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Mr R M Mdakane, MP  
Chairperson: National Assembly Subcommittee on Rules  
Parliament  
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Dear Mr Mdakane

### LEGAL OPINION: THE IMPACT OF RECENT CONSTITUTIONAL COURT JUDGMENTS ON THE RULES OF THE NATIONAL ASSEMBLY

#### INTRODUCTION

1. The Office of the Chief State Law Adviser has been requested by the Chairperson of the National Assembly Subcommittee on Rules ("the Committee") to furnish it with an analysis of the impact of the following two Constitutional Court judgments on its processes for the review of the Rules of the National Assembly:

- (a) *Democratic Alliance v The Speaker of the National Assembly and Others*<sup>1</sup> ("the DA Judgment"); and
- (b) *Economic Freedom Fighters v Speaker of the National Assembly and Others*<sup>2</sup> ("the Nkandla Judgment").

<sup>1</sup> [2016] ZACC 8.  
<sup>2</sup> CCT 143/15 and CCT171/15, Constitutional Court on 31 March 2016.

## THE DA JUDGMENT

2. The DA Judgment was concerned with the constitutional validity of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004) ("the Act"). The Constitutional Court specifically considered whether the word "*person*" in the said provision included members of Parliament. The provision reads as follows:

***"Persons creating disturbance***

**11.** *A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services."*

3. The judgment further dealt with the limitation of free speech of members of Parliament and the removal of members of Parliament from the Chamber as a result of a disturbance. "Disturbance" is defined in section 1 of the Act as "any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or committee".

## DISCUSSION

4. The Constitutional Court found that grammatically, the word "person" does include a member of Parliament, that there is nothing which militates against such an interpretation<sup>3</sup> and that excluding a member of Parliament from the interpretation of the word would amount to an absurdity<sup>4</sup>. The Constitutional Court specifically referred to section 27 of the Act which stipulates that a person, including a member of Parliament, commits an offence and is liable to a fine or imprisonment in the event of contravening certain provisions of the Act<sup>5</sup>. Section 7(e) of the Act prohibits a person from creating or taking part in a disturbance while Parliament or a House or committee is meeting. Section 27 of the Act

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<sup>3</sup> *Ibid*, paragraph 29.

<sup>4</sup> *Ibid*, paragraph 33.

<sup>5</sup> *Ibid*, paragraph 30.

criminalises any contravention of section 7 of the Act and the Constitutional Court found that section 7(e) of the Act therefore includes members of Parliament and that if that were not the case, the offence of creating or taking part in a disturbance contained in section 27(1) of the Act would be meaningless in so far as a member of Parliament is concerned.<sup>6</sup> Madlanga J held as follows:

*"If the proscription – in section 7(e) – of the creation of or taking part in a disturbance applies to a member, it strikes me as absurd that in section 11 this same proscribed activity should exclude a member"*<sup>7</sup>.

5. Section 57(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures and make rules and orders concerning its business.<sup>8</sup> Section 58(1)(a) of the Constitution provides as follows:

**"Privilege**

**58.** (1) *Cabinet members, Deputy Ministers and members of the National Assembly—*

(a) *have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and*

(b) *are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—*

(i) *anything that they have said in, produced before or submitted to the Assembly or any of its committees; or*

(ii) *anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees."*

6. Section 71(1) of the Constitution provides delegates to the National Council of Provinces with the same privileges and protections as provided for members of Parliament in section 58(1) of the Constitution.

7. The Constitutional Court had to answer the question whether "an instrument other than rules and orders may be employed to limit free speech".<sup>9</sup> The Constitutional Court indicated that it is of the view that section 11 of the Act limits the privilege and immunities contained in sections 58(1) and 71(1) of the

<sup>6</sup> *Ibid*, paragraph 31.

<sup>7</sup> *Ibid*.

<sup>8</sup> Refer also to paragraph 20 below.

<sup>9</sup> DA Judgment, paragraph 39.

