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MEMORANDUM

[Confidential]

TO: Adv SP Holomisa, MP
Mr BA Mnguni, MP
Co-Chairpersons of the Joint Constitutional Review Committee

COPY: Acting Secretary to Parliament
[Mr M Coetzee]

FROM: Constitutional and Legal Services Office
[Dr BE Loots – Parliamentary Legal Adviser]

DATE: 17 August 2012

CRC REF: CR12-16

REF: 198/2012

SUBJECT: OPINION ON THE CONSTITUTIONAL REVIEW SUBMISSION FOR
CONSTITUTIONAL AMENDMENTS RELATED TO THE ROLE AND
FUNCTIONS OF TRADITIONAL LEADERS

Mr Moses Masole

16



MEMORANDUM

TO: Adv SP Holomisa, MP (NA)
Mr BA Mnguni, MP (NCOP)
Co-Chairpersons of the Joint Constitutional Review Committee

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CONSTITUTIONAL AMENDMENTS RELATED TO THE ROLE AND
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INTRODUCTION

1. Our Office was requested to advise on the submission of Mr Moses Mashile for the annual constitutional review by the Joint Constitutional Review Committee ('the Committee').

OVERVIEW OF SUBMISSION

2. In his submission, Mr Mashile recommends that the Constitution of the RSA, 1996 ('the Constitution') be amended as follows:
 - (a) sections 42 & 60 be amended to allow for the inclusion of Traditional Leaders within the National Council of Provinces ('the NCOP') and the National House of Traditional Leaders be abolished;
 - (b) section 212 be amended to elaborate on the functions and duties of traditional leaders, i.e. to include the enforcement of a code of conduct of traditional leaders, dispute resolution, withdrawal of recognition etc;
 - (c) section 76 be amended to include referral of bills to the National House of Traditional Leaders;

- (d) the duties of the Chairpersons of the National House and Provincial Houses of Traditional Leaders be clarified and equated with that of the Speaker the National Assembly ('the NA') and the Chairperson of the NCOP, or in the case of the provinces, the Speakers of the Provincial Legislatures; and
- (e) Members of the National and Provincial Houses of Traditional Leaders, be equated to the Members of the National and Provincial Legislatures.
3. The latter two submissions, do not call for any specific constitutional amendments, but rather speak to the status and benefits of public office bearers and stands to be regulated through legislative and other measures if so required. The opinion is therefore limited to consideration of the proposed amendment of sections 42, 60, 76 and 212.

PROPOSED AMENDMENT OF SECTIONS 42 & 60

Relevant Constitutional Provisions

4. Section 42 of the Constitution deals with the composition of Parliament and reads as follows:
1. Parliament consists of
 - a. the National Assembly; and
 - b. the National Council of Provinces.
 2. The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.
 3. The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.
 4. The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.
 5. The President may summon Parliament to an extraordinary sitting at any time to conduct special business.
 6. The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76(1) and (5) may determine that the seat of Parliament is elsewhere.¹
5. Section 60 of the Constitution deals with the composition of NCOP and reads as follows:
1. The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.
 2. The ten delegates are
 - a. four special delegates consisting of-
 - i. the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and
 - ii. three other special delegates; and
 - b. six permanent delegates appointed in terms of section 61(2).
 3. The Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation.

¹ Underlining added for emphasis.

Constitutional Analysis

6. In the current government system, the South African legislature has a bicameral character, with the two houses each representing different interests, while acting as a check and balance for one another:²

*"[T]he National Assembly is intended to represent the interests of all South Africans while the NCOP is intended to represent the interests of the nine provinces."*³

7. As section 42(4) therefore indicates, the NCOP's composition and structure is designed to give effect to its participation "in the national legislative process ... by providing a national forum for public consideration of issues affecting the provinces".
8. It must further be kept in mind that the NCOP's representative composition is the product of an electoral system,⁴ whereas members to the National House of Traditional leaders are nominated as per the requirements of the Traditional Leadership and Governance Framework Act, No 41 of 2003.
9. Abolishing the House of Traditional Leaders and including that forum (with a very specific and specialised role, composition and interest focus) within the scope of the NCOP would call for the NCOP's role, composition and interest focus to be significantly altered to allow for the voice of both these houses to still be heard within such a collective.⁵
10. It would not only require the amendment of sections 42 and 60, but also of section 212, as that section allows for the establishment of national and provincial houses of traditional leaders.
11. Furthermore, incorporating the National House of Traditional Leaders into the NCOP will result in the National and Provincial structures no longer aligning, if a similar step is not taken at provincial level.

