



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
12th Floor, Atterbury House, 9 Riebeeck Street, Cape Town, 8001
Tel (021) 441-4900 Fax (021) 421-7923
Ref: 605/2015/16
Enq: Mongameli Kweta/ Sisa Makabeni/Theo Hercules
Tel: (021) 441-4900
e-mail: mkweta@justice.gov.za/smakabeni@justice.gov.za
website: <http://www.doj.gov.za>
Date: 05 April 2016

Mr RM Mdakane, MP
Chairperson: National Assembly Subcommittee on Rules
Parliament
PO Box 15
Cape Town
8000

Dear Mr Mdakane

LEGAL OPINION ON ESTABLISHMENT OF COMMITTEE TO DEAL WITH ISSUES ARISING OUT OF SECTION 89 OF CONSTITUTION

INTRODUCTION

1. The Office of the Chief State Law Adviser has been requested to furnish the Subcommittee on Review of Assembly Rules, of the National Assembly ("NA Rules") with a legal opinion on the constitutionality of the establishment of a sub-committee of the National Assembly ("the NA") that is composed of non-members of the National Assembly, to deal with issues arising out of section 89 of the Constitution.

LEGISLATIVE FRAMEWORK AND DISCUSSION

2. Section 42(3) of the Constitution is foundational to the legal framework governing the matter under consideration and provides as follows:

"(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the

of issues, by passing legislation and by scrutinizing and overseeing executive action. In view of the foregoing it appears that the NA acts through elected members as envisaged by section 4(3).

6. In terms of section 46² of the Constitution the NA is made up of women and men elected as members in terms of an electoral system that is prescribed by legislation. In addition to this, section 48 of the Constitution provides for the oath or affirmation. In this regard section 48 provides that before members of the NA begin to perform their functions in the NA, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2 to the Constitution. The members of the NA are accountable to Parliament and are mandated to exercise oversight on the executive arm of government. These provisions distinguish a member of the NA from a member of the public.

7. Section 57 of the Constitution provides for the internal arrangements, proceedings and procedures of the NA, which assist the NA in conducting its business, as follows:

“(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;

² *“(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—*

(a) is prescribed by national legislation;

(b) is based on the national common voters roll;

(c) provides for a minimum voting age of 18 years; and

(d) results, in general, in proportional representation.

(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.”.

(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

(d)the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.”. (our underlining)

8. Section 57(2) allows the NA to make rules and orders for the establishment, composition, powers, functions, procedures and duration of its committees. Section 56³ of the Constitution also provides for some of the powers of the NA and its committees to summon any person to appear before a committee to give evidence under oath or affirmation or to produce documents.

9. Section 89 of the Constitution provides for the removal of the President as follows:

“89. Removal of President.—(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—

- (a) a serious violation of the Constitution or the law;*
- (b) serious misconduct; or*
- (c) inability to perform the functions of office.*

(2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.”.

³ **“56. Evidence or information before National Assembly.—***The National Assembly or any of its committees may—*

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;*
- (b) require any person or institution to report to it;*
- (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and*
- (d) receive petitions, representations or submissions from any interested persons or institutions.”.*

10. Although section 89 of the Constitution does not expressly provide for a committee of the NA to deal with the removal of the President, section 57(1) allows the NA to determine and control its internal arrangements, proceedings and procedures, to make rules and orders concerning its business. Furthermore the rules and orders that the NA makes may provide for the establishment, composition, powers, functions, procedures and duration of its committees.

11. Section 102 of the Constitution provides for motions of no confidence in the President and the Cabinet, as follows:

“102. Motions of no confidence.—(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet. (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.”.

