

Monday, 22 June 2020]

No 78—2020] SECOND SESSION, SIXTH PARLIAMENT

PARLIAMENT

OF THE

REPUBLIC OF SOUTH AFRICA

ANNOUNCEMENTS,

TABLINGS AND

COMMITTEE REPORTS

MONDAY, 22 JUNE 2020

TABLE OF CONTENTS

ANNOUNCEMENTS

National Assembly

1. Referral to Committees of papers tabled 2
2. Bills returned for consideration of President's reservations..... 2

TABLINGS

National Assembly and National Council of Provinces

1. Speaker and Chairperson..... 14

COMMITTEE REPORTS

National Assembly

1. Justice and Correctional Services 15
2. Justice and Correctional Services 18

ANNOUNCEMENTS

National Assembly

The Speaker

1. Referral to Committees of papers tabled

- (1) The following papers are referred to the **Portfolio Committee on Environment, Forestry and Fisheries** for consideration:
 - (a) Government Notice No R. 439, published in Government Gazette No 43190, dated 31 March 2020: Directions issued by the Minister of Forestry, Fisheries and the Environment in terms of Regulation 10(8) of the Regulations issued in terms of section 27(2) of the Act: Measures to address, prevent and Combat the Spread of Covid-19, in terms of the Disaster Management Act, 2002 (Act No 57 of 2002)
 - (b) Government Notice No 421, published in Government Gazette No 43174, dated 27 March 2020: Amendment of the listed Activities and Associated Minimum Emission Standards Identified in Section 21 of the National Environmental Management: Air Quality Act, 2004 (Act No 39 of 2004).
 - (c) General Notice No 221, published in Government Gazette No 43173, dated 27 March 2020: Calling for admissions to advisory committee (High-Level panel) in terms of the National Environmental Management: Biodiversity Act, 2004 (Act No 39 of 2004).

2. Bills returned to Assembly for consideration of President's Reservations

- (1) A letter dated 16 June 2020 has been received from the President of the Republic, returning the **Copyright Amendment Bill** [B13B-2017] and the **Performers' Protection Amendment Bill** [B24B-2016] to the National Assembly for consideration of the President's reservations about their constitutionality.



16 June 2020

Dear Speaker;

REFERRAL OF THE COPYRIGHT AMENDMENT BILL [B13B - 2017] AND THE PERFORMERS' PROTECTION AMENDMENT BILL [B24 - 2016] TO THE NATIONAL ASSEMBLY

- 1 The Copyright Amendment Bill [B13B-2017] and the Performers' Protection Amendment Bill [B24- 2016] were passed by the National Assembly and referred to me for assent and signing into law.
- 2 The Copyright Amendment Bill [B13B-2017] ("the Copyright Bill") raises important matters that *inter alia* seek to accommodate the visually impaired and otherwise print disabled persons by introducing exceptions to the exclusive right of authors or their assignees preventing the reproducing or copying of their work in any manner or form. The proponents of the exception contend that without such exception, the visually impaired will have limited access to copyright literary works as such works cannot be transcribed to braille and

other formats for the print disabled. Educators and librarians also seek greater and easier access to works of all kinds; broadening access is aimed at increasing access to information and facilitating freedom of expression. The Bill seeks to address all of these issues.

- 3 According to section 79(1) of the Constitution, the President must either assent to and sign the Bill referred to him by the National Assembly or, if he or she has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- 4 My office received submissions against the signing of the two Bills into law as well as submissions in favour of my assenting to the two Bills.
- 5 In considering the numerous and varied submissions made and the process followed in Parliament to pass the Bills, I have a number of reservations as to the Constitutionality of the Bills. These reservations lead me to conclude that, in its present form, the Bill may not pass constitutional muster and may therefore be vulnerable to constitutional challenge. I set out below those constitutional matters that require reconsideration so that these important statutes achieve their intended purpose without the risk of being set aside by the courts.
- 6 I raise the constitutional issues below, mindful of the noble objectives of the amendments and with the intention that these objectives may yet be achieved in a manner that accommodates the visually impaired, educators, students and

others who are meant to benefit from their provisions, without opening the statutes to future constitutional challenges, which would further impact on the very access the Bill seeks to facilitate.

