

Constitution of the Republic of South Africa Second Amendment Bill, 2001

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.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA SECOND AMENDMENT BILL, 2001

To amend the Constitution of the Republic of South Africa, 1996—

- to provide for the introduction of certain financial legislation in the National Assembly only, and only by the Cabinet member responsible for national financial matters;
- to provide for Bills regulating certain financial matters to be dealt with in Parliament in terms of section 76 (1) of the Constitution;
- to extend the definition of a money Bill;
- to provide for national supervision of local administration if a municipality fails to comply with an obligation in terms of legislation or the Constitution;
- to further regulate national supervision of provincial administration;
- to extend the principle that provinces' equitable share of revenue raised nationally are direct charges against the National Revenue Fund, to local government's equitable share;
- to further regulate the withholding of funds by the national treasury if organs of state commit a serious and material breach of legislation prescribing treasury norms and standards;
- to provide that the enactment of national framework legislation governing the policies of organs of states on preferential procurement should be obligatory;
- to provide for the enactment of national framework legislation in connection with the withdrawal of money as direct charges against a Provincial Revenue Fund and certain payments from a Provincial Revenue Fund to municipalities;
- to reduce the number of members of the Financial and Fiscal Commission, and to change the appointment procedure;
- to make further provision for the regulation of municipal and provincial borrowing powers; and
- to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:—

Amendment of section 73 of Act 108 of 1996

1. Section 73 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended –

(a) by the substitution for subsection (2) of the following subsection:

"(2) Only a Cabinet member or a Deputy Minister, or a member or committee

of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill [in the Assembly]; or

(b) a Bill which provides for legislation envisaged in Chapter 13 except when that legislation –

(i) relates to the financial administration of Parliament or the provincial legislatures;

(ii) determines a matter mentioned in section 219; or

(iii) regulates rates on property in terms of section 229 (2) (b)."; and

(c) by the substitution for subsection (3) of the following subsection:

"(3) A Bill referred to in section 76 (3), except **[a money Bill]** a Bill referred to in subsection (2) (a) or (b) of this section, may be introduced in the National Council of Provinces."

Amendment of section 76 of Act 108 of 1996

2. Section 76 of the Constitution is hereby amended by the substitution for paragraph (b) of subsection (4) of the following paragraph:

"(b) envisaged in Chapter 13 and which **[affects]** contains a provision affecting the financial interests of the provincial sphere of government."

Substitution of section 77 of Act 108 of 1996

3. The following section is hereby substituted for section 77 of the Constitution:

"Money Bills

77. (1) A Bill [that] is a money Bill if it –

(a) appropriates money; [or]

(b) imposes national taxes, levies, [or] duties or surcharges [is a money Bill];

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money, [or] the imposition, abolition or reduction of, or the granting of exemptions from, taxes, levies or duties or the authorisation of direct charges.

[(2)](3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament. "

Substitution of section 100 of Act 108 of 1996

4. The following section is hereby substituted for section 100 of the Constitution:

"National supervision of provincial and local administration

100. (1) When a province or municipality cannot or does not fulfil an **[executive]** obligation in terms of legislation or the Constitution, excluding an obligation to pass legislation in the case of a province, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

(a) issuing a directive to the provincial executive or the municipality, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that province or municipality to the extent necessary to –

(i) maintain essential national standards; **[or]**

(ii) meet established minimum standards for the rendering of a service;

[(ii)](iii) maintain economic unity;

[(iii)](iv) maintain national security; or

[(iv)] (v) prevent that province or municipality from taking unreasonable action that is prejudicial to the interests of another province or municipality or the country as a whole.

(2) If the national executive intervenes in a province or municipality in terms of subsection (1) (b) –

(a) notice of the intervention must be **[tabled in]** submitted to the National Council of Provinces within 14 days **[of its first sitting]** after the intervention began;

(b) the intervention must end **[unless it is approved by]** if the Council [within 30 days of its first sitting after the intervention began] by resolution requests the national executive to stop the intervention; and

(c) the Council **[must]** may review the intervention regularly and make any appropriate recommendations to the national executive.

(3) National legislation –

(a) may regulate the process established by this section; and

(b) must co-ordinate the process established by this section with the process established by section 139."

