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PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

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LEGAL OPINION

TO:	**Honourable DS Monsiti, MP** **Chairperson: Joint Constitutional Review Committee**
COPY:	**Secretary to Parliament**
DATE:	**28 August 2008**
SUBJECT:	**Committee Ref:** **CR08 P: Clive Rubin**
LEGAL ADVISER:	**Adv A Gordon**
REFERENCE NUMBER:	**137/08**

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MEMORANDUM

To: **Honourable DS Monsiti, MP**
Chairperson: Joint Constitutional Review Committee

Copy: **Secretary to Parliament**

From: **Legal Services Office**
Adv A Gordon

Date: **28 August 2008**

Subject: **Your ref:**
CR08 P : Mr Clive Rubin

CR 08 P: Mr Clive Rubin

The Constitution 12th Amendment Act.

Mr Clive Rubin, a freelance journalist questions whether the Constitution 12th Amendment Act was "ever passed" by the National Assembly because he is of the opinion that the two thirds majority required by section 74 of the Constitution was not met. He also questions (considering that he is of the opinion that the required vote was not obtained) whether the NA can "ignore the law" when making law?

It is my opinion that the matter raised by Mr Rubin is not a matter that falls within the "terms of the reference" of the Joint Constitutional Review Committee. Mr Rubin does not present to the Committee a recommendation on a possible amendment to the Constitution but rather questions the constitutionality of the 12th Amendment on the basis on non-compliance with section 74 of the Constitution. Joint Rule 97 provides that the Constitutional Review Committee must review the Constitution annually. Mr Rubin's matter does not speak to a "review" function by the Committee.

Further, Mr Rubin has canvassed his concerns before various other committees of Parliament including the Portfolio Committee on Justice and Constitutional Development, the Public Protector and the Speaker of the National Assembly over the past two years. I attach a memorandum (for ease of reference) which was prepared by the National Assembly Table during 2006 for the Speaker of the NA which addressed the concerns of Mr Rubin.

On the basis that Mr Rubin has previously addressed his concerns with various role players inside and outside Parliament who found no evidence that the vote on the Constitution 12th Amendment was irregular, I am of the opinion that there is no matter for the Committee to consider.

ADV A J GORDON
PARLIAMENTARY LEGAL ADVISER

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PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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MEMORANDUM

To: Speaker

From: M K Mansura / K Hahndiek

Date: 19 May 2006

Subject: **Letter from Public Protector: Complaint – alleged failure to comply with Constitutional and Parliamentary Procedure: Constitutional 12th Amendment Bill**

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1. BACKGROUND

1.1 The Public Protector has written to you on 8 May 2006 to advise that he has received a complaint concerning the alleged failure by the National Assembly to comply with both the Constitutional requirement and its own rules when passing the Constitution 12th Amendment Bill on 15 November 2005.

1.2 The complainant alleges that:

a) the National Assembly did not have the required two-thirds majority to pass the Bill; and

b) one or two votes may have not been validly cast / recorded / or counted.

1.3 The complainant in addition says that the computer printout of the vote does not reflect the vote of the Deputy Speaker but adds the name of Ms L L Mabe by hand.

1.4 The complainant correctly states that a version of the minutes of Proceedings of the National Assembly for 15 November 2005 reflects 266 votes in favour and includes the name of the Deputy Speaker (Mahlangu-Nkabinde, GL) as voting in favour of the bill and that in addition the Deputy Speaker cast a deliberative vote from the Chair, which is reflected in the minutes.

1.5 The complainant alleges that the addition of the name of Ms LL Mabe should, in terms of the "Parliamentary Handbook" have been signed by the Whip.

2. COMPLAINT SUMMARISED

In essence the complaint is that: -

a) a version of the minutes of proceedings records the name of Ms Mahlangu-Nkabinde as voting with the "Ayes" in addition to casting a deliberative vote as the Chair, and

b) the name of Ms LL Mabe was added to the "electronic voting" record without the signature of a whip.

