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TO:

Adv S P Holomisa, MP
Mr. B A Mnguni, MP
Co-Chairpersons of the Constitutional Review
Committee

COPY:

Secretary to Parliament

DATE:

20 May 2013

SUBJECT:

Submission: Chairperson of the NCOP
Section 73(4) of the Constitution

LEGAL ADVISER:

Adv A Gordon

COMMITTEE REFERENCE:

8/12 (additional submission dated 25 April 2013)

REFERENCE NUMBER:

134 /13



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MEMORANDUM

To: Adv S P Holomisa, MP
Mr. B A Mnguni, MP
Co-Chairpersons of the Constitutional Review Committee

Copy: Secretary to Parliament

From: Constitutional and Legal Services Office
Adv A Gordon

Date: 20 May 2013

Subject: Submission: Chairperson of the NCOP
Section 73(4) of the Constitution

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1. During 2012 a letter was sent by the Chairperson of the National Council of Provinces (NCOP) to the Joint Constitutional Review Committee (JCRC) which indicated an intention to request that section 73(4) of the Constitution be amended to allow Cabinet members and Deputy Ministers to introduce Bills in the NCOP.
 2. The Chairperson of the NCOP motivates for an amendment to section 73(4) on the basis that majority of the 76(3) Bills are introduced in the NA because Cabinet members or Deputy Ministers may not introduce Bills in the NCOP. Also, that because section 76(3) Bills affect provinces, these Bills should be introduced in the NCOP in order to allow the NCOP maximum time to process these Bills.
 3. The above mentioned letter was amplified on 25 April 2013 and contains a proposed draft amendment to section 73(4) of the Constitution.
 4. The proposed amendment is as follows:

"73(4) [Only] Except where the Constitution provides otherwise, a member, or committee of the National Council of Provinces, or a Cabinet member or a Deputy Minister may introduce a Bill in the Council.

Advice:

The Constitutional Design of the NCOP

5. In terms of section 42(1) of the Constitution, Parliament consists of the National Assembly (NA) and the NCOP. Section 42(2) prescribes that the NA and NCOP participate in the legislative process as set out in the Constitution. Section 42(3) indicates that the NA is elected to represent the people and to ensure government by the people under the Constitution while section 42(4) indicates that the NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. The NCOP carries out this function by participating in the national legislative process.
6. In terms of section 44(1)(b)(i) to (iii) read with section 68(a) of the Constitution, the NCOP may participate in amending the Constitution, pass legislation which falls within the 4th Schedule to the Constitution, and consider any other national legislation. The legislative competence by the NCOP is therefore regulated by the procedure set out in section 74, section 76 and section 75 respectively.
7. Section 68(b) of the Constitution enhances the legislative function of the NCOP by providing that the NCOP may initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.
8. In terms of section 60(1) of the Constitution, the NCOP is comprised of a single delegation from each province consisting of ten delegates each. Six of these delegates become permanent delegates to the NCOP (section 60(2)(a)(ii)) and are considered to be the members of the NCOP in terms of section 62(2) read with section 62(6) of the Constitution.
9. Section 73(4) provides that only a member or committee of the NCOP may introduce a Bill in the NCOP. Section 73(3) limits the Bills that may be introduced in the NCOP to the Bills mentioned in section 76(3) of the Constitution. If a Bill is introduced in the NCOP it follows the procedure contemplated in section 76(2) of the Constitution.
10. The design of section 76(2) of the Constitution presupposes that the NCOP is the first House of Parliament dealing with a Bill to which section 76(3) of the Constitution refers.
11. It is noteworthy that the Constitution makes provision for Bills that affect provinces to be introduced in the NCOP but places a restriction on who may introduce a Bill in the NCOP. This is essentially the focal point of the submission by the Chairperson of the NCOP.

The Constitutional Legislative Power

12. The Constitution sets out the legislative power of the NA and NCOP in sections 55 and 68 respectively. Section 55(1)(b) provides as follows:

- "(1) In exercising its legislative power, the National Assembly may-
- (a) ...
 - (b) initiate or prepare legislation, except money Bills."

Section 68(b) provides as follows:

"In exercising its legislative power, the National Council of Provinces may-

(a) ...

(b) Initiate and prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills."

13. The matter concerning the "initiation" and "preparation" of Bills in the NA was decided by the Constitutional Court in *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* (CCT 16/12) [2012] ZACC; 2012(6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (9 October 2013). Whilst the Constitutional Court judgment turns on the constitutional provisions that relate to the NA the judgment is similarly applicable to the NCOP for the purpose of interpretation. It is a well established principle of interpretation that where the same words are used in the same statute that the words should be given the same meaning unless the context indicates otherwise.
14. At paragraph 51 of the above mentioned Constitutional Court judgment the court directs that "the *interplay between the initiation and preparation powers and the power to introduce a Bill*" must be determined. In doing so, the Constitutional Court turned to section 73(2) of the Constitution. This section, which relates to the NA, provides as follows:

"Only a Cabinet member of a Deputy Minister, or a member of committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matter may introduce the following Bills in the Assembly:

 - (a) a money Bill; or
 - (b) a Bill which provides for the legislation envisaged in section 214."
15. The Constitutional Court at paragraph 53, in interpreting the word "introduce" referred to the Shorter Oxford Dictionary which defines the word "introduce" as "*Bring, put or lead into or in*". It may also be construed to mean "announce" or "*bring to the notice or cognizance of a person or group; bring a bill or proposal before Parliament*." At paragraph 55 the Constitutional Court went on to say that,

"It is not the purpose of the Constitution to give the word "introduce" a meaning that is so broad as to accommodate the initiation or preparation process that must ordinarily precede the unveiling of the Bill in the Assembly. Had this been so, provision would not have been made in section 55 and 85 for the power to handle these preliminary stages of the legislative process, by even some of those functionaries who are already empowered by section 73(2) to introduce a Bill. Besides, "initiate" or "prepare" in section 55(1)(b) should be given the same meaning as in section 85(2)(d) and "introduce" in section 73(2) should be construed differently. As noted by this Court in a different context, "[t]hese are not idle words randomly inserted into the Constitution. They must be given meaning."
16. Drawing from the above excerpt, the meaning of "initiate" and "prepare" in section 68(b) of the Constitution should be given the same meaning as "initiate" and "prepare" in section 55(1)(b) of the Constitution and, the word "introduce" in

section 73(2) of the Constitution should be given the same meaning as the word "introduce" in section 73(4) of the Constitution.


17. "Introduction" the Court stated was an advanced stage of the law-making process which only happens after the ground work of initiating and preparing has taken place. In terms of the Constitution, the Executive Authority of the Republic, i.e. the President, assisted by Cabinet members [section 85(2)(d)], the NA and its members or committees [section 55(1)(b)] and the NCOP and its members or committees [section 68(b)] may initiate and prepare legislation.
18. However, the introduction of Bills may only be undertaken by Cabinet members, Deputy Ministers, members or committees of the NA in terms of section 73(2) or by members or committees of the NCOP in terms of section 73(4) of the Constitution. This means that the "announcement" or "bringing" of a Bill (see paragraph 13 above) to a House of Parliament may only occur by the functionaries mentioned in this paragraph.
19. The design of the Constitution affords Cabinet members and Deputy Ministers the power to introduce Bills in the NA but not in the NCOP.
20. It is trite that the only members of Cabinet who are not members of the NA are, the President of the Republic [section 87 of the Constitution] and the two Ministers selected in terms of section 91(3)(c). The two Deputy Ministers selected in terms of section 93(1)(b) of the Constitution are also not members of the NA. However, these persons are empowered to introduce Bills in the NA because section 73(2) extends such a competence to them.
21. The question therefore turns to whether the power to introduce section 76(3) Bills in the NCOP should be extended to Cabinet members and Deputy Ministers.
22. The NCOP represents the provinces in the national sphere of government. In this respect, the Constitution envisages a relationship between the Cabinet and Deputy Ministers even though they are not members of the NCOP. Section 66(1) of the Constitution allows Cabinet members and Deputy Ministers of speak in the NCOP but they may not vote. They may also be required to attend meetings of the NCOP or its committees (section 66(2)). Clearly this design fosters an environment for provinces to participate in the national sphere of government.
23. Cognizance should also be taken of the fact that section 92(2) of the Constitution instructs that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Section 92(2) does not limit the accountability of the Cabinet to the NA. The Constitutional design in this regard enhances the fact that the NCOP participates in the national sphere of government.
24. Therefore, the question arises as to whether the JCRC considers it cogent to extend the introduction of Bills in the NCOP to Cabinet members and Deputy Ministers. This would mean that a policy decision would have to be taken to deviate from the current position in that the introduction of Bills in the NCOP is restricted to its members or its committees.
25. The introduction of section 76(3) Bills in the NCOP is already provided for, but such introduction is restricted to its members or committees. If Cabinet members or Deputy Ministers are afforded the Constitutional competence to introduce

section 76(3) Bills in the NCOP, it will not require a new legislative process as the legislative process contemplated in section 76(2) of the Constitution will be followed.

26. It is therefore my considered opinion that it falls within the purview of the JCRC to decide whether to extend the power to a Cabinet member or Deputy Minister to "announce" or to "bring" a Bill to the NCOP.

The Proposed Amendment

27. Should the JCRC consider to proceed with the policy position to extend the competence to introduce section 76(3) Bills in the NCOP to Cabinet members and Deputy Ministers, I am on the opinion that the words "Except where the Constitution provides otherwise" (in the proposed draft), is unnecessary as the introduction of Bills in the NCOP is not provided for in any other section of the Constitution.
28. Further, that the word "only" should remain as this gives a clear indication as to who the competent functionaries are who may introduce a Bill in the NCOP. This would also conform to section 73(2) of the Constitution and Joint Rule 161(a). Joint Rule 161(a) states that a Bill is Constitutionally out of order if it is introduced by an unauthorized person or committee.
29. In conclusion, I am not aware of a legal impediment which prevents the concept of the proposed amendment from finding impetus.


ADV A J GORDON
LEGAL ADVISER