

REPUBLIC OF SOUTH AFRICA

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# CONSTITUTIONAL MATTERS AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill  
published in Government Gazette No 27782 of 12 July 2005)  
(The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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**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 Public Funding of Represented Political Parties Act, 1997, so as to provide for the allocation of moneys from the Represented Political Parties' Fund to political parties participating in Parliament and provincial legislatures where a member of a legislature becomes a member of another party whilst retaining membership of that legislature or where an existing party merges with another party, subdivides into more than one party or subdivides and any one subdivision merges with another party; to amend the Determination of Delegates (National Council of Provinces) Act, 1998, so as to provide for the determination of certain delegates of a provincial legislature that has been reconstituted on account of changes of party membership and mergers or subdivision of parties; and to provide for matters connected therewith.

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

**Amendment of section 1 of Act 103 of 1997**

1. Section 1 of the Public Funding of Represented Political Parties Act, 1997 (hereinafter referred to as the Funding Act), is hereby amended by the insertion of the following definition before the definition of “financial year”:

“ ‘**Constitution**’ means the Constitution of the Republic of South Africa, 1996;”.

**Amendment of section 5 of Act 103 of 1997**

2. Section 5 of the Funding Act is hereby amended—

(a) by the substitution in subsection (1)(a) for the words preceding subparagraph (i) of the following words:

“**[Every]** Subject to this Act, every political party is entitled to be allocated moneys from the Fund for any financial year that it is represented—”;

(b) by the substitution for subsection (4) of the following subsection: 15

“(4) **[The]** Subject to subsections (6) and (7), the allocation of moneys from the Fund to a political party will end when the party ceases qualifying therefor in terms of subsection (1)(a). Within 21 days after the date on which a political party has so ceased to qualify, it must repay the unspent balances, as at that date, of all moneys that had been allocated to it in terms of this section.”; and 20

(c) by the addition of the following subsections:

“(5) If a member of a legislature becomes a member contemplated in item 2(1) of Schedule 6A to the Constitution, the nominating party contemplated in that item does not have to repay to the Commission the unspent balances of all moneys that had been allocated to it in terms of this section in respect of the seat held by the member concerned. 5

(6) A political party which immediately prior to the period referred to in item 4(1)(a) or (b) of Schedule 6A to the Constitution qualified for the allocation of moneys from the Fund in terms of subsection (1)(a) as a result of its representation in a legislature must, within 28 days after the expiry of the period referred to in item 5(3) of Schedule 6A to the Constitution, repay to the Commission the unspent balances, as at 1 September of the financial year in question, of all moneys that had been allocated to it in terms of this section if it— 10

(a) ceases to qualify for the allocation of moneys from the Fund in terms of subsection (1)(a) as a result of its merger with another political party which did not immediately prior to the period referred to in item 4(1)(a) or (b) of Schedule 6A to the Constitution qualify for the allocation of moneys from the Fund in terms of subsection (1)(a) as a result of the other party not being represented in the legislature concerned; or 15

(b) subdivides in a manner contemplated in item 3(1)(b) of Schedule 6A to the Constitution, and no subdivision of that party continues to represent the party in the legislature concerned after the expiry of the period referred to in item 5(3) of Schedule 6A to the Constitution. 20 25

(7) A political party which immediately prior to the period referred to in item 4(1)(a) or (b) of Schedule 6A to the Constitution qualified for the allocation of moneys from the Fund in terms of subsection (1)(a) as a result of its representation in a legislature does not have to repay to the Commission the unspent balances of all moneys that had been allocated to it in terms of this section if it— 30

(a) ceases to qualify for the allocation of moneys from the Fund in terms of subsection (1)(a) as a result of its merger with another political party in terms of item 3(1)(a) of Schedule 6A to the Constitution, but the other party— 35

(i) qualified for the allocation of moneys from the Fund in terms of subsection (1)(a) immediately prior to the period referred to in item 4(1)(a) or (b) of Schedule 6A to the Constitution as a result of its representation in the legislature concerned; and 40

(ii) continues to qualify for the allocation of moneys from the Fund in terms of subsection (1)(a) after the expiry of the period referred to in item 5(3) of Schedule 6A to the Constitution as a result of its representation in the legislature concerned; or 45

(b) subdivides in a manner contemplated in item 3(1)(b) of Schedule 6A to the Constitution, and any subdivision of that party continues to—

(i) represent that party in the legislature concerned after the expiry of the period referred to in item 5(3) of Schedule 6A to the Constitution; and 50

(ii) qualify for the allocation of moneys from the Fund in terms of subsection (1)(a) as a result of its representation in the legislature concerned, 55

whether the subdivision of that party has changed the name of that party or not.

