PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

AMENDMENT TO THE RULES OF PARLIAMENT TO PROVIDE FOR IMPEACHMENT

OPINION

Furnished to: The State Attorney, Cape Town

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I. INTRODUCTION

1. On 29 December 2017, the Constitutional Court handed down judgment in the matter of **Economic Freedom Fighters and Others v Speaker of the National Assembly and Another** (CCT 6/17) [2017] ZACC 47 (29 December 2017) ("**the Second EFF judgment**").

2. The Second EFF judgment ordered *inter alia* as follows:

   2.1. That the failure by the National Assembly to make rules regulating the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid.

   2.2. The National Assembly must comply with section 237 of the Constitution and make rules referred to in the preceding paragraph without delay.

3. Pursuant thereto, the Subcommittee on the Review of the National Assembly Rules has prepared and resolved to table two options for consideration to the Rules Committee ("**the Draft Rules**").

4. Our advice has been sought as to whether:

   4.1. The Draft Rules dealing with section 89 of the Constitution accord with and give effect to the Second EFF judgment.

   4.2. Whether the requirement of passing the resolution "with a supporting vote of at least two-thirds" of its members means two-thirds of the total seats

(i.e. 400) or two thirds of the incumbent members (i.e. total seats less vacancies).

5. In so doing, we shall address the following issues:

5.1. In Part II, we identify certain fundamental constitutional principles which, in our view, ought to inform the content and scheme of the Draft Rules.

5.2. In Part III, we specifically identify those aspects of the Second EFF judgment which, in our view, provide some guidance in respect of the objectives and content of Rules that the Constitutional Court ordered must be adopted.

5.3. In Part IV, we analyse the Draft Rules and advise on which aspects, in our view, do not comply with the relevant constitutional principles and the Second EFF judgment.

5.4. In Part V, we address the question of whether the requirement of passing the resolution "with a supporting vote of at least two-thirds" of its members means two-thirds of the total seats (i.e. 400) or two thirds of the incumbent members (i.e. total seats less vacancies).

II. GUIDING PRINCIPLES THAT OUGHT TO INFORM THE CONTENT AND SCHEME OF THE DRAFT RULES

6. The Constitution is the point of departure in this matter. The following provisions bear particular relevance:

6.1. In terms of section 83 of the Constitution the President: (a) is identified as the head of State and head of the national executive; (b) is obliged to uphold, defend and respect the Constitution as the supreme law of the Republic; and (c) promotes the unity of the nation and that which will advance the Republic.

6.2. Section 84 of the Constitution identifies the powers and functions of the President.[1]

6.3. Section 89 governs the removal of the President. It provides:

> **"89 Removal of President**
>
> **(1) 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**

[1] The section provides as follows:
"84 Powers and functions of President
(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
(2) The President is responsible for-
(a) assenting to and signing Bills;
(b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
(d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
(f) appointing commissions of inquiry;
(g) calling a national referendum in terms of an Act of Parliament;
(h) receiving and recognising foreign diplomatic and consular representatives;
(i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
(k) conferring honours."

(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office."

6.4. In terms of section 55(2) of the Constitution, 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.

6.5. Section 56 of the Constitution regulates evidence or information before the National Assembly. It provides:

"56 Evidence or information before National Assembly

The National Assembly or any of its committees may-

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or institution to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

(d) receive petitions, representations or submissions from any interested persons or institutions."

6.6. Section 57 provides:

"57 Internal arrangements, proceedings and procedures of National Assembly

(1) The National Assembly may-

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Assembly must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

(d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition."

7. According to the Second EFF judgment, the Constitution provides for a system of checks and balances in order to prevent an abuse of power by those who hold office; one such provision relates to the removal of the President from office.[2]

[2] Second EFF judgment at par 133.

8. In **United Democratic Movement v Speaker, National Assembly and Others** 2017 (5) SA 300 (CC) the Constitutional Court observed:

8.1. That the President is an indispensable actor in the proper governance of our Republic and bears important constitutional responsibilities.[3]

8.2. Public office, in any of the three arms, comes with a great deal of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office bearers who occupy positions of high authority therein; they are therefore not to be used for the advancement of personal or sectarian interests. Since state power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.[4]

8.3. The constitutional scheme is designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office bearers, in all arms of the state, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And

[3] At par 6.
[4] At par 7.

the objective is to arrest or address underperformance and abuse of public power and resources; it is essentially about executive accountability.[5]

8.4. The ultimate accountability-ensuring mechanisms range from being voted out of office by the electorate to removal by Parliament through a motion of no confidence or impeachment. These are crucial accountability-enhancing instruments that forever remind the President and cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests.[6]

9. In **Economic Freedom Fighters v Speaker of the National Assembly** 2016 (3) SA 580 (CC) the Constitutional Court emphasised the role of the President as head of State and head of the national executive. According to the Constitutional Court:

> **"[20] …. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the wellbeing of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination that all other progress-driven nations**

[5] At par 8.
[6] At par 10.

strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of state affairs and the personification of this nation's constitutional project.

[21] He is required to promise solemnly and sincerely to always connect with the true dictates of his conscience in the execution of his duties. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities. And, but for the Deputy President, only his affirmation or oath of office requires a gathering of people, presumably that they may hear and bear witness to his irrevocable commitment to serve them well and with integrity. He is, after all, the image of South Africa and the first to remember at its mention on any global platform.

