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## GENERAL NOTICE

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### NOTICE 1644 OF 2001

#### DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

#### PUBLICATION OF BILLS AMENDING CONSTITUTION

The Minister for Justice and Constitutional Development intends introducing the—

- Constitution of the Republic of South Africa Amendment Bill, 2001; and
- Constitution of the Republic of South Africa Second Amendment Bill, 2001,

in the National Assembly. The Bills 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, Department of Justice and Constitutional Development, Private Bag X 81, Pretoria 0001, by not later than 10 August 2001.

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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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**B I L L**

To amend the Constitution of the Republic of South Africa, 1996, in order to make provision for the appointment of Deputy Ministers from outside the National Assembly; to allow a municipal council to bind the municipality in the exercise of its executive and legislative authority if this is necessary to secure loans or investments for the municipality; to enable the enactment of national legislation to provide for the exercise of executive and legislative authority on behalf of a municipality in certain circumstances; to make provision for the head of the Constitutional Court to be the Chief Justice of South Africa; to make provision for the Offices of Deputy Chief Justice, President of the Supreme Court of Appeal and Deputy President of the Supreme Court of Appeal; to enable the Legislature to regulate the term of office and retirement age of Constitutional Court judges by means of an Act of Parliament; and to provide for matters connected therewith.

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

**Amendment of section 51 of Act 108 of 1996**

1. Section 51 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the [**President of the Constitutional Court**] Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods."

**Amendment of section 52 of Act 108 of 1996**

2. Section 52 of the Constitution is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) The [**President of the Constitutional Court**] Chief Justice must preside

over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker."

#### **Amendment of section 64 of Act 108 of 1996**

3. Section 64 of the Constitution is hereby amended by the substitution for subsection (4) of the following subsection:

"(4) The **[President of the Constitutional Court]** Chief Justice must preside over the election of the Chairperson, or designate another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons."

#### **Amendment of section 86 of Act 108 of 1996**

4. Section 86 of the Constitution is hereby amended by the substitution for subsections (2) and (3) of the following subsections:

"(2) The **[President of the Constitutional Court]** Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the **[President of the Constitutional Court]** Chief Justice, but not more than 30 days after the vacancy occurs."

#### **Substitution of section 93 of Act 108 of 1996**

5. The following section is hereby substituted for section 93 of the Constitution:

##### **"Deputy Ministers**

93. The President may appoint—

- (a) any number of Deputy Ministers from among the members of the National Assembly; and
- (b) no more than two Deputy Ministers from outside the Assembly;

to assist the members of the Cabinet, and may dismiss them."

#### **Amendment of section 110 of Act 108 of 1996**

6. Section 110 of the Constitution is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) After an election, the first sitting of a provincial legislature must take place at a time and on a date determined by a judge designated by the **[President of the Constitutional Court] Chief Justice**, but not more than 14 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods."

#### **Amendment of section 111 of Act 108 of 1996**

7. Section 111 of the Constitution is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) A judge designated by the **[President of the Constitutional Court] Chief Justice** must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker."

#### **Amendment of section 128 of Act 108 of 1996**

8. Section 128 of the Constitution is hereby amended by the substitution for subsections (2) and (3) of the following subsections:

"(2) A judge designated by the **[President of the Constitutional Court] Chief Justice** must preside over the election of the Premier. The procedure set out in Part A of Schedule 3 applies to the election of the Premier.

(3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the **[President of the Constitutional Court] Chief Justice**, but not later than 30 days after the vacancy occurs."

**Amendment of section 155 of Act 108 of 1996, as amended by section 1 of Act 87 of 1998**

9. Section 155 of the Constitution is hereby amended by the addition of the following subsection:

"(8) National legislation may provide for the exercise of executive and legislative authority on behalf of a municipal council to the extent necessary—

- (a) to govern the municipality when the council for any reason cannot function; or
- (b) to resolve a serious and persistent financial emergency in the municipality."

**Amendment of section 156 of Act 108 of 1996**

10. Section 156 of the Constitution is hereby amended by the addition of the following subsection:

"(6) The council of a municipality may, within a framework prescribed by national legislation, bind itself and a future council in the exercise of its executive and legislative authority if this is necessary to secure loans or investments for the municipality."

**Amendment of section 167 of Act 108 of 1996**

11. Section 167 of the Constitution is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Constitutional Court consists of [a President, a Deputy President] the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges."

**Amendment of section 168 of Act 108 of 1996**

12. Section 168 of the Constitution is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

"(1) The Supreme Court of Appeal consists of a [Chief Justice, a Deputy Chief Justice] President, a Deputy President and the number of judges of appeal determined [by] in terms of an Act of Parliament."

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined [by] in terms of an Act of Parliament."