- 7 The submissions received raise a series of issues with the Copyright Bill some of which I set out below. While I am encouraged by the objects of the Bill, I am dutybound to ensure that all possible constitutional vulnerabilities have been cured. The National Assembly is the body entrusted with such a task. I have considered the legal opinions obtained and the issues raised, and concluded that in order to do justice to these important Statutes, the National Assembly must satisfy itself that all the legitimate issues raised have been considered in the final Bills for signature by the President.

Incorrect Tagging

- 8 Many statutes have been set aside by our courts for incorrect tagging even if their substance passes constitutional muster. I set out below those issues that relate to the tagging of these Bills and which have been raised in the submissions I considered and form the basis for my referral of the Bills back to the National Assembly.
- 9 The Copyright Amendment Bill ("the Copyright Bill") and the Performers' Protection Amendment Bill have been incorrectly tagged as section 75 Bills when they are actually section 76 Bills by reason of those of their provisions which substantially affect two areas listed in schedule 4 to the Constitution, namely cultural matters and trade.

9.1 The Copyright Bill obviously affects trade because sections 6A, 7A, 8A, 39(cG), (cl), 22(3), 7B-F and 22A of the Bill provide for how copyright may be traded.

9.2 The Bill further affects cultural matters since indigenous works will become eligible for payment of royalties under the Bill. Indigenous work is defined in section 1 of the Copyright Bill as literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, or an indigenous community and which work is regarded as part of the heritage of such community. The Bill itself was referred to the House of Traditional Leaders for its comments in terms of section 18(1) of the Traditional Leadership and Governance Framework Act 41 of 2003.¹ This supports the view that the Bill deals with cultural matters as contemplated in Schedule 4 of the Constitution.

9.3 The Performers' Protection Amendment Bill affects performances and performers of "traditional works" including cultural expressions or knowledge, and the rights of these performances. It further regulates the manner in which related performances are made and shared.

10 The Bills therefore ought to have been enacted in terms of the section 76 process.

¹ Explanatory Memorandum to the Bill, para 6.9. The referral was done on 11 September 2017.

Retrospective and arbitrary deprivations of property

- 11 I also have reservations that Sections 6A(7), 7A(7) and 8A(5) of the Copyright Bill may constitute retrospective and arbitrary deprivations of property. These provisions mean that going forward, copyright owners will be entitled to a lesser share of the fruits of their property than was previously the case. The impact of these provisions reaches far beyond the authors it seeks to protect – those that live in poverty as a result of not having been fairly protected in the past. The retrospective provisions deprive copyright owners of property without sufficient reason and will therefore result in substantial and arbitrary deprivation of property. In addition, the uncertainty created by its unlimited retrospective operation, how assignment by multiple authors would work or what would happen if the owner of the copyright is a non-profit organisation aggravates the situation. The sections which raise this concern are likely not to survive constitutional challenge.

Fair Use

- 12 Following public hearings in August 2017, substantial amendments were effected to various sections of the Bill, including section 12A which deals with the fair use of a work or performance of a work. The relevant provisions as amended were not put out for public comment before the final version of the Bill was published. The changes made to this particular section of the Bill were material to the scheme as a whole and the failure to consult, in the face of such materiality of the amendments, could render the provisions constitutionally invalid.

Impermissible delegation of legislative power to the Minister

13 Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) confer substantial discretionary powers on the Minister and this may well constitute an impermissible delegation of legislative authority, and as such would be constitutionally invalid if the Bill is assented to in its current form.

14 Section 6A(7)(b) permits the Minister to make key decisions regarding the deprivation of property (copyright) from those to whom it was assigned in the past. This also has the effect that there is no participation process to which litigation is generally subjected. In this regard, I have reservations that the Bill fails to provide for the oversight role by the NCOP. The contention is that the decision making process in the Bill is in fact within the domain of the National Assembly and is therefore an impermissible delegation.

