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LEGAL OPINION
[Confidential]

TO: Ms A F Muthambi, MP
**Chairperson: Portfolio Committee on Environment, Forestry
and Fisheries**

COPY: Ms. P Tyawa
Acting Secretary to Parliament

FROM: Adv Z Adhikarie
Chief Legal Adviser

DATE: 15 November 2021

**SUBJECT: Advice on procedures to consider the Climate Justice Charter
in terms of section 234 of the Constitution**

REF: 118 / 2021

MESSAGE: Attached herewith find a memorandum for your attention

ADV Z ADHIKARIE
CHIEF LEGAL ADVISER



MEMORANDUM

TO: Ms A F Muthambi, MP
Chairperson: Portfolio Committee on Environment, Forestry and Fisheries

COPY : Ms. P Tyawa
Acting Secretary to Parliament

Mr M Xaso
Secretary to the National Assembly

Ms R Begg
Division Manager: Core Business Support

FROM: Adv Z Adhikarie
Chief Legal Adviser

DATE: 15 November 2021

REF. NO. 118 / 2021

SUBJECT: Advice on procedures to consider the Climate Justice Charter in terms of section 234 of the Constitution

Purpose

1. To advise the Chairperson of the Portfolio Committee on Environment, Forestry & Fisheries (the Committee), Ms A F Muthambi, MP, on the Climate Justice Charter (the Charter).

Background

2. On 22 September 2020 the Legal Resources Centre (LRC), acting on behalf of the Co-operative and Policy Alternative Centre (COPAC), addressed a letter to the Presiding Officers of the National Assembly (NA) and National Council of Provinces (NCOP).
3. The correspondence indicates that COPAC drafted a climate justice charter. The document puts forward systemic solutions to the current climate crisis facing South Africa and the rest of the world.
4. The request in the correspondence is for the adoption of the Charter, by Parliament in terms of section 234 of the Constitution.
5. However, it is pointed out in the correspondence that the Joint Rules of Parliament do not provide for the procedure to table, consider, debate and vote on whether such a charter should be adopted.
6. The correspondence suggests that rule 2 of the Joint Rules of Parliament could potentially assist.
7. Joint Rule 2 deals with “Unforeseen matters” and permits the Speaker of the NA and the Chairperson of the NCOP, acting jointly, to give a ruling or to make a rule “in respect of any matter for which the Joint Rules do not provide.”
8. Hence, LRC is requesting confirmation that “the adoption of a Charter of Rights” is an unforeseen matter and that the rule 2 of the Joint Rules of Parliament can be used to process the request to adopt the Charter. LRC is also requesting that the process be codified to allow members of the public and Members of Parliament to give effect to section 234.
9. The Speaker responded on 7 October 2020 by inviting the submission of the Charter to NA for consideration in terms of its Rules and through its appropriate structures.
10. On 9 September and 6 October 2021, the LRC wrote on behalf of COPAC, to the Speaker requesting the tabling of Charter for adoption as a Charter of Rights in terms of section 234 of the Constitution.
11. On 14 October 2021 the Deputy Speaker referred the proposed Charter and associated documents to the Committee to consider in terms of the mandate of the

Committee. The referral indicates that the Committee must engage on the matter “and the legal implications thereof and, thereafter, map out an appropriate approach by Parliament, including which other structures in both Houses should be consulted. This could also serve as a basis for a discussion in the rules committees on the content of any rules for the implementation of section 234 of the Constitution in general.”

12. On 15 October 2021 the Deputy Speaker responded to LRC that the Charter has been referred to the Committee. A similar letter was sent on 5 November 2021 from the Secretary to NA to the LRC.

Legal brief

13. The Committee seeks legal advice on:

13.1 Whether the current Climate Justice Charter before the Committee qualifies as one of those rights consistent with the Constitution?

13.2 The legal status of the Charter, once it is adopted by Parliament in relation to the existing body of policies (legislation), which already addresses the matters that the Charter seeks to address, though not in line with existing policies?

13.3 Whether by adopting this Charter Parliament is not embracing an alternative policy-making approach than the one we already know (consultative and broad-based)?

13.4 Whether there are National Assembly rules for processing this particular Charter?

Regulatory framework

Constitution

14. Section 45 of the Constitution provides that the NA and NCOP must establish a Joint Rules Committee to make rules and orders concerning the joint business of the Houses.

15. Section 59 of the Constitution provides that the NA must “*facilitate public involvement in the legislative **and other processes** of the Assembly and its committees*” (emphasis added).

