



191031 JSCD Defense

**LEGAL OPINION**  
[Confidential]

**TO:** Hon ME Nchabeleng, MP  
Hon VC Xaba, MP  
Co-Chairpersons: Joint Standing Committee on Defense

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

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

**DATE:** 02 October 2019

**REF:** 103/2019 NM

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**SUBJECT: LEGAL EFFECT OF THE DUPLICATE POWERS AND FUNCTIONS OF THE JOINT STANDING COMMITTEE ON DEFENCE, PORTFOLIO COMMITTEE ON DEFENCE AND THE SELECT COMMITTEE ON DEFENCE**

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**INTRODUCTION**

1. Our Office received a request from the Hon ME Nchabeleng, MP and Hon VC Xaba, MP together referred to as the Co-Chairpersons of the Joint Standing Committee on Defence ("JSCD"), to advise the JSCD on the legal effect of the seemingly duplicated powers and functions of the oversight function over the Department of Defence as provided in the Interim Constitution, the Joint Rules of Parliament, the National Assembly rules and the National Council of Provinces rules respectively.
2. The JSCD has noted that "it is apparent that the relevant regulatory framework duplicates the powers and functions of the relevant Committees, being the Portfolio

Committee on Defence (“Portfolio Committee”), Select Committee on Defence (“Select Committee” and the JSCD.”

3. In context, the request for advice arose when the JSCD was examining its mandate and it realised that section 228 of the Interim Constitution, 1993 read with schedule 6 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) which sets out its powers and functions is duplicated by the Portfolio Committee and the Select Committee’s mandate as set out in the Constitution and the respective House Rules. The Committee is of the view that the latter leads to a duplication of effort by all committees concerned, which is undesirable.

## LEGAL QUESTIONS

4. The legal question is: “what is the legal effect of the apparent duplicate powers and functions of the Portfolio Committee, Select Committee and the JSCD?”

## LEGAL FRAMEWORK

### Interim Constitution<sup>1</sup>

5. Section 228(d) of the Interim Constitution establishes the JSCD and states that “*The committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the National Defence Force and to perform such other functions relating to parliamentary supervision of the Force as may be prescribed by law.” (our emphases).*
6. As mentioned above, section 228 was saved in Schedule 6 of the Constitution when it was passed in 1996 as a transitional clause. Schedule 6 of the Constitution deals with the transition from the legal order under the Interim Constitution to the new order established by the 1996 Constitution.<sup>2</sup> It is plain from the term transitional arrangements in schedule 6 of the Constitution that the provisions listed herein are not meant to be indefinite, it was envisaged that the said provisions would either be repealed or amended through ordinary section 75 legislation.

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<sup>1</sup> Interim Constitution, 1993.

<sup>2</sup> *Gauteng MEC: Development Planning and Local Government v Democratic Party and Others* [CCT 33/97].

7. It is common cause that section 228 of the Interim Constitution was never amended or repealed and remains in effect. On this basis, it can be reasonably concluded that the latter is legal justification/basis as to why the JSCD persists unless section 228 is repealed.

### Constitution<sup>3</sup>

8. 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.<sup>4</sup> Furthermore, the Constitution provides for evidence or information before National Assembly.<sup>5</sup> It states that the National Assembly or any of its committees may summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; require any person or institution to report to it.<sup>6</sup>

9. Section 69 of the Constitution provides for evidence or information before the NCOP. It states that the NCOP or any of its committees may summon any person to appear before it to give evidence on oath or affirmation or to produce documents and to require any institution or person to report to it.<sup>7</sup>

10. Section 57 of the Constitution provides for internal arrangements, proceedings and procedures of the National Assembly. It states that the NA may determine and control its internal arrangements, proceedings and procedures and may make rules and orders concerning its business, amongst others.<sup>8</sup> Section 70 of the Constitution vests corresponding powers in respect of the NCOP.

11. As reflected above, Schedule 6 of the Constitution provides for transitional arrangements. It provides that all law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal; and consistency with the new Constitution.<sup>9</sup>

12. Specifically, Clause 24(1) of Schedule 6 of the Constitution provides that section 228 of the Interim Constitution, amongst others, continue to be in force as if the

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<sup>3</sup> Constitution of the Republic of South Africa, 1996.

<sup>4</sup> Section 2 of the Constitution.

<sup>5</sup> Section 56 of the constitution.

<sup>6</sup> Section 56(a) and 9b) of the Constitution.

<sup>7</sup> Section 69(a) and (b) of the Constitution.

<sup>8</sup> Section 57(1)(a) and (b) of the Constitution.

