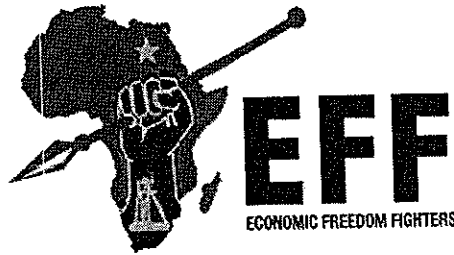


150306 SUBRULES.



RE: Economic Freedom Fighters submission on removing powers from the Speaker of the National Assembly to arbitrarily suspend members of parliament without following due process

Introduction

1. The principles of natural justice and procedural fairness are the most fundamental principles on matters relating to issues of discipline in a democratic setting. The opportunity to be heard by an impartial decision maker is the cornerstone of the rules of natural justice and procedural fairness.
2. The National Assembly, an institution tasked with enacting laws upon which over 50 million South Africans depend, ought to be an example of how principles of natural justice and procedural fairness are implemented.
3. The arbitrary suspension of members by the Speaker as provided for in rule 52, 53 and 54 of the National Assembly Rules violates these principles of natural justice and procedural fairness.
4. Varying as the circumstances demanding natural justice may be, there are some very basic principles that apply to every situation, and these are commonly known as; the hearing rule, the bias rule, and the no evidence rule.

The hearing rule

The hearing rule demands that a decision maker must give an opportunity to a person whose interests may be adversely affected by their decision the opportunity to be heard. This means information is usually provided to the decision maker (in this case, the Speaker) in the form of oral submissions, documentary evidence and questioning of the member (and, obviously the answers and submissions from him and/or his representatives thereto). Note that this aspect of natural justice can be satisfied in a number of ways. If, for some

reason, the Speaker is not able to question a member, allegations may be put to the member in writing and the member given a reasonable opportunity to respond either orally or in writing.

The bias rule

The bias rule demands that the decision maker should be disinterested and/or unbiased in the matter to be decided. Justice should not only be done but be seen to be done. If fair minded people would reasonably apprehend/suspect the decision maker has prejudged the matter, the rule is breached (often referred to as 'a reasonable apprehension of bias'). The application of the bias rule is most easily established when the person who is the position of accuser also is the decision maker or participates in the investigation/decision or gives advice throughout the course of the matter. This is not a hard and fast rule and will depend to a large extent on the circumstances of a matter.

The no evidence rule

The no evidence rule means, in essence, that the decision that is eventually made must be based on logical evidence (proven on the balance of probabilities - that is, the alleged behaviour is more likely to have occurred than not).

5. It is also important that in making decisions, decision makers:
 - Take into account relevant considerations;
 - Do not take into account irrelevant considerations;
 - Act for a proper purpose; and
 - That the decision is not unreasonable in the sense that no reasonable decision maker could have reached such a decision.

Legislative Frameworks

6. As much as we understand that the relations between members and the Speaker in the National Assembly is not the same as that between the employer and the employee, it is important to highlight the following sections of the Constitution and the Labour Relations Act, to show that this principle of natural justice is deeply embedded in our country's legislative ethic.

7. Section 23 (1) of the Constitution of the Republic states that “everyone has the right to fair labour practices”
8. Section 185 of the Labour Relations Act of 1995 states that:
“Every employee has the right not to be:
 - (a) Unfairly dismissed; and
 - (b) Subjected to unfair labour practice”
9. And section 186 (2) of the same Act says unfair labour practices include: “The unfair suspension of an employee or any other unfair disciplinary action short of dismissal of an employee”
10. The key take home message from these provisions is that people who are charged with particular offences must be heard before any decision against them is taken.
11. On the manner parliament works, we do have legislative frameworks governing the relations between members and the Speaker.
12. The Constitution of the Republic, on Section 57 (1) (b) states that “The National Assembly or any of its committees may make rules and orders concerning its business, with **due regard to representative and participatory democracy, accountability, transparency and public involvement**”
Section 58 (1) (a) reads: “Cabinet Members, Deputy Ministers and members of the National assembly **have freedom of speech** in the Assembly and in its committees, subject to its rules and orders”
13. The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No 4 of 2004 has this to say about the disciplining members for contempt of parliament:
Section 12 (1): Subject to this Act, a House has all the powers which are necessary for **enquiring** into and pronouncing upon any act or matter declared by or under section 13 to be contempt of parliament by a member, and taking disciplinary action provided therefore.
(2) A house **must appoint a standing committee** to deal with all enquiries referred to in subsection (1)

(3) **Before** a House may take any disciplinary action against a member in terms of subsection (1), the standing committee must:

(a) Enquire into the matter **in accordance with a procedure that is reasonable and procedurally fair**; and