12. In *Mazibuko NO v Sisulu and Others NNO 2013 (6) SA 249 (CC)*, the Constitutional Court dealt with the constitutionality of Chapter 12 of the rules of the NA which failed to provide for the unhindered exercise by a member of the NA, acting alone or in concert with other members, of the right to have the NA schedule, deliberate and vote on a motion of no confidence in the President within a reasonable time, or at all. Chapter 12 of the NA Rules was therefore declared inconsistent with s 102(2) of the Constitution. This declaration of constitutional invalidity was suspended by the Constitutional Court for a period of six months, it being just and equitable to afford the NA an opportunity to remedy the defect. The NA Rules were duly amended in terms of section 57 of the Constitution and Rule 102A was inserted in there NA Rules to deal with motions of no confidence in terms of section 102 of the Constitution.

13. At paragraphs 43 and 44, Moseneke DCJ highlighted section 42(3) of the Constitution as follows:

“[43] The assembly 'is elected to represent the people and to ensure government by the people under the Constitution. A motion of no confidence in

the President is a vital tool to advance our democratic hygiene. It affords the assembly a vital power and duty to scrutinise and oversee executive action. The ever present possibility of a motion of no confidence against the President and the cabinet is meant to keep the President accountable to the assembly which elects her or him. If a motion of no confidence in the President were to succeed, he or she and the incumbent cabinet must resign. In effect, the people through their elected representatives in the assembly would end the mandate they bestowed on an incumbent President.

[44] The right that flows from s 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution. It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance. (our emphasis).

14. The provisions in section 89 of the Constitution must be linked to the power and duty of the NA to scrutinise and oversee executive action by the people only through their elected representatives. Furthermore, these provisions are central to the deliberative, multiparty democracy envisioned in the Constitution. Section 89 of the Constitution impacts on the values of democracy, transparency, accountability and openness, and is an important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance.

15. It must be noted that in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC), the Constitutional Court judgement dealt with the principle of legality, and at paragraph 56, the principle of legality was expressed as follows:

“These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition. It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law.”

16. Ngcobo J (as he then was) in *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3, at paragraph 49, endorsed the Fedure judgement and held that—

“The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’.”.

17. It is therefore important that whatever rules that the NA makes, these rules must be made in the context of section 42(3) of the Constitution as pointed out in *Primedia Broadcasting, A Division of Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others*.

18. The NA duly made rules in terms of section 57 of the Constitution. The existing rules of the Na, in our view, correctly provide for committees of the NA to be comprised of members of the NA.

19. It is our view that a committee comprising persons who are not members of Parliament would fall foul of the Constitution as section 42(3) envisages elected members to represent the people and to ensure government by the people under the Constitution.

Rules of the National Assembly

20. Section 121 of the NA Rules provides for a list of committees of the NA as follows:

“121. List of committees

(1) The Assembly has the following committees:

- (a) the Rules Committee established by Rule 158;
- (b) the Programme Committee established by Rule 187;

- (c) the Powers and Privileges Committee established by Rule 191;
 - (d) the Committee of Chairpersons established by Rule 195;
 - (e) the portfolio committees that must be established in terms of Rule 199;
 - (f) the Committee on Public Accounts established by Rule 204;
 - (g) the Committee on the Auditor-General established by Rule 208A;
 - (h) the Committee on Private Member's Legislative Proposals and Special Petitions established by Rule 209; and
 - (i) *ad hoc* committees that may be established in terms of Rule 214.
- (2) Other committees may be established but only by—
 - (a) resolution of the Assembly; or
 - (b) the Rules Committee.
 - (3) If a proposal to establish a committee is contained in draft legislation before a portfolio committee, that committee must first refer the proposal to the Rules Committee for a report and recommendation before that committee considers the proposal.”.

21. The foregoing Rule provides a full list of the Committees of the NA and envisages the establishment of *ad hoc* committees in terms of Rule 214. Rule 121(2) allows for other committee to be established by the NA by resolution or by the Rules Committee.

22. It is our considered view, in the light of section 42(3) of the Constitution, that only members of Parliament may comprise any of the committees envisaged under section 121.

