



Centre for
**CONSTITUTIONAL
RIGHTS**

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

The Honourable Adv T M Masutha, MP
Chairperson
Subcommittee on Review of the Assembly Rules
Parliament of the Republic of South Africa
Parliament Street
Cape Town
8000

Attention: Mr Perran Hahndiek

Per email: phahndiek@parliament.gov.za

Per fax: 021 403 3048.

5 November 2012

Dear Adv Masutha

CONCISE SUBMISSION TO THE SUBCOMMITTEE ON REVIEW OF THE ASSEMBLY RULES

Introduction

1. The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation – a non-profit organisation dedicated to upholding the *Constitution of the Republic of South Africa, 1996* (the Constitution). To this end, the Centre seeks to promote the values, rights and principles provided for in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.
2. With reference to section 57 of the Constitution and your call for submissions as published on www.parliament.gov.za, CFRC welcomes the opportunity to make concise submissions to the

A UNIT OF THE FW DE KLERK FOUNDATION

PO Box 15785, Panorama, 7506, South Africa / Zeezicht Building, Tygerberg Office Park, 163 Hendrik Verwoerd Drive, Platteklouf, 7500, South Africa
Tel: +27 21 930 3622 Fax: +27 21 930 3898 Email: info@cfc.org.za Website: www.cfc.org.za NPO 031-061//PBO 930004278

Adv Johan Kruger (Director)

Panel of Advisors

FW de Klerk (Chairperson), Dave Steward (Executive Director), The Hon Mr Justice Ian Farlam (Patron), Adv Nichola de Havilland, Adv Paul Hoffman SC, Dr Anthea Jeffery, Adv Johan Kruger SC, Dr Penuell Maduna, Johann Marais, Prof Francois Venter, Prof David Welsh, Prof Marinus Wiechers

Committee regarding the Rules of the National Assembly 7th Edition (the Rules) and certain aspects of those Rules that we believe require revision or amendment.

3. It is not the purpose or intention of this submission to provide a comprehensive legal analysis of the Rules, but rather to draw attention to some Rules and their limiting effect on the constitutional values of accountability, responsiveness and openness, as demanded by section 1(d) of the Constitution. The submission will also briefly reflect on the consequences of the Rules in question in relation to parliamentary oversight as required in terms of section 42(3) of the Constitution.
4. Section 1 of the Constitution enshrines a system of democratic governance based on constitutional jurisprudence and limited government comprising multiple political parties. Section 1, however, also qualifies a "*multi-party system of democratic government*" by requiring such a system to result in "*accountability, responsiveness and openness*". This, in principle, means that the Government, its officials and its institutions must be able to explain and justify its decisions, actions and laws to the people; respond to and be accessible to the people; and conduct its business of governance in an open and transparent manner.
5. In giving effect to representative and participatory democratic governance, the Constitution, in terms of section 42(3), determines that the National Assembly "*is elected to represent the people and to ensure government by the people under the Constitution*" by choosing the President, providing a national forum for public consideration of issues, passing legislation and scrutinising and overseeing executive action.
6. Section 55(2)(a) requires the National Assembly to provide for mechanisms to ensure that all executive organs of state are accountable and section 55(2)(b) demand from it to "*maintain oversight of the exercise of national executive authority, the implementation of legislation and any organ of state*".
7. Section 57 accordingly empowers the National Assembly to determine its own internal arrangements, proceedings, procedures, rules and orders concerning its business. The Constitution, nevertheless, requires the National Assembly to make such rules with due regard to representative and participatory democracy, accountability, transparency and public involvement. The Constitutional Court in *Oriani-Ambrosini v Sisulu* (the *Oriani-Ambrosini-matter*) recently held that section 57 must be interpreted to mean that the National Assembly was not at liberty to impose substantive or content-based limitations on the constitutional duties or powers of its members, but at best adopt rules that were procedural in nature.

Key concerns regarding the Rules

Ad Rule 66 "*Reflections upon judges, etc*"

8. Rule 66 currently provides as follows:

"66. *Reflections upon judges, etc*

No member shall reflect upon the competence or honour of a judge of a superior court, or of the holder of an office (other than a member of the Government) whose removal from such office is dependent upon a decision of this House, except upon a substantive motion in this House alleging facts which, if true, would in the opinion of the Speaker prima facie warrant such a decision."