The Copyright exceptions

15 The Copyright Bill introduces copyright exceptions in the new sections 12A to 12D, 19B, and 19C. From my reading of the various submissions and advice, a number of issues arise from these provisions which may constitute reasonable grounds for constitutional challenges for the following reasons:

15.1. Sections 12 and 19 include exceptions and limitations that seek to align the Bill with the Marrakesh Treaty. However, sections 12A, 12B (1) (a) (i), 12B (1) (c), 12B (1) (e) (i), 12B (1) (f), 12D, 19C 93), 19C (4), 19 (c) (5) (b) and 19 (9) may constitute arbitrary deprivation of property.

Section 12A and 12D may further run the risk of violating the right to freedom of trade, occupation and profession;

15.2. It is also clear that these sections may be in conflict with the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty both of which have been signed by South Africa, although they are yet to be acceded to. If these exceptions and limitations run the risk of constitutional challenges, they require reconsideration by the National Assembly.

15.1 There is also a contention that the Copyright Bill breaches the Three-Step Test, first established under Article 9(2) of the Berne Convention to which South Africa is bound in terms of section 231(5) of the Constitution, The Three-Step Test is also referred to extensively in the Marrakesh Treaty. The Test is that an exception or limitation:

20.1. shall cover only certain special cases;

20.2. shall not conflict with the normal exploitation of the work; and

20.3. shall not unreasonably prejudice the legitimate interests of the rightsholder.

International Treaty Implications

16 The Bill seeks to align national legislation with international treaties which have been reviewed and are in the process of being acceded to by South Africa,

including the World Intellectual Property Organization (“WIPO”) digital treaties, namely, the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are blind, visually impaired or otherwise print disabled. It is not necessary for me to provide

- 17 The WIPO Copyright Treaty was adopted in Geneva on 20 December 1996. It is a special agreement under the Berne Convention dealing with the protection of works and the rights of the authors of such published works. It grants authors the right to authorize distribution, rental and communication to the public of their work. It further provides legal remedies against the circumvention of technological measures used by authors to protect their works. South Africa has signed this treaty although we have not yet acceded to it.
- 18 The WIPO Performance and Phonograms Treaty is another relevant international treaty signed by the member states of WIPO. South Africa has signed this treaty, but has not yet acceded to it. Like the WIPO Copyright Treaty, it was adopted in Geneva on 20 December 1996 but came into effect on 20 May 2002. It deals with the rights of performers and producers of phonograms. It grants performers economic rights in their performances, i.e. the right of reproduction, the right of distribution, the right of rental as well as the right of making it available. Various of the submissions received by my office expressed concern about the economic implications of the Bills as they relate to the economic rights of performers. It is not clear that the Bills appropriately consider the implications in this regard of the WIPO Performance and Phonograms Treaty.

- 19 The Marrakesh Treaty is a multilateral treaty on copyright and was adopted in Marrakesh, Morocco, on 28 June 2013. It has a bearing on the rights contained in the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. Since first signed by India, many other countries seeking to cater for their visually impaired have signed it and enacted statutes that seek to facilitate the terms of the treaty within their relevant national statutes. Its objective is to facilitate access to published works by visually impaired persons and persons with print disabilities. It is the first treaty to deal with copyright exceptions. It seeks to harmonize and strike a balance between the interests of rights-holders and vulnerable users, particularly the visually impaired and print disabled persons. It does this by allowing for copyright exceptions to facilitate accessible versions published books and other copyrighted works for visually impaired persons. It also requires contracting parties to include limitations and exceptions in order to allow reproduction, distribution and formats of published works designed for the visually impaired persons. It also seeks to facilitate exchange of published works between different countries.
- 20 The Marrakesh Treaty also includes in its definition of affected persons, persons with physical disabilities that prevent them from holding a book or any such published work if it requires holding in order for one to read. In its definition of “works” it includes works “...*in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.*”

- 21 I have reservations about whether the Bills comply with the above Treaties and am therefore referring the Bills back to Parliament in order that it may consider the Bills against South Africa's International Law obligations.

