

REPUBLIC OF SOUTH AFRICA

CONSTITUTION SEVENTEENTH AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 74);
Bill published in Government Gazette No. 32311 of 17 June 2009)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 8—2009]

REPUBLIEK VAN SUID-AFRIKA

SEWENTIENDE WYSIGINGSWETSONTWERP OP DIE GRONDWET

*(Soos ingedien by die Nasionale Vergadering (voorgestelde artikel 74);
Wetsontwerp in Staatskoerant No. 32311 van 17 Junie 2009 gepubliseer)
(Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 8—2009]

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GENERAL EXPLANATORY NOTE:

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

BILL

To amend the Constitution of the Republic of South Africa, 1996, so as to empower the national government to further regulate the exercise by municipalities of their executive authority in respect of local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 when it is necessary to achieve regional efficiencies and economies of scale in respect of a specific municipal function; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Amendment of section 156 of the Constitution of the Republic of South Africa, 1996

1. Section 156 of the Constitution of the Republic of South Africa, 1996, is hereby amended by the insertion after subsection (1) of the following subsection: 5

“(1A) (a) Notwithstanding the provisions of sections 151, 154, 155 and 156, national legislation may further regulate the exercise by municipalities of their executive authority in respect of local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 when it is necessary to achieve regional efficiencies and economies of scale in respect of a specific municipal function. 10

(b) National legislation referred to in paragraph (a) may further regulate the exercise by municipalities of their executive authority in order to—

- (i) facilitate appropriate institutional arrangements and municipal participation in those arrangements, including, but not limited to, compulsory participation and transfer of assets; 15
- (ii) facilitate appropriate planning and expenditure in respect of infrastructure and maintenance;
- (iii) facilitate equitable tariffs, user charges, fees and service levels;
- (iv) ensure equitable access and universal coverage;
- (v) maintain, regulate and enforce essential minimum national standards; and 20
- (vi) prevent unreasonable actions by a municipality which are prejudicial to the interests of another municipality or the country as a whole.

- (c) National legislation referred to in paragraph (a) must, as far as possible—
 - (i) facilitate appropriate municipal participation in decision-making in respect of matters referred to in paragraph (b);
 - (ii) maintain municipal accountability to its community in respect of the function concerned; and
 - (iii) maintain municipal fiscal and institutional sustainability through protecting municipal revenue other than revenue derived from equitable shares and allocations referred to in section 214.
- (d) National legislation referred to in paragraph (a) may only be enacted—
 - (i) if municipal boundaries and executive authority negatively impedes regional efficiencies and economies of scale in respect of a specific municipal function; and
 - (ii) after organised local government and the Financial and Fiscal Commission have been consulted and any recommendations of organised local government and the Commission have been considered.”.

Short title and commencement

2. This Act is called the Constitution Seventeenth Amendment Act of 2009, and comes into operation on a date set by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION SEVENTEENTH AMENDMENT BILL OF 2009

1. BACKGROUND

- 1.1 In February 2001 Cabinet approved the Blueprint for the Reform of the Electricity Distribution Industry (EDI) in South Africa which includes, amongst others, the establishment of six wall-to-wall regional electricity distributors (REDs) as public entities.
- 1.2 The Constitution of the Republic of South Africa, 1996 (the Constitution) defines electricity reticulation as a local government matter to the extent that municipalities are granted executive authority over, and the right to administer, electricity reticulation. Municipal participation in EDI restructuring is therefore voluntary and the national government cannot compel municipalities to transfer their electricity distribution assets into the REDs. Voluntary EDI restructuring can therefore never achieve the government's objective of consolidating the industry into six wall-to-wall REDs. Consequently, it is not possible for the national government to achieve regional efficiencies, economies of scale and an effective regulatory and investment regime through the restructuring of the EDI into six wall-to-wall REDs.
- 1.3 Since the Blueprint was adopted in 2001, attempts have been made to restructure the EDI on a voluntary basis. Despite strenuous efforts it has not been possible to establish the REDs, and therefore no electricity distribution assets or staff have been restructured to date. It has therefore been concluded that EDI restructuring cannot work on a voluntary basis and that a constitutional amendment is required, followed by national legislation which establishes a mandatory EDI restructuring programme.
- 1.4 It is consequently recommended that the Constitution be amended in order to—
 - (a) enable EDI restructuring;
 - (b) enable the proper establishment and functioning of the REDs; and
 - (c) allow for a more effective and efficient regulatory regime for the sector.