[22] Similarly, the National Assembly, and by extension parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least remembered. It is the watchdog of state resources and, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the executive and state organs and ensure that constitutional and statutory obligations are properly executed. <u>For this reason it fulfils a pre-eminently unique role of holding the executive accountable for the fulfilment of the promises made to the populace through the state of the nation address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the executive before assumption of office</u>. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so are reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa."

10. In **Oriani-Ambrosini v Sisulu, Speaker of the National Assembly** 2012 (6) SA 588 (CC) at par 66 and 67, in its analysis of the validity of Parliamentary Rules, the Constitutional Court held that the validity of the Parliamentary Rules depends

on whether they recognise and facilitate the exercise of the individual member's powers in section 55(1)(b) and 73(2) or whether they create a high risk of those powers being paralysed.

11. As regards constitutional interpretation, in **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others** 2001 (1) SA 545 (CC) at par 21, the Constitutional Court said:

> **"The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."**

12. In **Matatiele Municipality and Others v President of the RSA and Others (No 2)** 2007 (6) SA 477 (CC) at par 36, the Constitutional Court made the following observations in relation to the correct approach to adopt in construing our Constitution:

> **"Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate. Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with**

those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole."

III. THE SECOND EFF JUDGMENT OF THE CONSTITUTIONAL COURT

13. There were four separate judgments in the Second EFF judgment. Jaftha J wrote for the majority of the Court (with a concurring judgment having been written by Froneman J). Dissenting judgments were written by both the Chief Justice and the Deputy Chief Justice[7].

14. Section 89 is one of the two provisions (the other being section 102), which the Constitutional Court has described as being a tool for holding the President to account.[8] The Constitutional Court explained that section 102 of the Constitution does not prescribe any conditions for the exercise of the power to remove by means of a motion of no confidence; all that is required is a motion of no confidence supported by a simple majority.[9] On the other hand, removal by impeachment pursuant to section 89 is subject to certain conditions, *viz*: (a) it must have as its foundation at least one of the three grounds listed in section 89(1); and (b) it must be supported by a two-thirds majority; this distinction, according to the Constitutional Court, is underpinned by the fact that impeachment is punitive and,

[7] Ultimately, there were seven Judges in support of the majority judgment and four Judges dissented from the majority.
[8] At par 134.
[9] At par 137.

depending on the ground on which it is based, the impeached President may lose all benefits and may be barred from occupying any public office.[10]

15. According to the majority judgment:

15.1. Section 89 of the Constitution empowers only the National Assembly to remove the President from office.[11]

15.2. The Constitution does not define any of the three grounds identified in section 89(1); it left the details relating to these grounds, to the National Assembly to spell out.[12] Elsewhere the judgment expresses a concern regarding the consequences if different members of an Ad Hoc Committee / the National Assembly attach different meanings / interpretations to each of these grounds.[13] According to the judgment, there must be an institutional pre-determination of what: (a) a serious violation of the Constitution or the law is; (b) serious misconduct is; (c) an inability to perform the functions of the office is. The Constitutional Court accepted that the first two grounds exhibit wrongdoing on the part of the President.[14]

15.3. Section 89(1) involves an antecedent determination by the National Assembly to the effect that one of the listed grounds exist.[15] This is

[10] At par 138.
[11] At par 173.
[12] At paragraphs 176 and 177.
[13] At paragraph 188 and 177.
[14] At paragraph 178.
[15] At paragraph 204.

interpreted by the dissenting judgment to mean that there must be rules that define the word "serious" as well as the terms "serious violation" and "serious misconduct" in section 89.[16]

15.4. It is left to the National Assembly to determine the circumstances under which, if the President is removed from office on one of these grounds, he or she must forfeit benefits.[17]

15.5. Any process for removing the President from office must be preceded by a preliminary enquiry, during which the Assembly determines whether a listed ground exists. The form that the preliminary enquiry takes depends entirely on the National Assembly. [18]

15.6. It is also left to the National Assembly to decide whether the President must be afforded a hearing or not at the preliminary stage.[19] Elsewhere in the judgment and commenting on the process that had been followed, the Court noted that the President was not afforded the opportunity to defend himself. The judgment notes that without knowing whether the National Assembly holds the view that the President has committed a serious violation of the Constitution, it would be difficult for him to mount an effective defence.[20]

[16] At paragraph 64.
[17] At paragraph 178.
[18] At paragraph 180.
[19] At paragraph 180.
[20] At paragraph 205.

15.7. An impeachment complaint must be accorded priority over other normal business of the National Assembly. Once lodged, the National Assembly must take steps to ensure that it is addressed without delay.[21]

15.8. The National Assembly must decide and facilitate the initiation of the preliminary stage (i.e. the determination of whether a listed ground exists). It may well be that each member of the National Assembly has a right to initiate a preliminary process; even so, the National Assembly must facilitate the steps to be taken in this regard and a process to be followed, not only at the preliminary stage but at the stage of actual impeachment up to the final stage of voting on whether the President should be removed from office, so as to determine whether the removal is supported by the necessary two thirds majority.[22] Rules defining the entire process are necessary to implement section 89.[23]

15.9. The shortcomings under the current ad hoc system include the following:

15.9.1. In the absence of a meaning being assigned to the listed grounds, the question of whether a listed ground exists (or not) is left to the initiator or the process; in so doing, the process

