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LEGAL OPINION

[Confidential]

TO: Adv S P Holomisa, MP
Mr B A Mnguni, MP
Co-Chairpersons of the Constitutional Review
Committee

COPY: Secretary to Parliament

DATE: 17 September 2009

SUBJECT: Submission by Advocates For Transformation
Gauteng

LEGAL ADVISER: R Mathabathe

COMMITTEE REFERENCE: 11

REFERENCE NUMBER: 142/09



Legal Opinion

1. You requested our office to advise the Joint Constitutional Review Committee ("Committee") on the submissions received from members of the public on the review of specific sections of the Constitution.
2. Advocates for Transformation ("AFT") made a submission in which it recommends that Parliament amend section 168(3) and 172 of the Constitution.

Section 168(3)

3. AFT recommends that Parliament amend this section to clearly exclude from the jurisdiction of the Supreme Court of Appeal all matters which fall within the exclusive jurisdiction of the Labour Appeal Court in terms of the Labour Relations Act, 1995 (Act 66 of 1995) ("LRA").
4. According to AFT it is now accepted as law that the Supreme Court of Appeal ("SCA") has jurisdiction to hear appeals from the Labour Appeal Court ("LAC"). This is based on a number of judgments from the SCA to that effect.
5. This they submit is a misdirection for four reasons: (1) in terms of sections 173(1) and 183 of the LRA the LAC is clearly intended to be the apex court in labour matters; (2) the LRA establishes the LAC as a court with equal status as the SCA insofar as labour matters are concerned, and to have equity jurisdiction which the SCA was never intended to have; (3) the SCA's literal interpretation of section 168(3) is not in line with the purposive interpretation which the Constitution must be given; and (4) Parliament clearly intended for the LAC to have a status similar to that of the SCA in labour matters and the failure to state that in the Constitution was an oversight that it can correct now.
6. AFT argues that it was the intention of Parliament to create specialist courts in the Labour Court and LAC which would deal expeditiously with labour matters which affect the economy of the country.
7. Moreover that labour matters have historically been imbalanced to the prejudice of employees and the Labour Court and the LAC were established as specialist courts to deal with that imbalance while developing a more equitable labour policy. This they argue was acknowledged by the Constitutional court in *Nehawu v UCT* 2003(3) SA 1 (CC).

8. Section 166 of the Constitution makes provision for the establishment of a court in terms of an Act of Parliament. The LRA established the Labour Court and the LAC with the same status as the High Court and the SCA, respectively, to deal specifically with labour matters.
9. It is clear from sections 151 and 167 of the LRA that it was not Parliament's intention to subject the decisions of the LAC to appeals to the SCA. However, these provisions of the LRA are subject to the Constitution which provides in section 168(3) that the SCA is the highest court of appeal except in constitutional matters.
10. Parliament's intention to establish the LAC as a specialist court dealing exclusively with labour matters with the same status as the SCA is clear in the LRA.
11. This however is inconsistent with section 168(3) of the Constitution and can only be cured by amending the Constitution to make that intention clear in the Constitution as well.

Section 8 and 38

12. Section 8 of the Constitution dealing with the application of the Bill of rights provides that when the Bill of Rights is invoked against a natural or juristic person the court must apply or develop common law, where there isn't legislation, to give effect to that right.
13. AFT argues that that may be and has been interpreted to mean that common law or legislation must be relied on to invoke rights in the Bill of Rights. They argue that this is an incorrect interpretation and that Parliament should amend this clause to make it clear that this is not what is intended.
14. It is my view that what is meant by the section is that the court in applying the Bill of Rights must develop common law to reflect the spirit, purport and intent of the Bill of Rights.
15. Any different interpretation was, in my view, misdirection by one judge of the High court in a dissenting judgment, the matter has not been decided by any court and particularly the Constitutional Court and as such that interpretation is not final.
16. I am of the view therefore that it is not necessary to amend the Constitution in the manner that is suggested by AFT in this respect.
17. Section 38 of the Constitution provides that any person listed in that section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. [my emphasis]
18. This, AFT argues, results in confusion in terms of which the court may think it has discretion to decide whether to grant a declaratory order after

it has found that the law or conduct challenged is inconsistent with the Constitution.

19. It argues that section 38 has to be read with section 172 which makes it clear that once a court has found that the law or conduct is inconsistent with the Constitution it has to declare such law or conduct invalid to the extent of its inconsistency.
20. This confusion was apparent in *Hlophe v Constitutional Court of SA 2009 (2) BCLR 161 (W)* where the South Gauteng High Court found that the Constitutional Court had unjustifiably violated Judge Hlophe's constitutional rights contained in the Bill of Rights but declined to grant a declaratory order.
21. Section 38 deals with *locus standi* or who may approach a court to enforce rights in the Bill of Rights, and section 172 deals with powers of the court in constitutional matters which include the Bill of Rights.
22. It is clear that once the court has established that it is dealing with a constitutional matter it cannot exclude the application of section 172, its application is clearly mandatory.
23. It is my view that the court in Hlophe misdirected itself and that given that the Constitutional Court is the apex court in respect of this matter, and still has not expressed itself on the matter, that an amendment would be premature.

