

# NATIONAL ASSEMBLY RULES COMMITTEE

**Chairperson** **Committee Secretary**

Speaker of the National Assembly Francois Basson x3899

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#### DRAFT MINUTES OF PROCEEDINGS

Thursday, 1 February 2018, E249

**Chairperson: Speaker of the National Assembly**

**Present:**

Bhengu, F (ANC – Alternate); Booi, M S (ANC); Dudley, C (ACDP – Alternate); Kilian, J D (ANC); Mbete, B (Speaker of the National Assembly); Mdakane, M R (ANC); Mthembu, J M (Chief Whip of the Majority Party); C N Ndaba (ANC); Ndlozi, M Q (EFF); Tsenoli, S L (Deputy Speaker); Singh, N (IFP) and Steenhuisen, J H (Chief Whip of the Opposition).

**Absent:**

Dlakude, D E (Deputy Chief Whip of the Majority Party); Mahlalela, A F (ANC); Mazzone N W A (DA); Jafta, S (AIC – Alternate); Mente, N V (EFF); Mulder, C P (FF Plus); Radebe, B A (ANC – Alternate); Shivambu, N F (EFF); Shope-Sithole, S C N (ANC); and Waters, M (DA).

**Other Members in attendance:**

Frolick, C T (House Chairperson), A T Didiza (House Chairperson), M G Boroto (House Chairperson) and M Hlengwa (IFP).

#### Staff in attendance:

M Xaso (Secretary to the National Assembly), Z Adhikarie (Chief Legal Adviser), F Jenkins (Legal Services), F Basson, V Ngaleka, C Mahlangu and N Ismail (NA Table).

**1. Opening and welcome**

The Speaker opened the meeting at 14:10.

**2. Apologies (Agenda item 1)**

Apologies were tendered on behalf of Mr N F Shivambu (EFF), Dr G Koornhof (ANC), Dr C P Mulder (FF Plus), Mr M Waters (DA), Ms D E Dlakude (ANC) and Ms N W A Mazzone (DA).

**3. Consideration of draft agenda (Agenda item 2)**

The draft agenda was adopted without discussion.

**4. Discussion on report of Subcommittee on Review of Assembly Rules – rule amendments in terms of section 89 of the Constitution (Agenda item 3)**

The Chairperson of the subcommittee, Mr Mdakane, introduced the report which consisted of a background, principles of the relevant court judgment and draft rules to give effect to Section 89 of the Constitution. The report and draft rules are attached in full as Annexure A.

Mr Ndlozi stated that the subcommittee’s option 1 was flawed as the committee it created was similar to an ad hoc committee which the majority of the court had rejected as inadequate for impeachment proceedings. He added that the composition of the proposed committee along proportional representation lines was incorrect as the majority party would be able to stop an impeachment motion from reaching the next stage of proceedings. That too was against the judgment of the court, he said. Mr Ndlozi added that any preliminary report would be subjected to a majority vote in the National Assembly (NA) and that a panel of judges would better deliver an objective hearing and ruling.

Mr Singh said it was important to support the majority court judgment and that he supported option 1 in the subcommittee’s report.

Mr Mthembu said the Constitution was clear that MPs elected the President and that it should be they that removed the President. He said that Members could not assign their duties in this regard to a panel of non-members. He also agreed to option 1. Mr Mthembu said that the panel of experts, working with the committee, proposed for the preliminary stage was acceptable as it would be objective and its report would be based on facts. He added that option 1 would not violate the Constitution or Parliament’s own rules and procedures.

Mr Steenhuisen warned against outsourcing Parliament’s powers to “outsiders” because members were accountable to Parliament in a variety of ways that did not apply to such outsiders. He said that if the preliminary report was not passed by the House it would be irrational and reviewable by a court. He added that it made sense to employ a panel of experts in the first stage, but that they might not always be necessary if the Constitutional Court, for instance, ruled that the President was guilty of serious misconduct.

Ms Didiza said that option I presented a clear mechanism to give effect to section 89 of the Constitution but that the definitions might have to be looked at again. She added that it was important that MPs take the lead in any impeachment process with the assistance of experts.

The Chairperson commented that it was her impression that there was agreement among most parties to accept option 1. She added that the process of finalising the rule amendments necessary should not go beyond the end of March. She added that the subcommittee’s proposal should be presented to party caucuses for their inputs and then returned to the Rules Committee.

Mr Ndlozi said that the EFF would support the committee option if the parties were represented by one member each on the committee and it not being composed through proportional representation. He added that it was unacceptable that the House could stop an inquiry by majority vote.

