

REPUBLIC OF SOUTH AFRICA

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# CONSTITUTIONAL MATTERS AMENDMENT BILL

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*(As amended by the Portfolio Committee on Justice and Constitutional Development  
(National Assembly)) (The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B 22B—2005]**

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that date, of all moneys that had been allocated to it in terms of this section.”.

**Amendment of section 6 of Act 103 of 1997**

3. Section 6 of the Funding Act is hereby amended by the substitution for subsections (3) and (4) of the following subsections, respectively: 5

“(3) Within two months after the end of a financial year for which moneys have been allocated to any political party from the Fund, that accounting officer must—

(a) prepare a statement showing all amounts received by the party from the Fund during that financial year and its application of those moneys, as well as the purposes for which the various amounts have been applied[, **whereafter that accounting officer must have**]; and 10

(b) submit that statement and those books and records of account **[audited by]** to a public accountant and auditor registered and practising as such in terms of the Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991), **to be audited.** 15

(4) An auditor who has performed an audit contemplated in subsection (3)(b), must in the auditor’s report express an opinion as to whether **or not** the allocated moneys were spent for purposes **[not]** authorised by this Act.”.

**Insertion of section 6A in Act 103 of 1997** 20

4. The following section is hereby inserted in the Funding Act after section 6:

**“Repayment of unspent balances**

**6A.** (1) 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, subject to subsection (3), have to repay to the Commission the unspent balances of all moneys that had been allocated to it in terms of section 5 in respect of the seat held by the member concerned. 25

(2) 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 section 5 does not have to repay to the Commission the unspent balances of all moneys that had been allocated to it in terms of that section if it subdivides in a manner contemplated in item 3(1)(b) of Schedule 6A to the Constitution, and any subdivision of that party continues to— 30 35

(a) represent that party in the legislature concerned after the date on which the Speaker of a legislature has published the notice contemplated in item 5(3) of Schedule 6A to the Constitution; and

(b) qualify for the allocation of moneys from the Fund in terms of the said section, 40

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

(3) 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 section 5 must, in accordance with this section, repay to the Commission the unspent balances of all moneys that had been allocated to it in terms of that section if it ceases to qualify for the allocation of moneys from the Fund in terms of the said section as a result of its— 45

(a) member or members changing party membership contemplated in item 2(1); 50

(b) merger with another political party in terms of item 3(1)(a); or

(c) subdivision in a manner contemplated in item 3(1)(b), of Schedule 6A to the Constitution.

(4) The person who last held the office of accounting officer contemplated in section 6(1)(b) of a political party contemplated in subsection (3), or if he or she is not available the leader of that party, must on the last day 55

of September of the financial year in question close the books and records of account of the party kept in terms of section 6 and within one month thereafter—

- (a) prepare a statement showing—
- (i) all amounts received by the party from the Fund during that financial year and its application of those moneys, as well as the purposes for which the various amounts have been applied; 5
  - (ii) the unspent balances of the party, if any, as at the date when its books and records of account are so closed, of all moneys that had been allocated to it in terms of section 5; and 10
  - (iii) all the existing legal financial obligations of the party until the end of the financial year in question; and
- (b) submit that statement and those books and records of account to a public accountant and auditor registered and practising as such in terms of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991), to be audited. 15
- (5) An auditor who has performed an audit contemplated in subsection (4)(b), must in the auditor's report express an opinion—
- (a) as to whether or not the allocated moneys were spent for purposes authorised by this Act; and 20
  - (b) on the correctness of the information referred to in subsection (4)(a)(ii) and (iii).
- (6) The auditor's report and audited statement, as well as all statements for the financial year in question of the banking account of the political party kept in terms of section 6(1)(a) and documents in support of the information referred to in subsection (4)(a)(iii), must be submitted to the Commission by the accounting officer or the leader of the party, as the case may be, within two months after the date on which the books and records of account of the party were closed. 25
- (7) The Commission must within two months after receipt of the auditor's report, audited statement, statements of the banking account of the political party and documents in support of the information referred to in subsection (4)(a)(iii) submitted to it in terms of subsection (6)— 30
- (a) determine the amount of the unspent balances of all moneys that had been allocated to the political party in terms of section 5 that must be repaid to the Commission, taking into account the information referred to in subsection (4)(a)(iii); 35
  - (b) determine the date on which that amount of unspent balances of moneys must be repaid to the Commission, which date must be before the last day of the financial year in question; and 40
  - (c) inform the accounting officer or the leader of the party, as the case may be, of the amount and date determined in terms of paragraphs (a) and (b).
- (8) (a) The Commission may for the purposes of subsection (7)(a)— 45
- (i) direct the accounting officer or the leader of the party, as the case may be, to provide it with such other information as it may deem necessary; and
  - (ii) appoint a public accountant and auditor registered and practising as such in terms of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991), to— 50
    - (aa) verify the auditor's report and audited statement submitted to it in terms of subsection (6); or
    - (bb) audit the statement referred to in subsection (4)(a) and the books and records of account kept in terms of section 6.
- (b) Subsection (5) applies, with the necessary changes, to an auditor who has performed an audit contemplated in paragraph (a)(ii)(bb). 55
- (c) The verification of the auditor's report and audited statement contemplated in paragraph (a)(ii)(aa) or the auditor's report and audited statement contemplated in paragraph (a)(ii)(bb), as the case may be, must be submitted to the Commission by the auditor concerned within one month after the date of his or her appointment by the Commission. 60
- (9) The accounting officer or the leader of the party, as the case may be, must—

