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PORTFOLIO COMMITTEE AMENDMENT OF THE JUDICIAL MATTERS AMENDMENT BILL [B3B – 2019]

1. INTRODUCTION

The Judicial Matters Amendment Bill, 2019 is a direct response to two separate Constitutional Court judgements (summarised below) which declared certain sections of the Divorce Act 70 of 1979, and the National Prosecuting Authority Act 32 of 1998 (“NPA Act”), respectively, constitutionally invalid and which placed a duty on Parliament to remedy the Constitutional defects.

The Portfolio Committee on Justice and Correctional Services reported the Bill with amendments, namely the Judicial Matters Amendment Bill [B3B-2019], on 11 March 2020. The National Assembly passed the Bill on 18 March 2020, after which it was transmitted to the National Council of Provinces for processing.¹ The Bill is now before the Select Committee on Security and Justice for consideration in terms of s75 of the Constitution², i.e. a Bill not affecting provinces.

2. LEGISLATION AMENDED BY THE JUDICIAL MATTERS AMENDMENT BILL [B13B-2019]

2.1 DIVORCE ACT 70 OF 1979

The Divorce Act, 1979 was enacted to (a) ensure that the proprietary regime of all marriages in South Africa, irrespective of race, would be in community of property, and (b) prevent a situation where mostly women married out of community of property or marriages governed by an antenuptial contract that excluded community of property, profit and loss and accrual sharing, were left with no claim to any of the assets or benefits of such marriages at divorce.

Section 7 in particular, “empowers a court granting a decree of divorce in respect of a marriage out of community of property to order a **redistribution of assets where it considers it just and equitable** to do so, taking into consideration the contribution, monetary and otherwise, of the parties to the marriage. The objective hereof was to **make proprietary transfers possible that favoured women married out of community of property.**”³

Section 7 of the Divorce Act 1979, however, applies to all marriages out of community of property, except those concluded in the former Transkei in terms of the repealed Transkei Marriage Act, 1978⁴, which had retained the proprietary regime of the repealed Black Administration Act of 1927, that determined that civil marriages between Africans were out of community of property, unless an indication was given to an official within a month before the wedding that the marriage was intended to be in community of property.⁵

Section 1 of the Bill amends section 7 of the Divorce Act 70 of 1979, to regulate the division of assets and maintenance of parties in divorce proceedings in accordance with the 2018 Constitutional Court judgment in *Bukelwa Nolizwe Holomisa v Sango Patekile Holomisa and Another (“Holomisa v Holomisa”)*.⁶ In

¹ Parliament of South Africa (2020). Proceedings on Bills, 8 May 2020

² Constitution of the Republic of South Africa, 1996

³ Memorandum on the Objects of the Judicial Matters Amendment Bill, 2019 (p4)

⁴ Act 21 of 1978

⁵ Section 39

⁶ [2018] ZACC 40



Holomisa v Holomisa, the applicant challenged the Constitutionality of Section 7 of the Divorce Act, 1979 on the ground that it discriminated against women married out of community of property under the Transkei Marriage Act, 1978. **The Constitutional Court, in granting the application, held that section 7(3) of the Divorce Act “fails to extend to [such women] the protection of a just and equitable redistribution of property on divorce” and was not rational “in terms of section 9(1) of the Constitution which affords everyone the right to equal protection of the law”.**⁷

Clause 1 of the Bill inserts a new paragraph (c) into section 7(3) of the Divorce Act, 1979 to make section 7(3) of the Divorce Act, 1979 applicable to all marriages out of community of property, including those concluded under the Transkei Marriage Act.

The wording of the original Bill was amended by the Portfolio Committee. The amended or B-version of the Bill, now provides that a court granting a decree of divorce in respect of a marriage out of community of property “entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law, may...on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets [or part thereof as the court may deem just] be transferred to the [applicant]”. The insertion as amended thus allows a court to make a redistribution order that is just and equitable at the dissolution of such marriages.

2.2 THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998 (“NPA ACT”)

National Directors of Public Prosecutions (NDPPs) and Deputy NDPPs serve for a non-renewable term of 10 years and must officially retire at age 65. **Nevertheless, section 12(4) of the NPA Act provides that the President can extend such term of office for a further 2 years in the public interest beyond the Directors’ retirement age.**

Section 12(4) of the NPA Act currently allows the President to extend the term of office of a National Director (NDPP) or a Deputy National Director of Public Prosecutions beyond the official age at which they must retire from office (65).