Ms Kilian said that the court judgment demanded a specific mechanism for section 89 proceedings and that ad hoc committees were not sufficient. She added that the ANC felt that the proposed committee should be constituted by proportional representation as that was what the Constitution demanded and the principle was applied throughout Parliament.

Mr Mdakane pointed out that the committee would not take the ultimate decision as that power lay with the Assembly. He argued in support of proportional representation for the committee that would result in 39 or 31 members and added that a subcommittee could be charged with the detailed work and then report to the parent committee.

Mr Mthembu said that he agreed with a 39-member committee but that proportional representation would be needed as the Constitution provided. He added that party caucuses should now engage with the subcommittee’s proposals and that the EFF would also be engaged.

Mr Steenhuisen proposed that the committee engage the services of a constitutional law expert for a legal opinion on the subcommittee’s proposals. Ms Didiza supported this proposal.

On the proposal of the Chairperson, it was **AGREED** that there was in principle agreement on option 1 but that the concerns of the EFF would be taken into account. It was **FURTHER AGREED** that the proposals would be submitted to party caucuses and that a constitutional law expert would be retained to provide a legal opinion. The committee would meet after the State of the Nation Address to take the mater forward.

The Chairperson added that the EFF proposal to retain a retired Constitutional Court judge for the legal opinion would be taken into account.

**5. Closing (Agenda item 4)**

The meeting adjourned at 16:00.

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**B Mbete MP**

**Speaker of the National Assembly**

**APPROVED ON:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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**REPORT OF THE SUBCOMMITTEE ON THE REVIEW OF THE ASSEMBLY RULES**

30 January 2018

**Introduction**

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 (impeachment of the President) without undue delay.

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.

**Principles of the Judgment**

In response to this Judgment, the Subcommittee on the Review of the National Assembly Rules (the Subcommittee) met on 10, 24 and 30 January 2018 to consider the Judgment and draft the requisite procedures. In deliberating on the Judgment the Subcommittee first identified a number of fundamental principles including –

1. The Assembly Rules must provide for specific Rules to regulate Section 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).

**Conclusion**

Derived from the principles in the Judgment and subsequent discussions, the Subcommittee resolved to table two options for the consideration of the Rules Committee. The key distinction between the options relates to the mechanism used to undertake “impeachment” proceedings. The first option, that of a committee, was supported by the majority of the members.

As a note, once the Rules Committee has agreed to a procedure, the numbering and order of the rules will be duly adjusted.

**DRAFT RULES (DRAFT I) TO REMOVE A PRESIDENT IN TERMS OF SECTION 89 OF THE CONSTITUTION**

**Definitions**

For the purpose of a section 89(1) enquiry in terms of these rules –

“**inability**” means “a permanent or temporary physical or mental condition of the President”

“**misconduct**” means “unacceptable, improper or unprofessional behaviour by the President”;

“**serious**” means “an intentional, malicious or reckless act or omission performed by the President otherwise than in good faith”

“**violation**” means “any breach of the Constitution or the law that has been determined by a competent body”

**1. Initiation of Section 89 procedure**

1. A member of the National Assembly may, by way of a notice of motion in terms of Rule 124 (6), initiate proceedings to remove the President in terms of Section 89 of the Constitution provided that –
2. the motion must be limited to a clearly formulated and substantiated complaint on the grounds specified in Section 89, which *prima facie,* warrants an inquiry;
3. the complaint must relate to an action or conduct by the President in person; and
4. the motion is consistent with the Constitution, the law and these Rules.
5. For purposes of proceedings to remove the President in terms of Section 89(1)(c), the term “complaint” must be understood as the grounds for averring the President’s inability to perform the functions of office.

**2. Compliance with criteria**

1. Once a member has given notice of a motion to initiate proceedings to remove the President in terms of Section 89 of the Constitution, the Speaker may consult the member to ensure the motion is compliant with the criteria set out in Rule (1).

**3. Referral of motion**

1. When the motion is in order, the Speaker must refer the motion within 48 hours, and any supporting documentation provided by the member, to the Committee/Panel established for the purposes of considering Section 89 matters.
2. The Speaker must inform the Assembly and the President of such referral without delay.

**4. Consideration of preliminary report**

1. Once the Committee/Panel has considered the motion, it must report to the Assembly/Speaker forthwith.
2. The report of the Committee/Panel must contain –
3. findings and recommendations including the reasons for such; and
4. any written representations by the President.
5. The scheduling of the report for debate and decision must be given due priority given the programme of the Assembly.
6. The President must be informed of the scheduling and any decision on the report.

**5. Consideration of final report**

(1) Once the Committee/Panel has concluded the inquiry, it must report to the Assembly/Speaker forthwith.

