extent I should be understood to mean that, *ipso facto*, separation 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 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.

H The second area of contention is whether or not the National Assembly has power to suspend a Member of Parliament. While the learned Senior State Attorney maintained that what goes on in Parliament falls 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

A suspension, and that in suspending the applicant it arrogated to itself the power it did not have, hence injury to the applicant's 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, B 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 difficulty in answering this issue as it is very clear for both blind C and naked eye to see. It is rule 60 of the Standing Rules 1988 that, among other punishments, provides 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 D my fishing gear into uninviting waters.

Are such powers of suspension and therefore the Standing Rules so unconstitutional as, may I pose, to contravene human rights? It is my view that an act or rule, so long as the possibility of its being E applied to purposes not sanctioned by the Constitution cannot be ruled out, 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 F cannot abdicate from that duty: see Article 30(3) of the Constitution, and the Basic Rights and Duties Enforcement Act 1994. But I would be fast to add that this power of review, while exercisable in many areas like: (1) contravention of mandatory provisions of the Constitution, G imposing limitations on the Legislature, (2) state operating beyond statutory 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, H 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* (4) at page 981 and *Abuki and another v. Attorney General* (5) by the Ugandan Constitutional court. I

While on this area, I find it fascinating to pose a question as to A what extra fundamental or human rights the applicant gained by being a Member of the National Assembly, rights for the violation of which he is now seeking remedy. I hold a confident view that the test in B adjudging the constitutional validity or otherwise of an action of state or authority, on the cornerstone of fundamental rights, is what the object of the authority in taking the action is; what the subject matter of the action is, and to which fundamental rights it relates. C With respect, our Constitution in Part III articles 12-24, provides 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, D 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 E likes, of course subject to other factors. They are, in my view, natural rights but since there 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 of which is the duty of all civil governments to ensure. As the Supreme Court of Pakistan has explained in the case of *Nawaz Sharif v. President of Pakistan* (6) [where it] pointed out: F

... basic fundamental rights of individual which presently stand formally G incorporated 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 H origin, could not have been discovered and earned by the applicant in and from the National Assembly. It follows, in my view, that the applicant's basic human rights were not as such violated in Parliament. While the applicant had his human rights intact and unviolated being I in Parliament, and as a legitimate member thereof, he thereby *ipso facto* had to enjoy rights and privileges in Parliament, but also be

- A subject to the rules that pertain to the functioning of Parliament, under the jurisdiction of the Speaker and equally guaranteed by the Constitution. As a follow up, it seems to be uncontestable that the
- B powers, were promulgated through the legislative competence of Parliament and particularly the Standing Orders promulgated under Article 89(1) of the Constitution, "*kuweka utaratibu wa kutekeleza shughuli zake*," meaning "to lay down the procedure for the proper
- C functioning of the Parliament's business." The Standing Rules or Orders, Order 60 includes suspension of a Member of Parliament as a punishment, obviously for a cause: see Orders 58, 59 etc. And in my view, it is this constitutionally permitted procedure, freedom
- D and privilege, including suspension as punishment 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.
- E Whether the court has jurisdiction to inquire into the said suspension emanates from the complainant's, charges that his rights as a Member are violated by the Speaker of the National Assembly. His counsel cited the South African case – High Court of South Africa, of *Patricia De Lille and The Pan Africanist Congress of Azania v. The Speaker of the National Assembly* (7) to vindicate the applicant's position,
- F while the learned Senior 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
- G no jurisdiction to inquire into the same under the ousting article 100(1) of the Constitution, citing the case of *Bradlaugh v. Gossett* (1), and other authorities. The question for determination is whether this
- H 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 is this issue of jurisdiction, having disposed off other aspects above, that brings us here. I have always imagined that the inventor of Constitutions was initially troubled with power
- I and the distribution thereof, for while the authority of any ruler should

ultimately rest upon law, it must also have the power; but law does not extend beyond power, and law without power is, *Ihering's* phrase, "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 court's jurisdiction in the matter is 100(1) of the Constitution, section 3 and 12 of the Parliamentary Immunities, Powers and Privileges Act 1988, hence to be called the Act. The curiosity 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 na utaratibu katika Bunge na Uhuru huo hautavunjwa na chombo chochote katika Jamhuri ya Muungano, au katika mahakama au mahali pengine nje ya Bunge.