Substitution of section 120 of Act 108 of 1996

5. The following section is hereby substituted for section 120 of the Constitution:

"Money Bills

120. (1) A Bill **[that]** is a money Bill if it –

(a) appropriates money; [or]

(b) imposes provincial taxes, levies, [or] duties or surcharges [is a money Bill];

(c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or

(d) authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money, [or] the imposition, abolition or reduction of, or the granting of exemptions from, taxes, levies or duties or the authorisation of direct charges.

[(2)](3) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill."

Substitution of section 139 of Act 108 of 1996

6. The following section is hereby substituted for section 139 of the Constitution:

"Provincial supervision of local government

139. (1) When a municipality cannot or does not fulfil an **[executive]** obligation in terms of legislation or the Constitution, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

(a) issuing a directive to the **[Municipal Council]** municipality, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —

(i) **[to]** maintain essential national standards; **[or]**

(ii) meet established minimum standards for the rendering of a service;

[(ii)](iii) [to] prevent that **[Municipal Council]** municipality from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii)] (iv) [to] maintain economic unity.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b) —

[(a) the intervention must end unless it is approved by the Cabinet member responsible for local government affairs within 14 days of the intervention;]

[(b)](a) notice of the intervention must be **[tabled in]** submitted to the provincial legislature and **[in]** the National Council of Provinces within 14 days **[of their respective first sittings]** after the intervention began;

[(c)](b) the intervention must end **[unless it is approved by]** if the Council **[within 30 days of its first sitting after the intervention began]** by resolution requests the provincial executive to stop the intervention; and

[(d)](c) the Council **[must]** may review the intervention regularly and make any appropriate recommendations to the provincial executive.

(3) National legislation may regulate the process established by this section."

Amendment of section 159 of Act 108 of 1996, as amended by section 1 of Act 65 of 1998

7. Section 159 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 100 or 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected."

Amendment of section 163 of Act 108 of 1996

8. Section 163 of the Constitution is hereby amended by the substitution for paragraph (b) of the following paragraph:

"(b) determine procedures by which local government may –

(i) consult with the national or a provincial government; and

(ii) designate representatives to participate in the National Council of Provinces. [and

(iii) nominate persons to the Financial and Fiscal Commission]".

Amendment of section 213 of Act 108 of 1996

9. Section 213 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) [A province's] The equitable share of revenue raised nationally to which provinces and local government are entitled in terms of section 214 is a direct charge against the National Revenue Fund."

Amendment of section 216 of Act 108 of 1996

10. Section 216 of the Constitution is hereby amended by –

(a) the substitution for subsection (2) of the following subsection:

"(2) [The national treasury, with the concurrence of the Cabinet member responsible for national financial matters, may stop the transfer of funds to an organ of state only for serious or persistent material breach of the measures established in terms of subsection (1)] The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures."; and

(b) the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

"(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1) (b) may be taken only in [terms of] the circumstances mentioned in subsection (2) and –".

Amendment of section 217 of Act 108 of 1996

11. Section 217 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) [may] must be implemented."

Amendment of section 221 of Act 108 of 1996, as amended by section 2 of Act 2 of 1999

12. (1) Section 221 of the Constitution is hereby amended –

(a) by the substitution for subsection (1) of the following subsection:

"(1) The Commission consists of the following women and men appointed by the President as head of the national executive:

(a) a chairperson and deputy chairperson;

(b) [nine persons each of whom is nominated by the Executive Council of a province, with each province nominating only one person] two persons chosen after consulting the Premiers of the provinces;

(c) two persons [nominated by] chosen after consulting organised local government [in terms of section 163]; and

(d) [nine] two other persons."; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) Members of the Commission must have [appropriate] expertise relevant to the functions of the Commission."

(2) Subsection (1) takes effect on 1 April 2002.

Amendment of section 226 of Act 108 of 1996

13. Section 226 of the Constitution is hereby amended by the addition of the following subsection:

"(4) National legislation may determine a framework within which –

(a) a provincial Act may in terms of subsection (2) (b) authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and

(b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province."

Amendment of section 228 of Act 108 of 1996

14. Section 228 of the Constitution is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) flat-rate surcharges on [the tax bases of] any tax, levy or duty that is imposed by national legislation, other than [the tax bases of] on corporate income tax, value-added tax, rates on property or customs duties."

