



OUR REFERENCE:

OFFICE OF THE SPEAKER

FREE STATE LEGISLATURE

Committee on Rules and Orders

Report on Negotiating Mandate on Mandating Procedures of Provinces Bill [B8-2007]

1. **Terms of Reference**

The Mandating Procedures of Provinces Bill [B8-2007] has been referred to Committee on Rules and Orders by the Speaker on 31 January 2007

2. **Briefing**

On 31 July 2007 Advocate T. Malakoane, Legal Advisor to the Free State Legislature briefed the Committee on the legal substance and the proposed amendments by the Select Committee on Security and Constitutional Affairs. The Committee further considered the Negotiating Mandate.

3. **Consideration**

The Committee considered the Bill including the proposed amendments as follows:

Mandate of the Free State Provincial Legislature:

The Free State Provincial Legislatures has conferred the negotiating mandate as follows;

☎ 051 - 4071111 / 1237 (FAX) 051 - 4483761

Private Bag X20561 BLOEMFONTEIN 9300

1. Option One: Proposed withdrawal of the bill

- a) That the Mandating Procedures of Provinces Bill [BB-2007] be withdrawn until the Constitutional provisions pertaining to the composition and leadership of a provincial delegation to the NCOP in section 60 of the Constitution of the Republic of South Africa 1996, are amended.

- b) The proposed withdrawal of the bill results from the Free State Legislature's proposed amendment of section 4 of the Mandating Procedures of Provinces bill to provide that;

"4. A Speaker of a provincial legislature, or a delegate of a provincial delegation designated by the Speaker, must cast a vote on behalf of a provincial legislature".

- c) The proposed amendment is motivated as follows;

- i) In 1996, the final Constitution was adopted by South Africa's Constitutional Assembly. It came into effect in February 1997 and created a bicameral parliament consisting of the National Assembly and the National Council of Provinces (NCOP). The NCOP, established as the second chamber of parliament, is a unique body created to facilitate provincial and local government participation in the national legislative process.

- ii) The NCOP is a concrete expression of the principles of "co-operative governance" set out in Chapter 3 of the Constitution. The NCOP is a functioning partnership among the three spheres of government: national, provincial and local. Indeed, it is the only body in South Africa in which all three spheres of government meet to formulate policy by means of including delegations from provincial legislatures. The rationale of the NCOP is to ensure that national policy is sensitive to provincial needs and concerns.

- iii) However, the practice of electing only Premiers on a rotational basis in terms of section 64(3) is not sanctioned by the Constitution. It is a practice that is probably influenced by the language of section 60(3) of the Constitution. According to section 60(3), the Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation. In the Free State, special delegates are usually members of the relevant provincial portfolio committee (often the Chairperson) or less often, the MEC entrusted with that portfolio. However, the point is that, strictly in terms of the Constitution, the Premier may delegate either an ordinary member or an MEC. Premiers head provincial executives but they have overwhelming legislative authority with regard to NCOP matters. These matters should be led by provincial legislatures. It is provincial legislatures that confer authority to vote in the NCOP and not provincial executives.

- iv) Furthermore, in the consideration of a negotiating mandate and/or when conferral of authority to vote in the NCOP takes place in provinces, those proceedings are hardly ever attended by

the Premier and MECs. Those processes (negotiating mandate and conferral of voting authority) relate to one of the primary constitutional responsibilities of the legislature, namely the consideration of legislation. The Speaker, as the head of a provincial legislature, or a person designated by the Speaker, is the appropriate office/person to head a delegation to participate in the NCOP processes on legislation.

- v) Not only is section 60(3) problematic, but also section 61(4) of the Constitution. According to that section, the Legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation, must designate special delegates, as required from time to time, from among the Members of the Legislature. To this extent, it does seem that a legislature accounts to the executive with regard to this constitutional function. This function is more legislative than executive. For that reason, Premiers should be excluded by a constitutional amendment. Premiers are members of legislatures and, as such, they should be absorbed into legislatures on legislative functions. It runs counter to the spirit of the Constitution to regard them as legislative entities separate from legislatures. This is because the NCOP provides a mechanism for provinces to perform an oversight role over the national executive, to give inputs on national legislation and to propose amendments thereto and to bring national parliament closer to the people via the provincial and local spheres of government. All these happen by means of mandates emanating from legislatures and the participation of municipal councils. Should the Constitution be amended as proposed, the NCOP processes would thus play a significant role in ensuring the institutional integrity, autonomy of provincial legislatures and enhancing the legislative authority of provincial legislatures.
- vi) The NCOP has an oversight role of the executive branch of government, be it national or provincial government. The NCOP also has a constitutional legislative function that is achieved by considering, passing, amending or even rejecting legislation that are meant for implementation by the national or provincial executive. To allow Premiers to head delegations, lead the debate and determine who must be special delegates constitute a conflict of interest. It is the role of legislatures alone to deal with legislation, maintain oversight and to facilitate public participation in the legislative and other processes.
- vii) The current constitutional provisions do not support and strengthen the principle and practice of the separation of powers between the executive and legislative branches of government.
- d) A draft bill to give effect to the proposed constitutional amendments is attached hereto.

