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MEMORANDUM
[Confidential]

**TO: Mr LP Nzimande; and
Mr VG Smith
Co-Chairpersons Joint Constitutional Review Committee**

**COPY: Ms PN Tyawa
Acting Secretary to Parliament;

Adv EM Phindela
Acting Deputy Secretary: Core Business; and

Ms R Begg
Division Manager: Core Business Support**

**FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office**

DATE: 2 November 2017

**REF: 147/2017/SSI
CR 16/15**

SUBJECT: Opinion on Submission by Mr Kagiso Gabriel Mathe

MESSAGE: Please find attached the above memorandum for your attention.


Adv Z Adhikarie
Chief Legal Adviser

Enquiries: Sueanne Isaac (X2610)



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INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Joint Constitutional Review Committee ("JCRC") to advise the JCRC on the submission received from Mr Kagiso Gabriel Mathe.

BACKGROUND

2. Mr Mathe proposes amendments to sections 1(2), 47(a)(i), 48, 52(4), 55(a), 64 (4), 83(b), 84(e), 89(1), 91(a) and 96(b) of the Constitution of the Republic of South Africa ("the Constitution"). Each proposed amendment will be discussed separately.

LEGAL FRAMEWORK AND DISCUSSION

Section 1(2)

3. The submitter proposes an amendment to section 1 of the Constitution by inserting a subsection 1(2) to read: "Supremacy of the constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations by it must be fulfilled."
4. Currently, section 2 of the Constitution provides as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
5. The proposed amendment is already provided for in section 2. Further, the proposed wording of section 1(2) is tautologous. This amendment is therefore unnecessary.

Section 47(a)(i)

6. The submitter proposes that section 47(a)(i) of the Constitution be amended to state "Minister and their deputies should be excluded from voting concerning matters of the parliament and should be allowed to vote on matters concerning their portfolios."
7. Currently, section 47 sets out the requirements for membership of the National Assembly and the circumstance where membership may be lost. It does not deal with voting by members.

8. In terms of section 91, the President appoints Ministers from among members of the National Assembly. Similarly, in terms of section 93, the President may appoint Deputy Ministers from the National Assembly. No more than two Ministers and two Deputy Ministers may be appointed from outside the National Assembly. Hence, the majority of Ministers and Deputy Ministers are members of the National Assembly.
9. A Minister or Deputy Minister who is a member of the National Assembly has the same voting rights as other members. Section 53 of the Constitution sets out how decisions are to be taken in the National Assembly. Apart from the member presiding, every member may vote on a decision before the House.¹
10. The membership of National Assembly is determined on a proportional basis. Although it is unclear what the submitter means by “matters of...parliament”, excluding Ministers and Deputy Ministers from voting on such matters may significantly affect that member’s party. A party with the majority of Ministers and Deputy Ministers will lose a significant number of votes when decisions related to Parliament are before the House. In instances where parties have narrow majorities, they may be hamstrung from passing legislation and conducting the business of Parliament. Such voting restrictions will also affect decisions that require special majorities. This is a policy consideration.
11. The Committee must therefore consider the merit of this amendment.

Section 48

12. The submitter proposes that section 48 of the Constitution be amended to reflect as follows: “[a]ny bridge or inconsistency with the breaking of oath should have an amendment to terminate membership give extensive proof presented either through a judicial court judgment or any concrete form.”
13. At present, section 48 provides that members must take an oath before they begin to perform their functions in the Assembly.

¹ In terms of section 53(2) of the Constitution, the member presiding over the meeting has no vote except when a question must be decided with a supporting vote of at least two thirds of members of the National Assembly.

14. A member of the National Assembly loses office as provided for in section 47(3) of the Constitution:

“A person loses membership of the National Assembly if that person—

- (a) ceases to be eligible;²
- (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or
- (c) ceases to be a member of the party that nominated that person as a member of the Assembly.”

15. The Constitution does not provide for the loss of membership where a member is found to have breached their oath of office. A member who has breached their oath of office may be referred to the Joint Committee on Ethics and Members’ Interests to answer to such allegations. However, the Code on Ethical Conduct and Disclosure of Members’ Interests does not provide termination of membership as a sanction for an ethical breach.

16. Unless a member is no longer eligible in terms of the Constitution, only the member’s party may terminate membership.

