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LEGAL OPINION
[Confidential]

TO: Mr V Smith, MP and Ms M G Boroto, MP
Co-chairpersons of the Interim Joint Committee on Scrutiny
of Delegated Legislation

COPY: Secretary to Parliament

DATE: 04 September 2013

SUBJECT: Housing Development Agency Regulations

LEGAL ADVISER: Ms V Ngcobozi
Parliamentary Legal Adviser

REFERENCE NUMBER: 205/13

MESSAGE : Attached please find opinion for your attention



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Background

1. The Minister of Human Settlements (the Minister) submitted the Draft Housing Development Agency Regulations (the draft Regulations) to the Speaker of the National Assembly on 20 June 2013. The draft Regulations were tabled in the Assembly and referred on 07 August 2013 to the Portfolio Committee on Human Settlements and the Interim Joint Committee on Scrutiny of Delegated Legislation (the Committee) for consideration and report (ATC, 07 August 2013).
2. Our Office was requested to comment on the draft Regulations to ensure that they meet the scrutiny criteria for delegated legislation.

Regulatory framework

3. The draft Regulations were submitted to Parliament for comment in terms of section 32 of the Housing Development Agency Act, 2008 (Act No.23 of 2008) (the Act)
4. Section 32 (1) of the Act provides that "The Minister must, after consultation with the Agency and Parliament, make regulations

regarding..." [Emphasis added.] This provision gives powers to the Minister to make regulations after consulting both the Agency and Parliament.

5. Section 7(3) of the Act provides that "In performing its functions the Agency may implement such measures as may be prescribed to fast-track housing development in the declared priority housing development areas." [Emphasis added.]
6. The Committee must, amongst others, scrutinise delegated legislation that requires consideration and report by Parliament in accordance with the criteria set out in the interim Rules applicable to the Committee (Minutes of Proceedings of NCOP, 20 September 2011, Rule 3(2)(a)(iii) read with rule 4(1)).

Advice

7. The draft Regulations deal with the issues provided for in section 32(1) of the Act. It is necessary to compare the provisions of the draft Regulations with the scrutiny criteria set out in interim rule 4(1).
8. The draft Regulations has no provisions imposing levies, taxes or duties.
9. The draft Regulations appear to comply with the procedural aspects. They have been submitted to Parliament in compliance with the provisions of section 32(1).
10. The draft Regulations do not impinge on the jurisdiction of the Courts.
11. The draft regulations have no provisions that have a retrospective effect.
12. The draft Regulations conform to the objects of the Act.
13. The provisions of the draft Regulations do not appear to make unusual use of powers conferred by the Act.
 - 13.1 The Act confers powers on the Minister to make regulations. The Minister is doing so in respect of section 32 (1) of the Act as stated in paragraph 4 above. In addition to the specific provisions of section 32(1) (a) to (m), section 32(2) (a) and (b) provides that, "The Minister may make regulations regarding—
 - (a) any matter that this Act requires or permits to be prescribed; and
 - (b) generally, any ancillary or incidental, administrative or procedural matter that is necessary to prescribe for the proper implementation or administration of this Act."
 - 13.2 Regulation 23 deals with penalties and offences. The Act does not empower the Minister to make regulations regarding offences and penalties. Regulation 23 does not meet the principle of legality. The Minister is acting outside the scope and power granted to her. This renders regulation 23 invalid.

13.3 In *Affordable Medicines Trust and Others v Minister of Health and Others*¹ the Honourable Justice stated that “[49] *The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.*”

14. My recommendation is for regulation 23 to be deleted in its entirety.

15. The drafts Regulations are properly drafted.

16. The draft Regulations do not trespass on personal rights and liberties, including those set out in the Bill of Rights, in a manner inconsistent with the Constitution.

17. The draft Regulations do not amount to substantive legislation.

18. In conclusion, it is my considered view that once regulation 23 is deleted, the regulations will meet the scrutiny criteria.



Ms V Ngcobozi
Parliamentary Legal Adviser

¹ (2005)ZACC3;2006(3) SA 247(CC);2005 (6) BCLR 529 (CC)