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MEMORANDUM
[Confidential]

TO: Hon E Makue MP
Chair: Select Committee on Trade and International Relations

COPY: Mr PN Tyawa
Acting Secretary to Parliament

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

DATE: 14 March 2019

REF: 30/2019/NM

MESSAGE: Please find attached the above memorandum for your attention

Adv Z Adhikarie
Chief Legal Adviser



LEGAL OPINION
[Confidential]

TO: Hon E Makue, MP
Chair: Select Committee on Trade and International Relations

COPY: Ms PN Tyawa
Acting Secretary to Parliament

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

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SUBJECT: ADVICE ON CERTAIN PROVISIONS OF THE FOREIGN SERVICE BILL

INTRODUCTION

Our Office received a very urgent request from the Chairperson of the Select Committee on Trade and International Relations, Hon Makue, MP, to advise the Select Committee on Trade and International Relations ("the Committee"), on certain provisions of the Foreign Service Bill ("the Bill"). The request for advice arose because the Committee had received comments, through its stakeholder consultations on the Bill and it needed clarity on the applicable legal principles pertaining to certain clauses of the Bill.

The Department of International Relations and Cooperation ("the Department/DIRCO") provided some responses on most of the issues raised, save on two matters which the Committee requested the advice of our Office. The two matters arise from clauses 2(2) and 8(1) of the Bill, respectively.

Clause 2(2) of the Bill states that *“Where this Act conflicts with the provisions of the Public Services Act, 1994, (proclamation No. 103 of 1994), or any other legislation, and it is not possible to read the conflicting provisions as complementary to one another, this Act must prevail.”*

Clause 8(1) of the Bill states that *“The Minister may establish such consultative, coordination and other mechanisms as may be necessary for the effective execution of this Act.”*

LEGAL QUESTIONS

The legal questions are the legal implications:

(a) of not amending clause 2(2) of the Bill; and

(b) using “may” and not “must” in conferring the power to the Minister in clause 8(1) of the Bill?

LEGAL FRAMEWORK

Constitution¹

The Constitution is the supreme law of the Republic, all law and conduct that is inconsistent with the Constitution is invalid and obligations imposed by it must be fulfilled.²

Chapter 3 of the Constitution provides for cooperative government. All organs of state **must** observe and adhere to the principles of cooperative government as set out in chapter 3 of the Constitution.³

Section 41(1)(h) of the Constitution provides that all spheres of government and all organs of state within each sphere must cooperate with one another in mutual trust and good faith by coordinating their actions and legislation with one another and must inform

¹ Constitution of the Republic of South Africa, 1996.

² Section 2 of the Constitution.

³ Section 40 of the Constitution.

one another of, and consult one another on, matters of common interest, amongst others.

Section 41(2)(a) and (b) of the Constitution provides that an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and provide for mechanisms and procedures to facilitate settlement of intergovernmental disputes.

The national legislative authority vests with Parliament in terms of section 43 and 44 of the Constitution.

Members of Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.⁴

Section 173 of the Constitution provides that the Courts have the inherent power to develop the common law, taking into account the interests of justice.

Intergovernmental Relations Framework Act⁵

The Intergovernmental Relations Framework Act ("the IGR Act") is a framework for the spheres of government and relevant organs of state to promote and facilitate intergovernmental relations, amongst others.

Section 9(1) of the IGR Act provides that any member of the national executive may establish a national intergovernmental forum to promote and facilitate intergovernmental relations in the functional area for which that Cabinet member is responsible. The power conferred in section 9(1) of the Act is exercised as set out in section 11 and 12 of the Act and the reports generated during this process must be submitted to the President's Co-ordinating Council.

Chapter 3 of the IGR Act provides for conduct of intergovernmental relations. Where the exercise of a statutory power and performance of a statutory function or the provision of a service depends on the participation organs of state in different

⁴ Section 92 of the Constitution.

⁵ Act 13 of 2005.

governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.⁶

Section 35(2) of the Act sets out what must be provided for in the implementation protocol.

