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Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

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**Date:** 20 October 2020

Adv. BT Bongo

The Chairperson

Portfolio Committee on Home Affairs

**Cape Town**

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**For attention:** Mr E Mathonsi

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Honourable Adv Bongo

## **LEGAL OPINION: PROPOSED NEW AMENDMENTS TO THE ELECTORAL LAWS AMENDMENT BILL, 2020.**

### **INTRODUCTION**

1. On 9 October 2020 the Independent Electoral Commission ("Commission") had briefed the Portfolio Committee for Home Affairs on the Electoral Laws Amendment Bill, 2020. The Commission had, furthermore, included new amendments which remove reference to the

essential service and provide for the prohibition on strikes and lock outs during a stipulated period.

2. The following procedural issues must be noted:

- On 18 March 2009 Cabinet made a decision that every Bill that is submitted to Cabinet must be accompanied by a preliminary opinion from the Office of the Chief State Law Adviser ("OCSLA") on matters relating to the normal certification process such as quality control and constitutionality. The current version of the Electoral Laws Amendment Bill, 2020 was submitted to Cabinet. It is common cause that the proposed new amendments were not contained in the version presented to Cabinet or opined on by the OCSLA in the final certification opinion for introduction to Parliament.
- The current version of the Bill was published, together with an explanatory summary on the objects of the Bill on 9 September 2020 in terms of rule 241(1)(c) of the Rules of the National Assembly. The new amendments were not published for public comment nor was there any consultation with relevant stakeholders.

## **LEGAL QUESTION**

3. Will the legislative process be constitutionally sound if the proposed amendments are incorporated, at this stage, into the current version of the Bill?

## **DISCUSSION**

### **Importance of public consultation**

4. A lack of proper consultation with the relevant stakeholders, especially those who may be critically affected by this Bill, could render this Bill unconstitutional.
5. The Constitution of the Republic of South Africa, 1996 ("the Constitution") supports the principle of participatory democracy. In the matter of *Matatiele Municipality and Others v*

President of the Republic of South Africa and Others (please insert reference) the Constitutional Court explained that the system of democracy established by the Constitution is partly representative and partly participative in nature.<sup>1</sup> What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements in our democracy.” The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.

6. In *Merafong Demarcation Forum v President of the Republic of South Africa*<sup>2</sup> the Constitutional Court explained that while the system of public participation envisaged by the Constitution is supposed to supplement and enhance the democratic nature of general elections and majority rule, it is not supposed to conflict with or even overrule or veto them.

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<sup>1</sup> 1. The Constitutional Court explains this principle as follows:

“The representative and participative elements of our democracy should not be seen as being in tension with each other. They are mutually supportive, as we pointed out in *Doctors for Life International*: “In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”

<sup>2</sup> (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) The Constitutional Court further found, that “there is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of government”. While government can be expected to be responsive to the needs and wishes of minority or interest groups, our system of government would not be able to function if the legislature were bound by these views. This was further explained in the matter of *Poverty Alleviation Network v President of the Republic of South Africa* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) where the Constitutional Court stated that—

“Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself”.

7. The Commission has provided the Committee with an explanatory memorandum on 14 October 2020. Paragraph 11 must be noted –

“ NEHAWU has already referred a dispute to the CCMA arising from the failure by NEHAWU and the COMMISSION to conclude a MSA. A panel appointed by the ESC has determined that the draft MSA be adopted as final, although NEHAWU has taken the award on review in the Labour Court. The MSA identifies job categories and employees who will be permitted to strike, notwithstanding the status of the Commission as a provider of essential services.”

8. In light of the fact that this issue has already been identified as contentious, is subject to a CCMA award, and is soon to be on review in the labour court, there is sufficient motivation to motivate the Commission to ensure that proper consultation with key stakeholders be undertaken before these proposed amendments are incorporated into an Amendment Bill. Our view is that the inclusion of the proposed amendments without at least consultation with key stakeholders will compromise the constitutionality of the legislative process and render the Bill unconstitutional for lack of proper consultation.