#### **Amendment of section 174 of Act 108 of 1996**

13. Section 174 of the Constitution is hereby amended by the substitution for subsections (3) and (4) of the following subsections:

"(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the [**President and Deputy President of the Constitutional Court**] Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the [**Chief Justice and Deputy Chief Justice**] President and Deputy President of the Supreme Court of Appeal.

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the [**President of the Constitutional Court**] Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:

- (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
- (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
- (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list."

**Amendment of section 175 of Act 108 of 1996**

14. Section 175 of the Constitution is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the **[President of the Constitutional Court and the]** Chief Justice."

**Substitution of section 176 of Act 108 of 1996**

15. The following section is hereby substituted for section 176 of the Constitution:

**"Terms of office and remuneration**

176. (1) **[A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70.**

(2) **Other judges]** Judges hold office until they are discharged from active service in terms of an Act of Parliament.

**[(3)] (2)** The salaries, allowances and benefits of judges may not be reduced."

**Amendment of section 178 of Act 108 of 1996, as amended by section 2 of Act 65 of 1998**

16. Section 178 of the Constitution is hereby amended—

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) the **[President of the Constitutional Court]** President of the Supreme Court of Appeal";

(b) by the substitution for paragraph (k) of subsection (1) of the following paragraph:

"(k) when considering matters **[specifically]** relating to a **[provincial or local division**

of the] specific High Court, the Judge President of that division and the Premier of the province concerned, or an alternate designated by each of them."; and

(c) by the substitution for subsection (7) of the following subsection:

"(7) If the Chief Justice or the [**President of the Constitutional Court**] President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the [**Constitutional Court**] Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission."

#### **Amendment of section 239 of Act 108 of 1996**

17. The following definition is hereby inserted in section 239 of the Constitution:

"'Chief Justice' means the Chief Justice of South Africa referred to in section 167(1);".

#### **Substitution of Schedule 2 to Act 108 of 1996, as amended by section 2 of Act 35 of 1997**

18. The following Schedule is hereby substituted for Schedule 2 to the Constitution:

##### **"Schedule 2**

##### **OATHS AND SOLEMN AFFIRMATIONS**

##### **Oath or solemn affirmation of President and Acting President**

1. The President or Acting President, before the [**President of the Constitutional Court**] Chief Justice, or another judge designated by the [**President of the Constitutional Court**] Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- promote all that will advance the Republic, and oppose all that may harm it;
- protect and promote the rights of all South Africans;

- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

#### **Oath or solemn affirmation of Deputy President**

2. The Deputy President, before the [**President of the Constitutional Court**] Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

- promote all that will advance the Republic, and oppose all that may harm it;
- be a true and faithful counsellor;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

#### **Oath or solemn affirmation of Ministers and Deputy Ministers**

3. Each Minister and Deputy Minister, before the [**President of the Constitutional Court**] Chief Justice or another judge designated by the [**President of the Constitutional Court**] Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with

honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

**Oath or solemn affirmation of members of the National Assembly, permanent delegates to the National Council of Provinces and members of the provincial legislatures**

4. (1) Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the **[President of the Constitutional Court] Chief Justice** or a judge designated by the **[President of the Constitutional Court] Chief Justice**, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly/ permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability.

(In the case of an oath: So help me God.)

- (2) Persons filling a vacancy in the National Assembly, a permanent delegation to the National Council of Provinces or a provincial legislature may swear or affirm in terms of subitem (1) before the presiding officer of the Assembly, Council or legislature, as the case may be.

**Oath or solemn affirmation of Premiers, Acting Premiers and members of provincial Executive Councils**

5. The Premier or Acting Premier of a province, and each member of the Executive Council of a province, before the **[President of the Constitutional Court] Chief Justice** or a judge designated by the **[President of the Constitutional Court] Chief Justice**, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/ member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

#### **Oath or solemn affirmation of Judicial Officers**

6. (1) Each judge or acting judge, before the Chief Justice [**of the Supreme Court of Appeal**] or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)

- (2) A person appointed to the office of Chief Justice [**of the Supreme Court of Appeal**] who is not already a judge at the time of that appointment must swear or affirm before the President of the [**Constitutional Court**] Republic of South Africa.
- (3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation."

#### **Amendment of Schedule 3 to Act 108 of 1996, as amended by section 2 of Act 3 of 1999**

19. Schedule 3 to the Constitution is hereby amended by the substitution for item 9 of Part A of the following item:

**"Rules**

9. (1) The **[President of the Constitutional Court] Chief Justice** must make rules prescribing—
- (a) the procedure for meetings to which this Schedule applies;
  - (b) the duties of any person presiding at a meeting, and of any person assisting the person presiding;
  - (c) the form on which nominations must be submitted; and
  - (d) the manner in which voting is to be conducted.
- (2) These rules must be made known in the way that the **[President of the Constitutional Court] Chief Justice** determines."

