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Mr TA Mufamadi, MP
Chairperson: Standing Committee on Finance
Parliament of the RSA
PO Box 15
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Dear Mr Mufamadi

SUBMISSION ON PROPOSED AMENDMENTS TO THE FMPA

Introduction

1. On 22 March 2012 the Constitutional Court, in *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature*, through Khampepe J, found the following provincial Acts inconsistent with the Constitution and invalid:
 - a. Financial Management of the Eastern Cape Provincial Legislature Act 3 of 2009;
 - b. Financial Management of the Free State Provincial Legislature Act 6 of 2009;
 - c. Financial Management of the Gauteng Provincial Legislature Act 7 of 2009;
 - d. Financial Management of the Mpumalanga Provincial Legislature Act 3 of 2010; and
 - e. North West Provincial Legislature Management Act 3 of 2007.
2. The declarations of invalidity were suspended for 18 months from the date of the judgment and the parties were ordered to file a report by Monday 9 September 2013 informing the Court what steps have been taken to remedy the defect.
3. On 20 September 2012 the National Assembly referred the Financial Management of Parliament Act, 2009 (Act No. 10 of 2009) (FMPA) to the Standing Committee on Finance to review the Act with a view to introducing amending legislation if necessary. The resolution noted technical challenges with implementation of certain provisions of the Act and instructed the Standing Committee to evaluate the application of Act, including those provisions relating to authority of provinces to enact similar legislation and timeframes associated with various reporting mechanisms. In fulfilling this mandate, the resolution required the Standing Committee to take account of work of the Speakers' Forum and to report to the Assembly by 22 November 2012.
4. The Standing Committee of Finance reported on its progress on Tuesday, 20 November 2012 (see ATC, p. 4769). The draft Financial Management of Parliament

Amendment Bill (draft Bill) was published in the *Government Gazette* No. 36631, 3 July 2013

Proposed amendments

5. The following amendments are proposed in the draft Bill to give effect to the resolution of the Assembly:
 - a. including a new section to make the Act applicable to provincial legislatures and to give effect to the order of the Constitutional Court;
 - b. amending the provisions relating to the oversight mechanism to allow the present Parliamentary Oversight Authority to fulfill the functions of the oversight mechanism (section 4);
 - c. inserting provisions to clarify the procedure for dealing with Parliament's adjustments budget in respect of its own funds (section 17);
 - d. amending the provisions relating to the tabling of the annual report by the Executive Authority (sections 58, 59, 60 & 62); and
 - e. consequential amendments to the Public Finance Management Act 1 of 1999 (PFMA) relating to the application of that Act to provincial legislatures.
6. The purpose of this submission is to clarify the first two sets of amendments. The latter three sets of proposed amendments are aimed essentially at making the FMPA consistent with the PFMA.
7. This submission will also comment on the submission from the Office of the Auditor-General.

Giving effect to the order of the Constitutional Court in *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature*

8. Following the decision by the Speakers' Forum that the financial management of provincial legislatures will be provided for in an amendment to the Financial Management of Parliament Act, instead of assigning such legislative competence to the provincial legislatures, proposals were drafted to include the necessary definitions and substantive provisions in the Act similar to Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004). The proposal includes the omission of the provisions setting norms and standards for provincial legislatures as these are of no effect since the decision of the Constitutional Court.
9. The proposed amendments to make the FMPA applicable to provincial legislatures take account of input from the Legal Advisers' Forum and opinion from Parliament's counsel in the *Limpopo* matter. Minor comments were received from provincial legislatures during the public participation process before the Standing Committee on

Finance. As the draft Bill is proposed to follow the legislative procedure provided for in section 76(1) of the Constitution, it is expected that provincial legislatures will participate more during the mandating process before the Select Committee on Finance in the NCOP.

10. On the initial advice from counsel, the report required by the Constitutional Court order should indicate the following:
 - a. What steps have been taken to remedy the defect, e.g. procedures in the Committees, public consultation, consultation with Minister of Finance concerning amendments to the Public Finance Management Act, NCOP process, provincial mandates, public consultation, etc. depending on the stage of the process by September 2013.
 - b. An affidavit, if the process is still ongoing, in which it is explained why the process has not been completed and what further steps are required and what the anticipated date of completion will be.
 - c. A request for leave from the Chief Justice to file a further report once the process has been completed and to specify a date by which that will be done.
11. However, the Speaker's Office was concerned that the amendments incorporating the provincial legislatures into the FMPA would not be passed before the provincial legislation in question was rendered invalid, and requested advice from counsel on how to proceed.
12. Counsel then advised that in light of Parliament not being able to pass the amendment incorporating the provinces into the FMPA before the order of invalidity becomes effective, that a formal application be made to the Constitutional Court requesting an extension of the suspension of the invalidity. In light of the jurisprudence of the Constitutional Court, counsel advised that an application be made as a matter of urgency. The Executive Authority met to discuss the advice of counsel and it was agreed that an application be made as a matter of urgency.
13. The State Attorney have since been approached to brief counsel on making an application to the Constitutional Court to extend the suspension of the order of invalidity until the amendments to the FMPA come into effect.