1. The report of the Committee/Panel must contain –
2. findings and recommendations including the reasons for such; and
3. any written representations by the President.

(3) The scheduling of the report for debate and decision must be given due priority given the programme of the Assembly.

(4) The report must be put to the Assembly for a vote and, if the report recommends that the President be removed from office and the question is supported by at least two thirds of the members of the Assembly, the President is thereby removed.

**Mechanism to inquire into matters related to Section 89 of the Constitution**

**OPTION 1: COMMITTEE**

**1. Establishment**

There is a Committee to consider motions in terms of Section 89 of the Constitution.

**2. Composition and appointment**

(1) The Committee consists of the number of Assembly members that the Speaker may determine with the concurrence of the Rules Committee, subject to the provisions of Rule 154, provided that all parties in the Assembly must be represented.

(2) Notwithstanding Rule 155 (2), the members of the Committee must be appointed as and when necessary.

**3. Chairperson**

The Committee must elect one of its members as Chairperson and another as Deputy Chairperson.

Option: The Committee must elect one of its members as Chairperson and another as Deputy Chairperson, provided that the Chairperson and Deputy Chairperson are not from the same party

**4. Functions and powers**

(1) The Committee may, once constituted, appoint and/or consult appropriately qualified experts to assist it in its work.

(2) The Committee must consider any motion proposing to remove the President in terms of Section 89 of the Constitution, referred to it by the Speaker, and –

(a) make a recommendation within 30 days to the Assembly whether any of those grounds specified in Section 89 of the Constitution exist for the Assembly to proceed to inquire into the removal of the President; and

(b) in considering the motion, afford the member in whose name the motion stands an opportunity to substantiate the complaint(s).

(3) The Committee must, when the Assembly has approved the recommendation to proceed with an inquiry, proceed to establish the veracity and, where required, the seriousness of the complaint(s) and report to the Assembly thereon, provided that the Committee must –

1. ensure that the inquiry is conducted in a reasonable and procedurally fair manner; and
2. afford the President the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice.

(4) The Committee may, when it reports, include a report or reports of the experts referred to in Rule 4(1).

(5) For the purposes of performing its functions, the Committee has all the powers applicable to Parliamentary committees as provided for in the Constitution, applicable law and the Rules of the National Assembly.

**5. Decisions**

A question before the Committee is decided when a quorum in terms of Rule

162(2) is present and there is agreement among the majority of the members present, provided that when the Committee reports all views expressed in the Committee must be included in its report.

**6. Subcommittee**

1. The Committee may appoint a subcommittee to consist of the number of members and party representation as determined by the Committee.
2. A subcommittee appointed by the Committee has those functions and powers as provided for in Rule 172.

**OPTION 2: PANEL[[1]](#footnote-1)**

1. **Establishment**

The National Assembly must, at its second sitting after the commencement of the term, establish a Panel to consider motions in terms of Section 89 of the Constitution.

1. **Composition and appointment**
2. The Panel consists of five retired judges proposed by the Rules Committee for appointment by the Assembly, provided that the Panel is gender balanced.
3. The Rules Committee must decide on the proposed composition of the Panel by consensus.
4. In the event that the Rules Committee cannot agree, the Speaker must propose a Panel to the Assembly.
5. **Chairperson**

The National Assembly must appoint, on the recommendation of the Rules Committee or the Speaker, one of the judges as chairperson of the Panel.

1. **Quorum and decisions**
2. The Panel may proceed with its business when three Panellists are present.
3. A question before the Panel is decided by a majority of Panellists.
4. **Functions and powers**
5. The Panel must –
6. consider any motion proposing to remove the President in terms of Section 89 of the Constitution, referred to it by the Speaker, and make a recommendation within 30 days to the Speaker whether sufficient grounds exist for the Assembly to proceed to inquire into the removal of the President;
7. in considering the matter, afford the member in whose name the motion stands an opportunity to substantiate the charge(s);
8. when the Assembly has approved the recommendation to proceed with an inquiry, proceed to establish the veracity and, where required, the seriousness of the charges set out in the inquiry and report to the Speaker thereon;
9. conduct its proceedings in public in a manner that is reasonable, impartial and procedurally fair; and
10. afford the President the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice.
11. The Panel may –
12. appoint a legal practitioner as evidence leader; and
13. afford parties in the National Assembly an opportunity to lead evidence.
14. The Panel has the powers given to it by the Assembly including the power to subpoena witnesses and/or require any documents.
15. **Tabling of reports**

Once the Panel has reported in terms of Rule (1) (a) and Rule (1) (c), the Speaker must table the report in the Assembly without delay.

1. These draft rules are derived from the submissions by the EFF. [↑](#footnote-ref-1)