



**CONSIDERATION BY THE NATIONAL RULES COMMITTEE OF THE CONSTITUTIONAL COURT
JUDGMENT ON RULES PERTAINING TO THE INTRODUCTION OF PRIVATE MEMBERS' BILLS**

16 OCTOBER 2012

QUESTION BEFORE THE CONSTITUTIONAL COURT

Recently the Constitutional Court, at the behest of Dr M G R Oriani-Ambrosini MP, considered among others the constitutional validity of National Assembly rules that pertain to the processing of private members' bills in the Assembly against the power of an individual member of Parliament to introduce legislation, as set out in section 73(2) of the Constitution.

FINDING OF THE CONSTITUTIONAL COURT

On 9 October 2012, the Constitutional Court, in a majority judgment, found that the rules of the National Assembly that impose restrictions on an individual member of the Assembly by requiring him or her to obtain permission before he or she may introduce a bill are inconsistent with the Constitution and therefore invalid.

[Full judgment attached as Annexure A]

SOME ARGUMENTS ADVANCED BY THE COURT

- (1) No rule created by the Assembly may preclude individuals from initiating and preparing legislation, which the Constitution gives them power to do... [41]
- (2) It [Chapter 4] affords even an individual member of the National Assembly the possibility to introduce a Bill in the Assembly. This power extends to all and must not, therefore, inadvertently or deliberately, be rendered hollow and inconsequential for those individual members of the Assembly who may wish to exercise it. [44]

- (3) Even if a Bill does not result in an Act of Parliament, the power to introduce it is vital to the type of democracy envisaged by our Constitution. This is so because it facilitates meaningful deliberations on the significance and potential benefits of the proposed legislation. It is therefore an important power and should not be restricted without good reason. [59]
- (4) The words “arrangements, proceedings and procedures” indicate that the Assembly’s power to make rules is limited to the regulation of process and form, as opposed to content and substance. [61]
- (5) Within the context of the law-making process, transparency would be enhanced optimally by rules that generally allow for a legislative proposal to be debated properly and in a manner that is open to the public, before its fate is decided. [64]
- (6) This is achievable by, amongst other things, interpreting section 57 as empowering the Assembly to make rules that do not constitute an inadvertent deployment of invincible giants in a member’s path to exercising her section 55(1)(b) or section 73(2) power. [64]
- (7) The Constitution, therefore, does not entitle the Assembly to impose substantive or content-based limitations on the exercise of the constitutional powers of its members, but rather contemplates rules that are procedural in nature. [65]

EFFECT OF THE COURT’S FINDING

- (1) The court ordered Rules 234, 235, 235A and 236 to be severed in their entirety, while certain words and phrases were excised from Rules 230(1), 230(2), 237(1) and 243(3).
- (2) The Committee on Private Members’ Legislative Proposals and Special Petitions could not continue with its consideration of any legislative proposals before it, as Rule 211(a) was excised. Its mandate will therefore have to be reconsidered.
- (3) It can reasonably be expected that the number of private members’ bills will increase following the Constitutional Court’s judgment, with a concomitant increase in pressure on the capacity of Parliament’s support services for committees and legal services.
- (4) It is also expected that a larger number of private members’ bills will have an impact on the programme of the Assembly, as these bills have to receive the same consideration as all other bills.

JOINT RULES REQUIRING CONSIDERATION

Joint Rule 217

In terms of Joint Rule 217, an Assembly member in charge of a bill introduced in the Assembly, designates a Council member as the person in charge of the bill in Council proceedings.

Consideration must be given at what point this will be done and how and where it will be announced or made known. A recommendation could be made to the Joint Rules Committee,

since it affects the Joint Rules. It will, of course, only be applicable if the bill in question is passed by the Assembly and progresses to the NCOP.

Joint Rule 220

Joint Rule 220(2) determines that the official translation of a bill must be received by Parliament at least three days before the formal consideration of the bill by the House in which the bill was introduced.

With the likelihood of a greater number of private members' bills not progressing to the second House than is the case with section 75 and section 76 bills, consideration could be given to saving costs by allowing for the suspension of Joint Rule 220(2) unless the private member's bill is approved by the House.

DECISION REQUIRED BY THE RULES COMMITTEE:

[DRAFT]

The Rules Committee

AGREED: That –

- (1) the judgment of the Constitutional Court in Case No CCT16/12 be referred to –
 - (a) the Subcommittee on Review of the Assembly Rules for consideration in the context of the rules review and existing review instruments on the legislative process, as well as for consideration and report on the mandate of the Committee on Private Members' Legislative Proposals and Special Petitions;
 - (b) the Parliamentary Oversight Authority for consideration and report on issues of capacity and cost in regard to the processing of private members' bills; and
- (2) the *Guidelines for the Introduction of Private Members' Bills in terms of the Current Rules of the National Assembly* be published in the ATC as a one-stop reference for members of Parliament who want to introduce section 75 and section 76 private members' bills.

