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**MEMORANDUM**  
**[Confidential]**

**TO: Mr S Luzipo, MP**  
**Chairperson: Portfolio Committee on Mineral Resources and Energy**

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

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

**DATE: 31 May 2022**

**REF: 61/2022**

**SUBJECT: Opinion on various issues relating to the Upstream Petroleum Resources Development Bill [B13 – 2021]**

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

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*SIGNED ELECTRONICALLY*

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**Adv Z Adhikarie**  
**Chief Legal Adviser**



## MEMORANDUM

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### **PURPOSE**

1. The purpose of this memorandum is to advise the Chairperson of the Portfolio Committee on Mineral Resources and Energy (“the Committee”), Mr S Luzipo, MP, (“the Chairperson”) on various issues relating to the Upstream Petroleum Resources Development Bill (“the UPRD Bill”).
2. Before giving our advice, we set out briefly the background to this matter.

### **BACKGROUND**

3. The Chairperson briefed us that:

- 3.1. On 17 May 2022, the Committee was briefed by the Department of Mineral Resources and Energy (“the DMRE”) on the UPRD Bill.
  - 3.2. Essentially, the UPRD Bill replaces Chapter 6 of the Mineral and Petroleum Resources Development Act No. 28 of 2002 (“the MPRDA”)
  - 3.3. The predecessor to the current Committee recommended amendments to the MPRDA by considering the Mineral and Petroleum Resources Development Amendment Bill [B 15–2013] (MPRD Amendment Bill) during the fifth Parliament, which the National Assembly (“the NA”) adopted, and the Bill was sent to the National Council of Provinces (“the NCOP”) for concurrence.
  - 3.4. It is reported in the media that “in August 2018, the then Minister of Mineral Resources (“the Minister”) submitted a request for the withdrawal of the MPRD Amendment Bill from parliamentary processes.”
  - 3.5. By the end of April 2019, the MPRD Amendment Bill lapsed and the lapsing of the said Bill presented an opportunity to separate the petroleum and mineral provisions.
  - 3.6. According to the NCOP colleagues who dealt with the aforementioned Bill, the Bill was not officially withdrawn from Parliament, except announcements by the Minister in the media that the Bill had been withdrawn.
4. In light of the above, the Chairperson wants to know the following:
    - 4.1. *“Given the fact that the UPRD Bill replaces Chapter 6 of the MPRDA, will this (the above scenario) not have legal implications when the Committee starts processing the UPRD Bill? and*
    - 4.2. *What are the implications of the MPRD Amendment Bill not being withdrawn officially from Parliament?*
  5. The long title of the UPRD Bill designates a State Petroleum Company as a state owned entity (“SOE”) responsible for managing state participation in exploration and production of activities through a carried interest in petroleum rights. In its Annual Performance Plan for the 2022/2023 financial year, the DMRE indicated that it would submit to Cabinet for approval the National Petroleum Company Bill. The Chairperson wants to know the following:

5.1 *“Is it legal to designate a non-existing company to implement some aspects of legislation?”*

5.2 *“Should it not be that the National Petroleum Company is formed prior to its designation in the UPRD Bill? Put differently, shouldn’t the National Petroleum Company Bill be dealt with first, or can the processes run parallel?”*

6. These questions shall be addressed below.

## **LEGAL FRAMEWORK**

7. Section 49(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) provides that the NA is elected for a period of five years. Subsection (4) of that section further provides that the NA remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly.

8. The Constitution does not specifically provide what the term of the NCOP is. Section 62(3) of the Constitution provides that permanent delegates are appointed for a term that expires immediately before the first sitting of the provincial legislature after its next election. Section 64 of the Constitution provides that the Chairperson and one of the Deputy Chairpersons are elected for five years.

9. Section 108 of the Constitution provides that a provincial legislature is elected for a term of five years and that provincial legislatures remain competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

10. There is no provision in the Constitution providing for the lapsing of any business of either House, including legislation.

