



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

**LEGAL SERVICES**

PO Box 15 Cape Town 8000 Republic of South Africa  
Tel: 27 (21) 403 2911  
[www.parliament.gov.za](http://www.parliament.gov.za)

Tel: (021) 403-2626  
Direct: (021) 403-2483  
Fax (021) 403-3888  
E-mail: [agordon@parliament.gov.za](mailto:agordon@parliament.gov.za)

**LEGAL OPINION**  
[Confidential]

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

**COPY:** Acting Secretary to Parliament

**DATE:** 28 August 2012

**SUBJECT:** Submission: Mr. Bonga Mthembu

**LEGAL ADVISER:** Adv A Gordon

**COMMITTEE REFERENCE:** 6/12

**REFERENCE NUMBER:** 188/12

6



## **MEMORANDUM**

**To:** Adv S P Holomisa, MP  
Mr. B A Mnguni, MP  
Co-Chairpersons of the Joint Constitutional Review Committee

**Copy:** Acting Secretary to Parliament

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

**Date:** 28 August 2012

**Subject:** Submission: Mr. Bonga Mthembu

---

### **Background and Summary**

1. A submission was received from Mr. Bonga Mthembu and his general concern is that the construct of the South African government landscape should be changed.
2. To this end he submits that-
  - (a) an absolute unitary state should replace the role of provinces in government;
  - (b) Parliament should only have one House (i.e. that the National Council of Provinces should be removed);
  - (c) the amount of Members of the National Assembly should be reduced;
  - (d) the electoral system of proportional representation should be changed to a constituency based electoral system; and
  - (e) a hybrid of parliamentary supremacy and constitutional supremacy should be adopted.
3. Mr. Mthembu also submits that-
  - (a) the part in the Preamble which reads "South Africa belongs to all who live in it" is questionable;
  - (b) the national anthem should be changed;
  - (c) certain indigenous languages should be included in the list of official languages; and
  - (d) a Press Freedom Commission should be included in Chapter 9 of the Constitution.
4. I set out more fully the submission below.

## The Submission

### 5. Preamble

“Believe that South Africa belongs to all who live in it, united in our diversity.”.

- 5.1 Mr. Mthembu wants to know who the rightful owners of South Africa are. He states that it cannot be that South Africa belongs to all who live in it as people of other nationalities or countries are the rightful owners of their own countries.
- 5.2 Whilst Mr. Mthembu questions a part of the Preamble to the Constitution he does not propose an amendment or an aspect for review by the Joint Constitutional Review Committee (JCRC).
- 5.3 It should however be noted that section 7(1) of the Constitution places the Bill of Rights as the cornerstone of South African democracy and that “all people in our country” are entitled to human dignity, equality and freedom. It would therefore be illogical to exclude persons from the protection of the Constitution by the fact that they are not South African citizens.
- 5.4 It should also be noted that the Constitution does make the necessary distinction between the protection of individuals in respect of rights (such as the fact that only South African citizens may vote- section 19(3)) as compared to fair labour practices (section 23) and other rights in the Bill of Rights which are afforded to everyone. The submission therefore does not take into account the design of the Constitution.
- 5.5 On the basis that Mr. Mthembu questions the words of the Preamble and does not propose an amendment there is therefore no proposed amendment before the JCRC.

### 6. Supremacy of the Constitution

- 6.1 Section 2 of the Constitution provides as follows:

“This Constitution is supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”.

- 6.2 The submission calls for the Constitution to be amended in order to create balance in the exercise of the will of the majority through its elected representatives. Mr. Mthembu questions whether countries with parliamentary supremacy are less democratic than countries that have constitutional supremacy. The submission calls for a hybrid model that will balance the will of the people through its elected representatives.
- 6.3 It is common knowledge that South Africa adopted a constitution in order to move away from the concept of Parliamentary Supremacy. South Africa's history is rich with incidents where Parliament, prior to 1994, abused its absolute power.