[21] At paragraph 215.
[22] At paragraph 181.
[23] At paragraph 182.

lacks a sifting mechanism which would determine whether there is a case for the President to answer or not.[24]

15.9.2. Under the current ad hoc system, the Committee process does not have a procedure to be followed when carrying out its task.[25]

15.9.3. The parties are entitled to be represented in substantially the same proportion as the proportion in which they are represented in the National Assembly, except where the rules prescribe the composition of the committee or the number of the members in the committee does not allow for all parties to be represented.[26] In this regard the judgment notes that the rules relevant to the Ad Hoc Committee: (a) do not determine the size of the committee; (b) do not require that all parties be represented. They merely state that the resolution establishing such committee must specify the number of members to be appointed or their names and that if more than one party is represented, the representation mirrors their representation in the Assembly; the majority party would have majority representation. This, according to the judgment, raises the risk of an impeachment complaint not reaching the National

[24] At paragraph 189.
[25] At paragraph 189.
[26] At paragraph 191

> Assembly even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus. The judgment therefore cautions that "a decision by member of the majority party in the Ad Hoc Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader.[27]

IV. DO THE DRAFT RULES ACCORD WITH AND GIVE EFFECT TO THE SECOND EFF JUDGMENT AND THE BROADER CONSTITUTIONAL PRINCIPLES?

16. In light of our analysis in the preceding sections, we address the Draft Rules with reference to the following questions:

16.1. First, whether they provide for an antecedent process.

16.2. Second, whether they define each of the listed grounds.

16.3. Third, whether the composition of the preliminary panel accords with the judgment.

16.4. Fourth, whether the process is procedurally fair in relation to the President.

[27] At paragraph 192. The dissenting judgment takes a different view on this specific issue as is apparent from paragraph 65 of the judgment.

16.5. Fifth, whether the Draft Rules provide for the requisite priority to be accorded to an impeachment complaint.

16.6. Sixth, whether the Committee /Panel is afforded the requisite powers in order to properly and meaningfully fulfil its functions.

16.7. Finally, the reporting by the Panel / Committee.

In what follows, we undertake this analysis with reference to both Option 1 and Option 2 of the Draft Rules.

The antecedent process

17. Both options of the Draft Rules contemplate the following antecedent process:

17.1. First, that the process may be initiated by a member of the National Assembly. This, in our view, is consistent with the observation of the Constitutional Court that it may well be that each member of the Assembly has a right to initiate the preliminary process.[28]

17.2. Second, the Draft Rules contemplate that the mechanism by which proceedings are initiated is Rule 124(6) and are subject to three further requirements. These are:

17.2.1. Rule 124(6) which provides:

[28] At par 181.

"When giving notice of a motion, a member must –

(a) Read it aloud and immediately thereafter deliver at the Table a signed copy of the notice, which may not differ from the notice as read out aloud; or

(b) Deliver to the Secretary a signed copy of the notice on any Parliamentary working day for placing on the Order Paper."

(We point out that the remaining subparagraphs of Rule 124, which do not find application in the Draft Rules regulate: (a) circumstances under which members are entitled to give notices of motion; (b) the process for determining the number of notices of motion on any sitting day and the period of time for completion on that day; (c) the timing as to when members are given the opportunity to give notices of motion; (d) the requirements for a notice of motion; (e) requirements as to delivery of a notice of motion.)

17.2.2. The second requirement is that the motion "must be limited to a clearly formulated and substantiated complaint on the ground specified in section 89, which *prima facie* warrants an enquiry":

17.2.2.1. There is no difficulty with the motion needing to be clearly formulated and substantiated on the grounds specified in section 89; this requirement is clearly aimed at: (a) ensuring compliance with

the constitutional prescripts; and (b) facilitating the process.

17.2.2.2. We do however have a difficulty with the requirement that it "*prima facie* warrants an enquiry". It is unclear to us as to why, once a motion has been formulated in the terms provided for (i.e. substantiated on the grounds provided for in section 89), it *prima facie*, warrants an enquiry. The reference to "*prima facie*" is presumably used in its generally accepted meaning of in the absence of further evidence from the other side, that which is *prima facie* now becomes conclusive proof (i.e. unless rebutted), the motion, warrants inquiry.[29] The Draft Rules also do not stipulate: (a) who will determine whether the threshold of *prima facie* is met; (b) the factors that will be relevant to such an inquiry; (c) why such an inquiry is necessary if there has been compliance with the threshold requirements of section 89 (i.e. the motion has been substantiated on the grounds set forth in

[29] In the context of both civil and criminal proceedings, this is the approach adopted. See for example: Osman v Attorney-General, Tvl 1998 (4) SA 1224 (CC) at par 22; S v Boesak 2001 (1) SA 912 (CC) at par 24 and Osman v Minister of Safety and Security and Others (EC09/2008) [2010] ZAEQC 1 (15 December 2010).

section 89). In our view, this requirement unduly and unnecessarily curtails a motion in terms of the Draft Rules.

17.2.2.3. We are of the view that the words "which *prima facie* warrants an inquiry" be deleted.

17.2.3. The third requirement is that the complaint must relate to an action or conduct by the President in person. In light of the grounds identified in section 89(1) of the Constitution, we do not foresee a difficulty with this requirement.