9. The issue of the extent of the proposed amendments in so far as they relate to a significant degree of change to current policy is irrelevant to the importance of proper consultation. This is aptly discussed in the matter of *South African Veterinary Association v Speaker of the National Assembly and Others* (CCT27/18) [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC) (5 December 2018), where the Constitutional Court held that both the **National Assembly and the National Council of Provinces failed to facilitate meaningful public involvement around the insertion of the word “veterinarian” into the Act.** The insertion of the word constituted a material amendment to the Act, as it brought an entire profession, which had previously been regulated by other legislation, under the Act’s purview. **The National Assembly Portfolio Committee made this amendment without obtaining the requisite permission from the National Assembly and without any public involvement on the insertion. This complete lack of public participation renders the actions of the National Assembly constitutionally invalid.**

10. The Constitutional Court held further that while the **National Council of Provinces took some steps to facilitate public participation on the Bill, it did not take reasonable steps to ensure that the public was consulted about the insertion of the word “veterinarian”.** In some

provinces where public hearings were held, only one or two days' notice was given to the public. This unreasonably hindered the ability of interested parties to take note of the amendments and prepare representations on them.

#### **Analysis of the proposed amendment and change of policy**

10. Section 112 of the Electoral Act, 1998 (Act No. 73 of 1998) provides as follows –

“Prohibition on certain strikes and lockouts

(1) The service provided by the Commission is an essential service for the purpose of the Labour Relations Act, 1995 (Act 66 of 1995).

(2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995.” (Our emphasis.)

11. Section 86 of the Local Government : Municipal Electoral Act, 2000 (Act No 27 of 2000) provides as follows-

“ Prohibition on certain strikes and lockouts

(1) The service provided by the Commission from the date the notice calling an election is published to the date the result of the election is declared, is an essential service for the purpose of the Labour Relations Act, 1995 (Act 66 of 1995).

(2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995.” (Our emphasis.)

12. The proposed amendment is as follows-

“Prohibition on strikes and lock outs

(1) A strike by employees of the Electoral Commission or a lock out by the Electoral Commission as defined in s213 of the Labour Relations Act, 66 of 1995, as amended, is prohibited from-

(a) Six weeks before an official registration event and up to fourteen days after the final registration date;

(b) The proclamation of an election date up to and including the date on which the final results of that election are published.

(2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995.”<sup>3</sup>

13. Whereas section 112 of the Electoral Act, 1998 and section 86 of the Local Government : Municipal Electoral Act, 2000 stipulate that the service provided by the Commission is an essential service, the Municipal Electoral Act, 2000 provides that the service provided by the Commission is an essential service for a stipulated period of time only.

14. The proposed amendment does not stipulate that the service is an essential service and is intended to substitute the current sections and provide for a prohibition of strikes and lock outs within a stipulated period. This is a policy shift from declaring an essential service to the prohibition of a strike or lockout.

15. We draw the Committee’s attention to the following –

The proposed amendment makes provision for the prohibition of strikes and lock outs. Employees of the Commission are prohibited from striking within a stipulated period. The Commission is prohibited from locking out its employees. We must note that it is the duty of the legislature to ensure that the law is precise and not arbitrary in instances where the judiciary is required to provide guidance on provisions in the Act.

#### **Applicable law relating to strikes and lock outs**

16. Section 23(2)(b) and (c) of the Constitution confers on every worker the right to participate in the activities and programmes of a trade union and the right to strike, respectively. In this regard, the judgment of Eskom Holdings Ltd v National Union of Mineworkers and Others (840/2010) [2011] ZASCA 229 (30 November 2011) must be noted, where the Supreme Court of Appeal set out the current position in our country in relation to the right to strike<sup>4</sup>. This judgement clearly

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<sup>3</sup> Exact wording as supplied by the Commission

<sup>4</sup> “[4] Although the right of workers to strike is enshrined in s 23(2)(c) of the Constitution, that right is not absolute and may be limited in terms of a law of general application to the extent that such limitation may be reasonable and justifiable in an open and democratic society. It is widely recognised, both in this country and abroad, that in certain



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circumstances it will be reasonable and justifiable to limit the right to strike, particularly in times of national emergency or in services where a strike is likely to harm the public. Thus the LRA provides that no person may take part in a strike if "that person is engaged in an essential service" and defines an "essential service" as meaning:

"(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;

(b) the Parliamentary service;

(c) the South African Police Service."

