



**PARLIAMENT**  
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## LEGAL OPINION

**TO:** Honourable Adv. SP Holomisa and  
Honourable Mr BA Mnguni  
Co-Chairpersons: Constitutional Review Committee

**COPY:** Mr M. Coetzee  
Acting Secretary to Parliament

**DATE:** 17 October 2012

**FROM:** Constitutional and Legal Services Office  
[Ms SS Isaac – Parliamentary Legal Adviser]

**SUBJECT:** Annual Submission to the Joint Constitutional Review  
Committee  
Submission 1: Lebogang Lance Nawa

**REFERENCE:** 183/12

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## MEMORANDUM

# PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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**To:** Honourable Adv. SP Holomisa and  
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Co-Chairpersons: Constitutional Review Committee

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**Subject:** Annual Submission to the Constitutional Review Committee  
Submission 9: Lebogang Lance Nawa

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### FACT

1. Our office was requested by the co-chairpersons of the Joint Constitutional Review Committee to advise on a submission received Mr Lebogang Lance Nawa.
2. Mr Nawa states that, from a developmental and social perspective, the Constitution severely undermines the role that culture could play in building a new South Africa. The impact of this is negatively felt on the creation of a national identity and the lack of a role for local government in developing culture.
3. Mr Nawa states that the Constitution does not, except symbolically in reference to the national anthem, locate South Africa within the African continent. This omission has resulted in some labelling the Constitution as European in character and as perpetuating the dominance of other continents over South Africa. Further, he states that the Constitution, in section 232 and

section 233, endorses international law but does not refer to African customary law or any other African-based or influenced laws.

4. He also states that culture is the key element in development and economic growth and that the White Paper on Local Government identifies local government as the locus where culture-led development best finds expression. However, this is not reflected in the Constitution as culture is not clearly defined and is not dealt with separately from other rights. Further, arts and culture is not an area allocated to local government in terms of Schedules 4B and 5B of the Constitution. As municipalities do not have specific legislative competence over culture, culture has been sidelined from local government service delivery. He concludes that as local government is at the forefront of service delivery, the country's development matrix is deprived of the cultural element.
5. He does not suggest specific amendments but requests that the following sections of the Constitution be reviewed by the Committee:

The Preamble

Chapter 7: Local government

Section 152: Objects of the local government

Section 232 and 233: Customary International Law

Schedule 4: Functional Areas of concurrent national and provincial competence

Schedule 5: Functional areas of exclusive provincial legislative competence

## **LAW**

### **African Identity**

6. The Constitution is the supreme law of the country but is also the embodiment of the new social contract that marks the end of apartheid and the establishment of the era of freedom and democracy. The Preamble of the Constitution acknowledges this historical context, the past injustices caused by apartheid and sets out the values and goals that it seeks to promote in

South Africa as a democratic society.<sup>1</sup> Accordingly, the Constitution strives to establish a new South African national identity that unifies the nation.

7. Section 222 and 223, which the submitter refers to, are provisions that set out the relationship between the Constitution and international law. These are important provisions as they enable South Africa to be part of the international community of nations including African countries, regulates how the executive enters into agreements with other countries and how these agreements may be incorporated into South African law. These sections do not curtail the establishment of an African identity and in fact have been used to enter into various continental and regional agreements.
8. The submitter is incorrect in stating that the Constitution does not refer to African customary law or any other African-based or influenced laws. The Constitution protects the rights to culture<sup>2</sup> and acknowledges that the rights conferred on people by customary law are legally enforceable to the extent that they are consistent with the Bill of Rights.<sup>3</sup>
9. However, the submitter is correct in pointing out that the Constitution makes no specific reference to African identity. The decision to promote and African identity by amending the Constitution is a policy decision for the Committee to make.

## Culture

10. Schedule 4 to the Constitution lists cultural matters and indigenous or customary law and traditional leadership as concurrent national and provincial competencies. Schedule 5 to the Constitution lists provincial cultural matters as an exclusive provincial competency. However, that local

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<sup>1</sup> Preamble, Constitution 1996.

<sup>2</sup> Section 30 and 31, Constitution 1996.

<sup>3</sup> Section 39, Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum
  - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - b. must consider international law; and
  - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

government does not have the legislative competence in this area does not preclude its involvement and engagement on matters related to culture.

