

**NOTES ONProcedure to Remove the President in terms of Section 89 of the Constitution**

17 January 2018

**Prepared by the National Assembly Secretariat**

**A. Introduction**

1. Section 89 (1) of the Constitution provides for the removal from office of the President. It reads thus:

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.

1. On 29 December 2017, the Constitutional Court, in its Judgment on the matter of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47 (29 December 2017)*, ordered that the National Assembly put in place Rules to regulate Section 89 proceedings without undue delay. In response to this Judgment, the Subcommittee on the Review of the National Assembly Rules met on 10 January 2018, to consider the Judgment and put forward principles, which would inform such a procedure. This document attempts to capture these principles, including possible options. The document should thus be read with the draft Rules, as attached.Once the Subcommittee has agreed on a particular option, applicable guidelines will be developed where required.

**B. General Principles for a Section 89 Procedure**

1. The following general principles relating to a procedure to regulate Section 89 of the Constitutioncan be derived from the Judgment –

1. The Assembly Rules mustprovide for specific Rules toregulateSection 89 proceedings (para 196);
2. The National Assembly may only remove the President in terms of Section 89 on those grounds listed (para 176);
3. There must be an institutional predetermination of what serious violation of the Constitution or the law is. The same must apply to serious misconduct and inability to perform the functions of the office (para 178).
4. The National Assembly (the House) must decide whether grounds exist in order to initiate a process envisaged in the Section (para 179);
5. A process to determine whether a President should be removed must be preceded by a preliminary enquiry to be determined in the Rules (para 180);
6. A motion in terms of Section 89 must be accorded priority over other business in the Assembly (para 215).

Note: In paragraph 182, the judgment could be interpreted to mean that it would not be desirable for a committee considering Section 89 proceedings to be proportionally constituted as this could lead to the majority “blocking” the process, and also that all parties be represented.

**C. Discussion on a Section 89 Procedure**

**1. Procedure to initiate a process to remove the President**

The initiation of a Section 89 procedure wouldtake the form of a motion. In this respect, the draft Rulesprovide that any member of the National Assembly may give notice of a motion to remove the President. Such a motion, however, must be limited to a properly formulated and substantiated charge on the grounds specified in Section 89, and must comply with the relevant Assembly Rules. The Speaker may only disallow the motion in the event it does not meet these requirements.

The draft Rules also state that, for purposes of proceedings to remove the President in terms of Section 89 (1) (c), the term “charge” must be understood as the grounds for averring the President’s inability to perform the functions of office.

If such a motion is in order, the Speaker must refer the motion (and any supporting evidence/documentation) to a committee and/or panel forthwith.

**2. Preliminary investigation**

The Judgment requires that the House must, pursuant to a preliminary review of any charges, decide whether grounds exist in order to initiate a process envisaged in Section 89. Consequently, the draft Rules provide that, once a motion to remove the President has been received by an appropriate structure it must scrutinize the motion and any supplementary evidence to assess whether sufficient grounds exist for the Assembly to proceed with the motion and report to the House thereon[[1]](#footnote-2).

Once the report is tabled it must be scheduled for House decisionwith due urgency given the programme of the Assembly. Once scheduled, the Rules on decision-making will apply i.e. the report will be decided by an ordinary majority.

1. **Inquiry into the Removal of the President**

The draft Rules provide that, once the House has agreed that a motion be proceeded with, the structure must undertake the inquiry in order to establishthe veracity and, where required, the seriousness of the charges[[2]](#footnote-3) and report accordingly.

1. **Consideration of final report**

Once the committee/panel report is tabledit must be scheduled for debate and decision without delay. If the report recommends that the President be removed from office, the draft Rules provide that the question be put to the House directly for a vote.If agreed, the President is immediately removed from office.

1. **Establishment of a Mechanism on Section 89 Proceedings**

The National Assembly must establish a mechanism to inquire into matters related to Section 89 proceedings. In this regard, three options are provided.

**Option One**: A Standing (permanent) Committee comprised of Members of the Assembly with the discretion to solicit the advice and/or assistance of external persons.

**Notes:**

\* Members of Parliament would take the lead in engaging on the Section 89 enquiry atcommittee level.

\* This model could lead to perceptions of partiality.

\* If the Committee is proportionally composed while, at the same time, providing that allparties must be represented, the committee would necessarily be relatively large whichcould frustrate its operations.

\* If the committee were not proportional, a challenge may arise regarding decision-making.

 making.

 **Option Two:** A Standing Commitee, obligated to make use of external persons during certain proceedings/ stages of an inquiry –

**Notes:**

\* The second option attempts to hybridize the first and third models in that it provides for the establishment of a committee but that such astructure must solicit the expertise and consider the views ofexternal persons during an inquiry.

\* The committee could also be required to include the opinions ofsuch persons in its report to the House. The workingarrangements between the Members and external persons will bedefined.

**Option Three:** The establishment of an external panel of appropriately qualified persons/ experts (retired judges or medical experts) to inquire into Section 89 matters.

**Notes:**

\* The mechanism would allow the Assembly to inquire into and establish the facts relatingto charges against the President without such an inquiry being perceived to bepartial and influenced by party political considerations.

\* An Assembly structure would still be required to nominate/appoint appropriatepersons as well as determine the terms of reference and conditions of service.

\* The mechanism could be viewed as the Assembly delegating its constitutional responsibilities of oversight and accountability to an external panel. There is,however, an argument that the Assembly would not be delegating powersas the powers would remain with the Assembly (See EFF submission, as attached).

**Attached to this document are the following:**

1. First Draft Rules (17 January 2018) to remove the President in terms of Section 89 of the Constitution;
2. Submission and Proposals by the Economic Freedom Fighters (EFF)
3. Submission and Proposals by the African Independent Congress (AIC)
4. Legal Opinion by the State Law Advisors on the establishment of a committee to deal with Section 89 matters;
5. Judicial Services Commission Act (9 of 1994)
1. Paragraph 179 of the judgment determines thatthe National Assembly (the House) must decide whether grounds exist in order to initiate a process. [↑](#footnote-ref-2)
2. The Rules will provide guidance regarding the definition of “seriousness”“misconduct” and “inability”. [↑](#footnote-ref-3)