IN DIE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2000/002

In the matter between:

AUDREY EUNICE VAN ZYL	Applicant
And	
THE NEW NATIONAL PARTY	1st Respondent
THE AFRICAN NATIONAL CONGRESS	2nd Respondent
LYNNE BROWN	3rd Respondent
THE NEW NATIONAL PARTY, WESTERN CAPE	4th Respondent
THE EXECUTIVE COMMITTEE OF THE NEW NATIONAL PARTY, WESTERN CAPE	5th Respondent
FREDDIE ADAMS	6th Respondent

JUDGMENT: 22 MAY 2003

VAN REENEN, J:

1] The applicant, a qualified medical doctor, who at the time was being employed as a clinical researcher by pharmaceutical companies in Belgium, was during 1998 approached by leaders of the first respondent, the New

National Party (the NNP), with a view to becoming involved in politics in the Province of the Western Cape. The applicant relocated to the Republic of South Africa and soon became a member of the Western Cape Provincial Parliament (the Provincial Parliament) representing the New National Party of the Western Cape (NNPWC). The applicant was during June 2001 appointed as Minister of Constitutional Affairs in the Provincial Cabinet.

2] The Federal Council of the NNP during or about October/November 2001 resolved that the NNP would disassociate itself from the Democratic Alliance, an alliance that had been established between the Democratic Party (the DP), the NNP and the Federal Alliance. Mr Gerald Morkel, the then Premier of the Province of the Western Cape, disapproved of the resolution and his stance thereanent led to the development of disaffection between himself and leaders of the NNP.

3] On 1 November 2001, members of the NNP staged a demonstration at the entrance of the Western Cape Provincial Administration Building (the seat of the Provincial Parliament) in support of Mr Morkel.

4] The applicant was alleged to have been involved in arranging the demonstration and to

have disavowed any involvement therein when she was confronted by the leadership of the NNP and the NNPWC.

5] As a result of the said disaffection Mr Morkel vacated his positions as leader of the NNPWC and premier of the Province of the Western Cape.

6] In disregard of a resolution taken by the caucus of the NNPWC that the proposing of any motions in the Provincial Parliament had first to be cleared with the party's Chief Whip, as well as an arrangement between the Whips of the political parties represented in the Provincial Parliament that no motions would be proposed by any of their members at its sitting on 27 November 2001, the applicant proposed a motion of thanks to Mr Morkel.

7] On 28 November 2001 and because of the applicant's said conduct, the Head Council of the NNPWC in terms of section 38.2 of its constitution, resolved to institute disciplinary proceedings against the applicant; appointed a disciplinary committee consisting of three persons as well as a pro forma prosecutor; and formulated the charges that the applicant had to face.

8] Disciplinary proceedings against the applicant commenced on 5 February 2002 but were postponed to 7 February 2002 because she was indisposed. On the latter date the matter was postponed to 2 March 2002. On thát date the applicant's counsel moved for the recusal of the members of the disciplinary committee. They declined to do so and made their decision known on 6 March 2002. As a consequence, the applicant on 8 March 2002, launched an application against the individual members of the disciplinary committee and the NNP in which she sought an order reviewing and setting aside the said decision.

9] The applicant's attorney Mr Francois du Toit, on 11 March 2002, sought and obtained confirmation that, pending finalization of the review proceedings, the disciplinary hearing would be held in abeyance.

10] Shortly after the disciplinary proceedings had commenced the applicant was relieved of her post as Minister of Constitutional Affairs and subsequently nominated by the NNPWC as a permanent delegate to the National Council of Provinces (NCOP) and appointed by the Provincial Parliament. It appears not to be in issue that the applicant's membership of the Provincial Parliament terminated when she, upon being requested to do so, resigned as a member of the Provincial Parliament prior to being nominated and appointed as aforementioned.

11] Mr Hendrik Albertyn Smit (Mr Smit) the Chief Whip of the NNPWC in the Provincial Parliament, in compliance with the provisions of Standing Rule 123(1) of the Western Cape Provincial Government, handed a signed copy of a notice of motion in the following terms to the secretary of the Provincial Parliament before noon on 11 March 2002, to be dealt with by it on 12 March 2002.

> "1. The Chief Whip (NNP): That the House has lost confidence in Dr A.E. van Zyl as a permanent delegate to the National Council of Provinces"

12] That motion appeared as an item on the Order Paper of the Provincial Parliament of 12 March 2002 that was distributed in the NCOP and posted on the internet during the course of that morning.

13] When the Provincial Parliament convened at 14h15 on 12 March 2002, Mr Smit proposed a motion of no confidence in the applicant in the terms printed on the Order Paper. When the Leader of the Opposition in the Provincial Parliament, the DP, required that motivation be provided and expressed the view that the rules of natural justice found application, Mr Smit's response was that there were no provisions that prescribed that

reasons had to be provided for a motion of no confidence and referred to sub-section 62(4)(c) of the Constitution which provides that a person ceases to be a permanent delegate to the NCOP if he or she has lost the confidence of the provincial legislature and is recalled by the party that nominated him or her. The Speaker of the Provincial Parliament, the third respondent, at the request of the Leader of the Opposition allowed a Declaration of Vote. The spokesperson of the African National Congress (the ANC) supported the motion on the basis that to the best of his party's knowledge the applicant had not fulfilled her functions in the Provincial Parliament; had "not been visible"; and had not performed her functions adequately in the standing committees and "elsewhere". Mr Smit declined to elaborate and contented himself with the terms of the motion as proposed. The Leader of the Opposition opposed the motion on the basis that the members of the Provincial Parliament had not been provided with information sufficient to enable them to apply their minds to the question whether the applicant had represented the Parliament of the Western Cape suitably or not. Of the two minority parties one spoke in support of the motion: the other declined to do so. The motion was put to the vote and adopted. When a Division was called for 35 representatives voted in favour of the motion and five against. The representatives of the other parties abstained.

14] At approximately 15h15 on 12 March 2002, and whilst she was attending a committee meeting of the NCOP, the applicant was handed an envelope containing a typed note signed by Mr Smit in the following terms:

> "Hiermee stel ek u, namens die NUWE NASIONALE PARTY van die WESKAAP, in kennis dat die WESKAAPSE PROVINSIALE PARLEMENT vandag (12 Maart 2002) tydens 'n SITTING van díe RAAD 'n mosie aanvaar het, dat vertroue in u, as afgevaardigde in die Nasionale Raad van Provinsies (NRvP) verloor is."

15] The Executive Committee of the NNPWC (the Executive Committee) during a meeting held at 18h30 on 12 March 2002 under the acting chairmanship of Mr Pierre Uys (Mr Uys), resolved to recall the applicant as a permanent delegate to the NCOP. That resolution is herein referred to as the recall resolution.

16] The acting Head Secretary of the NNPWC, on 13 March 2002, by means of a hand-delivered letter, advised the applicant as follows:

> "Geagte dr Van Zyl
> Op 'n vergadering van die Uitvoerende Komitee van die Nuwe Nasionale Party van die Wes-Kaap wat op Dinsdag, 12 Maart 2002 plaasgevind het, is daar besluit dat u uit hoofde van die bepalings van artikel 62(4)(c) van die Grondwet van die Republiek van Suid-Afrika, 1996, met onmiddellike effek teruggeroep word as vaste afgevaardigde na die Nasionale Raad van Provinsies.

Die voorsitter van die Nasionale Raad van Provinsies is dienooreenkomstig ingelig."

17] The Executive Committee at an urgent meeting held at 10h00 on 13 March 2002, under the chairmanship of the then provincial leader of the NNPWC, Mr P J Marais, unanimously resolved to nominate Mr Freddie Adams (Mr Adams) in the place of the applicant as a permanent delegate to the NCOP. The written nomination, duly accepted, was on 14 March 2002 forwarded to the secretary of the Provincial Parliament. The minutes of the proceedings of the Provincial Parliament of 15 March 2002, reflect that the motion of Mr Smit that Mr Adams of the NNP be appointed as a permanent delegate to the NCOP was duly agreed to.

18] On 13 March 2000, the applicant's attorney, by means of a facsimile addressed to Mr Adams, the Acting Head Secretary, recorded that he had recently been advised by the

applicant that a vote of no confidence in the applicant had been proposed by the NNP, and adopted by the Provincial Parliament the previous day and that it appeared to him that the motion had not been placed on the Order Paper in a regular manner; that its adoption had not been properly motivated; that the applicant had not been given an opportunity to oppose its adoption; and that the proposing of the motion constituted a transparent attempt to terminate the applicant's membership of the Provincial Legislature because the already instituted disciplinary proceedings had run into difficulties. He added that any attempt to terminate the applicant's membership on that basis would detrimentally affect her rights and legitimate expectations and would offend against all principles of fair administrative action, more in particular section 33 of the Constitution and the spirit and most of the provisions of The Promotion of Administrative Justice Act, No 3 of 2000 (the AJA). The letter concluded with the following paragraph:

> "Ons versoek u derhalwe dringend om nie op hierdie wyse te poog om ons kliënt te "kruisig" sonder 'n verhoor nie. Dit spreek vanself dat indien u sou voortgaan om dit te doen ons kliënt dringende regshulp by die Hooggeregshof sal aanvra wat u verbied om gevolg daaraan te gee, hangende die hersiening van sodanige besluit, met 'n gepaste kostebevel en wel soos op die skaal tussen prokureur en kliënt."

