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**REPUBLIC OF SOUTH AFRICA**

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**GENERAL NOTICE**

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NOTICE 1991 OF 2002

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT****PUBLICATION OF BILL AMENDING CONSTITUTION**

The Minister for Justice and Constitutional Development intends introducing the Constitution of the Republic of South Africa Fourth Amendment Bill, 2002, in the National Assembly. The particulars of the proposed amendments are hereby published for public comment in accordance with section 74(5)(a) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). Any person wishing to comment on the proposed amendments is invited to submit written comments to the Minister for Justice and Constitutional Development. Comments should kindly be directed to the attention of Mr J A. de Lange, Private Bag X 81, Pretoria 0001, by not later than 8 November 2002. (Electronic mail address: DelangeJ@justice.gov.za)

**GENERAL EXPLANATORY NOTE:**

[                    ] Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

**To amend the Constitution of the Republic of South Africa, 1996, in order to enable a member of the National Assembly or a provincial legislature to become a member of another party whilst retaining membership of the National Assembly or that provincial legislature; to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one of the subdivisions to merge with another party, whilst allowing a member of a legislature affected by such changes to retain membership of that legislature; and to provide for matters connected therewith.**

### **PREAMBLE**

**WHEREAS** section 46(1)(d) of the Constitution of the Republic of South Africa, 1996 (the Constitution), requires an electoral system for the National Assembly that results, in general, in proportional representation;

**AND WHEREAS** section 47(3)(a) of the Constitution provides that a person loses membership of the National Assembly if that person ceases to be eligible on the grounds listed in section 47(1);

**AND WHEREAS** section 105(1)(d) of the Constitution requires an electoral system for provincial legislatures that results, in general, in proportional representation;

**AND WHEREAS** section 106(3)(a) of the Constitution provides that a person loses membership of a provincial legislature if that person ceases to be eligible on the grounds listed in section 106(1);

**AND WHEREAS** the Constitution of the Republic of South Africa Amendment Act, 2002, amended the Constitution in order to enable a member of a Municipal Council to become a member of another party whilst retaining membership of that Council; and to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one of the subdivisions to merge with another party, whilst allowing a member of a Council affected by such changes to retain membership of that Council;

**AND WHEREAS** the need exists for uniformity within the three spheres of government regarding loss or retention of membership of the National Assembly, any provincial legislature or any Municipal Council in the event of a change of party membership, or mergers or subdivision or subdivision and merger of parties,

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 46 of Act 108 of 1996**

1. Section 46 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the substitution for the words preceding paragraph (a) of subsection (1) of the following words: 5

“[The] Subject to Schedule 6B, 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—”.

**Amendment of section 47 of Act 108 of 1996** 10

2. Section 47 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) A person loses membership of the National Assembly if that person—  
 (a) ceases to be eligible; **[or]**  
 (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; **or** 15  
 (c) other than in accordance with Schedule 6B, ceases to be a member of the party that nominated that person as a member of the Assembly.”.

**Amendment of section 105 of Act 108 of 1996**

3. Section 105 of the Constitution is hereby amended by the substitution for the words preceding paragraph (a) of subsection (1) of the following words: 20

“[A] Subject to Schedule 6B, a provincial legislature consists of women and men elected as members in terms of an electoral system that—”.

**Amendment of section 106 of Act 108 of 1996**

4. Section 106 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection: 25

“(3) A person loses membership of a provincial legislature if that person—  
 (a) ceases to be eligible; **[or]**  
 (b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; **or** 30  
 (c) other than in accordance with Schedule 6B, ceases to be a member of the party that nominated that person as a member of the legislature.”.

**Amendment of Schedule 6A to Act 108 of 1996, as inserted by section 2 of Act 18 of 2002**

5. Schedule 6A to the Constitution is hereby amended by the deletion of item 9. 35

**Insertion of Schedule 6B in Act 108 of 1996**

6. The following Schedule is hereby inserted into the Constitution:

**“Schedule 6B**

= **Retention of membership of National Assembly or provincial legislature, after a change of party membership, mergers between parties, subdivision of parties and subdivision and merger of parties, and filling of vacancies** 40

**Definitions**

1. In this Schedule—  
 “legislature” means the National Assembly or any provincial legislature; 45  
 “party” means a party duly registered as a political party in accordance with applicable law.

### Retention of membership of legislature in event of change of party membership

2. (1) Subject to item 4, a member of a legislature who becomes a member of a party (the new party) other than the party which nominated that person as a member (the nominating party), whether the new party participated in an election or not, remains a member of that legislature if that member, whether by himself or herself or together with one or more other members who, during a period referred to in item 4(1)(a) or (b), ceased to be members of the nominating party, represent not less than 10 per cent of the total number of seats held by the nominating party in that legislature.