<sup>9</sup> Clause 6(2) of Schedule 6 of the Constitution.

previous Constitution had not been repealed, subject to amendment and consistency with the Constitution, however, the final Constitution repealed the Interim Constitution when it was passed in 1996 and the transitional provisions in schedule 6 of the Constitution may be repealed or amended in terms of the procedure as set out in section 75 of the Constitution as opposed to a Constitutional amendment process as set out in section 74.<sup>10</sup>

### **Joint Standing Rules of Parliament**

13. Joint Rule 120A provides for the establishment of the JSCD. It states that "*there is a JSCD as required by section 228(3) of the Constitution, 1993*". The aforementioned Joint Rule establishes the JSCD and cross references section 228 of the Constitution. The JSCD **investigates and make recommendations** regarding the budget functioning, organisation, armaments, policy, morale and state of preparedness of the National Defence Force and to perform such other functions relating to parliamentary supervision of the Force as may be prescribed by law.

14. In essence, the JSCD performs oversight function over the Department of Defence.

### **National Assembly Rules**

15. Rule 227 of the National Assembly rules provides for functions of the Portfolio Committees. Rule 227(1)(c) states that "*a Portfolio Committee may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution, including the legislative programme, budget, rationalisation, policies of such organ of state, institution or other body or institution*".

16. In terms of the oversight role of the Portfolio Committee, the Committee also exercises oversight over the Department of Defence, including on the very same areas oversight as stipulated in section 228 of the Interim Constitution.

### **National Council of Provinces Rules**

17. Rule 103(1) of the NCOP rules states that "*for the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other*

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<sup>10</sup> Schedule 6, clause 24 of the Constitution.

*provisions of these Rules and resolutions of the Council summon any person to appear before it to give evidence on oath or affirmation, or to produce documents, including conducting public hearings”.*

18. In terms of the oversight role of the Select Committee, the Committee in addition to the JSCD and the Portfolio Committee, also exercises oversight over the Department of Defence, including on the very same areas of oversight as stipulated in section 228 of the interim Constitution.

### **Judicial Precedent**

19. In *S v Perrington and Another* 1997 (4) SA 1076 (CC), the court held that pending the enactment of envisaged legislation or rules, the existing legislation or rules should apply.

20. In line with the aforementioned decision of the Constitutional Court, the provisions of the Interim Constitution which were never amended or repealed, which form part of the items as listed in Schedule 6 of the Constitution, continue to be in force and of full effect, pending such repeal or amendment.

### **ADVICE**

21. The Constitution which is the supreme law of the Republic provides for the mandate of Parliament, amongst which it vests on Parliament the power and function to exercise oversight over the Executive. The Department of Defence falls within the realm of the Executive and is subject to the aforesaid oversight function of Parliament.

22. Sections 56 and 69 of the Constitution respectively, provide for the power of the Parliament or its Committees, in this respect the Portfolio Committee and Select Committee to summon persons or institutions to appear before it and or to produce documents. The aforementioned powers include powers to investigate and make recommendations to the respective Houses on any relevant matter. The latter is supported by sections 57 and 70 of the Constitution.

23. The Joint Rules which provide for the establishment of the JSCD do not provide for powers and functions of the said Committee but it cross references section 228 of

the Constitution, which in turn sets out the said powers. As noted in previous paragraphs, the oversight powers of the JSCD as set out in section 228 of the Interim Constitution are an exact duplicate of the powers of Parliamentary Committees as set out in sections 56 and 57 of the Constitution as well as the relevant rules of the respective Houses.

24. It is our considered view that the aforementioned duplication of powers may at times result in an unnecessary duplication of effort, which is an undesirable outcome as correctly noted by the JSCD. It is important to note that whilst there may be a duplication as noted above, the powers of the JSCD as set out above remain in force and full effect pending repeal or amendment as per the Constitutional Court decision in the *Perrington* decision.

25. The JSCD is advised to consider its options herein and make a recommendation to the Speaker on whether to sustain the *status quo* or repeal/amend section 228 of the Interim Constitution. If the JSCD recommends to sustain the status quo, it may perhaps be advisable for the JSCD to also recommend that its mandate be re-defined narrowly so as to limit the extent of the duplication with the other two Committees. However, if the JSCD recommends a repeal/amendment of section 228 it would appear that the correct vehicle for such an amendment/repeal will be the Defence Act 42 of 2002. To this end, the JSCD should further recommend to the Speaker that a letter be addressed to the Minister of Defence and Military Veterans for her to consider an amendment to the Defence Act with a view to repeal section 228 of the Interim Constitution.

  
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**Adv Z Adhikarie**  
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**Date:**