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Ms WR Tshabalala
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Department of Women
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Attention: Nondumiso Maone (nondumiso.maonme@women.gov.za)

Dear Ms Tshabalala

LEGAL OPINION: AGREEMENT AMENDING THE SADC PROTOCOL ON GENDER AND DEVELOPMENT: YOUR EMAIL DATED 02 JULY 2018

INTRODUCTION

1. The Department of Women (the "Department") has provided us with an Agreement Amending the SADC Protocol on Gender and Development (the "Amendment Agreement") for scrutiny and to provide it with a legal opinion.
2. It is apparent from the Department's instructions that the legal opinion is sought on whether the Amendment Agreement is compatible with South Africa's domestic law. To this end, we have scrutinised the Amendment Agreement with reference to Chapter 5 of the *Constitutional Handbook for Members of the*

Executive ("Handbook"), Chapter 5 of the *Manual on Executive Acts of the President of the Republic of South Africa*, the Constitution of the Republic of South Africa, 1996 ("the Constitution") and relevant domestic legislation.

3. Evidently, the Amendment Agreement amends the SADC Protocol on Gender and Development (the "SADC Protocol") which was signed and adopted in Johannesburg on 17 August 2008 and, as far as we could ascertain, entered into force on 22 February 2013.¹ The objectives of the SADC Protocol are, among others things, to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects.² South Africa is a member of SADC and also a signatory to the SADC Protocol. However, we have not been able to ascertain when exactly South Africa ratified the SADC Protocol. Nonetheless, we presume that such ratification was done.

4. The Amendment Agreement is in a pdf format and bears the signatures of eight of the 15 SADC Member States who are signatories to the SADC Protocol. As such, we cannot effect any changes on the text of the Amendment Agreement. Therefore, we consider it expedient, for the purpose of this legal opinion, to provide an overview of the terms of the Amendment Agreement starting with the Preamble.

Ad Preamble

5. The Preamble captures the rationale for the Amendment Agreement together with the history and the considerations that were taken into account in formulating the Amendment Agreement.

¹ <https://www.sadc.int/issues/gender/> accessed on 10 July 2018.

² Article 3 of SADC Protocol referred to in para 3 of this legal opinion.

Ad Article 1

6. Article 1 deals with the definition and its contents are self-explanatory and comprehensible. It is thus not necessary to provide any further comments on this Article.

Ad Articles 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22

7. On the one hand, Articles 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, and 22 amend the various Articles of the SADC Protocol which are set out in the table of contents to the Amendment Agreement. On the other hand, Article 19 inserts a new Part Ten into the SADC Protocol. We note that the amendments in the abovementioned Articles entail deletion and substitutions of certain words and provisions in the SADC Protocol. However, we note that the amendments and substitutions do not change the substance of the SADC Protocol.

Ad Article 6

8. Article 6 of the Amendment Agreement amends subparagraph (a) of paragraph 2 of Article 8 of the SADC Protocol.

Subparagraph (a) prior to amendment stated as follows:

*“(a) no person under the age of 18 shall marry, unless otherwise specified by law, **which takes into account the best interests and welfare of the child;**”.* (Our emphasis.)

Subparagraph (a) as amended states as follows:

“(a) no person under the age of 18 shall marry;”.

The words *“..., unless otherwise specified by law, which takes into account the best interests and welfare of the child”* in subparagraph (a) prior to it being amended are indicative of an exception where the general prohibition does not apply. Notably, the aforesaid words have been taken out in the amended

subparagraph (a). The effect of subparagraph (a) in its amended form seems to be that whatever legislation or measure the State Party takes to prohibit marriage of persons under the age of 18 years must do so wholly and completely. In other words, the prohibition is outright.

9. In South Africa the Marriages Act, 1961 (Act No. 25 of 1961) and the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) are the main Acts which govern the conclusion of marriages. However, the Civil Union Act, 2006 (Act No. 17 of 2006) also deals with civil union which is defined as meaning *“the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others”*.

10. However, and as far as we could ascertain, the Marriages Act, 1961, and the Recognition of Customary Marriages Act, 1998, do not provide for an outright prohibition of persons under the age of 18 years (minors) from entering into a marriage. In fact, minors may, in certain circumstances enter into marriages as it can be seen from the provisions of section 25 of the Marriages Act, 1961 and section 3 of the Recognition of Customary Marriages Act, 1998.

