

PARLEMENT VAN DIE REPUBLIEK VAN SUID-AFRIKA  
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Telefoon 403-2911  
Telephone

Verw./Ref.



Postbus 15  
P.O. Box  
KAPSTAD  
CAPE TOWN  
8000

MEMORANDUM  
CONFIDENTIAL

TO : Secretary of the National Assembly [Mr K Hahndiek]  
COPY : Secretary to Parliament  
: Assistant Secretary to Parliament  
FROM : Legal Services Office  
DATE : 14 July 2003  
SUBJECT : Employment of the Defence Force

1. In your memorandum dated 23 June 2003 you requested our Office to advise on the following:
- Whether the provisions in the Defence Act 42 of 2002 that empower the Minister of Defence to employ the Defence Force and to inform Parliament of such, specifically requires a constitutional amendment?
  - If the Defence Act alters the constitutional provision concerning the notification of Parliament and Parliament's role and responsibility in respect of a report on the employment of the Defence Force? If so, what are the legal implications of such alteration?
  - Did the President inform Parliament of the employment of the Defence Force in fulfilment of an international obligation in accordance with section 201 of the Constitution?

Whether the provisions in the Defence Act that empower the Minister of Defence to employ the Defence Force and to inform Parliament of such, specifically requires a constitutional amendment?

2. Section 201(2) of the Constitution provides that only the President, as head of the national executive, may authorise the employment of the Defence Force -
- in co-operation with the police services;
  - in defence of the Republic; or
  - in fulfilment of an international obligation.

3. The Defence Act (except sections 55 and 57) came into effect on 23 May 2003. Section 18(1) of the Act provides that in addition to the employment of the Defence Force by the President in the circumstances listed in section 201(2), the President or the Minister of Defence, may authorise the employment of the Defence Force for service inside the Republic or in international waters to -

- (a) preserve life, health or property in emergency or humanitarian relief operations;
- (b) ensure the provision of essential services;
- (c) support any department of state, including support for purposes of socio-economic upliftment; and
- (d) to effect national border control.

4. While the Minister of Defence is empowered to employ the Defence Force for the circumstances listed in section 18(1), only the President may employ the Defence Force for the purpose stated in section 201(2) of the Constitution. Thus the purposes of employing the Defence Force in terms of the Defence Act and the Constitution are different. As such we are of the opinion that section 18(1) of the Defence Act is not in conflict with section 201(2) of the Constitution and a constitutional amendment is not required.

Does the Defence Act alter the constitutional provision concerning the notification of Parliament and Parliament's role and responsibility in respect of a report on the employment of the Defence Force? If so, what are the legal implications of such alteration?

5. Section 201(3) of the Constitution provides that when the President employs the Defence Force in terms of section 201(2), he must inform Parliament promptly and in appropriate detail of the reasons for the employment, any place where the force is being employed, the number of people involved, and the period for which the force is expected to be employed.

6. Section 18(4) of the Defence Act further stipulates that if the President employs the Defence Force in terms of section 201(2) of the Constitution, the President must also inform Parliament of the expenditure incurred or expected to be incurred in such employment. While this provision is not a constitutional obligation, it is nevertheless a legal obligation that the President must fulfil.

7. In terms of section 18(5) of the Defence Act, when the President or Minister, as the case may be, employs the Defence Force in terms of section 18(1), Parliament may by resolution within seven days after receiving the information -

- (a) confirm any such authorisation of employment;
- (b) order the amendment of such authorisation;
- (c) order the substitution for such authorisation of any other appropriate authorisation; or

- (d) order the termination of the employment of the Defence Force.

8. An order contemplated in section 18(5)(b)-(d) will not, however, affect the validity of the authorisation up to the moment of the passing of the resolution by Parliament. Such an order also does not affect the validity of anything done by virtue of the authorisation up to the moment that the amendment, substitution or termination of the authorisation takes effect. All rights, privileges, obligations or liabilities acquired, accrued or incurred as a result of the authorisation for the employment of the Defence Force are not affected up to the moment that the resolution takes effect (section 18(6) of the Defence Act).

9. The employment of the Defence Force in terms of section 201(2) of the Constitution must be distinguished from an employment in terms of section 18 of the Defence Act. When the Defence Force is employed in terms of the Constitution, such an order is not subject to the approval of Parliament and it may not amend, substitute or terminate such employment. Furthermore, the notice in terms of section 201(3) remains unaffected by the Defence Act save for the additional requirement provided for in section 18(4) of the Act.

*Did the President inform Parliament of the employment of the Defence Force in fulfilment of an international obligation in accordance with section 201 of the Constitution?*

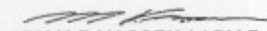
10. In our opinion dated 23 June 2003 we indicated that the term "promptly" in section 201 of the Constitution must be interpreted to mean "without unreasonable delay". We are of the view that the reference to seven days in section 201(4) is not intended to define the period referred to in section 201(3).

11. Provisions of the Constitution need to be interpreted purposively. The purpose of section 201 is to provide parliamentary oversight over the employment of the Defence Force when it is employed in terms of section 201(2). If the information required is not provided "without unreasonable delay" it could render parliamentary oversight over such employment ineffectual. Nevertheless, whether or not the President acted "promptly" remains a factual enquiry.

12. Section 201(4) applies only when Parliament does not sit during the first seven days after the Defence Force was employed in terms of section 201(2). In such an instance the President must provide the information required by section 201(3) to the appropriate oversight committee, i.e. the Joint Standing Committee on Defence. As section 201(4) does not specifically state that the said information must be provided to the Committee within seven days, it is our view that by necessary implication the provision requires submission of the information "promptly", i.e. without unreasonable delay.

13. We have been unable to establish with certainty when the President employed the Defence Force. If the President employed the Defence Force in January 2003, i.e. during a period when Parliament was not in session, he was obliged in terms of section 201(4) to provide the information specified to the Joint Standing Committee on Defence without unreasonable delay after employing the Defence Force.

14. If the President indeed employed the Defence Force in January 2003 but only notified Parliament of such employment in March 2003, this would *prima facie* indicate non-compliance with the provisions of section 201 of the Constitution.

  
ADV M R VASSEN / ADV F JENKINS  
PARLIAMENTARY LEGAL ADVISERS