**Amendment of Schedule 6 to Act 108 of 1996, as amended by section 3 of Act 35 of 1997 and section 5 of Act 65 of 1998**

20. Schedule 6 to the Constitution is hereby amended—

(a) by the deletion of subitems 2(b) and (3)(b) of item 16; and

(b) by the addition to item 16 of the following subitem:

- "(7) (a) Anyone holding office, when the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, as—
- (i) the President of the Constitutional Court, becomes the Chief Justice as contemplated in section 167(1) of the new Constitution;
  - (ii) the Deputy President of the Constitutional Court, becomes the Deputy Chief Justice as contemplated in section 167(1) of the new Constitution;
  - (iii) the Chief Justice, becomes the President of the Supreme Court of Appeal as contemplated in section 168(1) of the new Constitution;  
and
  - (iv) the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal as contemplated in section 168(1) of the new Constitution.

- (b) All rules, regulations or directions made by the President of the Constitutional Court or the Chief Justice in force immediately before the commencement of the Constitution of the Republic of South Africa Amendment Act, 2001, continue in force subject to any amendment or repeal thereof.
- (c) Unless inconsistent with the context or clearly inappropriate, a reference in any law or process to the Chief Justice or to the President of the Constitutional Court, must be construed as a reference to the Chief Justice as contemplated in section 167(1) of the new Constitution."

#### **Short title and commencement**

**21.** This Act is called the Constitution of the Republic of South Africa Amendment Act, 2001, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION OF THE  
REPUBLIC OF SOUTH AFRICA AMENDMENT BILL, 2001  
(Published in terms of Rule 258(3) of the Rules of the National Assembly)**

The Bill amends the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution), in respect of the following three areas:

- ▶ The judiciary.
- ▶ The appointment of Deputy Ministers.
- ▶ Local governments.

**A The judiciary (Clauses 1 to 4, 6 to 8 and 11 to 20)**

- (a) Firstly, provision is made for the office of the President of the Constitutional Court to become that of the Chief Justice of South Africa. (Clause 11.) This necessitates a number of consequential amendments, including the conversion of the offices of—
- ▶ "Deputy President of the Constitutional Court" to "Deputy Chief Justice";
  - ▶ "Chief Justice" (of the Supreme Court of Appeal) to "President of the Supreme Court of Appeal" (clause 12); and
  - ▶ "Deputy Chief Justice" to "Deputy President of the Supreme Court of Appeal".
- (b) Secondly, section 176 of the Constitution is substituted in order to enable the Legislature to regulate the term of office and retirement age of Constitutional Court judges by means of an Act of Parliament. At present section 176 provides that Constitutional Court judges hold office for a non-renewable term of 12 years, and must retire at the age of 70, whereas other judges hold office until they are discharged from active service in terms of an Act of Parliament. (Clause 15.)

**B The appointment of Deputy Ministers (Clause 5)**

- (a) In terms of section 91(3) of the Constitution, the President may select any number of Ministers from among the members of the National Assembly, and may select no more than two Ministers from outside the Assembly. In terms of section 93, Deputy Ministers may, however, be appointed from among the members of the National Assembly only.
- (b) The effect of the requirement in section 93 that Deputy Ministers must be appointed from among the members of the National Assembly, is that, if the President appoints a Deputy Minister from a party that has very few members of Parliament, that party's effective participation in the ordinary business of Parliament might be compromised severely.
- (c) Clause 5 of the Bill is consequently aimed at bringing section 93 into line with section 91(3), by making provision for the appointment of not more than two Deputy Ministers from outside the National Assembly.

**C Local governments (Clauses 9 and 10)**

- (a) The object of clause 9 is to help municipalities to continue functioning whilst experiencing serious problems, as they restructure to resolve such problems. The Bill enables Parliament to enact legislation to allow for the exercise of executive and legislative authority on behalf of a municipality in circumstances where the council of a municipality for any reason cannot function or when this becomes vital to resolve a financial emergency in a municipality.
- (b) The object of clause 10 is to empower local governments to borrow long-term funds. It seeks to empower municipalities to bind themselves in future in the exercise of their executive and legislative powers in order to borrow funds for capital at a cheaper rate and over a longer term.
- (c) Both amendments give effect to the published "Policy Framework for Municipal Borrowing and Financial Emergencies" and the Municipal Finance Management Bill, both endorsed by Cabinet and published on 28 July 2000 in *Government Gazette* No. 21423, Notice 2738 of 2000.
- (d) The first part of the amendment to section 155 is self evident and relates to situations where a municipal council is unable to function and hence to provide governance in the municipality. The inability to govern may be due to various reasons, such as mass resignations in the council, the removal of councillors for misconduct, the dissolution of a council following an intervention in terms of section 100 or 139, etc. In such a case national legislation should provide caretaker arrangements for the governance of the municipality until a by-election can be held and allow, for instance, the appointment of an administrator.
- (e) The second part of the amendment to section 155 is necessary to provide a missing piece in the Government's overall strategy for dealing with municipal financial problems. The published draft Municipal Finance and Management Bill contains comprehensive mechanisms, processes and procedures for municipal monitoring, reporting and auditing, including provisions to address financial problems in municipalities and the restructuring of municipal finances where necessary. There is uncertainty as to whether the proposed financial restructuring provisions are constitutional where these provisions provide for the exercise of municipal executive and legislative authority on behalf of the municipality. The "Policy Framework for Municipal Borrowing and Financial Emergencies" envisions the creation of a Municipal Finance Emergency Authority, which could direct the financial structuring of a municipality when there is no alternative.
- (f) Financial emergencies can arise from many causes, sometimes including circumstances beyond the control of the council then in office. The restructuring process envisioned in the Policy Framework could be invoked by the municipality itself, if it seeks relief from unmanageable debt, by an MEC or Minister if necessary to supplement a national or provincial intervention in terms of section 100 or 139, or by a party to a contract if the municipality is in default of its contractual obligations. The underlying purpose of the policies outlined in the Policy Framework is to restore the municipality to financial health