17.2.4. The fourth requirement is that the motion is consistent with the Constitution, the law and these Rules: while there is no difficulty with the Draft Rules requiring compliance with the Constitution and the law, compliance with "these Rules" has the potential to cause confusion and uncertainty. By way of example, it is apparent from Draft Rule 1, that the notice of motion to initiate proceedings must comply with Rule 124(6) only. Implicit in this requirement is that the remaining sub clauses of Rule 124 find no application. Yet, Draft Rule 1(c) requires that the motion be consistent with "these Rules"; the import thereof being that there must be compliance with the remaining subparagraphs of Rule 124.

17.3. Third, Rule 1(2) makes clear that it is intended to also apply to section 89(1)(c) of the Constitution; there is nothing objectionable in that respect.

17.4. Fourth, Rule 2(1) affords the Speaker a discretion to consult with the member who has given notice of motion to initiate proceedings, to ensure that the motion is compliant with the criteria set out in Rule 1. Its objective is to facilitate the exercise of the rights afforded by section 89 of the Constitution.

17.5. Fifth, Rule 3 provides for the Speaker to refer the motion (when it is in order), within 48 hours together with supporting documentation provided by the member to the Committee / Panel for the purposes of considering section 89 matters; the Speaker is also obliged to inform the Assembly and the President of such referral without delay. This provision provides for both transparency (to the Assembly and the President) and expediency in light of the timeframes provided for therein.

17.6. Sixth, Rule 4 facilitates informed decision-making (through imposing as a requirement reasons for any findings and recommendations) as well as transparency and expediency. In so doing, it provides that:

17.6.1. Once the Committee / Panel has considered the motion, it must report to the Assembly / Speaker forthwith.

17.6.2. The report of the Committee / Panel must contain:

17.6.2.1. Findings and recommendations including the reasons for such; and

17.6.2.2. Any written representations by the President.

17.6.3. The scheduling of the report for debate and decision must be given due priority in the programme of the Assembly.

17.6.4. The President must be informed of the scheduling and any decision on the report.

17.6.5. Rule 4(3) provides that the scheduling of the report "must be given due priority given the programme of the Assembly". The Second EFF judgment required that an impeachment complaint must be accorded priority over other normal business of the National Assembly and that once lodged, the National Assembly must take steps to ensure that it is addressed without delay.[30] The Draft Rule, in its present form, requires that due priority be given, given the programme of the Assembly; this language appears, in our view, to suggest that the priority to be afforded to the scheduling of the report is not an unconditional one; but is subject to the programme of the Assembly. As such, we are of the view that it does not accord

[30] At paragraph 215.

with the Second EFF judgment in respect of the giving of priority to complaints of impeachment.

17.7. Seventh, Rule 5 provides that for the process to be followed once the Committee / Panel has concluded the inquiry; it requires reporting to the Assembly / Speaker forthwith. The same concerns that we expressed in respect of the scheduling of the preliminary report for debate and decision find equal application in respect of Rule 5.

18. It is apparent from a consideration of Draft Rules 4 and 5 that the Draft Rules contemplate a two-pronged report back process to the National Assembly, *viz*:

18.1. A reporting initiative to the National Assembly / Speaker, on consideration of the motion. As stated, that report must contain: (a) findings and recommendations including the reasons for such; and (b) any written representations by the President ("**the preliminary report**").

18.2. A reporting initiative to the National Assembly / Speaker on conclusion of the inquiry ("**the final report**").

(We address the reporting by the Committee / Panel to either the Speaker or the National Assembly separately.)

19. Our conclusions in respect of the antecedent process are that the process is unobjectionable, save for the following:

19.1. Rule 1(a): the following words ought to be deleted "which *prima facie,* warrants an inquiry". The reasons for our proposal are addressed at paragraph 17.2.2.2 above.

19.2. Rule 1(c): the following words ought to be deleted "and these Rules". Should compliance with specific Rules be required, these should be expressly stipulated. The reasons for our proposal are addressed at paragraph 17.2.4 above.

19.3. Rule 4(3) and Rule 5(3): the following words ought to be deleted: "given the programme of the Assembly". The reasons for our proposal are addressed at paragraph 17.6.5 and 17.7 above.

The definition of the listed grounds

20. At the outset, we accept that a measure of latitude will be afforded to the National Assembly in adopting appropriate impeachment rules. Such rules must endeavour to give proper effect to the object and purpose of impeachment. Defining the central concepts is obviously important. The definitions' section of the Draft Rules defines the central concepts as follows:

20.1. "**inability**" means "a permanent or temporary physical or mental condition of the President".

20.2. "**misconduct**" means "unacceptable, improper or unprofessional behaviour by the President".

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

20.4. "**violation**" means "any breach of the Constitution or the law that has been determined by a competent body".

21. We raise some concerns regarding all the definitions. In what is set out below, we are alive to the fact that it is difficult to envisage all possible scenarios justifying impeachment that may arise. So a balance has to be struck between precision and flexibility.

22. At the level of generality, each definition has the word "means". This, in our view is unduly restrictive. We suggest that instead of "means", the word "includes" would be more appropriate. This would provide flexibility to cater for unforeseen circumstances.

23. We set out below a range of examples from other statutes, giving judicial consideration of the meaning of misconduct. We do so for purposes of highlighting various problems with the current definitions in the Draft Rules.