The system of Constitutional Supremacy was adopted in order to hold every arm of the Government, i.e. the Executive, the Legislature and the Judiciary accountable for its actions and for each arm to be subjected to the checks and balances of the other arms of the Government.

6.4 Even though democracy lends itself to the very simple concept of "government by the people" it still requires the exercise of all government functions and functionaries to be subjected to checks and balances. The will of the elected majority through its elected representatives cannot be balanced through an amendment to the Constitution. True democracy requires that the elected representatives in Parliament consult the electorate when making decisions. After the majority in Parliament has voted on a matter and a decision is taken, the action may then be subject to checks and balances within the parameters of the Constitution.

6.5 In terms of the Founding Provisions to the Constitution it is clear that Constitutional Supremacy and rule of law are the founding values upon which the current South African democratic state is built (section 1(c)). Section 2 of the Constitution reinforces a system of Constitutional Supremacy in South Africa. It may well be that Mr. Mthembu's concern is that the will of the people is not carried out by the elected representatives but he does not elaborate further in this respect. Should this be his actual concern it does not require an amendment to the Constitution as it deals with aspects between the voters and their political party representatives in Parliament.

6.6 It is recommended that the JCRC does not consider the submission for the purpose of an amendment to the Constitution.

## 7. National Anthem

7.1 Section 4 of the Constitution provides as follows:

"The national anthem of the Republic is determined by the President by proclamation."

7.2 Mr. Mthembu submits that the part of the national anthem that originates from "the Stem" should be removed from the national anthem. He states that "the Stem" reminds people of the apartheid days.

7.3 It is noted that the request by Mr. Mthembu is for an amendment to the national anthem and not necessarily an amendment to section 4 of the Constitution. On the basis that the President determines the national anthem by proclamation, the JCRC does not have the necessary jurisdiction to amend the national anthem. Mr. Mthembu's should direct his submission in this regard to the President.

7.4 It is recommended that the JCRC does not consider the submission for the purpose of an amendment to the Constitution.

*-not to the committee*

## 8. Languages

8.1 Section 6(1) and (2) of the Constitution provides as follows:

- "(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."

8.2 Mr. Mthembu states that the Khoi and San languages should be added in the Constitution. He states that this will help promote the development of indigenous languages.

8.3 In terms of section 6(2) of the Constitution the Khoi and San languages are perceived to be part of the category of the indigenous languages whose status must be advanced.

8.4 In terms of clause 4(2)(d) of the Use of Official Languages Bill [B23B-2011] before Parliament ( currently before the NCOP) every National Department, National Public Entity and Public Enterprise must describe how they will effectively communicate with members of the public whose language is not an official language. Khoi and San are not official languages in terms of section 6(1) of the Constitution but these languages are prioritized for advancement in its usage in terms of section 6(2) of the Constitution and the Use of Official Languages Bill [B23B-2011].

8.5 Clause 4(3) of the Use of Official Languages Bill [ B23B-2011] reiterates section 6(2) of the Constitution and this shows the current commitment by the National Government to develop the languages. An amendment to section 6(1) of the Constitution would therefore not be required in order to elevate the Khoi and San languages.

8.6 It is recommended that the JCRC does not consider the submission for the purpose of an amendment to the Constitution.

## 9. Property

*Take land from people and not pay them for it - breaching Sec. 25A*

9.1 Section 25(1) and (2) of the Constitution provides as follows:

- "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
- (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