as soon as possible. Safeguards will be included to ensure that all stakeholders have input into the formulation of a recovery plan and that essential services are continued during the restructuring process.

- (g) The amendment to section 156 allows a municipal council to bind the municipality as to how it will exercise its future discretion, if that is necessary, to make credit more available or affordable. In order to ensure a proper exercise of the powers granted to municipalities through this amendment, the clause states explicitly that these powers may only be exercised within a framework prescribed by national legislation.
- (h) The proposed amendments to sections 155 and 156 together lay the foundation for national legislation to implement the Policy Framework for Municipal Borrowing and Financial Emergencies referred to above.

### **Parliamentary procedure**

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 74(3)(a) of the Constitution since it contains no amendment which—

- (i) relates to a matter that affects the National Council of Provinces;
- (ii) alters provincial boundaries, powers, functions or institutions; or
- (iii) amends a provision that deals specifically with a provincial matter.

## 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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**CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA SECOND  
AMENDMENT BILL, 2001**

To amend the Constitution of the Republic of South Africa, 1996—

- \* to provide for the introduction of certain financial legislation in the National Assembly only, and only by the Cabinet member responsible for national financial matters;
- \* to provide for Bills regulating certain financial matters to be dealt with in Parliament in terms of section 76 (1) of the Constitution;
- \* to extend the definition of a money Bill;
- \* to provide for national supervision of local administration if a municipality fails to comply with an obligation in terms of legislation or the Constitution;
- \* to further regulate national supervision of provincial administration;
- \* to extend the principle that provinces' equitable share of revenue raised nationally are direct charges against the National Revenue Fund, to local government's equitable share;
- \* to further regulate the withholding of funds by the national treasury if organs of state commit a serious and material breach of legislation prescribing treasury norms and standards;
- \* to provide that the enactment of national framework legislation governing the policies of organs of states on preferential procurement should be obligatory;
- \* to provide for the enactment of national framework legislation in connection with the withdrawal of money as direct charges against a Provincial Revenue Fund and certain payments from a Provincial Revenue Fund to municipalities;
- \* to reduce the number of members of the Financial and Fiscal Commission, and to change the appointment procedure;
- \* to make further provision for the regulation of municipal and provincial borrowing

- powers; and
- \* to provide for matters connected therewith.

**BE IT ENACTED** by the Parliament of the Republic of South Africa as follows:—

**Amendment of section 73 of Act 108 of 1996**

1. Section 73 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended –

(a) by the substitution for subsection (2) of the following subsection:

“(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill [**in the Assembly**]; or

(b) a Bill which provides for legislation envisaged in Chapter 13 except when that legislation –

(i) relates to the financial administration of Parliament or the provincial legislatures;

(ii) determines a matter mentioned in section 219; or

(iii) regulates rates on property in terms of section 229 (2) (b).”; and

(c) by the substitution for subsection (3) of the following subsection:

“(3) A Bill referred to in section 76 (3), except [**a money Bill**] a Bill referred to in subsection (2) (a) or (b) of this section, may be introduced in the National Council of Provinces.”.

**Amendment of section 76 of Act 108 of 1996**

2. Section 76 of the Constitution is hereby amended by the substitution for paragraph (b) of subsection (4) of the following paragraph:

"(b) envisaged in Chapter 13 and which **[affects]** contains a provision affecting the financial interests of the provincial sphere of government.".

**Substitution of section 77 of Act 108 of 1996**

3. The following section is hereby substituted for section 77 of the Constitution:

**"Money Bills**

77. (1) A Bill **[that]** is a money Bill if it –

- (a) appropriates money; **[or]**
- (b) imposes national taxes, levies, [or] duties or surcharges [is a money Bill];
- (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
- (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money, **[or]** the imposition, abolition or reduction of, or the granting of exemptions from, taxes, levies or duties or the authorisation of direct charges.