17. Amending the Constitution to allow for termination of membership where a member breaches their oath of office, is a policy consideration. If the

² Section 47(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except—

- (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—
 - (i) the President, Deputy President, Ministers and Deputy Ministers; and
 - (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
- (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
- (c) unrehabilitated insolvents;
- (d) anyone declared to be of unsound mind by a court of the Republic; or
- (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

Committee accepts the proposal, the amendment must stipulate (a) what conduct constitutes a breach of the oath; and (b) the process to remove the member if the oath is breached.

Section 52

18. The submitter proposes that section 52(4) of the Constitution be amended to provide that “[v]oting for resolution of the National Speaker or Deputy Speaker should be done through a secret ballot.”
19. Section 52(4) currently provides that “[t]he National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.”
20. In *United Democratic Movement vs the Speaker of the National Assembly*,³ the Constitutional Court held that in terms the Rules of the National Assembly, the Speaker has a discretion to determine if voting should take place by secret ballot. The Court stated:

“But, read together, sub-rules (1) and (3) of rule 104 empower the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of Members. That is an indiscriminate manual secret ballot procedure. Indiscriminate because it is not limited to the election of the President, Speaker or Deputy Speaker. It is not incident-specific and must thus apply just as well to any incident of voting for which the Speaker may prescribe a secret ballot including the removal of the President. The National Assembly has, through its Rules, in effect empowered the Speaker to decide how a particular motion of no confidence in the President is to be conducted.”

21. Amending the Constitution as suggested by the submitter will allow for voting by secret ballot on all resolutions to remove the Speaker and Deputy Speaker from office. This amendment will remove the Speaker’s discretion to, in this

³ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21. para 67.

instance, allow a secret ballot as provided in the Rules of the National Assembly.

22. The proposed amendment is a policy decision for the Committee to consider.

Section 55

23. The submitter proposes that section 55(a) of the Constitution be amended to provide that “[a]dequate remedial action is taken to the benefit of the credibility of the parliament towards the citizens of the Republic and overall international confidence in the country’s stance on injustice and promptness to maintain order and decisive leadership to be upheld at all times.”
24. Section 55 currently provides for the powers of the National Assembly, which are to legislate, and hold to account and oversee the Executive.
25. It is unclear what the submitter is proposing.

Section 64

26. The submitter proposes that section 64(4) of the Constitution be amended to provide: “Upon being sworn in by the chief justice or the delegated judge by the chief justice the chairperson must relinquish their political membership until the tenure lapses to create balance in terms of show non-partisanship towards opposition party members in parliament.”
27. The submitter proposes that the Chairperson of the National Council of Provinces resign political membership during their term of office. Currently, presiding officers are allowed to maintain their party membership and may hold office in their parties.
28. There is international precedent for presiding officers resigning from their political party upon being elected into that role. For instance in the United

Kingdom's House of Commons, the Speaker "must resign from their political party and remain separate from political issues even in retirement."⁴

29. The proposed amendment is a policy decision for the Committee to consider.

Section 83

30. The submitter proposes that section 83(b) of the Constitution be amended to provide that the President "[m]ust be accountable for any infringement of the Constitution and be excused from all duties of holding an office as a president of the Republic. As the number one citizen the president must set precedence over upholding the constitution as it is the supreme law of the land and the president and nobody is above the Constitution."

31. Section 89(1)(b) of the Constitution currently provides for the removal of the President, and reads as follows: "The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of serious misconduct."

32. The submitter proposes that the President be removed from office for "any infringement of the Constitution." "Any infringement" includes both major, minor, and unintentional violations of the Constitution. For instance, if the President signs a law that is later held to be unconstitutional, this will amount to an infringement of the Constitution. By way of example, in the matter of Pharmaceutical Manufacturers Association of South Africa and Another⁵ the Constitutional Court found that although the President acted in good faith, his decision was found to be constitutionally invalid.

33. The proposed amendment may have far-reaching consequences and the Committee must consider its merit.

⁴ <http://www.parliament.uk/business/commons/the-speaker/the-role-of-the-speaker/role-of-the-speaker/>

⁵ Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others [2000] ZACC 1.

Section 84

34. The submitter proposes the following amendment to section 84(e) of the Constitution: "The appointments that the Constitution or the legislative requires should not solely be left to the President's prerogative as a leader to choose appointees. There should be a committee set including the presidency and national assembly members."
35. Section 84(2)(e) currently directs that the "President is responsible for making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive."
36. When the President is acting in terms of section 84(2)(e), the Constitution or relevant legislation directs the appointment process, as well as the body that will make a recommendation on the appointment. In such instances, the President does not have a discretion, but merely gives effect to a decision. The President as head of the national executive also has the power to make executive appoints to enable the effective running of government.
37. The submitter proposes that a committee be set up comprising members of the National Assembly and the Presidency to make all such appointments. Allowing all executive appointments to be made by this committee will curtail the powers of the President and breach the doctrine of separation of power.
38. The proposed amendment is broad and encompasses all types of appointments made by the President. Each type of appointment should be individually scrutinized to determine the most appropriate process. As the proposal in its current phrasing undermines the separation of powers, it is not legally sound, and cannot be endorsed.

