



Direct: (021) 403-2772
Fax (021) 403-3888
E-mail: nmjxane@parliament.gov.za

MEMORANDUM
[Confidential]

TO: Mr LP Nzimande, MP and
Mr VG Smith, MP
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

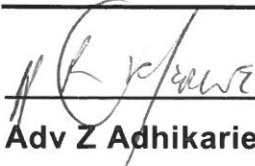
FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 6 November 2017

REF: 123/ 2017/NM
CR 16/26

SUBJECT: Submission by Adv HA Mulhavela: Request to review sections 179
& 188 of the Constitution, 1996

MESSAGE: Please find attached the above memorandum for your attention



Adv Z Adhikarie
Chief Legal Adviser



LEGAL OPINION
[Confidential]

TO: Hon LP Nzimande, MP and
Hon VG Smith, MP
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 : 6 November 2017

REF: 123/ 2017/NM
CR 16/26

SUBJECT: Submission by Adv HA Mulhavela: Request to review sections
179 & 188 of the Constitution, 1996

INTRODUCTION

1. Our Office was requested to advise the Constitutional Review Committee (“the Committee”), on a submission by Adv HA Mukhavela in which he calls for the amendment of sections 179 and 188 of the Constitution of the RSA, 1996 (“the Constitution”).

OVERVIEW OF SUBMISSION

National Prosecuting Authority (Section 179)

2. Adv Mukhavela states that at its core, his submission is in support of the independence and impartiality of the National Prosecuting Authority (“the NPA”).
3. In summary, his submission proposes that section 179(1) of the Constitution should be amended to—
 - a. provide for public advertisement of the position of the National Director of Public Prosecution (“NDPP”) when it becomes vacant; and
 - b. make allowance for the invitation of all suitable candidates to apply to fill the position of the NDPP.
4. In support of this proposed amendment, Adv Mukhavela proffers that judges are interviewed in public, so it follows that NDPP candidates should be interviewed in public, in the same or similar manner.
5. The submission further argues that section 179(6) of the Constitution weakens the independence and impartiality of the NDPP, as it allegedly makes it susceptible to political control. Adv Mukhavela accordingly request that the Committee amend same to ensure greater independence and impartiality of the NPA.

Auditor-General (Section 188)

6. Adv Mukhavela also makes the point that section 188 of the Constitution does not place a duty on the Auditor-General of South Africa (“AGSA”) to submit reports to the NPA and the South African Police Service (“SAPS”) for the purposes of investigations and prosecution.
7. In his submission, he suggests that section 188 be amended to place an obligation on the AGSA to submit its reports to the NPA and SAPS, so that action can be taken against individuals or institutions implicated in those reports. Adv Mukhavela argues that this will serve as a deterrent, as it “will discourage any

wrongdoing and public funds will be used for their desired purpose”, which in turn “will also improve service delivery to our people”.

LEGAL OPINION

National Prosecuting Authority (Section 179)

8. The prosecuting authority’s association with the Executive arm of the State has historic legislative roots. This position can be traced back to the 1926 amendment of sections 7 and 139 of the Criminal Procedure and Evidence Act (Act No. 31 of 1917). This amendment placed the then Attorney-General under the control and direction of the Minister of Justice. Section 3(5) of the Criminal Procedure Act (Act No. 51 of 1977) endorsed this Executive control of the prosecutorial authority.¹
9. The Constitution as the supreme law of the Republic did not change this position, as section 179(6) of the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
10. However, the Constitution did through section 179 add the safeguard that the NPA must be independent and impartial.
11. Section 179(4) of the Constitution states that national legislation must ensure that the prosecuting authority exercises its functions “**without fear, favour or prejudice**”. In this regard, the National Prosecuting Authority Act (Act No. 32 of 1998) (“NPAA”) gives legislative effect to section 174(4). Section 32(b) of the NPAA unequivocally provides that no person or organ of state may interfere with the independence and impartiality of the NPA in the “carrying out or performance of its, his or her powers, duties and function”.²
12. In our view, the requirement that the NPA’s functions must be exercised “**without fear, favour or prejudice**” is a guarantee of independence and an

¹ N Horn, “The Independence of the prosecutorial authority of South Africa and Namibia: a comparative study.

