



**TO:** Honourable E Mthethwa, MP  
Co-Chairperson: Constitutional Review Committee

**AND TO:** Honourable Dr M Motshekga, MP  
Co-Chairperson: Constitutional Review Committee

**COPY:** Ms PN Tyawa  
Acting Secretary to Parliament

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

**DATE:** 01 December 2020

**REF:** 134/2020

**SUBJECT:** Opinion on the review of accountability provisions in the Constitution

---

**MESSAGE:** Please find attached the above memorandum for your attention.

---



Adv Z Adhikarie  
Chief Legal Adviser



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

Tel: (021) 403-8287  
Fax (021) 403-3888  
E-mail: atetyana@parliament.gov.za

**MEMORANDUM**  
**[Confidential]**

**TO:** Honourable E Mthethwa, MP  
Co-Chairperson: Constitutional Review Committee

**AND TO:** Honourable Dr M Motshekga, MP  
Co-Chairperson: Constitutional Review Committee

**COPY:** Ms. PN Tyawa  
Acting Secretary to Parliament

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

**DATE:** 01 December 2020

**REF:** 134/2020

---

**SUBJECT:** Opinion on the review of accountability provisions in the Constitution

---

**INTRODUCTION**

1. Our Office was requested by the Co-chairpersons of the Joint Constitutional Review Committee, Messrs Dr MS Motshekga, MP and EM Mthethwa to provide a legal opinion on the review of accountability provisions in the Constitution as part of the constitutional review process.

2. We are required to look at whether there is a need for such a review and advise accordingly.

## **BACKGROUND**

3. On 21 May 2020, Mr Andries Havenga (“Mr Havenga”) submitted that there must be a specific accountability provision that must be built into the Constitution in which politicians and senior officials can be forced to resign or can be suspended immediately in the event of questionable conduct of a serious nature.
4. In addition, Mr Havenga is of the view that a cursory reading of the Constitution reveals that the Constitution is flawed, in that, the accountability of the President and Cabinet is dealt with in a superficial manner.
5. Furthermore, Mr Havenga submits that it is not clear what the exact grounds of removal of the President are under section 89(1)(b) of the Constitution. He makes mention of the fact that nowhere is the suspension of the President in certain circumstances stated in this section.
6. Moreover, Mr Havenga avers that there is no consequence management that flows from non-compliance with section 96 of the Constitution by Members of the Cabinet and Deputy Ministers.
7. Likewise, Mr Havenga opines that the elephant in the room is the fact that there is no specific provision in the Constitution in which a President, Member of Cabinet or Member of Parliament against whom a *prima facie* case of serious misconduct has been made, can be suspended from office pending a final decision by courts or an administrative body.
8. As a consequence, Mr Havenga suggest that section 19 of the Constitution should be amended by way of an addition of subsection (4) in the following manner:

### **“Political rights**

19. (1) Everyone to make political choices, which include the right –

- (a) to form a political party;
- (b) to participate in the activities of, or recruit members for, a political party, and
- (c) to campaign for a political party or cause.
- (2) Every citizen has a right to free, fair and regular elections for any legislative body established in terms of the Constitution
- (3) Every adult citizen has the right -
  - (a) to vote in elections for any legislative body established in terms of the Constitution and to do so in secret; **[and]**
  - (b) to stand for public office and, if elected, to hold office; and
- (4) Every citizen has the right to transparent and accountable governance by government.”

9. Mr Havenga’s view is that the Constitution must give more protection to the citizens of the country against elected members of Parliament, who, once elected, have no obligation, other than within their political party structures, to be accountable to the people who elected them.

10. This opinion is solicited in the abovementioned context.

## LEGAL FRAMEWORK AND DISCUSSION

11. Section 1 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) deals with the founding values of the Constitution and section 1(d) provides as follows:

*(1) “The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

*(a) ...;*

*(b) ...;*

*(c) ...: and*

*(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” [my emphasis]*

12. It is important to note that the founding values of the Constitution as the most protected part are the strongest entrenched provisions.
13. Section 1 read with section 74(1) of the Constitution states that it requires a 75% majority in the National Assembly and a supporting vote of at least six provinces if these values are to be changed or taken away.
14. In addition, section 41(1) (c) of the Constitution provides that all spheres of government and all organs of state within each sphere must provide “*effective, transparent, accountable and coherent government.*”
15. In the *Economic Freedom Fighters vs Speaker, National Assembly 2016 (3) SA 580 (CC) paragraph 1*, the Constitutional Court emphasised the importance of the principle of accountability in the following manner:

*“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands to chop the ugly head of impunity off its stiffened neck.” [my emphasis]*

16. Section 85(2) of the Constitution vests the executive authority in the national sphere of government in the President and the Members of his Cabinet. Section 92(2) provides that they are “*accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.*”

