



Financial and Fiscal Commission's Submission on the Financial Management of Parliament Amendment Bill of 2013

For an Equitable Sharing of National Revenue

29 July 2013

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1. Introduction

This submission is made in terms of Section 3(1) (b) (ii) of the Financial and Fiscal Commission Act 99 of 1997 as amended, which provides that the Commission acts as a consultative body for and makes recommendations and gives advice to organs of state in the national, provincial and local spheres of government on financial and fiscal matters.

2. Background

By March 2012 five provinces (excluding Limpopo) had already enacted their own Financial Management of Provincial Legislatures Acts. However, in a Constitutional Court case between the Premier of Limpopo province as applicant and speaker of the Limpopo Provincial Legislature as the first respondent (and the parliamentary representatives, the Minister of Finance, and the Speakers of the five provincial legislatures as other respondents), Judge Khampepe ruled that the Financial Management of the Eastern Cape Provincial Legislature Act 3 of 2009, Free State Provincial Legislature Act 6 of 2009; Gauteng Provincial Legislature Act 7 of 2009, Mpumalanga Provincial Legislature Act 3 of 2010 and North West Provincial Legislature Management Act 3 of 2007 were inconsistent with the Constitution and therefore invalid. The Court's reason for declaring the provincial Acts inconsistent and constitutionally invalid was that while Parliament has plenary legislative powers, the legislative powers of the provinces are restricted and are set out in section 104 of the Constitution. The Court also indicated that the Financial Management of Provincial Legislatures Acts were neither Schedule 4 nor Schedule 5 matters. Thus it found that a provincial legislature may legislate on "its own financial management only if this is a matter that has been expressly assigned to it by national legislation or is a matter for which a provision of the Constitution envisages the enactment of provincial legislation" (Constitutional Court Case "CCT 94/10 [2012] ZACC 3). The Court made a decision that provinces do not have the authority to pass legislation with respect to their own financial management because "sections 2(e) and 3 of the Financial Management of Parliament Act (FMPA) read with Schedule 1 had *not* expressly assigned this power to them. The Limpopo Bill was accordingly declared unconstitutional" (Constitutional Court Case "CCT 94/10 [2012] ZACC 3).

To reduce the possibility of significant impacts that an immediate implementation of this ruling might have (i.e. both in terms of creating a gap in legislation and reducing good governance), the declaration of validity of this judgment was suspended for 18 months from its date of

application. The Court used section 172(1)¹ of the Constitution to allow all parties affected to consult and file a report by 9 September 2013. The length of the suspension was to allow Parliament and legislatures enough time to provide it with progress made on the steps taken to remedy the impact of any defect that can result from this judgment.

In accordance with National Assembly Rule 241, notice was given by the Standing Committee on Finance in July 2013 on its intention to introduce the FMPA Bill.

3. Commission comments on the Financial Management of Parliament Amendment (FMPA) Bill of 2013

The objects of the 2013 Financial Management of Parliament Amendment Bill are to amend the Financial Management of Parliament (FMP) Act, 2009, so as to deal with; **The financial management of provincial legislatures; Align the provisions dealing with the oversight mechanism with the Public Finance Management Act (for purposes of reporting and auditing); And to delete certain references to "provincial legislatures" in the Public Finance Management Act, of 1999, any inconsistencies that may occur between the Constitutional provisions and the FMP Act.**

The first proposed amendment to the Act is the inclusion of the word "provincial legislature," where before it only referred to "Parliament". This amendment means that the Bill now directly regulates provincial legislatures as well. To this effect, the title of the Bill is proposed to change to Financial Management of Parliament and Provincial Legislatures (FMPPL) Act, of 2009. The renaming and inclusion of the provincial sphere in this Bill implies that the Bill replaces other laws in provinces that precede it. As indicated in the introduction, this amendment is important, because it closes the gap that was brought about by the Constitutional Court ruling that provinces may not pass their own Financial Management Laws.

The Commission fully supports this decision, because it allows for Parliament to deal with provincial legislatures in terms of a uniform national legislation. The Commission's support is based on the Constitutional Court ruling in the case between the Premier of Limpopo Province and Limpopo Provincial Legislature. Another welcome amendment is the insertion of the word "Accounting Officer" where initially the Act was only making reference to the Executive Authority. This change will help to regulate instances where government entities especially at a

¹Section 172(1) of the Constitution provides for the Court to make any just and equitable order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

provincial level may be led by Accounting Officers who may be both Executive Authority and Accounting Officers.