[5] The task of determining which services should be regarded as essential services has been entrusted by the legislature to the ESC, its functions being defined in s 70(2) inter alia as:

"(a) to conduct investigations as to whether or not the whole or part of any service is an essential service, and then to decide whether or not to designate the whole or part of that service as an essential service;

(b) to determine disputes as to whether or not the whole or a part of any service is an essential service."

[6] In s 71 of the LRA the ESC's powers and procedures in designating a service as an essential service are detailed as follows:

"(1) The essential services committee must give notice in the Government Gazette of any investigation that it is to conduct as to whether the whole or a part of a service is an essential service.

(2) The notice must indicate the service or the part of a service that is to be the subject of the investigation and must invite interested parties, within a period stated in the notice-

(a) to submit written representations; and

(b) to indicate whether or not they require an opportunity to make oral representations.

(3) Any interested party may inspect any written representations made pursuant to the notice, at the Commission's offices.

(4) The Commission must provide a certified copy of, or extract from, any written representations to any person who has paid the prescribed fee.

(5) The essential services committee must advise parties who wish to make oral representations of the place and time at which they may be made.

(6) Oral representations must be made in public.

(7) After having considered any written and oral representations, the essential services committee must decide whether or not to designate the whole or a part of the service that was the subject of the investigation as an essential service.

(8) If the essential services committee designates the whole or a part of a service as an essential service, the committee must publish a notice to that effect in the Government Gazette.

(9) The essential services committee may vary or cancel the designation of the whole or a part of a service as an essential service, by following the provisions set out in subsections (1) to (8), read with the changes required by the context.

(10) The Parliamentary service and the South African Police Service are deemed to have been designated an essential service in terms of this section.

provides that the right to strikes and lock outs may be restricted for services that are considered essential services. This is done by the Essential Services Committee in accordance with the procedure as set out under section 71 of the Labour Relations Act, 1995. The other instance whereby strikes and lock outs may be restricted is if there is a collective agreement that permits such action.

Irrespective of whether one opts to determine if a service is an essential service or enter into a collective agreement – **proper consultation must be undertaken.**

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[7] On 12 September 1997, by way of a notice published under s 71(8) of the LRA, the ESC declared the "generation, transmission and distribution of power" (the industry in which the appellant operates) to be an essential service. That declaration still stands and was operative at all times material to this appeal.

[8] However, it is acknowledged both in this country and internationally that not all the workers employed in an industry declared to be an essential service need to be precluded from striking for that service to continue to operate at an acceptable level. This has given rise to the concept of a "minimum service" which is intended to allow certain workers in an industry designated as an essential service to strike, while at the same time, maintaining a level of production or services at which the life, personal safety or health of the whole or part of the population will not be endangered. Recognising this the legislature, presumably in a bid to prevent the declaration of an industry as an essential service from impinging unnecessarily on the right to strike, provided in s 72 of the LRA that:

"The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in the service designated as an essential service, in which case

(a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and

(b) the provisions of section 74 do not apply."

Section 65(1) of the Labour Relations Act, 1995 (Act No. 66 of 1995) contains certain limitations on the right to strike, and states as follows:

"65 Limitations on right to strike or recourse to lock-out

(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) that person is engaged in-

(i) an essential service; or

(ii) a maintenance service."




## **Conclusion**

17. Section 65(1)(a) of the Labour Relations Act, 1995, prohibits the right to strike by any person who is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute. We propose that the Commission undertakes proper consultation to finalise the policy directive regarding the proposed amendment, as –

- (a) the proposed amendment changes the policy directive and removes the statutory requirement that the service of the commission is an essential service;
- (b) the new policy directive is to prohibit strikes and lockouts for a stipulated period of time without a collective agreement in place.

18. We further advise the Commission to consider amending the proposed clause to provide that employees may not strike if such person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; or that person performs an essential service. If the Commission considers retaining the sections declaring the service to be an essential service, then it must finalise the agreement regulating the service as an essential service.

19. This Bill is a priority Bill and we would recommend that the Committee proceeds to deliberate on the current version of the Bill while the Commission conducts a parallel consultation process to determine or finalise the policy directive relating to the essential service or strike and lock out prohibition.



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