



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

P0 Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel: (021) 403-2626
Direct: (021) 403-3342
Fax: (021) 403-3888
E-mail: bloots@parliament.gov.za

LEGAL OPINION
[Confidential]

TO: Mr LP Nzimande
Mr VG Smith
Co-Chairpersons of the Joint Constitutional Review Committee

COPY: Ms P Tyawa
Acting Secretary to Parliament

Adv ME Phindela
Acting Deputy Secretary to Parliament: Core Business

Ms R Begg
Division Manager: Core Business Support

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

DATE: 10 November 2017

REF: 130/2017
CR16-41

SUBJECT: SUBMISSION BY PK MAIBELO


Adv Z Adhikarie
Chief Parliamentary Legal Adviser



MEMORANDUM

TO: Mr LP Nzimande
Mr VG Smith
Co-Chairpersons of the Joint Constitutional Review Committee

COPY: Ms P Tyawa
Acting Secretary to Parliament

Adv ME Phindela
Acting Deputy Secretary to Parliament: Core Business

Ms R Begg
Division Manager: Core Business Support

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

DATE: 10 November 2017

REF: 130/2017
CR16-41

SUBJECT: SUBMISSION BY PK MAIBELO REGARDING THE ELECTORAL SYSTEM

INTRODUCTION

1. Our Office was requested to advise on the submission by Mr PK Maibelo for the annual constitutional review by the Joint Constitutional Review Committee ('the Committee').

OVERVIEW OF SUBMISSION

2. In his submission, Mr Maibelo argues that "[s]ection 86 of the Constitution... contradicts what is said in the Freedom Charter", with the latter in his opinion better reflecting/safeguarding the will of the people as opposed to the will of individuals not directly elected by the people.

3. Mr Maibelo therefore calls on “the Review Committee to strongly consider reviewing Sec 86(1) and its accompanying Schedule 3 of the Electoral Procedure and in particular Part A (1) (a).” It is assumed that with “Electoral Procedure”, Mr Maibelo is referring to Schedule 3 of the Electoral Act (Act No. 73 of 1998) which sets out the formula by which seats are allocated for membership to the National Assembly, from which membership the President (in terms of section 86 of the Constitution) is elected.

ANALYSIS

4. As a starting point, it needs to be kept in mind that the status and the character of the Constitution of the RSA, 1996 (“Constitution”) and the Freedom Charter is different. Whereas the Constitution is the supreme law of the land¹ and any legislation or action inconsistent with it is unconstitutional, the Freedom Charter in turn is a statement of core principles adopted by the South African Congress of Alliances.
5. As such, the Freedom Charter encapsulates a vision, which could be translated into policy, which in turn could inform a constitutional amendment. At present though, the standing of the Freedom Charter does not trump the supremacy of the Constitution.

CONCLUSION

6. It is therefore not legally correct to argue that the provisions reflected in section 86 (dealing with the election of the President) is unsound, because it does not precisely align (or as argued in the submission contradicts) the content of the Freedom Charter.
7. It is however, a policy decision that the Committee can take to recommend that some considerations reflected in the Freedom Charter be reflected in the Constitution through a constitutional amendment in terms of the legislative procedures outlined in section 74 of the Constitution.


Adv Z Adhikarie
Chief Parliamentary Legal Adviser

¹ Section 2 of the Constitution states that “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Direct: (021) 403-8402
Fax (021) 403-3888
E-mail: pngema@parliament.gov.za

MEMORANDUM
[Confidential]

TO: Mr LP Nzimande, MP and
Mr VG Smith, MP
Co- Chairpersons Joint Constitutional Review Committee

COPY: Ms PN Twaya
Acting Secretary to Parliament

Mr ME Phindela
Acting Deputy Secretary: Core Business and

Ms R Begg
Division Manager: Core Business Support

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

DATE: 8 November 2017

REF: 135/2017
CR 16/49

SUBJECT: S103 (1) OF CONSTITUTION PROPOSED AMENDMENT

MESSAGE: Please find attached the above memorandum for your attention



Adv Z Adhikarie
Chief Legal Adviser



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Direct: (021) 403-8402
Fax (021) 403-3888
E-mail: pngema@parliament.gov.za