The Commission is of the opinion that there are other areas which may still need further clarity and consideration. These are as follows:

- With respect to enforcement of compliance with the norms of the FMP Act, it is not clear what organ of state should be charged with ensuring compliance where provincial legislatures continuously and/or materially fail to comply with its requirements. Whereas previously, provincial legislatures fell under the PFMA and national treasury regulations, in the Bill the provincial legislature financial management norms and standards now fall under the FMP Act. Because in the case of the PFMA, the provincial treasuries and National Treasury could intervene following acts of non-compliance with financial norms and standards (for instance through section 100 of the Constitution), the relocation of the norms and standards within the FMP Act means that there is a need for the clarification of roles and responsibilities for monitoring and enforcement of these norms within the FMP Act.
- The Bill is silent on who should provide regular reviews of regulations, interpretations of provincial norms and standards and adjudication of disputes. For instance programme performance information of provincial legislatures is audited by the Auditor General in audits of predetermined objectives and the relevant regulations for provincial legislatures may need to be reviewed (to ensure a balance between minimum legislatures sector requirements and legislature-specific information). Provincial legislatures also have to align with Provincial Growth and Development Strategies and generally with provincial consolidated financial statements. It is not clear in this legislation what the hierarchy of regulation is, especially with regard to province specific guidelines issued by provincial treasuries, and how possible disputes arising will be dealt with. While the oversight mechanisms within Parliament and Provincial Legislatures have the responsibility to oversee compliance with the norms and standards of this Act within their individual institutions, it is not clear whether they have the responsibility to coordinate the development and review of norms across the legislatures sector as a whole.
- It is also the Commission's view that the review of the PFMA should also be aligned with the review of the FMP Act). While the PFMA is an older legislation and precedes the FMP Act and while the PFMA does in places regulate provincial legislatures, the extent to which it

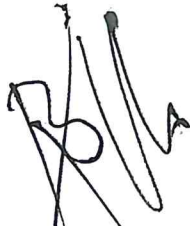
does so is not comparable with that of the provincial statutes. The PFMA has wider influence across the legislatures sector as a whole and goes beyond Parliament and provincial legislatures, provincial statutes are more localised in terms of their jurisdiction of influence. For example a provincial specific Act such as the North West Provincial Legislature Management Amendment Bill includes provisions that regulate the internal arrangements, proceedings and procedures of its legislature with the North West (such as creating a Legislature Service, defining the roles, functions and responsibilities of the Speaker, the Members, and the Secretary; and establishing a framework for the administration of the Legislature in general). It may not be applicable to other provinces and thus not have as much influence on the PFMA.

- Because some of FMPL Acts such as the North West dealt with issues beyond financial management of legislatures, the Commission is of the view that there should be an inclusion of a clause in the Bill to deal with such matters contained in the North West's FMPL Act. This will prevent the need to pass a separate legislation for the province. Such an inclusion should not, however, be made compulsory to all other provinces, as it may not be applicable to them.
- With respect to regular reviews and updates of information, the Commission suggests that consideration be given to two possible broad options. Firstly, that under the review of the PFMA section 65 and section 66, the Executive Authority of Parliament as the custodian for setting regulations for both national Parliament and the provincial legislatures, should take responsibility for updating regulations for the legislatures sector and coordinating with National Treasury on PFMA regulation. Secondly, Parliament's regulatory responsibilities in these sections can be restricted to Parliament itself and consider other mechanisms for the updating and coordination of provincial legislature norms.
- Chapter 2 section 4 (2) of the Traditional Leadership and Governance Framework (TLGF) Act, of 2003, deals with functions of Traditional Councils stating that "an applicable provincial legislation must regulate the performance of functions by a traditional council by at least requiring a traditional council to: (a) keep proper records; (b) have its financial statements audited; (c) disclose the receipt of gifts; and (d) adhere to the code of conduct. Because by implication this applicable provincial legislation imply the FMPL Act, the Traditional Leadership and Governance Framework Act 2003 needs to be amended to make reference to the FMPL Bill, where it was only referring to an "applicable provincial legislation". The other legislation is the National House of Traditional Leaders (NHTL) Act, 22

of 2009, which under section 16 (b) and (e) anticipates an improvement in national legislation to support and strengthen the capacity of the House of Traditional leaders to assist them to fulfill their functions in terms of their finances and administrative systems.

Having considered most of the issues regarding the purpose of this amendment, the Commission supports the enactment of the Bill into an Act. Furthermore, it is the Commission's view that the above matters if considered may be important in ensuring that the FMPA Bill attains its Objects.

For and on behalf of the Financial and Fiscal Commission

A handwritten signature in black ink, appearing to be 'Bongani Khumalo', written over a horizontal line.

Bongani Khumalo (Mr.)

Chairperson/CE

29 July 2013