In terms of the current Section 12(6) of the NPA Act, the President can provisionally suspend the NDPP indefinitely without pay or with a salary determined by the President for the duration of the suspension.

In *Corruption Watch NPC and Others v The President of South Africa and Others*, the Constitutional Court declared these provisions constitutionally invalid.⁸

Clause 2 of the Bill amends section 12(4) and (6) of the NPA Act, as the Constitutional Court felt that the President’s powers to extend the term of office of the NDPP or Deputy NDPP or suspend them indefinitely without pay undermines the independence of the office of the NDPP.

Clause 2 deletes section 12(4) of the NPA Act to remove the provision that allows the President to extend the term of office of a NDPP or a Deputy NDPP beyond retirement age .

Clause 2 inserts a new subsection 6(a) into the NPA Act to provide that the period of suspension from office of a NDPP or a Deputy NDPP may not exceed 12 months. In addition, **Clause 2 inserts a new subsection 6(e)**

⁷ Memorandum on the Objects of the Judicial Matters Amendment Bill, 2019 (p 5).

⁸ [2018] ZACC 23



into the NPA Act to provide that a NDPP or a Deputy NDPP who has been provisionally suspended, must receive his or her full salary for the duration of the suspension.

While the wording and amendments in Clause 2 closely follows the guidelines of the Constitutional Court judgment in the Corruption Watch matter, the Department proposes a period of suspension not exceeding 12 months, which is longer than the six months ordered by the Constitutional Court. The reason for the deviation is based on practical considerations. According to the Department, it “would be virtually impossible to complete an investigation within six months”.⁹

3. PUBLIC CONSULTATION

3.1 CONSULTATION DONE BY DEPARTMENT¹⁰

The Department had only consulted the National Prosecuting Authority in respect of the amendments to the National Prosecuting Authority Act 32 of 1998. Because the Bill arises from Constitutional Court judgments, the Department did not deem it necessary to consult further on the Bill. The Department is also of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders, as the Bill “does not contain provisions pertaining to customary law or customs of traditional communities”. According to the Department, the Bill also has no financial implications for the State and provinces.

3.2 CONSULTATION DONE BY PORTFOLIO COMMITTEE

- The Portfolio Committee (PC) on Justice and Correctional Services received only two written submissions, from the Africa Criminal Justice Reform (ACJR) based at the University of the Western Cape, and the Congress of South African Trade Unions (COSATU), respectively.
- Both organisations made oral presentations to the PC on 25 February 2020, to which the Department of Justice and Constitutional Development responded on 3 March 2020.
- The submissions focussed solely on that portion of the Bill amending the NPA Act.
- The PC concluded its deliberations and adopted the Bill with amendments on 11 March 2020.

4. MAIN ISSUES / CONCERNS RAISED IN SUBMISSIONS

4.1 AFRICA CRIMINAL JUSTICE REFORM (ACJR)

- **ACJR** welcomed the Bill as an independent prosecution authority, free from political interference was essential for the criminal justice system. The President’s power to unilaterally extend the term of office of the National Director, or to suspend him or her for an indefinite period without pay, compromised that independence and integrity.
- **However, the ACJR was concerned that the proposed 12 months suspension period was too long** as all appointment and disciplinary processes concerning the NDPP should be facilitated and processed speedily to ensure that the Office of the NDPP or his or her Deputy is not compromised.
- **The Bill failed to address holistically other shortcomings undermining the NPA’s independence** like the appointment and dismissal of the NDPP, Ministerial control over the prosecution service and the NPA’s accountability to Parliament.

⁹ Memorandum on the Objects of the Judicial Matters Amendment Bill, 2019 (p 4).

¹⁰ Memorandum on the Objects of the Judicial Matters Amendment Bill, 2019 (p 5).



4.2 CONGRESS OF SOUTH AFRICAN TRADE UNIONS (COSATU)

- COSATU supported any rational attempt to strengthen the rule of law, especially in relation to the leadership of law enforcement agencies like the NPA.
- It welcomed the processes undertaken, including the call for applications for the NDPP post, the appointment of a Judicial Services Commission-type panel of non-partisan experts to interview the candidates, and open and transparent interviews.
- COSATU nevertheless advocated for the insertion into the Bill of a clause to formalise these very progressive processes for the appointment of the NDPP as it felt that such a transparent, considered and inclusive process should not be left to the generosity of an incumbent President.
- COSATU called on Parliament to review all existing legislation to ensure that unconstitutional and discriminatory clauses were removed, in particular, colonial and apartheid-era Acts, and to scrap such legislation.

5. MAIN PROVISIONS OF THE JUDICIAL MATTERS AMENDMENT BILL [B13B-2019]

The Bill consists of a Long Title and three clauses.

- **LONG TITLE (not amended by Portfolio Committee)**

The Long Title states the main aim of the Bill, namely:

- To amend the Divorce Act, 1979 “to further the division of assets and maintenance of parties in divorce proceedings in accordance with a judgment of the Constitutional Court; and
- To amend the National Prosecuting Authority Act, 1998, in order to “deal with aspects pertaining to the term of office of the National Director of Public Prosecutions and the Deputy National Directors of Public Prosecutions in accordance with a judgment of the Constitutional Court”.

- **CLAUSE 1 (amended by Portfolio Committee)**

- Clause 1 inserts a new paragraph (c) into section 7(3) of the Divorce Act, 1979 to make section 7(3) of the Divorce Act, 1979 applicable to all marriages out of community of property, including those concluded under the Transkei Marriage Act.
- The wording of Clause 1(c) was amended by the Portfolio Committee to provide that a court granting a decree of divorce in respect of a marriage out of community of property “entered into in terms of any law applicable in a **former homeland**, without entering into an **antenuptial contract or agreement** in terms of such law, may...on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets [or part thereof as the court may deem just] be transferred to the [applicant] (my emphasis).
- The wording in the original Bill read as follows: “(c) entered into in terms of any law applicable in the Republic, the impact of which excludes the benefits accruing to spouses in terms of this section”. The previous wording did not make reference to the former homelands or antenuptial contract or agreement as was referenced in the Transkei Marriage Act.
- **The amendment by the PC makes it clear that the Divorce Act will also apply to marriages concluded under the Transkei Act as was the case in *Holomisa v Holomisa*, and allows a court to make a redistribution order that is just and equitable at the dissolution of such marriages.**



- **CLAUSE 2 (not amended by Portfolio Committee)**
 - **Amends section 12(4) and (6) of the NPA Act**, as the Constitutional Court felt that the President's powers to extend the term of office of the NDPP or Deputy NDPP or suspend the NDPP indefinitely without pay undermines the independence of the office of the NDPP.
 - **Deletes section 12(4) of the NPA Act** to remove the provision that allows the President to extend the term of office of a NDPP or a Deputy NDPP beyond retirement age.
 - **Inserts a new subsection 6(aA) into the NPA Act** to provide that the period of suspension from office of a NDPP or a Deputy NDPP may not exceed 12 months.
 - **Also inserts a new subsection 6(e) into the NPA Act** to provide that a NDPP or a Deputy NDPP who has been provisionally suspended, must receive his or her full salary for the duration of the suspension.
 - **The Department's proposed suspension not exceeding 12 month is longer than the six months ordered by the Constitutional Court** as the Department is of the view that it "would be virtually impossible to complete an investigation within six months".¹¹
- **CLAUSE 3 (not amended by the Portfolio Committee)**
 - Clause 3 provides that the Short Title of the Bill is called the Judicial Matters Amendment Bill, 2019.

6. ROLE OF THE NCOP

The Bill is classified as a Bill to be dealt with in terms of section 75 of the Constitution¹², i.e. a Bill not affecting provinces.

The Select Committee on Security and Justice can make non-binding proposal(s) on possible amendments to the National Assembly for consideration.

SOURCES

Judicial Matters Amendment Bill [B3-2019].

Judicial Matters Amendment Bill [B3A-2019].

Judicial Matters Amendment Bill [B3B-2019].

Parliamentary Monitoring Group. Meeting of the Portfolio Committee of Justice and Corrections. Judicial Matters Amendment Bill [B2-2015]. Public hearings. 5 August 2015. Available at <https://pmg.org.za/committee-meeting/21239/>. Accessed 27 October 2015.

¹¹ Memorandum on the Objects of the Judicial Matters Amendment Bill, 2019 (p 4).

¹² Constitution of the Republic of South Africa, 1996