3. COMMENT

3.1 The first version of the minutes of Proceedings of the National Assembly for 15 November 2005 did indeed include the name Mahlangu-Nkabinde as voting with the "ayes". However the total number of votes was correctly reflected as 266. That was the number of 'Ayes' without the addition of Ms Mahlangu-Nkabinde. The Deputy Speaker then cast a deliberative vote, in terms of the Constitution, and the required 267 votes in favour were obtained thereby passing the Bill.

3.2 The minutes have subsequently been re-printed to reflect the correct situation.

It is normal practice to re-print any Parliamentary paper if a technical error occurs.

3.3 Ms Mabe approached the Table in person when the vote was taken on 15 November and indicated that her voting device did not appear to be working. The Table staff therefore added her name to the "ayes" on her direct instruction.

It is only when a whip approaches the Table on behalf of a member or members to make a correction to the electronic voting that we require the signature of the whip. If a member approaches us directly a whip's signature is not required.

3.4 The assertion that the provisions of the "Parliamentary Handbook" should apply is not correct. The handbook indeed states in its introduction (page iii) that:
"The Guide is not intended to be an authoritative reference work on National Assembly procedure".

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4. MINUTES ARE THE FORMAL RECORDS OF THE HOUSE

In terms of the Rules of the Assembly the Minutes of Proceedings of the Assembly, signed by the Secretary, constitute the official journals of the National Assembly.

These official Minutes reflect the 266 'aye' votes plus the deliberative vote cast by the Deputy Speaker thereby giving the required 267 votes to pass the Bill.

5. COMPLAINANT

Although the Public Protector does not mention from whom the complaint comes, we have been in communication with a Mr Clive Rubin in regard to these precise issues on several occasions and went to great lengths to clarify the procedures to Mr Rubin.

In addition Mr Rubin has taken his queries and allegations to both Mr DHM Gibson and Ms C-S Botha. Both members have discussed the matter with us and they are entirely satisfied that the bill was properly passed in compliance with the Constitution and told Mr Rubin so.

6. ARTICLE IN THE MAIL & GUARDIAN

Mr Clive Rublin has also published an article in the Mail & Guardian of 12 to 18 May 2006 in which he makes the same allegations that the Public Protector brings to your attention. Indeed Mr Rubin, in the article, says that he has taken the matter to the Public Protector. Interestingly the article confirms that Mr Gibson has dismissed the issue as a technicality.

7. RECOMMENDATION

We are clear that the procedure followed in passing the Bill was correct.

Mr Rubin's persistent attempts to fabricate a story where there is none is vexatious if not mischievous.

The attached letter to the Public Protector sets out our recommended response.

As the matter has been widely reported in the newspaper, on radio and TV it is suggested that, once we are satisfied that the Public Protector has received your response, a media statement be made on the matter.

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LEGAL OPINION

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TO:	Honourable DS Monsiti, MP Chairperson: Joint Constitutional Review Committee
COPY:	Secretary to Parliament
DATE:	28 August 2008
SUBJECT:	Committee Ref: CR08 Q: Chemical and Allied Industries Association
LEGAL ADVISER:	Adv A Gordon
REFERENCE NUMBER:	138/08

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MEMORANDUM

To: **Honourable DS Monsiti, MP**
Chairperson: Joint Constitutional Review Committee

Copy: **Secretary to Parliament**

From: **Legal Services Office**
Adv A Gordon

Date: **28 August 2008**

Subject: **Your ref:**
CR 08 Q : Chemical and Allied Industries Association

CR 08: Chemical and Allied Industries Association

The Chemical and Allied Industries Association (the Association) is of the opinion that Part A of Schedule 4 of the Constitution should be amended in order to set parameters for the powers in respect of the "environment" between the national and provincial government.

The Association states that the granting of Environmental Impact Assessments (EIA's) by the provincial Department takes too long and that the time frames that are set by the regulations are not complied with. Upon reading the representation I am of the opinion that their concern centres on legislative "implementation" issues and not the "environment" as provided in the Constitution.