19] Thát facsimile elicited a response by means of a facsimile dated 13 March 2002 on a letterhead of the Parliament of the Republic of South Africa under the signature of Mr Francois Beukman LP, in which the applicant's attorney was advised that the matter did not fall within his area of responsibility and requested him to direct all correspondence to the Head Secretary of the NNPWC.

20] On 15 March 2002 the secretary of the Provincial Parliament advised the chairperson of

the NCOP that Mr Adams had been appointed by the NNP as permanent delegate in the place of the applicant and undertook to provide him with a copy of the minutes of the proceedings confirming his appointment by 18 March 2002.

21] The applicant on 15 March 2002 launched an urgent application, set down for hearing at 14h15 on 18 March 2002, in which she claimed against the NNP, the ANC and the third respondent, an order in the following terms:

"1. That the matter be treated as one of urgency;

2. That applicant's recall as a permanent delegate to the National Council of Provinces in terms of first respondent's decision to that effect of 12 March 2002 be suspended pending the final determination of the review proceedings referred to in paragraph 4 [read 3] below and that Applicant be permitted to forthwith resume and continue with her functions as permanent delegate of the National Council of Provinces pending such determination;

3. That respondents be called upon to show cause on a date to be determined by the above Honourable Court why;

3.1 The vote of no confidence in Applicant which was adopted by the Western Cape Provincial Assembly on 12 March 2002 should not be reviewed and set side;

3.2 The decision by First Respondent of 12 March 2002 to recall applicant as its delegate to the National Council of Provinces should not be reviewed and set aside; and

3.3 First Respondent should not be ordered to pay the costs of this application on an attorney and client scale and why the other Respondent who opposes the relief sought should not be ordered to pay such costs jointly and severally with First

Respondent"

22] The applicant's attorney's facsimile of 13 March 2002, must have found its way to the NNPWC as Mr Uys, in a letter dated 19 March 2002 and hand-delivered to the applicant's attorney on 20 March 2002, stated that the Executive Committee had on 19 March 2002 considered it and had resolved to make the following offer to the applicant:

a) that the Executive Committee, was prepared to reconsider the recall resolution; and

b) that a special meeting of the Executive Committee would be held at 10h00 on 26 March 2002 to –

   i) to give consideration to the vote of no confidence adopted by the Provincial Parliament; and

   ii) to reconsider the recall resolution.

23] The letter also advised the applicant's attorney that the applicant would be permitted to advance reasons why she should not be recalled by the NNPWC as a permanent delegate to the NCOP in terms of the provisions

of Section 62(4)(c) of the Constitution and that, if the recall resolution were to be reversed, the nomination of Mr Adams as the applicant's substitute in the NCOP would be withdrawn.

24] The applicant was given until 10h00 on Friday 22 March 2002 to advise the Head Secretary in writing whether she accepted the Executive Committee's offer.

25] The applicant's attorney in a facsimile dated 20 March 2002, addressed to Mr Uys, requested to be advised whether, in terms of the resolution of 19 March 2002, the recall resolution had been reversed and would be considered afresh at the meeting of 26 March 2002 or whether it continued to operate and would only be reconsidered after the meeting.

26] Mr Uys in a facsimile addressed to the applicant's attorney informed him that the recall resolution continued to operate; would be reconsidered on 26 March 2002; and thereafter be set aside or confirmed.

27] The applicant's attorney in a facsimile to Mr Uys, dated 22 March 2002, described the proposed hearing of 26 March 2002 as merely a tactical manoeuvre and an attempt to frustrate the applicant's right to approach the court for appropriate relief. Thát conclusion was based on the view that the offer acknowledged that the applicant was entitled to a hearing and that the Executive Committee's unwillingness to recall the decision which had been taken in her absence was incongruent therewith; that the offer to reconsider the recall resolution was difficult to reconcile with the attitude adopted by the NNPWC and third respondent in their answering affidavits namely, that the motion of no confidence was unassailable and there furthermore was no indication what the Executive Committee could or would do about it in the event of a outcome favourable to the

applicant; that in the absence of reasons having been provided for the proposing of the motion of no confidence and the passing of the recall resolution, it would not be possible to properly present the applicant's case; that no indications were given as regards the format the hearing would assume; that it would appear from the Executive Committee's refusal to retract the recall resolution that the applicant would be saddled with the burden of proving why it should be set aside; and that the NNPWC's counsel had told a judge that the proposed hearing would address all the applicant's complaints and render the application instituted by her unnecessary. The applicant's attorney concluded by recording that, in the circumstances, it was not possible for him to advise the applicant properly for the purpose of presenting her case at the hearing and that she had been advised not to attend it.

28] After answering affidavits deposed to on 18 March 2002 by the third respondent and Mr Smit had been filed, in which issues of mis- and non-joinder were raised, the applicant by notice of motion applied for the joinder of the NNPWC (as fourth respondent), the Executive Council (as fifth respondent) and Mr Adams (as sixth respondent).

29] By agreement between the parties, Blignault J on 27 March 2002, granted the joinder application. He at the same time postponed the main application; determined a timetable for the filing of supplementary affidavits; the filing of answering affidavits; the filing of a replying affidavit; and the filing of heads of argument by the applicants and any respondents who wished to oppose the application.

30] The applicant on 15 April 2002 gave notice of her intention to apply at the hearing of the matter, that the notice of motion be amended by the deletion of paragraph 3 thereof and the substitution thereof with the following:

"3. That an order be granted in terms whereof:

3.1 The adoption by the Western Cape Provincial Assembly on 12 March 2002 of the motion that the House has lost confidence in the Applicant as a permanent delegate to the National Council of Provinces be reviewed and set aside;

3.2 The decision by the Fourth and/or Fifth Respondent taken on 12 March 2002 to recall Applicant as the delegate of the Fifth Respondent to the National Council of Provinces be reviewed and set aside;

3.3 That the appointment of the Sixth Respondent as a permanent delegate to the National Council of Provinces on 15 March 2002 by the Fourth and/or the Fifth Respondent be reviewed and set aside;

3.4 That the Fourth and Fifth Respondents be ordered to pay the costs of this application jointly and severally on an attorney and client scale;

3.5 That any other Respondent who opposes the relief sought be ordered to pay the costs occasioned by such opposition jointly and severally with the Fourth and Fifth Respondent"

31] As no objections were raised thereto the amendment was granted in the terms sought.

32] Of the respondents only the third respondent, the NNPWC, the Executive Committee and Mr Adams filed opposing affidavits and at the hearing before me the NNP, the NNPWC, the Executive Committee and Mr Adams, were represented by Mr WG Burger SC and Mr Osborne and third respondent by Mr Heunis SC and Mr Gess. The second respondent

did not take part in the proceedings.

33] The applicant, represented by Mr Van Riet SC and Mr Stelzner, seeks to have the following decisions reviewed and set aside –

33.1 The adoption by the Western Cape Provincial Assembly on 12 March 2002 of the motion that the Provincial Parliament had lost confidence in the applicant as a permanent delegate to the NCOP (prayer 3.1);

33.2 The decision by the NNPWC and/or the Executive Committee taken on 12 March 2002 to recall Applicant as the delegate of the NNPWC to the NCOP (prayer 3.2); and

33.3 The decision on 15 March 2002 by the NNPWC and/or the Executive Committee to appoint Mr Adams as a permanent delegate to the NCOP be reviewed and set aside (prayer 3.3).

34] Prayer 3.3 is formulated infelicitously. It is clear from the provisions of subsections 62(1) and (2) and 61(2)(b) of the Constitution that Mr Adams could only have been nominated by the NNPWC and not appointed as the appointment had to be made by the Provincial Parliament.

35] A further observation needs to be made before proceeding to consider the merits of the application. Whilst there is no room for doubt that all the parties that have a direct and substantial legal interest in the relief that is being claimed in prayers 3.2 and 3.3 are before the court, it is doubtful whether the same can be said of the relief claimed in prayer 3.1. The applicant in her replying affidavit, when dealing with the question of liability for costs, explicitly disavowed having sought any relief against the Provincial Parliament. Thát perception in all probability explains why the Provincial Parliament, in its collective capacity through its representative and spokesperson, the third respondent, as Speaker (See: **Gauteng Provincial Legislature v Kilian and Others** 2001(2) SA 68 (SCA) at 78 B) or its individual members, who are alleged to have acted arbitrarily or

capriciously, have not been cited as parties. The applicant in the papers attacks the adoption of the vote of no confidence on two substantive bases. The first is that the NNPWC and/or the Executive Committee proposed and procured its adoption by collaborating with the ANC, for an ulterior purpose or motive namely, to achieve her recall from the NCOP in order to censure her for her perceived support of Mr Morkel. The second is that the members who had voted in favour of the vote of no confidence had not given consideration to the question whether the Provincial Parliament had in fact lost confidence in her but merely gave effect to their political instructions with the consequence that the first requirement prescribed by section 62(4)(c) of the Constitution for the cessation of her membership of the NCOP is absent. Both those grounds were ventilated in the papers by the deponents for the respective respondents and their experienced counsel did not during argument raise the non-joinder of the Provincial Parliament as an issue despite the fact that the mis- and non-joinder of parties had featured prominently during the early stages of the proceedings. Although the Third Respondent was cited in her personal capacity she stated that she "resisted" the application, in order to "… protect the Provincial Parliament's constitutional autonomy vis-á-vis (sic) the judiciary and the executive". In my view such conduct is susceptible of only one reasonable inference namely, that the Third Respondent in her capacity as speaker as well as the institution represented by her, tacitly signified a willingness to submit to and be bound by any judgment that may be given thereanent (See: **Amalgamated Engineering Union v Minister of Labour** 1949(3) SA 637 (A) at 662/3).

