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**LEGAL OPINION**  
[Confidential]

**TO:** Mr. R Mdakane  
Chairperson of the Sub-Committee of the  
National Assembly Rules

**COPY:** Secretary to Parliament

**DATE:** 02 July 2015

**SUBJECT:** Legal authority of the Parliamentary Protection  
Services to remove members of the National  
Assembly from the House

**LEGAL ADVISER:** Adv A Gordon

**REFERENCE NUMBER:** 60/15



## **MEMORANDUM**

**To:** Mr. R Mdakane  
Chairperson of the Sub-Committee of the National Assembly Rules

**Copy:** Secretary to Parliament

**From:** Constitutional and Legal Services Office  
Adv A Gordon

**Date:** 02 July 2015

**Reference:** 60/15

**Subject:** Legal authority of the Parliamentary Protection Services to remove members of the National Assembly from the House

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1. The Constitutional and Legal Services Office was requested to provide a legal opinion on the legal authority of the Parliamentary Protection Services to remove members of the National Assembly (NA) from the House on the instruction of the Speaker of the NA.

### **Background**

2. Since the start of the 5<sup>th</sup> Parliament in May 2014, Parliament has witnessed various disturbances to the proceedings of the House by members of political parties represented in Parliament.
3. The disturbance escalated on 12 February 2015 during the joint sitting which was convened by the President of the Republic of South Africa (the President) in terms of section 84(2)(d) of the Constitution in order for him to deliver his State of the Nation Address (SONA).
4. It is common knowledge that members of the Economic Freedom Fighters (EFF) have been at the forefront of the disturbances. On 12 February

2015 the disturbance escalated to such a point that the Presiding Officers had to call security services including parliamentary protection service officials to remove certain members of Parliament from the House.

5. This matter formed the basis of litigation between the *Democratic Alliance v the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Government of the Republic of South Africa* (Case Number 2792/2015) (the DA judgment). The focal point of this litigation was whether section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No. 4 of 2004 (PPI Act) applies to members of Parliament. If section 11 applied to members of Parliament it meant that members of Parliament can be arrested and removed from the Chamber in breach of section 58(1) and section 71(1) of the Constitution.
6. The DA also raised the point before the court that doctrine of separation of powers was breached by allowing security services to arrest members of Parliament on the floor of the House. The court did not address this issue (see paragraph 45 of the judgment).

### **Legal Advice**

7. In terms of section 57(1) of the Constitution the NA has the competence to determine and control its internal arrangements, proceedings and procedures. In the case of the *Speaker of the National Assembly v De Lille and Another 1999 (11) BCLR 1339 (SCA) (De Lille)* the court stated at paragraph 16 that section 57(1) is wide enough to enable the NA to maintain internal order and discipline in its proceedings by means which it considers appropriate for the purpose. The court went on to state that without such internal control and discipline, the NA would be impotent to maintain effective discipline and order during a debate.
8. In the recent DA judgment at paragraph 43, the court stated that section 11 does not pass constitutional muster because it allows members of Parliament to be arrested for what they may say on the floor of the House. This in the true sense of the word violates a member's constitutional privilege to freedom of speech and freedom from arrest as guaranteed under section 58(1) and 71(1) of the Constitution. The court further stated that the power of a presiding officer to regulate internal proceedings must be dealt with in the rules and orders. (Underlining my emphasis)
9. Rule 51 of the NA rules makes provision for the Presiding Officer to order that a member must withdraw from the Chamber in respect of the member's conduct or when the member disregards the authority of the Chair. The NA rules do not expressly allow for the parliamentary protection services or the security services to enter the Chamber to remove a member who is seen to be displaying disorderly conduct or who

is defiant of the authority of the Chair. The PPI Act expressly empowers a member of the security services or a staff member to arrest and remove "a person" from the precincts of Parliament who takes part or who creates a disturbance while a House or committee is meeting (section 11). However, in the DA judgment it is clearly indicated that section 11 is unconstitutional because "a person" includes a member of Parliament and as read with the definition of "any disturbance" is too wide and may infringe upon the prohibition of arrest as set out section 58(1)(b) and 71(1)(b) of the Constitution in respect of privilege.

10. In the PPI Act, "staff member" is defined as "the Secretary (to Parliament) or any other person employed or contracted by Parliament, whether in a permanent or temporary capacity". In this respect the parliamentary protection service officials will be considered to be staff members as they are employed by Parliament. Section 11 of the PPI empowers the parliamentary protection services, on the order of the Speaker of the NA to arrest and remove members of Parliament who create or take part in a disturbance when the House is meeting.
11. The Security Policy for the Parliament of the Republic of South Africa (2005) (the Policy) emanates from discussions between the National Intelligence Agency and the Speaker of the NA and the Chairperson of the NCOP during 2004. The Policy fleshes out the issues of security for Parliament as arranged between various stakeholders. In terms of the Policy "protection officer" is defined as members of the South African Police Services assigned to the protection of Parliament or a member of the Parliamentary Protection Services. At clause 6(b) and (c) of the Policy, the Parliamentary Protection Services (PPS) is established to render protection and security services in Parliament which is headed by a Security Manager. The Policy, amongst others, applies to all members of Parliament, their spouses and companions (clause 4(a)) but does not expressly deal with disturbances that arise on the floor of the House.
12. It needs to be mentioned that the DA judgment did not address the issue of who effected the removal of members of Parliament from the Chamber but ruled that section 11 of the PPI Act is inconsistent with the Constitution for the fact that it allows members of Parliament to be arrested contrary to section 58(1) and 71(1) of the Constitution. However, it is my considered opinion that the prohibition against arrest and sanction only finds a legal basis for what a member said, submitted, produced or revealed to the NA as was the case in the De Lille judgment. If a member displays unruly behavior that escalates to the point of disorder of the House, the NA rules need to address such disorderly conduct as a separate mechanism and not one that may be misconstrued in the light of any constitutional or legal privilege.

13. Therefore, the Parliamentary Protection Services obtains its legal authority to arrest and remove members of Parliament from the precincts of Parliament on the order of the Speaker of the NA, from section 11 of the PPI Act as read with the Policy.
14. The constitutional invalidity of section 11 is suspended for 12 months in order to allow Parliament to remedy the defect.



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**ADV A J GORDON**  
**LEGAL ADVISER**