**[(2)](3)** All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament. ”.

**Substitution of section 100 of Act 108 of 1996**

4. The following section is hereby substituted for section 100 of the Constitution:

**"National supervision of provincial and local administration**

100. (1) When a province or municipality cannot or does not fulfil an **[executive]** obligation in terms of legislation or the Constitution, excluding an obligation to pass legislation in the case of a province, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

- (a) issuing a directive to the provincial executive or the municipality, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that province or municipality to the extent necessary to –
  - (i) maintain essential national standards; **[or]**
  - (ii) meet established minimum standards for the rendering of a service;
  - [(ii)](iii)** maintain economic unity;
  - [(iii)](iv)** maintain national security; or
  - [(iv)] (v)** prevent that province or municipality from taking unreasonable action that is prejudicial to the interests of another province or municipality or the country as a whole.

(2) If the national executive intervenes in a province or municipality in terms of subsection (1) (b) –

- (a) notice of the intervention must be **[tabled in]** submitted to the National Council of Provinces within 14 days **[of its first sitting]** after the intervention began;
- (b) the intervention must end **[unless it is approved by]** if the Council [within 30 days of its first sitting after the intervention began] by resolution requests the national executive to stop the intervention; and
- (c) the Council **[must]** may review the intervention regularly and make any appropriate recommendations to the national executive.

(3) National legislation –

- (a) may regulate the process established by this section; and
- (b) must co-ordinate the process established by this section with the process established by section 139.”.

#### Substitution of section 120 of Act 108 of 1996

5. The following section is hereby substituted for section 120 of the Constitution:

##### “Money Bills

120. (1) A Bill **[that]** is a money Bill if it –

- (a) appropriates money; **[or]**

- (b) imposes provincial taxes, levies, [or] duties or surcharges [is a money Bill];
- (c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or
- (d) authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money, [or] the imposition, abolition or reduction of, or the granting of exemptions from, taxes, levies or duties or the authorisation of direct charges.

[(2)](3) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill.”

#### **Substitution of section 139 of Act 108 of 1996**

6. The following section is hereby substituted for section 139 of the Constitution:

#### **“Provincial supervision of local government**

139. (1) When a municipality cannot or does not fulfil an **[executive]** obligation in terms of legislation or the Constitution, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

- (a) issuing a directive to the **[Municipal Council] municipality**, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —
  - (i) **[to]** maintain essential national standards; **[or]**
  - (ii) meet established minimum standards for the rendering of a service;
  - [(ii)](iii)** **[to]** prevent that **[Municipal Council] municipality** from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
  - (iii)] (iv)** **[to]** maintain economic unity.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b) —

- [(a) the intervention must end unless it is approved by the Cabinet member responsible for local government affairs within 14 days of the intervention;]**
- [(b)](a)** notice of the intervention must be **[tabled in]** submitted to the provincial legislature and **[in]** the National Council of Provinces within 14 days **[of their respective first sittings]** after the intervention began;
- [(c)](b)** the intervention must end **[unless it is approved by]** if the Council **[within 30 days of its first sitting after the intervention began]** by resolution requests the provincial executive to stop the intervention; and
- [(d)](c)** the Council **[must]** may review the intervention regularly and make any appropriate recommendations to the provincial executive.

(3) National legislation may regulate the process established by this section.”.

**Amendment of section 159 of Act 108 of 1996, as amended by section 1 of Act 65 of 1998**

7. Section 159 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 100 or 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.”.

**Amendment of section 163 of Act 108 of 1996**

8. Section 163 of the Constitution is hereby amended by the substitution for paragraph (b) of the following paragraph:

- “(b) determine procedures by which local government may –
- (i) consult with the national or a provincial government; and
  - (ii) designate representatives to participate in the National Council of Provinces. **[and**
  - (iii) **nominate persons to the Financial and Fiscal Commission]**”.

**Amendment of section 213 of Act 108 of 1996**

9. Section 213 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) [A province’s] The equitable share of revenue raised nationally to which provinces and local government are entitled in terms of section 214 is a direct charge against the National Revenue Fund.”.

**Amendment of section 216 of Act 108 of 1996**

10. Section 216 of the Constitution is hereby amended by –

(a) the substitution for subsection (2) of the following subsection:

“(2) [The national treasury, with the concurrence of the Cabinet member responsible for national financial matters, may stop the transfer of funds to an organ of state only for serious or persistent material breach of the measures established in terms of subsection (1)] The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.”; and

(b) the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

“(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1) (b) may be taken only in [ ~~terms of~~ ] the circumstances mentioned in subsection (2) and –”.