The National Environmental Management Bill (Bill 36/07) (NEMA) is currently before the NCOP. The Bill aligns the environmental impact assessment process, sets the competent authorities as the Minister of Environmental Affairs and Tourism and the Minister of Minerals and Energy in respect of EIA's for mining. The Portfolio Committee on Environmental Affairs and Tourism has acknowledged that the powers and scope of MEC's as set in the regulations must be referred to the Portfolio Committee before it is published.

In conclusion, I am of the opinion that the concern by the Chemical and Allied Industries Association is best directed to the Chairperson of the Portfolio Committee on Environmental Affairs and Tourism.

ADV A J GORDON
PARLIAMENTARY LEGAL ADVISER

Background

1. You requested that we advise the Joint Constitutional Review Committee (the Committee) on the feasibility of submissions received from members of the public "on specific sections of the Constitution that they feel need to be reviewed".

The submission

2. In his submission, Mr Spies suggests an amendment to the definition of "*designated groups*" in the Employment Equity Act, 1008 (Act No.55 of 1998) to include youths or "free born South Africans". Mr Spies has also prepared an amendment to the Employment Equity Act.

Opinion

3. It is my opinion that the matter should be referred to the Committee on Private Members' Legislative Proposals and Petitions.

Adv K Beja

Parliamentary Legal Adviser

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LEGAL OPINION

[Confidential]

To: Hon Mr S D Montsitsi
Chairperson Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Senior Legal Adviser

Date: 28 August 2008

Ref: 139/08 [CR08S]

Subject: Submission from Mr S Mokoena

MESSAGE:

Attached please find the confidential opinion as requested

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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Memorandum

To: Hon Mr S D Montsitsi
Chairperson Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Senior Legal Adviser

Subject: Submission from Mr S Mokoena

Date: 28 August 2008

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1. This submission contains proposals to amend sections 9, 27(1)(a), 28(1)(b), 165(3), 176(3) and 180 of the Constitution.

2. **Section 9 (Equality)**

2.1 The first proposal under this section is based on the fact that convicted criminals should have their rights withdrawn and thus that section 9(2) which reads that "[e]quality includes the full and equal enjoyment of all rights and freedoms.", should be qualified by the addition of the words "by all law abiding, obedient, respectful citizens of South Africa.".

2.2 The second proposal under this section purports to change section 9 (3) that currently provides that "the state may not unfairly discriminate", to read that the state "may unfairly discriminate" [my underlining] against convicted criminals, and may not do so against a "law-abiding citizen".

2.3 In summary, the above proposal introduces two new restrictive provisos in that only "law-abiding" "citizens" should be afforded these rights – thus limiting them right to "citizens" in the first instance and further qualifying them to "law-abiding".

2.4 In *Brink v Kitshoff NO 1996(6) BCLR 752 (CC)*, the first Constitutional Court case that dealt with the right to equality, O' Reagan J differentiated between formal equality and substantive equality. She expressed the view that the equality clause in the Constitution was adopted in the recognition that past discrimination led to patterns of group disadvantage and harm. She held that "[t]he need to prohibit such patterns of discrimination and remedy their results are the primary purpose of [the equality clause]" (paragraph 42).

2.5 The Constitution Court has since reiterated and re-emphasised that the Constitution prescribes that remedial action must be taken to achieve substantive equality. Thus where such measures were taken to achieve substantive equality in accordance with

section 9, the discrimination is regarded as fair (see for example *President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC)* and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)*.

2.6 More recently, in *Minister of Finance and Another v Van Heerden 2004 (11) BCLR 1125 (CC)*, Moseneke J (as he was then) held that the "Constitution enjoins us to dismantle [past forms of discrimination] ...Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality". This is in line with Constitutional Principle (CP) II.

2.7 Described in CP II as one of the key attributes of a democracy is the following: "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution."

2.8 The drafters of the Constitution included all those rights that have gained a wide measure of international acceptance as fundamental human rights. Thus the CP is a narrower group of rights than that entrenched by the IC. The closing clause of CP II required the Constitutional Assembly(CA) to give "due consideration to inter alia the fundamental rights contained in Chapter 3" of the IC. The CA was clearly not obliged to duplicate those rights, nor to match them. They merely had to be duly considered.