36] The applicant seeks to have the decisions that form the subject-matter of this application reviewed and set aside as constituting unjust, unreasonable, procedurally unfair and accordingly unlawful administrative action in that they conflict with firstly, the principle of

legality, second, the provisions of section 33 of the Constitution; third, a number of provisions of the AJA; and fourth, the administrative law principles of the common law.

37] Each of the decisions that the applicant seeks to review will be considered individually and in the following sequence. Firstly, the acceptance of the vote of no confidence; second, the recall resolution; and third, the nomination of Mr Adams as one of the NNPWC's delegates to the NCOP.

The vote of no confidence

38] The review and setting aside of the vote of no confidence is predicated on broadly the following averments – which in the main consist of conclusions and inferences without the primary facts on which they are based:

a) that the tabling, proposing and acceptance of the vote of no confidence did not comply with the provisions of rules 122, 123(2) and 123(3) of the Standing Rules of the Western Cape Parliament.

b) that the vote of no confidence constituted administrative action and that the provisions of sub-sections 3(2) and (3) of the AJA had not been complied with in that –

(i) no prior notice had been given of the nature and purpose of the proposal of the motion;

(ii) no reasonable opportunity had been given for the making of representations;
(iii) no statement of the contemplated motion of no confidence had been given;
(iv) no opportunity had been given to obtain legal assistance and/or present and dispute information and/or present argument and/or appear in person; and
(v) no reasons were provided for the acceptance thereof and that, having regard to the nature thereof reasons could not be provided.

c) That the vote of no confidence was part of a transparent political stratagem on the part of the NNPWC to achieve the same purpose as that of the stalled

disciplinary proceedings namely, the termination of the applicant's membership of it as well as her seat in the NCOP in terms of the provisions of Section 62(4)(c) of the Constitution; that it procured the acceptance of the motion of no confidence by having formed an alliance with the ANC as a consequence whereof their respective members voted en bloc for its acceptance; and that such conduct constituted an abuse of the parliamentary process so that the applicant was recalled for a purpose other than that authorized by the Constitution.

d) That as despite a specific request, the reasons for the proposal of the vote of no confidence had not been motivated and there had not been any debate thereanent, those members of the Provincial Parliament who had voted in favour of its acceptance did no more than give effect to their political instructions and had not considered whether they in fact had lost confidence in the applicant so that one of the jurisdictional requirements prescribed by section 62(4)(c) of the Constitution for the cessation of the applicant's membership of the NCOP was absent. It was further alleged that the individual members who had voted in favour of the motion of no confidence acted arbitrarily or capriciously.

39] The averments in paragraph 38 (a) above were not persisted with.

40] Mr Smit, who deposed to answering affidavits on behalf of the NNPWC, denied that the motion of no confidence was designed to achieve the same aim as the ongoing but stalled disciplinary proceedings, but conceded, at least by implication, as is confirmed by what he said when he introduced the motion of no confidence in the Provincial Parliament, that it was part of a strategy to procure her recall as a permanent delegate to the NCOP in terms of Section 62(4)(c) of the Constitution. He also denied that the NNPWC and the ANC had formed an alliance for the purpose of voting on the motion of no confidence; that the NNPWC and the ANC had voted en bloc; and that those who voted in favour of the motion of no confidence did so simply on the instructions of the chief whips of their respective parties.

41] As the applicant is claiming relief of a final nature against the NNPWC, the Executive Committee and Mr Adams, and real, genuine or bona fide disputes in respect of a number of the factual averments made by her have been raised, the relief claimed may be granted only if the factual averments in the applicant's affidavits together with the factual averments in the respondents' affidavits justify the granting thereof (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at

634 E – H).

42] If the respondents' versions of disputed issues are accepted the factual basis for the applicant's invocation of the concept of legality either in the form of the constitutional principle (See: **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Council** 1998(2) SA 374 (CC) paragraphs 56, 58; **President of the Republic of South Africa v South African Rugby Football Union** 2001(1) SA 1 (CC) paragraph 148 and **Pharmaceutical Manufacturers Association of SA: In Re, Ex Parte President of the Republic of South Africa,** 2000(2) SA 674 (CC) paragraph 85) or the administrative law counterpart falls away as in the absence of the applicant's disputed factual averments it cannot be contended, as the applicant does, that the passing of a vote of no confidence in her fell outside of or was in conflict with the powers conferred upon the Provincial Parliament and the NNPWC by Section 62(4)(c) of the Constitution.

42] The applicant's contention that the passing of a vote of no confidence in her constituted administrative action as envisaged in the AJA and that the measures prescribed by section 3 thereof in order to achieve procedural fairness, were not complied with, has been countered on the narrow basis that in terms of the Constitution votes of no confidence are resolutions for which no prerequisites, reasons or grounds are required because they are political decisions and accordingly cannot be subjected to judicial review and set aside on the basis of unreasonableness or otherwise.

43] Section 62(4)(c) of the Constitution provides that a person ceases to be a member of the NCOP if that person has lost the confidence of the provincial legislature and is recalled by the party that nominated him or her. As the applicant resigned prior to becoming a member of the Provincial Parliament and it is questionable whether the Provincial Parliament possesses the authority to consider and/or adopt motions of no confidence in persons other than any of its members - I not surprisingly, could not find any such authority in the Standing Rules of the Provincial Parliament as in terms of section 116 of the Constitution its powers to determine and control its own proceedings and procedures extend only internally - the only empowering provision in terms whereof the vote of no confidence in the applicant could have been proposed

and adopted by the Provincial Parliament was section 62(4)(c) of the Constitution.

44] Parliamentary motions, including motions of no-confidence are decided by means of a question put by the Speaker upon a motion proposed by a member.

45] In terms of the provisions of Section 21 of the Constitution of the Western Cape, No 1 of 1998, in matters other than a Bill or an amendment to a Bill, a vote may be taken on any question if at least one third of the members of the Provincial Parliament are present and the outcome thereof is decided by a majority of all the votes cast by such members. Despite the constraints imposed on members of provincial legislatures by the list system of proportional representation that prevails in our multi-party system of representative government in order to ensure party loyalty and discipline, as well as the long-standing practice and tradition of political parties of ensuring, through the offices of their Whips, that members vote in accordance with a predetermined party line, it is recognized that the individual members thereof retain the right to follow the dictates of their own conscience (See: In Re: **Certification of the Constitution of the RSA** 1996(4) SA 744 (CC) at 831 E; the **Fedsure** case (supra) paragraph 41). Viewed from thát perspective the vote of any individual member constitutes an articulation of his or her own view of how the question posed in the motion should be responded to. Whether a motion is adopted or rejected depends on which of the sums of the votes cast in favour or against its acceptance is the greater.

46] The constitution draws a clear distinction between a) on the one hand, resolutions to remove certain persons from office and as a prerequisite requires i) a finding by a prescribed body regarding such persons misconduct, incapacity or incompetence (eg: the President in terms of section 89(1); the Premier of a Province in terms of section

139(3); a judge in terms of sections 177(1)(a) and (b); and the Public Protector and Auditor General in terms of section 194(1)) or ii) without any findings or circumstances as a prerequisite but on the basis of a simple majority (eg. the Speaker by the National Assembly in terms of section 52(1); the Speaker by the provincial legislature in terms of section 111(4) and the Chairman of the NCOP in terms of section 64(6)) and, b) on the other hand, resolutions of no confidence for which no conditions are prescribed (eg. the National Assembly in the Cabinet in terms of section 102(1) or in the President in terms of section 102(2); a provincial legislature in the provincial executive council in terms of section 141(1) or in the Premier in terms of section 141(2); and a provincial legislature in respect of a permanent delegate to the NCOP in terms of section 62(4)(d)). I find myself in agreement with the submission of third respondent's counsel that it is fair to infer from such differentiation that resolutions of no confidence may be adopted without any definable reason, for a disparity of reasons or even no particular reason on the part of those members who cast their votes.

47] Although the Provincial Parliament when it adopted the motion of no confidence in the applicant was clearly not performing a legislative function, it was nevertheless functioning as a popularly elected deliberative legislative body, the business whereof takes place in an assembly open to the public; whose members are, subject to its rules and procedures, at liberty to articulate their own views on any proposed motion; entitled to vote in favour of or against it for their own reasons; and politically accountable to their constituents.

48] Our courts have already held that decisions of that nature are not susceptible of being reviewed. Chaskalson P et al in the **Fedsure** case (supra), at paragraph 41, said the following thereanent –

> "The counsel is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must of course be lawful but, as we show later, the requirement of legality exists independently of, and does not depend on, the provisions of section 24(a) the procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of bylaws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them on the grounds contemplated by section 24(b). Nor are the provisions of section 24(c) or (d) applicable to decisions taken by a deliberative legislative assembly. The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the courts to judge what is relevant in such circumstances. Paragraphs 24(c) and (d) cannot sensibly be applied to such decisions".

Conradie J in **Steele and Others v South Peninsula Municipal Council and Another** 2001(3) SA 640 (C) at 644 C – D, (a matter decided before the AJA came into operation) in the context of an application to review the majority decision of a politically elected deliberative assembly namely, a Municipal Council taken in the performance of a non-legislative function namely, a decision that half of the speed bumps constructed by it in certain public roads in its area of jurisdiction had to be removed, said the following:

> "The council resolution was carried by a majority. It was not a decision taken by a functionary who could be expected to furnish reasons. It was a decision taken

by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted".