**Amendment of section 217 of Act 108 of 1996**

11. Section 217 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) [may] must be implemented.”.

**Amendment of section 221 of Act 108 of 1996, as amended by section 2 of Act 2 of 1999**

12. (1) Section 221 of the Constitution is hereby amended –

- (a) by the substitution for subsection (1) of the following subsection:

“(1) The Commission consists of the following women and men appointed by the President as head of the national executive:

- (a) a chairperson and deputy chairperson;
  - (b) **[nine persons each of whom is nominated by the Executive Council of a province, with each province nominating only one person]** two persons chosen after consulting the Premiers of the provinces;
  - (c) two persons **[nominated by]** chosen after consulting organised local government **[in terms of section 163];** and
  - (d) **[nine]** two other persons.”; and
- (b) by the substitution for subsection (2) of the following subsection:

“(2) Members of the Commission must have **[appropriate]** expertise relevant to the functions of the Commission.”

- (2) Subsection (1) takes effect on 1 April 2002.

#### **Amendment of section 226 of Act 108 of 1996**

13. Section 226 of the Constitution is hereby amended by the addition of the following subsection:

“(4) National legislation may determine a framework within which –

- (a) a provincial Act may in terms of subsection (2) (b) authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and
- (b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.”

#### **Amendment of section 228 of Act 108 of 1996**

14. Section 228 of the Constitution is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) flat-rate surcharges on **[the tax bases of]** any tax, levy or duty that is imposed by national legislation, other than **[the tax bases of]** on corporate income tax, value-added tax, rates on property or customs duties.”

**Substitution of section 230 of Act 108 of 1996**

15. The following section is hereby substituted for section 230 of the Constitution:

**“Provincial and municipal loans**

230. (1) A province or a municipality may raise loans for capital or current expenditure, **[in accordance with reasonable conditions determined by national legislation]** but loans for current expenditure -

- (a) may be raised only when necessary for bridging purposes during a fiscal year and
- (b) must be repaid within **[twelve months]** the same fiscal year.

(2) The power of a province or a municipality to raise loans may be regulated by national legislation.

**[(2)](3)** National legislation referred to in subsection **[(1)] (2)** may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.”.

**Short title**

16. This Act is called the Constitution of the Republic of South Africa Second Amendment Act, 2001, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION OF THE  
REPUBLIC OF SOUTH AFRICA SECOND AMENDMENT BILL, 2001  
(Published in terms of Rule 258(3) of the Rules of the National Assembly)**

The broad object of the Bill is to address a range of practical difficulties that were encountered in implementing the Constitution, especially the financial regime established by the Constitution. As these difficulties are diverse and mostly unrelated, the object of each proposed amendment contained in the Bill can best be explained under a discussion of the sections that are affected.

**1. Section 73**

Section 73 (2) establishes the principle that only a Cabinet member, a Deputy Minister or a member or committee of the National Assembly may introduce draft legislation in the National Assembly, but that only the Cabinet member responsible for national financial matters, i.e. the Minister of Finance, may introduce a money Bill in the Assembly. The Bill proposes that the principle that only the Minister of Finance may introduce a money Bill be extended to all legislation emanating from the provisions of Chapter 13 of the Constitution, except when that legislation—

- (a) relates to the financial administration of Parliament or the provincial legislatures; or
- (b) deals with the remuneration of persons holding public office mentioned in section 219, or
- (c) regulates rates on property in terms of section 229 (2) (b).

The effect of this amendment is that only the Minister of Finance would be constitutionally competent to introduce in the Assembly money Bills and generally most other financial legislation which gives effect to Chapter 13. The financial legislation that would be affected by the amendment relates exclusively to typical financial matters that impact on macro-economic policy and the financial administration of the state. Normally this legislation would fall within the line function of the National Treasury, and the aim of the amendment, therefore, is to ensure that the National Treasury assesses such draft legislation and the impact it may have on macro-economic policy and the financial administration of the state before such legislation is introduced.

**2. Section 76 (4) (b)**

The proposed amendment of this section is aimed at avoiding the splitting of draft financial legislation into section 75 and 76 Bills where some provisions of the legislation affect the provinces and others do not. It is accordingly proposed that a Bill envisaged in Chapter 13 of the Constitution in future be dealt with in the parliamentary proceedings in terms of section 76 (1) if it contains a provision affecting the financial interests of the provincial sphere of government; in other words in terms of the procedure which requires the Bill to be passed by the National Council of Provinces as well. This amendment would not affect the parliamentary proceedings on money Bills which in terms of sections 77 (2) and 76 (6) of the Constitution must be dealt with in accordance with the section 75 procedure.

### 3. Section 77

This section defines a money Bill. The proposed amendment extends this definition to include Bills abolishing or reducing, or granting exemptions from, any national taxes, levies, duties or surcharges, or authorising direct charges against a Revenue Fund. Read with section 73, the implication of this proposed amendment is that only the Minister of Finance would be competent to introduce legislation which abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges or which authorises the withdrawal of money from the National Revenue Fund as direct charges against the Fund.