Section 25 of the Marriages Act, 1961 states as follows:

“26 Prohibition of marriage of persons under certain ages

(1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.

(2) *If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister or any officer in the public service authorized thereto by him, in terms of this Act or a prior law, contracted a marriage without such permission and the Minister or such officer, as the case may be, considers such marriage to be desirable and in the interests of the parties in question, he may, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act, or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.*

(3) *If the Minister or any officer in the public service authorized thereto by him so directs it shall be deemed that he granted written permission to such marriage prior to the solemnization thereof.*" (Our underlining)

Section 3 of the Recognition of Customary Marriages Act, 1998, states as follows:

"3 Requirements for validity of customary marriages

(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

(2) Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.

(3) (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies.

(4) (a) Despite subsection (1) (a) (i), the Minister or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4), section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.”. (Our underlining)

11. The absence of such an outright prohibition is notwithstanding the fact that the Children’s Act, 2005 (Act No. 38 of 2005) provides in section 17 that “[a] child, whether male or female, becomes a major upon reaching the age of 18 years”. **Accordingly, there is currently, as far as we could ascertain, no legislation in South Africa which provides for an outright prohibition as envisaged in subparagraph (a) of paragraph 2 of Article 8 of the SADC Protocol. In this regard, the SADC Protocol conflicts with our domestic law.**

Ad Articles 23 and 24

12. Article 23 deals with entry into force and states that the Amendment Agreement will enter into force on the date of its adoption by a decision of three-quarters of the Member States that are signatories to the SADC Protocol. Article 24 deals with depository which essentially entails administrative matters. It requires the original text of the Amendment Agreement to be deposited with the Executive Secretary of SADC who in turn must provide certified copies of the Amendment Agreement to all SADC Member States.

AMENDMENT OF THE SADC PROTOCOL

13. The amendment of the SADC Protocol is provided for in Article 38 of the SADC Protocol itself, which provides as follows:

"ARTICLE 38

AMENDMENT

1. *A proposal for the amendment of this Protocol shall be submitted to the Executive Secretary of SADC by any State Party that is party to the Protocol.*
2. *The Executive Secretary of SADC shall submit a Protocol for amendment of the Protocol to Council after:*
 - (a) *all Member States that are parties to the Protocol have been notified of the proposal; and*
 - (b) *thirty days have elapsed since notification to the Member States that are parties to the Protocol.*
3. *An amendment to this Protocol shall be adopted by a decision of three-quarters of the Member States that are Parties to the Protocol."*

14. It our view that the Amendment Agreement accords with the provisions of Article 38 of the SADC Protocol.

CHANGES IN DOMESTIC LAW IN RESPECT OF MATTERS CONTAINED IN THE PROTOCOL

15. As far as we could ascertain, since the signing of the SADC Protocol in 2008, no changes have been introduced in our domestic law which contradicts the SADC Protocol in respect of the matters contained in the SADC Protocol. However, we note that there are various measures which have already been taken while others continue to be taken to address the issues contained in the SADC Protocol. In paragraphs 16 and 17 below we refer to some of the existing measures dealing with some of the matters contained in the SADC Protocol.

16. The SADC Protocol states in Article 4 that “[s]tates Parties shall endeavour, by 2015 to enshrine gender equality and equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices”. The Constitution enshrines gender equality and equity in its various provisions, particularly in section 9 which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Furthermore, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (“PEPUDA”) gives effect to section 9 of the Constitution (and does in our view also give effect to Article 4 of the SADC Protocol even though the SADC Protocol was signed only after PEPUDA had already been enacted). Section 8 of PEPUDA provides as follows:

“8 Prohibition of unfair discrimination on ground of gender

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including-

- (a) gender-based violence;*
- (b) female genital mutilation;*
- (c) the system of preventing women from inheriting family property;*
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;*
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;*
- (f) discrimination on the ground of pregnancy;*

- (g) limiting women's access to social services or benefits, such as health, education and social security;*
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;*
- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.”.*

17. Article 5 of the SADC Protocol states that “[s]tates Parties shall put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation”. Section 15 of the Employment Equity Act, 1998 (Act No. 55 of 1998) requires designated employers to take and implement affirmative action measures which must include, amongst other things, measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups and measures designed to further diversity in the workplace based on equal dignity and respect of all people.

