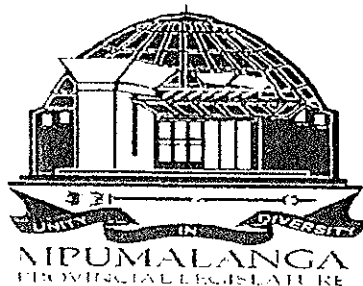


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Office of the Chairperson

Portfolio Committee on Agriculture, Rural Development and Land Administration; Economic Development, Environment and Tourism

Enquiries: Hon RC Mahlobogoane

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Tel. No: 013 766 1037/ 1402

NEGOTIATING MANDATE

To : The Chairperson: Select Committee on Land and Environmental Affairs

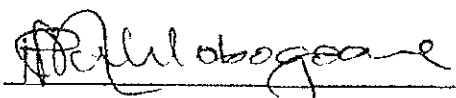
Name of the Bill : National Environmental Management: Air Quality Amendment Bill

Number of the Bill : [B27B - 2013]

Date of Deliberation : 14 February 2014

Vote of the Legislature :

The Portfolio Committee on Agriculture, Rural Development and Land Administration; Economic Development, Environment and Tourism (the Committee) supports the objects of the National Environmental Management: Air Quality Amendment Bill [B27B - 2013] and hereby confers on the permanent delegate representing the Province of Mpumalanga in the National Council of Provinces, the mandate to negotiate in favour of the Bill.



HON RC MAHLOBOGOANE (MPL)

14/02/2014

DATE

CHAIRPERSON: PORTFOLIO COMMITTEE ON
AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION;
ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM

REPORT OF THE PORTFOLIO COMMITTEE ON AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION; ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM ON THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY AMENDMENT BILL [B27B - 2013]

1. INTRODUCTION

The National Environmental Management: Air Quality Amendment Bill [B27B – 2013] (the Bill) was tabled in the Mpumalanga Provincial Legislature by the Chairperson of the National Council of Provinces (NCOP) on 06 November 2013. The Honourable Speaker of the Mpumalanga Provincial Legislature subsequently referred the Bill to the Portfolio Committee on Agriculture, Rural Development and Land Administration; Economic Development, Environment and Tourism (the Committee) for further processing and report back to the Legislature, in accordance with Rule 185 of the Rules and Orders of the Mpumalanga Provincial Legislature.

The Committee was tasked to provide the NCOP with a negotiating mandate by 18 February 2014 and a final mandate by 25 February 2014, which would enable the delegation representing the Province of Mpumalanga in the NCOP to negotiate in relation to the Bill.

2. BACKGROUND

The National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) exists to: -

- (a) Protect the environment by providing reasonable measures for -
 - (i) the protection and enhancement of the quality of air in the Republic;
 - (ii) the prevention of air pollution and ecological degradation; and
 - (iii) securing ecologically sustainable development while promoting justifiable economic and social development; and
- (b) Give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.

The proposed amendments to the Act as contemplated in the National Environmental Management (NEM): Air Quality Amendment Bill, 2013 (the Bill) seek to address certain challenges that have been negatively impacting upon the effective and efficient implementation of the NEM: Air Quality Act of 2004 (the Act) from as early as 2005. Challenges were identified in the implementation of the Act, specifically the atmospheric emission licensing system.

3. OBJECTS OF THE BILL

The NEM: Air Quality Amendment Bill, 2013 will thus amend certain provisions under the NEM: Air Quality Act of 2004, so as **to provide for the further alignment with the provisions of the National Environmental Management Act, 1998** (Act No. 107 of 1998). The Bill will ensure that regulatory gaps within the atmospheric emission licensing system are closed and will also delete certain obsolete provisions.

4. METHOD OF WORK

The Committee interacted with the Bill as follows:

- a. The Honourable Speaker referred the Bill to the Committee on 13 November 2013 for consideration and report back to the House.
- b. On 07 February 2014, the Committee was briefed on the Bill by Hon MP Sibande, the permanent delegate representing Mpumalanga in the NCOP and who sits on the Select Committee on Land and Environmental Affairs. Provincial and national stakeholder departments were invited to attend the briefing.
- c. The Committee resolved in terms of Section 118 (1) of the Constitution to conduct public hearings on the Bill in all three districts of the Province. Invitations to the public hearings were issued to the Speakers of the three targeted local municipalities, which included open invitations to all councillors, ward committees, CDWs and officials involved in pollution and environmental matters.
- d. The targeted communities and invited stakeholders were engaged on the crucial matters relating to the Bill. All stakeholders, including those who did not attend the public hearing itself, were requested to submit their written comments on the Bill before 12 February 2014.