Oversight mechanism

14. The Constitution envisages a system of democratic government to ensure accountability, responsiveness and openness. Government is constituted into national, provincial and local spheres. Parliament is the legislative authority in the national sphere of government.
15. Broadly, all organs of state in the national sphere of government are accountable to Parliament or a House of Parliament. Parliament or the relevant House must maintain

oversight of the exercise of national executive power, including the financial management of public funds. Section 55 of the Constitution requires specifically that the National Assembly provide for mechanisms to ensure that all organs of state in the national sphere of government are accountable to it.

16. Parliament is accountable for the financial management of its funds. Section 4 of the FMPA requires that an oversight mechanism must maintain oversight of the financial management of Parliament. Pursuant hereto, the FMPA requires the referral of the annual report, including the audited financial statements and the audit report on those statements, to the oversight mechanism for consideration. The FMPA further provides that the oversight mechanism may require the Accounting Officer or any other official of Parliament to appear before it.
17. The oversight mechanism has not yet been established as required by the FMPA. In response to queries from the Auditor General in this regard, Parliament has responded that the oversight mechanism will be established pending the finalisation of the review of the FMPA. This review, as indicated in the resolution of the National Assembly on 20 September 2012, is to address a number of technical challenges that have become apparent with the implementation of certain provisions of the Act, amongst others. Foremost of the technical challenges is to align the Act with the governance structures of Parliament, which will be discussed below.
18. The oversight mechanism contemplated in the FMPA is in effect a joint committee with the same powers and functions of committees envisaged in the Constitution. Representation must be in accordance with the Joint Rules, but excludes the Speaker and Deputy Speaker of the National Assembly (NA) and the Chairperson and permanent Deputy Chairperson of the National Council of Provinces (NCOP). The reason for excluding the Speaker and the Chairperson was possibly to prevent a conflict of interest as the aforementioned positions are mandated to perform functions as the Executive Authority of Parliament. The oversight mechanism must consider and report on these executives functions, amongst others.
19. The FMPA provides that additional functions may be ascribed to the oversight mechanism by the Act or the Rules of Parliament. The draft Bill provides that the oversight mechanism must consider drafts of the strategic plan, annual performance plan and the budget. It is in respect of such additional functions pertaining to planning and budgeting, amongst others, that the draft Bill proposes to amend the provision that excludes the Speaker and Deputy Speaker of the NA and the Chairperson and permanent Deputy Chairperson of the NCOP.

Amendment of the composition of the oversight mechanism

20. Clause 6 of the draft Bill proposes to delete the exception preventing the Speaker and Deputy Speaker of the NA and the Chairperson and permanent Deputy

Chairperson of the NCOP from being members of the oversight mechanism. In other words, the effect of the amendment is that representation on the oversight mechanism must be in accordance with the Joint Rules without exception. This would allow the formulation of Joint Rules that allow representation on the oversight mechanism by any Member of Parliament.

21. In respect of functions pertaining to financial planning and budgeting, the FMPA requires the Accounting Officer to submit drafts of the strategic plan, annual performance plan and budget to the Executive Authority. The present practice is for the Executive Authority to submit these drafts to the Parliamentary Oversight Authority (POA), which is chaired jointly by the Speaker and Chairperson.
22. To ensure a more efficient governance model for Parliament, the functions of the POA and the oversight mechanism should be rationalised. One option is to restructure the POA to fulfil the functions of the oversight mechanism in accordance with the FMPA. As indicated above, the draft Bill will require the oversight mechanism to fulfil the function of considering drafts of the strategic plan, annual performance plan and budget. Amending the provision for representation on the oversight mechanism facilitates this aim.

Conflict of interest

23. The proposed amendment to representation on the oversight mechanism – including the possibility that members of the Executive Authority may serve on or preside over it – must be considered in light of Schedule 2 to the FMPA. Schedule 2, which is enforceable as part of the Act, provides that members of the Executive Authority must perform their official functions and duties in a way that will bear the closest public scrutiny, "an obligation that is not discharged by simply acting within the law." Items (3)(b) and (c) of Schedule 2 provide that members of the Executive Authority must "perform their duties and exercise their powers with honesty and diligence and in accordance with the highest ethical standards [and] act in all respects in a manner that is consistent with the integrity of their office[.]"
24. The abovementioned provisions have the effect of regulating representation on the oversight mechanism by members of the Executive Authority in situations that would amount to a conflict of interest. The Joint Rules that provide for representation on the oversight mechanism must comply with the provisions of the FMPA, including those contained in Schedule 2.
25. During deliberations by the Standing Committee on Finance on clause 6 of the draft Bill, the issue was raised of including a specific provision to ensure that the Joint Rules giving effect to the representation on the oversight mechanism take account of the possibility of a conflict of interest. While this is an option for the Standing

Committee on Finance to consider, the provisions of Schedule 2 have the same effect.