Section 89(1)

39. The submitter proposes the following amendment to section 89 of the Constitution:

“(1) National Assembly by a resolution adopted with a vote that is automatically unanimous may remove the president from office on grounds that all or any of the stipulated grounds for impeachment are transgressed.

(2) The National Assembly cannot override the constitutional bridge by the president on the grounds of cadreship that is inconsistent with the upholding of the Constitution.”

40. The submitter proposes that the President be removed in terms of section 89 by a unanimous vote. “Unanimous” means “in complete agreement”.⁶ Therefore, the proposal is that all members of the National Assembly to vote in favour of a section 89 motion for it to carry. The threshold suggested by the submitter is higher than the current requirement of a vote supported by two thirds of the National Assembly.

41. Amending the Constitution as suggested by the submitter is a policy decision. However, the merit of the submission must be considered by the Committee.

42. The proposed amendment to section 89(2) requires that the President be removed in terms of section 89, regardless of party loyalty. The removal of a President entails political considerations. The submitter does not clearly articulate how members should be curtailed from exercising this political choice.

Section 91

43. The submitter proposes that section 91(a) of the Constitution be amended to provide as follows: “A curb of any determinable number of ministers and their deputies should be exercised to avoid a bloated number of cabinet ministers and their deputies, that has huge financial ramification to the taxpayer’s money.”

⁶ Dictionary.com

44. The Constitution does not limit the number of Ministers and Deputy Ministers that the President may be appoint. The President may choose the number he wishes to appoint to enable him to adequately discharge the duties of government.
45. Some countries place a percentage limitation on the total number of cabinet members. The Indian Constitution provides that no more than 15% of the Lok Sabha may be appointed by the Prime Minister to his Cabinet.⁷ In the UK, legislation sets a limit for the number of people the Prime Minister may appoint as Ministers. In terms of the Ministerial and other Salaries Act, 1975, there may only be 109 paid ministerial posts (ministerial in this context includes various executive offices), including 50 Cabinet Minister of which a maximum of 21 may be paid Cabinet posts.
46. The decision to set a limit to the number of Ministers and Deputy Ministers that the President may appoint is a policy decision for the Committee to consider.

Section 96

47. The submitter proposes that section 96(b) of the Constitution be amended to provide that “[t]he ministers and deputy ministers must declare their business interests before appointment to office and also be subject to a lifestyle audit to determine if privilege information of their office is being used to unlawfully amass wealth through unscrupulous insider trading stance.”
48. Section 96, which provides for “Conduct of Cabinet members and Deputy Ministers”, currently reads as follows:

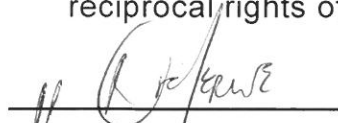
“(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—
(a) undertake any other paid work;

⁷ Article 75(1A), of the Constitution of India.

- (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”

49. The Executive Members’ Ethics Act, 1998 (Act No. 82 of 1998) is the legislation envisaged in section 96(1) of the Constitution. The Executive Ethics Code is the code published in terms of the Act, “prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.”
50. In terms of the Executive Ethics Code, Members of Cabinet and Deputy Ministers are required to disclose their financial interests to the Secretary of the Cabinet within 60 days of assuming office or of a member becoming aware of a financial interest. Thereafter, a member must disclose annually on the date determined by the Secretary of the Cabinet. Those Ministers and Deputy Ministers, who are members of Parliament, must disclose to the Registrar of Member’s Ethics and may provide a copy of the disclosure to the Secretary of the Cabinet on the same date.
51. Requiring Ministers and Deputy Ministers to disclose their financial interests prior to appointment is a policy consideration. In such consideration, the practicality of requiring disclosure prior to assuming office must also be taken into account.
52. Similarly, requiring that Ministers and Deputy Ministers be subject to a lifestyle audit is a policy consideration that requires further scrutiny. This may be better dealt with in legislation or the Executive Ethics Code. The instances where a lifestyle audit must take place should be detailed together with the reciprocal rights of anyone subject to such scrutiny.


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