2.9 The issue of prisoners' rights (the category of persons proposed to be excluded) was before the Constitutional Court only in respect of voting rights (which is correlative to equality). In *August and Another v Electoral Commission and Others 1999 (3) SA 1 (CC)*, the Constitutional Court indicated that section 1(d), a founding provisions of the Constitution, provides South Africa is, *inter alia*, founded on the value of universal adult suffrage and a national common voters roll.

2.10 With regard to restricting equality rights to citizens only, it was pointed out that restricting certain rights such as those contained in sections 19, 21 and 22 of the Bill of Rights was justifiable. In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para 20, the restriction to citizens of the right to choice of occupation is in accordance with recognised international human rights instruments. The Court went on to say at para 21:'This distinction [between citizens and others] is in fact recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies where the right to occupational choice is extended to citizens only, or is not guaranteed at all. Those

considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection..."

2.11 In line with international law, there is no similar reasonable and justifiable basis to restrict the right to "equality". Neither does the petitioner demonstrate or motivate why he is of the view that convicted persons should not enjoy the rights contained in section 9.

2.12 While all persons have the above rights, it is trite that rights are not absolute (section 36 of the Constitution allows for the limitation of rights in the Bill of Rights under certain circumstances where such limitations are "reasonable and justifiable").

2.13 In my opinion the proposal is not consistent with international law or the Constitutional Principles. The Committee should therefore reject this proposal.

3. **Section 27(1)(a):** The submission further proposes that section 27(1)(a) of the Constitution dealing with the right to healthcare should include the words "speedy medical attention in public hospital(s)" This he motivates on the basis that patients queue for several hours to receive medical attention.

3.1 In my view this is not a matter for constitutional review as it relates to matters of service delivery, which is an oversight function and can be referred to the relevant portfolio committee.

4. **Section 28(1)(b):** The next proposal deals with section 28(1)(b) of the Constitution. The proposal is that the rights of children should also contain an obligation that children should respect, honour and obey their parents and elders.

4.1 Childrens' rights are to be protected as the most vulnerable group of society. This proposal however concerns parental responsibilities that cannot be included in a Constitution as it would change the focus of the right. In any event one cannot include such a right which is not capable of a remedy as children are persons up to the age of 18. Even if such a policy consideration was considered it would not be an enforceable right against the child in that parents are responsible for their children's wrongdoings in delict. Nevertheless this proposal requires a policy position.

5. **Section 165(3):** The next proposal outlines cases where, in Mr Mokoena's view the outcome of court decisions were unfair. He thus proposes that section 165(3) of the Constitution be reviewed to provide that court processes may be interfered with to ensure just decisions.

5.1 Interference with the judiciary could expose the judicial system to abuse and the proposal would conflict with the Bill of Rights in general and in particular with the Equality provision discussed above.

5.2 This is not be a matter open for policy consideration for the reasons above.

6. **Section 176(3):** Mr Mokoena further submits that section 176(3) should provide that Judges salaries' should be reduced subject to work performance.

6.1 This is a matter where there is no legal precedent and in my view would conflict with the Doctrine of Separation of Powers and would compromise the independence of the judiciary. In my view this is not within the Committees competence to agree to as it would undermine the founding principles of our Constitution and the above doctrine.

7. **Section 180:** The last proposal appears to be a repeat of the provisions already contained in section 180 of the Constitution, except that Mr Mokoena replaces "may" with "must". I am not sure what the proposal is in this regard. If it is merely to replace the words "may" with "must" as it appears to me, it would result in a tenuous construction as "any matter is relative and unascertainable. Thus to place an obligation on the legislature where it must itself assess a situation (a discretionary exercise) would amount to a contradiction in terms. As such, the proposal is without merit.
It is however ultimately a policy decision for consideration by this committee.

Adv Z Adhikarie
Senior Legal Advisers