Submission from the Office of the Auditor-General

26. Of the comments submitted by the Office of the Auditor-General (AG), the proposal to include that a reference in clause 5 of the draft Bill to section 30 of the PFMA should be construed as a reference to section 31, which addresses the issue of the provincial adjustments budget, is supported. The draft Bill should include this comment.
27. The other most relevant comments from the Office of the Auditor-General mostly pertain to including references to "performance management" in the Long Title, the Preamble, the Objects of the Act and in sections 48(1)(c)(iii), 58(3), 59 and 60.
28. The Long Title and Preamble are broad statements of the purpose of the Act. The issue of performance management / performance plan is addressed in the FMPA in sections 8, 10(4)(e), 13, 14(2)(e), 15, 17, 52, 53 and 55. Performance management is regulated in the FMPA pursuant to the objects as stated in the Long Title, the Preamble and the Objects clause (section 2). Performance management is a tool to achieve the objects of the Act; it is not an object in itself of the legislation.
29. It may also be mentioned, that section 55 deals with the content of the annual report. Subsection (2)(b) provides specifically that the purpose of the annual report is to provide a report on the performance of Parliament's administration. Subsection (3) provides that the annual report must be based on the annual performance plan and must contain an assessment of the performance of Parliament during the financial year against the objectives and outcomes identified in Parliament's annual performance plan. Insofar as the submission from the AG requires inclusion of the performance assessment of Parliament in the annual report, this is included in the FMPA.
30. Specifically, section 48(1)(c)(iii) requires the audit committee of Parliament to comment on "any reports compiled by the Accounting Officer in terms of this Act." It would thus include quarterly performance reports compiled in terms of section 52; and the mid-year performance assessment compiled in terms of section 53. These performance reports should include compliance with legislation as a matter of principle and governance. The submission from the AG is therefore included in a way in the Act.
31. The proposal from the AG to amend section 58(3) of the FMPA to include a reference to the annual performance report must be considered in light of section 40(2) of the PFMA. Section 58 is based on section 40(2) of the PFMA. There is no reference to "reporting on performance against pre-determined objectives" in section 40(2) of the

PFMA. The issue of auditing performance information should be treated the same whether in terms of the PFMA or the FMPA as it is a question of value for money. Section 4 of the Public Audit Act, 2004, sets out the functions of the Auditor General. If there is a discrepancy between the fulfilling these functions in respect of departments and institutions subject to the PFMA and Parliament and provincial legislatures in terms of the FMPA, this could be resolved through regulations to either the Public Audit Act or the FMPA. Section 65(1)(r) of the FMPA authorises the making of regulations to facilitate the application of the Act. This includes the issue of uniformity.

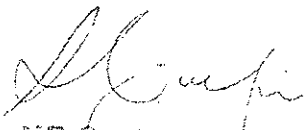
32. It appears that the issue concerns a legal basis to audit Parliament's performance information. Such basis exists as indicated above. Furthermore, in the interest of uniformity, the FMPA should correspond to the PFMA. Be that as it may, performance information must be audited and the solution is that Parliament must either make such regulations/policy or that the Executive Authority of Parliament may require such audit in terms of section 66 of the FMPA, where the FMPA does not provide a basis for the AG to audit Parliament's performance information. This would be consistent with the solution in the PFMA. Section 41 refers to regulations or requirement of the relevant treasury or the AG as a basis to submit information to the AG that is not in the PFMA.

Conclusion

33. The proposed amendments will give effect to the order of the Constitutional Court to regulate the financial management of provincial legislatures. Processes to respond to the report required by the Constitutional Court and to apply for an extension of the suspension of the order of invalidity pertaining to various provincial Acts have been initiated.
34. In addressing technical challenges to the implementation of the FMPA, specifically aligning the establishment of the oversight mechanism contemplated in the FMPA with the existing governance structures of Parliament, namely the POA, the draft Bill proposes giving additional functions relating to planning and budgeting to the oversight mechanism. Pursuant hereto, the draft Bill proposes an amendment to representation on the POA which would allow any Member of Parliament, including members of the Executive Authority, to be members of or even preside over the oversight mechanism.
35. Representation must be in accordance with the Joint Rules. Therefore the Joint Rules will have to provide if there is a role for the members of the Executive Authority on the oversight mechanism. The NA and NCOP, in considering the report from the Joint Rules Committee, will decide whether members of the Executive should be represented on the oversight mechanism. Even so, the Joint Rules must comply with the FMPA, including Schedule 2.

36. Situations where there is a conflict of interest between the functions of the oversight mechanism considering a decision taken by a member of the Executive Authority, who is represented on the oversight mechanism, would be resolved through the application of the relevant Joint Rules. In addition, a proposal may be made to the Standing Committee on Finance to consider including a provision in the draft Bill that would require the Joint Rules giving effect to representation on the oversight mechanism, to provide that any member of oversight mechanism must declare a possible conflict of interest. The oversight mechanism would be authorised to decide whether a conflict of interest is material and how to resolve it though replacing the member, for example.
37. Performance management and reporting and auditing performance information is already provided for in FMPPA and if a basis for a specific audit of performance information is necessary, such basis should be provided by the relevant regulations or instructions from the Executive Authority, acting as Parliament's treasury, as is the case with government departments.

Yours faithfully



MB Coetzee
Secretary to Parliament