Substitution of section 230 of Act 108 of 1996

15. The following section is hereby substituted for section 230 of the Constitution:

"Provincial and municipal loans

230. (1) A province or a municipality may raise loans for capital or current expenditure, [in accordance with reasonable conditions determined by national legislation] but loans for current expenditure -

(a) may be raised only when necessary for bridging purposes during a fiscal year and

(b) must be repaid within [twelve months] the same fiscal year.

(2) The power of a province or a municipality to raise loans may be regulated by national legislation.

[(2)](3) National legislation referred to in subsection [(1)] (2) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered."

Short title

16. This Act is called the Constitution of the Republic of South Africa Second Amendment Act, 2001, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA SECOND AMENDMENT BILL, 2001

(Published in terms of Rule 258(3) of the Rules of the National Assembly)

The broad object of the Bill is to address a range of practical difficulties that were encountered in implementing the Constitution, especially the financial regime established by the Constitution. As these difficulties are diverse and mostly unrelated, the object of each proposed amendment contained in the Bill can best be explained under a discussion of the sections that are affected.

1. Section 73

Section 73 (2) establishes the principle that only a Cabinet member, a Deputy Minister or a member or committee of the National Assembly may introduce draft legislation in the National Assembly, but that only the Cabinet member responsible for national financial matters, i.e. the Minister of Finance, may introduce a money Bill in the Assembly. The Bill proposes that the principle that only the Minister of Finance may introduce a money Bill be extended to all legislation emanating from the provisions of Chapter 13 of the Constitution, except when that legislation—

(a) relates to the financial administration of Parliament or the provincial legislatures; or

(b) deals with the remuneration of persons holding public office mentioned in section 219, or

(c) regulates rates on property in terms of section 229 (2) (b).

The effect of this amendment is that only the Minister of Finance would be constitutionally competent to introduce in the Assembly money Bills and generally most other financial legislation which gives effect to Chapter 13. The financial legislation that would be affected by the amendment relates exclusively to typical financial matters that impact on macro-economic policy and the financial administration of the state. Normally this legislation would fall within the line function of the National Treasury, and the aim of the amendment, therefore, is to ensure that the National Treasury assesses such draft legislation and the impact it may have on macro-economic policy and the financial administration of the state before such legislation is introduced.

2. Section 76 (4) (b)

The proposed amendment of this section is aimed at avoiding the splitting of draft financial legislation into section 75 and 76 Bills where some provisions of the legislation affect the provinces and others do not. It is accordingly proposed that a Bill envisaged in Chapter 13 of the Constitution in future be dealt with in the parliamentary proceedings in terms of section 76 (1) if it contains a provision affecting the financial interests of the provincial sphere of government; in other words in terms of the procedure which requires the Bill to be passed by the National

Council of Provinces as well. This amendment would not affect the parliamentary proceedings on money Bills which in terms of sections 77 (2) and 76 (6) of the Constitution must be dealt with in accordance with the section 75 procedure.

3. Section 77

This section defines a money Bill. The proposed amendment extends this definition to include Bills abolishing or reducing, or granting exemptions from, any national taxes, levies, duties or surcharges, or authorising direct charges against a Revenue Fund. Read with section 73, the implication of this proposed amendment is that only the Minister of Finance would be competent to introduce legislation which abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges or which authorises the withdrawal of money from the National Revenue Fund as direct charges against the Fund.

4. Sections 100 and 139

Section 100 of the Constitution empowers the national executive to intervene in a province if the province fails to fulfil an executive obligation imposed on the province in terms of legislation or the Constitution. If the national executive intervenes in terms of this section, it may either direct the province to take steps to meet its obligations or otherwise assume responsibility for the relevant obligation if that is necessary to maintain national standards, to meet established minimum standards for the rendering of a service, to maintain economic unity, to maintain national security or to prevent unreasonable action from the province. A similar provision is found in section 139 which provides for a province to intervene in a municipality if the municipality fails to fulfil an executive obligation imposed in terms of legislation. The Constitution does not provide for the national executive to intervene in a municipality directly. Such interventions are restricted to a province as the Constitution currently reads.

