



## MEMORANDUM

**TO: HON. MR. MI RAYI, MP**  
**CHAIRPERSON: SELECT COMMITTEE ON TRADE AND INDUSTRY,  
ECONOMIC DEVELOPMENT, SMALL BUSINESS DEVELOPMENT,  
TOURISM, EMPLOYMENT AND LABOUR**

**FROM: ADV. ME PHINDELA**  
**SECRETARY TO THE NATIONAL COUNCIL OF PROVINCES**

**DATE: 10 FEBRUARY 2020**

**RE : PROCEDURAL ADVICE: AMENDMENT OF PRINCIPAL ACT**

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### **1. BACKGROUND**

We refer to your request for procedural advice on whether it is permissible to propose amendments to the National Minimum Wage Act (the principal Act) during the consideration of the National Minimum Wage Amendment Bill [B9-2019] (the Amendment Bill). The Amendment Bill seeks to amend the principal Act so to correct a cross-reference contained in section 17 of the principal Act. The facts herein are similar to the matter relating to the Electoral Laws Amendment which was dealt with by the House in 2019. The only difference is that the purported proposed amendments were introduced by a Permanent Delegate. For ease of reference, we attach a Ruling in relation thereto.

The Amendment Bill was introduced in the National Assembly and classified as a bill not affecting provinces to be dealt with in terms of the procedure outlined in section 75 of the Constitution. The National Assembly passed the Amendment Bill and referred it to the National Council of Provinces for consideration and adoption. The Amendment Bill was referred to the Select Committee on Trade and Industry, Economic

Development, Small Business Development, Tourism, Employment and Labour (Select Committee). The principal Act is currently not before the Select Committee.

On calling for comments, the Select Committee received various submissions which proposed to amend not only the principal Act but also the Basic Conditions of Employment Act, Compensation of Injury on Duty Act and Unemployment Insurance Fund Act. It is these proposed amendments that the Select Committee seek to determine whether they are permissible.

## **2. LEGISLATION AND RULES APPLICABLE**

- (a) Section 68, 75 and 76 of the Constitution;
- (b) Council Rule 210; and
- (c) Joint Rule 161.

## **3. APPLICATION**

The Amendment Bill is classified as a Bill not affecting provinces and is therefore dealt with in terms of section 75 of the Constitution. Section 75(1)(a) of the Constitution authorises the National Council of Provinces to pass the Bill, pass the Bill subject to proposed amendments or reject the Bill referred to it by the National Assembly.

Rule 210(1)(a) of the Rules requires the Select Committee to which the Bill is referred to inquire into the subject of the Bill, in this instance, the Amendment Bill. The Select Committee is therefore confined to inquire into the subject of the Amendment Bill as passed by the National Assembly. The subject of the Amendment Bill is to amend section 17 of the principal Act (the National Minimum Wage Act, 2018).

Rule 210(1)(h) prohibits a Select Committee from proposing amendments that would render the Bill constitutionally or procedurally out of order within the meaning of joint rule 161.

In terms of joint rule 161(2)(a) of the Joint Rules a Bill is procedurally out of order if the procedure prescribed in either the Assembly or the Council rules as a precondition for the introduction of a Bill in the particular House has not been complied with.

Section 68(b) of the Constitution empowers the National Council of Provinces to initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3). The content of the Amendment Bill is neither one of those functional areas, nor does it fall within the category of legislation referred to in section 76(3). To attempt to amend the principal Act and other legislation referred to above in the manner proposed would amount to initiation or preparation of legislation that does not fall within the functional areas listed in Schedule 4 or other legislation referred to in section 76(3) of the Constitution. The National Council of Provinces simply does not have the power to do so. Such amendments would render the Amendment Bill procedurally and constitutionally out of order.

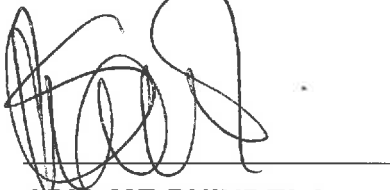
Having regard to the proposed amendments to the Amendment Bill, it is evident that they should not be classified as amendments within the meaning of Council Rule 210. The inclusion of the proposed amendments would inadvertently result in the creation of a new piece of legislation. This in turn would be inconsistent with the Constitution and the Council Rules.

