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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: 3 November 2017

REF: 124/2017
CR16-27

SUBJECT: SUBMISSION BY J GREAVES REGARDING THE ELECTORAL SYSTEM

Adv Z Adhikarie
Chief Parliamentary Legal Adviser

Enquiries: Ms Z Ngoma X3066

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MEMORANDUM

TO: **Mr LP Nzimande**
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COPY: **Ms P Tyawa**
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FROM: **Adv Z Adhikarie**
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: **3 November 2017**

REF: **124/2017**
CR16-27

SUBJECT: **SUBMISSION BY J GREAVES REGARDING THE ELECTORAL SYSTEM**

INTRODUCTION

1. Our Office was requested to advise on the submission by Ms Jesse Greaves for the annual constitutional review by the Joint Constitutional Review Committee ('the Committee').

OVERVIEW OF SUBMISSION

2. In her submission, Ms Greaves calls on the Committee to reconsider Chapter 4 of the Constitution of the RSA, 1996 ('the Constitution'). She calls for specific reconsideration of section 46 of the Constitution, which speaks to the electoral system with reference to the election and composition of the National Assembly.

3. She states that 22 years after the adoption of this system as part of the Constitution there is voter dissatisfaction, as voters no longer know who their representatives are. This, she argues, also leads to a lack of accountability of those who are supposed to represent voters' interests, but fail to do so.

4. Ms Greaves suggests "splitting the number of MPs represented proportionally in half; two hundred MPs represent a proportional national vote, and two hundred MPs represent constituencies (or districts) through a constituency ballot" to address this concern.

ANALYSIS

5. Ms Greave's submission reminds of the 2003 Slabbert Commission Report. That Commission recommended that 200 members of Parliament (half the current component) be elected directly by their constituents, and not deployed from a list, as is currently the practice associated with the proportional representation approach currently reflected in South Africa's electoral system. The Commission's recommendation was said to speak to the enhancement of accountability.

6. The submission submitted by Mr Maharaj (CR16/16) called on the Committee to reconsider the inclusion of this 200/200 members-split recommendation as only some of the Commission's recommendations were subsequently reflected in the Electoral Act 73 of 1998, which gives expression to section 46 of the Constitution.

7. Section 46 requires that –

> *"(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that –*
>
> *(a) is prescribed by national legislation;*
>
> *(b) is based on the national common voters roll;*
>
> *(c) provides for a minimum voting age of 18 years; and*
>
> *(d) results, <u>in general</u>, in proportional representation.*
>
> *(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly."* (My emphasis)

8. In considering the general proportional representation informed electoral system provisions of the then new text ('NT') of the Constitution, the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*[1] declared that "[t]here is no suggestion that those provisions of the NT offend in any way".[2]

9. As then constitutionally approved, section 46 merely requires that the electoral system reflect proportional representation –

   a. in general; and

   b. by means of a formula set out in legislation.[3]

10. Section 114 of the Electoral Act addresses the issue of "[c]omposition of National Assembly and provincial legislatures" and stipulates that "[t]he formulas referred to in sections 46 (2) and 105 (2) of the Constitution are set out in Schedule 3", which formula reads as follows:

> *"Formula for determining number of members of National Assembly*
>
> *(1) By taking into account available scientifically based data and representations by interested parties, the number of seats of the National Assembly must be determined by awarding one seat for every 100 000 of the population with a minimum of 350 and a maximum of 400 seats.*
>
> *(2) If the total number of seats for all provincial legislatures determined in terms of item 2 exceeds 400, the number of seats for the National Assembly may not be less than 400."*

11. Both the suggestion provided by Ms Greaves, as well as the Slabbert Commission, would meet the "in general" threshold for "proportional representation" as the Constitution in section 46 prescribes for South Africa's democratically informed electoral system. As such, these suggestions could be addressed by amendment of the Electoral Act, as highlighted in Opinion Ref

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[1] 1996 (4) SA 744 (CC).

[2] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) at para 180.

[3] To provide further context, it must be noted that Constitutional Principle VIII, which informed the drafting of the Constitution, reads as follows: "There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation." Although the Constitutional Principles are not binding, these do have interpretative value, in providing insight and guidance as to the reason and structure of constitutional provisions.