This regime created by sections 100 and 139 in terms of which the national government may intervene in a defaulting province and only a province may intervene in a defaulting municipality, is out of line with the other provisions of the Constitution which depicts government as three distinctive, inter-dependent and inter-related spheres. To the extent then that the constitutional relationships between the three spheres are generally direct and not hierarchical, sections 100 and 139 must be seen as a constitutional anomaly that should be corrected by extending the power to intervene in municipalities to the national government as well.

Another reason why these sections should be corrected is the fact that provinces have very little capacity in some functional areas, such as water and electricity supply systems. If a municipality defaults on its obligations in this regard, there is very little a province can do by way of an intervention apart from facilitating national institutions to assume the responsibility.

The Bill consequently proposes amendments to both sections. It is suggested that section 100 be amended to give the national executive the same power to intervene in a non-complying municipality as section 139 confers on provinces. The section 139 power of a province to intervene will not be affected by the amendment, but will remain and become a concurrent power. As such there would appear to be a need for coordination of the processes established by the two sections. It is proposed that such coordination be provided by national legislation, and a provision to this effect is accordingly inserted in section 100 (3). Apart from these amendments, it is also proposed to make certain technical changes to section 100, viz:

- The adjective "executive" before the word "obligation" is deleted as the Constitution and certain legislation such as the Local Government: Municipal Systems Act, 2000, place certain obligations of a legislative nature on municipalities, e.g. the annual passing of a budget. Legislative obligations of provinces are specifically excluded as the national executive cannot pass provincial laws by way of an intervention.
- Section 100(1)(b)(i) is split into two separate subparagraphs to disconnect the maintenance of essential national standards from the words "for the rendering of a service". These words should apply to the second part of the sentence

only, viz. to established minimum standards. See in this connection section 44 (2) (c) and (d) where the distinction is properly drawn.

- Section 100(2)(b) is changed to give the National Council of Provinces a direct veto over national interventions instead of the current process requiring the Council's approval within 30 days as a precondition for the survival of the intervention.
- The current burden on the NCOP in terms of section 100 (2) (c) to review the intervention regularly and to make appropriate recommendations to the national executive, is removed and replaced by a discretionary power. This means that the NCOP may review an intervention at any time and make recommendations if it so chooses.

The proposed amendments to section 139 are confined to technical changes similar to those suggested for section 100. (See bullets above.)

5. Section 120

This section defines the provincial equivalent of a money Bill. The definition of provincial money Bills is amended along similar lines as proposed for national money Bills and includes Bills which abolish or reduce, or grant exemptions from, any provincial taxes, levies, duties or surcharges, or which authorise direct charges against the Provincial Revenue Funds. As section 119 currently states that only the member of the Executive Council responsible for financial matters in the province may introduce a money Bill in the provincial legislature, the effect of the amendment is that only the MEC for finance in a province is competent to introduce legislation abolishing or reducing, or granting exemptions from, any provincial taxes, levies, duties or surcharges, or authorising the withdrawal of money from a Provincial Revenue Fund as direct charges against the Fund. This amendment is necessary to ensure integration and coherence, and also financial discipline, in the provincial budget process.

6. Section 159 (3)

This is consequential to the amendment of section 100, which extends the national intervention power to municipalities. Subsection (3) of section 159 refers to a municipal council which has been dissolved following an intervention in terms of a provincial intervention under section 139. This amendment adds a reference to section 100 as a dissolution of a municipal council will also be possible in terms of an intervention under section 100.

7. Section 163 (b) (iii)

It is proposed that this section be amended to delete the current obligation on Parliament to provide in an Act of Parliament for the determination of a procedure in terms of which local government may nominate persons for appointment to the Financial and Fiscal Commission. This amendment is consequential to the proposed amendment of section 221 concerning the composition of the Commission.

8. Section 213

In terms of section 213 money can be withdrawn from the National Revenue Fund either in terms of an appropriation by an Act of Parliament or as a direct charge authorised by the Constitution or an Act of Parliament. The section currently provides that provinces' equitable share of revenue raised nationally must be paid to provinces as a direct charge against the Revenue Fund but is silent on how local government's equitable share must be withdrawn from the Fund. The Bill proposes to extend this principle to local government's equitable share.