CLASSIFICATION OF FRAMEWORK AGREEMENT

18. We turn now to deal with the classification of the Amendment Agreement. To begin with, section 231 of the Constitution deals with the negotiation and signing of international agreements and provides as follows:

"International agreements

231 (1) *The negotiating and signing of all international agreements is the responsibility of the national executive.*

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification

or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect." (Our underlining)

19. Although, the Constitution does not define what an international agreement is, the prevailing view is that "international agreement" in section 231 of the Constitution is synonymous with "treaty" and refers to legally binding, enforceable agreements as defined in Article 2 of the Vienna Convention.³ Article 2 of the Vienna Convention defines a treaty as meaning "*an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*".

20. Paragraph 5.1 of Chapter 5 of the Manual on Executive Acts of the President of the Republic of South Africa ("the Manual")⁴ distinguishes between two frameworks for concluding international agreements, namely the framework which applies to international agreements which require ratification or accession in order to be brought into effect and the framework which applies to international agreements which merely require the signature of a duly authorised representative of a contracting state party to come into effect. Paragraph 5.5 of Chapter 5 of the Manual deals with international agreements referred to in section 231(3) of the Constitution, namely international agreements of a technical, administrative or executive nature. It states that these types of international agreements refer to the following categories of international agreements: Agreements which are

³ John Dugard, *International Law (South African Perspective)* 3rd Edition and the Vienna Convention on the Law of Treaties of 1969 at pages 63 to 64.

⁴ Edited by: Dr David Levey: University of South Africa. Revised in 2007 by Geoffrey Mphaphuli.

departmentally specific, agreements which are not of major political or other significance and agreements which have no financial consequences and do not affect domestic law.

21. It is apparent that the SADC Protocol constitutes a multilateral treaty which is binding on and as between the Member States who are signatories to it. Furthermore, a *Protocol* is defined as follows: “**Protocol**’ is a legally binding document committing Member States to the objectives and specific procedures stated within it”. Articles 39 and 40 of the SADC Protocol both provide as follows:

“ARTICLE 39

SIGNATURE

This Protocol shall be signed by the duly authorised representatives of the Member States.

ARTICLE 40

RATIFICATION

This Protocol shall be ratified by the Signatory States in accordance with their constitutional procedure.”

22. Besides providing for entry into force in Article 23, the Amendment Agreement does not have the same provisions as those contained in Articles 39 and 40 of the SADC Protocol. However, and notwithstanding the fact that the Amendment Agreement is an agreement in and of itself and does not expressly state that it must be ratified, Articles 39 and 40 of the SADC Protocol apply to the Amendment Agreement since both documents ultimately constitute one instrument. In our view, the Amendment Agreement falls within the ambit of the provisions of section 231(2) of the Constitution and is thus required to be approved in accordance with South Africa’s constitutional procedure which is provided for in section 231(2) of the Constitution and the relevant rules of Parliament.

23. In *Glenister v President of the Republic of South Africa and Others*⁵ the Constitutional Court held as follows:

⁵ 2011 (3) SA 347 (CC).

"[95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.

[96] This is not to suggest that the ratification of an international agreement by a resolution of Parliament is to be dismissed 'as a merely platitudinous or ineffectual act'. The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights." (Our underlining)(Footnotes omitted)

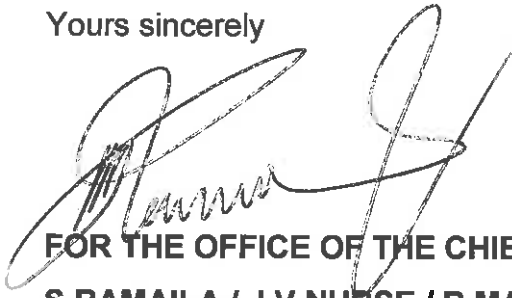
24. Insofar as the Amendment Agreement constitutes an international agreement referred to in section 231(2) of the Constitution, the Department's attention is drawn to paragraph 5.21 of the Manual which requires the Department to send the Amendment Agreement to the Department of International Relations and Cooperation for checking and certification.

CONCLUSION

25. Subject to our comments above and our views expressed especially in paragraph 11 above, we are of the view that the Amendment Agreement is in order and compatible with our domestic law. A copy of the Amendment Agreement is attached herewith for ease of reference.

26. We trust you find the above in order.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S Ramaila', written in a cursive style. The signature is positioned above the typed name and title.

**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S RAMAILA / J V NURSE / B MAKHENE-GADINI**