116/2017 dealing with Mr Maharaj's submissions. (Attached for ease of reference.)

12. Unlike Mr Maharaj's submission, Ms Greaves' request is more specific in expressly requesting the amendment of section 46(1)(d) of the Constitution, and therefore not open to the interpretation that she is possibly only requesting an amendment to the Electoral Act in line with the current guidelines found in section 46.

13. Ms Greaves' submission, requesting the inclusion of a constituency informed representation split, calls for the consideration of an amendment to the constitutional text of section 46(1)(d), which section –

    a. is intentionally broadly phrased as the Constitution is a living document and must be adaptable to changing social conditions; and

    b. is a provision which the Constitutional Court approved of upon certification of the Constitution.

CONCLUSION

14. As long as the principles in the Constitution are informed by the democratic spirit and purport of that document as the supreme law, amendment of its text is allowed.

15. The amendment proposed by Ms Greaves, while still respecting the participatory nature of democracy, will alter the general nature of section 46 (which aligns with 'living document' drafting style of the Constitution), changing it from a general proportional representation guideline into a specific formula-prescriptive provision.

16. As such, there is no legal argument that makes her suggestion untenable. Her submission would require the Committee to take a policy decision as to whether to support such a proposed amendment in its constitutional review report.

Adv Z Adhikarie
Chief Parliamentary Legal Adviser

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MEMORANDUM
[Confidential]

TO: **Mr LP Nzimande; and**
Mr VG Smith
Co-Chairpersons Joint Constitutional Review Committee

COPY: **Ms PN Tyawa**
Acting Secretary to Parliament;

Adv EM 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: **9 November 2017**

REF: **127/2017/SSI**
CR 16/36

SUBJECT: **Opinion on Submission by Ms Evelyn Motlhaping**

MESSAGE: **Please find attached the above memorandum for your attention.**

Adv Z Adhikarie
Chief Legal Adviser

Enquiries: Sueanne Isaac (X2610)

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MEMORANDUM

[Confidential]

TO: **Mr LP Nzimande; and**
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COPY: **Ms PN Tyawa**
Acting Secretary to Parliament;

Adv EM 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: **9 November 2017**

REF: **127/2017/SSI**
CR 16/36

SUBJECT: OPINION ON SUBMISSION BY MS EVELYN MOTLHAPING

INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Joint Constitutional Review Committee ("JCRC") to advise the JCRC on the submission received from Ms Evelyn Motlhaping.

BACKGROUND

2. Ms Motlhaping is a Principal Court interpreter. In her submission, she highlights the challenges faced in finding foreign language interpreters for foreign nationals who are suspected of criminal activity. The cost of providing foreign language interpreters is considerable and impacts on the budget of interpretation services.

3. Ms Motlhaping relates an incident in 2015, when she had to secure a Creole speaking interpreter for a person accused of rape. An interpreter could not be found locally. With the help of DIRCO, an interpreter was found in Kenya. However, the matter against the accused was withdrawn. If the matter had proceeded, the costs of flights and accommodation for the interpreter would have had to been paid. This would have serious financial implications.

4. In light of the above challenges, Ms Mothlaping suggests that section 35(3)(k) of the Constitution be amended to read as follows:

> "Every accused person has a right to a fair trial, which includes the right to be tried in one of the official languages of the Republic of South Africa, or if that is not practicable, to have the proceedings interpreted in one of the official languages."

LEGAL FRAMEWORK AND DISCUSSION

5. A person who is subject to criminal proceedings and who is later convicted of an offence is subject to the limitation of many of their fundamental rights. It is in light of this that the Constitution affords accused persons various rights to a fair trial including the right that proceedings are in language that an accused understands or that proceedings are interpreted in that language that the accused understands.

6. The purpose of the right of an accused to understand criminal proceedings is self-evident. An accused person must be able to make informed choices[1], contest evidence and put up a defence against allegation brought by the State.

7. Currently, section 35(3)(k) reads:

> "Every accused person has a right to fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."

8. Section 35(3)(k) confers to an accused the right to be tried in a language that the accused understands. "Understands" in this section does not mean that the accused must be tried in their first language but rather in any language that the accused is able to understand. Further, an accused only has the right to have proceedings conducted in a language that she or he understands, where it is practicable for that to happen. Where that is not practical, proceedings must be interpreted in a language that the accused understands.