49] The right to just administrative action entrenched in Section 33(1) and (2) of the Constitution consists of three components namely lawfulness, reasonableness and procedural fairness. Hugh Corder in **South African Constitutional Law** (2002): **The Bill of Rights** (Editors **M H. Cheadle** et al) at 614, expresses the view that as the requirements of lawfulness and procedural fairness cover all formal and procedural aspects, it follows that the constitution, by the introduction of the requirement of reasonableness, "demands a degree of review of the substance of the decision" and "represents a significant advance into the area of *limited* merits review". In a review of that kind the merits are not considered in order to determine whether the conclusion arrived at by the administrative decision-maker is right or wrong but whether there is a rational basis between the outcome and the material available justifying such a conclusion (See: **Carephone (Pty) Ltd v Marcus NO** 1998(11) BLLR 1093 (LAC) paragraph 37; **Bel Porto School Governing Body v Premier, Western Cape** 2002(3) SA 265 (CC) paragraph 84 et seq). Although there is no explicit entrenchment of the right to reasonable administrative action in the AJA, sections 6(2)(f)(ii) and 6(2)(h) thereof give effect thereto through the mechanism of review on the basis of lack of rationality and absence of reasonableness respectively.

50] In my view, the introduction of reasonableness by the Constitution as a requirement of just administrative action and the inclusion of reasonableness and rationality in the AJA, warrant the conclusion that for a decision to constitute administrative action in terms of the Constitution and the provisions of the AJA and be susceptible of review it should be capable of assessment against those criteria. In my view the acceptance of votes of no

confidence in the Provincial Parliament in the words of the authors of **De Smith, Woolf and Jowell: Judicial Review of Administrative Action** (6th Ed) paragraph 6 – 031) "admit no objective justification" as they cannot be subjected to an evaluation for reasonableness and rationality and accordingly are not appropriate for judicial review. The rationality//reasonableness enquiry necessitates evaluating the decision of an administrative decision-maker in the light of the facts available to him or her and the reasons provided. That enquiry, in the case of a popularly elected legislative assembly such as the Provincial Parliament, presents numerous problems that become apparent by merely posing the following questions. How does one establish what the facts are? Are they restricted to the information (information in the context is intended to convey facts as well as opinions) advanced during debate or do they also include extraneous, but relevant information, known to one or more of the members? What happens if there is no debate? Who is required to provide reasons if that were to be permissible? Surely not the Speaker as he or she would not know what animated members to vote in a particular manner and he or she does not vote, unless there is an equal number of votes on each side of a question, in which event he or she would only know what animated him or her to vote in a certain manner. Which members should be required to provide reasons? Surely all of those who voted, as to require only the majority to do so would imply that the minority view is rationally justifiable. If the reasons provided by a member fail the rationality enquiry, because the decision of that member to vote in a particular manner is not rationally justifiable on the facts available to him or her and the reasons provided, how many such failures would be necessary to taint the majority vote? And what countervailing effect, if any, would a failure of the rationality enquiry on the part of any of the members who voted for the minority view have on that enquiry?

51] As the basis on which I have found that the acceptance of a vote of no confidence, if it is

in conformity with the Constitution and the Provincial Parliament's own Rules and Procedures, is not susceptible of review, may appear to reveal a similarity with one of the considerations on which the doctrine of "the political question" - recognized in American constitutional jurisprudence but not in Canada and Germany - is based namely, "lack of judicially discoverable and manageable standards" for resolving it (per Brennan CJ in **Baker v Carr** 369 US 186 (1962) at 217) it is recorded that my conclusion is not predicated on the third respondent's counsels' characterization of it as a decision of a political nature but on the attributes of the conduct or decision encompassed in the concept administrative action in Section 33(1) of the Constitution and the AJA. I find myself in full agreement of the view of Halton Cheadle in **South African Constitutional** Law (Editors **M.H. Cheadle** et al) at 36, that in the light of the explicit provisions of section 2 of the Constitution the constitutional doctrine of "the political question" has no place in our constitutional dispensation.

52] The conclusion arrived at namely, that the vote of no confidence is not susceptible of judicial review obviates the necessity to enquire whether its adoption complies with the other requirements of the definition of "administrative action" in the AJA, save to state that it does not appear to me that the vote of no confidence, adversely affected any rights of the applicant: nor did it have a direct external legal effect, the meanings whereof are considered below.

53] In view of the aforegoing the applicant, in my opinion, has not succeeded in showing that the vote of no confidence in her, adopted on 12 March 2002 by the Provincial Parliament, is reviewable.

The Recall Resolution

54] The NNPWC's counsel contended that the court should defer entertaining the application insofar as it relates to the review of the recall resolution, until such time as the applicant

has exhausted the internal remedy of an appeal provided for in Section 49 of the constitution of the NNPWC which provides as follows:

> "A member, chairman, council or body which objects to a judgement, decision, finding or ruling, except of the Congress or of the Provincial Leader or National Leader acting on behalf of the Congress, may appeal to the Legal Commission, with further right of appeal to the Congress."

55] In terms of the common law the right to seek judicial review may be deferred until the aggrieved party has exhausted an extra-curial remedy created by governing legislation or the terms of an agreement between a voluntary association and a member. The right of review may be so deferred and any domestic remedy should first be exhausted if the obligation to do so is clearly evident from such governing legislation or agreement (See: **Lenz Township Co (Pty) Ltd v Lorentz NO** 1961(2) SA 450 (A) at 455 A – D; 458 E et seq; **Welkom Village Management Board v Leteno** 1958(1) SA 490 A at 502 G).

56] Section 7(2) of the AJA which provides that

> "(a) subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) subject to paragraph (c) a court or tribunal must, if it is not satisfied with any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituted proceedings in a court or tribunal or judicial review in terms of this Act."

has modified the common law considerably but its ambit is limited to "any internal remedy provided for in any other law".

57] Van Zyl J in **Marais v Democratic Alliance** 2002(2) BCLR 171 (C) at 184 B – E held

that the concept "other law" in that phrase must be interpreted in accordance with its definition in section 2 of the Interpretation Act, No 33 of 1957, namely a law, proclamation, ordinance, Act of Parliament "or other enactment having the force of law" and that the constitution of a voluntary association is not encompassed therein.

58] As the domestic remedy on which the NNPWC relies for the deferral of the applicant's right of review is contained in its constitution, the provisions of section 7(2) of the AJA, in my view, do not constitute an impediment to the recall resolution being reviewed.

59] To the extent that the common law obligation to exhaust domestic remedies has survived the coming into operation of section 7(2) of the AJA - I express no firm views thereanent - I am, on the basis of an interpretation thereof not satisfied that the right of review without first exhausting an appeal to the Legal Commission, is excluded by section 49 of the NNPWC's constitution. I say so because that section explicitly provides that, inter alia, a member "may" appeal to the Legal Commission. There is no indication that thát word, in the context, is used in a sense other than a permissible or empowering one, so that the applicant enjoyed a choice between an internal appeal and a right of review to this court. It further is questionable whether the appeal provided for is an adequate remedy in the circumstances. An appeal would have dealt with only the decision to recall the applicant and not the subsequent decision to nominate Mr Adams, in the absence whereof she would not have obtained complete redress. As thát aspect as well as whether the Executive Committee, by having raised the non-exhaustion of a domestic remedy at the late stage it did, had not acquiesced in the review, were not argued I refrain from expressing any views thereon.

60] In the premises I incline to the view that this court's jurisdiction to consider the review has

not been deferred by section 49 of the NNPWC's constitution either specifically or by implication.

61] The review of the recall resolution is based on basically the same factual averments set out in paragraphs 38 (b) and (c) above.

62] The review of the recall resolution for want of conforming with the constitutional principle of legality fails for the same reasons as in the case of the vote of no confidence namely, the absence of a factual basis that supports it as the respondents' versions of disputed facts have to be accepted.

63] The applicant, in addition, appears to rely on a violation of a constitutional right to administrative justice. Writers on the subject seem to accept that a free-standing constitutional right to administrative justice survived the coming into operation of the AJA but that its ambit is limited and can be relied upon either directly, to challenge the constitutionality of the AJA or legislation passed subsequent thereto or indirectly, namely to interpret the terms of the former (See: **Iain Currie & Jonathan Klaaren: The Promotion of Administrative Justice Handbook** (2001) paragraph 1.28; **Cora Hoexter: The New Constitutional and Administrative Law,** Vol 2; **Administrative Law** page 88). The view that the provisions of Section 33 of the constitution could also be relied upon directly in order to supplement the under-inclusiveness of the definition of administrative action in the AJA (See: **Johan de Waal** et al: **The Bill of Rights Handbook, (**4th Ed) 496) is cogently criticized by **Currie & Klaaren** (op cit) paragraph 1.28). As the applicant has not invoked the provisions of Sections 33(1) and (2) of the Constitution in order to challenge the constitutionality of the AJA or interpret its terms,

what must be considered is whether the recall resolution falls to be reviewed in terms of the provisions of the AJA or the administrative law principles of the common law.