² Section 32(b) of the National Prosecuting Authority Act 32 of 1998.

instruction to the NPA to be impartial in carrying out its functions. The mere fact that the Head of the Executive appoints the NDPP and the Minister of Justice exercises final responsibility over the NPA, should not be construed as an indicator of lack of independence and/or impartiality.

13. In fact, in *Ex Parte: Chairperson of the National Assembly. In re: Certification of the Constitution of the Republic of South Africa*³, the Constitutional Court stated that the prosecuting authority is not part of the judiciary and explained that the fact that the President appoints the NDPP does not necessarily pose challenges for its independence.
14. In the above-mentioned matter, the Constitutional Court further clarified that the prosecutorial function of the State falls within the Executive's realm and not the Judiciary, and that fact in itself is not an indicator of lack of independence.
15. Therefore, whilst the NPA falls within the realm of the Executive, through the appointment of the NDPP by the Head of the Executive and the exercise of final prosecutorial authority by the Minister of Justice, this does not necessarily indicate lack of independence and impartiality of the NPA. The Constitution and the NPAA direct that the NPA must be independent and impartial from influence by any person organ of state when exercising its functions.
16. Furthermore, Parliament, provincial legislatures and municipal councils have a constitutional and legal obligation to conduct oversight over the Executive and other relevant organs of state. The aforementioned institutions hold the Executive to account for the exercise of power and performance of functions. The ministry of Police and Justice, amongst others, report to Parliament. Matters of concern that arise during an exercise of oversight, are referred to the relevant institution for attention.

Auditor-General (Section 188)

17. Section 188 of the Constitution establishes the AGSA as a Chapter 9 Institution. As such, it is one of the state institutions supporting constitutional democracy.

³ 1996 (4) SA 744 (CC).

18. Section 181(2) of the Constitution guarantees that Chapter 9 Institutions, such as the AGSA, "are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour, or prejudice".
19. Following section 181, section 188 sets out the functions of the AGSA, which is further regulated in the Public Audit Act, 2004 (Act No. 25 of 2004) ("PAA").
20. The PAA mandates the AGSA to perform specific functions that comply with its broader mandate, as set out in the Constitution.
21. In performing its functions, the AGSA is accountable to the National Assembly in terms of section 181(5) of the Constitution, read with section 3(d) of the PAA. Accordingly, it has to report on its activities and the performance of its functions in terms of section 10 of the PAA to the National Assembly for oversight purposes, which reports in terms of section 188(3) of the Constitution "**must be made public**". The Standing Committee on the Auditor-General, as an extension of the National Assembly, oversees this oversight function, as per section 10(3) of the PAA.
22. The AGSA annually produces audit reports on all government departments, public entities, municipalities and public institutions. Over and above these entity-specific reports, the audit outcomes are analysed in general reports that take into account the prescribed timelines in both the Public Finance Management Act, 1999 (Act No. 1 of 1999) and the Municipal Finance Management Act, 2004 (Act No. 56 of 2004).
23. In addition, reports on discretionary audits, performance audits, and other special audits are also produced. The AGSA tables reports to the legislature with a direct interest in the audit, namely the national legislature, provincial legislatures or municipal councils. To facilitate oversight in this regard, Rule 243 of the Rules of the National Assembly establishes the Standing Committee on Public Accounts ("SCOPA") to consider financial statements of all the organs of state and constitutional institutions, when submitted to Parliament. SCOPA may

report on these to the National Assembly and may also initiate any investigation in its area of competence.

24. Parliament's referral of any matter arising out of the AGSA report to the Executive for attention is part of the Institution's oversight function over the Executive and has thus far been effective.

CONCLUSION

25. In light of the above, there are no justifiable basis in law to amend sections 179 and 188 of the Constitution, as there are already constitutionally endorsed safeguards in place to—
- a. provide for independence and impartiality of the NPA; and
 - b. allow the AGSA reports to be considered by the SAPS and NPA for investigations and prosecution as these reports are public records, which are submitted to Parliament for its oversight consideration.
26. We submit that the Constitution sufficiently provides for the aforementioned within the current constitutional and legal framework.
27. The above notwithstanding, this matter remains one where the Committee may make a policy decision to revisit sections 179 and 188 of the Constitution to further enhance the associated independence and impartiality of the NPA and the reporting functions of the AGSA respectively.



Adv Z Adhikarie
Chief Legal Adviser