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MEMORANDUM

[Confidential]

TO: Hon VC Xaba, MP
Chairperson of the Portfolio Committee on Defence

COPY: Mr PN Tyawa
Acting Secretary to Parliament

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

DATE: 21 October 2019

REF: 108/2019/SH

MESSAGE: Please find attached the above memorandum for your attention

Adv Z Adhikarie
Chief Legal Adviser



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LEGAL OPINION
[Confidential]

TO: Hon VC Xaba, MP
Chairperson of the Portfolio Committee on Defence

COPY: Ms PN Tyawa
Acting Secretary to Parliament

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

DATE : 21 October 2019

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SUBJECT: REQUEST BY THE PORTFOLIO COMMITTEE ON DEFENCE AND MILITARY VETERANS FOR LEGAL ADVICE ON THE INTERPRETATION OF CERTAIN PROVISIONS OF THE MILITARY VETERANS ACT (ACT NO 18 OF 2011)

INTRODUCTION

1. Our Office received a request from the Hon VC Xaba, MP, the Chairperson of the Portfolio Committee on Defence and Military Veterans, to advise on the interpretation of certain provisions of the Military Veterans Act (the Act). The full extent of the request is set out hereunder.

2. Apparently, the Department of Military Veterans (the Department) has raised concerns around the interpretation of certain sections of the Act and further has proposed that these sections must be reviewed. In its latest Annual Report, the Department states that "The Department has worked hard to finalise the amendment of the Military Veterans Act 18 of 2011 however, this process is delayed whilst the White Paper is being drafted herein." It is in this context that the legal opinion is requested by the Committee.

LEGAL QUESTIONS

3. The legal question is broadly captured as follows:

"Some of the aspects identified for possible amendments and on which clarification is sought by the Portfolio Committee, include:

- Section 1. Definition of a military veteran. The question was raised whether preference can be given, especially to members of the Non-Statutory Forces (NSF) and whether retired SANDF members can and should qualify for the benefits as stipulated in Section 5 of the Act. Reference was also made to SANDF members who resigned or whose contracts were not renewed such as Military Skills Development System (MSDS) members who wanted to claim benefits.
- Section 5 (i) access to health care. Questions were raised around the justifiability of extending this benefit only to the military veteran and not to her/his spouse. In addition, questions were raised around the status of widows and widowers and their children once the main beneficiary has passed on.
- Section 5 (j) housing. Given that the housing benefit only applies to the military veteran, what happens when she/he passes on or, he/she was in the process of being allocated a house and passes on.
- Section 5 (k) burial support. Is it justifiable to extend the benefit only to the military veteran and not to his/her spouse or partner?
- Section 7 — National military veterans' association. The Department had challenges around the funding of conferences of individual military associations as this is not spelled out in the Act or regulations.

- Section 9 — 18 Advisory Council and Section 19 — 23 Military Veterans Appeal Board. Questions were raised around the functions and specific roles of these two statutory bodies in terms of how, when it should be consulted and especially the "authority" of their advice/recommendations and whether these should/must be accommodated."

4. Specifically, we are requested to provide a legal interpretation of the background and the main objectives of the Act to evaluate whether it is justifiable to deal with these aspects in an amendment Act.

5. As is evident from the above, the questions posed to us go beyond our competence as they raise issues of policy which can be better dealt with by the Department. For this reason, we will limit our advice to issues of legal interpretation of the relevant provisions of the Act.

LEGAL FRAMEWORK

Constitution¹

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

7. Section 44 of the Constitution provides as follows:

"44. (1) The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power—

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

¹ Constitution of the Republic of South Africa, 1996.

² Section 2 of the Constitution.

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government;”

National Assembly Rules

8. 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”.*

9. In terms of the oversight role of the Portfolio Committee, the Committee also exercises oversight over the Department of Military Veterans, including on the legislative programme and policies.

Military Veterans Act

10. According to the Long Title the purpose of the Act is to “provide for principles recognised by the State as governing the affairs of military veterans and for policy objectives in this regard;” (our emphases).

11. Section 3 of the Act sets out broad fundamental principles recognised by the State and policy objectives. In particular section 3(1)(c) states that “in the event of a military veteran or category of military veterans being considered for possible non-contributory aid by the State, such military veteran or category of military veterans must be subjected to a means test to determine their eligibility;” (our emphases).

12. Section 24(1)(a) of the Act empowers the Minister to make regulations relating to the “criteria that must be met in order to qualify for benefits”.

13. Further to the above, section 3(2)(g) provides that any policy regarding the affairs of military veterans must contribute towards reconciliation and nation building.

14. With these fundamental principles in mind, we now turn to deal with the specific legal questions raised by the Committee.