11. Section 30 of the Constitution protects the right to participate in the cultural life of one's choice in a manner that is consistent with the Bill of Rights.<sup>4</sup> Section 31 protects the rights of people to belong to a cultural community and to enjoy their culture and form, join and maintain cultural associations in a manner that is consistent with the Bill of Rights.<sup>5</sup> Section 7(2) directs that the state must respect, protect, promote and fulfill the rights in the Bill of Rights. Therefore there is an obligation on local government, as part of the state, to positively take measures to promote rights such as culture.
12. In terms of the constitutional framework, apart from being vested with executive and legislative authority<sup>6</sup>, section 151(3) of the Constitution provides that 'a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.' Govern in this context 'connotes a regulatory and policy making role'<sup>7</sup> within the parameters of the Constitution.
13. Section 152 of the Constitution set out the objects of local government which are to: provide democratic and accountable government for local communities; ensure the provision of services to communities in a sustainable manner; promote social and economic development; promote a safe and healthy environment; and encourage the involvement of communities and community organisations in the matters of local government. A municipality, subject to the Constitution, national and provincial legislation, has the right to exercise any power concerning a matter

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<sup>4</sup>Section 30. Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

<sup>5</sup> Section 31. Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
  - a. to enjoy their culture, practise their religion and use their language; and
  - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>6</sup> Section 151(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

<sup>7</sup> Nico Steytler and Jaap de Visser. 'Chapter 22: Local Government.' Constitutional Law of South Africa. p 44

reasonably necessary for, or incidental to, the effective performance of its functions.<sup>8</sup>

14. Local government may also utilise the competencies under its control to promote culture. The White Paper on Local Government states that 'local government can also promote social development through functions such as arts and culture, the provision of recreational and community facilities, and the delivery of aspects of social welfare services.'<sup>9</sup> Accordingly, local tourism in Part B in Schedule 4 and cemeteries, local amenities, local sport facilities, public places in Part B in Schedule 5 may also be resources that may be utilised to promote culture and development.

15. Hence, while local government may not have original legislative power in respect of culture it must play a significant role in implementing national and provincial legislation related to culture. It must also seek to promote culture in terms of the Constitution and it may utilise its existing competencies in this regard. However, the decision to extend the authority of local government to include culture as a direct competency is a policy decision for the Committee to make.

## CONCLUSION

16. The decision to include provisions in the Constitution that will promote African identity is a policy matter that may be decided on by the Committee.

17. The decision to extend municipal power over culture is a policy matter that may be decided on by the Committee.



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**Ms SS Isaac**

**Parliamentary Legal Adviser**

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<sup>8</sup> Nico Steytler and Jaap de Visser. 'Chapter 22: Local Government.' Constitutional Law of South Africa. p 48

<sup>9</sup> The White Paper on Local Government 9 March 1998 <http://www.info.gov.za/view/DownloadFileAction?id=108131>, p24

**SUBMISSION TO THE CONSTITUTIONAL REVIEW COMMITTEE**

(May 2012)

By Lebogang Lance Nawa

**SPECIFIC ARREARS OR SECTIONS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA THAT WARRANT REVIEW:**

- Preamble
- Chapter 7: Local government
- Section 152: Objects of the local government.
- Sections 232 & 233: Customary Internal Law
- Schedule 4: Functional Areas of Concurrent National and Provincial Competence
- Schedule 5: Functional Areas of exclusive Provincial Legislative Competence

**PROBLEM STATEMENT**

Several studies [Atkinson, McIntosh, Smith & Visser (2002), Atkinson and Roefs (2003:14-16), Hagg (2003) and Roodt (2006)] indicate that the Constitution of the Republic of South Africa Act 108 of 1996 severely undermines the role of culture in the building of a truly new South African nation, from both the developmental and social perspectives. It is observed that this is manifested in various ways; starting with the issue of national identity, and then followed by the ambivalent or lack of role accorded to local government in development.