(b) Table a report on its finding and recommendations in the House

14. Section 12 (5) reads as follows:

When a House finds a member guilty of contempt, the House may, in addition to any other penalty to which a member may be liable under this Act or any other law, impose any one or more of the following penalties:

(a) A formal warning

(b) A reprimand

(c) An order to apologize to Parliament or the House or any person, in a manner determined by the House;

(d) The withholding, for a specified period, of the member's right to the use or enjoyment of any specified facility provided to members by Parliament

(e) The removal, or the suspension for a specified period, of the member from any parliamentary position occupied by the member;

(f) A fine, not exceeding the equivalent of one month's salary and allowances payable to the member concerned by virtue of the Remuneration of Public Office Bearers Act, 1998;

(g) The suspension of a member, with or without compensation, for a period not exceeding 30 days, whether or not the House or any of its committees is scheduled to meet during that period

14. We highlight these provisions from the Act, to demonstrate that by law, any action taken against a member must be as a result of a thorough process that is procedurally, substantively, and reasonably fair.

15. The importance of substantively and procedurally fair disciplinary process cannot be overstated, more especially in a House comprising political parties with varied ideological underpinnings, elected to represent voters in a constitutional

democratic House such as ours. In a setting of this nature, discipline should be to help the House and members to correct bad behavior, rather than to punish.

It must be applied:

- Fairly
- Consistently, there must be no different rules for different political parties
- Promptly and aggressively

16. Therefore, if the Speaker or a Presiding Officer are of the view that a member has broken a rule, then it would be procedurally fair to:

- Give such a member a formal hearing
- A member must be told of the breach of rules within a reasonable space of time
- A member must be given written reasons for a decision taken
- A member must be given the right to appeal
- A member must be given an opportunity to be questioned and to question

17. To embed the principle of substantive fairness in the manner the House conducts itself in disciplining members, two issues must be looked at:

- Is the member actually guilty of the offence for which s/he is suspended?
- If it is indeed proven that a member is guilty, then is the offence so serious that suspension from the House of an elected official is seen as a correct action?

18. Accepting that the above issues on substantive and procedural fairness are sacrosanct to any democracy, then the House should be able to, before suspending any member, ask the following questions:

- Did the member actually break the rule of the House?
- If a rule was indeed broken, then the House should ask:
 - (a) Was the rule reasonable?

- (b) Did the member know about the rule? Or should the member have known about the rule?
- (c) Has the Speaker applied the rule in the same way for all other members of the House?
- (d) Is suspension the correct action for the rule thus broken?

Our Case

- 19. Answers to the above questions cannot possibly be arrived at without a due and proper process to ascertain whether or not an offence by a member warrants suspension from the House.
- 20. The manner through which members are suspended from the House currently is grossly inadequate if measured against salient principles of natural justice, captured so aptly in the constitution and in other laws in South Africa.
- 21. Parliament, as an institution tasked with developing laws governing our country, should be exemplary in the manner it conducts its own business
- 22. NA Rules 52, 53, 54 and 55 deal with the manner through which members may be suspended from the House.
Rule 52 reads as follows: "If a presiding officer is of the **view** that a contravention committed by a member of this House is of so serious a nature that an order to withdraw from the chamber for the remainder of the day's sitting is inadequate, the presiding officer may:
 - (a) If he or she is the Speaker, suspend the member; or
 - (b) If he or she is not the Speaker, name the member, whereupon the Speaker, after consultation with the presiding officer, may take such action as he or she deems necessary"
- 23. Rule 54, dealing with Period of suspension, reads as follows: "The suspension of a member shall on the first occasion during a session continue for 5 Parliamentary working days, on the second occasion for 10 Parliamentary working days, and on any subsequent occasion for 20 Parliamentary working days."

24. From the legislative frameworks thus quoted above, it must be easy to deduce that Rule 52, up to Rule 54, are not only illegal, but also procedurally unfair, and fall far short of meeting the requirements for natural justice.
25. As seen in the manner the Speaker dealt with the suspension of Honorable Mngxitama in 2014, wherein the Speaker suspended the member for five working days after the member insisted of reminding the Speaker about decisions taken by the Rules Committee on Motions without Notice; the powers given to the Speaker to arbitrary suspend members can be seriously abused, to the detriment of our democratic project as a country
26. Decisions on whether to suspend or not to are merely dependent on the 'views' of the Speaker. Naturally, these 'views' can never be free from political bias because the Speaker is also a political being.
27. Such decisions violate all the rules of natural justice, they reduce important matters of the nation to depend on emotional whims of the Speaker
28. Therefore, we propose that any suspension of a member from the House that is for longer than a period of one day be subjected to a proper forum where a member will also have an opportunity to be heard, presided over by a person whose bias is not as palpable as that of the Speaker, and where decisions about whether to suspend or not will be based on evidence