Referral

- 22 I have considered both the Bills, all submissions received and the process followed by Parliament in passing the Bills. Having done so, I have reservations about the constitutionality of the Bills for the following reasons:

22.1 I am of the view that the Bills have been incorrectly tagged and that they ought to have been classified and passed as section 76 Bills. This is primarily because their provisions have an impact on "Trade" and "Cultural matters" as contemplated in Schedule 4 of the Constitution.

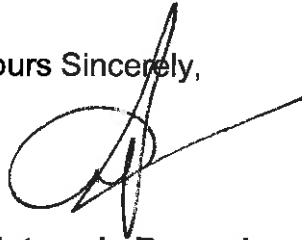
22.2 The retrospective application of the proposed new sections 6A, 7A and 8A of the Copyright Bill to copyright assigned before the new sections come into operation may indeed be unconstitutional on the ground that it constitutes an arbitrary deprivation of property under section 25 of the Constitution.

22.3 The new exceptions introduced by sections 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

23 For the reasons set out above, and in terms of section 79(1) of the Constitution, I hereby express my reservations about the constitutionality of the Bills. I request the National Assembly to consider these Bills afresh so that their objectives can be realized speedily and without the risk of any constitutional challenge.

24 Although the submissions broadly related to the constitutionality of the Copyright Bill, similar concerns have been raised in relation to the provisions of the Performers Protection Amendment Bill, which incorporate the provisions of the Copyright Bill through cross-referencing. It follows that both Bills ought to be referred back to the National Assembly in terms of section 79(1) of the Constitution.

Yours Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke extending to the right.

Mr Cyril Matamela Ramaphosa
President of the Republic of South Africa

Honorable Thandi Modise, MP
Speaker of the National Assembly
Parliament of the Republic of South Africa
P. O. Box 15
CAPE TOWN
8000

TABLINGS

National Assembly and National Council of Provinces

1. The Speaker and the Chairperson

- (a) Monthly Financial Statements of Parliament – May 2020, tabled in terms of section 54(1) of the Financial Management of Parliament and Provincial Legislatures Act, 2009 (Act No 10 of 2009).
-

COMMITTEE REPORTS

National Assembly

1. Report of the Portfolio Committee on Justice and Correctional Services on the Notices determining the remuneration of the Public Protector and Commissioners of the South African Human Rights with effect from 1 April 2019, dated 19 June 2020

1. In a letter to the Speaker, dated 26 March 2020, the President requested the National Assembly to consider Notices determining the salaries and allowances payable to office bearers of independent constitutional institutions with effect from 1 April 2019.
2. On 8 April 2020, the matter was referred to the Committee for it to consider the proposed determination of the salaries and allowances payable to the Commissioners of the South African Human Rights Commission, and to the Public Protector.
3. Section 219 (5) of the Constitution of the Republic of South Africa, 1996, provides that national legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor -General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to section 192. The Determination of Remuneration of Office Bearers on Independent Constitutional Institutions Laws Amendment Act 22 of 2014, which came into operation on 1 April 2019, creates the necessary framework to determine the salaries of office bearers of the Chapter 9 institutions. Among others, the Act amends the Public Protector Act 23 of 1994 and South African Human Rights Commission Act 40 of 2013 to provide a process to determine the salaries of the office bearers of these constitutional institutions.
4. Specifically, section 2(2) of the Public Protector Act, 1994, read with section 17 of the Determination of Remuneration of Office Bearers on Independent Constitutional Institutions Laws Amendment Act, 2014, provides that the Public Protector is entitled to such salary, allowance and

benefits as determined by the President, from time to time, by Notice in the Gazette, after taking into account the recommendations of the Independent Commission.

