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**LEGAL OPINION**  
**[Confidential]**

**TO:** Chairperson: Portfolio Committee on Trade and Industry  
[Ms J Fubbs]

**COPY** Secretary to Parliament

**DATE:** 28 February 2011

**SUBJECT:** Public participation in the Companies Amendment Bill  
[B40-2010]

**LEGAL ADVISER:** Adv M R Vassen

**REFERENCE:** 37/2011



## MEMORANDUM

**To:** Chairperson: Portfolio Committee on Trade and Industry  
[Ms J Fubbs]

**Copy:** Secretary to Parliament

**From:** Legal Services Office

**Date:** 28 February 2011

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**Subject:** Public participation in the Companies Amendment Bill [B40-2010]

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1. I was requested to advise whether the Portfolio Committee on Trade and Industry (the Committee) may propose amendments to the Companies Act, Act 71 of 2008 (the principal Act) if these amendments were not contained in the Companies Amendment Bill [B40-2010] (Bill). I was also requested to advise whether a need exists for public involvement in respect of such new amendments.

### Background

2. The Committee is currently considering the Bill and has embarked on an extensive public involvement process. Thus in addition to receiving written submissions, the Committee held three full days of public hearings.
3. I am advised that in many instances submissions by the public included proposed amendments to the principal Act which are not contained in the Bill. Pursuant to these submissions the Department of Trade and Industry (the Department) recommended amendments to the principal Act, which are not contained in the Bill.
4. In addition the Department also suggested that the Committee insert an additional provision in the principal Act which was neither contained in the Bill nor raised in the public submissions. In this regard the Department suggested that section 194 of the principal Act be amended to allow members of the Companies Tribunal to be reappointed for a second term.

## Whether the Committee may insert additional amendments to a principal Act which are not contained in the Bill

5. Rule 249 of the National Assembly Rules regulates how a committee may process a Bill. In this regard rule 249(3)(a) provides that a committee must enquire into the subject of the bill and report on it to the Assembly.
6. Rule 249(3)(b) however provides that if it is a bill amending provisions of legislation, the committee "may seek the permission of the Assembly to inquire into amending other provisions of that legislation".
7. Despite the use of the word "may", read in its context, it denotes that the Committee must first seek the permission of the House before enquiring into amending other provisions of the principal Act.
8. Thus while the Committee must enquire into the subject of the Bill, only with the permission of the House, is it permissible to inquire into amending other provisions of the principal Act.

## In light of the above amendments, whether it is necessary to hold further public hearings

9. Section 59(1)(a) of the Constitution *inter alia* provides that National Assembly must facilitate public involvement in the legislative process of the Assembly and its committees.
10. Parliament's duty to facilitate public involvement in the legislative process was considered by the Constitutional Court in both *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) (*DLI*) as well as in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) (*Matatiele*).
11. Ngcobo J, writing for the majority of the Court in both cases, built on the dicta in *King and Others v Attorneys Fidelity Fund Board of Control and Another*, 2006 (1) SA 474 (SCA), which held that while the Constitution "imposes on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it" (at para 22). As such, in both *DLI* and *Matatiele* the Court held that Parliament had a broad discretion to determine how best to fulfil its obligations in a given case, provided that it is reasonable to do so. The Court indicated that what is required will vary from case to case but "what ultimately is of concern is that a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say" (*DLI* para 125).
12. Furthermore, in determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances.

Factors relevant to determining reasonableness would include the Rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate.

13. While the Rules are silent on the need for additional public hearings, in my view, in light of the above dicta by the Constitutional Court, and given that the additional amendments to the principal Act were in response to submissions by the public, no further public hearings are necessary.
14. Furthermore, in my view, the proposed amendment of section 194 of the principal Act (which allows members of the Companies Tribunal to be reappointed for a second term) is not a major policy shift and will not have a huge impact on the public in general. In this regard it will be reasonable not to hold further public hearings on the matter.

## Summary

15. In summary -

- The Committee must seek the permission of the House before proposing amendments to the principal Act.
- As the additional amendments to the principal Act were in response to submissions from the public, it is not necessary to hold public hearings on these amendments.
- The amendment of section 194 of the principal Act does not require additional public participation.



Adv M R Vassen

PARLIAMENTARY LEGAL ADVISER