Section 1 of the Act: Definitions

15. Section 1 of the Act defines “military veterans” broadly as follows:

“means any South African citizen who—

(a) rendered military service to any of the military organisations, statutory and non-statutory, which were **involved on all sides of South Africa's Liberation War from 1960 to 1994;**

(b) served in the **Union Defence Force before 1961;** or

(c) became a member of the **new South African National Defence Force after 1994,**

and has completed his or her military training and no longer performs military service, and has not been dishonourably discharged from that military organisation or force: Provided that this definition does not exclude any person referred to in paragraph (a), (b) or (c) who could not complete his or her military training due to an injury sustained during military training or a disease contracted or associated with military training;”

16. It is clear from the wording of this definition that it was intentionally designed to be inclusive of all forces. This is evident in the use of the phrase “involved on all sides of South Africa’s Liberation War from 1960 to 1994”. This is re-enforced by the specific reference to “Union Defence Force before 1961”. This seems to accord with the fundamental principle captured in section 3(2)(g) that any policy regarding the affairs of military veterans must contribute towards reconciliation and nation building.

17. The question of who must qualify for benefits prescribed in section 5 of the Act is regulated through the “means test” referred to in section 3(1)(c) of the Act. Section 3(1)(c) provides for a “means test” to determine the eligibility for benefits. The “means test” is prescribed in the Military Veterans Regulations, 2011 issued on *Government*

Gazette No.: 37355 of 2011. In particular regulations 12, 13, 14 and 16 are of relevance for this purpose.

18. The Act and Regulations as currently crafted do not give preference to any specific category of veterans as the “means test” is of general application to all military veterans. As such, any preferential treatment of one category of veterans over the other will fall foul of the Act and Regulations.

19. It may be instructive to reflect on section 2 of the Act which provides that “This Act must not be interpreted as entitling any person who is defined as a military veteran in this Act, or his or her dependants, to any benefit provided for in this Act or any other law merely on the grounds of such definition.” Simply put, the status of being a “military veteran” *per se* does not automatically entitle a person to any benefits under the Act. An additional requirement, in this instance the “means test”, needs to be fulfilled for eligibility for benefits.

Section 5(i) & (j): Access to health care/Housing

20. Section 5(1) of the Act provides a list of benefits relating to military veterans. Section 5(2) extends some of these benefits to the dependants of the military veterans. The specific benefits extended to dependants are limited to “*dedicated counselling and treatment to military veterans who suffer from serious mental illness, post-traumatic stress disorder or related conditions*”, “*education, training and skills development*” and “*pension*”. This is a clear demonstration that the legislature intended to limit the benefits of the dependants to the three that are mentioned in subsection (2) and unfortunately “access to health care” and “housing” are part of the exclusions.

21. In respect of section 5(j), we add that where a house has already been allocated it is our view that ordinarily that house will devolve to the veterans’ beneficiaries through his/her estate. Where he/she passes on before the allocation unfortunately his/her beneficiaries do not stand to benefit.

22. If the Committee wishes to extend the benefits in subsection (2), this can only be achieved through an amendment to the Act.

Section 5(k): Housing

23. Save to add that the benefits listed in section 5 are primarily meant for the military veterans, we repeat what we stated above in respect of section 5(i) and (j).

Section 7: National Military Veterans Association

24. Section 26 of the Act provides that “The costs and expenses connected with the administration and implementation of this Act must be defrayed from moneys appropriated by Parliament to the Department for that purpose.” From this provision it is clear that the budget of the Department can only be utilised for a purpose related to the “administration and implementation of this Act”. To the extent that it is necessary, we opine that the National Military Veterans Association is a statutory body established in terms of the Act and is required to advise both the Minister and the Director General on matter affecting the military veterans. As such, we are of the opinion that its activities are related to the administration and implementation of the Act and therefore may (subject to availability of resources) be funded from the budget of the Department.

25. Notwithstanding the above opinion, we advise that the Accounting Officer of the Department is better placed to determine what activities are related to the administration and implementation of the Act. It is difficult to deal with this question in the abstract.

Section 9 – 18: Advisory Council

26. In terms of section 10 of the Act, the role of the Advisory Council is to advise the Minister and the Director General on policy applicable to military veterans and all other matter pertaining to military veterans. According to Dictionary.com the word “advise” is a verb meaning “to give counsel to; offer an opinion or suggestion as worth following.” It would appear therefore that the Minister is under no obligation to follow the advice.

27. This, however, does not mean the Minister is at liberty to ignore sound advice without good reason. She is required, by principle of rationality, to at least demonstrate that she has considered the advice. Any other interpretation would have the effect of rendering the Council superfluous contrary to the clear intentions of the legislature.

Section 19 – 23: Military Veterans Appeal Board

28. From the reading of section 20 of the Act it would appear that the Appeal Board has both adjudicative (S20(1)(a)) and advisory (S20(1)(c)) powers. We are fortified in this view by the provisions of section 20(2) of the Act. In as far as the adjudicative powers, the Appeal Board may "confirm, set aside or vary a decision contemplated in subsection (1)(a)" and "substitute any other decision for the decision". To this end it would appear that the decision of the Board in this regard would be binding on the Department.

CONCLUSION

29. To the extent that the questions posed by the Committee hint at a policy shift we would advise the Committee to engage with the Department with a view to persuade it to consider the relevant amendments which the Committee deems necessary.



Adv Z Adhikarie
Chief Legal Adviser

24/10/2019
Date