64] The decisions that form the subject-matter of this application occurred after 30 November 2000 i.e. the date on which the provisions (other than Sections 4 and 10) of the AJA had come into operation. Accordingly the question whether or not such decisions constituted just administrative action must, in addition to the constitutional principle of legality, be considered in the light of the provisions of the AJA which is now the principal source of and delineates the scope and content of administrative justice rights and remedies (See: **Currie & Klaaren:** (op cit) paragraph 1.28; **Hoexter:** (op cit), pages 87 – 88). As the said decisions occurred prior to 21 July 2002, ie the date on which the Regulations on Fair Administrative Proceedings 2002 were promulgated, their provisions need not be taken into account.

65] Does the recall resolution constitute "administrative action" as defined in Section 1 of the AJA? As it was taken by a juristic person it will so qualify if it constituted the exercising of a public power or the performance of a public function in terms of an empowering provision and adversely affected the rights of the applicant and further, had a direct external legal effect.

66] It is common cause that the Executive Committee, at a meeting at 18h30 on 12th of March 2002, passed a resolution to recall the applicant as permanent delegate to the NCOP without prior notice to her and without having complied with any of the requirements prescribed by subsections 3(2) and (3) of the AJA which have as their objective procedurally fair administrative action.

67] The text of the unsigned minutes of that meeting is as follows:

> "Die vergadering neem daarvan kennis dat hierdie aangeleentheid nie oor tugoptrede, strafoptrede of die oorweging van die beeindiging van dr Van Zyl se NNP lidmaatskap handel nie. Dit handel wel oor die vraag of die NNP dr Van Zyl in terme van Artikel 62 (4)(c) van die Grondwet van die Republiek van Suid-Afrika wil terugroep al dan nie.

Die Party moet dus oordeel of dit gewens is dat dr Van Zyl voortgaan om die Party in die Nasionale Raad van Provinsies as vaste afgevaardigde te verteenwoordig al dan nie. Die Uitvoerende Komitee besluit vervolgens om dr Van Zyl as vaste afgevaardigde na die Nasionale Raad van Provinsies te onttrek."

68] A perusal of the minutes reveals that the resolution to recall the applicant was not preceded by any debate and that no motivation for the passing thereof is provided. That the minutes constitute a reliable reflection or what took place is apparent from following account thereof provided by Mr Smit –

> "It is also relevant that the recall decision by the Executive Committee was taken in light of the motion of no confidence in Applicant adopted by the Provincial Parliament earlier that day, with the unanimous support of all members of the Fourth Respondent present. Given the fact that Fourth Respondent's members of the Provincial parliament had all voted in favour of the no confidence motion, the recall could have been regarded as a mere formality, to be effected by, for example, myself as its Chief Whip. In the event, however, it was the Executive Committee that formally resolved to recall the Applicant. Any member of the Executive Committee who opposed the recall motion had the opportunity to speak. And the decision was in full compliance with the Constitution of the NNPWC."

69] That the denial of any administrative procedures to the applicant was not unintentional is apparent from the fact that, according to Mr Smit, the leaders of the NNPWC held the view that a decision such as whom should be nominated and recalled as a permanent delegate to the NCOP is the prerogative of political parties so as to enable them to give effect to the political will of their members and constituents and that the provisions of the AJA, and the rules of natural justice, do not apply thereto. The decision in **Bushbuck Ridge Border Committee v Government of the Northern Province** 1999(2) BCLR 193 (T), at 200 B, appears to be support for the proposition that the rules of natural justice do not apply to political parties. Kirk-Cohen J (at 199 H and 200 B) found that the ANC, a political party in the guise of a voluntary association, and not an administrative body or an organ of state, by having failed to give effect to an election promise to the residents of **Bushbuck Ridge** to incorporate it into Mpumalanga, had not and could not have performed an administrative act that is subject to the rules of natural justice. The debate whether a political party is subject to the Constitutional right of just administrative action (See: **Lisa Thornton: The Constitutional right to Just Administrative Action - Are Political Parties Bound?** (1999) 15 SAJHR 351) has become a less contentious issue after the coming into operation of the AJA which in the definition of "administrative action" explicitly includes decisions of juristic persons when exercising a public power or performing a public function in terms of an empowering provision. Accordingly, any decision of a political party which is a juristic person, is amenable to review if the other elements of administrative action as defined in the AJA are present. A full court of this division in the **Marais v Democratic Alliance** case – although in my respectful view, **ex abundanti cautela** - did not consider itself precluded from applying the rules of natural justice to decisions of a political party.

That effectively disposes of the argument advanced on the NNPWC's

behalf that decisions of political parties are generally not subject to judicial review.

70] In terms of the provisions of Section 62(3) of the Constitution permanent delegates to the NCOP are appointed for a term that expires immediately before the first sitting of the provincial legislature after its next election. The NNPWC is not by its own constitution or legislation (other than the Constitution), explicitly empowered to recall the person nominated by it as a permanent delegate to the NCOP. The contention that the NNPWC is by Section 36.2 read with Sections 40.1, 40.10, 42.4 and 62 of its own constitution empowered to do so, in my view, is untenable. The sole source of the authority to do so is subsections 62(4) (c) and (d) of the Constitution. It appears from the minutes of the Executive Committee, that it recalled the applicant in terms of the provisions of section 62(4)(c) and, as is common cause, clearly acted in terms of an empowering provision.

71] In considering whether the exercise of the authority to recall a permanent delegate in terms of section 62(4)(c) of the Constitution amounts to the exercising of a public power or the performing of a public function, it has to be borne in mind that the authority to do so arises only after the adoption of a motion of no confidence by a provincial legislature and that the party that nominated such a person is under no obligation to recall him or her.

72] The NCOP is part of Parliament. It is the Second House of Parliament and its primary function is to represent the provinces by ensuring that their interests are taken into account in the national sphere of government by participating in the national legislative process and by providing a national forum for the public consideration of issues that affect provinces (section 42(4) of the Constitution). Each province is represented by a

single delegation consisting of six permanent and four special delegates appointed in terms of a formula prescribed by the Determination of Delegates (National Council of Provinces) Act, No 69 of 1998, with the aim of ensuring the inclusion of all parties represented in a provincial legislature on the basis of proportional representation. Each delegation has one vote except in the case of the matters enumerated in section 75(1) of the Constitution i.e. ordinary Bills that do not affect provinces, in respect whereof delegates are entitled to vote individually. Section 8 of the Western Cape Constitution imposes a duty on delegates to take an active part in the NCOP in order to promote, in accordance with the principles of co-operative government and intergovernmental relations set out in the Constitution, the interests of the Western Cape and the country as a whole. In addition thereto delegates may be required to serve on joint committees established in terms of section 45 of the Constitution and the Joint Rules of Parliament as well as joint monitoring committees on eg women, the youth, and the disabled. In terms of section 22 of the Constitution of the Western Cape permanent delegates may be required by the provincial parliament to attend it or any of its committees.

73] What is clear from the above is that the applicant on her appointment to the NCOP became a member of a public body, with legislative and other functions which are intended to serve the interests of the general public in the provincial as well as the national sphere and that the applicant, by having accepted the nomination and appointment, assumed the responsibilities that flow from such membership.

74] No statutory definitions of the concepts "exercising a public power" and "performing a public function" have been provided in the AJA. Accordingly, recourse has to be had to the dictionary meanings thereof. The **Shorter Oxford English Dictionary's** definition of "public", in the context, means belonging to, affecting or concerning the community or the

nation and "power" means the ability to act in a particular way. On the basis of the dictionary meanings of the constituent components of the concept "exercising a public power" it conveys the ability to act in a manner that affects or concerns the public. Some support for that conclusion is to be found in **Korf v Health Professions Council of South Africa** 2000(1) SA 1171 (T) - a decision handed down before the promulgation of the AJA - in which Van Dijkhorst J concluded that the concept "public function" in the definition of "organ of state" in section 239(b)(ii) of the Constitution, means "engaged in the affairs or service of the public".

75] In my view the exercising of the authority to recall a permanent delegate to the NCOP in terms of section 62(4)(c) of the Constitution constitutes the exercising of a public power. That conclusion is based thereon that the exercising of such authority has an influence on how the NCOP; the delegations of the respective provinces; and the joint committees on which delegates may serve, are constituted and may affect the manner in which those bodies perform their functions and duties, and that in turn may impact upon the interests of the community on provincial and national levels. Accordingly the exercising of that authority has a strong public component. The argument that the fact that a party who nominated the delegate in whom a vote of no confidence has been passed is not obliged to recall him deprives it of any public character does not impress me. The power granted is to recall such a delegate. A failure to do so merely manifests a declination to do so. What one is dealing with in this case is the exercise of that power, which is conduct not merely confined to the internal affairs of the NNPWC (Cf: **Transnet Limited v Goodman Brothers (Pty) Ltd 2001(2) BCLR 176 (SCA)** at 189 D**; 2001(1) SA 853 (SCA)** at 867 B) and not its declination.

76] To the extent that dicta of Van Zyl J in the **Marais v Democratic Alliance** case at 195 E – G and 187 B – D, are relied on in support of a contention that the decision of a political party to recall a member who holds a public position as part of a scheme to achieve a predetermined

outcome - the proposing of the vote of no confidence and the recall resolution is alleged to be part of a scheme of that nature - is incapable of constituting the exercise of a public power or the performance of a public function in terms of an empowering provision and therefore not a decision of an administrative nature, certain observations need to be made. The first is that the learned judge at 185 G specifically stated that whether or not such conduct qualifies as the exercise of a public power or the performance of a public function depends on the facts and circumstances of each individual case. The second is that although the stalled disciplinary proceedings could have resulted in the cessation of the applicant's membership of the NNPWC and also her membership of the NCOP, if followed by a resolution to recall her, there is absolutely no evidence that that is what was envisaged: on the contrary, the fact that her nomination took place after her perceived support for Mr Morkel had manifested itself, militates against such a possibility. The third is that the proposing of a vote of no confidence in the applicant and her recall on the facts that have to be accepted do not constitute part of a scheme devised by the NNPWC: it is a legitimate means by which the termination of a permanent delegate's membership of the NCOP may be achieved. I accordingly incline to the view that the **Marais v Democratic Alliance** case, on the facts, is distinguishable from the instant one.

