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MEMORANDUM
[Confidential]

TO: Mr O Sefako, MP
Chairperson of the Select Committee on Land & Mineral Resources

COPY: Ms P Tyawa
Acting Secretary to Parliament;

Adv ME Phindela
Acting Deputy Secretary: Core Business; and

Ms R Begg
Division Manager: Core Business Support

FROM: Constitutional and Legal Services Office
[P Ngema – Parliamentary Legal Adviser]

DATE: 5 February 2018

REF: B8 B-2015 & B11 B-2015 [PLANT BILLS]

SUBJECT: COMMENTS ON ISSUES RAISED DURING NEGOTIATING MANDATES' DELIBERATIONS BY THE SELCET COMMITTEE

INTRODUCTION

1. On 21 November 2017, the Select Committee on Land and Mineral Resources (the Committee) deliberated on the provincial negotiating mandates submitted for the Plant Improvement Bill [B8 B2015] and Plant Breeders' Rights Bill [B11 B2015] (the Plant Bills). The Committee took resolutions in respect of numerous amendments proposed respectively from each provincial legislature through the negotiating mandates.

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2. Section 5 of the Mandating Procedure of Provinces Act, 2008 (Act No. 52 of 2008) provides important information to take heed.
 - a. A committee designated by a provincial legislature **must** in accordance with the format prescribed in Schedule 1 **confer authority** on its provincial delegation to the NCOP **of parameters for negotiation when the relevant NCOP select committee considers a Bill** after tabling and before consideration of final mandates, and may include proposed amendments to the Bill. Out of this provision, the following is ascertained.
 - b. The negotiating mandate confers authority of the parameters for negotiating amendments on the Bill or views of the provincial legislature.
 - c. Parameters could be broad principles of a position the provincial legislature prefers addressed or specific expressed proposed amendments.
3. The Committee Secretary after the deliberation meeting of negotiating mandates prepared the Committee report outlining proposals that arose out of the negotiating mandates and to which the Committee either agreed or disagreed with. The agreed to amendments normally results in the preparation of the C list amendments proposed by the Committee on Plant Bills. This note serves as explanation to the C list and legal background to justify preparation of proposed amendments in the official format.
4. The legal assistance this document thus provides is an understanding and explanation certain amendments require no effect as per the proposals from the negotiating parameters of the provincial legislatures' conferred authority.

PROPOSED AMENDMENTS AND LEGAL JUSTIFICATION

CLAUSE 1: Definitions

5. Some negotiating mandates presented parameters to negotiate the amendment of the word "sell" in both Plant Bills. The Department of Agriculture, Forestry and Fisheries (DAFF), State Law Adviser and Parliamentary Adviser made inputs either in support or against the amendment in respect of sub-paragraph (b) or (c) respectively either for the Plant Improvement Bill or Plant Breeders' Rights Bill.
6. Amongst others, one legal consideration pointed out was that the Committee must recall the definition of sell as it stood in either the Plant Improvement Act, 1976 (Act No. 53 of

1979) and the Plant Breeders' Rights Act, 1976 (Act No. 15 of 1976). The definition in either of these two Acts mirrored one another and read as follows:

“**sell**” includes agree to sell, or to offer, advertise, keep, expose, transmit, send, convey or deliver for sale, or to exchange or to dispose of to any person in any manner for consideration; and sold and sale have corresponding meanings.

(Underline and bold is my emphasis)

7. The underlined and bold phrase written above as “any manner for consideration” does not appear in the current Plant Bills’ definition for “sell”. That being the case led to the parameters of the negotiating mandates from few provincial legislatures to request a consideration of the omission of the following phrases respectively from the definition of “sell” in Plant Bills.

(b) exchange or to otherwise dispose of to any person in any manner; (in respect of Plant Improvement Bill)

(c) to exchange or to otherwise dispose of to any person in any manner; (in respect of the Plant Breeders’ Rights Bill)

8. The quoted paragraphs may appear broad and becomes a catch all phrase apparent, as argued by the negotiation parameters¹, that is too wide, requiring small scale farmers to exchange money to procure their seeds.

ADVICE

9. DAFF argued that the removal of either paragraph (b) or (c) respectively might create a loophole that is likely to suffer exploitation by the transgressors. A response from DAFF indicated that the protection called for on behalf of the smallholder farmers is already covered under clause 23 of Plant Improvement Bill and clause 10 of Plant Breeders’ Rights Bill. The Parliamentary Legal Adviser felt the lack of words sell or exchange “for consideration” could still leave the protection sought by the amendment lacking and the definition too wide. The exemption clauses and application processes that enable the granting of an exemption may suffice to discard the warrant or making the proposed amendment at the expense of opening a loophole for transgressors in the broader international application of the Bill once enacted into law.
10. The view suggested in order to avoid the greater transgression is that the amendment be not effected. Similarly, in respect of the request to provide a definition for “non-commercial users”, be not done since the ordinary dictionary meaning suffice.

¹ Example see the Eastern Cape negotiating mandate under point 4 of general submissions.

11. The suggested definition of “person” for purposes of the Plant Breeders’ Right Bill, is legally speaking not necessary because the Interpretation Act, 1957 (Act No. 33 of 1957) already stipulates and prescribe on the concern raised.
12. Clause 19 proposal to substitute “must” with “may” will hinder the necessary discretion that the current provision bestows on the Minister for exemption purposes. We found that it also contradicted the proposal from another province, which indicated that the discretion is required.
13. Clause 39 and 49 proposal for amendments in respect of the Plant Improvement Bill is unnecessary since it is trite that where one is legally required to administer either the affirmation or oath based on the preferences of the person taking the oath or affirmation, such obligation is mandatory. The discretion is on the choice of either taking an oath or affirmation.
14. The extension of timeframes as deliberated and agreed to by the Committee is correctly effected, hence the C list presented for the Plant Bills.
15. Clause 55 of the Plant Breeders Rights Bill require no further amendment since the concerns raised are generally default position in law and by operation of legal principles in line with section 34 and 35 of the Constitution. Furthermore, our statute book has the Adjustment of Fines Act, 1991 (Act No. 101 of 1991) a law that provides details on the calculation method to find and equate the financial payment as a fine to the imprisonment that any court may pronounce as a form of punishment for a validly declared misconduct or offence. This law suffice as long as there is an empowering provision in the specific law, which creates the offence and required penalties. Clause 55 is the necessary empowering provision that creates offences and empowers while it guides any court on the viable penalty for purposes of offences created by this Act or Plant Bills.
16. This explanatory note is prepared after preparation and research conducted by all the support staff of the Committee including the State Law Advisers and mutually seek to provide the necessary support and direction to the work of the Committee.

P Ngema
Parliamentary Legal Adviser

Date: 2 February 2018