**Proposal of a Rule in terms of Section 89(1) of the Constitution**

EFF Submission to Parliament Sub-Committee on Rules

**Introduction**

The Constitutional Court in its recent judgement in Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (29 December 2017) made the following orders:

1. This Court has exclusive jurisdiction to hear the application.

2. The failure by the National Assembly to make rules regulating the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid.

3. The National Assembly must comply with section 237 of the Constitution and make rules referred to in paragraph 2 without delay.

4. The failure by the National Assembly to determine whether the President has breached section 89(1)(a) or (b) of the Constitution is inconsistent with this section and section 42(3) of the Constitution.

5. The National Assembly must comply with section 237 of the Constitution and fulfil the obligation referred to in paragraph 4, without delay.

6. The National Assembly and the President must pay costs of the application, jointly and severally including costs of two counsel where applicable.

Accordingly, this submission relates to the expression of Orders 2 and 3 in that we ought to firstly understand how the National Assembly has failed to make rules regulating the removal of a President in terms of section 89 (1). Secondly, following on the provisions of section 89 (1) make such rules.

This submission intends to establish a set of principles that may be the guide and the skeleton of new rules that will make section 89 (1) of the constitution find expression in the National Assembly Rules. This, the submission will do based on the judgment itself, the general interpretation it has provided of section 89 (1) and its critique of the existing rules. Finally, the submission will lay out actual proposed rules, borrowing from the existing proposal by the Sub-Committee on Rules.

**Understanding the Judgment**

To achieve a perfect proposal for a new rule that best expresses section 89 (1) of the Constitution, we have to take note of what are the key aspect of the judgment. These key aspects help us to know what the National Assembly did wrong, so as to not repeat it again. They also provide guidance on the tests the new rules must pass in order to comply with section 89 (1).

The first aspect therefore is that the existing regime of parliament committees does not meet the requirements of section 89(1) of the constitution. At the centre of the judgment’s reasoning is that existing provisions for committees in terms of the rules have one important floor, they reach decisions by consensus or majoritarianism. This logic of why existing committee regime of the National Assembly falls short in terms of requirements of section 89 is laid out in paragraphs 189 - 192 of the judgment, which state:

[189] On this approach, it is the initiator of the process who determines whether the President has committed a serious misconduct or a serious violation of the Constitution or the law. If the initiator holds that opinion, he or she may request that an ad hoc Committee be established to investigate and recommend to the Assembly that the President be removed from office. This process lacks a sifting mechanism which would determine whether there is a case for the President to answer.

[190] But over and above that,the ad hoc Committee process does not have a set procedure for the committee to follow when carrying out its task. More importantly, in terms of rule 255 a question before an ad hoc Committee is decided by “agreement among the majority of the members present” unless the resolution establishing the committee provides otherwise.[68]

[191] The other shortcoming of the ad hoc Committee system which appears from the Acting Speaker’s affidavit is that in committees, including ad hoc Committees, “parties are entitled to be represented in substantially the same proportion as the proportion in which they are represented in the Assembly, except where the rules prescribe the composition of the committee or the number of members in the committee does not allow for all parties to be represented.”

[192] The rules relevant to the establishment of ad hoc Committees do not determine the size of a committee. Nor do they require that all parties be represented.They merely state that the resolution establishing such committee must specify the number of members to be appointed or their names.[69] If more than one party is represented, the representation mirrors their representation in the Assembly. The majority party would have majority representation. This raises the risk of an impeachment complaint not reaching the Assembly, even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus, as provided in rule 255. A decision by members of the majority party in the ad hoc Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader.

This means we ought to find an approach in which a decision of whether the president is in breach of section 89 (1) of the constitution is not reached by consensus. This warrants an sharp interpretation of this section. To put it in full Section 89 reads;

“(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.”

The operative word here is “may”, which is different to saying the National Assembly “must”. What we have here is therefore the uncomfortable reality that the constitution envisages that upon an establishment that a President is (a) in serious violation of the Constitution or the law, (b) serious misconduct; or (c) inability to perform the functions of office, the National Assembly “may” not remove the President from office “with a supporting vote of at least two thirds of its members”. Precisely because the two thirds majority may at times not been reached.

The point that the determination of “seriousness” in a President breaking the law/constitution or in his misconduct is not a matter of voting is clear in the judgement’s rejection of Parliament’s existing committee system. Such a determination of whether a violation is serious or not, could not be arrived at through a vote because one, it requires an investigation, and two, it is not meant to block the motion from reaching the National Assembly and ultimately being voted on. Hence the judgement states in paragraph 180-181;

[181] Since the power to remove is institutional, the Assembly must decide and facilitate the initiation of the preliminary stage. It may well be that each member of the Assembly has a right to initiate the preliminary process. Even so, the Assembly must facilitate steps to be taken in this regard and a process to be followed. Not only as a preliminary stage but also at the stage of actual impeachment up to the final stage of voting on whether the President should be removed from office, so as to determine whether the removal is supported by the necessary two thirds majority.

