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**MEMORANDUM**

**TO:** Mr. M Xaso  
Secretary to the National Assembly

**FROM:** Adv Z. Adhikarie  
Chief Legal Adviser

**DATE:** 28 May 2018

**REF. NO** 39 /2018

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**SUBJECT: LEGAL OPINION ON THE CONDUCT OF Hon J.S MALEMA DURING  
PRESIDENCY BUDGET VOTE**

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**INTRODUCTION**

1. Our Office was requested by the Secretary of the National Assembly (NA) to provide a legal opinion “on the permissibility of the call by Hon Malema for people to occupy land (see page 5 of the attached Hansard), and specifically whether Section 58 of the Constitution, freedom of speech, would permit such a comment, or whether it would be in violation with the member’s oath to uphold the law of the Republic and therefore unparliamentary. Our view is also requested on what consequences could follow in the event a member was found to have breached their oath of office.”

2. The opinion outlined below is based on the information received from the Secretary of the NA, and done in extreme haste due to the urgency of the matter.

## LEGAL QUESTION

3. The legal questions for consideration therefore are as follows:
  - (a) whether it is permissible for Hon Malema, in the course of parliamentary proceedings, to call for people to occupy land (see page 5 of the attached Hansard)?;
  - (b) whether Section 58 of the Constitution, freedom of speech, would permit such a comment?; and
  - (c) whether it would be in violation of the Member's oath to uphold the law of the Republic and therefore unparliamentary to make such a call. If that is the case what are the consequences of such a violation of the oath?

## BACKGROUND

4. On 23 May 2018, during a parliamentary debate on the Presidency Budget Vote, Hon Malema made the following statement:

*"President, I came here and told you that you are bluffing about the land. Now you are wishy-washy and saying all manner of things. It is clear you are not going to expropriate land without compensation, **but I need to tell you that we had issued an instruction in the EFF for people to scale down the occupation of land because we wanted to give you time. However, since you are no longer clear, we have made a call, and we make it even here, for our people to occupy the unoccupied land. It is their land because the ANC is not going to give them land anytime soon.*** (Our emphases)

5. It is this statement that triggered the request for a legal opinion.

## CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

6. Section 58(1)(a) of the Constitution provides that “Cabinet members, Deputy Ministers and **members of the National Assembly have freedom of speech in the Assembly and in its committees**, subject to its rules and orders”. The section further absolves members from civil and criminal liability for anything they have said in, produced before or submitted to the Assembly or any of its committees (S58(1)(b)).
7. Section 6 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004, further entrenches the freedom of speech of members in parliamentary proceedings.
8. Rule 63 of the Rules of the National Assembly incorporates section 58(1)(a) and (b) into the Rules and extends it to cover “mini-plenaries and other forums of the Assembly.”
9. Item 4(1) of Schedule 2 to the Constitution prescribes the oath/affirmation by which members must swear or affirm before they take office and among others it reads as follows:

“I, \_\_\_\_\_, swear/solemnly affirm that I will be faithful to the Republic of South Africa and **will obey, respect and uphold the Constitution and all other law of the Republic;**” (our emphases)

## DISCUSSIONS

10. From the legislative framework quoted above it is clear that members of the National Assembly have freedom of speech in the Assembly and in its committees, subject to its rules and orders. This means that members can say anything in Parliament unless constitutionally valid rules or orders of the Assembly regulate or prohibit such speech. Nothing could be found in the rules or orders of the NA that specifically and directly regulates or prohibits the kind of

speech attributed to Hon Malema. This is an important consideration if the behaviour is sought to be impugned.

11. Notwithstanding the above, it is imperative that I hasten to add that in this specific case there are specific circumstances that invite a deeper inquiry and analysis of the context within which the speech was delivered. It is now common cause that Hon Malema is already facing criminal charges in a Free State Provincial court for having uttered similar words in a political rally in that Province. From the available information it appears that he was charged under section 18 (2) (b) of the Riotous Assemblies Act, Act 17 of 1956, in that he incited, instigated, commanded or procured his Economic Freedom Fighters followers and/or others to commit crime, to trespass, in contravention of section 1 (1) of the Trespass Act 6 of 1959 by illegally occupying any vacant land whenever they found same. It is common cause that he has made numerous appearances for this charge. All of this is in the public domain.
12. The significance of this context lies in the fact that at the time Hon Malema delivered his speech he was acutely aware that there is an existing Act of Parliament that prohibits such conduct on his part and more relevantly, that there was a pending case against him to determine whether his conduct fell within the prohibitions of that Act. Against this background, it is inevitable to form a view that Hon Malema was aware of the legal risk of uttering such a statement outside Parliament and purposefully chose a parliamentary process to propagate a message he wouldn't otherwise have been permitted to propagate without the refuge of parliamentary privilege.
13. This then raises two issues. Firstly, whether the utterances of Hon Malema in the face of a pending court case to determine the appropriateness and lawfulness of his previous and similar statements offend the rules of the NA. Secondly, whether parliamentary privilege was abused.
14. This is particularly so given that Hon Malema, as a member of the NA, has taken oath that he will be faithful to the Republic and that he will obey, respect and uphold the Constitution and all other law of the Republic. It matters not that

a member may not agree with that particular law but it must be obeyed and respected until it has been set aside as unconstitutional or found to be invalid by a court of law.

15. Rule 355 empowers the NA to make a finding that a breach or abuse of the privilege provided for in section 58 of the Constitution is contempt of Parliament. However, it may only do so after the Powers and Privileges Committee has made a finding that a specified act is contempt of Parliament and has reported so to the House. There is, however, no specific threshold or category of conduct that, clearly articulates what would constitute such abuse- the rule is therefore very vague

## CONCLUSION

16. Based on the above deliberations, the following conclusions are reached:

- a. The statement of Hon Malema is covered by parliamentary privilege, in as far as it was made in Parliament and in a context of a parliamentary debate. As such, no criminal or civil liability can flow from the utterances;
- b. This, however, does not preclude the NA from inquiring into the conduct of Hon Malema in as far as the **possible abuse of privilege** as set out in rule 355. There is a preponderance of evidence which points to a deliberate use of privilege to propagate a view that the member knew he could not express outside Parliament by virtue of the pending court case against him;
- c. With regard to b. above, a decision may be taken for the matter to be referred to the Powers and Privileges Committee for investigation and recommendation to the House. The challenge though is that the Rules do not clearly articulate the conduct that constitutes abuse of privilege.
- d. To the extent that it may be substantiated that Hon Malema was deliberate in his conduct it may also amount to breach of his oath of office in as far as it amounts to **disrespect of an existing law** of the Republic;
- e. These are however very vaguely proscribed infringements and subject to different interpretations that are open to a challenge.

17. **It is therefore our view** that -

1. There may be a breach of his oath but given the vagueness or lack of specificity of the rules, any action on this ground may be subject to a legal challenge.
2. Whilst the possible abuse of privilege may be referred to the Powers and Privileges Committee, the absence of Rules that clearly articulate abuses, would open this up to challenge.

18. It is therefore recommended that clear Rules be drafted to deal with such matters.



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**Adv. Zuraya Adhikarie**  
**Chief Legal Adviser**