For:

PARLIAMENT: THE POWERS AND PRIVILEGES COMMITTEE

Re:

POINTS OF ORDER RAISED BY THE ECONOMIC FREEDOM FIGHTERS, DURING THE STATE OF THE NATION ADDRESS, OBJECTING TO THE PRESENCE OF: FORMER PRESIDENT FW DE KLERK AND MINISTER P GORDHAN, MP

OPINION

On the instructions of:

Moyahabo Selowa
State Attorney
Cape Town

ADIEL NACERODIEN

Chambers
Cape Town
21 August 2020

INTRODUCTION

1. On 13 February 2020, during the State of the Nation Address (**"SONA"**), members of the Economic Freedom Fighters (**"EFF"**) raised points of order objecting to the presence of:

    1.1. former President Mr FW de Klerk; and

    1.2. Minister P Gordhan, MP.

2. The points of order were in turn, ruled to be invalid by the President Officer. Nonetheless, the same points of order were repeatedly raised.

3. As a result of the above, the proceedings were suspended and resumed after about one hour.

4. During the period of suspension, of their own volition, members of the EFF left the House. It is important to note that:

    4.1. The Speaker did not order any EFF member to leave the House[1]; and

    4.2. No EFF member was forcibly removed from the House.

5. Pursuant to the above, the Speaker referred the matter to Powers and Privileges Committee (**"the Committee"**) for a determination on whether the above constitutes contempt of Parliament.

[1] Save for Ms Sonti. Although not stipulated in my brief, it would appear that Ms Sonti was not forcibly removed.

6. At the Committee's deliberations, a divergence of views arose regarding whether the conduct amounts to contempt of Parliament. In this context, the Chairperson of the Committee made the following observations:

6.1. The members had left of their own volition;

6.2. None of the EFF members were physically removed from the House;

6.3. The Speaker had not ordered the members to leave, save for Ms Sonti;

6.4. Consequently, the Chairperson was doubtful whether the Committee had the necessary 'jurisdiction'[2] to act against the members.

7. Due to the differing views, an external opinion has been sought. In the circumstances, I have been briefed herein and the ambit of my instructions appears to be, to determine whether the conduct described above, constitutes contempt of Parliament as contemplated in terms of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (**"the Act"**).

8. For the sake of completeness, it is recorded that the following documents were included in my brief:

8.1. A brief cover – with instructions and describing the background to this matter;

[2] The terms appears to be used loosely, but is understood to mean *vires*, i.e. the question that is being asked is - whether the Committee has the *vires* to determine the dispute.

8.2. The Act;

8.3. The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Amendment Bill; and

8.4. The Rules of the National Assembly (9th Edition).

9. The question for determination is thus a crisp one: does the conduct constitute contempt of Parliament?

10. For the reasons to be explained more fully hereinbelow, because of the envisaged procedure, a process must be followed whereby the EFF members are first given an opportunity to put their version of events before the Committee before a determination can (or should) be made regarding whether their conduct amounts to contempt of Parliament.

11. For similar reasons, it would be premature, in this opinion, to make a determination on whether the conduct amounts to contempt of Parliament. Nonetheless, in order to be of assistance, certain relevant aspects are highlighted in relation to both the Act and the Rules, in relation to the factual matrix (as it currently stands).

12. The starting point is the Act. However, before looking at the Act, there is a preceding issue – the question raised by the Chairperson regarding whether the Committee has 'jurisdiction'.

JURISDICTION: THE RULES OF PARLIAMENT

13. In terms of Rule 214 (Chapter 12 Committee System, Part 7: Powers and Privileges Committee), it records that:

"214. Functions:

(1) The committee must consider any matter referred to it by the Speaker relating to contempt of Parliament…

(2) (a) Upon receipt of a matter relating to contempt of Parliament… the committee must deal with the matter in accordance with the procedure contained in the Schedule to the Rules of the National Assembly.

(b) The committee must table a report in the Assembly on its findings and recommendations in respect of any alleged contempt of Parliament, as defined in Section 13 of the [Act]…

…"

(emphasis supplied)

14. In broad terms, the scheme of the 'Schedule to the Rules' sets out a procedure whereby the allegations are put to the member(s) for comment (in writing) and makes allowance for a further process whereby the member is given an opportunity to respond thereto and have the matter heard.