23.1. In terms of section 18 of the Intelligence Services Act No 65 of 2002: "A member is guilty of misconduct if that member- (a) commits a crime or an offence; or (b) contravenes or fails to comply with any provision of this Act."

23.2. In the Compensation for Occupational Injuries and Diseases Act 130 of 1993, "serious and wilful misconduct" is defined to mean: (a) being under the influence of intoxicating liquor or a drug having a narcotic effect; (b) a contravention of any law for the protection or the health of employees or for the prevention of accidents, if such contravention was committed wilfully or with a reckless disregard of the provisions of such law; or (c) any other act or omission which the Director-General having regard to all the circumstances considers to be serious and wilful misconduct.

23.3. In **Moodley v Scottburgh/Umzinto North Local Transitional Council and Another** 2000 (4) SA 524 (D) at 532C (in the context of the Pension Funds Act) the Court held:

> **"The word 'misconduct' used in the context of this section is ambiguous in the sense that it can have different meanings and is at the same time a word of a general or wider import used in connection with other misdemeanours of a serious nature.**
>
> **The principal words used in s 37D(d)(ii) are theft, dishonesty, fraud or misconduct - the specific words being the first three followed by the general word 'misconduct'.**
>
> **If the law as set out above is applied to the section under scrutiny, I am of the view that the common denominator of the specific words is dishonesty - they are species of the same genus, that is dishonesty, and it consequently follows that the meaning of the general word 'misconduct' must be inferred from that of the specific words, which means that misconduct used in this section must be interpreted to include dishonest conduct, or at least an element of dishonesty. Differently put, applying the principle of noscitur a sociis, the word 'misconduct' must be construed as conduct which is restricted to a meaning where dishonest conduct is an element or component. In other words, what the Legislature to my mind**

intended was that the fund may, in the instant matter, only deduct from the amount due to the plaintiff on the date of his retirement the amount of the judgment obtained against him for damages suffered by the town board if such damages had been caused by reason of any theft, dishonesty, fraud or misconduct, the latter restricted to conduct of which dishonesty is an element or component - in other words, if plaintiff's misconduct does not include any dishonesty by him the fund may not make any deduction from the amount due to him on his retirement in respect of the judgment for damages, etc."

23.4. In **Johan Louw Konstruksie (Edms) Bpk v Mitchell NO and Another** 2002 (3) SA 171 (C) (in the context of the Arbitration Act), the Court held:

"[38] Section 33(1)(a) of the Arbitration Act 42 of 1965 provides that, where any member of an arbitration tribunal 'has misconducted himself in relation to his duties as arbitrator', the Court may set his award aside. …

[41] The concept 'wrongful or improper conduct' has, in general, been interpreted to mean some or other form of moral turpitude in the form of dishonesty or bad faith. Thus in Donner v Ehrlich 1928 WLD 159 Solomon J said (at 160):

> **'As I read Dickenson and Brown v Fisher's Executors (1915 AD 166), the misconduct which entitles a Court to set aside the award of an arbitrator must amount to dishonesty. I think that is the true reading of the judgment. It is possible that the dishonesty may be inferred from the manner in which the arbitration has been held; in other words, there need not be direct proof that the arbitrator, for example, has accepted a bribe, in order to find him guilty of misconduct. But I think that, unless I have misinterpreted the judgment in that case, this Court could not upset the award in the present case unless dishonesty were adduced from the evidence or the manner in which the arbitration has been conducted.'**

> **In this regard the learned Judge observed (at 161) that it had not been suggested that, in the case before him, the arbitrator had displayed mala fides or partiality. See further Naidoo v Estate Mahomed and Others 1951 (1) SA 915 (N) at 920A - G ('improper conduct . . . lack of good faith or some ulterior motive'); Bester v Easigas (Pty) Ltd and Another (supra at 37I) ('moral turpitude or mala fides') and 38F ('some improper, mala fide conduct').**
>
> **….**
>
> **[46] …. It seems clear that an arbitrator's decision or award, which is not supported by the evidence, should be regarded, and dealt with, as a mistake of fact. It will hence be construed as misconduct only if the mistake is of so gross and manifest a nature that it demonstrates <u>moral turpitude in the sense of dishonesty, partiality or bad faith. To this may be added gross carelessness</u>, as suggested, in the Dickenson case (para [42] above), or recklessness, provided it has given rise to a mistake of this nature."**

23.5. In **Total Support Management (Pty) Ltd v Diversified Health Systems** (SA) (Pty) Ltd 2002 (4) SA 661 (SCA) at par 21, the SCA held (also in the context of the Arbitration Act):

> **"A gross or manifest mistake is not per se misconduct. At best it provides evidence of misconduct . . . which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as 'wrongful and improper conduct' . . . 'dishonesty' and 'mala fides or partiality' . . . and 'moral turpitude'."**

24. In our view, there are the following problems with the current definitions:

24.1. <u>First</u>, instead of providing definitions of **"serious violation of the Constitution or the law"** and **"serious misconduct"**, the Draft Rules separate out the word **"serious"** to govern both situations. This is apt to

cause confusion and inadequacy of the respective definitions. We accordingly suggest that consideration be given to providing definitions which accord with section 89(1)(a) and (b) of the Constitution without a separate definition of **"serious"**. We will offer certain proposals in due course.

24.2. The word "**serious**" is difficult to define in advance. It is a term of degree and judgment. A single isolated act or omission may not necessarily be regarded as serious but a series of acts or omissions may cumulatively be regarded as serious.