9. The Court, in the matter of *Mthethwa v De Bruin NO & Another*, confirmed the above. The Court held that: [2]

> "Section 35(3)(k) does not give an accused person the right to have a trial conducted in the language of his choice. Its provision are perfectly plain, namely, that he has the right to be tried in a language which he understands or, if that is not practicable, to have the proceedings interpreted in that language."

10. The submitter seeks to limit the application of the rights in section 35(3)(k) so that an accused will be tried in an official language or where not practicable, to have the proceedings interpreted in an official language. This means that an accused who does not understand any official may not understand

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[1] F. Snyckers and J. le Roux. Criminal Procedure: Rights of Arrested, Detained and Accused Persons. *Constitutional Law of South Africa*. pg OS 07-06, ch51-p168.

[2] *Mthethwa v De Bruin NO & Another* 1998(3) BCLR 336(N). p338 D.

proceedings. This will curtail the accused's right to a fair trial, including the right to "adduce and challenge evidence".

11. It is noted that the submitter is concerned about the cost of sourcing foreign language interpreters. This is a legitimate concern. However, there are cost implications for the State in respecting, protecting, promoting and fulfilling all fundamental rights in the Bill of Rights.

CONCLUSION

12. The decision to limit section 35(3)(k) to only official languages of South Africa is a policy decision for the Committee to consider. However, the implications of such an amendment on the rights of accused persons must be carefully considered.

Adv Z Adhikarie
Chief Legal Adviser

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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: 128/2017
CR 16/39

SUBJECT: Legal Opinion on the submission by Adv. N M Masemola

MESSAGE: Please find attached the above memorandum for your attention

Adv Z Adhikarie
Chief Legal Adviser

PARLIAMENT
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MEMORANDUM

TO: **Honourable LP Nzimande, MP**
Co-Chairperson: Joint Constitutional Review Committee

AND TO: **Honourable V Smith, MP**
Co-Chairperson: Joint Constitutional Review Committee

COPY: **Ms. P Tyawa**
Acting Secretary to Parliament

FROM: **Constitutional and Legal Services Office**
[Adv. Z Adhikarie – Chief Parliamentary Legal Adviser]

DATE: **9 November 2017**

SUBJECT: Legal Opinion on the submission by Adv. N M Masemola to the Joint Constitutional Review Committee- CR 16/39

INTRODUCTION

1. Our Office was requested by the co-chairpersons of the Joint Constitutional Review Committee (JCRC) to advise on the submission received from Adv. N M Masemola in response to the JCRC's annual invitation for public submissions on the review of the Constitution.

FACTS

2. Adv. Masemola's submission raises two issues, which he would like the JCRC to consider.

3. The first relates to the inclusion of the language "Sesotho Sa Leboa" in the Constitution as an official language. Adv. Masemola proposes that this language be deleted as an official language and be replaced with the Sepedi language.

4. The second part of the submission relates to Chapter 6 of the Constitution, which deals with Provinces. Adv. Masemola has proposed that the level of provincial government be scrapped.

5. Each issue is dealt with separately.

LEGAL FRAMEWORK

6. Sections 6: Languages

6.1. Section 6 (1) of the Constitution recognises 11 languages as official languages of the Republic of South Africa, namely Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

6.2. Section 6 (5) (b) of the Constitution recognises all other languages commonly used by communities in South Africa and directs the Pan South African Language Board to promote and ensure respect for such languages. However, their status is inferior to that of official languages in so far as only an official language can be used for the purposes of government and the state has, only in respect of official languages, the duty to take practical and positive measures to elevate its status and advancement.[1] It is in this context that the submission must be considered.

6.3. The Sepedi language is included as an official language in the English version of the Constitution and enjoys the status associated with official languages. Sesotho Sa Leboa is not listed as an official language in the English text of the Constitution. However, in the Sepedi version of the Constitution "Sesoth Sa Leboa" is listed instead of Sepedi. There is therefore clearly an inconsistency in the Sepedi and English versions of the Constitution. It must be noted further that in the interim Constitution, Sesotho Sa Leboa was designated as an official language but was

[1] S 6 (2) of the Constitution

replaced by Sepedi in the final Constitution. The reason for same is unclear and the minutes of the Constitutional Assembly do not speak to the issue.

