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MEMORANDUM

[Confidential]

TO: **Dr MS Motshekga, MP**
Chairperson: Ad hoc Committee on the amendment of Section 25 of the Constitution

COPY: **Ms. P.N. Tyawa**
Acting Secretary to Parliament

Mr M Xaso
Acting Deputy Secretary: Core Business

FROM: **Constitutional and Legal Services Office**

[Adv Z Adhikarie, Chief Parliamentary Legal Adviser]

DATE: **20 May 2021**

SUBJECT: **Amending the current draft of the 18th Constitutional Amendment Bill**

REF No.: **C4.2018.1.2021**

MESSAGE: **Please find attached the above Memorandum for your attention.**

pp _____

Adv Z Adhikarie

Chief Legal Adviser

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SUBJECT: **Amending the current draft of the 18th Constitutional Amendment Bill**

INTRODUCTION

1. Our Office has been requested by the *Ad Hoc* Committee on the amendment of Section 25 of the Constitution ("the Committee"), to provide legal advice on whether the Committee may make further changes to the current draft of the Eighteenth Constitutional Amendment Bill ("the Bill").

BACKGROUND

2. The Bill has undergone an extensive public participation process that included written submissions, public hearings and further oral submissions relating to the written submissions. On completion of this process the Committee met on 14 May 2021 to deliberate on the Bill. At the meeting of 14 May 2021 the question was raised about whether the Committee was able to make further changes to the Bill. Further questions arose regarding the process involved in making amendments, if such were possible. These further questions related to whether any changes were limited by Committee's

mandate, which emanated from the National Assembly meeting on 25 July 2019, and whether changes resulting from public inputs, have to be advertised again for public inputs.

LEGAL QUESTION

3. The legal question is whether the Committee may make further amendments to the Bill that had been advertised for public comment in the Government Gazette on 13 December 2019, before it is introduced to the National Assembly.

LEGAL FRAMEWORK

National Assembly Rules

4. National Assembly Rule 274 provides as follows:

> *"(1) If the Assembly gives permission that the proposed legislation be proceeded with, the committee must —*
>
> *(a) prepare a draft Bill, and a memorandum setting out the objects of the Bill in a form and style that complies with any prescribed requirements, including those set out in Rule 279;*
>
> *(b) consult the JTM for advice on the classification of the Bill; and*
>
> *(c) comply with Rule 276 or, if it is a proposed constitutional amendment, with Rule 295.*
>
> *(2) If the committee chooses in terms of Rule 276 or 295 to publish the draft Bill, it is not bound to publish the Bill as it is to be introduced, but the committee may publish any version of the draft Bill prepared by it in terms of Subrule (1)(a).*
>
> *(3) The committee must report to the Assembly when it publishes the draft Bill."* (own emphasis)

5. National Assembly Rule 275 further provides that:

> *"Before introducing its Bill, the committee –*
>
> *(a) must give interested persons and institutions a period of at least three weeks after the draft Bill or particulars of the draft Bill have been published in terms of Rule 276 or 295 to comment on the proposed legislation;*
>
> *(b) must give the relevant department in the national executive authority or executive organ of state in the national sphere of government sufficient opportunity to make submissions to the committee;*
>
> *(c) must consult the JTM for advice on the classification of the draft Bill as it is to be introduced; and*

(d) *may in view of any comments received in terms of Paragraph (a) or (b) or advice given in terms of Paragraph (c), adjust the draft Bill before its introduction."* (own emphasis)

6. As the Bill is a constitutional amendment the Committee must comply with National Assembly Rule 295, which sets out the requirements that must be met prior to introducing a constitution amendment Bill:

> *"(1) A Cabinet member or a Deputy Minister, or a member or committee of the Assembly, intending to introduce a Bill amending the Constitution must, before introducing the Bill, comply with Section 74(5) of the Constitution[1].*
>
> *(2) When the person or committee intending to introduce the Bill publishes particulars of the Bill in the Gazette in accordance with Section 74(5), the publication must contain —*
>
> *(a) a notice stating the intention to introduce the Bill; and*
>
> *(b) an invitation to interested persons and institutions to submit written representations on the draft constitutional amendment to the person or committee intending to introduce the Bill.*
>
> *(3) If the draft Bill itself, as it is to be introduced, is published, a memorandum setting out the objects of the Bill must also be published."* (own emphasis).

7. NA Rule 295(3) has the effect that when a draft Bill is published (as opposed to an explanatory summary of the Bill), that draft must then be introduced – in other words, no further amendments may be effected to the version of the Bill that was so published.