- 9.2 Mr. Mthembu submits that land redistribution should be fast tracked and that expropriations should take place even without the necessary "compensation" requirement embodied in section 25(2)(b) of the Constitution. *depriving people*
- 9.3 Section 25 of the Constitution is a right which encompasses the attempt by the Government to make right the colonial land imbalance of the past by paying a sum of money which has been agreed to between the parties or determined by a court of law for the purchase of land.
- 9.4 In First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC) at page 705 it was stated that the protection of property [both movable and immovable] was not an absolute right but subject to societal considerations. The Preamble to the Constitution instills that the Constitution was adopted as supreme law in order to, amongst others, heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights. It is therefore clear that property is a method of addressing the social imbalances of the past.
- 9.5 The right contained in section 25(1) of the Constitution is not a positive right. The section does not provide that, "everyone has the right to property". Conversely, the right contained in section 25(1) of the Constitution is negative in application in that no one may be deprived of property. This presupposes that a person must possess property in order to be deprived. However, deprivation may be lawful if it occurs in terms of a law of general application and is not done in an arbitrary manner. Section 25(2) requires that expropriations must also be conducted in terms of a law of general application, for public purpose and with compensation.
- 9.6 AJ van der Walt, Constitutional Property Law 2005 at page 15 writes that the characteristic that distinguishes expropriations from deprivation of property is the element of compensation. Without compensation being paid, a person would then be deprived of property. Deprivation of property is what is prohibited in terms of section 25(1) of the Constitution unless the requirements in section 25(1) are met.
- 9.7 Therefore when the State expropriates land, compensation must be paid to the owner of the land. If compensation is not paid, such action by the State will amount to unlawful deprivation and a violation of section 25(1) of the Constitution.
- 9.8 It is therefore clear that section 25(2)(b) of the Constitution cannot be amended without a complete policy change to the concept of expropriation for the purpose of redress.
10. **Government of the Republic and Composition of Parliament**
- 10.1 Section 40(1) of the Constitution provides as follows: *under one paragraph in Mr Mthembu's*
- "(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."

10.2 Mr. Mthembu submits that provincial legislatures and executive councils should be abolished. He submits that provincial structures should implement national policies and provide services at provincial level. He is of the opinion that this will generate financial savings and South Africa will become a true unitary state.

10.3 He further submits that the National Council of Provinces should be removed as the second House of Parliament and that Parliament should only have one House.

10.4 Section 42(1) of the Constitution of the Constitution provides as follows:

*Reduce members to 200 from 400*

“(1) Parliament consists of –  
(a) the National Assembly, and  
(b) the National Council of Provinces.”.

10.5 Rautenbach and Malherbe, Constitutional Law, 1999 at 269 sketch the history of South Africa that gave rise to the introduction of the nine (9) provinces in South Africa. The provincial concept emanates from the previous Unitary System which had four colonies which later became provinces. The four provinces exercised authority at a regional/ provincial level over certain matters that fell within the legislative competence of the province. However at the time of the Interim Constitution considerable detail went into the demarcation of the country along provincial lines. South Africa had to be inclusive of all races and this had to be reflected in the demographic composition of the provinces.

10.6 When the Final Constitution was drafted, Chapter 3 of the Constitution which deals with Co-operative Government focused on strengthening the role of the provinces.

10.7 GE Devenish, The South African Constitution, 2005 at page 271 and 272 articulates that the Constitution is drafted in such a manner that it gives rise to a quasi-federal government. But, by conferring constitution-making powers upon the provinces, the Constitution does not empower the provinces as sovereign states. The effect of the Constitution is a government that resembles the structure of federalism and this structure is enhanced through the principles of co-operative government as contained in chapter 3 of the Constitution.

10.8 Mr. Mthembu's submission that all government and legislative powers should reside in the National Government and the National Legislature disregards the South African history that gave rise to the creation of the nine provinces. However, should the JCRC consider that Mr. Mthembu's submission has merit, it would require a substantial change of government policy.

## 11. The National Assembly

11.1 Section 46(1) of the Constitution provides as follows:

“(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that –  
(a) is prescribed by national legislation;

- (b) is based on the national common voters roll;
- (c) provides for a minimum voting age of 18 years; and
- (d) results, in general, in proportional representation.”.

