

EXPLANATORY MEMORANDUM

The Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho on the Facilitation of Cross Border Movement of citizens of the Republic of South Africa and the Kingdom of Lesotho ("the Agreement") simplifies the mutual travel procedures of citizens of both countries, as well as to deliver on improved services regarding the immigration clearance of their citizens who routinely cross the common border. The Agreement is aimed at permitting citizens of both countries to enter into and sojourn in the territories of the countries of the Parties for the purposes of holiday, business and transit, without visas and/or temporary residence permit.

The Agreement is consistent with both the domestic laws of the Republic as including the Constitution as well as International law in general. The legal opinions of the State Law Advisers: Department of Justice and Constitutional Development are attached hereto and marked Annexures "A1" and "A2" respectively. The legal opinion of the State Law Adviser (International Law): Department of Foreign Affairs is attached hereto and marked Annexure "B".

The Agreement has self-executing provisions that will become law in the Republic in terms of section 231(4) of the Constitution of the Republic of South Africa, 1996 upon approval by Parliament. The Agreement will have an impact on the Immigration Act, 2002 (Act No. 13 of 2002).

There are no financial or other related implications on implementation of this Agreement.

From:

To: 00865144267

31/10/2008 09:41

#865 P.001/009

12/06/2007 09:22 0123151743

STATE LAW ADVISORS

PAGE 01/08

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20/03/2007

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justice

Department:
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REPUBLIC OF SOUTH AFRICA

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236/2007
Ref: Adv W J J Nel
Enq: (012) 315 1125
Tel: jnel@justice.gov.za
e-mail: 11 June 2007
Date:

Attention: Gloria Modiroa

AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF LESOTHO AND THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON THE FACILITATION OF CROSS BORDER MOVEMENT OF CITIZENS OF THE KINGDOM OF LESOTHO AND THE REPUBLIC OF SOUTH AFRICA: YOUR UNNUMBERED FACSIMILE DATED 11 JUNE 2007

1. We have scrutinised the amended text of the draft "Agreement between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa on the Facilitation of Cross Border Movement of Citizens of the Kingdom of Lesotho and the Republic of South Africa" in terms of *paragraph 5.20(a)* of the *Manual on Executive Acts of the President of the Republic of South Africa* and have indicated suggested amendments and made certain comments in ink directly on the copy of the Agreement attached hereto.
2. Subject to our comment on the text of the Agreement the provisions of the amended Articles appear not to be in conflict with the domestic law of the Republic of South Africa.
3. We reiterate our previous comments regarding the entry into force and constitutionality of the Agreement.

CHIEF STATE LAW ADVISER

W J J NEL/S M MASAPU

From:

To: 00865144267

31/10/2008 09:31 #863 P.001/007



justice

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J 46

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Ref: 236/2007
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Date: 29 May 2007

AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF
LESOTHO AND THE GOVERNMENT OF THE REPUBLIC OF SOUTH
AFRICA ON THE FACILITATION OF CROSS BORDER MOVEMENT OF
CITIZENS OF THE REPUBLIC OF SOUTH AFRICA AND THE KINGDOM
OF LESOTHO: YOUR UNNUMBERED FACSIMILE DATED 16 MAY 2007

1. We have scrutinized the draft "Agreement between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa on the Facilitation of Cross Border Movement of Citizens of the Republic of South Africa and the Kingdom of Lesotho" in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and have indicated suggested amendments and made certain comments in ink directly on the copy of the Agreement attached hereto.

2. We also have the following comment:

Ad entry into force of Agreement

2.1 The Department's attention is drawn to the provisions of section 231 of the Constitution of the Republic of South Africa, 1996, (hereinafter referred to as the "Constitution"). If it is decided that the Agreement falls within the scope of section

HIV/AIDS is a murderer  bring it to justice

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STATE LAW ADVISORS

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From:

To:00665144267

31/10/2008 09:33

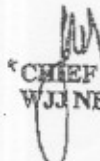
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231(2) of the Constitution, then, the provision concerning the entry into force (i.e. Article 11) shall suffice.

