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MEMORANDUM

[Confidential]

TO: Mr MR Mdakane, MP
Chairperson of the Subcommittee on the Review of the
National Assembly Rules

COPY: Mr G Mgidlana
Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Ms SS Isaac – Parliamentary Legal Adviser]

DATE: 21 April 2016

SUBJECT: Summary and implications of the judgment in *Democratic Alliance / Speaker of the National Assembly and Chairperson of the National Council of Provinces (CCT 86/15)*

REFERENCE: 24/2016

MESSAGE: Please find attached the above Memorandum for your attention



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Assembly Rules

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**RE: SUMMARY AND IMPLICATIONS OF THE JUDGMENT IN
*DEMOCRATIC ALLIANCE / SPEAKER OF THE NATIONAL ASSEMBLY AND
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES (CCT 86/15)***

Introduction

1. Our Office was requested by Mr MR Mdakane, MP; the Chairperson of the Subcommittee on the Review of the National Assembly Rules to provide a summary of the judgment in *Democratic Alliance / Speaker of the National Assembly and Chairperson of the National Council of Provinces (CCT 86/15)* and an opinion on the implications of the judgment in relation to the National Assembly Rules (“the Rules”) including the draft amendments to the Rules.

SUMMARY OF JUDGMENT

Judgment of the Western Cape High Court



2. The Applicant in the matter, the Democratic Alliance, among others, challenged the constitutionality and meaning of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004) (“PPIPPLA”). The Applicants did not challenge the conduct of the Speaker or Chairperson during the State of the Nation Address on 12 February 2015 and this matter was therefore not consider by the Court.
3. The matter was initially heard in the Western Cape High Court. The High Court held that section 11 of PPIPPLA was not envisaged by section 58(1) and section 71(1) of the Constitution and therefore did not pass constitutional muster. Section 11 violated a member’s freedom of speech and freedom from arrest as guaranteed in the Constitution. Further, the Court held that section 11 was overbroad and as a result constitutionally flawed.
4. The Court found that the most appropriate remedy in the matter was notional severance to bring section 11 within constitutional bounds. Accordingly, section 11 of PPIPPLA was declared inconsistent with the Constitution and invalid “to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution”. The order of invalidity was suspended for a period of 12 months in order for Parliament to remedy the defect.

Judgment of the Constitutional Court

5. The judgment of the High Court was referred to the Constitutional Court for confirmation of the order of constitutional invalidity. The respondents also noted an appeal against the judgment and the applicants noted a cross appeal.¹

¹ The respondents (the Speaker and the Chairperson) noted an appeal against the judgement on the basis that the *court a quo* erred in finding and declaring that section 11 of PPIPPLA inconsistent with the Constitution and invalid to the extent that it permits a member of Parliament to be arrested for conduct that is protected by section 58(1)(b) and 71(1)(b) of the Constitution. In this regard, it was argued that section 11 does not in fact apply to a protected speech by a member which falls within the ambit of section 58(1)(b) and 71(1)(b) and therefore it is not inconsistent with the Constitution. The applicants (the Democratic Alliance) noted a cross-appeal. They argued that while the High Court was correct in finding section 11 of



6. The main issue before the Constitution Court was whether section 11 of PPIPPLA was constitutionally valid. Section 11 of PPIPPLA provides as follows:

“11. Persons creating disturbance

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”

7. Madlanga J in the majority judgment detailed the importance of free speech within our parliamentary system. Each party and each member have a right to full and meaningful participation and contribution in both parliamentary processes and decision making.² Free speech has a greater importance when regard is had to the functions of Parliament, namely law making and the oversight of the Executive.
8. The majority judgment found that the word “person” in section 11 read in the context of PPIPPLA as a whole, must be interpreted to include a member.³
9. Madlanga J observed that the privilege contained in sections 58(1)(a) and 71(1)(a) of the Constitution “can never go so far as to give members a licence so to disrupt the proceedings of Parliament that it may be hamstrung and incapacitated from conducting its business.”⁴ Therefore, the Constitution gives the respective Houses the authority to determine and control internal arrangements, proceedings and

PPIPPLA inconsistent with section 58(1) and 71(1), the High Court erred in granting a remedy of notional severance. The Applicants further argued that the High Court erred in failing to deal with the Applicant’s contention that section 11 of PPIPPLA was inconsistent with separation of powers. The Applicants also argued against the suspension of the order of invalidity for a period of 12 months.