77] Having come to the conclusion that the decision to recall the applicant constituted the exercise of a public power in terms of a empowering provision, what must be considered next is whether it adversely affected the rights of the applicant and had a direct external legal effect.

78] The concept "rights" in Section 1(i)(b) of the AJA has not been defined and there does not seem to be any reported case law dealing with the meaning thereof. The concept "right" is in the **Shorter Oxford English Dictionary on Historical Principles** (3rd Edition by **CT. Onions**) defined as "justifiable claim, on legal [or moral grounds], to have or obtain something, or to act in a certain way" and "a legal, [equitable, or moral] title or claim to the possession of property or authority, the enjoyment of privileges or immunities, etc. (The words in square brackets are clearly inapposite if the definitions are applied in a legal contex). Coetzee J (with whom Nicholas and F.S. Steyn JJ agreed) in **Secretary for Inland Revenue v Kirsch** 1978(3) SA 93 (T), at 94 D – F, said the following when dealing with the meaning of the word "right" in Section 8 A of the Income Tax Act, No 58 of 1962:

"Legal terms used in a statute generally bear the same meaning as in common law **(Kleynhans v Yorkshire Insurance Co Ltd** 1957 (3) SA 544 (AD) at 551-2) and must be read in that sense. The word 'right', in legal parlance, is not necessarily synonymous with the concept of a 'legal right' which is the correlative of duty or obligation. On the contrary, legal literature abounds with 'right' being used in a much wider sense and, as is pointed out in **Salmond on Jurisprudence** II ed at 270, in a laxer sense to include any legally recognized interest whether it corresponds to a legal duty or not. An owner, for instance, has at common law the **right** to use or abuse his property …

There are many cases in which 'right' when used in a statute has been interpreted in the wider sense …"

79] An instance where a court, in a constitutional context, applied the concept "right" in a sense wider than as the correlative of a duty or an obligation is **Van Niekerk v Pretoria City Council** 1997(3) SA 839 (T) in which Cameron J, at 846 J, held that the right of access to information required for the exercise or protection of a person's rights in terms of section 23 of the Interim Constitution included **all** and not only fundamental rights. That conclusion accorded with the jurisprudence in respect of section 23 of the Interim Constitution which, but for a notable exception (See: **Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting** 1996(3) SA 800 (T) favoured a broader interpretation of that concept. Streicher JA in **Cape Metropolitan Council v Metro Inspection Services CC** 2001(3) SA 1013 (SCA) at 1026 E – F, agreed with Cameron J's conclusion and reasoning and held that it was equally applicable to the provisions of section 32 of the Constitution which is in **pari materia** with Section 23 of the Interim Constitution.

80] Is the concept "rights" in section 1(i)(b) of the AJA used in the sense of a legal right i.e. the correlative of a duty or obligation or in a wider sense? What is immediately evident is that

the legislature used the concept "rights" and not "legal rights". Oregan J in **Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal** 1999(2) SA 91 (CC) in a footnote to paragraph 31, whilst declining to explore the precise ambit of the concept "rights" in section 24 of the Interim Constitution, expressed the view that a broader notion of right than that used in private law may be appropriate. Olivier JA in the **Transnet Limited v Goodman Brothers** case (supra) held that the concept "rights" in sections 33(1) and (2) of the Constitution, as they provided prior to the enactment of the AJA, encompassed also fundamental rights, in that case, the right to equality.

81] As the AJA was enacted to give effect to the rights encompassed in sections 33(1) and (2) of the Constitution it must be construed and applied consistently therewith (Cf: **NEHAWU v University of Cape Town** 2003(2) BCLR 154 (CC) paragraph 14). That being so, the concept "rights" in section 1(i)(b) of the AJA and having regard to the judgment in the **Transnet Limited v Goodman Bros** case (supra) encompasses also constitutional rights, a conclusion that militates against a view that it has been used in a restricted sense. I accordingly incline to the view that the term "rights" in the AJA is not used in the sense of the correlative of legal obligations and duties but in a wider sense that at least encompasses enforceable and prospective rights. That conclusion - which obviates the need to consider the submission that any of the applicant's legitimate expectations were violated - may have the effect of broadening the scope of administrative review, but appears to be consonant with one of the stated purposes in the preamble to the AJA namely, to create a culture of accountability, openness and transparency, inter alia, in the exercise of a public power or the performance of a public function.

82] The applicant by having accepted nomination as a permanent delegate to the NNPWC and having allowed herself to be appointed by the Provincial Parliament and having assumed her seat in the NCOP exercised a fundamental right to stand for and if elected, hold public office (section 19(3)(b) of the constitution). As a result of such appointment she became entitled to remain a member of the NCOP until the first sitting of the

Provincial Parliament after its next election, unless her membership came to an end as a result of any of the circumstances enumerated in section 62(4) of the Constitution manifesting itself, prior thereto. The applicant whilst remaining a member of the NCOP enjoyed the privileges and immunities enumerated in subsections 75 (1) and (2) of the Constitution and became entitled to the salaries, allowances and benefits payable to members thereof. The consequences of the recall resolution was that the applicant's constitutional right to hold the public office to which she had been appointed was terminated and that she lost her status as a member of one of the two houses of parliament; as well as her entitlement to the salary, allowances and benefits payable to permanent delegates to the NCOP. Salary and allowances are mentioned to complete the picture because of doubts whether affected material interests attract procedural fairness (See: The **Bel Porto Schools** case (supra) paragraph 97).

83] The applicant's right (in the wider sense) to hold the public office to which she had been appointed was clearly of a limited duration namely the earlier of her membership coming to an end or the first meeting of the Provincial Parliament after its next election. Any suggestion that the applicant occupied her office at the NNPWC's pleasure because she was nominated by it is untenable as it ignores the fact that she was appointed by the Provincial Parliament and that in terms of Section 62(4) of the Constitution it is directly and exclusively involved in the cessation of her membership in only two of the five circumstances enumerated therein and then only if the other specified jurisdictional requirements exist. The mere fact that the NNPWC was empowered to recall the applicant if she ceased to be one of its members or after the acceptance of a vote of no confidence in her in the Provincial Parliament did not derogate from the fact that she, prior to being recalled, held office by virtue of a constitutional right to do so and that thát right was deleteriously affected by the recall, because if it had not happened, she would

have continued to occupy such office and enjoy the benefits that pertained thereto. The issue is not whether the applicant possessed a right not to be recalled but whether the resolution to recall her affected any of her rights adversely

84] The concept "adversely affected" in the phrase "adversely affected the rights of any person" has not been defined in the AJA or interpreted in reported case law. Its meaning, based on the definitions of the words "adversely" and "affected" in **The Oxford English Dictionary** is wide namely, unfavourably influenced. As the present is a case where the applicant was deprived of rights it is not necessary to enquire into the vexed question whether that phrase also encompasses the determination of rights. In my view the recall resolution clearly affected the applicant's rights adversely and materially.

85] Did the resolution to recall the applicant have a direct external legal effect? That phrase which derives from article 35 of the German Federal Law of Administrative Procedure of 1976, has not been defined by the AJA and has not been interpreted in reported case law. The dictionary meanings of its constituent components are so general of ambit that they contribute little to the quest to determine the intended meaning thereof. Except for **R Phaff & Holger Schneider: 'The Promotion of Administrative Justice Act from A German Perspective'** (2001) 17 SAJHR 59 who provide the general import of the provision from which that phrase has been borrowed, the only helpful guidance as regards the meaning thereof is provided by **Currie & Klaaren:** (op cit) paragraphs 2.34 – 2.36 which on my understanding thereof (paraphrased) is that it must be a final decision by an administrative decision-maker that constitutes a legally binding determination of another legal entity's rights. The recall resolution in my view complied with those requirements and I accordingly have come to the conclusion that it did have a direct external legal effect on the rights of the applicant.

86] As I have already found that the decision to recall the applicant complies with the other requirements of the definition of "administrative action" as defined in Section 1 of the AJA all that remains to be determined is whether it is a decision of "an administrative nature." That is necessary because the concept "decision" in the definition of "administrative action" is defined as follows:

> "(v) **'decision'** means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –
>
> (a) making, suspending, revoking or refusing to make an order, award or determination;
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
>
> (d) imposing a condition or restriction;
>
> (e) making a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do any other act or thing of an administrative nature,
>
> and a reference to a failure to take a decision must be construed accordingly."

87] Although that definition enumerates the subject-matter of decisions that do constitute decisions of an administrative nature it is not all-inclusive and succeeds in contributing to its own convolutedness by introducing as part of such subject-matter a decision relating to "doing or refusing to do any other act or thing of an administrative nature".