24.3. At present, **"serious"** is defined as **"an intentional or malicious or reckless act or omission performed by the President otherwise than in good faith"**. There appears to us to be an inherent contradiction in this formulation. Something which is malicious is, by definition, not in good faith. It is arguable that the same applies to a reckless or omission.

24.4. The current definition of **"misconduct"** includes **"unacceptable"** behaviour by the President. This term is potentially open-ended and vague.

24.5. The present definition of **"violation"** requires the breach of the Constitution or the law that has been determined by a competent body. It is not clear to us why the requirement of an antecedent determination by a **"competent body"** is required. There will undoubtedly be certain

circumstances where, for example, a court of law has made such a finding. But it does not seem to us to be a necessary precondition for impeachment. After all, that will be the task of the committee/panel.

25. We suggest that consideration be given to defining **"a serious violation of the Constitution or the law"** as including **"an act or an omission or series of acts or omissions by the President which amounts to an intentional or malicious or reckless breach of the Constitution or the law"**.

26. We further suggest that **"serious misconduct"** be defined to include **"an act or omission or series of acts or omissions by the President of a dishonest or improper or unprofessional or unlawful nature"**.

Whether the composition of the preliminary panel accords with the Second EFF judgment?

27. In terms of the Second EFF judgment, the form that the preliminary enquiry takes depends entirely on the National Assembly.[31]

28. The Draft Rules contemplate two options in this regard:

Option 1: the Committee

29. Option 1 contemplates that the Committee consists of the number of Assembly members that the Speaker may determine with the concurrence of the Rules

[31] At paragraph 180.

Committee, subject to the provisions of Rule 154, provided that all parties in the Assembly must be represented.

30. Rule 154 provides as follows:

> "**154. Composition**
>
> (1) Parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly, except where —
>
> (a) these rules prescribe the composition of the committee; or
>
> (b) the number of members in the committee does not allow for all parties to be represented.
>
> (2) Subject to these rules, the Joint Rules and decisions of the Rules Committee, and where practicably possible, each party is entitled to at least one representative in a committee."

31. The Constitutional Court has pronounced on more than one occasion on the composition of Parliamentary committees:

31.1. In the Second EFF judgment, the Constitutional Court noted that where the representation mirrors their representation in the Assembly; the majority party would have majority representation. This, according to the majority judgment, raises the risk of an impeachment complaint not reaching the National Assembly even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus. The judgment therefore noted that "a decision by member of the majority party in the Ad Hoc Committee may prevent

an impeachment process from proceeding beyond the committee, to shield a President who is their party leader."[32]

31.2. In **Mazibuko NO v Sisulu and Others NNO** 2013 (6) SA 249 (CC), though in the context of a motion of no confidence, the Constitutional Court emphasised:

31.2.1. That a vital constitutional entitlement (in that instance to move a motion of no confidence in the President) cannot be left to the whim of the majority or minority in the programme committee or any other committee of the assembly. It observed that it would be inimical to the vital purpose of s 102(2) to accept that a motion of no confidence in the President may never reach the assembly except with the generosity and concurrence of the majority in that committee. It is equally unacceptable that a minority within the committee may render the motion stillborn when consensus is the decision-making norm.[33]

31.2.2. Lobbying, bargaining and negotiating amongst political parties represented in the assembly must be a vital feature of advancing the business and mandate of parliament conferred

[32] At paragraph 192. The dissenting judgment takes a different view on this specific issue as is apparent from paragraph 65 of the judgment.
[33] At par 57.

by chapter 4 of the Constitution. The Constitution Court proceeded to state[34]:

> **"However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement. That is so because our Constitution is supreme and demands that all law and conduct must be consistent with it. We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members serving on the programme committee or any other committee of the assembly. A vote on a motion of no confidence in the President must occur in the assembly itself."**

31.2.3. When the Constitution entitles a member or party to take a particular step or embark on a process in the assembly, the rules may prescribe a procedure for the envisaged process. What the rules may not do is to thwart or frustrate the steps and thereby negate a constitutional entitlement.[35]

31.3. In **Oriani-Ambrosini v Sisulu, Speaker of the National Assembly** 2012 (6) SA 588 (CC) at par 66 and 67 the Constitutional Court held:

> **"The notice of motion filed in this court singles out certain Rules for attack. Central to the constitutional challenge is the permission requirement they impose on individual members of the Assembly seeking to initiate, prepare or introduce legislation. Potentially, the permission requirement will negate the exercise of the power to initiate, prepare and introduce legislation in the National Assembly. And this does not bode**

[34] At par 58.
[35] At par 60.

well for our democracy. Common sense suggests that any majority party in the Assembly is likely to support its own legislative projects and not those of minority parties or any individual member. For this reason, a permission requirement boils down to a mechanism that is inescapably prone to denying individual members and minority parties the power to initiate, prepare and introduce legislation, however well-meaning those who drafted the Rules might have been."

32. In line with the above *dicta*, we are of the view that the composition of the Committee, which mirrors the proportional representation in the National Assembly is subject to attack as being unconstitutional. While it may be argued that the Draft Rules, do not afford the Committee the role of a gatekeeper in that the Committee is duty-bound to report to the National Assembly at two stages, namely, at the preliminary stage; and after the inquiry, we nevertheless remain of the view that a Committee that has a composition that is in proportion to representation in the National Assembly, potentially carries with it the risk of the majority party dictating the outcome of the inquiry.