Foreign Service Bill

The Bill provides for the management, administration, accountability, and functioning of a professional Foreign Service of the Republic of South Africa. It further provides for the operational requirements that are suitable and supportive of the operations of the Foreign Service in a global environment.⁷

The Bill regulates the subject matter of Foreign Service exhaustively to the exclusion of any other irreconcilable/non complementary legislation.

Notably in clause 2(1), the Bill provides that subject to the provisions of the Bill, the conditions of service of members of the Foreign Service must be governed by the law governing that employee's conditions of service.

In terms of clause 2(2) of the Bill, the first step in the event of conflict should be to reconcile/harmonize/complement with the Public Service Act or any other legislation and only where such harmonisation fails, should the provisions of the Foreign Service Bill, when passed into law, would supersede other legislation.

Conflict between laws regulating completely different areas or even similar areas is almost inevitable. However, effort must be made to interpret laws in a manner that reconciles or harmonises the law and gives meaning to its purpose. To this extent, the Executive as implementers of legislation, amongst others, is constitutionally enjoined to cooperate in mutual trust and good faith to harmonise conflicts and properly delineate functions using intergovernmental relations protocols.

⁶ Section 35 of the IGR Act.

⁷ The Preamble to the Foreign Service Bill.

The Courts have developed well established interpretation rules over time to adjudicate matters of conflict in legislation. Where the Interpretation Act is silent on a matter, the courts have looked to common law. Section 173 of the Constitution grants the courts inherent authority to develop common law in the interest of justice.

Rules of Interpretation

The common law principle of *lex specialis derogat legi generali* (*lex specialis principle*), is generally accepted and internationally recognised technique/principle of interpretation and conflict resolution between statutes of similar status (national legislation). In a nutshell, the *lex specialis* principle suggests that whenever two or more pieces of legislation deal with the same subject matter, priority should be given to the legislation that is more specific to the subject matter.

The application of the *lex specialis* common law principle of interpretation is consistent with the Constitution and has been applied by our Courts in interpreting conflicting statutes of similar status.⁸ It does not normally extinguish the relevant general law. The general law will remain valid and applicable and will, in accordance with the principle of harmonization, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.

The rationale of the principle that special law (Foreign Service Bill, when and if it is promulgated into law) takes precedence over other general law including the Public Service Act, where reconciliation/harmonisation was not possible, is justified by the fact that the special law, is more concrete and often takes better account of the particular features of the context in which it is to be applied than any other general law. Its application may also often create a more equitable result.

It is our view that in the circumstances, that the Foreign Service Bill, when promulgated into law, will provide for a more concrete regime as it relates to its purpose, which is specifically to deal with matters of Foreign Service. Any conflicting provisions between national legislation should be resolved on the basis of harmonisation. Any law other

⁸ *Maccsand and another v City of Cape Town and Others* 709/2010 (SCA).

than the specific/special one would be preceded by the relevant provisions of the Foreign Service Act, when promulgated, in circumstances where reconciliation/harmonisation would not be possible.

In Ex Parte Speaker of Kwazulu Natal Legislature in re: Certification of the Kwazulu Natal Constitution 1996(4) SA 1098 (CC), the Court held that "provisions of legislation are inconsistent when they cannot stand at the same time, or cannot stand together or cannot both be obeyed at the same time. They are NOT inconsistent when it is possible to obey each without disobeying either. The court further held that there is no principal or practical reason why such provisions cannot operate harmoniously in regulating the same matter."

The Constitutional Court in the above matter settled the matter of two or more pieces of legislation regulating the same or similar areas. The Court found that such legislation would not be inconsistent by mere virtue of regulating similar areas. The test is whether the two laws can stand or be obeyed without disobeying the other. Therefore the Foreign Service Bill, when passed, can operate harmoniously as directed in Section 2(2) with other relevant legislation similar to it.

The processes as outlined in the IGR Act are one of the mechanisms that could be used to ensure harmonisation where conflict is anticipated.