88] As the recall resolution does not fall with any of the matters mentioned in paragraphs (a) to (f) of that definition it is necessary to determine whether it qualifies as a decision of an administrative nature. It is no easy task to determine the precise meaning of the concept

"… any decision … of an administrative nature" in the definition of "decision". **Johan De Waal** et al (op cit) at 503, express the view that decisions of an administrative nature are decisions "… connected with the daily business of government: the implementing (administering) of legislative policy and the making of policy within the framework allowed by primary legislation". **Currie and Klaaren** (op cit) paragraph 2.12 (pp 51/2) say that decisions of an administrative nature "… are decisions connected with the daily or ordinary business of government" but immediately concede that it serves no classificatory purpose and contributes little to the definition of administrative action beyond identifying the core content of implementation of legislation. **Cora Hoexter** (op cit) at 101 states that the definition of decision is so wide that it is of not much assistance and that it seems that almost any type of action would fall within it. As the ordinary everyday meaning of "nature" in the context is "the basic or inherent features, qualities or character of a thing" (**The Concise Oxford English Dictionary** sv "nature") what is required is a decision having the features, qualities or character of an administrative decision. Bearing in mind that the enquiry whether action is administrative or not is now determined with reference to the task performed rather than the status and function of the person or body performing it (See: **President of the RSA and Others v SARFU and Others** (supra) paragraph 141) it appears to me to be axiomatic that such a decision is one given by a person or body exercising a public function or power in terms of an empowering statute that prejudicially affects the rights of others. I have already found that the exercise of the authority to recall the applicant constituted the exercise of a public power and accordingly incline to the view that it was a decision of an administrative nature and that it constituted administrative action as defined in Section 1 of the AJA.

89] It was argued by the NNPWC's counsel that the recall resolution did not amount to a decision of an administrative nature because it constituted a discretionary political

decision closely analogous to policy determinations by organs of government which in terms of case law are not considered to amount to administrative action. Thát argument echoes the following statement made by Mr Uys:

> "… as the product of a purely political judgment, the recall decision is consequently not an administrative decision, and the rules of natural justice do not apply thereto."

90] As already stated: once a power to recall comes into being by the passing of a vote of no confidence the political party that nominated a permanent delegate to the NCOP in whom a vote of no confidence has been passed has a choice. It may decline to exercise the authority to recall him or her, in which event the vote of no confidence stands as an expression of a view held by the majority of the members of the Provincial Parliament that voted thereon and the **status quo** remains and no rights and interests are affected thereby: if it is decided to exercise the power the obverse is the case.

91] Although the making of the choice whether to exercise the power to recall or not may entail the exercise of a discretion there is no basis upon which any discretion can be implied into the manner in which the power to recall is exercised. As the exercise of the power to recall, as I have already found, amounts to the exercise of a public power it must conform with the rule of law and not be arbitrary (See: **Reuters Group PLC and Others v Viljoen and Others NNO** 2001(12) BCLR 1265 (C) paragraph 44).

92] As I have already found that political parties are not immune to judicial review and that their decisions are susceptible of judicial review - unless they are incapable or being objectively evaluated for rationality - and the recall resolution, in my view, is capable of

being so evaluated, it follows that counsels' argument that it did not constitute a decision of an administrative nature cannot be upheld.

93] Having come to the conclusion that the exercise of the power to recall the applicant constituted administrative action what must be decided next is whether it falls to be reviewed on the basis of any of the grounds enumerated in Section 6(2) of the AJA. Administrative action is so reviewable if it, inter alia, was procedurally unfair (subsection 6(2)(c)). It is not in dispute that none of the measures enumerated in Section 3(2) and (3) of the AJA were complied with. In fact it is the NNPWC's case that it was not obliged to do so. In the light of the finding that the recall resolution constituted administrative action it in my view clearly had to do so.

94] The NNPWC'S counsel have argued that if the recall resolution constituted administrative action and the provisions of the AJA as regards procedurally fair administrative action had to be complied with, the offer of the Executive Committee in its letter of 19 March 2002 to give consideration to the motion of no confidence and to reconsider the recall resolution, constituted sufficient compliance therewith.

95] On my understanding thereof Section 3 of the AJA prescribes two categories of measures to ensure procedural administrative fairness. The first, enumerated in subsection (2)(b), are compulsory. The second, enumerated in subsection (3), are dependent on the administrative decision-maker exercising his or her discretion whether or not to allow them. It is notable that no such discretion is provided for in respect of the second category. In terms of the provisions of subsection (4)(a) the first category of measures may be departed from if it is reasonable and justifiable in the circumstances. Subsection (4)(b) sets out the factors that should be taken into account by an

administrative decision-maker in determining whether a departure should be allowed.

96] I am of the opinion that the legislature intended the measures enumerated in subsections 3(2)(b) and 3(3) to be complied with prior to an administrative decision being taken. That view is based on the involvement of the administrative decision-maker in what departures should be allowed in respect of the measures in the first category; his or her involvement in whether or not any of the second category of measures should be allowed; and the explicit reference in subsection 2(b)(a) to "the proposed" administrative action.

97] Such an intention would accord with the general common law practice that procedural justice must be observed before, rather than after, the taking of an administrative decision. A deviation from the general practice was countenanced for instance, where urgent, ex parte action was permitted; where prior hearings were impractical because of the large numbers of people involved; where a prior hearing would defeat the purpose of the action being taken; and where the prior hearing was merely provisional. In such cases a subsequent hearing cured the initial lack of administrative procedural fairness if the decision had not yet been implemented; the decision-maker retained an open mind and could be persuaded to alter his or her decision; and no prejudice had resulted from the absence of a prior hearing (See: **Currie & Klaaren:** (op cit) at page 98 footnote 31; **Cora Hoexter** (op cit) pages 201 – 2; **Lawrence Baxter: Administrative Law** 587/8 and the cases cited by them).

98] It is common cause that the Executive Committee as the administrative decision-maker never exercised any discretion in respect of the second category of measures and had not considered whether any of the first category of measures should be departed from.

99]	Not a single one of the factors set out in paragraph 97 above that would have justified non-compliance with the measures enumerated in Section 3(2)(b) and 3(3) was present and no reasons have been provided, and none are apparent, for the inordinate haste with which the recall resolution was passed and the nomination of Mr Adams finalized.

100]	In any event, the recall resolution had already been implemented and acted upon in that Mr Adams had already been nominated by the NNPWC and appointed by the Provincial Parliament; the view persisted with even during argument that the recall resolution was a manifestation of a discretionary political decision and accordingly did not attract fair administrative procedures is difficult to reconcile with a mindset on the part of the Executive Committee conducive to a preparedness to change the original decision; and the fact that a duty was placed on the applicant to show why she should not have been recalled in my view was potentially prejudicial to her because of “the natural human inclination to adhere to a decision once taken” (per Corbett CJ in **Attorney-General Eastern Cape v Blom** 1988(4) SA 645 (A) at 668 E).

101]	I accordingly incline to the view that the offer on the part of the Executive Committee of the NNPWC to reconsider the recall resolution did not constitute procedurally fair administrative action.

102]	In the premises the recall resolution falls to be set aside.

The Decision to nominate Mr Adams

103] The basis of the conclusion at which I arrived in respect of the review and setting aside of the decision of the Executive Committee to nominate Mr Adams as a permanent delegate to the NCOP obviates the need to set out the grounds on which the applicant relied for such relief, or to deal therewith.

104] Mr Adams' counsel contended that the chairperson of the NCOP should have been joined as a necessary party to the proceedings as the relief sought by the applicant will impact directly on that body's composition by nullifying the basis upon which he holds his seat as a permanent delegate. The applicant's attorney when the non-joinder of the chairperson of the NCOP was raised, on 18 April 2002 addressed a letter to her in which she was advised that a dispute existed regarding whether she should be joined or not and that the applicant had no objection to her being joined. The chairperson did not take any steps in that regard.

105] A party must be joined in legal proceedings if such a party has an interest of such a nature that he, she or it is likely to be prejudicially affected by any relief granted therein (See: **Amalgamated Engineering Union v Minister of Labour** (supra)). The test is whether such a person has a direct and substantial interest i.e. a legal and not merely a financial interest in the subject-matter of the proceedings (See: **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953(2) SA 151 (O) at 169 H; **United Watch & Diamond Co (Pty) Ltd v Disa Hotels** 1972(4) SA 409 (C) at 415 E – F).

106] Whilst it seems to be self-evident that the manner in which the NCOP is constituted will be affected should the nomination of Mr Adams and consequently his appointment as a permanent delegate be reviewed and set aside, no direct and substantial interest of the

chairperson of the NCOP, in my view, is affected thereby. The total number of delegates in the delegation of each province and the representation of the different political parties therein is determined on the basis of a formula prescribed by national legislation; the identities of the persons that form part of such a delegation are determined by the respective political parties entitled to be represented; and delegates are appointed by the respective provincial legislatures. The chairperson of the NCOP has no say or any interest in the identities of delegates. I accordingly incline to the view that the chairperson of the NCOP does not have a direct and substantial interest in the relief that is been claimed in paragraph 3.3 of the Notice of Motion. In the premises the argument that she should have been joined is rejected. The view that she does not have such an interest seems to be shared by the chairperson of the NCOP as is apparent from the fact that she, despite being urged to do so, did not take any steps to be joined.

107] The only possible source of the power in terms whereof the Executive Committee could have nominated Mr Adams to replace the applicant as a permanent delegate to the NCOP is Section 2 of the National Council of Provinces (Permanent Delegates Vacancies Act) No 17 of 1997 which prescribes the procedure that has to be followed if a vacancy occurs among permanent delegates. In terms of subsection 2(2) the party who nominated a vacating permanent delegate is called upon to nominate a person in his or her stead and subsection 2(3) provides that a person so nominated by the party concerned shall be appointed as a permanent delegate to the NCOP by the provincial legislature concerned.