5. Section 2(3) of the Public Protector Act, 1994, requires that the National Assembly resolve to approve the Notice, whether in whole or in part; or disapprove the determination, before publication.
6. Section 9(1) of the South African Human Rights Commission Act, 2013, read with section 17 of the Determination of Remuneration of Office Bearers on Independent Constitutional Institutions Laws Amendment Act, 2014, provides similarly with respect to the salaries, allowance and benefits of the full and part-time Commissioners of the South African Human Rights Commission.
7. Section 9(5) of the South African Human Rights Commission Act, 2013, requires the President to submit the Notice to the National Assembly for approval, whether whole or in part, or disapproval, before publication.
8. The Independent Commission gazetted its recommendations on 13 February 2020 (GG No. 43019, 13 February 2020), having consulted with the institutions concerned and the relevant Ministers to better understand the remuneration of office bearers in the various independent constitutional institutions, as well as related concerns and challenges. Pending a major salary review, the Independent Commission recommended that the office bearers be treated in line with other public office bearers receiving:
 - A 3% adjustment to the remuneration of all categories of public office bearers earning above R1 500 000.
 - 4% for all categories earning below R1 500 000.
9. Having taken into account the serious economic challenges that the country faces and the constrained fiscal environment, the President, however, has proposed:

- A salary-freeze for office-bearers earning R1.5 million and above.
 - A 2.8% adjustment for office-bearers earning between R1 million and R1.5 million.
 - A 4.5% adjustment for office-bearers earning below R1 million.
10. Concerning the proposed commencement date, namely 1 April 2019, the Committee is of the view that the proposed date does not comply with section 2(B) of the Public Protector Act, 1994, and section 9(4) of the South African Human Rights Commission Act, 2013, as already more than a year has passed without the Notices having been published in the Gazette. The Committee, therefore, proposes that before the Notices are published, the proposed commencement date of 1 April 2019 is amended to 1 July 2019 in order to comply with the provisions mentioned.

Recommendation

11. The Committee recommends that the National Assembly resolve to approve the Notices determining the remuneration of the Public Protector and Commissioners of the South African Human Rights with the condition that the President amends the commencement date before publication of the Notices in the Gazette to 1 July 2019.

Report to be considered

2. Report of the Portfolio Committee on Justice and Correctional Services on Government Notice No R. 1692 published in Government Gazette No 42916 dated 20 December 2019: Regulations for Judicial Officers in the Lower Courts, 1993: Amendment, made under section 16 of the Magistrates Act, 1993 (Act No 90 of 1993), dated 19 June 2020

The Portfolio Committee on Justice and Correctional Services, having considered Government Notice No R. 1692 published in Government Gazette No 42916 dated 20 December 2019: Regulations for Judicial Officers in the Lower Courts, 1993: Amendment, made under section 16 of the Magistrates Act, 1993 (Act No 90 of 1993), referred to it, reports as follows:

1. The Notice containing amendments to the Regulations for Judicial Officers in the Lower Courts, 1993, was referred to the Committee for consideration on 10 February 2020.
2. The Committee was briefed on the contents of the amendments to the Regulations on 17 June 2020. Briefly, the amended Regulations address the leave dispensation applicable to judicial officers of the lower courts with the intention to further de-link the magistracy from public service prescripts to allow for greater independence.
3. The Committee notes, further, that the amended Regulations came into operation on 1 January 2020.

4. The Committee notes further that section 16(2)(A) of the Magistrates Act, 1993 provides that a “[R]egulation made under this section shall be in force unless and until Parliament ... by resolution disapproves the regulation, in which event the regulation shall lapse with effect from a date to be specified in the resolution”.
5. Having considered Government Notice No R. 1692 published in the Government Gazette No 42916 dated 20 December 2019: Regulations for Judicial Officers in the Lower Courts, 1993: Amendment, made under section 16 of the Magistrates Act, 1993 (Act No 90 of 1993), the Committee confirms the Notice.

Report for information purposes.