11. Sections 57 and 70 of the Constitution, respectively, provide that the NA and the NCOP may determine and control their internal arrangements, proceedings and procedures and may make rules and orders concerning their business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

### **Internal arrangements of the two Houses related to the lapsing of business**

12. The following standing rules of the two Houses provide for the lapsing of Bills at the end of a session or term of Parliament:

## **National Assembly**

13. Rule 333(1) provides that all Bills introduced in the Assembly and which on the last sitting day of a session of the Assembly appear on the Order Paper for the First or Second Reading, lapse at the end of that day unless the Assembly decides otherwise.
14. Rule 333(2) provides that all Bills before the Assembly or any Assembly committee on the last sitting day of a term of the Assembly or when the Assembly is dissolved, lapse at the end of that day.
15. Rule 351(2) provides that all business before the Assembly or any Assembly committee on the last sitting day of a term of the Assembly or when the Assembly is dissolved, lapse at the end of that day.

## **NCOP**

16. Rule 238(1) provides that all Bills introduced in the Council and which have not yet been passed by the Council in terms of Rule 197, when it rises on the last sitting day in any annual session, lapse, but may be reinstated on the Order Paper during the next ensuing session by resolution of the Council.

**Question 1: Given the fact that the UPRD Bill replaces Chapter 6 of the MPRDA, will the status of not officially withdrawing the MPRD Amendment Bill from Parliament not have legal implications when the Committee starts processing the UPRD Bill?**

17. The information that has been placed before us indicates that the MPRD Amendment Bill lapsed at the end of April 2019, the effect of this is that the Bill became invalid and has no force or effect. This is due to the fact that a Bill, by its nature, is draft legislation of Parliament or a proposal for a new law that has been introduced in Parliament. A Bill is not law. Not all Bills become Acts (law) and some Bills do lapse and need to be reintroduced. An Act is a law passed by Parliament i.e. legislation passed by both Houses of Parliament, assented to and signed by the President and published in the Government Gazette.
18. Consequently, the above scenario will present no legal implications when the Committee starts processing the UPRD Bill.

**Question 2: And what are the implications of the MPRD Amendment Bill not being withdrawn officially from Parliament?**

19. This question does not arise as the MPRD Amendment Bill has lapsed. This has rendered it invalid and of no force or effect.

**Question 3: Is it legal to designate a non-existing company to implement some aspects of legislation?**

20. The long title of the UPRD Bill designates a state owned company (“SOC”) as an entity responsible for managing the state’s carried interest in petroleum rights. The short title of the UPRD Bill reads as follows:

*“111. (1) This Act is called the Upstream Petroleum Resources Development Act, 2021, and comes into operation on a date fixed by the President by proclamation in the Gazette.*

*(2) Different dates may be so fixed in respect of different provisions.”*

21. In terms of section 13(3) of the Interpretation Act No. 33 of 1957, as amended, (“the Interpretation Act”), if any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a province by proclamation in the *Gazette*, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act.

22. Furthermore, section 14 of the Interpretation Act provides as follows:

*“Where a law confers a power –*

*(a) to make any appointment; or*

*...*

*(e) to do any other act or thing for the purpose of the law,*

*that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof...”*

23. The legal effect of the above provisions is that the law allows the designation of a non-existing company to implement some aspects of legislation. However, the sections of the UPRD Bill that deal with the SOE in question cannot be promulgated up until the entity is established. Promulgation is that process through which the law is made known to the public and enters into force.

**Question 4: Should it not be that the National Petroleum Company is formed prior to its designation in the UPRD Bill? Put differently, shouldn't the National Petroleum Company Bill be dealt with first or can the processes run parallel?**

24. This question has been answered above. However, we reiterate that the processes can run simultaneously as long as the sections that deal with the SOE are not promulgated up until the entity is established.

**ADVICE**

25. In view of the foregoing, a Bill is not law and the legal effect of it lapsing is that it is invalid and of no force or effect.

26. The law allows the designation of a non-existing company to implement some aspects of legislation. However, the sections of the UPRD Bill that deal with the SOE in question cannot be promulgated up until the entity is established.

27. Put differently, those sections that deal with the SOE in question can be passed by Parliament and assented to and signed by the President, but cannot be promulgated up until the entity is established.

28. We advise accordingly.

*SIGNED ELECTRONICALLY*

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**Adv Z Adhikarie**  
**Chief Legal Adviser**