15. From the background that has been provided, it does not appear that this procedure has (as yet) been followed.

16. Insofar as it is suggested that the Committee does not have the jurisdiction (or rather, the *vires*) to determine this matter, in my view, Rule 214 is instructive in its peremptory language.

17. Thus, because of the Speaker's referral to the Committee it must deal with the matter in accordance with the procedure contained in the Schedule to the Rules.

18. The jurisdiction / *vires* is thus sourced from the Speaker's referral, read with Rule 214.

19. The Schedule to the Rules plainly creates a procedure whereby the principle of *audi alteram partem* (the right to be heard) is given effect to. It is only once the EFF members have been given an opportunity to be heard, that a determination can be made whether the conduct amounts to contempt of Parliament, such a determination cannot be made beforehand[3].

20. The above contention is ratified by the section 12(3)(a) of the Act, which reads:

> ***"12 Disciplinary action against members for contempt***
> *(1) Subject to this Act, a House has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared by or under section 13 to be contempt of Parliament by a member, and taking the disciplinary action provided therefore.*

[3] As remarked by Megarry J in John v Rees [1970] Ch 345 at 402:

'... the path of the law is strewn with examples open and shut cases which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and untenable determinations that, by discussion, suffered a change".

(2) A House must appoint a standing committee to deal with all enquiries referred to in subsection (1).
(3) Before a House may take any disciplinary action against a member in terms of subsection (1), the standing committee must-
(a) enquire into the matter in accordance with a procedure that is reasonable and procedurally fair; and
…"
(emphasis supplied)

21. It accordingly follows in my view that, although the question for consideration herein is to determine whether the conduct amounts to contempt, no definitive answer can be given, at this stage, because the EFF's version of events have not been provided (as envisaged by the procedure contained in the Schedule to the Rules). For the same reason, the Committee also cannot, with respect, make such a determination at this juncture. It is simply not possible at this stage to finally determine whether there has been a contravention of the Act or Rules.

22. Thus, what follows hereinbelow regarding the issue of contempt is only a high-level overview of aspects of the Act and the Rules, which may (already on the facts available) be applicable. It must be emphasised that because further facts may arise from the procedure to be followed (that may exacerbate or mitigate matters), that the aspects discussed below is not an exhaustive list.

THE ACT: CONDUCT CONSTITUTING CONTEMPT

(i) Applicable legal principles

23. The legal position regarding statutory interpretation may be summarised as follows:

23.1. In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) the following is stated:

> *'... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a … contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to …; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. … "*
>
> (emphasis supplied)

23.2. In the matter of *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), the Constitutional Court stated the following:

> *"[18] It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by s 2(1) of the Act, which expressly requires a purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does*

not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."

(emphasis supplied)

23.3. In the matter of *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) the Constitutional Court stated the following in relation to statutory interpretation:

"Proper meaning of s 10(1)(b) of the Housing Protection Act
[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
(a) that statutory provisions should always be interpreted purposively;
(b) the relevant statutory provision must be properly contextualised; and
(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).
..."

(ii) Section 13 of the Act

24. In terms of section 13 of the Act, the following conduct constitutes contempt:

*"**13 Conduct constituting contempt***
A member is guilty of contempt of Parliament if the member-
(a) contravenes section 7, 8, 10, 19, 21 (1) or 26;
(b) commits an act mentioned in section 17 (1) (a), (b) or (c) or (2) (a), (b), (c), (d) or (e);
(c) wilfully fails or refuses to obey any rule, order or resolution of a House or the Houses; or
(d) commits an act which in terms of the standing rules constitutes-
(i) contempt of Parliament; or
(ii) a breach or abuse of parliamentary privilege."

25. On a plain read of section 13 of the Act, any conduct falling with section 13(a) to (d) of the Act will constitute contempt and that sections 13(a) to (d) of the Act, must be read disjunctively (because of the word 'or' between section 13(c) and (d) of the Act.

