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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)