17. The national executive's accountability to Parliament is not limited to the Cabinet. It extends throughout the national executive- for instance to Deputy Ministers in terms of section 93(2); the state institutions supporting constitutional democracy in terms of section 181(5); the public administration in terms of sections 195(1)(f) and 196(5); and the security services in terms of section 199(8).
18. The National Assembly has both the power and the duty to hold the national executive to account:
- 18.1 Section 42(3) of the Constitution provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this in various ways. One of them is *"by scrutinising and overseeing executive action."*
- 18.2 Section 55(2) of the Constitution imposes a duty on the National Assembly to provide for mechanisms to hold the national executive to account:
- "The National Assembly must provide for mechanisms –*  
*(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and*  
*(b) to maintain oversight of,*  
*(i) the exercise of national executive authority, including the implementation of legislation; and*  
*(ii) any organ of state."*
19. The aforementioned paragraphs put paid to the proposition that the accountability provisions of the Constitution need to be reviewed. The Constitution is very clear on who has the power to do what and regarding whose duty it is to perform certain functions.
20. Accordingly, there is no need, in my view, to add the proposed subsection (4) under section 19 of the Constitution. At any rate, section 19 deals with political

rights and the principle of accountability is firmly entrenched in the Constitution as it has been amply demonstrated above.

21. It is worth mentioning to note that section 9(1) of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. Importantly, section 2 of the Constitution provides that the Constitution is supreme and any law or conduct inconsistent with it is invalid. Accordingly, it would border on unconstitutionality if South Africa were to have a different law for politicians and senior officials vis-à-vis other citizens of the Republic of South Africa.
22. In amplification of the above, section 35(3)(h) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to be presumed innocent. This provision was taken from the common law principle of natural justice, which provides that everyone must be presumed innocent until proven guilty. As previously advised, these rights find expression on all persons, including politicians and senior officials.
23. Section 165(1) of the Constitution prescribes that the judicial authority of the Republic is vested in the courts. Section 165(2) goes further and provides that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
24. In the *Economic Freedom Fighters vs Speaker, National Assembly 2016 (3) SA 580 (CC)* the Constitutional Court was very scathing on the dismal failure of the National Assembly to hold the President to account. Equally, the judgment was very critical of the President's disregard to uphold, promote and protect the Constitution, particularly in view of the fact that the office of the President is the upper guardian of the Constitution's ethos and values.
25. Amongst others, the Constitutional Court held that the President violated the Executive Ethics Code, which amounts to conduct that is inconsistent with his office as a member of Cabinet and a violation of section 96 of the Constitution.

26. For that reason, the Constitutional Court held that the President ought to pay a reasonable part of the expenditure towards the installations that were not identified as security measures in the list compiled by security experts in pursuit of the security evaluation.
27. It is also instructive to note that South Africa has a National Anti-Corruption Framework, which serves as a blueprint of fighting corruption and malfeasance in the country. The framework consists of key institutions, sectors, laws, policies, practices and specific mechanisms that collectively contribute towards enhancing integrity, transparency and accountability.
28. Other applicable legislative frameworks include the following:
- Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004);
  - Promotion of Access to Information Act, 2000 (Act No.2 of 2000);
  - Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000);
  - Public Disclosures Act, 2000 (Act No.26 of 2000);
  - Public Finance Management Act, 1999 (Act No.1 of 1999);
  - Public Administration Management Act, 2014 (Act No.11 of 2014);
  - Municipal Finance Management Act, 2003 (Act No.56 of 2003);
  - Financial Intelligence Centre Act, 2001 (Act No.38 of 2001);
  - Prevention of Crime Activities Act, 1998 (Act No.121 of 1998);
  - National Prosecuting Authority Act, 1998 (Act No.32 of 1998);
  - Public Service Act, 1994 as amended by Act 30 of 2007;
  - Public Protector Act, 1994 (Act No.23 of 1994);
  - Executive Members' Ethics Act, 1998 (Act No.82 of 1998);
  - Executive Ethics Code; and
  - King III Report on Code on Corporate Governance.
29. Section 6 of the Executive Members' Ethics Act buttresses the principle of equality before the law and prescribes that nothing in this Act may prevent or delay the prosecution of a Cabinet member, Deputy Minister or MEC in a court.



30. It is noteworthy to observe that section 91(1) of the Constitution provides that the Cabinet consist of the President, as head of the Cabinet, a Deputy President and Ministers.

31. In view of the foregoing, it appears that no one is above accountability and scrutiny, including the highest office in the land. The Nkandla judgment aptly demonstrated this assertion. Our courts have even pronounced on the President's prerogative to appoint and dismiss Ministers and Deputy Ministers as it happened in the *President of the Republic of South Africa vs Democratic Alliance and Others* CCT159/18.

## CONCLUSION

32. In view of the above, it is our considered opinion that there exists no need to review the accountability provision in the Constitution.

33. As previously advised, accountability is one of the founding values of our Constitution and as such, it is amongst the values that are the most protected and entrenched in our constitutional scheme.

34. Importantly, not even the highest office in the land is immune to ultimate scrutiny as witnessed in the Nkandla judgment.

35. We advise accordingly.



Adv Z Adhikarie  
Chief Legal Adviser