Conferral of Powers ("may" against "must")

In terms of the principle of legality, organs of state may only exercise the powers and perform functions authorised by law. The aforementioned principle was discussed extensively by our courts in the two significant decisions that are cited below:

In *Speaker of the National Assembly v De Lille and Others* 1999 (4) SA 863 (SCA), in examining the legal authority of the Assembly to suspend its members, the court held that

[14] *"this inquiry must crucially rest on the Constitution of the Republic, it is supreme, not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no*

President, however formidable be his reputation or scholarship, and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. No Parliament, no official, and no institution is immune from judicial scrutiny."

In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) the court held:

[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 control of public power."*

Conferral of powers in legislation is indicated by "**may**", whilst the imposition of a legal duty is indicated by "**must**".

Legislation should clearly confer power to ensure that the functionary on whom the power is conferred acts within proper authorisation and does not act beyond the scope of the authorised power or fail to follow the prescribed procedures.

Clause 8 of the Bill provides for the establishment of coordination and other mechanism. Clause 8(1) confers the power to the Minister to establish coordination and other mechanisms as and when necessary for the effective execution/proper implementation of the Foreign Service Act, when passed into law.

Moreover, chapter 3, sections 40 and 41 of the Constitution enjoin organs of state to cooperate with one another in good faith and in mutual trust by informing and consulting one another on matters of common interest.

The IGR Act provides mechanisms for the implementation of the cooperation principles, which include setting up implementation protocols to further clarify roles and harmonise conflicts.

ADVICE

There are a number of statutes in the statute book, which contradict one another on one level or another. Conflict in legislation is almost inevitable. The most critical issue to consider where conflict arises is to attempt, where possible, to harmonise the differences in legislation in order to give the true meaning to its purpose. Where the latter fails to yield the desired result, there are well established rules of interpretation, including the *lex specialis* principle as enunciated above.

The Committee has determined that there is a need to create a special law that establishes and grants powers to the Foreign Service. This special law will be the primary source of reference on all matters related to Foreign Service. There is likely to be other legislation in the statute book, which in general terms contradict some of the provisions of this special law. In the event of that foreseeable event, and only where harmonisation was not possible, the Foreign Service Act, when and if passed, as the special law, should take precedence. In a nutshell, any such conflict between National legislation should be resolved on the basis of the applicable common law principle with due regard to section 173 of the Constitution and clause 2(2) of the Foreign Service Act, when promulgated.

The Constitutional Court determined in the ***Certification of Kwazulu Natal Constitution*** that there is justifiable reason in law, why provisions from various laws cannot stand together, where they can be harmonised and obeyed at the same time. Section 2 of the Bill is in line with this principle as set by the Constitutional Court.

On the issue of “may” and not “must” in section 8 of the Bill, it is noteworthy that this section confers the power to the Minister and that it is not imposing an obligation. The constitutional obligation on the Minister to perform the power conferred on her in section 8 is provided for in chapter 3 of the Constitution as well as the special law promulgated to give effect to chapter 3 of the Constitution, the IGR Act. It is our view that conferring the power to exercise a duty which has already been imposed by another overarching

statute suffices. The use of “may” and not “must” in section 8 of the Act is in line with drafting convention and is legally sound. This provision is in line with the principle of legality as discussed above.

In the event that the Committee is concerned that there may be some overlap in the implementation of this legislation, the committee could consider resolving to direct the relevant Minister to facilitate processes as directed by the Constitution and the IGR Act and report to Parliament in this regard, to harmonise any conflicting implementation challenges that may arise. The Committee is fully empowered to do the aforementioned in line section 92 of the Constitution.

Lastly, we would like to bring it to the attention of the Committee that this Bill is one which is processed in line with section 75 of the Constitution. In terms of the aforementioned section, if the Committee passes the Bill without amendments, the Bill will proceed to the President for assent, however, if the committee proposes some changes, the Bill will be referred to the Portfolio Committee for it to consider the proposed amendments and determine whether it will accept or reject the proposed amendments as proposed by the Committee.


Adv Z Adhikarie
Chief Legal Adviser

14/03/2019
Date: