

EX PARTE:

**In Re: Constitutionality of the Rules of the National Assembly relating to Bills
introduced by a member of the National Assembly**

O P I N I O N

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Chambers, Cape Town
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Furnished to:

**The Parliamentary Caucus
Inkatha Freedom Party
National Assembly**

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INTRODUCTION

1. I am instructed by the Parliamentary Caucus of the Inkatha Freedom Party (“Inkatha”), a political party represented in the National Assembly (“the Assembly”), to provide an opinion on whether the rules of the Assembly (“the rules”) relating to the introduction of Bills in the Assembly by its members are consistent with the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
2. In this memorandum, I consider the relevant provisions of the Constitution, the rules and follow with a conclusion.
3. The Constitution grants an untrammelled and unfettered right to members of the Assembly to introduce Bills in it. The Constitution permits the Assembly to make rules to regulate the time, manner and place of the introduction of Bills.

The rules restrict the introduction of Bills by giving the Assembly a filtering role. The Assembly may refuse a member his or her right to introduce a Bill.

4. I conclude that the rules are unconstitutional to the extent that they effectively permit the Assembly to restrict its members from introducing Bills in it.¹

¹ The Constitutional Court has effectively held that such an inconsistency is subject to judicial scrutiny. See for example: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa* 1996 (4) SA 744 (CC) at para [224]; *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA); and for application of the legality principle see for example *Ex parte President of the RSA: in re Pharmaceutical Manufacturers Association of SA* 2000 (2) SA 674 (CC).

THE CONSTITUTION

5. The Constitution is the supreme law.² All law or conduct inconsistent with it is invalid.³
6. The legislative authority in the Republic in the national sphere of government is vested in Parliament.⁴
7. The composition of Parliament is dealt with in section 42. It consists of the Assembly and the National Council of Provinces (“the NCOP”).⁵
8. The powers of the Assembly are set out in the Constitution. The Assembly, in exercising its legislative power may consider, pass, amend or reject any legislation before it, and initiate or prepare legislation, except money Bills.⁶
 - 8.1 The provisions concerning the **internal arrangements**, **proceedings** and **procedures** of the Assembly are set out in the Constitution.⁷

² Section 1 of the Constitution.

³ Section 2.

⁴ Section 44.

⁵ Section 42 provides, *inter alia*:

“42. Composition of Parliament

....

42(2) The National Assembly . . . participate[s] in the legislative process in the manner set out in the Constitution.

42(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by . . . providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”

⁶ Section 55(1).

8.2 The Assembly may determine and control its internal arrangements, proceedings and procedures,⁸ and make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.⁹

8.3 The rules and orders of the Assembly must provide for the participation in its and its committee's proceedings the participation of minority parties represented in the Assembly, in a manner consistent with democracy.¹⁰

9. The power to introduce a Bill, other than a money Bill, is dealt with in section 73.

Section 73 states in relevant part:

- “(1) Any Bill may be introduced in the National Assembly.
- (2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:
- (a) a money Bill; or
- (b) a Bill which provides for legislation envisaged in section 214.”

(Emphasis added.)

10. Section 73 creates the constitutional power of introducing a Bill in the Assembly and vests such power in a limited number of persons.

⁷ Section 57(1).

⁸ Section 57(1)(a).

⁹ Section 57(1)(b).

¹⁰ Section 57(2).

For present purposes it is important to note that a **member** of the Assembly may introduce a Bill in the Assembly.

11. The only proviso to this proposition is that it is only the Cabinet member responsible for financial matters who may introduce money Bills,¹¹ which means that a member of the Assembly has an **unfettered** and **untrammelled** constitutional power to introduce any other Bill.
12. The wording of the Constitution is clear. Subsection 73(2) refers to “a member”, thereby indicating that the power (to introduce a Bill) vests on each member of the Assembly individually as opposed to a group or minimum number of them, or on a political party represented in the Assembly.
13. Section 57 of the Constitution gives the Assembly the power to adopt rules to deal with and regulate its internal arrangements, proceedings and procedures.

It states:

“(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;**

¹¹ Only the Cabinet Minister responsible financial matters may introduce money Bills. Money Bills are those contemplated by section 77 of the Constitution.

- (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.”**

14. 14.1 The Assembly’s power in regard to the making of rules and orders is constrained by the Constitution.¹²

14.2 First, the power has to be exercised with due regard to representative and participatory democracy, accountability, transparency and public involvement.

14.3 Secondly, section 57(2) prescribes constitutionally mandated content for the rules and orders.

14.4 Thirdly, the rules and orders must provide for the participation of minority parties in parliamentary proceedings in a manner consistent with democracy.

15. What section 57 does **not** do is to any way restrict or limit the power of all those persons referred to in section 73(2), including members of the Assembly, to introduce Bills in the Assembly.

¹² See for example, S Budlender in Woolman, et al, Constitutional Law of South Africa (2nd ed., Original Service, vol 1) at 17-37.

16. It in no way permits the filtering of members' powers to introduce Bills by the Assembly or any other body.
17. In summary, the Constitution in clear and unambiguous terms gives all members of the Assembly the power to introduce Bills in the Assembly.
18. I turn now to the relevant rules of the Assembly (as provided to me by Inkatha).

THE RULES OF THE ASSEMBLY

19. The rules of the Assembly establish a regime for any member of the Assembly to introduce a Bill in the Assembly ("the regime").
20. The regime goes further than regulating the time, manner and place in respect of which members may introduce Bills.
21. It goes beyond what is permitted by section 57(2) of the Constitution.
22. The regime itself imposes a limitation or what may be appropriately referred to as a restriction on the power of members of the Assembly to introduce Bills.
23. This restriction or limitation is not contemplated by the Constitution and is thus unlawful.
24. To appreciate the nuances of the regime, there are a number of rules which need to be quoted in full. I now set out the relevant rules to demonstrate the workings of the regime:

“121. List of committees

(1) The Assembly has the following committees:

....

(h) the Committee on Private Member’s Legislative Proposals and Special Petitions established by Rule 209; and

....

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.”

133. Quorum

(1) A majority of the members of a committee constitutes a quorum, subject to Subrule (2).

(2) A committee may proceed with business irrespective of the number of members present, but may decide a question only if a quorum is present.

....

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.

....

25. A Parliamentary Committee, the Committee on Private Member's Legislative Proposals and Special Petitions, exists to deal with members' **proposals**. The Committee does not deal with the introduction of Bills in the Assembly as that concept is used in section 73(2) or at all. **Proposals** to the Assembly do **not** constitute "the introduction of Bills" in the Assembly.

I quote now the rules relating to this Committee.

"Part 11: Committee on Private Members' Legislative Proposals and Special Petitions

209. Establishment

There is a Committee on Private Members' Legislative Proposals and Special Petitions.

210. Composition

- (1) **The Committee on Private Members' Legislative Proposals and Special Petitions consists of the number of Assembly members that the Speaker may determine with the concurrence of the Rules Committee.**
- (2) **The members of the Committee are appointed by the Speaker after consulting—**
 - (a) **the Chief Whip, when a member of the majority party is appointed; or**
 - (b) **the most senior whip of another party, when a member of that particular party is appointed.**

211. Functions and powers

The Committee on Private Members' Legislative Proposals and Special Petitions must consider and make recommendations to the Assembly on—

- (a) **all legislative proposals made by Assembly members intending to introduce Bills and referred to the Committee in terms of Part 2 of Chapter 13 of these Rules; and**

(b) all special petitions referred to the Committee by the Speaker in terms of Rule 315.

212. Decisions

A question before the Committee on Private Members' Legislative Proposals and Special Petitions is decided when a quorum in terms of Rule 133 is present and there is agreement among the majority of the members present.

230. Initiation of legislation by Assembly

(1) The Assembly initiates legislation through its committees and members acting with the permission of the Assembly in terms of these Rules.

(2) Any committee or member of the Assembly may in terms of section 73(2) of the Constitution introduce a bill in the Assembly that has been initiated in terms of Subrule (1)."

(emphasis added)

26. Thus, members of the Assembly may, according to the rules, introduce Bills only with the permission of the Assembly.

"Bills initiated by Assembly members in individual capacity

234. Submission of legislative proposals to Speaker

(1) An Assembly member intending to introduce a bill in the Assembly in an individual capacity (other than as a Cabinet member or Deputy Minister) must, for the purpose of *obtaining the Assembly's permission* in terms of Rule 230(1), submit to the Speaker a memorandum which—

- (a) sets out particulars of the proposed legislation;
- (b) explains the objects of the proposed legislation; and
- (c) states whether the proposed legislation will have financial implications for the State and, if so, whether those implications may be a determining factor when the proposed legislation is considered.

(2). The Speaker must table the member's memorandum in the Assembly."

27. This rule sets out the requirements a member must satisfy before he or she may introduce a Bill.

28. Even if all the requirements are satisfied, the Assembly may refuse the member permission to introduce the Bill.

“235. Referral of proposals to committee

- (1) The Speaker must refer the member’s memorandum to the Committee on Private Members’ Legislative Proposals and Special Petitions.
- (2) The Committee must consult the portfolio committee within whose portfolio the proposal falls.
- (3) If the Committee after such consultation is of the view that the member’s proposal warrants further investigation, but that it may have financial implications for the State that may be significant enough to affect its desirability, the Committee must request the Speaker to refer the member’s memorandum to the appropriate portfolio committee for a report on the financial implications of the proposal.
- (4) After considering the member’s memorandum and the portfolio committee’s report, if there is such a report, the Committee must recommend that permission either be—
 - (a) given to the member to proceed with the proposed legislation; or
 - (b) *refused*.
- (5) If the Committee recommends that the proposed legislation be proceeded with, it may—
 - (a) express itself on the desirability of the principle of the proposal;
 - (b) recommend that the Assembly approve the member’s proposal in principle; or
 - (c) recommend that permission be given subject to conditions.

236 Consideration of legislative proposal by Assembly

- (1) The Committee on Private Members’ Legislative Proposals and Special Petitions must table in the Assembly the member’s memorandum and the Committee’s recommendation, including any views of a portfolio committee on the financial or other implications of the proposal.
- (2) The Speaker must place the Committee’s report together with the member’s proposal on the Order Paper for a decision.
- (3) The Assembly may—
 - (a) give permission that the proposal be proceeded with;
 - (b) refer the proposal back to the Committee or the portfolio committee concerned for a further report; or
 - (c) refuse permission.

- (4) If the Assembly gives permission that the proposal be proceeded with, it may, if it so chooses—
- (a) express itself on the desirability of the proposal; or
 - (b) subject its permission to conditions.

243. Introduction of bills in Assembly

- (1) A Cabinet member or Deputy Minister or an Assembly member or committee introduces a bill (other than a bill mentioned in Subrule (4)) by submitting to the Speaker—
- (a) a copy of the bill or, if the bill as it is introduced was published in terms of Rule 241(1)(c), a copy of the Gazette concerned;
 - (b) the explanatory summary referred to in Rule 241(1)(c), if the bill itself was not published; and
 - (c) a supporting memorandum which must—
 - (i) state whether the bill is introduced as a section 75 bill, a section 76(1) bill, a money bill or a mixed section 75/76 bill;
 - (ii) explain the objects of the bill;
 - (iii) give an account of the financial implications of the bill for the state;
 - (iv) contain a list of all persons and institutions that have been consulted in preparing the bill; and
 - (v) if the bill is introduced by a Cabinet member or a Deputy Minister, include a legal opinion by a State law adviser, or a law adviser of the State department concerned, on the classification of the bill and any other question in respect of which the JTM is required to make a finding in terms of Joint Rule 160.
- (1A) A bill introduced by a Cabinet member or Deputy Minister must be certified by the Chief State Law Adviser or a state law adviser designated by him/her as being—
- (a) consistent with the Constitution; and
 - (b) properly drafted in the form and style which conforms to legislative practice.
- (1B) If a Bill is not certified as contemplated in subrule (1A), the Bill must be accompanied by a report or legal opinion by a state law adviser mentioned in subrule (1A) on why it has not been so certified.
- (2) A bill introduced by a Cabinet member or Deputy Minister must contain on its cover page a reference to that Cabinet member or Deputy Minister as the person introducing the bill.

- (3) A bill introduced by an Assembly member or committee with the Assembly's permission in terms of Rule 236(3) or 238(3) must—
 - (a) be accompanied by a statement to that effect; and
 - (b) contain on its cover page a reference to the name of the member or the committee as the member or committee introducing the bill.
- (4) This Rule does not apply to—
 - (a) constitution amendment bills, which must be introduced in accordance with Rule 260; and
 - (b) money bills when the special procedure set out in Rule 287(2) is followed.
- (5) Bills initiated by Assembly members or committees may be introduced only when the Assembly is in session.”

29. The foregoing, and particularly Rules 211, 230, 243 236 and 238, describes a regime in which a member of the Assembly only has the power to introduce a Bill in the Assembly by following these steps:

29.1 formulating the intention to introduce a bill;

29.2 formulating a memorandum about the purposes of the bill;

29.3 applying for permission to introduce a bill as described in such memorandum from a committee; and

29.4 applying for permission to introduce a bill as described in such memorandum from the Assembly.

30. Not only can individual members not, without permission, introduce a Bill but a member of a minority party will not have the right of introducing a Bill unless the party or parties controlling a majority of the committee concerned and the Assembly give such member permission to do so.

31. This regime is clearly in conflict with section 73 of the Constitution.
32. Any suggestion that this conflict is immaterial or simply technical, to the extent that the constitutional power to introduce legislation and its significance in the workings of democracy are not significantly and materially adversely affected, is without merit.
33. Similarly the argument that the same majority which has the power to reject a Bill that has been introduced may refuse permission to introduce the Bill is without merit. The answer is simply that there is significance in the introduction of a Bill.
34. As opposed to a proposal to introduce a Bill described in a memorandum, Bills are published in the *Government Gazette* and on the parliamentary website which lists all Bills, revealing the details of what has been proposed, and may call for and receive public inputs. This has significance in itself.
35. difference between a Bill and a proposal pending before Parliament, *inter alia* for purposes of soliciting support for it.
36. Moreover, the rules set out substantially different procedures for members' bills as opposed to Cabinet members' bills.
37. In assessing constitutional consistency, it is not necessary to enquire whether the regime set out in the rules is preferable, desirable, more practical or even more rational than the power of a member to introduce a Bill, for such analysis would turn into an impermissible questioning of the Constitution.

CONCLUSION

38. In my opinion the relevant Assembly rules—

39.1 are inconsistent with section 73 the Constitution; and

39.2 do not satisfy the constitutional imperatives set out in section 57(2)(b).

39. I advise accordingly.

**Anton Katz
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21 October 2009**