(ii) Section 13(a) of the Act

26. In relation to section 13(a) of the Act, the following may be of relevance:

26.1. Section 7 of the Act reads:

"7 Prohibited acts in respect of Parliament and members
A person may not-
(a) improperly interfere with or impede the exercise or performance by Parliament or a House or committee of its authority or functions;
(b) improperly interfere with the performance by a member of his or her functions as a member;
(c) threaten or obstruct a member proceeding to or going from a meeting of Parliament or a House or committee;
(d) assault or threaten a member, or deprive a member of any benefit, on account of the member's conduct in Parliament or a House or committee;
(e) while Parliament or a House or committee is meeting, create or take part in any disturbance within the precincts[4]; or
(f) fail or refuse to comply with a lawful instruction by a duly authorised staff member regarding-
(i) his or her presence at a particular meeting in the precincts; or
(ii) the possession of any article, including a firearm, in the precincts or any part thereof."

[4] See: section 1 of the Act, definition of 'precinct'; read with section 2 of the Act.

(emphasis supplied)

27. Section 7 of the Act refers to a 'person'. The Constitutional Court has held (albeit in relation to section 11 of the Act) that a 'person' would include a member of Parliament[5].

28. It would appear that on the facts presented thus far, that sections 7(a) and/or (e) of the Act may be of relevance.

29. Although there are no reported decisions on section 7 of the Act, the following may nonetheless, be useful:

29.1. The Constitutional Court in *DA v Speaker, National Assembly* 2016 (3) SA 487 (CC) has held, albeit in relation to the limitation of free speech in Parliament, that the constitutional privilege of parliamentary free speech cannot amount to a licence to incapacitate Parliament from its business. The Constitutional Court formulated the proposition as follows:

"[38] Surely, the privilege contained in ss 58(1)(a) and 71(1)(a) 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. This would detract from the very raison d'être of Parliament. Section 57 of the Constitution provides that the National Assembly may determine and control internal arrangements, proceedings and procedures and make rules and orders concerning its business. Of this power, Mahomed CJ tells us in De Lille:

[5] See: DA v Speaker, National Assembly and Others 2016 (3) SA 487 (CC) at para 20 – 33.

There can be no doubt that this authority [contained in s 57(1)] is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose. This would, for example, include the power to exclude from the Assembly for temporary periods any member 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. Without some such internal mechanism of control and discipline, the Assembly would be impotent to maintain effective discipline and order during debates.'

[39] More pertinently, ss 58(1)(a) and 71(1)(a) of the Constitution make freedom of speech in the two houses subject to 'the rules and orders' envisaged in ss 57 and 70. That must mean rules and orders may — within bounds that do not denude the privilege of its essential content — limit parliamentary free speech. The Democratic Alliance contends that s 11 is not a rule or order of the National Assembly or National Council of Provinces. The argument continues that the section is constitutionally invalid because — in terms of ss 58(1)(a) and 71(1)(a) of the Constitution — parliamentary free speech is subject to the rules of the National Assembly and National Council of Provinces, and not an Act of Parliament. This raises the question whether an instrument other than rules and orders may be employed to limit free speech. This arises in relation to the impugned s 11 which undoubtedly does limit parliamentary free speech. Before grappling with this question, let me demonstrate that s 11 does indeed limit the privileges and immunities contained in ss 58(1) and 71(1) of the Constitution."

(iii) Section 13(b) to (d) of the Act

30. With regard to sections 13(b) to (d) of the Act, for the reasons already stated, it would be premature to express a definitive view at this stage[6],

CONCLUSION

31. In the circumstances, in my view, Rule 214 read with the *"Schedule procedure to be followed in the investigation and determination of allegations of misconduct and contempt of Parliament"* should be followed.

32. Only once that procedure is followed can a determination be made whether the conduct, in light of the explanation given, amounts to contempt as envisaged in terms of section 13 of the Act.

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[6] Nonetheless, in relation to the Rules, the following are highlighted as being potentially relevant (it must be stressed, that no view is expressed whether these Rules have in fact been breached, that determination can only be made at a later stage):

1.1. Rule 10 - Contempt;

1.2. Rule 26(3) read with Rule 92(8); (9) and (11) – in this regard, it is noted that the EFF appear to have raised the same point of order multiple times.

1.3. Rule 69 – grossly disorderly conduct

1.4. Rule 70 (in the case Ms Sonti) – member ordered to leave Chamber

1.5. Rule 77 – Grave disorder

33. As explained, it would be premature, at this stage, to make a determination on whether the conduct amounts to contempt before the correct procedure has been followed.

34. In the circumstances, this opinion may need to be updated at a later stage.

35. I advise accordingly.

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Cape Town
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