(8) The Commission must deal with any circumstances, other than those provided for in subsections (5), (6) and (7), that arise during a period referred to in item 4(1)(a) or (b) of Schedule 6A to the Constitution in the manner it deems appropriate, taking into account the objectives and principles provided for in this Act.”. 60

### Amendment of section 9 of Act 103 of 1997

3. Section 9 of the Funding Act is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) If Parliament and every provincial legislature are dissolved in terms of the Constitution [of the Republic of South Africa, 1996 (Act No. 108 of 1996)], every political party that is represented in any or all of those legislative bodies must close its books and records of account kept in terms of section 6 not later than 21 days before the date set for the election of those legislative bodies and within 14 days thereafter submit an audited statement in respect of those books and records of account to the Commission.”. 5 10

### Amendment of section 10 of Act 103 of 1997

4. Section 10 of the Funding Act is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph:

“(d) prescribing the procedure according to which and manner in which payments from, and to, the Fund are to be made; and” . 15

### Amendment of section 2 of Act 69 of 1998

5. Section 2 of the Determination of Delegates (National Council of Provinces) Act, 1998, is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) (a) If the total number of special delegates determined in terms of subsection (3) in respect of a particular provincial legislature is less than four, the delegates of the parties that are entitled to only one delegate in the delegation of [the particular] that province must, despite subsection (1), become special delegates in the sequence from the lowest to the highest number of votes, including combined votes in the case of a merger contemplated in section 61(2)(b) of the Constitution, that have been recorded for those parties during the last election of [the] that provincial legislature [concerned], until four special delegates have been allocated to parties in the provincial delegation [concerned]: Provided that if any of the parties that are entitled to only one delegate in the delegation of that province— 20 25 30

- (i) came into existence on account of a change or subdivision contemplated in section 61(2)(b) of the Constitution; and
- (ii) did not participate in the last election of that provincial legislature, the legislature must, in a manner that is consistent with democracy, elect so many delegates from the delegates of those parties to become special delegates as may be required to allocate four special delegates to parties in the provincial delegation. 35

(b) If the total number of special delegates determined in terms of subsection (3) in respect of a particular provincial legislature is more than four, [the] those special delegates [so determined] must, despite subsections (2) and (3), become permanent delegates in the sequence from the highest to the lowest number of votes, including combined votes in the case of a merger contemplated in section 61(2)(b) of the Constitution, that have been recorded for the parties concerned during the last election of [the] that provincial legislature [concerned], until [six permanent] four special delegates have been allocated to parties in the provincial delegation [concerned]: Provided that if any of those parties— 40 45

- (i) came into existence on account of a change or subdivision contemplated in section 61(2)(b) of the Constitution; and
- (ii) did not participate in the last election of that provincial legislature, that legislature must, despite subsections (2) and (3) and in a manner that is consistent with democracy, elect so many special delegates of those parties to become permanent delegates as may be required to allocate four special delegates to parties in the provincial delegation.”. 50

### Short title

6. This Act is called the Constitutional Matters Amendment Act, 2005. 55

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTIONAL  
MATTERS AMENDMENT BILL, 2005**

**1. BACKGROUND**

- 1.1 During June 2002, Parliament passed the “Crossing-the-Floor” legislation which consisted of 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); and
  - Loss or Retention of Membership of National and Provincial Legislatures Act, 2002 (Act No. 22 of 2002).

The common objective of these four Acts was—

- 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, to subdivide into more than one party or to subdivide and any one subdivision to merge with another party.
- 1.2 On 4 October 2002, in the case of *United Democratic Movement v President of the Republic of South Africa and Others* (No. 2) 2003 (1) SA 495 (CC) (the UDM- case), the Constitutional Court found the Loss or Retention of Membership of National and Provincial Legislatures Act, 2002 (the Membership Act), as a result of a procedural defect, to be inconsistent with the Constitution and invalid. Section 1 of the Membership Act amended the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), whilst section 2 of that Act amended the Determination of Delegates (National Council of Provinces) Act, 1998 (Act No. 69 of 1998).
- 1.3 Shortly after the Constitutional Court gave its judgment in the UDM- case, the Constitution of the Republic of South Africa Amendment Act, 2003 (Act No. 2 of 2003), was passed by Parliament. The principal object of that Act was to re-enact the provisions of the Membership Act in a procedurally correct manner. However, when the provisions of the Membership Act were re-enacted, the amendments to the Determination of Delegates (National Council of Provinces) Act, 1998, as contained in section 2 of the Membership Act, were not re-enacted.