108] It accordingly, is clear that the existence of a vacancy among the permanent delegates to the NCOP that were nominated by the NNPWC is an indispensable prerequisite for the power to nominate a substitute arising. The consequence of the reviewing and setting

aside of the recall resolution is that one of the prescribed requirements for the cessation of the applicant's membership of the NCOP is absent so that no vacancy existed and accordingly the nomination of Mr Adams was a nullity (Cf: **The Monastery Diamond Mining Corporation (Edms) Bpk v Schimper en Andere** 1983(3) SA 538 (O) at 549 E) and falls to be set aside. That in turn results in the invalidity and nullity of his appointment by the Provincial Parliament as a permanent delegate to the NCOP.

109] In the premises the applicant is entitled to an order in terms of prayer 3.3 of the Notice of Motion save that the word "appointment" must be deleted and substituted with the word "nomination".

110] One other aspect has to be dealt with.

111] Despite the fact that the amended notice of motion does not contain a prayer for the reviewing and setting aside of the decision that a motion of no confidence in the applicant should be proposed, the applicant's attorney on 17 April 2002, by means of a facsimile addressed to the NNPWC's attorneys, Messrs Marais, Muller, requested amongst others, the production, presumably in terms of rule 35(12), of all minutes of meetings at which the NNPWC and/or the Executive Committee of the NNPWC resolved to "institute" the motion of no confidence in the applicant and all other documents relating thereto. The response to that request was that there was no reference to such a meeting or meetings in the answering affidavits that were filed on 15 April 2002 and accordingly, the request was not complied with. However, the applicant, when she in her replying affidavit, deposed to on 23 April 2002, responded to the averment of Mr Smit that he personally decided to move the motion of no confidence, she endeavoured in her replying affidavit, to expand her case, by assailing that decision on the following grounds:

> "I have been advised that the position is that, if such meetings were held, and if Fourth

> and Fifth Respondents wish to avoid inferences of bad faith and/or ulterior motive, they are enjoined to make the minutes available. If there are no such miutes, it means no proper decisions were taken and that the motion of no confidence should be set aside for that reason alone. If the deponent, as the chief whip, took it upon himself to propose the motion, as now appears likely, he should in any event fully explain he reasons therefor. Such actions would, for instance, fall short, even of an "expression of the political will of its constituents and members" upon which the deponent now (albeit without any basis therefore) wish (sic) to rely." (Paragraph 18)

112] The appellant, however, did not take any steps to make consequential amendments to the prayers of the notice of motion.

113] What is apparent from the first two sentences of the passage quoted in paragraph 111 above is that the applicant stops short of stating that the NNPWC and/or its Executive Committee held meetings at which it was decided that a vote of no confidence in her should be proposed. Thát, coupled with the applicant's willingness to accept the likelihood that Mr Smit took it upon himself to propose the motion of no confidence, seem to be incongruent with the existence of any belief on her part that the NNPWC and/or its Executive Committee held such meetings. In the absence of evidence that such meetings took place, the question whether minutes were kept or not; the inferences the applicant seeks to draw; and the consequences she attributes thereto, are not only legally contentious but amount to conjecture of no evidential value.

114] The applicant's contention that, absent minutes of the decision to propose a vote of no confidence in her, proper decisions had not been taken, is not only a **non sequitur,** but the conclusion that the vote of no confidence falls to be set aside for that reason alone,

disregards the dichotomy between a decision to propose the motion and the acceptance of the motion of no confidence by the Provincial Parliament.

115] In the absence of evidence that Mr Smit proposed the vote of no confidence pursuant to a resolution passed by the NNPWC and/or its Executive Committee, it would be fair to infer, as the applicant and her counsel do, that he did so on his own initiative.

116] As a decision of that nature does not constitute "administrative action" as defined in section 1 of the AJA it is not reviewable thereunder or in terms of the common law principles of administrative justice in its restricted application (See: **Pennington v Friedgood and Others** 2002(1) SA 251 (C) at 263 B – D).

117] That being the case it is unlikely that any application for an amendment of the Notice of Motion would have succeeded and accordingly no prejudice flows from the failure to have done so.

Costs

118] The applicant initially instituted proceedings against the NNP (as first respondent), the ANC (as second respondent) and the third respondent in which she, pending the institution of proceedings for the review and setting aside of the vote of no confidence adopted by the provincial parliament on 12 March 2002 and the recall resolution, sought an order suspending the recall resolution and permitting her to resume and continue with her functions as a permanent delegate to the NCOP.

119] As the NNP in the answering affidavit of Mr Smit, jurat 18 March 2002 raised the question

of the mis-joinder of itself and the non-joinder of the NNPWC, the Executive Committee and Mr Adams, the applicant on 22 March 2002, launched an application for their joinder. By agreement an order was made for their joinder by Blignault J on 27 March 2002 who, inter alia, reserved the respective parties' rights to argue the costs resulting from the mis-joinder of the NNP and the non-joinder of the NNPWC, the Executive Committee and Mr Adams. I am now called upon to decide that issue.

120] It does not appear to be an issue that the NNP was misjoined and it follows that it is entitled to any costs that flow therefrom.

121] As regards the non-joinder of the NNPWC, the Executive Committee and Mr Adams, those issues are dealt with in the answering affidavit of Mr Smit, jurat 18 March 2002, which dealt with the merits of the relief initially claimed. The non-joinder aspect constituted a minor part of that affidavit, the costs whereof constitute part of the costs in the main application. Accordingly there in my view is no need to make a special order regarding the costs flowing from such non-joinder.

122] Bearing in mind the purpose of an application to join necessary parties (See: **AC Cilliers: The Law of Costs** paragraph 11.2) the costs of such an application, if unopposed, in my view, in the absence of special circumstances, should be part of the costs in the cause. In my view the instant is a case where special circumstances are absent and accordingly the costs of the joinder-application are ordered to be costs in the cause.

123] The outcome of this application is that the third respondent was substantially successful

as regards the relief claimed in prayer 3.1 as against the applicant and that the applicant was substantially successful in respect of the relief claimed in prayer 3.2 and as against the NNPWC and its Executive Committee and prayer 3.3 as against Mr Adams. As the NNPWC, the Executive Committee and Mr Adams were represented by the same counsel and attorneys and in almost all other respects made common cause, fairness dictates that no differentiation should be made between them for the purposes of liability or costs.

124] The applicant's counsel contended that in the event of the third respondent being successful she should not be allowed her costs. They submitted that no relief was claimed against her and the Provincial Parliament and there accordingly, was no reason for her to have entered into the fray, more in particular because the attack on the vote of no confidence did not concern the exercise of a legislative function on the part of the Provincial Parliament but was based exclusively on an abuse by the NNPWC of its procedure coupled with the fact that it was indivisibly connected with the recall resolution, which was clearly reviewable, and had nothing to do with the Provincial Parliament.

125] I have already found that although the third respondent was cited in her personal capacity she participated in the proceedings in a representative capacity.

126] Although the proceedings commenced on the basis that the applicant was seeking interim relief the issues on the papers and during argument were restricted to whether the different decisions were reviewable or not.

127] I am in agreement with the submission of the third respondents' counsel that third

respondent was required to act in the interests of the Provincial Parliament in order to uphold its position and decisions and defend its constitutional position because the applicant from the outset attacked the motion of no confidence on the grounds that the Standing Rules of the Provincial Parliament had not been complied with; that the third respondent had not applied her mind to the matter; that the procedures of the Provincial Parliament were subject to the provisions of the AJA and accordingly subject to review and being set aside; that the individual members of the Provincial Parliament, who had not been joined, had acted arbitrally and capriciously; and that the Provincial Parliament could be required to provide reasons.

128] The third respondent in my view had an interest in opposing the proceedings even at the initial stage in order to deal with the incorrect allegations that were made regarding the proceedings in the provincial parliament on 12 March 2002 and to prevent the granting of temporary relief that was predicated upon the finding that the applicant had **prima facie** established a clear right that she was entitled to have the vote of no confidence reviewed and set aside.

129] In my view the third respondent is entitled to an order of costs as against the applicant including the costs of employing two counsel.

130] As no basis has been advanced why the general rule that costs follow the result should be deviated from, there is no reason why the NNPWC, the Executive Committee and Mr Adams, jointly, should not be liable for the applicant's costs including costs of employing two counsel.

ORDERS:

The following orders are made:

1] The applicant is ordered to pay the first respondent (The New National Party) such costs as flow from its having been joined as a party in the application.

2] The costs of the application to join the fourth respondent (The New National Party, Western Cape); the fifth respondent (The Executive Committee of the New national Party, Western Cape); and the sixth respondent (Freddie Adams) are ordered to be costs in the cause.

3] Prayer 3.1 of the Notice of Motion is refused.

4] Prayers 3.2 and 3.3 of the Notice of Motion are granted. The word "appointment" in prayer 3.3 is substituted with "nomination".

5] The applicant is ordered to pay the third respondent's costs on a party and party scale and such costs are to include the costs of the employment of two counsel.

6] The fourth-, fifth- and sixth respondents jointly are ordered to pay the applicants costs on a party and party scale and such costs are to include the costs of the employment of two counsel.

D. VAN REENEN