9. It is submitted that Rule 66 should be redrafted in order to correct less than desirable drafting. This rule was clearly intended to protect the "*competence or honour*" – and thus the independence – of superior court judges and individuals appointed in terms of section 193 of the Constitution. It specifically and quite correctly excludes the protection of "*members of the government*" including the President, who in terms of section 83(a) of the Constitution, is both head of state and head of the National Executive (i.e. Government). It is indeed the National Assembly's duty to criticise the National Executive and most certainly to reflect on the competence (and where necessary, the honour), of the Cabinet, Deputy Ministers and public service officials, if their conducts warrants such reflection in the House. This rule was, however, drafted in a peculiar manner. It is hence submitted that, without amending the objective of the rule, its structure and language be revised in order to better reflect its meaning. In this regard, drafting to the following extent could be of assistance:

66. Reflections upon judges and certain other persons

No member shall reflect upon the competence or honour of a judge of a superior court, or persons appointed in terms of section 193 of the Constitution, or holding any other office, other than a member of the national executive, whose removal from such office is dependent upon a decision of this House, except upon a substantive motion in this House alleging facts which, if true, would in the opinion of the Speaker prima facie warrant such a decision.

Ad Chapter 8 "Discussion of Matters of Public Importance", Rule 103(3) "Matter of public importance" (and corresponding Rule 104(4))

10. Rule 103(1) correctly provides for a private member to request the Speaker to place a matter of public importance on the Order Paper for discussion. However, Rule 103(3) determines as follows:

"(3) Such a discussion shall not exceed the time allocated for it by the Speaker after consultation with the Leader of the House.

[NOTE: For application of reference of "Leader of the House", see Rule 222 and Section 91(4) of the Constitution.]"

11. Rule 222 determines that the Chief Whip must arrange the business of the Assembly on the Order Paper, subject to these Rules, the directives of the Programme Committee and the concurrence of the Leader of Government Business when any government business is prioritised. Section 91(4) of the Constitution, in turn, provides that "*the President must appoint a member of the Cabinet to be the leader of government business in the National Assembly*".

12. The objective of Rule 103(3) (and and corresponding Rule 104(4)) seems to be unclear. If the intention was to have the Leader of Government Business (the "*Leader of the House*") guide the Speaker on the allocation of time for the discussion of matters of public importance (or even matters of urgent public importance), these rules may well negatively impact on the effectiveness of Parliament's oversight function where enough time, on the advice of the Leader of Government Business, is not allocated for comprehensive discussion of such a matter. Time allocated to the discussion of matters of public importance – especially where such matter relates to the conduct of the National Executive – should preferably not be influenced by the Leader of Government Business, especially since the latter also effectively represents the National Executive and its activities.
13. It is hence submitted that the Leader of Government Business should not be involved in the allocation of time in relation to the discussions of matters as provided for in Rules 103 and 104 – especially where such matters are being raised by a member of an opposition party – as such provision may well be misused to relegate matters which the National Executive does not want to debate, by merely allocating inadequate time for such a debate.

Ad Chapter 10 "Questions" Rules 108 – 115

14. It is contended that current provisions in terms of Rules 108, 110 – 111 regarding oral questions to the Deputy President and President are insufficient in allowing the National Assembly – and especially opposition parties – to effectively fulfil its oversight function.
15. In terms of Rule 110(1), question days for the Deputy President must be scheduled once every second week and questions must be submitted 9 days before the question day. In terms of Rule 111(1)(a), question days for the President has to be scheduled only once per parliamentary term, questions must be limited to matters of national and international importance, and must be submitted at least 16 days before the question day.
16. First, given the President's powers and functions in terms of section 84 of the Constitution as well as his or her executive authority in terms of section 85 of the Constitution, it is almost incomprehensible that it is only required of the President to answer questions in the National Assembly once every term. On the contrary, the Deputy President with far less executive authority has to face the National Assembly at least every other week.
17. Secondly, in terms of Rule 111(1)(b), questions to the President are limited to "*matters of national and international importance*". All other questions must, in terms of Rule 111(2), be directed to the Deputy President or the Minister in the Presidency. It is of course debatable whether the President's view of issues of "*national and international importance*" may be the same as those of opposition parties or even private members in the House. This provision potentially allows for the President to be very selective about which questions to answer and which questions to refer to the Deputy President or Minister, resulting in the President not being held account as head of the National Executive.