1.4.1 The Public Funding of Represented Political Parties Act, 1997 (Act No. 103 of 1997) (the Funding Act), among other things—

- established the Represented Political Parties’ Fund (the Fund) with a view to making provision for the funding of political parties participating in Parliament and provincial legislatures; and
- regulates the allocation of moneys from the Fund to political parties.

1.4.2 Section 5(1)(a) of the Funding Act provides that every political party is entitled to be allocated moneys from the Fund for any financial year that it is represented—

- in the National Assembly; or
- in any provincial legislature; or
- both in the National Assembly and any provincial legislature.

In terms of section 5(2)(a) of the Funding Act allocations from the Fund must be made and paid to each of the political parties concerned in accordance with a prescribed formula based, in part—

- on the principle of proportionality, taking into account, among other things, the relation that the number of such a party's representatives in the National Assembly bears to the membership of the National Assembly or in any provincial legislature bears to the sum of the memberships of all the provincial legislatures jointly; and
- on the principle of equity, taking into account, among other things, a weighted scale of representation for an allocation to each of the political parties represented in the National Assembly or in any provincial legislature or both in the National Assembly and any provincial legislature.

1.4.3 Regulation 2(1) of the Regulations made under section 10(1) of the Funding Act provides that the total amount of funding available for allocations from the Fund to political parties during a particular financial year must be announced by the Independent Electoral Commission by notice in the *Government Gazette* within two weeks of the beginning of that financial year. A financial year of the Fund runs from 1 April in every year to 31 March in the following year, both days included. Regulation 2(2) provides that the allocations from the Fund to be made and paid to each of the political parties concerned are calculated by allocating—

- ninety per cent of the total amount of funding proportionally; and
- ten per cent of the total amount of funding equitably.

In terms of Regulation 5(1) all allocations of moneys from the Fund to which a political party is entitled must be paid to the political party in question in four equal instalments, each within three months of the previous payment. The first instalment must be paid within four weeks of the beginning of the financial year in question.

1.5 Schedule 6A to the Constitution of the Republic of South Africa, 1996, enables—

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

The mechanism contained in Schedule 6A allows a member of a legislature to change party membership, and also allows a party to merge, to subdivide or to subdivide and merge—

- 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.

1.6 A window for “floor crossing” falls between the date on which the second instalment has been paid and the date on which the third instalment is payable to political parties. If a political party's representation in the National Assembly or a provincial legislature has been affected as a result of “floor crossing”, it will also affect the third and fourth instalments to which such a political party is entitled. Consequently, the need has arisen to regulate the allocation of moneys from the Fund to which political parties are entitled after a window for “floor crossing”.

## **2. OBJECTS OF BILL**

2.1 The objects of the Bill are to amend—

- the Funding Act so as to provide for the allocation of moneys from the Fund to political parties participating in Parliament and provincial legislatures where a member of a legislature becomes a member of another party whilst retaining membership of that legislature or where an existing party merges with another party, subdivides into more than one party or subdivides and any one subdivision merges with another party; and
- the Determination of Delegates (National Council of Provinces) Act, 1998, so as to make provision for the determination of certain delegates of a provincial legislature which has been reconstituted on account of changes of party membership and mergers or subdivision of parties.

### **2.2 Clauses 1 and 3**

Clause 1 seeks to amend section 1 of the Funding Act by the insertion of a definition of “Constitution”, whilst clause 3 contains a consequential amendment emanating from the proposed amendment contained in clause 1.

### **2.3 Clause 2**

Clause 2 seeks to amend section 5 of the Funding Act so as to provide for the allocation of moneys from the Fund to political parties participating in the National Assembly and provincial legislatures. Provision is made, among other things, for the circumstances under which a political party must repay, or does not have to repay, to the Independent Electoral Commission the unspent balances of all moneys allocated to it in terms of section 5 of the Funding Act if—

- a member of a legislature becomes a member of another party whilst retaining membership of that legislature; or
- an existing party merges with another party, subdivides into more than one party or subdivides and any one subdivision merges with another party.

### **2.4 Clause 4**

Clause 4 seeks to amend section 10 of the Funding Act so as to empower the President to make regulations prescribing the procedure according to which and manner in which payments to the Fund are to be made.

### **2.5 Clause 5**

Clause 5 seeks to re-enact the provisions of section 2 of the Membership Act into the Determination of Delegates (National Council of Provinces) Act, 1998.

## **3. CONSULTATION**

The Independent Electoral Commission was consulted.

## **4. IMPLICATIONS FOR PROVINCES**

The Bill may affect party representation in provincial legislatures and, consequently, the allocation of moneys from the Fund to the affected political parties participating in the provincial legislatures concerned.

## **5. FINANCIAL IMPLICATIONS FOR STATE**

None.

**6. PARLIAMENTARY PROCEDURE**

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.