2. OBJECTS OF BILL

- 2.1 The proposed amendment in the Constitution Seventeenth Amendment Bill of 2009 (the Bill) seeks to vest the national government with new powers of intervention at local government level when it is necessary to achieve regional efficiencies and economies of scale in respect of municipal functions. This is sought to be achieved by the insertion of a new subsection (1A) in section 156 of the Constitution.
- 2.2 The proposed new section 156(1A) is designed to facilitate not only EDI restructuring, but also the regionalisation of other municipal functions, when necessary. The purpose of the proposed new section 156(1A) is to allow the national government to further regulate the exercise by municipalities of their executive authority in certain circumstances. Those circumstances would include, for example, where a municipal function can be provided to communities more effectively, efficiently and sustainably on a regional basis

than on a local basis. While the proposed new section 156(1A) is not expressly linked to the electricity function, it allows for the removal of the current constraints that prevent the national government to effect EDI restructuring.

- 2.3 The proposed new section 156(1A)(a) provides that national legislation may, notwithstanding the provisions of sections 151, 154, 155 and 156 of the Constitution, further regulate the exercise by municipalities of their executive authority in respect of local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution when it is necessary to achieve regional efficiencies and economies of scale in respect of a specific municipal function. The circumstances under which such national legislation may further regulate the exercise by municipalities of their executive authority are set out in the proposed new section 156(1A)(b). In terms of the proposed new section 156(1A)(c) such national legislation must facilitate certain governance issues. The proposed new section 156(1A)(d) sets out the circumstances under which, and the requirements that need to be complied with before such national legislation may be enacted.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 An EDI Restructuring Inter-departmental Task Team, comprising officials of the Departments of Minerals and Energy, Public Enterprises, Justice and Constitutional Development, the former Provincial and Local Government and National Treasury, as well as the South African Local Government Association and the Electricity Distribution Industry Holdings (Pty) Ltd, was established to, amongst others, prepare suitable EDI restructuring legislation. That Task Team was consulted during the preparation of the Bill.
- 3.2 In terms of section 74(5) of the Constitution the Bill was—
- (a) published in the national *Gazette* for public comment; and
 - (b) submitted to the provincial legislatures for their views.

4. IMPLICATIONS FOR MUNICIPALITIES

The Bill envisages the passing of national legislation that may further regulate the exercise by municipalities of their executive authority in respect of a specific municipal function when it is necessary to achieve regional efficiencies and economies of scale. In the event that such national legislation is passed, that national legislation must, as far as possible, maintain municipal fiscal and institutional sustainability through protecting municipal revenue other than revenue derived from equitable shares and allocations referred to in section 214 of the Constitution.

5. IMPLICATIONS FOR PROVINCES

The Bill will alter provincial powers or functions in respect of local government.

6. FINANCIAL IMPLICATIONS FOR STATE

The financial implications of the Bill will be determined through related national legislation, in particular, the envisaged EDI restructuring legislation, the Division of Revenue Act and the Municipal Fiscal Powers and Functions Act, 2007 (Act No. 12 of 2007), authorising municipalities subject to conditions set out in that Act, to impose an electricity tax as contemplated in section 229(1)(b) of the Constitution

(which tax will replace the current electricity surcharges as a source of revenue for municipalities). Individual municipalities, Eskom and the national government are all likely to be affected.

7. PARLIAMENTARY PROCEDURE

- 7.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the proposed amendments fall within the ambit of section 74(3)(b) of the Constitution and consequently require the approval of both the National Assembly and the National Council of Provinces.
- 7.2 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.