- 11.2 Mr. Mthembu states that the amount of Members of the National Assembly should be reduced to 200 members. Mr. Mthembu submits that it costs too much to finance 400 Members of Parliament and that the system of proportional representation should be replaced with a constituency based, simple majority system.
- 11.3 Rautenbach and Malherbe (1999:121) indicate that the British Parliament was developed from the monarch’s need to obtain the consent of the representatives of the people for decisions. This was instrumental when the monarch wanted to impose taxes on the people. This system of Parliament gave rise to the principle of “representation”. At 130, Rautenbach and Malherbe indicate that the electoral system determines how the votes that are cast are conveyed into seats in Parliament. Generally, either a constituency or proportional representation system is followed.
- 11.4 If a constituency electoral system is followed it means that a country is divided into geographical areas (constituencies) and the voters in a specific constituency vote for their representative. A representative who wins a constituency vote obtains a seat in the legislature. The negative effect of a constituency based electoral system is that the majority requirement to secure a seat in the legislature may skew the final representation. For example, if the majority requirement is a relative majority, i.e. a simple majority (more than the rest) and not necessarily 50+1 then this could lead to a party who obtained a substantial amount of votes but just short of the majority not being represented in the legislature. This is the system that Mr. Mthembu recommends must replace the current system of proportional representation in South Africa.
- 11.5 At the time when the Final Constitution was drafted the Constitutional Court in Certification of the Constitution of the Republic of South Africa, 1996 at para 181 in considering Constitutional Principle VIII highlighted that there was no indication that the principle of proportional representation was problematic. However, the Constitutional Court in the context of the anti-deflection clause (commonly referred to as floor crossing), did caution that where elected representatives disregard the voice of its voters, they run the proverbial gauntlet of losing their electoral support in the next election. This position was once again echoed in United Democratic Movement v The President of the Republic of South Africa and Others CCT 23/02.
- 11.6 It is clear that the electoral system of proportional representation was fully considered by the Constitutional Court in the Certification judgment. However, if the submission by Mr. Mthembu is to be considered in order to change the electoral system it would require a policy decision to this effect.


## **12. Chapter 9: State Institutions Supporting Constitutional Democracy**

- 12.1 Mr. Mthembu submits that an independent institution should be included in the Constitution [Chapter 9] that regulates the media in South Africa. Mr. Mthembu further submits that the Press Freedom Commission Report with its



recommendations should set the framework for the model that should regulate the press media as a Chapter 9 institution.

- 12.2 It is common knowledge that the institutions that are included in Chapter 9 of the Constitution are the institutions that strengthen constitutional democracy. These institutions are independent, subject only to the Constitution and the law, perform their powers and functions without fear, favour or prejudice, are accountable to the National Assembly and report to the National Assembly on their activities and the performance of their functions at least once a year (see section 181 of the Constitution).
- 12.3 Section 192 of the Constitution makes provision for an independent authority to regulate broadcasting that is within the public interest, fair and diverse in respect of the South African society. It is noteworthy that an independent authority that regulates the print media was not included in Chapter 9 when the Constitution was adopted.
- 12.4 The Press Freedom Commission in its Report of March 2012 (the Report) identifies that the best mechanism to regulate the print media is through a system of co-regulation that is independent of government. The Report defines independent co-regulation as: "a system of press regulation that involves public and press participation with a predominant public membership without State or government participation. The Report further recommends that an independent co-regulated system should be accountable to the public.
- 12.5 The aspect of accountability in the Report does not give credence to the design of Chapter 9 of the Constitution. Whilst a Chapter 9 institution is independent, it is nonetheless accountable to and must report to the National Assembly. Further, the recommendations in the Report are the result of an extensive comparative study with other countries and how they regulate the print media.
- 12.6 Having considered the submission by Mr. Mthembu, it is clear that the fundamental reason why a regulatory print media council cannot be housed in Chapter 9 of the Constitution is because it would not be accountable to the National Assembly and would want to be free of any State involvement. This would be in conflict with section 181(5) of the Constitution.
- 12.7 The submission by Mr. Mthembu in this regard would not meet the provisions of Chapter 9 of the Constitution for the purpose of an amendment.

  
**ADV A J GORDON**  
**LEGAL ADVISER**

## Constitutional Review Submission

### Introduction

Our Constitution is a result of compromises reached at the negotiations prior to 1994. Unfortunately it appears that the ANC and its alliance partners were somehow outmanoeuvred by the apartheid government into accepting provisions that are today coming back to haunt the majority of the people in this country. A lot was compromised in striving to create "the best constitution in the world".