23. Part 2: of the rules of the NA provides for rules applicable to committees generally and provides as follows:

“124. Application of this Part

The provisions of this Part apply to all committees established by or in terms of these Rules except in so far as any of these provisions is inconsistent with—

- (a) another provision of these Rules applicable in a specific case; or
- (b) a resolution of the Assembly.

125. Composition

- (1) Parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly, except where—
 - (a) these Rules prescribe the composition of the committee; or
 - (b) the number of members in the committee does not allow for all parties to be represented.
- (2) Subject to these Rules, the Joint Rules and decisions of the Rules Committee, and where practicably possible, each party is entitled to at least one representative in a committee.

126. Appointment procedures

- (1) Unless these Rules provide otherwise the parties appoint the members of a committee and advise the Speaker accordingly.
- (2) The names of the members appointed must be published in the ATC without delay.”.

24. As will be noted from the above, Rule 125 of the NA Rules with regard to composition of committees, entitles parties to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly.

25. The aforesaid Rule has to be read in line with section 57(2)(a) and (b) of the Constitution which provide that 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.

26. Furthermore, Rule 126(2) of the NA Rules provides that unless the Rules provide otherwise the parties appoint the members of a committee and advise the Speaker accordingly. In addition, Rule 126(2) of the NA Rules clarifies that the names of the members appointed must be published in the ATC without delay.

27. Rule 137 of the NA Rules provides for reporting by a committee of the NA and provides as follows:

“137. Reporting

- (1) A committee must report to the Assembly on a matter referred to the committee—
- (a) when the Assembly is to decide the matter in terms of these Rules, the Joint Rules, a resolution of the Assembly or legislation;
 - (b) if the committee has taken a decision on the matter, whether or not the Assembly is to decide the matter as contemplated in paragraph (a); or
 - (c) if the committee is unable to decide a matter referred to it for a report.
- (2) A committee must report to the Assembly on—
- (a) all other decisions taken by it, except those decisions concerning its internal business; and
 - (b) its activities at least once per year.
- (3) A report of a committee—
- (a) must be submitted to the Assembly by the chairperson or another member of the committee designated by the committee; and
 - (b) may request that the chairperson or another member of the committee designated by the committee introduces or explains the report in the Assembly.
- (4) A committee may not submit a minority report except where provided for in these Rules.

(5) If a committee reports on a matter other than a matter mentioned in Subrule (1)(a) and is of the view that its report, or a specific matter mentioned in the report, should be considered by the Assembly, it may make a request to that effect in the report.”

28. As will be noted from the foregoing, Rule 137 of the NA envisages that members of a committee of the NA be members of the NA as they may be designated to introduce or explain reports of the committee in the NA.

29. Rule 138 of the Rules of the NA provides for general powers of a committee of the NA as follows:

“138. General powers

For the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these Rules and resolutions of the Assembly—

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
- (b) receive petitions, representations or submissions from interested persons or institutions;
- (c) conduct public hearings;
- (d) permit oral evidence on petitions, representations, submissions and any other matter before the committee;
- (e) determine its own procedure;
- (f) meet at a venue determined by it, which may be a venue beyond the seat of Parliament;
- (g) meet on any day and at any time, including—
 - (i) on a day which is not a working day;
 - (ii) on a day on which the Assembly is not sitting;
 - (iii) at a time when the Assembly is sitting; or
 - (iv) during a recess;
- (h) exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these Rules or resolutions of the Assembly.”

