



Mandating Procedures of Provinces Bill [B - 2006]

Submission to the Select Committee on Security and Constitutional Affairs

8 November 2006

1 INTRODUCTION

The South African Human Rights Commission (the Commission) welcomes the opportunity to present this submission on the Mandating Procedures of Provinces Bill [B – 2006] (the Bill). The Commission's mandate, entrenched in Chapter 9 of the Constitution, is to promote, protect, and monitor human rights. The legislative process plays an integral part in ensuring the promotion and protection of rights. This constitutionally dictated Bill seeks to support the legislative process and for this reason it is important to the Commission.

The Bill seeks to provide a uniformed procedure 'which enables the provincial legislature to confer authority on their delegation to cast votes on their behalf as required by section 65(2) of the Constitution'.¹ Section 65 (2) of the Constitution reads as follows:

' An act of Parliament enacted in accordance with the procedure established by either subsection 1 or subsection 2 of section 76 of the Constitution must provide for a[n] uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.'²

Prior to the draft Bill provinces were permitted to delegate their powers in terms of Item 21 (5) of Schedule 6 of the Constitution. In terms thereof, each provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces (NCOP). This must be read in conjunction with the Standing Rules of the Provincial Legislature.

CLAUSE 8 IS UNCLEAR

¹ The Mandating Procedure of Provinces Bill of 2006 [B-2006] as per the Long Title

² The Constitution of the Republic of South Africa Act 106 of 1996 as per section 65

Clause 8 (2) as it stands is unclear and may cause confusion. It is unclear what will occur when a matter arises and the province's final mandate cannot be cast. It is proposed that the clause should be sub-divided into two clauses as follows:

Clause 8(2)

If no matter arises from the deliberations of the NCOP select Committee when considering final mandates the provincial delegation to the NCOP from a provincial legislature must table its province's final mandate in the NCOP plenary as that province's voting mandate.

Clause 8(3)

If a matter arises from the deliberations of the NCOP select committee when considering final mandates, which may necessitate consideration by the provincial legislature to the NCOP the provincial delegation to the NCOP from a provincial legislature shall refer the matter back to the provincial legislature in terms of the Rules of the NCOP.

CLAUSE 7 AND CLAUSE 9 OF THE MEMORANDUM HAVE BEEN OMITTED FROM THE DRAFT BILL

The memorandum on the objects of the Bill carries 11 clauses. However the draft Bill only reflects 9 of these. It thus follows that two clause were omitted from the draft Bill.

Clause 7 described in the Memorandum has been omitted. It read as follows:

' Clause 7 provides for the establishment of the NCOP committee by the provincial legislature to deal with the National Council of Provinces matters.'

Clause 9 of the memorandum reads as follows:

'Clause 9 sets out the procedure to be followed when conferring of authority to vote on legislative and final mandates, if the House is not sitting'.

The Commission is of the view that these two clauses were omitted correctly from the Bill.

Clause 7 provides each province with the power to establish a committee, which will deal with the affairs of the NCOP. Clause 7 is wide in that it permits the committee to pass

final mandates on behalf of the province. This power is in direct conflict with section 112 of the Constitution, which prescribes the manner in which provincial legislatures take decisions. It states that unless the Constitution provides otherwise a majority of the provincial legislature must be present before a vote is taken on a bill.³ At least one third of the members must be present before a vote can be taken on any other question before the legislature.⁴ It thus follows that the provincial legislature cannot establish a committee that will take decisions that pertain to the conferring of authority on their delegation to cast votes on their behalf in the NCOP.

The omission of clause 7 from the Bill is in line with the Constitutional Courts' (the Court) judgment of *United Democratic Movement and the President of the Republic of South Africa & Others* (UDM judgment). In this decision the Court clearly states that the provincial legislature cannot delegate its voting power on legislation from the NCOP to a lower committees (presumptively nondelegable).⁵ In this case, the provincial legislature formed a Business Committee under section 116 of the Constitution.⁶ The Business Committee passed mandates and submitted these to the NCOP.⁷ The UDM objected to this, as it was not within the constitutional powers of the Business Committee to pass final mandates and submit it to the NCOP. By permitting the Business Committee to pass final mandates and make submissions to the NCOP the opportunity to participate in

³ Section 112 (1) (a) of the Constitution

⁴ Section 112 (1) (b) of the Constitution

⁵ *United Democratic Movement v the President of the Republic of South Africa & Others* (unreported) Case No: CCT 23/2002 at para 25

⁶ Section 116 reads as follows:

'Internal arrangement, proceeding and procedures of provincial legislature

116. (1) A provincial legislature may-
- (a) Determine and control its internal arrangements, proceedings and procedures; and
 - (b) make rules and orders concerning its business , with due regard to representative and participatory democracy, accountability, transparency, and public involvement.
- (2) The rules and orders of a provincial legislature must provide for;
- (a) the establishment , composition , powers, function, procedures and duration of its committees
 - (b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;
 - (c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and
 - (d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition.

⁷ UDM judgment note5 above para 7

a representative democracy was negated⁸. The issue before the Court was whether the actions of the provincial legislature were in line with section 70 and section 116 of the Constitution.

The spirit of the *UDM* judgment is to ensure that the legislature passes legislation in the spirit of legitimacy. The Court said as follows:

‘ [T] the rules of both the NCOP and the provincial legislature must have due regard to representative and participatory democracy, accountability, transparency and public involvement.... To the extent that the NCOP and provincial legislature fail to have due regard to these values, they are unconstitutional.’⁹

In *Fedsure Life v Greater Johannesburg Transitional Metropolitan Council*¹⁰ the Court found that central to the concept of our constitutional order lays the principle of legality. The principle of legality seeks to ensure that when the state seeks to exercise any legislative power that it is done in accordance with a constitutional framework. These legislative powers must give due regard to the values of a representative and participatory democracy, accountability, transparency and public involvement. Failing which, any delegation of power would be unconstitutional.

Clause 9 of the memorandum seeks to create procedures that would permit the provincial legislature to confer its authority to vote on legislative and final mandates if the House is not sitting. The *UDM* judgment found that lower committees do not have the constitutional mandate to make decisions i.e. determine final mandates on legislation. By implication thereof, the power of the provincial legislatures cannot be delegated to a lower committee.

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⁸ *UDM* Judgment note 5 above para 21

⁹ *UDM* judgment note 5 above para 18

¹⁰ 1998 (2) SA at para 58