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LEGAL OPINION
[Confidential]

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

COPY: Mr MB Coetzee
Acting Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Adv G Rhoda – Parliamentary Legal Adviser]

DATE: 5 September 2012

SUBJECT: Legal Opinion on the submission by Mr Gcuma to the
Joint Constitutional Review Committee

CRC Ref: CR12-2

REFERENCE: 184/2012

A handwritten signature, possibly 'G', enclosed in a hand-drawn circle.



MEMORANDUM

TO: Adv SP Holomisa, MP
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INTRODUCTION

1. Our Office was requested to advise on the submission by Mr Gcuma for constitutional review by the Joint Constitutional Review Committee.

BACKGROUND

2. Mr Gcuma argues for various amendments to the Constitution of the Republic of South Africa, 1996. These will be discussed individually.

ANALYSES / LEGAL FRAMEWORK

Amendment to section 9(2) of the Constitution of the Republic of South Africa, 1996

3. Section 9(2) of the Constitution, 1996 reads:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

4. Mr Gcuma argues for the amendment of section 9(2) of the Constitution, 1996 by suggesting certain substitutions and additions to the existing provision. In particular, Mr Gcuma suggests replacing "includes" with "means"; including "by all the people" at the end of the first sentence; and replacing "may" with "must" in the last sentence, so that the provision reads:

"Equality *means* the full and equal enjoyment of all rights and freedoms *by all the people*. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination *must* be taken."

5. The inclusion of "by all the people" would be tautologous. As a rule of legislative interpretation, section 9 of the Constitution should be read in its entirety in order to ascertain its true meaning. Section 9(1) of the Constitution reads: "Everyone is equal before the law and has the right to equal protection and benefit of the law." As section 9(2) of the Constitution is part of the supreme law of South Africa, the rights enumerated therein relate to "all the people".
6. In relation to the suggested substitution of "may" for "must", this would create a binding obligation on government to take such measures.
7. In my view, the amendments proposed by Mr Gcuma would limit the scope of equality, as envisaged by the Constitution. The existing Constitutional provision is deliberately drafted in a broad and flexible manner to address the many manifestations of inequality that have been inherited from our past.

Amendment to section 38(c) of the Constitution, 1996

8. Mr Gcuma argues that section 38(c) be deleted altogether as, in his opinion, it promotes sectoral interests.
9. Section 38(c) of the Constitution reads:

"The persons who may approach a court are: (c) anyone acting as a member of, or in the interest of, a group or class of persons".
10. The removal of this constitutional provision would limit the constitutional remedies and redress available to certain groups of the South African population, like indigenous peoples.
11. In my view, the deletion proposed by Mr Gcuma would dilute the rights afforded to groups of people, in the Constitution. The existing provision was included so as to protect the rights of religious, cultural or linguistic groups, for example traditional communities protecting their intellectual property rights.

Clarity on section 88(2) of the Constitution, 1996

12. Section 88(2) of the Constitution, 1996 states that:

"No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period

between that election and the next election of a President is not regarded as a term.”

13. Section 88(2) is clear in that it only refers to terms and not consecutive terms. As such, a President does not necessarily have to serve two consecutive terms. What matters in this regard is that a President not serve more than two terms, regardless of whether those terms were consecutive or not.
14. This submission does not propose an amendment to the Constitution and therefore does not fall within the parameters of the brief.

Deletion of section 142 of the Constitution, 1996

15. Mr Gcuma proposes that section 142 of the Constitution, 1996 be deleted in its entirety. He argues that because South Africa is a unitary state and not a federal state, section 142 should be deleted altogether as it promotes federalism.
16. Section 142 of the Constitution reads:

“A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.”

17. The Constitution, 1996 is drafted in such a manner that it “gives rise to a quasi-federal government.”¹ By conferring constitution-making powers upon the provinces, the Constitution is not creating sovereign states.² Instead, the Constitution, through section 142, entrenches the principles of co-operative governance as set out in Chapter 3 of the Constitution.³
18. I therefore disagree with Mr Gcuma assertion that section 142 of the Constitution should be deleted.

Deletion of words from the Preamble to the Constitution, 1996

19. Mr Gcuma proposed that the preamble to the Constitution be amended by deleting the words “may God protect our people”. In his submission, Mr Gcuma asserts that because South Africa is a secular state, the aforementioned words should be deleted.
20. It is accepted that the Constitution “is not a religiously neutral instrument”⁴, and that “the Constitution as a whole reflects a bias in favour of religion which is a departure from the principle of equality set out in section 9.”⁵
21. However, it should be noted that *In Re: Certification of the Constitution of the Republic of South Africa, 1996* the Constitutional Court held that the

¹ Devenish GE (2005) “*The South African Constitution*” Durban: LexisNexis Butterworths pg. 271.

