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MEMORANDUM
[Confidential]

TO: Mr Lewis Nzimande, MP and
Mr Vincent Smith, MP
Co- Chairpersons of the Constitutional Review Committee

COPY: Ms PN Tyawa
Acting Secretary to Parliament

Mr ME Phindela
Acting Deputy Secretary: Core Business

Ms R Begg
Division Manager: Core Business

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 1 November 2017

REF: 125/17
(CR 16/28)

SUBJECT: S196 (2) OF CONSTITUTION PROPOSED AMENDMENT

MESSAGE: Please find attached the above memorandum for your attention


Adv Z Adhikarie
Chief Legal Adviser



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INTRODUCTION

1. Our office received a request to advise on the proposed amendment of section 196(2) of the Constitution. The proposal relates to the independence and functions

of the Public Service Commission (PSC). It comes from Ms LV Sizani to the Constitutional Review Committee (CRC) for purposes of the annual review of the Constitution in terms of section 45(1)(c) and Joint Rule 97.

2. Ms Sizani argues that the Public Service Commission (PSC) should have no role in the grievance procedures between government as an employer and its employees. She believes in fact that the PSC duplicates the authority of the forums or institutions created in terms of section 23 of the Constitution and the Labour Relations Act.
3. She further contends that once government employees are dismissed the PSC's function lapses. Hence, her argument concludes by finding that the enabling provision in section 196(4)(d) is an error in relation to dismissals.
4. We telephoned Ms Sizani to receive clarity on her submission. Upon further consultation, she explained that she is of the view that the PSC lacks independence in that its staff and administration is subject to the control of the Department (she does not indicate which Department she is referring to).

LEGAL QUESTION

5. The legal question is whether sub-sections (d) and (f) of section 196(4) of the Constitution provide that the PSC be part of the grievance proceedings within the public service employment relations. If so, does this result in the lack of independence required for the PSC?

LEGAL FRAMEWORK

6. Subsections (d) and (f) of section 196(4) of the Constitution provide as follows:
"196(4) The powers and functions of the Commission are-
(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and **dismissals** comply with the values and principles set out in section 195; ...
(f) either of its own accord or on receipt of any complaint-
(i) to investigate and evaluate the application of personnel and public

administration practices, and to report to the relevant executive authority and legislature;

- (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
- (iii) to monitor and investigate adherence to applicable procedures in the public service; and
- (iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.” (my emphasis)


7. These provisions find application outside the internal grievance processes.
8. The Constitutional Court interpreting section 196 of the Constitution in the *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997(1) BCLR 1(CC)* (2nd Certification Judgement), mid-paragraph 188, found that the powers of the PSC are largely concerned with investigation and reporting. It further stated that the hands on control of the public service has been removed from the PSC and given, effectively, to the national and provincial executives.
9. Each sphere of the executive is responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administration, all within a framework of uniform norms and standards applying to the public service.

ADVICE

10. Thorough consideration of the relevant provision in the Constitution concerning the submission from Ms Sizani and in line with the 2nd Certification Judgment it is apparent that the submitter misconstrued the content of section 196 of the Constitution.
11. It is further apparent that this is not a matter where the application of the subsidiary principle finds relevance. We cannot argue that the issues raised could be resolved

by attacking and seeking amendment to the Public Service Act and the Labour Relations Act instead of the Constitution. Instead, this is an issue of misconstruction of the provisions, which can lead to an absurd interpretation. The interpretation construed for purposes of section 196(2) read with 196(4)(d) and (f) is based on the wrong assumption to the effect that the said provision enable the PSC to process or be part of grievance procedure or dismissal within the public service.

12. Proper construction of section 196 clearly shows that the PSC plays only an advisory role or as an outside monitor on the issues that may affect the employment relationship within a public sector through investigations and reporting in line with the 2nd Certification Judgment finding.
13. In respect of her recommendations, the Constitution is framed in inclusive terms with the intention to cover all labour related complaints as she suggests. Ignoring the appropriate construction of the mentioned sections will result in an absurdity.
14. Since she did not express herself on matters that are outstanding beyond "recruitment, transfers, promotions, and dismissals" it is unclear what should be further covered and added as she suggests a wider scope of section 196(4)(d) in her recommendations.
15. In our view, there is no need to amend section 196 of the Constitution due to the understanding that the concerns arise out of a misconstruction of the mentioned provisions.



Adv Z Adhikarie
Chief Legal Adviser

Date: 2017 / 11 / 01