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LEGAL OPINION
[Confidential]

TO: Mr LP Nzimande
Mr VG Smith
Co-Chairpersons of the Joint Constitutional Review Committee

COPY: Ms P Tyawa
Acting Secretary to Parliament

Adv ME Phindela
Acting Deputy Secretary to Parliament: Core Business

Ms R Begg
Division Manager: Core Business Support

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

DATE: 3 November 2017

REF: 124/2017
CR16-27

SUBJECT: SUBMISSION BY J GREAVES REGARDING THE ELECTORAL SYSTEM


Adv Z Adhikarie
Chief Parliamentary Legal Adviser



MEMORANDUM

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INTRODUCTION

1. Our Office was requested to advise on the submission by Ms Jesse Greaves for the annual constitutional review by the Joint Constitutional Review Committee ('the Committee').

OVERVIEW OF SUBMISSION

2. In her submission, Ms Greaves calls on the Committee to reconsider Chapter 4 of the Constitution of the RSA, 1996 ('the Constitution'). She calls for specific reconsideration of section 46 of the Constitution, which speaks to the electoral system with reference to the election and composition of the National Assembly.

3. She states that 22 years after the adoption of this system as part of the Constitution there is voter dissatisfaction, as voters no longer know who their representatives are. This, she argues, also leads to a lack of accountability of those who are supposed to represent voters' interests, but fail to do so.
4. Ms Greaves suggests "splitting the number of MPs represented proportionally in half; two hundred MPs represent a proportional national vote, and two hundred MPs represent constituencies (or districts) through a constituency ballot" to address this concern.

ANALYSIS

5. Ms Greave's submission reminds of the 2003 Slabbert Commission Report. That Commission recommended that 200 members of Parliament (half the current component) be elected directly by their constituents, and not deployed from a list, as is currently the practice associated with the proportional representation approach currently reflected in South Africa's electoral system. The Commission's recommendation was said to speak to the enhancement of accountability.
6. The submission submitted by Mr Maharaj (CR16/16) called on the Committee to reconsider the inclusion of this 200/200 members-split recommendation as only some of the Commission's recommendations were subsequently reflected in the Electoral Act 73 of 1998, which gives expression to section 46 of the Constitution.
7. Section 46 requires that –
 - "(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that –*
 - (a) is prescribed by national legislation;*
 - (b) is based on the national common voters roll;*
 - (c) provides for a minimum voting age of 18 years; and*
 - (d) results, in general, in proportional representation.*
 - (2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly."* (My emphasis)

8. In considering the general proportional representation informed electoral system provisions of the then new text ('NT') of the Constitution, the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*¹ declared that "[t]here is no suggestion that those provisions of the NT offend in any way".²
9. As then constitutionally approved, section 46 merely requires that the electoral system reflect proportional representation –
 - a. in general; and
 - b. by means of a formula set out in legislation.³
10. Section 114 of the Electoral Act addresses the issue of "[c]omposition of National Assembly and provincial legislatures" and stipulates that "[t]he formulas referred to in sections 46 (2) and 105 (2) of the Constitution are set out in Schedule 3", which formula reads as follows:

"Formula for determining number of members of National Assembly

(1) By taking into account available scientifically based data and representations by interested parties, the number of seats of the National Assembly must be determined by awarding one seat for every 100 000 of the population with a minimum of 350 and a maximum of 400 seats.

(2) If the total number of seats for all provincial legislatures determined in terms of item 2 exceeds 400, the number of seats for the National Assembly may not be less than 400."

11. Both the suggestion provided by Ms Greaves, as well as the Slabbert Commission, would meet the "in general" threshold for "proportional representation" as the Constitution in section 46 prescribes for South Africa's democratically informed electoral system. As such, these suggestions could be addressed by amendment of the Electoral Act, as highlighted in Opinion Ref

¹ 1996 (4) SA 744 (CC).

² *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) at para 180.

³ To provide further context, it must be noted that Constitutional Principle VIII, which informed the drafting of the Constitution, reads as follows: "There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation." Although the Constitutional Principles are not binding, these do have interpretative value, in providing insight and guidance as to the reason and structure of constitutional provisions.

116/2017 dealing with Mr Maharaj's submissions. (Attached for ease of reference.)

12. Unlike Mr Maharaj's submission, Ms Greaves' request is more specific in expressly requesting the amendment of section 46(1)(d) of the Constitution, and therefore not open to the interpretation that she is possibly only requesting an amendment to the Electoral Act in line with the current guidelines found in section 46.
13. Ms Greaves' submission, requesting the inclusion of a constituency informed representation split, calls for the consideration of an amendment to the constitutional text of section 46(1)(d), which section –
 - a. is intentionally broadly phrased as the Constitution is a living document and must be adaptable to changing social conditions; and
 - b. is a provision which the Constitutional Court approved of upon certification of the Constitution.

CONCLUSION

14. As long as the principles in the Constitution are informed by the democratic spirit and purport of that document as the supreme law, amendment of its text is allowed.
15. The amendment proposed by Ms Greaves, while still respecting the participatory nature of democracy, will alter the general nature of section 46 (which aligns with 'living document' drafting style of the Constitution), changing it from a general proportional representation guideline into a specific formula-prescriptive provision.
16. As such, there is no legal argument that makes her suggestion untenable. Her submission would require the Committee to take a policy decision as to whether to support such a proposed amendment in its constitutional review report.


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