### 4. Sections 100 and 139

Section 100 of the Constitution empowers the national executive to intervene in a province if the province fails to fulfil an executive obligation imposed on the province in terms of legislation or the Constitution. If the national executive intervenes in terms of this section, it may either direct the province to take steps to meet its obligations or otherwise assume responsibility for the relevant obligation if that is necessary to maintain national standards, to meet established minimum standards for the rendering of a service, to maintain economic unity, to maintain national security or to prevent unreasonable action from the province. A similar provision is found in section 139 which provides for a province to intervene in a municipality if the municipality fails to fulfil an executive obligation imposed in terms of legislation. The Constitution does not provide for the national executive to intervene in a municipality directly. Such interventions are restricted to a province as the Constitution currently reads.

This regime created by sections 100 and 139 in terms of which the national government may intervene in a defaulting province and only a province may intervene in a defaulting municipality, is out of line with the other provisions of the Constitution which depicts government as three distinctive, inter-dependent and inter-related spheres. To the extent then that the constitutional relationships between the three spheres are generally direct and not hierarchical, sections 100 and 139 must be seen as a constitutional anomaly that should be corrected by extending the power to intervene in municipalities to the national government as well.

Another reason why these sections should be corrected is the fact that provinces have very little capacity in some functional areas, such as water and electricity supply systems. If a municipality defaults on its obligations in this regard, there is very little a province can do by way of an intervention apart from facilitating national institutions to assume the responsibility.

The Bill consequently proposes amendments to both sections. It is suggested that section 100 be amended to give the national executive the same power to intervene in a non-complying municipality as section 139 confers on provinces. The section 139 power of a province to intervene will not be affected by the amendment, but will remain and become a concurrent power. As such there would appear to be a need for coordination of the processes established by the two sections. It is proposed that such coordination be provided by national legislation, and a provision to this effect is accordingly inserted in section 100 (3). Apart from these amendments, it is also proposed to make certain technical changes to section 100, viz:

- The adjective "executive" before the word "obligation" is deleted as the Constitution and certain legislation such as the Local Government: Municipal Systems Act, 2000, place certain obligations of a legislative nature on municipalities, e.g. the annual passing of a budget. Legislative obligations of provinces are specifically excluded as the national

- executive cannot pass provincial laws by way of an intervention.
- Section 100(1)(b)(i) is split into two separate subparagraphs to disconnect the maintenance of essential national standards from the words “for the rendering of a service”. These words should apply to the second part of the sentence only, viz. to established minimum standards. See in this connection section 44 (2) (c) and (d) where the distinction is properly drawn.
  - Section 100(2)(b) is changed to give the National Council of Provinces a direct veto over national interventions instead of the current process requiring the Council’s approval within 30 days as a precondition for the survival of the intervention.
  - The current burden on the NCOP in terms of section 100 (2) (c) to review the intervention regularly and to make appropriate recommendations to the national executive, is removed and replaced by a discretionary power. This means that the NCOP may review an intervention at any time and make recommendations if it so chooses.

The proposed amendments to section 139 are confined to technical changes similar to those suggested for section 100. (See bullets above.)

#### **5. Section 120**

This section defines the provincial equivalent of a money Bill. The definition of provincial money Bills is amended along similar lines as proposed for national money Bills and includes Bills which abolish or reduce, or grant exemptions from, any provincial taxes, levies, duties or surcharges, or which authorise direct charges against the Provincial Revenue Funds. As section 119 currently states that only the member of the Executive Council responsible for financial matters in the province may introduce a money Bill in the provincial legislature, the effect of the amendment is that only the MEC for finance in a province is competent to introduce legislation abolishing or reducing, or granting exemptions from, any provincial taxes, levies, duties or surcharges, or authorising the withdrawal of money from a Provincial Revenue Fund as direct charges against the Fund. This amendment is necessary to ensure integration and coherence, and also financial discipline, in the provincial budget process.

#### **6. Section 159 (3)**

This is consequential to the amendment of section 100, which extends the national intervention power to municipalities. Subsection (3) of section 159 refers to a municipal council which has been dissolved following an intervention in terms of a provincial intervention under section 139. This amendment adds a reference to section 100 as a dissolution of a municipal council will also be possible in terms of an intervention under section 100.

#### **7. Section 163 (b) (iii)**

It is proposed that this section be amended to delete the current obligation on Parliament to provide in an Act of Parliament for the determination of a procedure in terms of which local government may nominate persons for appointment to the Financial and Fiscal Commission. This amendment is consequential to the proposed amendment of section 221 concerning the composition of the Commission.

#### **8. Section 213**

In terms of section 213 money can be withdrawn from the National Revenue Fund either in terms

of an appropriation by an Act of Parliament or as a direct charge authorised by the Constitution or an Act of Parliament. The section currently provides that provinces' equitable share of revenue raised nationally must be paid to provinces as a direct charge against the Revenue Fund but is silent on how local government's equitable share must be withdrawn from the Fund. The Bill proposes to extend this principle to local government's equitable share.