16. Section 234 of the Constitution provides as follows:

In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

Rules

17. Joint Rule 2, referred to above, provides for “unforeseen matters” as follows:

2. Unforeseen matters

(1) The Speaker and the Chairperson of the Council, acting jointly, may give a ruling or make a rule in respect of any matter for which the Joint Rules do not provide.

(2) A rule made by the Speaker and the Chairperson of the Council, acting jointly, remains in force until a meeting of the Joint Rules Committee has decided on it.

18. Chapter 12 of the NA Rules (9th ed.) provides for Committees. Rule 167(f), dealing with ‘General powers’ provides that –

“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 —

.....

(f) determine its own working arrangements;”.

19. NA Rule 170 provides that “[c]ommittees must ensure public involvement in accordance with the provisions of the Constitution and these rules.”

20. NA rule 190 establishes the Rules Committee. Rule 193 provides that the Rules Committee is empowered “to develop and formulate policy proposals concerning the exclusive business of the Assembly in respect of the proceedings, procedures, rules, orders and practices concerning the business of the Assembly;”. Subrule (1)(f) of Rule 193 provides that it is the **Rules Committee that may recommend to the Assembly for adoption rules and orders and other policy proposals concerning the business of the Assembly.**

21. NA rule 193(2) provides –

(2) The committee may deal with a matter falling within its functions and powers —

(a) on its own initiative; or

(b) when referred to it for consideration and report by —

(i) the Assembly, or

(ii) the Speaker.

22. NA rule 227 provides for functions of portfolio committees. The rule provides for peremptory obligations of portfolio committees dealing with Bills, oversight and other matters falling within its portfolio that are referred to it in terms of the Constitution, legislation, the NA rules, the Joint Rules or by resolution of the NA.

Analyses

23. Section 234 provides a discretionary power on Parliament to adopt Charters of Rights consistent with the provisions of the Constitution. In the event that Parliament decides to exercise this discretion, the procedural and substantive aspects of the exercise must comply with at least sections 57, 59, 70, 72 and 234 of the Constitution.

24. Section 57 provides that the NA may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. Section 70 provides the same in respect of the NCOP.

25. Section 59 is applicable to “legislative and other processes” of the NA and requires public participation in the NA. Section 72 provides the same in respect of the NCOP.

26. From a substantive perspective, in giving effect to section 234 of the Constitution, the purpose must be “to deepen the culture of democracy established by the Constitution” and must be “consistent with the provisions of the Constitution”.

27. The legal effect of a Charter of Rights, once adopted by Parliament, has not been analysed in South African jurisprudence. We have not found a court decision dealing with section 234.

28. During 2006 and 2007 a Service Charter for Victims of Crime in South Africa (Victims’ Charter) was developed and approved by Cabinet. The Charter confers a range of rights on victims of crime, although some of the provisions of the Charter are merely restatements of what are already provided for in law. It does not appear that this Charter was submitted to Parliament for adoption, and the rights enumerated therein has thus not been conferred in terms of section 234 of the Constitution.

29. Should a Charter of Rights be adopted by Parliament in terms of section 234, the rights therein will, depending on the nature of the rights, be enforceable against the State. The adoption of the Charter would bind the State in certain circumstances to the responsibilities assumed therein. It is important to note that the rights in the Charter must be consistent with the Constitution to comply with section 234. The rights in the Charter will not have the same status as legislation. A Charter would be considered 'soft law'.¹

30. It is only through legislation – laws of general application - that rights in the Bill of Rights can be limited.² Hence, as a general position, rights and obligations between private persons must be captured in legislation and the provisions in a Charter of Rights would not limit the rights conferred on persons by the Constitution.

31. In light of this background we respond to the issues raised in the legal brief below.

Whether the current Climate Justice Charter before the Committee qualifies as one of those rights consistent with the Constitution?

32. The Climate Justice Charter that was referred to the Committee refers to many socio-economic rights (housing, education, health, welfare etc.), as well as individual rights pertaining to property. The language used in the Charter is not similar to language used in the Constitution or legislation, but the contents of the Charter is aligned to the provisions in the Constitution.

33. Be that as it may, a Charter of rights adopted by Parliament would be in accordance with the language and style used by Parliament for such purpose.

The legal status of the Charter once it is adopted by Parliament in relation to existing body of policies (legislation), which already addresses the matters that the Charter seeks to address though not in line with existing policies?

34. As indicated above, a Charter would be considered 'soft law'. **The rights contained in the Charter may be of such a nature that it will be enforceable against the**

¹ The term "soft law" refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law, often contrasted with soft law by being referred to as "hard law". (wikipedia.org accessed on 16 October 2020.)

²² Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of a law of general application.

State. However, it is only through legislation that rights and obligations between private persons are regulated.

35. The rights in the Charter will not have the same status as legislation.

Whether by adopting this Charter Parliament is not embracing an alternative policy-making approach than the one we already know (consultative and broad-based)?

36. The answer to this question is found in the language of section 234; namely, it would be a Charter by Parliament adopted by Parliament, consistent with the provisions of the Constitution. Hence, the process should comply with the Constitution, specifically the obligation to facilitate public involvement in the process.

37. The Charter that was referred to the Committee must be considered in light of the obligations in the Constitution, amongst others.

Whether National Assembly rules provide for processing this particular Charter?

38. There are no specific rules to give effect to the realisation of section 234 of the Constitution.

39. The fact that the Constitution expressly provides that Parliament may adopt Charters of Rights consistent with the provisions of the Constitution, militates against the approach that this matter is an “unforeseen matter”. Be that as it may, the Joint rule 2 appears broad enough to allow its use for such eventualities, pending the finalisation of specific rules. However, we are of the view that it would be appropriate to make specific rules for the implementation of section 234.

40. Furthermore, the Constitutional Court found that the NA has an obligation to make specific rules to give effect to section 89(1) of the Constitution.³ Although that section deals with the core responsibility of the NA to hold the President to account, it is also an indication that the NA should have rules in place to give effect to other constitutional provisions. The same applies to the NCOP.

³ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47, at para [196].

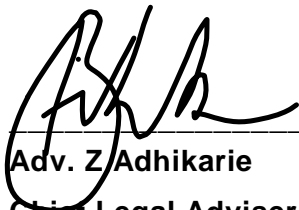
Advice

41. The implementation of section 234 of the Constitution requires rules made in terms of sections 57 and 70 of the Constitution. One might add that if it is a joint process between the NA and NCOP, section 45 of the Constitution will be applicable as it pertains to Joint Rules.
42. To deal with the request from LRC / COPAC, we are of the view that Joint Rule 2, notwithstanding its apparent scope, is not purposively meant to cater for constitutional prerogatives such as contemplated in section 234. Furthermore, we are not aware of any specific rules in the NA, NCOP or Joint Rules that facilitate the implementation of section 234.
43. We also advise that there is nothing in the interpretation of section 234 that requires only the Joint Rules to accommodate the submission of a Charter of Rights to Parliament. Similarly, there is nothing in section 234 that requires a separate process of adoption by resolution in each House as is the case with international agreements approved in terms of section 231 of the Constitution. Hence, the NA and NCOP may determine and control this process, as mandated by sections 57 and 70, respectively; or, through Joint Rules.
44. In our opinion the implementation of section 234 requires specific rules dealing with the submission, referral, reporting, debate and adoption of Charters of Rights consistent with the Constitution. These specific procedures fall outside the scope of this opinion.
45. The Committee may decide to proceed with public participation and discussion around the content of the Charter referred to it – as far as it is able to – in terms of NA rule 167(f) by determining its own working arrangements. However, given the paucity of procedure to deal with section 234, we are of the view that the Committee should recommend that specific rules be developed to deal with processing referrals of this nature.
46. The NA Rules Committee is empowered to develop and formulate policy proposals concerning the exclusive business of the NA in respect of the proceedings, procedures, rules, orders and practices concerning its business. Hence, it would be appropriate for the House or the Speaker to consider referring these recommendations to the NA Rules Committee. The Rules Committee may also, on its own, decide to consider such policy and rules.

47. The referral indicates that the Committee must engage on the matter “and the legal implications thereof and, thereafter, map out an appropriate approach by Parliament, including which other structures in both Houses should be consulted.” The referral letter specifically indicates that “[t]his could also serve as a basis for a discussion in the rules committees on the content of any rules for the implementation of section 234 of the Constitution in general.”

48. As we indicated, depending on the nature of the right in the Charter, adoption by Parliament would make the rights enforceable against the state, but the provisions of the Charter would not be capable of limiting rights of persons enshrined in the Bill of Rights. Should the committee consider that legislation is desirable to address the policy considerations contained in the proposed Charter, the options include that the committee may wish to initiate a Committee Bill to deal with the substantive rights if they are not adequately addressed in existing legislation.

49. We advise accordingly.



Adv. Z Adhikarie
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