

# Constitution of the Republic of South Africa Amendment Bill, 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*.

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**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.