8. However, NA Rule 295(3) constitutes a general provision: It applies to ALL Constitutional Amendment Bills, regardless of who is in charge of the Bill. NA Rule 274(2) is a specific provision – it applies to Committee Bills only and read with NA Rule 295, it trumps:

> *"Where the literal meaning of a general enactment covers a situation for which specific provision is made elsewhere in the Act, it is presumed that it was intended to be deal with by the specific provision. This is expressed in the maxim generalibus specialia derogant (special provisions override general ones). Acts often contain general provisions which, when read literally, cover a situation for*

[1] Section 74 (5) of Constitution provides:

At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must-

(a) Publish in the national *Government Gazette,* and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) Submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) Submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation. The more detailed a provision is, the more likely is it to have been tailored to fit the precise circumstances of a case falling within it."[2]

9. In summation, despite NA Rule 295(3), which prohibits further amendments to a draft that was advertised, National Assembly Rules 274(2) and 275(d) expressly provide that the Committee may adjust the Bill after it has been published for public comment and before it is introduced. National Assembly Rule 295(3) is thus overridden by the specific provision in the rules that deal with Committee Bills.

10. The Committee may thus make further amendments to the draft as it was published, however, it is important that the Committee ensure any new amendments to the draft – even those resulting from submissions by the public - do comply with all procedural requirements. These include compliance with section 74(5)(a) of the Constitution (publication of any new amendments), 74(5)(b) of the Constitution (notification of provincial legislatures), and any need to obtain permission for the House (NA Rule 273(1)).

When is further involvement of the public required?

11. In *Truworths v Minister of Trade and Industry*[3] ("Truworths case"), the Minister of Trade and Industry published regulations for comment. Following the publication, a number of comments on item 23A(4), were received. These comments mainly stated that the wording was too restrictive. One submitter even proposed alternative wording. The Minister indicated that these submissions were all considered and the regulations, including item 23A(4), were subsequently amended and a final version produced. The new wording of item 23A(4) was almost word for word amended to the proposal submitted. The final version of the regulations was not circulated for further comments by stakeholders or interested parties.

12. The court in the Truworths case, held that it was not necessary for the Minister to circulate the regulations again:

> *"It was submitted, correctly, on behalf of the respondents, that the Minister is not obliged to re-advertise for comment. However, where the Minister changes the draft regulations in a material respect, calling for further comment might under certain circumstances be advisable."*[4] (own emphasis).

[2] SA Law Reform Commission Report Discussion Paper 112 Statutory Revision. (2006). *Review of the Interpretation Act 33 of 1957*: page 70 (in reference to Francis Bennion.(2006) *Threading the Legislative Maze*. https://www.justice.gov.za/salrc/dpapers/dp112_interpretation.pdf

[3] [2018] JOL 39718 (WCC).

[4] This is again confirmed in paragraphs 9 to 60 of the Truworths case.

13. In the matter of *South African Veterinary Association v Speaker of the National Assembly and Others*[5] ("SAVA case") section 16 of the Medicines and Related Substances Amendment Act, 2015 (Act No. 14 of 2015) was considered. The effect of section 16 was that as all the other professionals listed in that section, veterinarians would also be required to obtain a licence to compound and dispense medicines.

14. The word "veterinarian" was not part of clause 16 when the Amendment Bill was introduced in Parliament – it was only added after comments were received from the public that suggested that veterinarians should also be required to obtain such a licence. The South African Veterinary Association ("SAVA") challenged the Amendment Act on the basis that further public consultations should have followed after the insertion of the word "veterinarian" into section 16, as this was a new concept added to the Amendment Act, and in respect of which no public consultations have been done.

15. SAVA argued that the inclusion of the word "veterinarian" in section 16 materially altered the way that veterinarians will be able to compound and dispense medicines. SAVA further argued that a number of consequential amendments were required as the veterinarian profession was not yet included in the principal Act[6]. In the SAVA case the Constitutional Court thus accepted that the amendments—

> *"…had the effect of bringing an entire profession under the control of an Act that never applied to it. This cannot be considered a technical or semantic amendment. The failure by the Health Committee to facilitate public involvement renders the procedure followed in inserting the word "veterinarian" constitutionally invalid in terms of section 59(1)(a) … The requirement that veterinarians be licensed to compound and dispense medicines is seemingly an extension of the subject of the Bill for which the Committee ought to have sought the NA's permission... The amendment made at the Committee stage constituted a material amendment to the Bill and will have lasting effects on the professional operations of veterinarians."*[7] (own emphasis).