GUIDELINES¹ FOR THE INTRODUCTION OF A PRIVATE MEMBER'S BILL IN TERMS OF THE CURRENT RULES OF THE NATIONAL ASSEMBLY

AS PRESENTED TO THE RULES COMMITTEE ON 16 OCTOBER 2012

The Constitutional Court judgment in Case No. CCT 16/12 states unambivalently that the “power to determine what processes ought to be followed falls within the constitutional domain of the National Assembly. It is not for this Court to dictate to the Assembly how it should go about regulating its own business”. [84]

Though some refinement is ultimately required in respect of the details of the process, there is sufficient provision in the current rules to allow for the introduction of private members' bills and comply with ruling of the Constitutional Court:

A. PREPARATION OF DRAFT BILL (Rule 237)

- (1) A member no longer first needs to present a legislative proposal to the Speaker for tabling and neither must that legislative proposal then be referred to and considered by the Committee on Private Members' Legislative Proposals and Special Petitions.
- (2) Previously that Committee also had to recommend to the Assembly whether permission should be granted to a member to proceed with his or her legislative proposal. That is no longer the case.
- (3) The permission aspect has been removed from the process and now the first step in introducing a private member's bill is the preparation of a draft bill.
- (4) In terms of Rule 237(1), the draft bill, and a memorandum setting out the objects of the bill, must be in a form and style that complies with any prescribed requirements.
- (5) That rule further states that the member concerned must consult the Joint Tagging Mechanism on the classification of the bill.
- (6) The Constitutional and Legal Services Office of Parliament can assist members with drafting their private members' bills in the form and style which conforms to legislative practice and facilitate access to the Joint Tagging Mechanism.
- (7) Should the requisite drafting capacity not be available in that Office, eg in the case of a highly technical and specialised bill, Rule 237(2) provides that a member must be reimbursed for any reasonable expenses, provided that those expenses had been approved by the Speaker before they were incurred.

¹ These guidelines apply to section 75 and section 76 private members' bills. For assistance with the introduction of private members' constitutional amendments, please consult the National Assembly Table Staff.

- (8) The Constitutional and Legal Services Office is ideally placed to -
 - (a) advise a member where the necessary drafting capacity could be obtained should it not be available in their Office;
 - (b) advise the Speaker on whether the expenses to be incurred and presented for approval qualify as reasonable, as required by the rules.
- (9) The Bills Office that vets all bills for procedural compliance before introduction is also a part of the Constitutional and Legal Services Office and would also vet private members bills for procedural compliance, ie for form and format, not content and substance.
- (10) At this stage the Rules provide only for Government bills to be certified as being consistent with the Constitution. Following the Constitutional Court judgment, it would not be possible to require that private members' bills be certified for constitutionality before they are introduced.

B. PRIOR NOTICE AND PUBLICATION OF DRAFT LEGISLATION (Rule 241)

- (1) Once a private member's bill has been properly drafted and is ready for introduction, the member must give notice in the *Gazette* of his or her intention to introduce the bill. Such notice is required in terms of Rule 241(1)(b).
- (2) Rule 241(1)(c) further compels the member to publish in the *Gazette* either an explanatory memorandum of the bill or the draft bill as it is to be introduced.
- (3) If the draft bill as it is to be introduced is published in the *Gazette* –
 - (a) the notice must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary to Parliament within a specified period; and
 - (b) a memorandum setting out the objects of the bill must also be published.
- (4) Once again the Constitutional and Legal Services Office will assist members in drafting the requisite notice and facilitate its publication.
- (5) Giving prior notice and publishing the draft bill or an explanatory memorandum in the *Gazette* is not necessary for a bill that has been certified by the member in charge of the bill, in consultation with the Speaker, as an urgent matter.
- (6) A request for a bill to be fast-tracked is considered in accordance with Joint Rule 216. That also applies to private member's bills.

C. INTRODUCTION OF BILLS IN ASSEMBLY (Rule 243 and New Rule 247)

- (1) A private member's bill may only be introduced when the Assembly is in session, ie during plenary or committee periods identified by the Programme Committee.
- (2) The member introduces the bill by submitting to the Speaker -

- (a) a copy of the bill or a copy of the relevant *Gazette* if the bill as it is being introduced was published in terms of Rule 241(1)(c);
 - (b) the explanatory summary if the bill itself was not published; and
 - (c) a supporting memorandum which must –
 - (i) state if the bill is introduced as a section 75, a section 76(1), a mixed section 75-76 or a money bill;
 - (ii) explain the objects of the bill;
 - (iii) give an account of the financial implications for the state; and
 - (iv) contains a list of all people and institutions consulted in preparing the bill.
- (3) At its last meeting, the Rules Committee adopted new rules that affect some aspects of the introduction of bills and first reading debates. These rules still have to be approved by the Assembly.
- (4) New Rule 247(1) determines that the Speaker must -
- (a) table the bill and the supporting memorandum in the Assembly, as well as the explanatory summary if there is one; and
 - (b) place the bill on the Order Paper for its First Reading.

D. FIRST READING AND REFERRAL OF A PRIVATE MEMBER'S BILL (New Rule 247)

- (1) Following the introduction of a private member's bill, the member in charge of the bill may request an opportunity from the Programme Committee to make an introductory speech.
- (2) If the opportunity is granted, it will be followed by a debate.
- (3) The Programme Committee could also decide to schedule a debate on the bill once it has been introduced.
- (4) In both cases, the member in charge of the bill must be allocated 15 minutes to make an introductory speech on the background to, reasons for and objects of the bill, and an opportunity to reply to the debate.
- (5) Once the speeches have been made, the bill is regarded as having been read for the first time.
- (6) If no introductory speech was requested or the request was not granted, or if no debate was scheduled by the Programme Committee, the bill as tabled is regarded as having been read for the first time.
- (7) When a bill has been read for the first time, the Speaker refers the bill and its annexures to the portfolio committee under which the subject of the bill falls, unless the House decides otherwise by resolution or it has to go to a joint committee.
- (8) A bill referred to an Assembly committee, including a private member's bill, must be dealt with in accordance with Rule 249, ie also the Assembly's committees are required to give effect to the ruling of the Constitutional Court by deliberating "critically and seriously on legislative proposals and other matters of national importance", as it

“would give meaning to and enrich our representative and participatory democracy, and will probably yield results that are in the best interests of all our people”.