(2) The seat held by a member referred to in subitem (1) is regarded as having been allocated to the new party which the member represents.

### Retention of membership of legislature in event of mergers, subdivision and subdivision and merger of parties

3. (1) Subject to item 4, any political party (the original party) which is represented in a legislature may—

- (a) merge with another party, whether that party participated in an election or not; or
- (b) subdivide into more than one party or subdivide and any one subdivision merge with another party, whether that party participated in an election or not, if the members of a subdivision leaving the original party represent not less than 10 per cent of the total number of seats held by the original party in that legislature.

(2) If a party merges with another party or subdivides into more than one party or subdivides and merges with another party in terms of subitem (1), the members concerned remain members of that legislature and the seats held by them are regarded as having been allocated to the party which they represent pursuant to any merger, subdivision or subdivision and merger contemplated in subitem (1).

### Period of application of items 2 and 3 and further requirements

4. (1) The provisions of items 2 and 3 only apply—

- (a) for a period of 15 days from the first to the fifteenth day of September in the second year following the date of an election of the legislature; and
  - (b) for a period of 15 days from the first to the fifteenth day of September in the fourth year following the date of an election of the legislature.
- (2) For the purpose of subitem (1) "year" means a period of 365 days.
- (3) During a period referred to in subitem (1)(a) or (b)—
- (a) a member of a legislature may only once change membership of a party, by informing the Speaker of the legislature thereof in writing and by submitting to the Speaker written confirmation from such other party that he or she has been accepted as a member of that party; and
  - (b) a party may only once—
    - (i) merge with another party;
    - (ii) subdivide into more than one party; or
    - (iii) subdivide and any one subdivision merge with another party, by informing the Speaker of the legislature thereof in writing and by submitting to the Speaker written confirmation from the other party of the names of all members involved in the merger or subdivision, and that the party has accepted the merger; and
  - (c) no party represented in a legislature may—
    - (i) suspend or terminate the party membership of a member representing that party in that legislature; or
    - (ii) perform any act whatsoever which may cause such a member to be disqualified from holding office as such a member, without the written consent of the member concerned.

(4) A party which has not been registered in terms of any law applicable to the registration of political parties, is regarded as a party for the purposes of this Schedule, but such a party must apply for registration as a party in accordance with applicable law within the period referred to in subitem (1)(a) or (b). If the party is not registered accordingly within four months after the expiry of that period, it is regarded as having ceased to exist, and the seats in question must be allocated to the remaining parties in accordance with applicable law.

**Composition of legislature maintained until election or reconstitution in terms of Schedule**

5. (1) After the expiry of a period referred to in item 4(1)(a) or (b), the composition of a legislature which has been reconstituted as a result of any conduct in terms of item 2 or 3 is maintained until the next election of that legislature or until the composition of the legislature is reconstituted in accordance with item 2 or 3.

(2) Within seven days after the expiry of a period referred to in item 4(1)(a) or (b), each party represented in a legislature contemplated in subitem (1) must submit a list of its candidates to the Secretary of the legislature.

**Party may at any time change name**

6. A party may at any time change its name.

**Transitional arrangement in respect of retention of membership of legislature in event of change of party membership, merger between parties, subdivision of parties and subdivision and merger of parties**

7. (1) During the first 15 days immediately following the date of the commencement of this Schedule—

- (a) a member of a legislature may become a member of another party (the new party), whether the new party participated in an election or not, whilst remaining a member of the legislature concerned and the seat held by that member must be regarded as having been allocated to the new party of which that member has become a member; and
- (b) any political party which is represented in a legislature may—
- (i) merge with another party, whether that party participated in an election or not; or
  - (ii) subdivide into more than one party or subdivide and any one subdivision merge with another party, whether that party participated in an election or not,
- whilst the members concerned remain members of that legislature and the seats held by them must be regarded as having been allocated to the party which they represent pursuant to any merger, subdivision or subdivision and merger contemplated in this paragraph.

(2) The provisions of item 4(3) and (4) and item 5 are also applicable in respect of subitem (1), and any reference therein to a period referred to in item 4(1)(a) or (b) must be construed as a reference to the period referred to in subitem (1).

(3) Any person who, during the period from 22 October 2002 until the date of the commencement of this Schedule, has been removed from membership of a legislature by reason directly or indirectly of anything done by such person in anticipation of the enactment of provisions substantially similar in content to this Schedule, shall be restored to such membership with all rights and privileges attaching thereto, and any person who has replaced such person as a member of the legislature shall cease to be a member of such legislature.”