MEMORANDUM
[Confidential]

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

COPY: Ms P Tyawa
Acting Secretary to Parliament

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

DATE: 8 November 2017

REF: 135/17 (CR 16/49)

MESSAGE: Attached please find a legal opinion on the proposed amendment for section 103(1) of the Constitution

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

Adv Z Adhikarie
Chief Legal Adviser



Direct (021) 403-8402
Fax (021) 403-3888
E-mail: pngema@parliament.gov.za

MEMORANDUM
[Confidential]

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

COPY: Ms P Tyawa
Acting Secretary to Parliament

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

DATE: 8 November 2017

REF: 135/17 (CR 16/49)

SUBJECT: S103 (1) OF CONSTITUTION PROPOSED AMENDMENT

INTRODUCTION

1. Our office received a submission from Abia Nkgoeng forwarded to the Constitutional Review Committee (CRC) in terms of section 45(1)(c) of the Constitution and Joint Rule 97. The CRC requests our advice on the proposed amendment of section 103(1) of the Constitution.
2. It appears that the author, Abia Nkgoeng, also signed the similar submission by Mr Nelson, which we have also dealt with under Reference CR 16/50. They propose a decrease in the number of provinces from nine to five. The justification for their proposal, amongst others, suggests that the saving once provinces are reduced can be utilised to address unemployment.

3. The proposal is for the number of provinces to be reduced from nine to five, without a suggestion as to which ones should be retained.
4. Other justifications they provide for their proposal, in addition to addressing unemployment, are that the savings may be used to build more schools, libraries and increase the old age grant.

LEGAL QUESTION

5. The legal question is whether provinces listed in section 103(1) of the Constitution can be decreased from nine to five.

LEGAL FRAMEWORK

6. Section 103(1) of the Constitution provides as follows:
103(1) The Republic has the following provinces:
 - (a) Eastern Cape;
 - (b) Free State;
 - (c) Gauteng;
 - (d) KwaZulu-Natal;
 - (e) Limpopo;
 - (f) Mpumalanga;
 - (g) Northern Cape;
 - (h) North West;
 - (i) Western Cape.
7. Section 103(3)(a) of the Constitution is crafted in a manner that is open to the idea of re-determining provincial boundaries or geographical areas.
8. Sections 74(3) and 74(8) of the Constitution are enabling provisions that permit the amendment of constitutional provisions where the amendments concern provinces.
9. According to the Constitutional Court judgment in, *In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996(10) BCLR 1253 (CC)* (Certification Judgment), the Constitution makes provision for provincial autonomy.

The Constitutional Court in its two certification judgments (one handed down in 1996 and other in 1997, respectively) was required to ensure that the final Constitution complied with all Constitutional Principles.

10. The Interim Constitution provided for the establishment of nine provinces. This arrangement was a political agreement with the boundaries of the provinces already existing when the Constitution took effect. The provincial demarcation was a result of the report from the Commission on the Demarcation of States/Provinces/Regions¹.

ADVICE

11. The Constitution enables the amendment of the provisions dealing with provincial boundaries. Sections 103(3) and 74 of the Constitution provide for this process respectively.

12. As indicated, the formation of nine provinces was a political decision.

13. Any proposed amendment to the Constitution relating to the number of provinces, requires political engagement and a political decision. Extensive and meaningful consultation with the public and the specific affected provinces would be a prerequisite for such a policy change.

14. We found no statutory prohibition to giving effect to the proposal, however, such remains a matter of political engagement. If a political decision is made in this regard, its implementation will only require consistency with the Constitution and relevant legislation.