33. One potential way of avoiding this problem would be to require the committee to comprise half the members of the ruling party and the other half to be members of opposition parties. This is akin to the formula used for the composition of the Judicial Service Commission in section 178 of the Constitution. Of course, this holds the potential for a deadlock along party political lines. To cure that problem it would make sense for the committee thus constituted to be presided over by a retired judicial officer who should have a casting vote.

34. The second subsection provides that notwithstanding Rule 155 (2), the members of the Committee must be appointed as and when necessary. We do not consider

this provision to be offensive, save for stating that the Constitutional Court alluded to a preference that the Rules identify the size of the Committee.[36] Rule 55(2) provides as follows:

> "Parties must appoint their members within five working days after the establishment of a committee by the House."

Option 2

35. In terms of Option 2, 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.

36. The manner in which the Panel is to be constituted is as follows:

    36.1. The Panel consists of five retired judges proposed by the Rules Committee for appointment by the Assembly, provided that the Panel is gender balanced.

    36.2. The Rules Committee must decide on the proposed composition of the Panel by consensus.

    36.3. In the event that the Rules Committee cannot agree, the Speaker must propose a Panel to the Assembly.

[36] Second EFF judgment; par 192.

37. We do not consider the composition of the Panel to be constitutionally offensive. Being composed of retired judges, this proposal has the distinct advantage of avoiding party political considerations.

Is the process procedurally fair in relation to the President?

38. Both Options 1 and 2 of the Draft Rules provide for the President to be heard:

Option 1:

38.1. Provides as follows in Draft Rule 4(3):

> "(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 –
>
> (a) ensure that the inquiry is conducted in a reasonable and procedurally fair manner; and
>
> (b) 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."

Option 2:

38.2. Provides as follows in Draft Rule 5(1)(e):

> "(a) conduct its proceedings in public in a manner that is reasonable, impartial and procedurally fair; and
>
> (b) 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."

Analysis

38.3. Both options, in our view, adequately ensure procedural fairness in relation to the President.

Do the Draft Rules provide for the requisite priority to be accorded to an impeachment complaint?

39. The question of whether the requisite priority is accorded to an impeachment complaint must be assessed with due regard to the following:

39.1. Draft Rule 3.1. provides that when the motion is in order, the Speaker must refer the motion within 48 hours, to the Committee/Panel established for the purposes of considering section 89 matters.

39.2. Draft Rule 3(2) requires that the Speaker inform the Assembly and the President of such referral without delay.

39.3. In respect of Option 1, Draft Rule 4(2) requires that 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 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. The same timeframe applies in respect of Option 2, Draft Rule 5(1)(a) which provides that the Panel must consider any motion proposing to remove the President in terms of section 89 of the Constitution, 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.

39.4. In terms of Draft Rule 4(3) the scheduling of the preliminary report for debate and decision must be given due priority given the programme of the Assembly.

39.5. In terms of Draft Rule 4(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. There is no timeframe imposed at this stage of the process and nor is there any requirement of expediency or promptitude at this stage.

39.6. In terms of Draft Rule 5(3) the scheduling of the final report for debate and decision must be given due priority given the programme of the Assembly.

39.7. In terms of Option 2, Draft Rule 6, 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. We assume that this is a reference to Option 2, Draft Rule 5(1)(a) and 5(1)(c); it is unclear how the tabling of the report finds application in relation to Option 2, Draft Rule 5(1)(c).

40. We are of the view that the Draft Rules do provide for the requisite priority to be afforded to an impeachment complaints, save in the following respects:

40.1. First, for reasons addressed in paragraphs 17.6.5 and 17.7, the words "given the programme of the Assembly" should be deleted from Draft Rule 4(3) and Draft Rule 5(3). This would ensure that a motion of impeachment is prioritised over the general programme of the Assembly.

40.2. Second, there is no timeframe or requirement of expediency imposed in respect of the inquiry as governed by Draft Rules; there ought to be such a requirement imposed, particularly given that the greatest delay is likely to occur at the stage of the inquiry.

40.3. Third, it is unclear as to what is sought to be conveyed by Option 2, Draft Rule 6. If the intention is to refer to the tabling of the preliminary report and the final report (after the inquiry), there is an overlap between Option 2, Draft Rule 6 and Rules 4(3) and 5(3). This is likely to result in confusion with two different provisions dealing with the same issue.

Powers of the Committee / Panel

41. It is of critical importance that the Panel / Committee is afforded the power to obtain the requisite information so as to be able properly to give effect to section 189 of the Constitution. The following considerations are of relevance in this regard:

41.1. In terms of:

41.1.1. Option 1, Draft Rule 4(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.

41.1.2. Option 2, Draft Rule 5(2), the Panel may: (a) appoint a legal practitioner as evidence leader; and (b) afford parties in the National Assembly an opportunity to lead evidence. In terms of Option 2, Draft Rule 5(2), the Panel has the powers given to it by the Assembly including the power to subpoena witnesses and/or require any documents.