I have made a free translation thereof, as follows:

Article 100(1)

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

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

Section. 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 purpose of jurisdiction and procedure in relation to breaches of parliamentary privileges, section 12(1) and (2) of the Act, has this to say:

A Section 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
B 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.

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

D 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 let
me pose a mischievous question: for the National Assembly to deserve
immunity, what goes on in there? I am sure the MPs know better but
E 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
Orders, 1988, promulgated under article 89(1) and (2) of the Constitution,
under the Chairmanship of the Hon. Speaker who, in this case, is
F the impleaded party. And the Speaker thereof is impleaded 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: he is, first, the spokesperson
and representative of the National Assembly; he is the custodian of
G the Powers and Privileges of the Assembly; he is the Chief functionary
and Constitutional Head of the Assembly; he is required under section
12(2) of the Act to discharge duties of a judicial or interpretative
character, with finality attached to the same; and he is the Chairman
H 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 and debates are immunized, being the base of the essence
I of the Parliamentary System of Government that MPs express themselves
without fear of legal consequences, with the orders and rules of

Parliament being under the control of the Speaker of the Assembly. A
Objectively observed, this is no mean portfolio, though the said Speaker
should not shelter thereunder where human rights are involved.

On reflection, it is at this relevant juncture that I recall the South B
African case – *Patricia's case* (7), a case against the South African
Assembly Speaker, that Mr Mnye, 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 C
what happened in 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 D
that twelve members of the 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. Courageously, she mentioned
eight of them, thereby provoking accusations by the Speaker and E
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 F
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 conspicuously biased; (2) that the *ad hoc* Committee Chairman G
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 that *ad hoc* committee was done as a political H
weapon for political reprisal; (6) that she had even been excluded
from attending the *ad hoc* committee meetings; and (7) that her
suspension was executed even after she had withdrawn the allegations
meaning that, technically, the National Assembly had no material I
on which to base the suspension. Exercise of any privilege by the

A 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.

B In the judgment, the learned judge in condemning the suspension as unconstitutional and, *inter alia*, observed and I quote:

C In my judgment it is important that our courts should borrow wisely from other jurisdictions; comparative 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.

F 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 Interior v. Harris*, where Parliament in the 1950s attempted to convert 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 interfered 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 I have had the advantage of thoroughly reading the South African case, the *Patricia De Lille (7)* Judgment, brought to my notice by counsel for the applicant, and for that I do express my appreciation.

A I agree that even in our country the Constitution is supreme law. The above case is instructive and deserves a lot 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 of 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 go, 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 June 1998, the genesis of it all is under black cover; and third, it does seem that the South African Constitution does not have provision similar to 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 impartiality, or the facts in that direction are lacking.

F 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 tyrannical use of the power of the majority still remains one of the problems of Governments and an area remediable by the electorate, and the courts cannot be substitutes thereof. Third, as the learned judge pointed out, their Constitution is a product of the South African history with, in my view, an extra snake-bitten sensitivity. Fourth, unlike the South African position, which does not provide for suspension, ours, - see Order 60 of the Parliamentary Standing Orders 1988,

A 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 our Constitution, that such freedom shall be subject to the freedom of others, the public generally and the interests of the 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 uncharged, unheard, without material to base the judgment on, how the 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 persuasive base is so dilute that, with respect it will be no guide to me.

E All said and done, there is no way one can tamper with any weighing scale to trivialize 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 the constituency he represents. But even worse, depending on the cause for suspension, the relevant Member of Parliament may lose credibility and be judged as an irresponsible, delinquent representative. However, the respondent maintains 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* (7) has failed to persuade me, of course, with respect.