- e. Subsequently the Committee met on 14 February 2014 to consider its draft report and negotiating mandate on the Bill.

5. BRIEFING BY THE NCOP

- a. Hon Sibande was accompanied by a senior official from the Department of Environmental Affairs (DEA) namely, Mr Sibusiso Shabalala (Director: Law Reform) who made a presentation to the Committee on the proposed amendments of the Bill.
- b. Provincial stakeholders who were invited to the briefing session and public hearings:
 - ➔ Department of Economic Development, Environment and Tourism (DEDET);
 - ➔ Mpumalanga Economic Growth Agency (MEGA);
 - ➔ South African Local Government Association (SALGA);
 - ➔ Mpumalanga House of Traditional Leaders (MHTL).

5.1. Political overview of the Bill by the Permanent Delegate

Hon Sibande explained the benefits of the proposed amendments, emphasizing that stricter laws are needed to combat pollution. The Committee agreed with the principles of the Bill and with the streamlining of the legislation to ensure that the air quality in the Province is improved.

5.2. Presentation by the Department of Environmental Affairs

After the overview by the Honourable Sibande, Mr Sibusiso Shabalala from the DEA made an informative presentation on the background and objectives of the Bill, the implications of implementing the Bill once it is passed, as well as a clause by clause analysis of the Bill.

5.3. Interaction during the briefing

The following comments, concerns and clarity-seeking questions were raised by the Committee:

- a. The Committee welcomed the overview by Hon Sibande and the presentation by the DEA, acknowledging that the proposed amendments will strengthen the management of the air quality in the Province.
- b. The Committee discussed the fact that air pollution is a major concern in the Province and the country at large. The mining industry, power stations and other industrial companies in

the manufacturing sector need to be strictly regulated and penalised by the legislation governing their operations.

- c. Illegal dumping sites in the Province were also discussed and the inadequate management of these sites were raised as a serious concern by the Committee. An example was cited of the environmental hazard that is caused when tyres dumped at these sites are set alight. The Committee urged the provincial department to look into this matter and fast track the current programmes for pollution and waste management, as well as strengthen relations with the municipalities to ensure that both spheres of government work together to find a solution to the problem of illegal dumping sites in the Province.
- d. A concern was also raised about the health risks for communities, in particular children, who are exposed to extremely high volume of atmospheric emissions in areas such as Witbank, Secunda and Middelburg.
- e. The Committee noted that there were no foreseeable financial implications for the Province in relation to the Bill, as the amendments it sought to bring about to the principal NEM: Air Quality Act of 2004 were not of an implementing nature but rather of a regulatory nature. The Committee cautioned the Department of Economic Development, Environment and Tourism (DEDET) about potential unfunded mandates for the Province.
- f. Another important issue raised in the discussion was the provision of environmental education programmes for the public, in particular, air pollution. The Committee urged the provincial and national departments responsible for environmental affairs in the Province to enhance the rollout of educational programmes in communities across the Province.

6. PUBLIC CONSULTATION PROCESS

6.1. Public Education and Public Hearings

The PPPS (Public Participation and Petitions Section) of the Legislature facilitated pre-public hearing educational workshops on the Bill on 06 February 2014 in all three districts. Members of the targeted communities and affected stakeholders in attendance were educated about the legislative processes of the Legislature and the content of the Bill.