² *Democratic Alliance / Speaker of the National Assembly and Chairperson of the National Council of Provinces* (CCT 86/15), para 11.

³ *Ibid.* para 28.

⁴ *Ibid.* para 38.



procedures and make rules and orders concerning its business. Rules and orders may limit parliamentary free speech but only to the extent that it does not “denude the privilege of its essential content”.⁵

10. Madlanga J also noted that in interpreting section 11 to include members, the effect is that this provision limits the privilege and immunities contained in sections 58(1) and 71(1) of the Constitution in two ways. Firstly, a member who creates or takes part in a disturbance commits a criminal offence that may possibly result in the member’s arrest, detention, prosecution and conviction.⁶ This will have a chilling effect on robust debate and that effect alone would constitute an infringement of parliamentary free speech.⁷ Secondly, section 11 directly infringes the immunities from criminal proceedings, arrest and imprisonment enjoyed by members in terms of sections 58(1)(b) and 71(1)(b) of the Constitution. In coming to this conclusion, the Court stated that “unlike the privilege of free speech contained in sections 58(1)(a) and 71(1)(a) of the Constitution, these immunities are not subject to the rules and orders of the National Assembly or National Council of Provinces. They are by their nature absolute.”⁸

11. With reference to the meaning of “disturbance” in section 11, Madlanga J noted that “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.”⁹ To be removed from the Chamber, “an interference or disruption must go beyond what is the natural consequence of robust debate”¹⁰ and any standard less than this may result in the erosion of parliamentary free speech.¹¹

⁵ *Ibid.* para 39.

⁶ *Ibid.* para 40.

⁷ *Ibid.* para 40 and 41.

⁸ *Ibid.* para 42.

⁹ *Ibid.* para 44.

¹⁰ *Ibid.* para 44.

¹¹ *Ibid.* para 44.



12. According to the majority judgment, an “interference and disruption that may be sufficient for the removal of a member must be of a nature that hamstring and incapacitates Parliament from conducting its business”¹² and there must be no anticipation of the resumption of business within a reasonable time.

13. Madlanga J further noted that freedom of speech in terms of sections 58(1)(a) and 71(1)(a) of the Constitution is only subject to the relevant House’s rules and orders. Parliamentary free speech may not be limited by an Act of Parliament and any such a limitation is constitutionally impermissible.¹³

14. In conclusion, the majority court held that section 11 is constitutionally invalid to the extent that it applies to members.¹⁴ It then went on to cure the constitutional defect by reading in the words “other than a member” after the word “person” at the beginning of section 11 of PPIPPLA.¹⁵

15. The Court dismissed both the appeal of the Speaker and Chairperson and the cross-appeal of the Democratic Alliance. An order of costs was made against the respondents.

Key Points from the Judgment

16. **Balancing deliberations and decision making** - The Court emphasized the importance of free speech to the parliamentary process and decisions making and especially with regard to Parliament’s law making and oversight functions. The

¹² *Ibid.* para 45

¹³ *Ibid.* para 47.

¹⁴ *Ibid.* para 52.

¹⁵ *Ibid.* para 60.



Court also noted that “deliberations may not go on forever”¹⁶ and that “[i]f need be, the views of the majority must finally prevail.”¹⁷

17. Determining what constitutes interferences and disruptions – The Court stated that the removal of a member is only warranted when an interference or disruption hampers the proceedings of Parliament to such an extent in it may not resume in a reasonable time. Accordingly, it must be determined when a member’s actions amounts to such an interference or disruption.