6.4. Notwithstanding the above, the English version of the Constitution is the official version as it is the version signed by the President. It is this version that is used for interpretation and which serves as conclusive evidence of the provisions of the Constitution. In this regard section 240 of the Constitution specifically states that, "in the event of an inconsistency between different texts of the Constitution, the English text prevails."

6.5. Accordingly, the submission of Adv. Masemola in this regard, is already dealt with in so far as the English version identifies Sepedi instead of Sesotha Sa Leboela as the official language thus in keeping with his proposal.

6.6. However, it must be noted that the issue of whether Sepedi or Sesotho Se Loboa is the correct designation is a matter that has been debated since the adoption of the Constitution and there appears to still be confusion amongst the public as to which term is the correct one. Certain people are of the view that Sepedi is a dialect of Sesotho se Leboa and therefore the correct designation is Sesotho Se Leboa whilst others, like Adv. Masemola, are of the view that Sepedi is the correct designation as the written language is based on Sepedi.

6.7. Given that the designation of a language as an official language has definitive consequences[2] in so far as it is elevated in comparison to other spoken languages and can be used as a medium for communication between Government and its citizens, it is important that the confusion between Sesotho Se Leboa and Sepedi be clarified so as to provide legal certainty.

7. **Chapter 6 – Provinces**

7.1. Chapter 3 of the Constitution provides for a system of multilevel government, with national, provincial and local governments constituting "spheres" that are to be "distinctive, interdependent and interrelated." [3] It further enjoins the different spheres, namely local, provincial and national government, to 'co-operate with each other in mutual trust and good will.' [4]

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[2] De Waal, Currie and Erasmus. South African Constitutional Law: The Bill of Rights. P 25-6
[3] S40 of the Constitution
[4] S 41(1) of the Constitution

7.2. The division of powers between the national government and provinces is set out in the Constitution. It affords national government broad legislative power to legislate on "any matter" except those contained in a list of 'exclusive' provincial powers.[5] Provinces also have the power to legislate on matters contained in a list of concurrent powers which the national government, can in certain circumstances override.[6]

7.3. Adv. Masemola submitted that provinces do not add value to processes of governance and exist "only to give some people jobs" and may therefore be abolished without impacting on our democracy.

7.4. The proposal is a matter of policy for consideration by the JCRC and there exist compelling reasons for and against the inclusion of the provincial tier of government. These include considerations relating to the revenue raising abilities of provinces, the impact on citizen participation and the reallocation of the current functions of provinces. These considerations would need to be weighed and an assessment made on whether the abolishment of the provincial tier would further strengthen democracy or not.

7.5. However, it must be noted that the proposal, if successful, would require a major re-engineering of the Constitution. In the first instance, the whole of Chapter 6, which deals with Provinces, will have to be deleted. Secondly and because of the deletion of Chapter 6, the National Council of Provinces (NCOP) will cease to exist and all reference to the NCOP will have to be deleted. This will affect the composition of Parliament and the legislative process as contained in Chapter 4. Chapter 3 which deals with co-operative government will also have to be amended.

7.6. Furthermore, the amendments will have far-reaching practical implications, which would need to be considered. These include the impact on the labour force employed to serve Provincial Legislatures and Provincial Governments, the impact on state resources that have been purpose built to accommodate the Provincial tier and the re-allocation of roles and responsibilities of National versus Local Government. Each of these considerations have legal and economic impacts.

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[5] S. 44(1) (Schedule 5)
[6] S 44 (2) read with S104

ADVICE

8. In respect of the first part of the submission relating to the deletion of "Sesotho Se Leboa" and the replacement thereof with "Sepedi", it is advised, that as per the official text of the Constitution, this is already the de facto position and accordingly the submission can be dispensed with in this regard. However, given that there remains confusion surrounding whether Sepedi or Sesoth Sa Leboa is the correct language designation, we advise that the Committee consider the matter further.

9. In relation to the second part of the submission proposing the abolishment of Provinces, we advise that this is a policy decision but one which has far reaching consequences that would need to be carefully considered and deliberated on.

Adv. Z Adhikarie
Chief Parliamentary Legal Adviser