The proposed change is based on practical considerations and on the current need for two separate Acts of Parliament to authorise the same transfer. Currently the annual Division of Revenue Act contemplated in section 214 which, like the budget, is passed annually, must provide for the division of revenue raised nationally among the spheres and for additional allocations to provinces and municipalities from the national share. The Division of Revenue Act is not an appropriation Act and its revenue division provisions cannot be understood as authorising the withdrawal of funds from the Revenue Fund. This necessitates the inclusion in the budget as ordinary appropriations of those transfers that are not direct charges, such as local government's equitable share and any additional allocations to provinces and municipalities.

#### 9. Section 216

The proposed amendments to section 216 are merely technical in nature and clarify certain ambiguities in the section without affecting the constitutional principles embodied in the section. These principles remain unaltered.

Subsection (2) as presently formulated is particularly ambiguous and on a literal reading has certain consequences that could never have been intended. To facilitate a better understanding of the true intention and to avoid misinterpretations and misunderstandings between affected parties, it is proposed that the whole subsection be redrafted as proposed in the Bill. The redraft firstly avoids the words in the current subsection that the National Treasury may stop the transfer of funds to an organ of state only *with the concurrence of the Cabinet member responsible for national financial matters*. These words obscure the content of the "national treasury" and do not recognise the fact that the Cabinet member responsible for national financial matters is the head of the national treasury and in fact the institution in which the power and authority of the national treasury vest. To suggest, as the current formulation implies, that the National Treasury and the Cabinet member responsible for national financial matters are different institutions, is artificial and practically untenable. Secondly, the current formulation implies that the only circumstances in which the stopping of funds to an organ of state is allowed, is when the organ of state commits a serious or persistent material breach of the norms and standards prescribed in terms of section 216 (1). This interpretation obscures the whole practice of transfer payments, but especially the enforcement of the conditions on which conditional grants are given to provinces and municipalities in terms of section 114 (1) (c). Obviously, the idea of a conditional grant is that if the conditions are not met, the grant may be stopped. The question whether a province or a municipality has committed a serious or persistent material breach of the treasury norms and standards should have no bearing on a decision to stop transfers of a conditional grant when conditions are not met, and section 216 (2) should not come into play when transfers are stopped because of non-compliance with the conditions of a grant.

The redraft of section 216 (2) now makes it clear that the stopping of funds is a mechanism to enforce the treasury norms and standards prescribed in terms of subsection (1), but a mechanism that may be used only where there is a serious or persistent material breach of these norms and

standards. It avoids the implication of the current formulation that the only instance where the stopping of funds is allowed is when a serious or persistent material breach of the norms and standards has been committed.

For the same reason, the proposed amendment to section 216 (3) brings the section into line with its true intention, and confines its application to the stopping of a province's equitable share.

#### **10. Section 217**

This section provides that when organs of state and certain other institutions procure goods and services they must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It further allows organs of state and institutions to implement a procurement policy providing preferences for persons disadvantaged by unfair discrimination. The proposed amendment to this section makes it mandatory for organs of state and institutions to implement their preferential procurement policies within a framework set out in national legislation.

#### **11. Section 221**

The proposed amendment to this section alters the composition of the Financial and Fiscal Commission by reducing the number of members from 22 to 8 persons. Currently each of the provinces is entitled to nominate one person, whilst the President may appoint nine additional members to balance the nine provincial members. In terms of the amendment the President will appoint two members after consulting the provinces and two additional members. The two local government members are retained but will in future be appointed by the President after consultation with organised local government. A previous amendment to the Constitution removed the need for the chairperson and deputy chairperson to be full-time members of the Commission.

#### **12. Section 226**

The Bill proposes the addition of a further subsection which would enable Parliament to determine a framework within which provinces—

- may authorise direct charges against their Revenue Funds; and
- must pay revenue allocated through a province to local government in that province to municipalities in the province.

Framework legislation is necessary to achieve proper and uniform budgetary processes in the provinces and also to ensure that direct charges are treated by all provinces as an exceptional form of authorising expenditure. There is also a need in the context of section 226 to ensure that the allocation of money to local government through a province is divided among municipalities in the province in accordance with national government's criteria.

#### **13. Section 228 (1) (b)**

In terms of the existing provision provinces are empowered to impose flat rate surcharges on the "tax bases" of any levy or duty other than the tax bases of corporate income tax, value-added tax, rates on property or customs duty. The reference to "tax bases" is deleted as these words have no definite meaning in the context they appear in the section.

**14. Section 230**

The proposed amendment deletes the requirement that a province or municipality may raise loans for capital or current expenditure only “in accordance with reasonable conditions determined by national legislation” and replaces it with the same controlling mechanisms that apply in the case of provincial and municipal fiscal powers. See sections 228 (2) and 229 (2).

**Parliamentary procedure**

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.

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