**Amendment of Schedule 2 to Act 200 of 1993, as amended by section 12 of Act 2 of 1994, section 3 of Act 20 of 1995 and Schedule 6 to Act 108 of 1996**

7. Schedule 2 to the Constitution of the Republic of South Africa, 1993, is hereby amended—

(a) by the substitution for item 23 of the following item: 5

**“Vacancies**

**23.** (1) In the event of a vacancy in a legislature to which this Schedule applies, the party which **[nominated]** the vacating member represented shall fill the vacancy by nominating a person—

(a) whose name appears on the list of candidates— 10

(i) from which **[the vacating member was]** that party’s members were originally nominated; or

(ii) where applicable, submitted by a party in terms of item 5(2) of Schedule 6B to the new Constitution; and

(b) who is the next qualified and available person on the list. 15

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of **[item 23A(1)]** section 47(3)(c) or 106(3)(c) of the new Constitution, the seats in question shall be allocated to the remaining parties *mutatis mutandis* as if such seats were forfeited seats in terms of item 7 or 14, as the case may be.”; and 20

(b) by the deletion of item 23A.

**Repeal of Act 22 of 2002**

8. The Loss or Retention of Membership of National and Provincial Legislatures Act, 2002 (Act No. 22 of 2002), is repealed. 25

**Short title**

9. This Act is called the Constitution of the Republic of South Africa Fourth Amendment Act, 2002, and comes into operation on a date set by the President by proclamation. 30

**MEMORANDUM ON THE OBJECTS OF THE  
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA  
FOURTH AMENDMENT BILL, 2002**

**(Published in terms of Rule 258(3) of the Rules of the National Assembly)**

## **1. Background**

1.1 During June 2002, Parliament passed four Acts that shared a common objective, namely—

- to enable a member of a legislature or municipal council to become a member of another party whilst retaining membership of that legislature or council; and
- to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one subdivision to merge with another party.

1.2 The four Acts in question are the—

- *Constitution of the Republic of South Africa Amendment Act, 2002* (Act No.18 of 2002)
- *Local Government: Municipal Structures Amendment Act, 2002* (Act No. 20 of 2002)
- *Constitution of the Republic of South Africa Second Amendment Act, 2002* (Act No. 21 of 2002)
- *Loss or Retention of Membership of National and Provincial Legislatures Act, 2002* (Act No. 22 of 2002).

1.3 The President assented to the Acts on 19 June 2002, and all four Acts were published in the *Gazette* of 20 June 2002. However, as a result of a challenge being brought in court against the constitutional validity of the Acts, the operation of all four Acts were effectively suspended pending the verdict of the Constitutional Court.

1.4 On 4 October 2002, in the case of *United Democratic Movement v President of the Republic of South Africa and Others* (Case CCT 23/02), the Constitutional Court held that “floor-crossing” legislation for national, provincial and local government is not as such inconsistent with the Constitution. Regarding the *Loss or Retention of Membership of National and Provincial Legislatures Act, 2002* (the Membership Act), however, the Court held that Parliament did not have the power to effect the provisions contemplated in that Act by means of an ordinary Act of Parliament, as opposed to an Act amending the Constitution. As a result of this procedural defect, the Membership Act was found to be inconsistent with the Constitution and invalid. The other three Acts were, however, found to be consistent with the Constitution and valid.

## **2. Objects of the Bill**

2.1 The objects of the Bill are to amend the Constitution in order to enable a member of the National Assembly or a provincial legislature to become a member of another party whilst retaining membership of that legislature; to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one subdivision to merge with another party.

2.2 The provisions of the Bill are modelled largely on the amendments effected to the Constitution by the *Constitution of the Republic of South Africa Amendment Act, 2002*, that inserted the provisions related to the “crossing of the floor” in the local government sphere in the Constitution. By adhering to the principles embodied in those provisions, the Bill will give effect to the Legislature’s clearly stated objective, as stated in the Preambles to the Acts in question, of ensuring that uniformity exists within the three spheres of government regarding loss or retention of membership of the National Assembly, any provincial legislature or any municipal council in the event of a change of party membership, or mergers or subdivision or subdivision and merger of parties.

2.3 The provisions of the Bill are applicable to members of, and parties represented in, the National Assembly and provincial legislatures. The mechanism contained in the Bill provides that a member of a legislature will be allowed to change party membership, and allows a party to merge or to subdivide, or to subdivide and merge, only during the first 15 days following the commencement of the legislation, and thereafter—

- only during a period of 15 days from the first to the fifteenth day of September in the second year following the date of an election of the legislature; and
- during a period of 15 days from the first to the fifteenth day of September in the fourth year following the date of an election of the legislature.



**3. Parliamentary procedure**

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill falls within the ambit of section 74(3)(b) of the Constitution and consequently requires the approval of both the National Assembly and the National Council of Provinces.