I Having, however, considered the pros and cons of submissions, article 100, section 12 of the Act and of course *Patricia's case* (7),

A 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 and duties in its business. This is not to say that Parliament cannot be questioned on anything regardless of its constitutional limits; after all as a 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 provisions of the Constitution, or by exercising power which Parliament does not, under the constitution, possess. As I did point out above, the novelty of the 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 Senior State Attorney, *Bradlaugh v. Gossett* (1), 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. At page 275, Lord Coleridge, *inter alia*, said:

E 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 v. Abbott* (9), and *Stockdale v. 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”.

G 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 that 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 and in the privileges of the Commons being determined by the Lords. But to hold the resolutions of either House absolutely beyond inquiry in a court of law, may land us in the conclusions not free from grave complications too.

I

- A The case above may have the character of antiquity, but the excerpted principle that the Parliamentary proceedings and procedures 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 Academy 259, similarly inclined, says:

C 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.

- D 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 Volume 229, Col. 353, 21 July 1993) thus;

- F 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 prohibition on the questioning of our proceedings ...

- G I am sure that the House is entitled to expect when the case [*R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees Mogg*] begins to be heard on Monday that Bill of Rights will be respected by all those appearing before the court.

- H My duty in this regard will not be derogated from, I hope, if I dutifully add another demonstration. In the case of *R v. Her Majesty's Treasury* (8), where counsel for the Treasury argued that for the court to give any remedy to Mr Smedley at that stage would constitute an unjustifiable interference with the procedure of Parliament, and Sir John Donaldson, MR, observed thus:

A Before considering Mr Smedley's objection to the [proceedings so far taken], and to the obvious intention to advise 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 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 behaves 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.

E 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.

F It is not out of place, in my view, to spread our curiosity to other jurisdiction 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 v. Atamaram Govind* (9) at page 327, the learned judge said:

G 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 scrutiny 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

A On the question whether it was wise and statesman like to pursue the
 B matter after Shri Raj Marain Singh had been ejected from the House, it
 C would be improper for me to express an opinion. Obviously this court is
 D not, in any sense whatever, a Court of Appeal or revision, against such
 E Legislature, or against the rulings of the Speaker who, as the holder of an
 F office of the highest distinction, has the sole responsibility cast upon him
 G of maintaining the prestige and the dignity of the House. Parliamentary
 H Government receives, for its successful working, a spirit of reasonableness
 I 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 representatives
 in our legislatures. A perusal of article 121 would show that the founding
 fathers have protected judges from criticism 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:

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

Perhaps not for or out of ear of monotony but for exhaustiveness, I
 would add another voice from the Indian Supreme Court, in the case
 of *MSM Sharma v. Dr. Shree Krishna Sinha and others* (10), in
 which the then Chief Justice, held:

H It was contended that the procedure adopted inside the House of the
 I 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

A to this part of the contention, raised on behalf of the petitioner. No court
 B can go into these questions which are within the special Jurisdiction of
 C the Legislature itself which has the power to conduct its own business.
 D Possibly, a third answer to this part of the contention, raised on behalf of
 E the petitioner, is that it is yet premature to consider the question of procedure
 F as the committee is yet to conclude its proceedings. It must also be observed
 G that once it has been held that the legislature has the jurisdiction to control
 H the publication of its proceedings, and to go into the question whether
 I 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 articles 32 of the
 Constitution. Courts have always recognized 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 v. State
 of Hyderabad* (11).

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

- F 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.
 G (2) No officer, or member of the Legislature of State in whom powers
 H are vested, or under this Constitution, for regulating procedure, or
 I the conduct of business or for maintaining order in the Legislature
 shall be subject to the jurisdiction of any court in respect of exercise
 by him of those powers.

H As per this article, and the authorities above cited, it is clear, that
 I the Indian Court 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

A 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 contents, 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, I am more and better persuaded by the Indian cases. In our case rule 60 of the 1998 Standing Orders, made under article 89(1) of the Constitution allows in principle the suspension of a Member of Parliament, of course for a cause, on matters happening in the House and therefore it cannot be unconstitutional; and it is not unconstitutional when it is imposed. Further, although the suspension did not come upon the applicant like hailstone, and the applicant did not tell us what happened 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 authorized 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 and to maintain its relevance to its business and the rights of Parliament as a people's institution, the preservation of those interests must be given precedence otherwise, as Lord Coleridge said, "They sink into utter contempt, and inefficiency without it".