- a. For the public hearings on 07 February 2014, the following stakeholders were invited to attend and to submit written comments on the Bill:

- SASOL
- SAPPI
- TSB
- ESKOM
- WESSA Lowveld (Wildlife and Environment Society of South Africa)
- Kruger Lowveld Chamber of Business Tourism (KLCBT)
- South African Local Government Association (SALGA)
- The National African Federated Chamber of Commerce and Industry (NAFCOC)
- National Economic Development and Labour Council (NEDLAC)

- b. The scheduled public hearings were advertised in provincial and regional newspapers, together with a call for written submissions on the Bill, as follows:

- The Lowvelder (whole province) – 31 January 2014 and 04 February 2014;
- Mpumalanga News (whole province) – 30 January 2014;
- Khanyisa (Gert Sibande district) – 05 February 2014;
- Uthingo Mail (Nkangala district) – 05 February 2014.

- c. Relevant stakeholders were invited to submit written comments on the Bill on or before 12 February 2014. The Bill was uploaded onto the Mpumalanga Provincial Legislature website at www.mpuleg.gov.za; it was also sent electronically to targeted stakeholders.

The public hearings were held on 07 February 2014 from 09:00 – 13:00 as follows:

DISTRICT	VENUE
Ehlanzeni	Mbombela Local Municipality, Matsulu Community Hall, Matsulu
Gert Sibande	Msukaligwa Local Municipality, Wesselton Community Hall, Ermelo
Nkangala	Thembisile Hani Local Municipality, Vezubuhle Community Hall, Vezubuhle

6.1.1. Interaction with stakeholders during the public hearings

- a. The Committee Members who were deployed at the various public hearings explained the purpose of the public hearings, which was to involve the public in the legislative processes of the provincial legislature, as required by Section 118(1) of the Constitution of the Republic of South Africa.
- b. At each public hearing, the Honourable Members ensured that the stakeholders understood the main objectives of the Bill and that their questions were adequately responded to. A common concern from all the public hearings was the pollution caused by the activities of mining and industrial companies, with the resulting damage to the environment.
- c. In turn, the communities in each district were requested to express their opinion on the Bill; there were no objections to the Bill being passed. **Therefore, each district of the Province gave the Committee a mandate to support the Bill.**

Furthermore, the following details were recorded at each public hearing:

EHLANZENI DISTRICT: MBOMBELA LOCAL MUNICIPALITY, MATSULU

- a. Mr Mandla Mahlalela (Deputy Director: Air Quality) from the provincial Department of Economic Development, Environment and Tourism made a presentation on the Bill.
- b. The community welcomed the Bill and agreed the bill would address the challenges of air pollution. They also raised concerns about illegal dumping sites and hoped that something could be done about it. They agreed that companies and mines should be fined for damaging the environment.
- c. **After the discussions and clarity-seeking questions, the public accepted the Bill as presented. The Bill was supported by the public at Matsulu.**

GERT SIBANDE DISTRICT: WESSELTON COMMUNITY HALL, ERMELO, MSUKALIGWA LOCAL MUNICIPALITY

- a. Mr Fikile Theledi (Director: Air Quality Management) from the provincial Department of Economic Development, Environment and Tourism made a presentation on the Bill. He explained the content of the Bill to the public.

The majority of the community members present were Zulu speaking, hence Mr Theledi made his presentation in Zulu and in English. He explained the purpose of the Bill and highlighted the problematic areas that the Bill sought to address.

- b. The stakeholders at this venue raised questions in relation to the surrounding coal mining operations and the ensuing environmental health risks, as well as their daily household energy (coal) requirements. After discussions in response to the questions, the public agreed that fines for offending companies should be increased.
- c. **After the discussions and clarity-seeking questions, the public accepted the Bill as presented. The Bill was supported by the public at Ermelo.**

NKANGALA DISTRICT: VEZUBUHLE HALL AT VEZUBUHLE, THEMBISILE HANI LOCAL MUNICIPALITY

- a. Mr Joseph Mabuza (Director: Pollution and Waste Management) and Mr Sam Maluleka (Chief Director: Environmental Services) from the provincial Department of Economic Development, Environment and Tourism made a presentation on the Bill. Mr Mabuza explained the purpose and content of the Bill to the public, in Zulu and English, highlighting the problematic areas that the Bill sought to address.
- b. The DEDET officials present explained to the public the reason for the Minister to also be empowered to issue atmospheric emissions licences for activities listed in the principal NEM: Air Quality Management Act, 2004. The disadvantages of illegal mining were also highlighted.
- c. The overall view of the stakeholders in attendance at this venue was that the Bill was very important to their daily lives and that it had raised their awareness about the legislation governing air pollution issues and the protection of the natural environment.
- d. The public raised minor questions like whether they needed licences for small businesses requiring minor emissions, such as recycling.
- e. **After clarity-seeking questions and discussions, the public was satisfied that the amendments in the Bill were for the good of the Province and thus accepted the Bill as presented. The Bill it as supported by the public at Vezubuhle.**

6.1.2. Written comments on the Bill

The Committee received written comments on the Bill from Eskom, as indicated below. In general, Eskom is in support of the proposed amendments to the Air Quality Act. However, a number of comments were made on the proposed amendments, and request that changes be made to the proposed amendments to address the issues raised:

1. **Section 1 (1): 'Commissioning'** is defined as 'the commencement of a listed activity'. This definition has implications for the validity of a provisional atmospheric emission licence and the conversion of a provisional atmospheric emission licence to a final atmospheric emission licence, and for these purposes is inadequate. (*See the comments on sections 41 and 42 below.*)
2. **The definition of commissioning as it stands does not adequately capture the fact that for a large coal-fired power station, commissioning of all units takes several years.** The commissioning process does not simply involve firing the boilers for the first time, but rather comprises the integrated application of a set of procedures to check, inspect and test every operational component of the plant, from instruments and equipment to systems. The main objective of commissioning is to effect the safe and orderly handover of the unit from the constructor to the owner, guaranteeing its operability in terms of performance, reliability, safety and information traceability. For these reasons, it is proposed that the definition of commissioning be amended to reflect that commissioning is the period of testing of a new facility (or section of the facility) prior to the commencement of normal operation.
3. **Sections 22A (2) and (3) stipulate that it is unlawful to conduct a listed activity without a valid APPA Registration Certificate or Atmospheric Emission Licence.** While in general Eskom supports this provision, it needs to be noted that a situation can arise that a facility is forced to operate without a valid atmospheric emission licence (or shut down), through no fault of their own. According to the National Environmental Management: Air Quality Act, 2004 section 61 (2) (a), APPA Registration Certificates are valid until end March 2014, provided a renewal application is submitted by end March 2013. All Eskom's power stations submitted applications for new Atmospheric Emission Licences by end 2012, but as of 11 February 2014, only 6 of Eskom's 19 power stations have received final or provisional AELs. **There is thus a risk that some power stations will not have received new AELs by end March 2014, and so will be forced to**

operate illegally or shut down. Eskom proposes that a realistic date be set to accommodate the competent authority's capability to issue new licences.

4. **Section 22A (6)(a)** allows that the licensing authority may 'direct a person conducting a listed activity illegally to rehabilitate the environment within such time and subject to such conditions as the licensing authority may deem necessary'. **Eskom submits that the rehabilitation should only require the (offending) person to correct the damages caused by the illegal operation of the listed activity, and should not be allowed to extend beyond that.**
5. **Section 36 (3A):** Eskom welcomes the allowance that 'whenever a licensing authority fails to take a decision on an atmospheric emission licence within the time period set out in section 40(3) or (3A) of [the] Act, the person that applied for an atmospheric emission licence may apply to the Minister or MEC, as the case may be, to take the decision.' **However, it is not clear when the application should be made to the Minister and when to the MEC.** Furthermore, section 36 (3A) deals with applications for new atmospheric emission licences which are coupled to the issuing of an environmental authorization. Eskom currently has to wait many months and normally years for the processing of a renewal of an atmospheric emission licence (conversion from APPA Registration Certificate to atmospheric emission licence). **Eskom requests that a similar condition which allows for applications to the Minister or MEC in the event of a delay in the renewal of an atmospheric emission licence be included.**
6. **Section 36 (3B):** Eskom requests that the 'reasonable period of time' within which the MEC or Minister must make a decision on the atmospheric emission licence application be stipulated exactly (in number of days), as what may seem reasonable to one party may not seem reasonable to another party.
7. **Section 36 (5):** Eskom strongly supports the provision that the Minister becomes the licensing authority for Eskom's atmospheric emission licenses, since the Minister has been identified as the competent authority for Eskom's listed activities in terms of the National Environmental Management Act, 1998. Currently Eskom's power stations have seven different licensing authorities. As a result, there is inconsistent regulation of emissions from power stations, and it is difficult for strategic issues of national importance such as national energy security to be adequately dealt with. **If the licensing function were to revert to the Minister, Eskom anticipates that the**

licensing of power stations could be handled in a better coordinated and better informed manner.

8. **Section 36 (6):** Eskom further supports the provision for the issuing of an integrated environmental authorization. They anticipate that this would streamline processes, allow for the effective regulation of all environmental impacts in a coordinated manner, and prevent duplication.
9. **Section 41 (3)** provides that 'a provisional atmospheric emission licence is valid for a period of one year from the date of the commissioning of the listed activity, and may be extended for an additional one year on good cause shown to the licensing authority.' Furthermore, in section 42 (1), it is stipulated that 'the holder of a provisional atmospheric emission licence is entitled to an atmospheric emission licence when the commissioned facility has been in full compliance with the conditions and requirements of the provisional atmospheric emission licence for a period of at least six months.'
10. **The view of Eskom is that the validity of a provisional atmospheric emission licence stipulated in section 41 (3) is completely inadequate,** given that the commissioning of a large coal-fired power station can take between 4 and 7 years. Eskom's power stations typically comprise six units, which are commissioned at 6-12 month intervals. The commissioning of each unit is expected to take between 10 and 12 months. Commissioning activities include hydro-testing, chemical cleaning and water flushing of pipelines and tanks; functional testing of each instrument, telecommunication and electrical system; functional testing of all pressure protection and other safety systems; and performing checks and 'live' operational tests for all plant and equipment. Plant performance trials are also conducted in accordance with specific performance criteria. The commissioning of a power station unit is not considered to be normal working conditions. Emissions will be higher during commissioning as a result of the use of fuel oil, the commissioning of the emission abatement technology, and special testing which needs to be done for contractual reasons and to comply with the grid code. **As a result, it is not possible for a power station to comply with the emission limits applicable to 'normal operating conditions' during the commissioning period.**
11. **Eskom requests that the validity of a provisional atmospheric emission licence be extended to cover the facility's entire commissioning period.** Their experience is that provisional atmospheric emission licences do contain stringent emission limits applicable

during normal operation, and so if the provisional atmospheric emission licence is valid for many years, it does not mean that emissions would be poorly controlled.

RESPONSE OF THE PROVINCIAL DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM TO ESKOM'S COMMENTS

The Committee sought the advice of the DEDET regarding the detailed submission on the bill. The DEDET indicated the following:

In principle, the comments by Eskom indicate that Eskom SOC Ltd supports the objectives of the Bill, notwithstanding the proposed changes referred to therein Eskom's submission. However, the changes proposed by Eskom, while they might work in favour of Eskom's operations, and by implication, ease the regulatory burden on electricity generation in the country, there is a possibility that some of these proposals might work against the spirit and purport of the Bill. A few of these aspects are discussed below:

Clause 1.1: Commissioning: Eskom argues that the commissioning period be adjusted to accommodate the rather lengthy period customary to power generation facilities. This matter came to the attention of the MEC during Eskom's appeal against the Provisional Atmospheric Emission License for Kusile Power Station dispensed with in May 2013. It must be noted that the Licensing Authority has discretionary powers to consider exceptional circumstances in determining the period to be considered as the "commissioning" phase of a project. Every application is considered based on its merits and the facts before the licensing authority. Even if it were to be entertained, the difficulty of determining the exact "standard period" for commissioning for the purposes of legislative provisions would be difficult to ascertain. As long as the Bill, read with the Act, provides for flexibility, the considerations that Eskom wishes to be outlined in the Bill should not be necessary.

Section 22A (Clauses (2) and (3): Unlawful activities where an operator does not have a valid Atmospheric Pollution Prevention Act (Act No. 45 of 1965) Registration Certificate (APPA RC) or Atmospheric Emission License (AEL). This section is meant directly to ensure that all holders of valid Registration Certificates issued in terms of the repealed Atmospheric Pollution Prevention Act of 1965 apply for conversion of those registration certificates into AEL's by 31 March 2013 and that the decision of the Licensing Authority be made before 31 March 2014.

