

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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Legal Opinion

[Confidential]

TO: Speaker

COPY: Secretary to Parliament
Assistant Secretary to Parliament

DATE: 6 August 2003

SUBJECT: Oversight of the employment of the defence
force during an election period

LEGAL ADVISERS: Adv M R Vassen / Adv F S Jenkins

Parliamentary Legal Services Office

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MEMORANDUM

TO: Speaker

COPY: Secretary to Parliament
Assistant Secretary to Parliament

FROM: Legal Services Office


DATE: 6 August 2003

SUBJECT: Oversight of the employment of the defence force
during an election period

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1. You orally requested our Office to comment on Parliament's oversight of the employment of the defence force during an election period. Section 201(3) of the Constitution and section 18(3) of the Defence Act 42 of 2002 both stipulate that Parliament must be informed when the defence force is employed.
 2. The National Assembly is however not competent to function during the period from the first day of polling until the first sitting of the new Assembly. This period could last up to 21 days (section 57(2) of the Electoral Act 73 of 1998 read with section 51(1) of the Constitution).
 3. Both the Constitution and the Defence Act provide that if Parliament does not sit during the first seven days after the defence force is employed, the

appropriate oversight committee must be informed. However, committees are not competent to function whilst Parliament is not competent to function, as indicated above.

4. The crisp issue is thus whether the employment of the defence force during an election period is exempt from oversight.
5. We are of the view that the mandatory language in the abovementioned provisions of the Constitution and the Defence Act, as well as the power of the National Assembly to maintain oversight of all organs of state (Constitution, sections 42(3) and 55(2)), indicate that the defence force is at all times subject to parliamentary oversight. Furthermore, section 237 of the Constitution stipulates that all constitutional obligations must be performed diligently and without delay.
6. The obligation on the President (or Minister of Defence) to inform Parliament of the employment of the defence force is thus not suspended during an election period. Although neither the Constitution nor the Defence Act specifically provides for an oversight mechanism *in lieu* of Parliament during an election period, we are of the view that the Constitution requires that Parliament, following its election, be informed, without unreasonable delay, of the employment of the defence force during the election period.


ADV M R VASSEN / ADV F S JENKINS
PARLIAMENTARY LEGAL ADVISERS