



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

P.O. Box 15
Cape Town
8000
Enquiries. 0845295832

Office 95 – 100 Good Hope Centre
Tel. 021 403 8653
Fax. 021 403 2048

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RE: SECTION 89 RULES: RECOMMENDATIONS BY THE AIC

The African Independent Congress (AIC) has sight of the constitutional court judgment, in which Justice Jafta ordered Parliament to adopt Rules to give effect to the provisions of section 89 of the Constitution, Act 108 of 1996.

The judgement was a sequel to the Economic Freedom Fighters (EFF) application before the Constitutional Court in *Economic Freedom Fighters V Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)* that Parliament had failed to hold President Zuma accountable, following the court's verdict. In para 106 (4), the court has stated:

The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid., he had acted inconsistent with the constitution

It was the view of the EFF that Parliament had to hold the President accountable and probe the extent to which the serious violation of the Constitution may or may not have occurred. The Constitutional Court, thus, ruled in favour of the EFF, and Parliament had to initiate a process through which the sum-total of section 89 had to be given meaning to.

The AIC is aware of the remit of the judgement in which the court "*rejected the argument by the Acting Speaker that the current rules of the Assembly could be used to deal with the section 89 process. The Court also rejected the argument by the applicants that the Assembly's current rules for establishing ad hoc Committees were suitable for a section 89 process*".

The root proposed by the court, of Parliament establishing its own Rules, is accordingly welcomed by the AIC. In this regard, we proffer the following Rules to give effect to the court's judgment and the remit of section 89 of the Constitution. We proffer the adoption of these Rules, having regard to the Kenyan Constitution. Article 145 of the Kenyan Constitution contemplates a constellation of processes in the impeachment of a sitting head of state.

We, however, do not entirely subscribe to some facets of these processes, including that a member of the national Assembly may only move a motion for the impeachment of the President if supported by at least a third of all the members of the House. We also don't agree with the Kenyan Constitution, that the Speaker of the Senate shall convene a meeting of the Senate (or the NA in our case) to



hear charges against the President. In our view, when a motion is tabled before the Speaker, she must (without testing the veracity of the claims contained in the motion), direct the House to convene a meeting to debate (and not hear the charge) charges against the President. It is not up to the Speaker to decide whether a motion may be heard.

As enunciated below, the AIC proposes the following Rules to give effect to the provisions of section 89 of the Constitution, Act 108 of 1996:

Moving a Motion

(1) A member of the National Assembly may move a motion for the impeachment of the President--

(a) on the ground of a serious violation of the Constitution, or the law;

(2) when a motion is tabled before the Speaker, she must – without examining the veracity of the particulars of the claims contained in the motion – issue a directive to the House to convene a meeting to debate the charges against the President within 10 days;

Composition and Election of the Committee Members:

(3) The House, without a majority resolution, must appoint a Special Committee comprising eleven of its members and other 4 external officials as listed herein to investigate the matter. The members chosen must not constitute, proportionally, representatives of the political parties represented in Parliament. The Speaker must appoint four of the Chief Whips of the political parties represented in Parliament to nominate eleven of the Committee Members. The House, on a secret ballot, must vote on the election of eleven of the nominated members.

The remainder (4 external officials) shall constitute of a retired judge or judges, a lead evidence leader (chosen by the majority of the Chief Whips of all political parties), and a forensic data analyst. If the nomination of any of the listed official's stalls, the decision of the majority of the Chief Whips represented in Parliament should prevail.

Remit of the functions of the Committee

(4) A special committee appointed under clause (3) shall --

(a) investigate the matter; and

(b) report to the house within 30 days (from date on which it was appointed) on its findings;

(5) The President shall have the right to appear and be represented before the special committee during its investigations.

Import and measure of substantiation

(5) If the special committee reports that the particulars of any allegation against the President –



- (a) have not been substantiated, further proceedings shall not be taken under this Article in respect of that allegation; or
- (b) have been substantiated, the House shall, after according the President an opportunity to be heard, vote on the impeachment charges.

The underlying measure for substantiation of the claims levelled against the President should be premised on whether the majority of the Committee members decides on the substantiation of the particulars of the claim.

Vote

- (6) If at least two-thirds of all the members of the House vote to uphold any impeachment charge, the President shall cease to hold office