² Devenish GE (2005) “*The South African Constitution*” Durban: LexisNexis Butterworths pg. 271-272.

³ Devenish GE (2005) “*The South African Constitution*” Durban: LexisNexis Butterworths pg. 272.

⁴ Devenish GE (2005) “*The South African Constitution*” Durban: LexisNexis Butterworths pg. 25.

⁵ Devenish GE (2005) “*The South African Constitution*” Durban: LexisNexis Butterworths pg. 25.

invocation of a deity does not amount to discrimination against non-theists which breaches the provisions of equality.⁶

22. While the submission proposes an amendment to the Preamble to the Constitution, the proposal amounts to a matter of policy that should be decided by the Committee.

Decriminalise the sex-trade

23. Mr Gcuma proposes the 'decriminalisation of the sex-trade'.
24. The 'sale' of 'carnal intercourse', or committing acts of indecency, with any other person for reward is prohibited (or criminalised) in terms of section 20(1A) of the Sexual Offences Act, No. 23 of 1957.
25. Moreover, purchasing carnal intercourse is prohibited (or criminalised) in terms of section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007.
26. As such, the submission does not propose an amendment to a provision of the Constitution, 1996 and may be addressed through amendments to ordinary legislation.

The Legalisation of polyandry

27. Mr Gcuma proposes the legalisation of polyandry. Polyandry refers to the practice where women are allowed to marry more than one spouse. Mr Gcuma however does not provide reasons for his submission.
28. Marriage in South Africa is regulated in terms of the Marriage Act, No. 25 of 1961, the Recognition of Customary Marriages Act, No. 120 of 1998 and the Civil Union Act, No. 17 of 2006. These Acts set out the grounds for marriage between persons.
29. Mr Gcuma's submission therefore relates to an amendment of the aforementioned legislative acts. While it can be assumed that the submission is based on gender equality between men and women in customary unions (which is protected in terms of the Constitution), it does not require an amendment of a constitutional provision.
30. As such, the submission does not propose an amendment to a provision of the Constitution, 1996 and may be addressed through amendments to ordinary legislation

Reduce Provinces from 9 to 4

31. Mr Gcuma proposes the reduction of provinces in the Republic from 9 to 4. He does not provide reasons for his submission.

⁶ Devenish GE (2005) *The South African Constitution* Durban: LexisNexis Butterworths pg. 26.

32. The number of provinces and the demarcation thereof is governed by section 103(1) of the Constitution, which states that the Republic shall have 9 provinces, while the geographical demarcation of those provinces is set out in Schedule 1A to the Constitution.
33. While the reduction of provinces from 9 to 4 would require a constitutional amendment, the provinces are a "political creation, unlike the erstwhile four provinces that previously existed as self-governing British Colonies".⁷ The 9 provinces were created "by virtue of historical, demographic, economic and social factors".⁸
34. As such, the reduction of provinces is a policy matter to be decided by the Committee.



Adv G Rhoda
Parliamentary Legal Adviser

⁷ Devenish GE (2005) *"The South African Constitution"* Durban: LexisNexis Butterworths pg. 273.

⁸ Devenish GE (2005) *"The South African Constitution"* Durban: LexisNexis Butterworths pg. 273.

From: "vusumuzi gcuma" <vusigcu@webmail.co.za>
To: <pjayiya@parliament.gov.za>
Date: 2012/05/04 09:55 AM
Subject: Constitutional review

As REVIEW means the examination of something with the intention of changing it if necessary, i hope this review is intending to effect some changes to our constitution and those changes are well-intentioned. 1.section 9(2)equality includes(replace includes by MEANS) the full and equal enjoyment of all rights and freedoms.(add "BY ALL PEOPLE") To promote the achievement of equality,legislative and other measures designed to protect or advance persons,or categories of persons,disadvantaged by unfair discrimination may(replace may with MUST) be taken. 2.remove section 38(c) because it promotes sectoral interests. 3.section 88(2) must be clarified,two consecutive terms or just any two terms in office even if those terms were not in a row? 4.Do away with section 142 because this is not a federal state but a unitary state. 5.remove the words "may God protect our people" from the preamble because this is a secular state 6.decriminalize sex-trade 7.legalise polyandry. 8.Reduce provinces from 9 to 4.Regards Mr Vusumuzi Gcuma,D288 Umlazi township,Umlazi,4066.Cell:0720682854.

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