In making this submission to the Constitutional Review Committee, I would like to invite the members of the Committee to ask themselves the following questions: South Africa's Constitution is regarded as one of the best constitutions in the world – but best for whom? Has the Constitution enabled the realisation of true liberation from white apartheid and achievement of economic freedom in this country? If not, what is Parliament going to do about it? Below are my comments on specific provisions of the Constitution.

Note: The numbering follows the relevant sections in the Constitution.

### Preamble

"Believe that South Africa belongs to all who live in it, united in our diversity."

Who are the rightful owners of this country? Surely it cannot be all who live in it. Countries such as Brazil, Bolivia, China, or India, belong to their rightful owners.

### Founding Provisions

#### 1. Republic of South Africa

(c) Supremacy of the constitution and the rule of law.

See comment in paragraph 2 below.

#### 2. Supremacy of Constitution.-This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Are the countries that have parliament sovereignty less democratic than constitutional democracies? Is constitutional supremacy an appropriate principle in a transformational state? Given the recent experience of tension between Government / Parliament (as elected by the majority of the people) and the Judiciary, what is the most suitable framework to create a balance between the rule of law and bringing true liberation and economic freedom in this country? What are the checks and balances against the power of the judiciary in interpreting the Constitution?

Parliament must amend the Constitution to create a "hybrid model" that will balance the exercise of the will of the majority through its elected representatives (Is that not what democracy is about?) and the rule of law.

4. **National anthem.**-The national anthem of the Republic is determined by the President by proclamation.

It is time we drop the short version of the Stem from our national anthem. For some people it reminds us of the apartheid days. It is a true demonstration of how the negotiated settlement failed the majority of the people in this country.

6. **Languages.**-(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

Recognise and add the Khoi and San languages in the Constitution. This will help promote the development of these indigenous languages.

25. **Property.**-(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application--

- (a) for a public purpose or in the public interest; and  
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Land distribution is one of the serious threats to our democracy. Until such time that land is returned to its rightful owners, the majority of people in this country would not enjoy economic freedom. Parliament must seriously consider amending the Constitution to fast-track land distribution – even without compensation, where necessary and reasonable to do so.

40. **Government of the Republic.**-(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

Amend the Constitution to abolish provincial legislatures and executive councils. Instead, provincial administration structures will implement national policies and provide services at provincial level. Apart from financial savings that will be generated, this will make South Africa a true unitary state. The semi-federal system is another compromise to appease certain political groups

42. **Composition of Parliament.**-(1) Parliament consists of-

- (a) the National Assembly; and  
(h) the National Council of Provinces.

If the only reason for the second chamber (NCOP) is to represent the provinces, therefore in a unitary state there is no need for a second house. Having two houses is very costly to the state and resources could be used to develop poor communities.

## THE NATIONAL ASSEMBLY

46. **Composition and election.**-(1) Subject to Schedule 6A, the National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that-

(d) results, in general, in proportional representation.

In a country with 50 million people, having 350 – 400 representatives is way too much. It amounts to a ratio of 1 member: 125 000 people. Amend the Constitution to reduce the size of the NA to 200 members and free all the resources that can be used for the development of the country.

Amend the Constitution to replace proportional representation with a constituency based / simple majority system – winner takes all. This will make members more accountable to the people and communities they represent. The amendment of the electoral system would apply to the election of municipal councils as well. This is one of the compromises to protect minorities, which becomes unnecessary as our democracy matures.

## CHAPTER 9

### STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

The Press Freedom Commission has published a report with its recommendations on the type of framework or model to regulate the print media. I would propose that an independent institution is provided in the Constitution to regulate the media in this country. As the current Public Protector has demonstrated, it is the capacity, integrity and quality of work of the individuals occupying such state institutions that counts and not necessarily where the institution is located.

Bonga Mithembu

Cape Town

9 May 2012