- (a) within 14 days after the receipt of a direction referred to in subsection (8)(a)(i), comply therewith; and
- (b) repay to the Commission the amount of the unspent balances of moneys contemplated in subsection (7)(a) on or before the date determined in terms of subsection (7)(b). 5

(10) Any unspent balances of moneys repaid in terms of this section during a particular financial year, must be credited to the Fund and carried forward to the next financial year.

(11) The Commission must deal with any circumstances, other than those provided for in this section, 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.” 10

#### **Amendment of section 8 of Act 103 of 1997**

5. Section 8 of the Funding Act is hereby amended by the substitution in subsection (1)(b) for subparagraph (i) of the following subparagraph: 15

- “(i) the amounts received by and accrued to the Fund, including the amounts of the unspent balances of moneys repaid to the Commission, if applicable, during that financial year;”.

#### **Amendment of section 9 of Act 103 of 1997** 20

6. 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.”. 25

#### **Insertion of section 9A in Act 103 of 1997** 30

7. The following section is hereby inserted in the Funding Act after section 9:

##### **“Offences and penalties**

**9A.** Any person who—

- (a) contravenes or fails to comply with section 6A(4), (6) or (9)(b); or
- (b) fails to comply with a direction in terms of section 6A(9)(a), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.”. 35

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

8. Section 10 of the Funding Act is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph: 40

- “(d) prescribing the procedure according to which and manner in which payments from, and to, the Fund are to be made after any election of Parliament or a provincial legislature or the expiry of the period referred to in item 4(1)(a) or (b) of Schedule 6A to the Constitution; and”.

### Amendment of Preamble of Act 103 of 1997

9. The Preamble of the Funding Act is hereby amended by the addition of the following paragraph:

“**AND WHEREAS** it is necessary to provide for the re-allocation of moneys from the Represented Political Parties’ Fund and to regulate the repayment of unspent balances of all moneys allocated 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;”.

### Substitution of long title of Act 103 of 1997

10. The following long title is hereby substituted for the long title of the Funding Act:

“**To establish the Represented Political Parties’ Fund with a view to making provision for the funding of political parties participating in Parliament and provincial legislatures; to provide for the management of that Fund by the Electoral Commission and for accountability regarding that Fund; to regulate the allocation of moneys from that Fund and the purposes for which allocated moneys may be used by political parties; to regulate the repayment to the Electoral Commission of the unspent balances of moneys by political parties under certain circumstances; and to provide for incidental matters.**”.

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

11. 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 merged party 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]**.”

(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 merged party 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 delegates have been allocated to parties in the provincial delegation **[concerned]**.”

(c) For the purposes of paragraphs (a) and (b), any party that is entitled to a delegate in the delegation of the province concerned and that—

(i) came into existence on account of a change of party membership or subdivision of parties contemplated in section 61(2)(b) of the Constitution; and

(ii) did not participate in the last election of that provincial legislature, must be regarded as having recorded no votes during the last election of the provincial legislature concerned.

(d) If more than one party that is entitled to a delegate in a provincial legislature recorded the same number of votes during the last election of that provincial legislature or must be regarded in terms of paragraph (c) as having recorded no votes during that election, the legislature concerned must, in a manner that is consistent with democracy—

- (i) in the case of paragraph (a), 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; or
- (ii) in the case of paragraph (b), despite subsections (2) and (3), elect so many special delegates of those parties to become permanent delegates as may be required to allocate six permanent delegates to parties in the provincial delegation.”

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**Short title**

12. This Act is called the Constitutional Matters Amendment Act, 2005.

**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 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 re-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 Bill seeks to amend the Funding Act so as to—

- regulate the repayment of unspent balances of all moneys allocated to political parties from the Fund in terms of section 5 of the Funding Act when parties cease to qualify for the allocation of such moneys as a result of changes of party membership, mergers or subdivision as contemplated in items 2(1) and 3(1) of Schedule 6A to the Constitution; and
- provide for the re-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.

2.2 The Bill also seeks to amend the Determination of Delegates (National Council of Provinces) Act, 1998, so as to make provision for the re-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.

## **3. CONSULTATION**

The 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.



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