18. Limitations of parliamentary free speech only by Rules - The Court made clear that it was constitutionally impermissible for parliamentary speech to be limited by an Act of Parliament.

19. Immunities of members are absolute - The Court emphasized that members’ immunities are absolute and not subject to the rules and orders of the Houses of Parliament.

ANALYSIS OF RULE 51 AND RULE 53A

20. The Rules were not tested by the Constitutional Court. This section of the opinion applies the key principles of the judgment to determine if the above rules would withstand constitutional scrutiny.

Rule 51

21. Rule 51 provides for circumstances under which a member may be ordered to leave Chamber as follows:

¹⁶ *Ibid.* para 16.

¹⁷ *Ibid.* para 16.



“51. Member ordered to [withdraw] leave Chamber

(1) If the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules, or that a member is **[in contempt of or is]** disregarding the authority of the Chair, or that a member’s conduct is grossly disorderly, he or she may order the member to **[withdraw immediately from] leave** the Chamber **immediately** for the remainder of the day’s sitting.

(2) A member ordered to withdraw from the Chamber must immediately withdraw from the precincts of Parliament.”

22. Madlanga J, in discussing the powers of the Assembly to determine and regulate its proceedings, quoted from *Speaker of the National Assembly v De Lille and Another*. In *De Lille* Mohammed CJ stated that the Assembly is empowered in terms of section 57(1) of the Constitution to maintain internal order and discipline. This would for example, include the power to exclude a member from the Assembly for temporary periods “who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society.”¹⁸

23. From the above we note that our courts agree that the rules and order may provide for the removal of a member.¹⁹ The standard established to by the Constitutional Court to warrant such a removal is stringent. For a member to be removed from the Chamber, their conduct must amount to an interference and disruption of such a nature that it hamstring and incapacitates Parliament from conducting its business and there must be no anticipation of the resumption of business within a reasonable time.²⁰ It must be conduct that goes beyond what is the natural consequence of robust debate.²¹

¹⁸ *Speaker of the National Assembly v De Lille and Another*. [1999] ZASCA 50, para 16

¹⁹ *Ibid* and *Democratic Alliance / Speaker of the National Assembly*. Para 54

²⁰ *Democratic Alliance / Speaker of the National Assembly*. para 45.

²¹ *Ibid*. para 44.



24. The first part of subrule 51(1) provides that “If the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules... he or she may order the member to leave the Chamber immediately....”

25. Madlanga noted that:²²

“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.”

26. The rule does not set out the criteria on which the presiding officer makes a determination that the member is deliberately contravening the Rules and thus gives the presiding officer a wide discretion. The subrule also does not differentiate between a violation of the rules that may occur in the course of robust debate and serious violations of the rules that incapacitates Parliament from conducting its business.

27. The second part of the rule 51(1) provides that “If the presiding officer is of the opinion that a member is... in contempt of or²³ is disregarding the authority of the Chair..... he or she may order the member to leave the Chamber immediately....”

28. In this regard, the Court noted that all conduct that annoys and tests the patience of the presiding officer does not automatically amount to interference or disruption.²⁴ Madlanga J further noted that “Robustness, heatedness and standing one’s ground inhere in the nature of parliamentary debate.”²⁵

29. The subrule does not differentiate between incidents in the normal course of robust debate where a member may disregard the authority of the Chair and instances where the member’s disregard for the authority of the Chair is of such a

²² *Ibid.* para 44.

²³ The Draft Rules proposes that “in contempt of or is” be deleted from this subrule.

²⁴ *Ibid.* para 44.

²⁵ *Ibid.* para 44.



serious nature that it hampers the business of the House from proceeding without undue delay. Only the latter instance may warrant a removal of a member from the Chamber.