[182] Without rules defining the entire process, it is impossible to implement section 89. The present facts, as set out in detail in the Acting Speaker’s affidavit, confirm this point. Some of those facts were referred to earlier. It would appear that sometimes the Assembly treated an impeachment complaint as a motion to be processed in terms of rule 85(2). On another occasion an ad hoc Committee was established but ceased to exist before completing its task. But notably, the Acting Speaker does not outline the procedure followed by that committee, in carrying out its mandate. However, the Acting Speaker accepts that if the ad hoc Committee route is followed, there may be an investigation.

Finally, it is crucial to further state that according to the Judgement one could not say that such a committee as envisaged in section 89(1) could be based on section 57 of the constitution which states;

“(1) The National Assembly may—

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Assembly must provide for—

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.”

An committee which must predetermine if there is a violation of the constitution/law or a misconduct by a President is serious could not be constituted within the spirit of the above section. This is so because the above section envisages parliament committees constituted in such a way that the majority would always have the final say. In essence they subject decisions to the principle of majority rule (democracy) or majoritarianism. Even though representation may include smaller parties or minority parties; still, decisions are subject to the majority.

A fact finding mechanism could not reach a decision of “serious” breaking of the law/constitution or misconduct by consensus or by voting or democratically. The voting is on removal of a President, but such a removal must have a pre-determining stage, an inquiry, of whether grounds exist for such a removal to be conducted using section 89(1). Meaning, before the National Assembly could remove a President it must fist establish if such a president has violated section 89(1). Section 57 of the constitution, upon which existing parliament rules are based, is limited to the expression of section 89(1).

In fact the judgement states in paragraph 195 dealing with the motion of no confidence that with regards to section 89(1), “grounds for impeachment must be established before the motion to remove the President from office is debated and voted on.” In paragraph 196 the judgement states:

**“In the result, I conclude that section 89(1) implicitly imposes an obligation on the Assembly to make rules specifically tailored for an impeachment process contemplated in that section.”**

As a result it is entirely up to the Assembly what those rules should say, however on the basis of all the above discussion we can deduce the following principles;

1. Impeachment proceedings can be initiated by any member of the house
2. Consideration of the impeachment motion cannot be predetermined in any committee of parliament as envisaged in the current rules
3. There must be an enquiry, before an impeachment motion can be debated and voted on, of whether grounds exist as stipulated in section 89 (1) of the constitution
4. The assembly must decide whether a President must be afforded a hearing at the preliminary stage

Before presenting a proposed rule, there are two final huddle to consider. The first relates to whether, if at a preliminary stage a finding is that the violation does not meet section 89(1). Does the motion still proceed to stages two and three which are debate and voting? The answer is an unconditional yes; a motion that must satisfy section 89 (1) requirements must have first determined if grounds exist. If they do not, removal of a President using this section would be illegal.

Herein lies the risk in that a member who wants to move a motion on the basis of section 89(1) needs an impartial body to determine whether ground exist or not. This relates to processing of a motion. For instance, in the case of the motion of no confidence, a member that moves such a motion does not have to go through any committee which will determine if the motion can or cannot be debated. It simply goes to the speaker for scheduling. This is so even if the Speaker may feel there are no grounds for the motion. The motion for impeachment cannot itself be subjected to the “generosity” of the Speaker such that it can be based on her opinion whether it meets requirements of section 89(1) or not.

The grounds for which it cannot be considered by an existing committee in relation to current rules, means it cannot also be subject to the speaker’s discretion. This is so because she too would need specific rules outside of the existing ones to consider such a motion as envisaged in section 89(1). In addition, it cannot be the speaker who, merely on her opinion decides whether such grounds as envisaged in section 89(1) exist for a motion to be tabled for debate and voting. What is unequivocally needed is an inquiry first which determines if such grounds exist, not the opinion or discretion of the Speaker. As result an additional principle can be determined;

5. The motion for an impeach cannot be subject to the opinion/discretion of the speaker, it must be subjected to an inquiry

The second huddle relates to whether members of parliament can actually be part of an inquiry or they could simply delegate this stage to an impartial expert who is not a member of parliament. It is important to immediately accept the idea that MPs conducting an inquiry would not in itself be outside the legal provisions of section 89(1) as interpreted in the judgement. Nevertheless, it is our opinion that for an inquiry to be truly effective, it must be in a Trail Form, in front of an impartial body. Such a body has only one remit, to establish if grounds exist as envisaged in section 89(1); serous violation of the law, serious violation of the constitution, serious misconduct or inability to perform functions of the office.

Even though the judgements leaves it to the National Assembly to determine whether a President may appear in front of such an inquiry or not. It is best that a President be given a chance to answer for herself/himself, and do so in front of people who ultimately may not be part of the debate and voting for her/his removal. This provides for the highest test of the inquiry to be met; the tests include impartiality and fairness.