2. Option Two: Support the bill

Subject to its interaction, deliberations and negotiations with other provinces regarding the required constitutional amendments, the Free State Legislature may consider to support the

10/09 '07 14:16 FAX

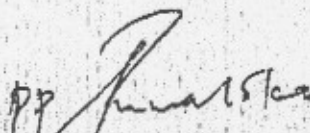
005

10/09 2007 12:13 FAX 051 4071137

DEPT OF LEGISLATURE

005/009

Mandating Procedures of Provinces Bill with amendments as proposed by the Select Committee
on Security and Constitutional Affairs.


M.A. DUKOANA
SPEAKER

Date: 10 September 2007

REPUBLIC OF SOUTH AFRICA

CONSTITUTION FIFTEENTH AMENDMENT BILL

(As introduced in the National Council of Provinces as section 74(3) Bill; explanatory
summary of the Bill published in *Government Gazette* No. of 2007)

(PERMANENT DELEGATE)

[B -2007]

GENERAL EXPLANATORY NOTE:

- [] Words in bold type is square brackets indicate omissions from existing enactments.
— 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 reconstitute the composition of the National Council of Provinces; to re-determine the allocation of delegates to the National Council of Provinces; and to provide for matters connected therewith.

BE IT ENACTED by Parliament of the Republic of South Africa, as follows:-**Amendment of section 60 of the Constitution of the Republic of South Africa, 1996**

1. Section 60 of the Constitution of the Republic of South Africa, 1996, is amended by the substitution for subsection (3) of the following subsection:

"(3) The [Premier] Speaker of a [province] provincial legislature, or if the [Premier] Speaker is not available, a member of the province's delegation designated by the [Premier] Speaker, heads the delegation."

Amendment of section 61 of the Constitution of the Republic of South Africa, 1996

2. Section 61 of the Constitution of the Republic of South Africa, 1996, is amended by the substitution for subsection (4) of the following subsection:

"(4) The legislature [, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation,] must designate special delegates, as required from time to time, from among the members of the legislature."

Short title and commencement

3. This Act is called the Constitution Fifteenth Amendment Act, 2007, and takes effect on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM

Purpose of the Bill

In 1996 the final Constitution was adopted by South Africa's Constitutional Assembly. It came into effect in February 1997 and created a bicameral parliament consisting of the National Assembly and the National Council of Provinces.

The NCOP, established as the second chamber of parliament, is a unique body created to facilitate provincial and local government participation in the national legislative process.

The NCOP is a concrete expression of the principles of "co-operative governance" set out in chapter 3 of the Constitution. The NCOP is a functioning partnership among the three spheres of government: National, Provincial and Local. Indeed, it is the only body in South Africa in which all three spheres of government meet to formulate policy by means including delegations from provincial legislatures. The rationale of the NCOP is to ensure that national policy is sensitive to provincial needs and concerns.

However, the practice of electing only Premiers on a rotational basis in terms of section 64 (3) is not sanctioned by the Constitution. It is a practice that is probably influenced by the language of section 60(3) of the Constitution. According to section 60(3) the Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation. In the Free State, Special delegates are usually members of the relevant provincial portfolio committee (often the chairperson) or less often, the MEC entrusted with that portfolio. However the point is that, strictly in terms of the Constitution, the Premier may delegate either an ordinary member or an MEC. Premiers head provincial executives; but they have overwhelming legislative authority with regard to NCOP matters. These matters should be led by provincial legislatures. It is provincial legislatures that confer authority to vote in the NCOP and not provincial executives. Furthermore, when conferral of authority to vote in the NCOP takes place in provinces, it hardly occurs that Premiers and MECs attend those proceedings in provinces. That raises the question as to how a leader of the delegation can be able to deliver the mandate and debate on behalf of a province. It is for this reason that the Constitution should be amended to give way for presiding officers and ordinary members of legislatures to represent their provinces in the NCOP in the name of legislatures.

Not only is section 60(3) problematic, but also section 61(4) of the Constitution. According to that section, the legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation, must designate special delegates, as required from time to time, from among the members of the legislature. To this extent, it does seem that a legislature accounts to the executive with regard to this constitutional function. This function is more legislative than executive. For that reason, Premiers should be excluded by a constitutional amendment. Premiers are members of legislatures and as such, they should be absorbed into legislatures on legislative functions. It runs counter to the spirit of the Constitution to regard them as legislative entities separate from legislatures. This is because the NCOP provides a mechanism for provinces to perform an oversight role

over the National Executive, to give inputs on national legislation and to propose amendments thereto and to bring national parliament closer to the people on the ground via the provincial and local spheres of government. All these happen by means of mandates emanating from legislatures and the participation of municipal councils. Should the Constitution be amended as proposed, the NCOP processes would thus play a significant role in ensuring the institutional integrity, autonomy of provincial legislatures and enhancing the legislative authority of provincial legislatures.

The NCOP has an oversight role over the executive arm of government, be it national or provincial government. The NCOP also has a constitutional legislative function which is achieved by considering, passing, amend or even rejecting laws that are meant for implementation by the national or provincial executive. To allow Premiers to lead the debates and determine who must be special delegates constitute a conflict of interest. It is the role of legislatures alone to deal with legislation, maintain oversight and to facilitate public participation in the legislative and other processes.

Clause 1

This clause reconstitutes the composition of the National Council of Provinces.

Clause 2.

This clause re-determines the allocation of delegates to the National Council of Provinces.

Clause 3

This clause sets out the short title and commencement.