30. Part 12 of the Rules of the NA provides for the establishment of an *ad hoc* committee, composition of an *ad hoc* committee and the decision thereof as follows:

“Part 12: *Ad hoc* Committees

214. Establishment

- (1) An *ad hoc* committee may be established—
 - (a) by resolution of the Assembly; or
 - (b) during an adjournment of the Assembly for a period of more than 14 days, by the Speaker after consulting the Chief Whip and the most senior whip of each of the other parties.
- (2) Any decision by the Speaker to appoint an *ad hoc* committee must be tabled in the Assembly on its first sitting day after the decision was taken, for ratification by the Assembly.
- (3) An *ad hoc* committee may only be established for the performance of a specific task.
- (4) The resolution of the Assembly or decision of the Speaker establishing an *ad hoc* committee must—
 - (a) specify the task assigned to the committee; and
 - (b) set time frames for—
 - (i) the completion of any steps in performing the task; and
 - (ii) the completion of the task.
- (5) An *ad hoc* committee has those of the powers listed in Rule 138 only as are specified in the resolution or decision establishing the committee.
- (6) An *ad hoc* committee ceases to exist—
 - (a) when it has completed the task for which it was established and has submitted its report to the Assembly;
 - (b) if it is dissolved by the Assembly earlier; or
 - (c) if it has not completed its task by the date set for the completion of the task.

215. Composition

- (1) The Assembly resolution establishing an *ad hoc* committee must either specify the number of members to be appointed or the names of the members who are appointed.
- (2) The Speaker appoints the members of an *ad hoc* committee if—
 - (a) the resolution of the Assembly establishing the *ad hoc* committee does not specify the names of the committee members; or
 - (b) the Speaker established the *ad hoc* committee.
- (3) The Speaker must appoint the members of an *ad hoc* committee established by—
 - (a) the Assembly, within five working days after the establishment of the committee;
 - (b) the Speaker, within ten working days after the establishment of the committee.
- (4) When appointing the members of an *ad hoc* committee the Speaker must consult—
 - (a) the Chief Whip, when a member of the majority party is appointed; and
 - (b) the most senior whip of another party, when a member of that particular party is appointed.
- (5) The names of the members appointed must be published in the ATC without delay.

216. Decisions

Unless a resolution establishing an *ad hoc* committee provides otherwise a question before an *ad hoc* committee is decided when a quorum in terms of Rule 133 is present and there is agreement among the majority of the members present.”.

31. Rule 214 of the NA Rules empowers the NA, or the Speaker when the NA is adjourned, to establish an *ad hoc* committee to perform a specific task whereafter it ceases to exist. In terms of the Rule, the resolution of the NA or decision of the Speaker establishing an *ad hoc* committee must—
- (a) specify the task assigned to the committee; and
 - (b) set time frames for—

- (i) the completion of any steps in performing the task; and
- (ii) the completion of the task.

32. Rule 215(1) of the NA Rules requires that the NA resolution establishing an *ad hoc* committee must either specify the number of members to be appointed or the names of the members who are appointed. Rule 215(2) of the NA Rules provides that the Speaker appoints the members of an *ad hoc* committee if—

- (a) the resolution of the Assembly establishing the *ad hoc* committee does not specify the names of the committee members; or
- (b) the Speaker established the *ad hoc* committee.

33. It is our view that issues arising out of section 89 of the Constitution would be ideally dealt with by an *ad hoc* committee contemplated in Rule 214 of the NA Rules comprised of members of the NA. As noted above, section 42(3) of the Constitution makes it clear that the NA is elected to represent the people and to ensure government by the people under the Constitution. It is therefore in this context that we conclude that only elected members of the NA may comprise a committee to deal with issues arising out of section 89 of the Constitution.

34. However, in our view there is nothing preventing the NA from providing in the rules that the resolution or decision by the Speaker, establishing an *ad hoc* committee may permit the committee to employ the assistance of experts, such as legal experts, in the discharge of their duties.

35. In this regard, the legal experts may be constituted as a panel that sits to consider the issues arising out of section 89 of the Constitution and making a recommendation to the *ad hoc* committee for its consideration and to take a decision on the task it is required to perform. The work of the panel would have to be guided by clearly circumscribed terms of reference to ensure that its mandate is clear and does not encroach on the role of the *ad hoc* committee.

Yours faithfully


CHIEF STATE LAW ADVISER