Adv Z Adhikarie
Chief Legal Adviser

Date: 10/11/17

¹ At page 273-274, para 239 of the South African Constitution, by GE Devenish.



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

P0 Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Direct: (021) 403-8402
Fax (021) 403-3888
E-mail: pngema@parliament.gov.za

MEMORANDUM
[Confidential]

TO: Mr LP Nzimande, MP and
Mr VG Smith, MP
Co- Chairpersons Joint Constitutional Review Committee

COPY: Ms PN Twaya
Acting Secretary to Parliament

Mr ME Phindela
Acting Deputy Secretary: Core Business and

Ms R Begg
Division Manager: Core Business Support

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

DATE: 8 November 2017

REF: 136/2017
CR 16/50

SUBJECT: S103 (1) OF CONSTITUTION PROPOSED AMENDMENT

MESSAGE: Please find attached the above memorandum for your attention



Adv Z Adhikarie
Chief Legal Adviser



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Direct: (021) 403-8402
Fax (021) 403-3888
E-mail: pngema@parliament.gov.za

MEMORANDUM
[Confidential]

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

COPY: Ms P Tyawa
Acting Secretary to Parliament

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

DATE: 8 November 2017

REF: 136/17 (CR 16/50)

MESSAGE: Attached please find a legal opinion on the proposed amendment for section 103(1) of the Constitution

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

Adv Z Adhikarie
Chief Legal Adviser



Direct (021) 403-8402
Fax (021) 403-3888
E-mail: pngema@parliament.gov.za

MEMORANDUM
[Confidential]

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

COPY: Ms P Tyawa
Acting Secretary to Parliament

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

DATE: 8 November 2017

REF: 136/17 (CR 16/50)

SUBJECT: S103 (1) OF CONSTITUTION PROPOSED AMENDMENT

INTRODUCTION

1. Mr Ramara Phuti Nelson has written to the Constitutional Review Committee (CRC) seeking a hearing to motivate for amendment to the Constitution to provide that the Republic have five provinces instead of nine. He proposes that the number of provinces be reduced so that the savings could be used for services in rural areas. The proposal is similar to CR 16/49, since they both propose a reconsideration of section 103(1) of the Constitution.
2. This submission gained support by a number of petitioners, through signing it. This is an indication that there was consultation prior to making the written submission.

LEGAL QUESTION

3. The legal question relates to whether provinces listed in section 103(1) of the Constitution can be decreased.

LEGAL FRAMEWORK

4. Section 103(1) of the Constitution provides as follows:
103(1) The Republic has the following provinces:
 - (a) Eastern Cape;
 - (b) Free State;
 - (c) Gauteng;
 - (d) KwaZulu-Natal;
 - (e) Limpopo;
 - (f) Mpumalanga;
 - (g) Northern Cape;
 - (h) North West;
 - (i) Western Cape.
5. Section 103 of the Constitution is crafted in a manner that is open to the idea of re-determining provincial boundaries or geographical areas.
6. Sections 74(3) and 74(8) of the Constitution are enabling provisions that permit the amendment of constitutional provisions where the amendments may concern provinces.
7. According to the Constitutional Court judgment in *In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996(10) BCLR 1253 (CC)* (Certification Judgment), the Constitution makes provision for provincial autonomy. The Constitutional Court in the two certification judgments confirmed the legislative process, including amendments to the Constitution according to section 74.
8. The Constitutional Court confirmed that the establishment of nine provinces was a creation out of a political agreement.

ADVICE

9. The Constitution allows for the amendment of some of its provisions. Section 103(3) of the Constitution facilitates the amendments that deal with provincial boundaries.
10. As indicated, the formation of nine provinces was a political decision in the first instance.
11. There is no law or provision of the Constitution, which prohibit the implementation of the proposal submitted by Mr Nelson.
12. The proposal is a political matter. If a political decision is made in this regard, it could be implemented in line with the Constitution and relevant legislation.



Adv Z Adhikarie
Chief Legal Adviser

Date: 8. November 2017