18. Thirdly, questions for oral reply to both the Deputy President and President involve a advanced timeframe of at least 9 days and 16 days, respectively, providing both office bearers with ample time to prepare answers in reply. Such preparation can by itself provide for better answers since the President or Deputy President could have more time to obtain relevant answers from other members of Cabinet. However, in relation to some aspects – especially policy and executive decisions – the Deputy President and in particular the President as head of the National Executive, should undoubtedly be able to explain his or her position or decision without any preparation or forewarning.
19. It is therefore submitted that the National Assembly's oversight function can, in line with its constitutional obligations, be strengthened by the introduction of a proper Questions to the President session on at least a monthly basis, if not twice a month (as currently provided for the Deputy President in terms of Rule 110). Such sessions should provide for a set number of questions from members of the National Assembly regarding any subject matter, addressed to the President in the House, without prior notice and allowing for proper interpellation and supplementary questions. It is contended that the latter Questions to the President will greatly enhance parliamentary oversight over the National Executive and will provide members of the National Assembly – in particular, members from opposition parties – to scrutinise actions, decisions and inactions by the President as head of the National Executive.

General comments

20. In general, it is advisable for the Committee to consider revising the Rules so as to amend all remaining references to the Constitution of the Republic of South Africa Act 200 of 1993, with appropriate references to applicable sections of the Constitution.
21. Also, the constitutional invalidity of Rules 234, 235, 235A and 236 as well as certain parts of Rules 230(1), 230 (2), 237(1) and 243(3) were comprehensively addressed by the Constitutional Court in the *Oriani-Ambrosini*-matter and requires no further elaboration in this submission. We trust that the Committee will reflect the findings of the Court in this judgement in an adequate manner in the revised Rules.

Conclusion

22. In conclusion, Parliament and its National Assembly have a constitutional duty to engage in debate on matters important to the electorate, call the National Executive to account and criticise the National Executive in the execution of their responsibilities. Parliamentary priorities and the degree of vigour with regard to debates and oversight are, however, primarily determined by the ruling party and do not necessarily reflect the views of either opposition parties, or in some instances, the broader electorate.
23. Parliament on its website rightfully contends that the true test of democracy is "*the extent to which Parliament can ensure that government remains answerable to the people*". Parliament also on its website describes its duties as to detect and prevent abuse of power and illegal or unconstitutional

conduct by the National Executive; protect the rights and liberties of citizens and hold the Government answerable for how tax money is spent; and make government operations more transparent in order to increase public trust in the Government. It is respectfully submitted, given for example the lack of proper debate about, or scrutiny of expenditure involving the President's private residence at Nkandla, that Parliament is not necessarily successful in achieving these objectives. It is further contended that in the absence of parliamentary rules allowing for proper oversight and scrutiny of the National Executive – in particular the President and Deputy President – (and preventing possible unjustified protection from criticism of the National Executive by office bearers of Parliament), the National Assembly may well be disregarding the letter and spirit of the Constitution by restricting accountability, responsiveness and openness by means of inadequate rules.

24. If the National Assembly is not providing a platform for grievances of the electorate and an assembly for debating matters of national concern, it is failing the people by being selective in which issues not to discuss, who not to criticise and which agenda to pursue.
25. The commitment to our constitutional values of accountability, responsiveness and openness dictates that Parliament and its National Assembly have a constitutional responsibility to provide – in a manner that is both reasonable and rational – a platform for public audience and debate and hold the National Executive accountable for its decisions, actions and inactions. The Constitutional Court in the *Oriani-Ambrosini*-matter fittingly observed that it is "*a collective responsibility of both the majority and minority parties and their individual members to deliberate critically and seriously on legislative proposals and other matters of national importance*". Accordingly, the Rules must, in giving effect to the letter and spirit of the Constitution, promote the ability to debate matters of concern to the electorate, but also embrace the opportunity to question, without fear of favour, the National Executive – headed by the President – about its actions and inactions.
26. CFCR would like to contribute positively to the promotion and protection of our constitutional democracy by ensuring that the Rules governing the conduct of our elected representative promote and protect our constitutional values, rights and principles. In this regard and if required, CFCR will be available to engage in oral submissions to the Committee in order to elaborate on this submission, whether during public hearings or at any such time as the Committee may see it fit.
27. We trust that our submission will be of assistance in guiding the Committee's deliberations on reviewing the Rules aimed at strengthening our constitutional democracy.

Yours sincerely



Adv Johan Kruger
Director