Eskom is understandably concerned that some licensing authorities might not be able to issue the required AELs by 31 March 2014. Again, while this might be a valid technical argument, it should not be considered as a legislative matter. This is so since Eskom's concern is not borne out by facts, and also the fact that this very amendment bill seeks to provide the Minister and the MEC with enough intervention authority to address concerns of this nature. There is therefore enough authority and legislative provisions to prevent or take into account such concerns with regard to compliance and enforcement matters.

Section 22A (Clause (6)): This provision is in line with (and one may well argue that it is almost a verbatim application of) section 28 of the National Environmental Management Act, 107 of 1998 (as amended), the provision that assigns a "duty of care" on operators of section 21 (Air Quality Act, 39 of 2004) listed activities. The duty of care, by implication, requires that polluters are held responsible for the damage caused by their operations on human health and/ or the environment. It is international best practice that the current polluter is held liable for all environmental harm, and where historical pollution responsibility cannot be ascertained, it extends to current land-owner. The nature of pollution is such that it is often very difficult to determine the boundaries of pollution plumes. However, it must be appreciated that the powers of the licensing authority are not unfettered, and the procedure offers the liable person all the necessary protection against administrative excesses.

Section 36(A): Eskom's request in this regard is already catered for in the current Bill as the Act does not make a distinction between new applications and conversions. Such determinations are only made at the administrative level. Every application, whether a renewal or brand new, will be considered by the competent authority first, and only where the law provides for intervention will such course of action be undertaken. In any event, this Amendment Bill implies that all future AEL applications from Eskom SOC Ltd will be the Minister's competence.

The rest of the submission generally deals with procedural matters and the arguments themselves are not so substantive to warrant legislative provisions.

What is important is to note the concerns raised by Eskom SOC Ltd on the Bill. It is further recommended that, for the purposes of public engagement, and in line with the purport of the section 76 legislative framework, Eskom's comments be brought to the attention of the lead organ of state, i.e. the Department of Environmental Affairs (DEA).

7. COMMITTEE OBSERVATIONS

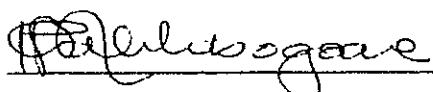
After examining the Bill and considering the inputs from the public consultation process, the Committee concluded that :-

- a) The DEDET participated in the MINMEC processes of the Bill and is fully aware of the implications of the Bill for the Province. In light of the DEDET's opinion on Eskom's comments and proposals, the Committee therefore brings the comments from Eskom, as detailed in this Committee report, to the attention of the National Council of Provinces and the National Assembly. This is in view of the national security role played by Eskom SOC Ltd in electricity generation and supply.
- b) The view of the Committee was that the Bill will not necessarily create a further financial burden on the provincial Department of Economic Development, Environment and Tourism (DEDET).
- c) The provincial authority needs to ensure that there are designated dumping sites to curb the problem of illegal dumping sites in communities across the Province. Environmental education programmes should also be strengthened.
- d) The Bill falls within the functional areas listed in Part A or B of Schedule 4 of the Constitution, namely "environment" and "air pollution" respectively. It does not contradict the principles of the Constitution of the Republic of South Africa and the objectives of the Bill are constructive to the regulation of the air quality in the Province and the sustained health and well-being of its citizens.
- e) The public consultation process was fruitful; at all three public hearings the public understood the significance of the Bill and participated in the interactions. The proposed amendments as per the Bill were unanimously supported.

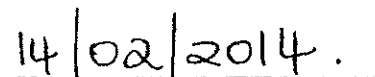
8. CONCLUSION AND RECOMMENDATION

As per the processes detailed in this report, the Committee facilitated the public consultation process in the Province in consideration of the National Environmental Management: Air Quality Amendment Bill [B27B-2013].

In light of the above and in consideration of its observations in this report, the Committee recommends that the House confers a mandate upon the Permanent Delegate representing the Province of Mpumalanga in the NCOP to **negotiate in favour of the National Environmental Management: Air Quality Amendment Bill [B27B-2013]**.



HON. RC MAHLOBOGOANE (MPL)



DATE

**CHAIRPERSON: PORTFOLIO COMMITTEE ON
AGRICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION;
ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM**