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MEMORANDUM
[Confidential]

TO: Mr LP Nzimande, MP and
Mr VG Smith, MP
Co- Chairpersons Joint Constitutional Review Committee

COPY: Ms PN Twaya
Acting Secretary to Parliament

Mr ME 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: 26 October 2017

REF: 117/2017
CR 16/18

SUBJECT: Submission by Phumudzo Nedzivhani

MESSAGE: Please find attached the above memorandum for your attention



Adv Z Adhikarie
Chief Legal Adviser



MEMORANDUM

TO: Honourable LP Nzimande, MP
Co-Chairperson: Joint Constitutional Review Committee

AND TO: Honourable V Smith, MP
Co-Chairperson: Joint Constitutional Review Committee

COPY: Ms. P Tyawa
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv. Z Adhikarie – Chief Parliamentary Legal Adviser]

DATE: 25 October 2017

SUBJECT: Legal Opinion on the submission by Mr Phumudzo Nedzivhani to
the Joint Constitutional Review Committee- CR 16/18

INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Joint Constitutional Review Committee (JCRC) to advise on the submission received from Ms Phumudzo Nedzivhani in response to the JCRC's annual invitation for public submissions on the review of the Constitution.

FACTS

2. Ms Nedzivahni's submission requests that sections 83-102 of the Constitution dealing with the President and National Executive and certain sections of the Bill of Rights be revised.
3. Each section and issue is dealt with separately.

LEGAL FRAMEWORK

4. **Sections 83-102: The President and National Executive**

Term of Office of President

- 4.1. The submission states that the President should not hold office for more than 2 terms, "in fear to create a dictator run state." This concern is covered by section 88(2), which provides that no person may hold office as President for more than 2 terms.

Conflict of Interest

- 4.2. The submission further states that, "the President shouldn't be associated with anyone with shares to a privately owned company". This concern presumably speaks to the issue of conflict of interest.
- 4.3. Section 96 of the Constitution provides as follows-

"96. Conduct of Cabinet members and Deputy Ministers.—(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;
- (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."

- 4.4. Section 96 does not contain a blanket prohibition, as proposed by Ms Nedzihvani, which prevents the President from being associated with anyone who has shares in a privately owned company.
- 4.5. Instead, the section prohibits the President from acting in any way inconsistent with his/her office or exposing him or herself to any situation involving the risk of a conflict of interest between official duties and personal interests. This is strengthened further by a prohibition against the President abusing his or her office to either enrich him or herself or improperly benefit another person.
- 4.6. It is my view that the proposal by Ms Nedzihvani that the President be prohibited from associating with any person who has shares in a private company is impractical and creates a threshold that in reality would be impossible to meet. The President, like any other citizen, will have associations or relations with private companies whether these arise because of the President acting as a consumer of goods or services in his or her personal capacity or because of interacting with persons for official business where such persons may hold shares in private companies. The current wording of section 96 is crafted in such a way as to not prohibit the President from being associated with persons who have interests in private companies except to the extent that such association creates a possible conflict of interest. In my view, this is sufficient.

Power of President to make treaties and appoint ambassadors and public ministers

- 4.7. Ms Nedzihvani stated in her submission that, "He (i.e the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors and other public ministers."
- 4.8. The proposal appears to be drawn from Article 2, section 2 of the Constitution of the United States of America (US).
- 4.9. International agreements (also referred to as treaties) are dealt with in section 231 of the Constitution. In terms of this section, all international agreements must be negotiated and signed by the National Executive provided that such agreement will

only be binding on the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces.¹

- 4.10. The main distinguishing feature between the US requirements for a treaty and section 231 is that the former requires a two-thirds majority of the Senate present whereas the latter requires a simple majority of the National Assembly. Whether the threshold for a resolution of this nature should be increased is a matter of policy.
- 4.11. In terms of section 91 (3) (b) and (c) of the Constitution, the President has the prerogative, to appoint any number of Ministers from the National Assembly and a maximum of two ministers from outside of the National Assembly. Similarly, the President has the prerogative in terms of section 84(2) (i) to appoint ambassadors.
- 4.12. The appointment of ministers and ambassadors is therefore, unlike in the US, not dependant on consent from the National Assembly. Whether a consent requirement must be included to limit the President's powers is an issue for policy consideration.

Removal of the President, Vice President and all public officers from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanours

- 4.13. Ms Nedzihvani proposes that the President, Vice President (I.e the Deputy President) and public officers be removed from office if impeached and convicted of treason, bribery or other high crimes or misdemeanours. This proposal, like the previous one, is based on provisions in the US Constitution. In the US the impeachment process provides that the House of Representatives initiates an impeachment by passing "articles of impeachment" by majority vote.² The grounds of impeachment are treason, bribery and other high crimes and misdemeanours. Once the indictment is passed by the House of Representatives, the US Senate is then given the sole power to adjudicate all impeachments and the proceedings unfold in the form of a trial. This culminates in a voting process with a two-third majority securing a conviction that will lead to removal from office. Accordingly, in the USA it is possible to be impeached without such impeachment leading to a removal from office if the two-third threshold in the US Senate is not met.

¹ In terms of s231 (3) an international agreement which is of a technical, administrative or executive nature or which does not require ratification or accession does not require the approval of the National Assembly.

² Article 2 of the United States Constitution

4.14. Section 89 of the Constitution provides for the removal of the President via an impeachment process. The said section reads as follows:

“89. Removal of President.—(1) 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—

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.”

4.15. It is submitted that the listed grounds in respect of the impeachment of the President are broad enough to cover the offences of treason, bribery or other high crimes or misdemeanours and no amendment is necessary in this regard.

4.16. Our Constitution is silent on the impeachment of the Deputy President. Whether the section 89 impeachment process should be extended to the Deputy President is a matter of policy.

4.17. It is presumed that the reference to public officers refers to those persons appointed by the President, such as members of the Judiciary, heads of State Institutions Supporting Democracy and the Director of Public Prosecutions. The removal of these persons are dealt with separately and do not form part of the impeachment provision in section 89. The removal of particular categories are dealt with in the Constitution or relevant legislation as follows:

a) Judges

In terms of section 177, a judge must be removed by the President if two-thirds of the National Assembly (following a finding by the Judicial Services Commission that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct) so resolves.

b) National Director of Public Prosecutions (“NDPP”)

The removal of the NDPP is not dealt with in terms of the Constitution but finds expression in the National Prosecuting Authority Act, 1998 (Act 32 of 1998). In terms of section 12 of the Act the President may remove the NDPP from office on account of misconduct, continued ill-health, incapacity or on account of no longer being a fit and proper person. If so removed, the National Assembly may by ordinary resolution restore the NDPP to his or her post. The President shall also remove the NDPP from office if an address from each of the respective

Houses of Parliament in the same session praying for such removal on any of the grounds referred to above is presented to the President.

c) Heads of State Institutions Supporting Democracy

The Heads of the so-called Chapter 9 Institutions must, in terms of section 194, be removed by the President from office on the grounds of misconduct, incapacity or incompetence. The removal is subject to a finding by a committee of the National Assembly and the adoption of a resolution of the National Assembly calling for the removal. In the case of the Public Protector and the Auditor-General the resolution must be passed by two thirds of the members of the National Assembly.

The Bill of Rights

5. Ms Nedzhivani proposes further a review of the Bill of Rights and lists a number of rights in this regard. Each right is dealt with separately as it appears in the submission.

5.1. The right to an adequate standard of living, including adequate food, clothing and housing

The Constitution does not contain a provision that speaks directly of a right to an adequate standard of living. However, the right to sufficient food and water³ as well as the right to access adequate housing is guaranteed.⁴ These rights are not absolute and the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

There is no right to adequate clothing contained in the Constitution. However, the right is contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966 and South Africa has since 2015 been party to the treaty.

Whether the rights outlined above should be absolute (i.e not limited by the availability of resources) and should be extended to include a right to be adequately clothed is a matter of policy. However, I am of the view that the right to clothing is in fact implicit in the right to dignity which is contained in section 10.

³ Section 27 (1) (b)

⁴ Section 26

5.2. The right to social security

In terms of section 27 (1) (c) everyone has the right to social security, including if they are unable to support themselves and their dependants, appropriate social assistance.

This right is therefore adequately covered in the Constitution and it is not clear what further amendment Ms Nedzihvani seeks.

5.3. The right to receive adequate healthcare, free at the point of use

Section 27 (1) (a) guarantees everyone the right to have access to health care services, including reproductive health care. Section 27 (3) further states that no one may be refused emergency medical treatment.

The right to access healthcare services is limited. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In the landmark judgment of *Soobramaney v Minister of Health*⁵, the Constitutional Court ruled that the right to access healthcare is limited by the availability of resources and accordingly the State may reasonably determine how to allocate its limited resources. In the case of Mr Soobramaney, who suffered from chronic renal failure, the Court ruled that the policy restrictions in place which prevented him from accessing dialysis did not constitute a breach of his right to access adequate healthcare as the State limited access based on its available resources.

5.4. The right to work in an occupation freely entered into, in a safe environment

Section 22 of the Constitution guarantees every citizen the right to choose their trade, occupation or profession freely. Section 24 further grants everyone the right to an environment that is not harmful to their health or wellbeing which environment would include the working environment.

This right is therefore adequately covered in the Constitution and it is not clear what further amendment Ms Nedzihvani seeks.

⁵ [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696

5.5. The right of workers to resort to collective action, including the right to strike

Section 23 of the Constitution contains substantial protection of labour rights. These include, amongst others, the right of workers to form and join a trade union and to strike.

It is not clear what further amendment or review Ms Nedzihvani is requesting the JCRC to consider.

5.6. The rights of certain groups within society shall be given special regard, in particular the rights of: Children, Older People, People with disabilities

Children's rights are guaranteed in section 28 of the Constitution. This section guarantees children the right, amongst others, to basic nutrition, shelter protection from maltreatment, abuse and neglect and family/parental or appropriate alternative care.

There are no stand-alone clauses in the Constitution dealing with older people or people with disabilities. However, these persons are eligible to enjoy all rights in the Bill of Rights and section 9 (3) in particular states that the State may not unfairly discriminate directly or indirectly against anyone on the grounds of age or disability. Ms Nedzihvani does not indicate how these categories of persons should be further protected or why the current version of the Constitution does not adequately cover the rights of older people and disabled people.

ADVICE

6. In respect of the first part of the submission on provisions relating to the President and the Executive, I advise as follows:
 - 6.1. The President's term is already restricted to a maximum of two terms and no further amendment is necessary.
 - 6.2. The proposal that the President must be prohibited from associating with anyone who has shares in a private company is impractical and the mischief this proposal seeks to prevent is, in my view, adequately covered by section 96 which governs the conduct of Cabinet Members and which sufficiently deals with the issue of conflict of interest.
 - 6.3. The submission relating to treaties is already addressed by section 231 of the Constitution that requires the National Assembly to approve international agreements. Whether the threshold for approval must be increased from a simple

- majority to two-thirds of the members of the National Assembly is a policy issue, which the Committee may wish to consider.
- 6.4. The appointment of Ministers and Ambassadors is a presidential prerogative. Whether these powers must be limited by a requirement that the National Assembly must approve the appointment is a policy issue which the Committee can consider.
- 6.5. The impeachment of the President is covered in section 89 of the Constitution. Whether section 89 must be amended to provide more clarity on the impeachment process or to provide for a Parliamentary trial procedure as is the case in the USA is a question of policy. Similarly, whether the section must be amended to also include the Deputy President is a policy issue which can be considered by the Committee.
- 6.6. The removal of persons appointed by the President is covered in various sections of the Constitution and relevant legislation. No further amendments are required in this regard.
7. The second part of the submission relates to various socio-economic rights. Ms Nedzihvani did not indicate what changes should be made to these rights and all the rights referred to are covered in some form or another. Whether a right to adequate clothing and special rights for elderly and disabled persons must specifically be included in the Constitution is a question of policy that can be further considered. However, in my view these rights are adequately addressed with reference to the right to equality and dignity.
8. It is not clear whether Ms Nedzihvani is proposing that socio-economic rights be absolute and not subject to progressive realisation, based on the availability of resources. If so, due regard must be had, in considering this proposal that an absolute right can only be granted if practically the State has sufficient resources to guarantee socio-economic rights for all citizens. The present drafting of the Constitution does not require the state to do more than is achievable within its available resources or to realise socio-economic rights immediately. It is submitted that the granting of absolute rights, in the current economic and social climate is not attainable and would lead to the State failing meet its constitutional obligations.



Adv. Z Adhikarie
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