16. Accordingly, where content is added to a Bill based on inputs from the public, only content that is new (substantive changes) – that extends the subject matter of the Bill - has to be advertised. Similarly, the views of provincial legislatures would have to be sought in respect of any such substantive amendments in order to comply with section 74(5)(b).

17. That having been said, we must also keep in mind the principles set out the case of *Doctors for Life International v Speaker of the National Assembly.*[8] In paragraph 128 of the judgment, the court sets out the following factors to consider:

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[5] [2018] ZACC 49.

[6] Note: Veterinarians were included in the principal Act in 1991. It appears that the court however accepted the statement by SAVA that veterinarians were not included.

[7] SAVA par 25, 26, 29 and 32.

[8] *Doctors for Life International v Speaker of the National Assembly*[8] *[2006] ZACC 11.*

> *"Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Court has explained, "context is all important." Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement."* (own emphasis).

18. The court further stated in in par 235 that:

> *"All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."* (own emphasis)

DOES THE COMMITTEE REQUIRE ADDITIONAL PERMISSION FROM THE HOUSE?

19. Political Parties were concerned with the interpretation of the Committee's mandate as contained in the Resolution of the National Assembly meeting of 25 July 2019 ("the Resolution").

    19.1. Some were of the view that the Committee was tasked with making *"explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation as a legitimate option for land reform"*[9]. This is the narrower interpretation of the mandate.

    19.2. Others were of the view that the words to have *"regard to the work done and recommendation as contained in the reports of the Constitutional Review Committee and the previous Ad Hoc Committee*"[10], meant that the Committee is mandated to revisit the work of the Constitutional Review Committee and that accordingly the Committee may now again consider to address issues such as custodianship of land by state (nationalisation), the arbitrary nature of the 1913 cut-off period for restoration of land rights in section 25 (7) of the Constitution and the exploration of mechanisms of administration of communal land under traditional leadership. This is a broad interpretation of the mandate.

[9] Paragraph 4(1) (a) of the Minutes of Proceedings of the National Assembly 25 July 2019.

[10] Paragraph 4 (3) (b) of the Minutes of Proceedings of the National Assembly 25 July 2019.

20. As our mandate does not lie in National Assembly procedural advice, we approached the NA Table for their assistance. The NA Table expressed the view that:

> *"The specific mandate of the Committee starts from paragraph 3 of the Resolution. The paragraphs before that, provides the background. What is thus important is to consider what the impact of paragraph 3(b) is in respect of this mandate.*
>
> *With hindsight the resolution could have mentioned subsection 2 and 3 of section 25 of the Constitution. This notwithstanding, when the House considered this matter, it had in mind what was recommended by the Constitutional Review Committee, namely that there is a need to amend section 25 of the Constitution "to make explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation, as a legitimate option for land reform" in order to address the mischief identified by that Committee.*
>
> *It is our understanding that the bill that was advertised dealt only with subsections 2 & 3 of section 25 of the Constitution. If this is correct, it would be procedurally safe for the committee to invoke the provisions of Rule 286(4)(b) &(c). These provisions require a committee to seek the permission of the House to inquire into extending the subject of a bill or amend other provisions of legislation not contained in the amendment bill.*
>
> *It should however be borne in mind that this approach entails obtaining further public inputs specifically on the new/additional focal point."*[11]

CONCLUSION

18 The National Assembly Rules clearly permit the Committee to make amendments to the draft Bill prior to introduction to the National Assembly, regardless of the fact that the draft Bill itself was published.

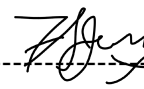
19 We would advise the Committee to call for comments on any subsequent amendments that materially or substantively change the content of the Bill. This advice is accentuated by the nature and importance of this Bill, as well as the intensity of its (perceived) impact on the public and that Parliament has considered it necessary to do extensive public hearings.

20 We would also advise that any such material or substantive amendments and amendments that extent the scope of the Bill be forwarded to Provincial Legislatures for their views.

21 With regard to whether the Committee should approach the House to seek permission for amendments that constitute new ideas, we would recommend that the Committee errs on the side of caution, so as to ensure that it fully complies with all procedural

[11] Opinion received from the NA Table DATED 19 May 2021

requirements underlying this Bill, and request permission for new ideas that do not directly relate to making explicit that which is implicit in respect of expropriation without compensation for purposes of land reform.

pp 

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