If the body that conducts an inquiry is constituted by the Speaker or MPs, it will not have passed the important test of impartiality as these are people who are, by virtue of being MPs, conflicted. A Trail Form, constituted by a panel of experts who then submit a report to the Speaker of the National Assembly to then determine tabling or not of the motion of impeachment passes the highest test. As a result an additional principle can be determined:

6. The National Assembly may delegate experts to conduct an inquiry and such an enquiry may be in Trail Form

Following the six principle, we need to answer one last question related to the inquiry and that is; who are the experts in front of which a sitting President may appear and to whom s/he may feel less prejudiced to present her/his case? Such a panel must be of retired judges who no longer need career favours from ether the National Assembly or the sitting President. Legal experts may be prejudicial since they may need cases from either the state of parliament; but these can represent anyone in front of a panel of retired judges. Since an impeachment motion may ultimately result in the removal of a sitting president, it is fair that such a president not only is given a chance to present his/her case, but to do so in front of an impartial panel.

Our concrete proposal is therefore that an impeachment panel be constituted by retired judges appointed by the National Assembly. Its remit must be strictly to consider motions initiated by any member of the assembly and institute an inquiry in which a sitting President may appear. This committee must then write a report to the Speaker who must announce the outcomes, upon which if there are indeed grounds for impeachment, the Speaker will table a motion of impeachment in the name of the initiator without delay.

**Proposed Impeachment Rule**

**Part 3: Motion for removal of a President from Office in terms of Section 89 of the Constitution**

**102B. Motion initiating proceedings for the removal of a President from Office**

1. A motion to remove a President from office in terms of Section 89 of the Constitution must be substantial and can be initiated by any member of the National Assembly
2. Before the National Assembly can debate and vote for the motion for the removal of a President, there must be an inquiry to establish if it meets the requirements of section 89 of the constitution
3. If the findings of such an inquiry are such that ground as contemplated in section 89 of the constitution do not exist, i.e. that a president is in (a) serious violation of the Constitution or the law; (b) serious misconduct; or, (c) inability to perform the functions of the office, such a motion will not proceed to be tabled for debate or vote in house

**102C. Criteria with which a motion to initiate proceedings must comply**

A motion to initiate proceedings for the removal of a President must comply with the following criterion;

1. The motion must be limited to a clearly formulated and properly substantiated charge that in the opinion of the member initiating *prima face* warrants an inquiry
2. The motion must, where possible, propose which actions, laws or parts of the constitution may have been violated by a sitting President as it is contemplated by section 89 of the constitution
3. The motion may not contain offensive expressions
4. The motion must, where possible, be accompanied by evidence substantiating charges as contemplated in section 89 of the constitution

**102D. Establishment of an Impeachment Panel**

1. At its second sitting, the newly constituted National Assembly must establish a panel of 5 retired judges proposed by the Speaker of the National Assembly who will constitute the Parliament Impeachment Panel
2. One of the judges must be a chairperson and the panel must be gender balanced
3. Any of the three judges may sit to consider an impeachment motion
4. Any MP can refer an impeachment motion to the impeachment panel, but must do so after informing the Speaker of the National Assembly

**102E. Procedure for consideration of the Impeachment Motion**

1. The Impeachment Panel must conduct its enquiry in public and in a manner that is reasonable, impartial, and procedurally fair
2. The panel may appoint a legal practitioner to act as an indictment officer
3. A sitting President has the right to be heard in her/his defence and is entitled to legal representation
4. Parties represented in the National Assembly may lead evidence in front of the panel and are entitled to legal representation
5. The impeachment panel has the power to subpoena anyone or any documents for its consideration
6. The Impeachment Panel must write and submit its findings to the Speaker of the National Assembly without delay

**102.F Consideration of Impeachment Panel Findings**

1. The Speaker of the National Assembly must, upon reception of the findings publish them in the ACT
2. If the Impeachment Panel reaches a finding that there are grounds for removal of a President in terms of section 89, the Speaker of the National Assembly must, without delay, schedule the impeachment motion in the name of the initiator
3. If the Impeachment Panel reaches a finding that there are no ground for removal of a President in terms of section 89, the Speaker of the National Assembly must, without delay inform the house, after informing the initiator.

**Conclusion**

The powers of the National Assembly to hold the President accountable in terms of section 89(1) are not impaired simply because a fact finding inquiry is constituted by non-members of parliament. Parliament can and has on many other occasions delegated inquiry powers to experts. What is essential is that powers of removal are not delegated to the inquiry, they remain with the assembly.

An impeachment process must always be seen to be fair and impartial so as to give the actual debate and voting a higher ground in terms of facts. It is critical to indicate that as an accountability mechanism, the impeachment process requires high tests since it results in a President loosing all retirement benefits. It must be executed responsibly and in a manner giving confidence to the general public.