

UNCERTAINTY HAS A PRICE, AND THE DRC NEEDS TO STOP PAYING IT

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Legal Briefings - By **Olivier Binyingo, Director, Johannesburg**

News broke last week that former President Thabo Mbeki had been appointed by President Ramaphosa as South Africa's special envoy to the Democratic Republic of Congo (DRC).

His intended task was to help resolve any issues President Joseph Kabila, or those standing for election, might have before the presidential poll, which has been set for December 23 2018.

However, the DRC rejected the appointment, indicating it fears foreign interference in its electoral process. Earlier this year, the DRC government rejected foreign aid to fund its elections, citing the same reason.

Whilst recent developments generated cautious optimism about the electoral process, both South Africa's appointment of a high-calibre envoy and the DRC's rejection are clear signs that further hurdles can be expected.

On August 8, the window officially closed for those who intend to run in the DRC's presidential election to submit their application to the DRC's electoral commission.

This follows weeks of speculation over whose names would be on the list of candidates to replace Kabila — and whether Kabila, after two terms in power, would put himself forward for his own succession. His name does not appear on the finalised candidates list.

This could be celebrated as a victory for the rule of law as, on the face of it, it complies with the constitutional provision prohibiting more than two consecutive presidential terms. However, the fact that this comes two-and-a-half years after the de facto expiry of Kabila's second term cannot be overlooked. Also, despite Kabila himself never having publicly declared his intention to run for a third term, speculation about his intentions persisted until the last minute. Even with a now-finalised candidates list, speculation may continue until Kabila actually steps down.

This is indicative of the state of uncertainty that has come to characterise the DRC, politically and legally.

The presidential succession debate kicked off early into Kabila's second five-year term, which began in 2011, after a heavily contested election.

The debate was opened by the publication of a book in 2013 by one of the president's close allies, in which the sacrosanct nature of certain constitutional provisions was brought into question.

Opposition leaders and observers perceived this book as the instrument to test the waters for a constitutional amendment removing the presidential term limits.

Later, the debate shifted from an alleged intention to run for a third term to an alleged intention to extend the second term beyond its constitutional expiry date, a scenario not explicitly catered for in the constitution.

An important milestone was reached in April 2016, when 276 members of parliament approached the DRC's Constitutional Court for an opinion on whether the sitting president would remain in office in the event that no presidential elections were held before the expiry of the presidential term.

In the absence of constitutional provisions explicitly dealing with such a scenario, the court ruled that the sitting president would remain in power until a new elected president could be sworn in. In the second half of 2016, the court's perceived blank cheque led to a build-up of political tension, reaching a climax in December 2016 at the official expiry of Kabila's second presidential term.

For a brief moment, the tension was eased when, on December 31 2016, a power-sharing agreement was signed between the presidential political platform and the most important opposition parties.

The agreement provided that presidential elections would be held before the end of 2017 and that Kabila would not be a candidate in those elections.

However, a less than perfect implementation of this agreement from the outset, combined with a legal environment where certainty and stability remain aspirational concepts, resulted in scepticism and speculation, and ultimately, this agreement was not honoured.

If the presidential elections effectively take place in December and power is handed over peacefully to the fifth president in the country's history, a return to some level of stability is possible. This stability is badly needed for the DRC's economic development.

The political instability of the past few years, coupled with the enactment of legislation making it more onerous to do business, has deterred new investors and frustrated companies with ongoing long-term projects.

A law on subcontracting adopted in 2017, and a revised mining code adopted in 2018, both have laudable policy objectives, including the empowerment of local small businesses, the increase of state revenue from mining operations, and the improvement of the livelihoods of mining communities.

However, the substance of such legislation does not match the importance of its objectives. Instead of enhancing legal certainty, the new legislation has been the source of legal uncertainty over both the manner in which it should be interpreted and the ability of the private sector to rely on legally enshrined guarantees of stability.

A populist argument would be that the companies most affected by the legal changes are international investors that can easily afford to pay the additional costs that come with these changes.

The problem is that this argument does not take into account the investment the country is missing out on because of legal uncertainty, the effect of restructuring operations to deal with impractical legislation, and the price mark-ups implemented throughout the supply chain to serve as contingency for unforeseeable events.

When all is said and done, uncertainty has its own price. If the DRC wants to improve on its country risk ratings, it will have to provide more certainty, both politically and legally. The final list of official candidates for the upcoming presidential elections puts the country on a path towards more political certainty. Working on legal certainty should be next on the agenda.

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