G 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's 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.

A And I am yet to hear of an authority holding that staying in the Parliamentary Sessions is at any cost and under any circumstances a constitutional right, and therefore sending one out or suspending him being labeled unconstitutional. I cannot, with respect, see the right violated. One does not have to philosophise, even if there are any rights as alleged then such rights have inherent limitations, so that such rights shall be enjoyed, all things being equal, if other rights are not trodden upon.

C 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. It follows that whatever rights and privileges the applicant had or has in the House, they should definitely be consistent with the obtaining order therein. So that even if there were no rule for suspension, there is an implied power of 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 participation if he was the author of the circumstances for suspension. There is no such thing as enjoying rights in the abstract, for instance, an MP cannot play disco in the 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 you cannot claim a right to food, you will perish if there is no food, simply because, these are itemized in the Constitution. As Walter Lippiman emphasized:

H To maintain a constitutional order, men must be more truthful, reasonable, just and honourable than the letter of the Laws.

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

A All the same, fifty years of the human rights declaration as standard achievement of all people, and of all nations, and they being designed to limit power to counterbalance a utilitarian use of power with an ethical requirement setting a limit to power so that any action, even
 B 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
 C is a product of a Constitution and circumstances not too close to our own, I am convinced that the suspension was resultant from disciplinary action by the assembly, for matters committed within the assembly which has exclusive jurisdiction to deal with the same, within the four
 D 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
 E 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 is unmaintainable, and I shall not by illegal force break into that parliamentary castle. The second objection is therefore pre-empted,
 F and its treatment is therefore rendered superfluous.

G But even if it were otherwise, I would be reluctant to issue the stay sought for the conditions thereof, not being satisfied - I - a private member's motion has no time circumscription, the present parliamentary life is five years, and 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 a working quorum, is so
 H common, and whether as a result of truancy or the Speaker's suspending order the effect is non-representation and a violation of the voters' rights, all the same, for which the electorate will be the judges: either when they know the effect of truancy, or the cause for suspension.
 I The application fails, therefore, with costs.

SAID MNIMBO AND OTHERS v. STATE TRAVEL SERVICES LTD, TOURISM SERVICES TANZANIA AND PARASTATAL SECTOR REFORM COMMISSION AS OBJECTORS

HIGH COURT OF TANZANIA
AT DAR ES SALAAM

(Kalegeya, J.)

CIVIL CASE No. 296 OF 1997

Public Corporations – Privatization of public corporations – Public corporation declared a specified public corporation with a view to privatization – Effect of declaring the corporation a specified corporation.

Civil Practice and Procedure – Garnishee Order – Order imposed on bank accounts of a wrong party to proceedings – Whether order may be lifted.

Banking – Garnishee order – Garnishee order imposed on bank accounts of a wrong party to the proceedings – Whether the order may be lifted.

The plaintiffs filed a suit against the State Travel Services Ltd for terminal benefits following staff retrenchment. After hearing the case *ex parte*, judgment was entered in their favour and a decree was drawn up to the sum of TZS. 185 697 985. The court, pursuant to the decree against State Travel Services Ltd, issued a garnishee order on 4 accounts held at Stanbic Bank, Arusha Branch, and 4 accounts at Stanbic Bank, Dar es Salaam; on 2 accounts held at NBC (1997) Ltd, Samora Avenue Branch, and one account at NBC (1997) Ltd, Foreign Branch, in Dar es Salaam.

Retrenchment of the employees followed declaration of the State Travel Services Ltd as a specified corporation under the Public Corporations (Amendment) Act 1993 [Number 16 of 1993], and the acquisition of 75% of its shares by Tourism Services Tanzania. Following that declaration the Parastatal Sector Reform Commission (PSRC) assumed responsibility over all matters that fell under the State Travel Services Ltd. Aggrieved by the garnishee order issued against the bankers of State Travel Services Ltd, Tourism Services Tanzania and PSRC filed an application praying for the garnishee orders to be lifted on grounds, *inter alia*, that from the date State Travel Services Ltd