41.2. With due regard to the provisions of National Assembly Rule 167 and the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004[37], we are of the view that in order to facilitate the objectives of the Panel / Committee and ultimately ensuring that the prescripts of section 89 are met, the Panel / Committee ought to be afforded the following powers:

[37] Section 14 thereof deals with the summonsing of witnesses; section 15 addresses the examination of witnesses and section 16 dealing with privilege of witnesses.

41.2.1. To summon, by way of subpoena, any person to give evidence on oath or affirmation or to produce documents.

41.2.2. To receive representations or petitions from interested persons or parties.

41.2.3. To permit oral evidence on any matter before the Committee.

41.2.4. To determine its own working arrangements.

41.2.5. To appoint a legal practitioner as evidence leader.

The reporting by the Committee / Panel

42. In terms of:

42.1. Option 1, Rule 4(2) under the Draft Rules, requires that the Committee make a recommendation to the National Assembly as to 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. Furthermore, in terms of Option 1, Rule 4(3) of the Draft Rules, the Committee reports to the National Assembly again after the inquiry.

42.2. Option 2, Rule 5(1) under the Draft Rules, requires that the Panel make a recommendation to the Speaker as to 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; it also requires that the Panel reports to the Speaker after the inquiry.

43. The reason for distinguishing between which entity the Committee reports to and which entity the Panel reports to is unclear. We are of the view that the Panel and the Committee (whichever option is preferred) must report to the National Assembly at both stages of the process (i.e. at the stage of the preliminary report and the after the enquiry). This, in our view, is a crucial issue given that it is the National Assembly that is vested with the powers under section 89 of the Constitution.

V. WHETHER THE REQUIREMENT OF PASSING THE RESOLUTION "WITH A SUPPORTING VOTE OF AT LEAST TWO-THIRDS" OF ITS MEMBERS MEANS TWO-THIRDS OF THE TOTAL SEATS (I.E. 400) OR TWO THIRDS OF THE INCUMBENT MEMBERS (I.E. TOTAL SEATS LESS VACANCIES)?

44. Section 89 of the Constitution provides that the removal of the President occurs "by a resolution adopted with a supporting vote of at least two thirds of its members".

45. Section 46(1) of the Constitution provides that the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that: (a) is prescribed by national legislation; (b) is based on the national common voters roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation.

46. In terms of section 47(3) of the Constitution a person loses membership of the National Assembly if that person: (a) ceases to be eligible; (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or (c) ceases to be a member of the party that nominated that person as a member of the Assembly.

47. In terms of section 47 (4) vacancies in the National Assembly must be filled in terms of national legislation.

48. Section 53 of the Constitution provides as follows:

> **"53 Decisions**
>
> **(1) Except where the Constitution provides otherwise-**
>
> **(a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;**
>
> **(b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and**
>
> **(c) all questions before the Assembly are decided by a majority of the votes cast.**
>
> **(2) The member of the National Assembly presiding at a meeting of the Assembly has no deliberative vote, but-**
>
> **(a) must cast a deciding vote when there is an equal number of votes on each side of a question; and**
>
> **(b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the Assembly."**

49. In **Oelofse and Others v Sutherland and Others** 2001 (4) SA 748 (T), the Court dealt with a similar issue in the context of local government. At issue was a legislative provision that provided: "A majority of councillors must be present at a meeting of the council before a vote may be taken on any matter."

50. The Court concluded at page 752A, with reference to the purpose of a quorum that:

> **"It follows that a municipal council must have at least one half plus one of the number of potential council seats, allocated to the particular council by the MEC for local government, to be filled by incumbents before the council can function. Had the intention been to determine a specific number or minimum number, the Act would have provided the number or formula according to which the number had to be calculated. It is clear that the quorum required by s 35 is an enabling quorum. Loughlin's case is therefore directly in point.**
>
> **It is significant that the Act provides for a quorum of members (my emphasis) in s 35 to establish the threshold that must be met before a council can function validly and lawfully. No other section determines a quorum by reference to members. The reason is not hard to divine: once a council can function because more than half the available council seats have been filled, decisions are taken by majority vote or, in the case of s 30(2), a weighted majority vote of the elected incumbents regardless of their affiliation or party membership, as long as the total number of incumbents exceeds one half of the total council seats.**
>
> **These provisions mirror s 160(3) of the Constitution, Act 108 of 1996…."**

51. We are of the view that the reference in section 89 to "a resolution adopted with a supporting vote of at least two thirds of its members" is a reference to two thirds of its incumbent members (i.e. total seats less vacancies). Our view is underpinned and informed by the following:

51.1. First, section 53(1)(b) of the Constitution provides that at least one third of the members must be present before a vote may be taken on any other question before the Assembly; there is no exception provided for in respect of matters concerning section 89 of the Constitution.

51.2. Second, section 53(1)(c) provides that all questions before the Assembly are decided by a majority of the votes cast. This is our view, points to an interpretation that section 89 refers to the incumbent members;

51.3. Third, the effect of interpreting the provision to refer to two thirds of the total members of the National Assembly is that effect cannot be given to an impeachment complaint until such time that all vacancies have been filled; this may result in long delays and does not accord with the priority that must be given to such matters.

52. In any event, we note that National Assembly Rule 45 provides that the Assembly may proceed with its business irrespective of the number of members present but may vote on a Bill or decide any question only if a quorum is present in terms of Rule 96. Rule 96 deals with a quorum.

53. We advise accordingly.

GJ Marcus SC
Karrisha Pillay

Chambers
Sandton and Cape Town