This submission is made against the backdrop that internationally culture has been identified by many countries as the key ingredient in development and economic growth. For instance, according to World Bank records, in 1999 the world's gross national product (GNP) was \$30,200

billion; of which the cultural industry contributed 7,3%. From 1977 to 1997, the cultural industry in the US grew at 6,3% (compared to an average of 2,7% of the country's overall economy), making the industry the fastest growing sector and major contributor to overall economy compared to other sectors. In the UK, the number of people employed in the cultural industry has grown many times faster than the overall population; for example, there are 60% more artists, 55% more musicians, 40% more actors and other performers, 30% more writers and 400% people working in the digital media proportionally than in other employment sectors. Incidentally, South Africa has, through its legislations such as the *White Paper on Local Government*, identified local government as a *locus* where culture-led development best finds expression. Yet this is sharply contradicted in the Constitution to an extent that culture in South Africa is practically the least of government priorities, including but not limited to the allocation of budget. Section C of the White Paper reads: "*Internationally, municipalities are the biggest funders of arts and culture, and many cities have made the transition from industrial to post-industrial global centres through the development of arts and culture locally.*"

The statement above is further supported by the Social Transformation Commission's Resolutions of the 52th ANC National Conference to "*review the ANC's draft cultural policy*" and also that "*local government must provide funding for arts and culture.*"

Having said the above, the two areas that the paper has identified as contentious are elucidated as below.

### **African Identify**

From its Preamble, the Constitution does not, except perhaps in the context of mere symbolic reference to the National Anthem, locate South Africa within the African Continent with a



particular rich cultural history credited for its influence in world civilisation; hence it is generally accused in certain legal, scholarly and otherwise quarters as European in character.

In the Preamble of the Constitution, South Africa appears to be existing in an abyss. The omission of the physical continental location or context ironically favours and/or invariably perpetuates the dominance or influences of other continents on the country given the colonial history from which South Africa originates. This claim is acutely demonstrated in Sections 232 of the Constitution in that despite the fact that South Africa is endowed with extensive and rich African customary law, the Constitution only endorses the relevance of international laws at the expense of African influenced laws. Nowhere in the doctrine is reference made to African Customary Law or any other Africa-based or influenced Laws. The statement about the International Laws reads: "*Customary International Law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*" Section 233 continues: "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*"

### **The role of local government in culture-led development**

The Constitution of the Republic of South Africa Act 108 of 1996 indeed displays a certain degree of indifference towards government's role in culture. From the onset, the Constitution does not offer any definition of culture; implying, as the maxim goes, "that which cannot be named, cannot be explained clearly and thoroughly". Secondly, culture has not been given full attention on its own, like some other concepts such as justice, agriculture, finance and so forth, with specific expectations or directives. Culture merely appears sparingly and in different configurations throughout the document as an appendage to other concepts such as language and religion; some of which are ironically supposed to be its component parts. At the most, specifics on culture appear in schedules in a scattered manner in relation to various government departments and supportive institutions, but there is no reference to it at all in the entire Chapter

7 on local government.

Schedules 4B and 5B of the Constitution do not allocate responsibility to arts and culture. In fact, local government is excluded from the very notion of “urban and rural development.” This competence is set aside, in Part A of Schedule 4 of the Constitution, as a concurrent function between national and provincial government. The consequences of this omission is that since Chapter 3 of the Constitution prohibits spheres of government from assuming powers it did not confer to them, municipalities end-up simply sidelining culture from their service delivery or development agenda. And because both the national and provincial spheres of government are unable to feel the cultural pulse of the nation on the ground, as opposed to the local government often referred to as the cold face of service delivery, the country’s development matrix is deprived of the cultural element proven world-wide to be the key aspect of economic growth and social cohesion.

Lebogang Lance Nawa is a scholar in cultural studies. The arguments advanced hitherto are contained in his PhD thesis entitled: “*Municipal cultural policy and development in South Africa: a study of the City of Tshwane Metropolitan Municipality.*”

#### SOURCES

- Atkinson, D, McIntosh, A, Smith, K & De Visser, J. 2002. *A passion to govern: third generation issues facing local government in South Africa*. Pretoria: Human Sciences Research Council.
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- Hagg, G. 2003. *Challenges to local public service delivery in constitutionally unmandated areas: the case of community arts centres in South Africa*. Pretoria: HSRC.
- Roodt, C. 2006. Cultural policy and the landscape of the law in South Africa. *Fundamina* (12-1):203-222.