Legal Opinion

12. The proposed amendments of sections 42 and 60 will require a restructuring of the legislative authority, as all provisions speaking to the NCOP and its functioning will have to be reconsidered. Such amendments require a policy decision to be taken by the legislature, as it does not amount to a legal question. It is therefore for the Committee to take a policy decision whether to recommend or oppose the proposed amendment in its constitutional review report.

² See I Currie & J de Waal *The New Constitutional & Administrative Law: Volume One* (2001) 133.

³ I Currie & J de Waal *The New Constitutional & Administrative Law: Volume One* (2001) 133.

⁴ See section 62, read with section 105, of the Constitution.

⁵ The Constitutional Assembly, in developing the current NCOP model specifically did so to enhance the collective power of the provinces. See *In re: Certification of the Constitution of the RSA, 1996 1996* (10) BCLR 1253 (CC) at par 318.

PROPOSED AMENDMENT OF SECTION 212

Relevant Constitutional Provision

13. Section 212 of the Constitution deals with the role of traditional leaders and reads as follows:

1. National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
2. To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law
 - a. national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - b. national legislation may establish a council of traditional leaders.

Constitutional Analysis

14. When the Constitutional Court in *In re: Certification of the Constitution of the RSA, 1996*⁶ had the opportunity to comment from a legal perspective on the relevant constitutional provisions dealing with traditional leaders the court noted as follows:

*"Our role is limited to ensuring that the institution, status and role of traditional leadership are recognised and protected ... The [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation."*⁷

Legal Opinion

15. Judicial interpretation to date has focussed on the legislation enacted in an attempt to give effect to section 212. The proposed amendment however goes further in that it calls for the section itself to give content to the functions and duties of traditional leaders.
16. Such an amendment is therefore not a legal question, but rather requires the legislature to make a policy decision whether the inclusion of the specific functions and duties of traditional leaders within the text of section 212 is so required. It is therefore for the Committee to take a policy decision whether to recommend or oppose the proposed amendment in its constitutional review report.

PROPOSED AMENDMENT OF SECTION 76

Relevant Constitutional Provision

17. Section 76 of the Constitution deals with the manner in which Parliament processes ordinary bills affecting provinces and reads as follows:

1. When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

⁶ 1996 (10) BCLR 1253 (CC).

⁷ 1996 (10) BCLR 1253 (CC) at paras 193 – 197.

- a. *The Council must*
 - i. *pass the Bill;*
 - ii. *pass an amended Bill; or*
 - iii. *reject the Bill.*
 - b. *If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.*
 - c. *If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.*
 - d. *If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on*
 - i. *the Bill as passed by the Assembly;*
 - ii. *the amended Bill as passed by the Council; or*
 - iii. *another version of the Bill.*
 - e. *If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.*
 - f. *If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.*
 - g. *If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.*
 - h. *If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.*
 - i. *If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.*
 - j. *If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.*
 - k. *A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.*
2. *When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:*
- a. *The Assembly must*
 - i. *pass the Bill;*
 - ii. *pass an amended Bill; or*
 - iii. *reject the Bill.*
 - b. *A Bill passed by the Assembly in terms of paragraph (a)(i) must be submitted to the President for assent.*
 - c. *If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.*
 - d. *If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on*
 - i. *the Bill as passed by the Council;*
 - ii. *the amended Bill as passed by the Assembly; or*
 - iii. *another version of the Bill.*
 - e. *If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.*
 - f. *If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.*
 - g. *If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.*