Conclusion

24. I recommend therefore that:
 - a. Section 168(3) should be amended to clearly exclude SCA's jurisdiction over labour appeals;
 - b. It is not necessary to amend section 8; and
 - c. Amending section 38 would be premature.



R Mathabathe
Parliamentary Legal Adviser



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LEGAL OPINION

[~~Confidential~~]

TO: Adv S P Holomisa, MP
Mr B A Mnguni, MP
Co-Chairpersons of the Constitutional Review
Committee

COPY: Secretary to Parliament

DATE: 15 September 2009

SUBJECT: Submission CR 09 K from Thamsanqa Robert Ncube

LEGAL ADVISER: Adv M Vassen

COMMITTEE REFERENCE: 10

REFERENCE NUMBER: 139/09



PARLIAMENT
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MEMORANDUM

To: Chairperson: Joint Constitutional Review Committee


Copy: Secretary to Parliament

From: Legal Services Office

Date: 15 September 2009

Subject: Submission CR 09 K by Thamsanqa Robert Ncube

1. I was requested to assist the Joint Constitutional Review Committee (the Committee) to evaluate the feasibility of submissions received from members of the public which propose amendments to the Constitution.
2. While the submission makes reference to the interrelationship between "material and political inequality and how protests formed around demands to address the former may have positive consequences", Mr Ncube does not propose an amendment to the Constitution as such.
3. As the submission does not propose an amendment to the Constitution, it does not fall within the parameters of the brief.


Adv M R Vassen
Parliamentary Legal Adviser



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LEGAL OPINION

[Confidential]

TO: Adv S P Holomisa, MP
Mr B A Mnguni, MP
Co-Chairpersons of the Constitutional Review
Committee

COPY: Secretary to Parliament

DATE: 15 September 2009

SUBJECT: Submission CR 09 N: Ruiters

LEGAL ADVISER: Adv M Vassen

COMMITTEE REFERENCE: 08

REFERENCE NUMBER: 138/09



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MEMORANDUM

To: Chairperson: Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Legal Services Office

Date: 15 September 2009

Subject: Submission CR 09 N: Ruiters

1. I was requested to assist the Joint Constitutional Review to evaluate the feasibility of submissions received from members of the public which propose amendments to the Constitution.
2. The handwritten submission by Ms or Mr Ruiters is totally illegible.
3. As the submission did not contain any contact details, I was advised that it was not possible to contact the writer to request him or her to re-submit a legible submission.


Adv M R Vassen
Parliamentary Legal Adviser



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LEGAL OPINION

[Confidential]

TO: Adv S P Holomisa, MP
Mr B A Mnguni, MP
Co-Chairpersons of the Constitutional Review Committee

COPY: Secretary to Parliament

DATE: 17 September 2009

SUBJECT: Submission by Ms Anne-Marie Robb on Legal Capacity

LEGAL ADVISER: Adv K Beja

COMMITTEE REFERENCE: 9

REFERENCE NUMBER: 143/09



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 her submission, Ms Robb requests the Committee to address the issue of legal capacity. As a survivor of the mental health care system and an activist defending the rights of mental health care users, she suggests the Constitution has to make it clear that legal capacity of a person cannot be taken away from them arbitrarily.
3. She submits that the term "conscience" may seem to suffice but including "psychosocial/physical disability" will enrich our Constitution in line with the United Nations Convention on the Rights of People with Disabilities.

Opinion

4. Section 9 of the Constitution provides that "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including... **disability**..." [my emphasis] The Constitution already protects people with any form of disability from discrimination.
5. It is true that disability induced by mental health problems may affect one's legal capacity to act. Legal capacity is defined as the capacity to have rights and duties and all human beings have this capacity irrespective of their personal qualities.¹ A distinction is however drawn between the capacity to have rights and duties, and the extent of these rights and duties that a person has at a specific time. This distinction is drawn because a legal subject may have limited rights or duties at a specific time. For example, although children below the age of seven have legal capacity, it is limited to the extent that they cannot marry. The limitation of

¹ DSP Cronje' & J Heaton, "The South African Law of Persons", Second edition at page 34.



legal capacity does not mean that a person has no legal capacity at all as no legal subject can be entirely without legal capacity.²

6. It is my view that by recognising and protecting against discrimination based on disability, the drafters of the Constitution recognised that all human beings have legal capacity and that it cannot simply be taken away from them arbitrarily. In fact, only a High Court is competent to give judgments regarding a person's status. The limitation placed on legal capacity is intended to protect people with mental disability from abuse.
7. It is therefore my recommendation that Ms Rodd be advised that her request is sufficiently addressed in the Constitution and the South African Law of Persons. She can also be advised to approach the Registrar of any High Court or the Department of Justice & Constitutional Development for further explanation on issues of legal capacity or status.



Adv K Beja

Parliamentary Legal Adviser

² Ibid.