As indicated above, this is a matter that does not affect provinces within the meaning of the Constitution and can therefore not be introduced for the first time in the National Council of Provinces. Should these proposed amendments be allowed, they will render the Bill both procedurally or constitutionally out of order. The proposed amendments would suitably be introduced in the National Assembly.

#### **4. ADVICE**

In the premise, we advise that it is not permissible to propose amendments, other than to section 17 of the National Minimum Wage Act (the principal Act) during the consideration of the National Minimum Wage Amendment Bill [B9-2019] (the Amendment Bill).

Yours sincerely,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

**ADV. ME PHINDELA**

**SECRETARY TO THE NATIONAL COUNCIL OF PROVINCES**

**34. Ruling by the Chairperson of the NCOP on the proposed amendments to Electoral Laws Amendment Bill [b 33b – 2018] (National Assembly – sec 75) in terms of Rule 212 of the NCOP**

**FACTS**

The Office of the Secretary to the NCOP received proposed amendments from Hon Hattingh at 14:00 on 8 January 2019. The proposed amendments were purportedly submitted in terms of Rule 212 of the Rules of the National Council of Provinces. The proposed amendments sought to amend the Electoral Laws Amendment Bill [B33B – 2018]. In terms of Rule 212(1)(a), after a Bill has been placed on the Order Paper but before the Council decides on the Bill, any member may place proposals for amending the Bill on the Order Paper. It was in terms of this Rule that the Hon. member purportedly submitted the proposed amendments.

**RULING**

The purported proposed amendments seek to amend certain provisions of the Electoral Act which are not covered by the Electoral Laws Amendment Bill [B33B- 2018]. The Bill is classified as a Bill not affecting provinces. It is therefore to be dealt with in terms of section 75 of the Constitution.

within the meaning of joint Rule 161 or amendments that are out of order for any other reason. Rule 210(1)(h), which applies to the consideration of the Bill by the committee, is similarly worded. It prohibits a committee from proposing an amendment that may render the Bill constitutionally or procedurally out of order within the meaning of joint Rule 161.

In terms of joint Rule 161(2)(a), to which rule 212 refers, a Bill is procedurally out of order if the procedure prescribed in either the Assembly or the Council rules as a precondition for the introduction of a Bill in the particular House has not been complied with. As indicated above, the Bill was classified as a Bill not affecting provinces to be dealt with in terms of the procedure prescribed in section 75 of the Constitution. Needless to say, the Constitution does not envisage the introduction of these types of Bills in the National Council of Provinces. Unlike Bills affecting provinces, which the National Council of Provinces may amend, the House is only confined to passing these types of Bills subject to proposed amendments.

To be precise, section 68(b) of the Constitution, dealing with the powers of the National Council of Provinces, empowers the National Council of Provinces to initiate or prepare legislation falling within a functional area listed in schedule 4 or other legislation referred to in section 76(3). The electoral law is neither

This will be inconsistent, not only with the Constitution, but also with the Rules. As indicated above, this is a matter that does not affect provinces within the meaning of the Constitution and can therefore not be introduced for the first time in the National Council of Provinces. Should these proposed amendments be allowed, they will render the Bill both constitutionally and procedurally out of order. These proposed amendments would suitably be introduced in the National Assembly.

When the Hon. member wrote to the Chairperson about these purported amendments, he said that he does so in the name of his party. Advice therefore would be that he requests his party to introduce these in the National Assembly, if he so wishes.

Having considered the purported proposed amendments by the Hon. member, the Chairperson came to the conclusion that they are constitutionally and procedurally out of order.

In terms of Rule 212(3)(b), the ruling by the Chairperson on whether an amendment is out of order, is final.

Had the Hon. member's proposed amendments been in order, the Chairperson of the NCOP could have been compelled by Rule 212(5) to either recommit the Bill to the committee or to put the proposed amendments to the House before the Bill as a whole is decided on. (Chairperson of the NCOP)