Constitution.<sup>10</sup> The Constitutional Court further held that section 11 of the Act is unconstitutional as it infringes the immunities from criminal proceedings, arrest and imprisonment enjoyed by members of Parliament in terms of sections 58(1)(b) and 71(1)(b) of the Constitution. Madlanga J further held that:

*"The language of sections 58(1)(a) and 71(1)(a) is plain. It makes freedom of speech in the National Assembly and National Council of Provinces subject to the relevant House's rules and orders, and nothing else. Limiting this freedom by means of an Act of Parliament is at variance with this constitutional stipulation. This must be constitutionally impermissible."<sup>11</sup>*

8. The Constitutional Court held that the removal of a member of Parliament in the event of a disturbance may deprive the member of further participation in the proceedings of Parliament for the duration of her or his removal and that it would limit the member's privilege under sections 58(1) or 71(1)<sup>12</sup> of the Constitution.

9. With regards to what may qualify as a disturbance which would warrant the removal of a member of Parliament, Madlanga J further held as follows:

*"It cannot be all conduct that annoys and tests the patience of the presiding officer and some in Parliament that amounts to interference or disruption. Robustness, heatedness and standing one's ground inhere in the nature of parliamentary debate. To warrant removal from the Chamber, interference or disruption must go beyond what is the natural consequence of robust debate. Otherwise the very idea of parliamentary free speech may be eroded. In the heat of a debate one must expect that – from time to time – a member's contributions will not come to a screeching, mechanical halt once the presiding officer has ruled that the member desist from further debate on a subject."<sup>13</sup>*

10. The Constitutional Court further held that a disturbance which may be sufficient for the removal of a member of Parliament must be of such a nature that it incapacitates Parliament from conducting its business and that there must be no anticipation of the resumption of business within a reasonable time.<sup>14</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, paragraph 47.

<sup>12</sup> *Ibid.*, paragraph 43.

<sup>13</sup> *Ibid.*, paragraph 44.

<sup>14</sup> *Ibid.*, paragraph 45.

11. The Constitutional Court acknowledged Parliament's powers to remove members forcibly in terms of Rules 51 and 53A of the National Assembly Rules and therefore held that the declaration of the constitutional invalidity of section 11 will not leave Parliament unable to deal with members who cause or take part in disturbances.<sup>15</sup>

### ***Observations and Recommendations***

12. Rule 51 of the National Assembly Rules (with the proposed amendments in Draft No. 8 of the NA Rules subcommittee) provides the instances where a member of Parliament may be ordered to leave the Chamber. In light of the Constitutional Court's findings in respect of disturbances as mentioned above, we recommend that the Rule should be amended to include that the member of Parliament's conduct should be of such a nature that it incapacitates Parliament from conducting its business and that there should be no anticipation of the resumption of business within a reasonable time.

13. Furthermore, Rule 53A(10) provides that in the event of a member of Parliament resisting his or her removal, members of the security services may be called upon to assist with such removal. Section 1 of the Act defines security services as "security services" referred to in section 199 of the Constitution which provides that security services includes the defence force, police services and any intelligence services. The removal of a member of Parliament by a member of the security services may amount to an arrest and removal which would thus be in violation of section 58(1)(b) of the Constitution which protects members of Parliament from arrest and criminal proceedings.<sup>16</sup> Such an arrest would be in accordance with section 11 of the Act which was declared as unconstitutional. Nugent AJ held as follows with regards to the aforesaid:

*"The mere act of seizure or forcible restraint, for whatever purpose, constitutes an arrest"<sup>17</sup> .....*

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<sup>15</sup> *Ibid*, paragraphs 60 and 61.

<sup>16</sup> *Ibid*, paragraphs 40, 41 and 42.

<sup>17</sup> *Ibid*, paragraph 73.

*“As I see it, the powers conferred by the section, both to “arrest” and to “remove” a member, whether viewed conjunctively or separately, are constitutionally offensive.”<sup>18</sup>*

14. This sub-rule should perhaps receive further consideration in view of the aforesaid observations. Furthermore, in accordance with the Order of the Constitutional Court, the Act must be amended by the omission of the words “other than a member” after the word “person” at the beginning of section 11 of the Act.

## **NKANDLA JUDGMENT**

15. The Constitutional Court considered the role of the National Assembly in holding the President and the Executive accountable in terms of section 42(3) read with section 55(2) of the Constitution, and was clear that the Constitutional Court has a distinct responsibility to ensure that it refrains “from undue interference with the functional independence of other branches of government”.<sup>19</sup> The Constitutional Court determined as follows:<sup>20</sup>

*“It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the “vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government”. Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against*

<sup>18</sup> *Ibid*, paragraph 79.

<sup>19</sup> Nkandla Judgment, paragraph 93.

<sup>20</sup> *Ibid*, paragraphs 93 and 94.

*impermissible encroachment on the powers of the other arms of government.*

*That said, the National Assembly chose not to challenge the Public Protector's report on the basis of the findings made by the Minister of Police and its last Ad Hoc Committee. Instead it purported to effectively set aside her findings and remedial action, thus usurping the authority vested only in the Judiciary.*" (Footnotes omitted) (Our underlining)

16. Thus the Constitutional Court recognised the applicability of the principle of the separation of powers and highlighted the divergent roles of the courts as opposed to the National Assembly in terms of their constitutional obligations. The Constitutional Court also highlighted the independence of the National Assembly to determine its own procedures for giving effect to its constitutional mandate to oversee Executive action, and recognised that the National Assembly has a constitutional obligation to hold members of the Executive accountable.<sup>21</sup>

17. The Constitutional Court, at paragraph 49 confirmed that "[L]ike other Chapter Nine institutions, the Office of the Public Protector was created to strengthen constitutional democracy in the Republic". Furthermore, the Constitutional Court stressed that only the judiciary is empowered to set aside the findings and remedial actions of the Public Protector.

18. The National Assembly must provide the Public Protector with sufficient resources to effectively execute her mandate in order to strengthen our constitutional democracy. The court stated in paragraph 54 as follows:

*"In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real. Within the context of breathing life into the remedial powers of the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy."* (Our underlining)

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<sup>21</sup> *Ibid*, paragraph 43.

19. The manner in which the National Assembly gives effect to its functions and responsibilities cannot be done in a manner which impacts negatively on the Public Protector's constitutional powers. In this light, the Constitutional Court stated that the Public Protector Act, 1994 (Act No. 23 of 1994), cannot water down or nullify the Public Protector's constitutional powers, stating as follows:<sup>22</sup>

*"The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take appropriate remedial action. Section 182(1) and (2) recognises the pre-existing national legislation which does regulate these powers and confer additional powers and functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution. In any event section 182(1) alludes to national legislation that "regulates" the Public Protector's three-dimensional powers." (Our underlining)*

20. The Committee must also be mindful, as stated above, that section 57 of the Constitution empowers the National Assembly to determine and control its internal arrangements, proceedings and procedures as well as to make rules and orders, as follows:

***"Internal arrangements, proceedings and procedures of National Assembly***

- 57.** (1) *The National Assembly may—*
- (a) *determine and control its internal arrangements, proceedings and procedures; and*
  - (b) *make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.*
- (2) *The rules and orders of the National Assembly must provide for—*
- (a) *the establishment, composition, powers, functions, procedures and duration of its committees;*
  - (b) *the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;*
  - (c) *financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and*

<sup>22</sup>

*Ibid*, paragraph 58.



- (d) *the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition."*

21. Therefore the power of the National Assembly to make rules is entrenched in the Constitution. It must be noted that the Constitutional Court in the Nkandla judgment exercised its power in terms of section 172(1)<sup>23</sup> of the Constitution and set aside the resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector, as being invalid and inconsistent with the Constitution because the court found that the National Assembly acted inconsistently with the Constitution. This means that the National Assembly must exercise its power to make rules in accordance with the Constitution.

## CONCLUSION

22. The abovementioned findings of the court in the DA Judgment should thus be considered by the Committee in the amendment of the National Assembly Rules in an effort to avoid any challenges to the constitutionality thereof.

23. It is our considered view that the Nkandla Judgment does not have an impact on the powers of the Committee to adopt rules and procedures to regulate the exercise of its powers and functions, provided that in doing so it takes cognisance of its constitutional obligations. The Constitutional Court has reiterated that, in line with the principles of the separation of powers, it is obliged to "refrain from undue interference with the functional independence of other branches of government" and will thus not readily interfere with the powers of the National Assembly to make rules and regulate its own processes. The only time

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<sup>23</sup> Section 172 of the Constitution provides for the powers of courts in constitutional matters as follows:

***"Powers of courts in constitutional matters***

- 172.** (1) When deciding a constitutional matter within its power, a court—
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including—
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

that the Constitutional Court will interfere is when the National Assembly acts inconsistently with its constitutional mandate.

We trust that you find the above in order.

Yours faithfully

A handwritten signature in black ink, appearing to be 'M. B. K. K.', written in a cursive style.

**CHIEF STATE LAW ADVISER**