- h. If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.
 - i. If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.
- 3. A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:
 - a. section 65(2);
 - b. section 163;
 - c. section 182;
 - d. section 195(3) and (4);
 - e. section 196; and
 - f. section 197.
- 4. A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation
 - a. envisaged in section 44(2) or 220(3); or
 - b. envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.
- 5. A Bill envisaged in section 42(6) must be dealt with in accordance with the procedure established by subsection (1), except that
 - a. when the National Assembly votes on the Bill, the provisions of section 53(1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and
 - b. if the Bill is referred to the Mediation Committee, the following rules apply:
 - i. If the National Assembly considers a Bill envisaged in subsection (1) (g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.
 - ii. If the National Assembly considers or reconsiders a Bill envisaged in subsection (1)(e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.
- 6. This section does not apply to money Bills.

Constitutional Analysis

18. Section 76 makes provision for a more burdensome parliamentary process for the passing of legislation, as it speaks to the processing of bills that substantively affects the interests of provinces.⁸ The Constitutional Court has declared that it highlights the "importance that the Constitution attaches to the voice of the provinces in legislation affecting them".⁹ Section 76 bills therefore do not always address issues of customary law.

Legal Opinion

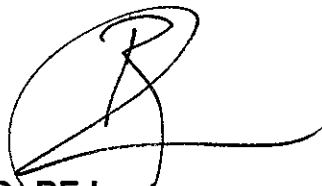
19. The first amendment proposed by this submission, namely that the National House of Traditional Leaders be abolished and form part of the NCOP, contradicts this third proposed amendment as (if the first amendment is accepted) there would be no National House of Traditional Leaders to which to refer a section 76 bill.
20. It must also be kept in mind that section 18(1) of the Traditional Leadership and Governance Framework Act, No 41 of 2003 provides for a broad referral in that not only a relevant section 76 bill, but

⁸ See *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (8) 741 (CC) at paras 59 & 61.

⁹ *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 (8) 741 (CC) at par 65.

"[a]ny parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments."

20. If the intention of the submission is that all section 76 bills are to be referred to the House of Traditional leaders, regardless of whether it pertains to customary law or customs, it would require a restructuring of the manner in which Parliament processes legislation.¹⁰ As such, the proposed amendment does not constitute a legal question. It rather requires a policy decision to be taken by the Committee whether to recommend or oppose the proposed amendment in its constitutional review report.

A handwritten signature in black ink, consisting of a large, stylized letter 'P' with a horizontal line extending to the right and a vertical line extending upwards, all enclosed within a circular scribble.

Dr BE Loots
Parliamentary Legal Adviser

¹⁰ As the submission did not elaborate on the extent or scope of the section 76 referral proposed, it is unclear whether the proposed amendment is to refer all section 76 bills or only relevant section 76 bills to the National House of Traditional Leaders.

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Pat Jayiya - Comments on Annual Constitutional Review

From: "Moses Mashile"
To:
Date: 2012/06/01 05:08 PM
Subject: Comments on Annual Constitutional Review
CC: , "Busisiwe Mthunywa"

Dear Sir/madam

I wish to submit the following inputs: I will elaborate on Monday, 4 June 2012:

1. Traditional Leaders should be part of the NCOP delegation as contained in the sections 42 & 60 of the constitution and the National House of Traditional Leaders be abolished.
2. Chapter 212 should be amended, the council for traditional leaders needs to be elaborated. Its functions and duties should include enforcement of the code of conduct of traditional leaders like Health or Nursing Council, deal with disputes for traditional leaders, withdrawal of recognition, etc.
3. Section 76 needs to be amended to include referral of bills to the National House of Traditional Leaders.
4. Duties of the Chairpersons of the National House and Provincial Houses should be clarified and equated with those of the Speakers and Chairpersons of the National Assembly, NCOP and Provincial Legislatures.
5. Members of the Houses should be equated to members of the Parliament both Nationally and Provincially.

Moses Mashile
072 232 8495

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