30. The third part of the rule 51(1) provides that “If the presiding officer is of the opinion ...that a member’s conduct is grossly disorderly...may order the member to leave the Chamber.” “Grossly disorderly” conduct is not defined in the Rules but must be interpreted in line with the judgment to ensure that it is constitutionally sound. Grossly disorderly conduct must amount to conduct that is of such a nature that it disrupts or interferes in the proceedings of the House to such an extent that there is little possibility of a resumption in proceedings in a reasonable time.

Rule 53A Removal of member from Chamber

31. Subrule 53A(10) provides that “If a member(s) offers resistance to being removed from the precincts, members of the security services may be called upon to assist with such removal.” Subrule 53A(11) provides that security service may in terms of section 4(1) of the PPIPPLA remove members from the Chamber and the precincts of Parliament in the event of “...a serious disruption ensuing in the Chamber as a result of a member(s) resisting removal..”

32. In terms of section 58(1)(b) of the Constitution:

“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.”

33. The judgment reiterated this provision of Constitution that members have an absolute immunity from arrest. The use of state security to remove members from the Chambers and precincts of Parliament must therefore be reconsidered in light of this as it may fall foul of the constitutional standards set in the judgment.

34. If the initial action by the member that gave rise to a disruption or interference in the proceedings in terms of subrule 53A (10) or (11) related to something a member said in the House, that member has an absolute immunity from arrest. Hence, if a member may not be arrested in this respect, what purpose does the use of security services serve in removing a member for the Chamber or precincts of Parliament?

35. In terms of PPIPPLA, security services is defined to mean the security services referred to in section 199 of the Constitution. Section 199(1) provides that the security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution. Section 205(3) provides that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. Section 200 provides that the primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force. The



functions of the intelligence services includes to gather, correlate, evaluate and analyse domestic intelligence.

36. The use of security services to remove a member for causing a disruption or for interfering in the proceedings of the House is not in keeping with the role set out by the Constitution for these respective state organs.

37. There is also a conflation between criminal acts of violence and disruption or interference to the proceedings of the House. Physical violence is outside the scope of the constitutional protections afforded to members in respect of parliament free speech. It may therefore be helpful to have separate provisions providing for the removal of a member for disruptions and interference to the proceedings of the House and the removal of a member who has committed a violent act or makes a real threat of violence. In the later instance, the Speaker may invoke section 4(1) of PPIPPLA.

OTHER RULES THAT MAY NEED TO BE RECONSIDERED

Automatic Suspension

38. Draft rule 51(2) provides that "A member ordered to withdraw from the Chamber must immediately withdraw from the precincts of Parliament." A member who was ordered out of the Chamber is in addition also required to leave the precincts of Parliament. Rule 53A(3) provides that a member who is removed from the Chamber by Parliamentary Protection Services in terms of rule 53A(2) is automatically suspended for a period as set out in Rule 54, and may not enter the precincts for the duration of the suspension. The period of suspension in terms of rule 54 is 5 parliamentary working days for the first occasion, 10 parliamentary working days for the second occasion and 20 parliamentary working days for any subsequent occasions.



39. The above rules seek to maintain order in the Chamber. Once a member who has caused a disruption or interference to proceedings has left the Chamber, the source of the interference or disruption is removed and order in the House may be restored. Suspending the member and requiring the member to immediately leave the precincts has a punitive effect on the member as it may prevent the member from accessing parliamentary resources such as their offices to continue with work outside the Chamber. This is a further sanction and goes beyond maintaining order in the Chamber and seeks to “punish” a member.

40. While the judgment does not deal with the suspension of members, the manner in which the Court emphasized a need for robust debate and the narrow grounds on which members may be removed from the Chambers may require a reconsideration of these rules.

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Ms SS Isaac
Parliamentary Legal Adviser

Quality Assurance:

A handwritten signature in black ink, appearing to read 'F Jenkins', written over a horizontal line.

Advocate F Jenkins
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