2.2 However, if the Agreement falls within the scope of section 231(3) of the Constitution, the Agreement can, subject to the constitutional requirements of the Kingdom of Lesotho in this regard, provide that it shall come into operation on the date of signature thereof.

3. Subject to our aforementioned remarks and our comments and amendments on the text of the Agreement, no provision of the proposed Agreement is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.


CHIEF STATE LAW ADVISER
WJJ NEL/SM MASAPU

From:

To:00865144267

31/10/2008 09:37

#864 P.001/004



DEPARTMENT OF FOREIGN AFFAIRS
Private Bag x 152, PRETORIA 0001

FACSIMILE MESSAGE

TO : MS GLORIA MODIROA
HOME AFFAIRS
PRETORIA

FAX NUMBER : (012) 810-7044

FROM : MR H LOTZE
SUBDIRECTORATE: LESOTHO
TEL: 012 - 351 0477
FAX: 012 - 323 1919

DATE : 11 JUNE 2007

FILE NO : BL1/LSO/4/A26

PAGES : 1 + 3

SUBJECT : LESOTHO/SA : AGREEMENT ON THE
FACILITATION OF CROSS BORDER MOVEMENT
OF CITIZENS

1. Your fax dated 30 May 2007 regarding the abovementioned draft agreement refers.
2. The Office of the Chief State Law Adviser (International Law) has studied the draft agreement and a copy of their comments is appended hereto for your attention. Please also note the prescribed requirements prior to the signing of a document of this nature by the Principals.
3. Your cooperation is appreciated.

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SERVICE CENTRE HS110

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Jun 11 2007 9:12



From:

To:00865144267

31/10/2008 09:38

#864 P.002/004



OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)
DEPARTMENT OF FOREIGN AFFAIRS

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07gcz0130806a
490/29/5/6
RO 258/06

Att: WH Lotze
Directorate: MMTZZ&L
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Agreement Between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa on the Facilitation of Cross Border Movement of Citizens of the Kingdom of Lesotho and the Republic of South Africa.

1. Your request for legal advice received 7 June 2007 refers. The Office of the Chief State Law Adviser (IL) has scrutinised the aforementioned Agreement to determine its consistency with international law.

BACKGROUND

2. We note that this Draft Agreement has a long history having originally been drafted in 2002. In September 2002, this Office issued a legal opinion under RO 285/02 in which we commented on the substance of the Agreement.
3. More recently, on Thursday 7 June 2007, the Agreement served before a Cabinet Committee Meeting for Justice, Crime and Security. Prior to this meeting there had been a workshop to discuss and consider the Agreement. The workshop considered the strengths, weaknesses, opportunities and threats flowing from the Agreement. The strengths included, *inter alia*, reduction of immigration officers and trade facilitation. The weaknesses included, *inter alia*, insufficient buy-in from stakeholders and the porous borders. A significant threat mentioned in the Cabinet memorandum relates to the security concerns that would result from the arrangement. For the latter purpose, the workshop determined that an implementation plan will be drawn up to deal with security issues.
4. In our legal opinion of 2002 (RO 285/02), we raised several issues of concern relating to the Draft Agreement. In particular we raised concern about the security implications of the Agreement, which is also raised in the most recent comments by the Department of Justice (See Justice comments on Article 9). We also raised some concerns about the possible tax implications of the Agreement. We advised, at the time, that given the fact that the Agreement has implications for several departments that there should be a process of consultation.

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COMMENTS ON THE PROCESS OF CONSULTATION AND TEXT OF THE AGREEMENT

5. In our view the current process of discussing the Agreement in Cabinet serves the purpose of consultation we requested earlier. The concerns we raised were policy concerns and not legal concerns. We note that Cabinet has been alerted to these policy concerns e.g. the possible threats posed by the Agreement. We are further satisfied that the Agreement contributes to the purpose of the SADC Protocol on the Facilitation of Movement of Persons namely "the progressive elimination of obstacles to the movement of persons in the Region".
6. We would suggest, however, that provision be made in the Agreement for an implementation framework as suggested in the Cabinet Memorandum. The provision could be inserted as sub-Article (2) of Article 9 dealing with security issues and can read as follows:
 - (2) A Task Team established by the Parties within [give a time frame], shall develop an implementation framework to address any security issues that may arise from the implementation of this Agreement. The implementation framework shall be adopted by the Bilateral Commission established in terms of the 2001 Agreement between the Parties.
7. Additionally we make the following suggestions:
8. Preamble: In the introductory paragraph, please delete the word "in" before "separately". Furthermore, please note that the inverted commas must come after "a" so that the phrase reads as 'and separately as a "party"'. Please add the word "Agreement" after "Commission of Cooperation" in preambular paragraph 1. Please note that "IN ORDER" is two words.
9. Article 2: In sub-Article (2), please insert "designated land" after "countries" in conformity with the definition and scope of the Agreement. The relevant sentence should, therefore, read as follows: "gates of the respective countries' designated land ports of entry ...". Please reconsider the phrase "as contemplated in sub-Article (1)" in sub-Article (3). From the context it appears to us that the phrase should rather be "as defined in Article 1".
10. Article 6: We suggest that insertion of a sub-Article (3):
 - (3) Such representatives shall report to the immigration officers of the respective countries' designated land port of entry for the purposes of verification of the validity and authenticity of their national passports and their visas or permits as may be relevant.
11. Article 7: Please insert "of the Parties" in paragraph (a) of Sub-Article (2). We also suggest the deletion of the word "legally" in paragraph (c).
12. Article 8: The meaning of the last portion of sub-Article (2) which reads "as well as to third country nationals residing in their respective territories .." is unclear to us. We suggest its deletion.
13. Article 9: Please delete the apostrophe after "negotiations".

From:

To:00865144287

31/10/2008 09:40

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14. Article 11: Please insert "compliance with the" after "their" so that the sentence reads: "channel of their compliance with the domestic requirements .."
15. Article 13: Please replace "by" with "in accordance with".

PROCEDURES FOR ADOPTION:

16. Subject to our comments above the Agreement is consistent with international law and is not in conflict with South Africa's specific international obligations. Given the far reaching nature of the Agreement, this Agreement is, in our view, an Agreement falling within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996. However, whether the Agreement is in fact a section 231(2) agreement falls to be determined by the line function (in consultation with this Office). Our approach has been that section 231(3) agreements are agreements that are department specific, are not of major political significance, have no unbudgeted for financial implications, do not affect domestic law and are generally of a routine nature. Given the far reaching nature of the Agreement, and the legislative implications as mentioned by the State Law Advisers of the Department of Justice, we would suggest that the Agreement is a section 231(2) agreement. We further remind the department that when in doubt, it is always preferable to adopt the section 231(2) procedure.
17. If it is determined that the Agreement is a section 231(3) agreement, then the Agreement only needs to be signed. However, if it is determined that the Agreement is a section 231(2) agreement, then once the Agreement has been signed, the line function department must take the necessary steps to obtain Parliamentary approval in accordance with the provisions the Constitution.
18. To facilitate the process for signature, please provide this Office with two copies of the finally agreed text of the Agreement, two copies of a President's Minute and an Explanatory Memorandum in folder z137 in order for us to certify the Agreement. You are reminded that the Agreement needs to be bound. Please make an appointment for this purpose with Mrs M Jacobs, at (012) 351 0892. Further, the originally signed Agreement must be deposited with the Treaty Section for safekeeping immediately after signature.

DR DIRE TLADI
PRINCIPAL STATE LAW ADVISOR(IL)

8 JUNE 2007
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