The proposed change is based on practical considerations and on the current need for two separate Acts of Parliament to authorise the same transfer. Currently the annual Division of Revenue Act contemplated in section 214 which, like the budget, is passed annually, must provide for the division of revenue raised nationally among the spheres and for additional allocations to provinces and municipalities from the national share. The Division of Revenue Act is not an appropriation Act and its revenue division provisions cannot be understood as authorising the withdrawal of

funds from the Revenue Fund. This necessitates the inclusion in the budget as ordinary appropriations of those transfers that are not direct charges, such as local government's equitable share and any additional allocations to provinces and municipalities.

9. Section 216

The proposed amendments to section 216 are merely technical in nature and clarify certain ambiguities in the section without affecting the constitutional principles embodied in the section. These principles remain unaltered.

Subsection (2) as presently formulated is particularly ambiguous and on a literal reading has certain consequences that could never have been intended. To facilitate a better understanding of the true intention and to avoid misinterpretations and misunderstandings between affected parties, it is proposed that the whole subsection be redrafted as proposed in the Bill. The redraft firstly avoids the words in the current subsection that the National Treasury may stop the transfer of funds to an organ of state only *with the concurrence of the Cabinet member responsible for national financial matters*. These words obscure the content of the "national treasury" and do not recognise the fact that the Cabinet member responsible for national financial matters is the head of the national treasury and in fact the institution in which the power and authority of the national treasury vest. To suggest, as the current formulation implies, that the National Treasury and the Cabinet member responsible for national financial matters are different institutions, is artificial and practically untenable. Secondly, the current formulation implies that the only circumstances in which the stopping of funds to an organ of state is allowed, is when the organ of state commits a serious or persistent material breach of the norms and standards prescribed in terms of section 216 (1). This interpretation obscures the whole practice of transfer payments, but especially the enforcement of the conditions on which conditional grants are given to provinces and municipalities in terms of section 114 (1) (c). Obviously, the idea of a conditional grant is that if the conditions are not met, the grant may be stopped. The question whether a province or a municipality has committed a serious or persistent material breach of the treasury norms and standards should have no bearing on a decision to stop transfers of a conditional grant when conditions are not met, and section 216 (2) should not come into play when transfers are stopped because of non-compliance with the conditions of a grant.

The redraft of section 216 (2) now makes it clear that the stopping of funds is a mechanism to enforce the treasury norms and standards prescribed in terms of subsection (1), but a mechanism that may be used only where there is a serious or persistent material breach of these norms and standards. It avoids the implication of the current formulation that the only instance where the stopping of funds is allowed is when a serious or persistent material breach of the norms and standards has been committed.

For the same reason, the proposed amendment to section 216 (3) brings the section into line with its true intention, and confines its application to the stopping of a province's equitable share.

10. Section 217

This section provides that when organs of state and certain other institutions procure goods and services they must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It further allows organs of state and institutions to implement a procurement policy providing preferences for persons disadvantaged by unfair discrimination. The proposed amendment to this section makes it mandatory for organs of state and institutions to implement their preferential procurement policies within a framework set out in national legislation.

11. Section 221

The proposed amendment to this section alters the composition of the Financial and Fiscal Commission by reducing the number of members from 22 to 8 persons. Currently each of the provinces is entitled to nominate one person, whilst the

President may appoint nine additional members to balance the nine provincial members. In terms of the amendment the President will appoint two members after consulting the provinces and two additional members. The two local government members are retained but will in future be appointed by the President after consultation with organised local government. A previous amendment to the Constitution removed the need for the chairperson and deputy chairperson to be full-time members of the Commission.

12. Section 226

The Bill proposes the addition of a further subsection which would enable Parliament to determine a framework within which provinces—

- may authorise direct charges against their Revenue Funds; and
- must pay revenue allocated through a province to local government in that province to municipalities in the province.

Framework legislation is necessary to achieve proper and uniform budgetary processes in the provinces and also to ensure that direct charges are treated by all provinces as an exceptional form of authorising expenditure. There is also a need in the context of section 226 to ensure that the allocation of money to local government through a province is divided among municipalities in the province in accordance with national government's criteria.

13. Section 228 (1) (b)

In terms of the existing provision provinces are empowered to impose flat rate surcharges on the "tax bases" of any levy or duty other than the tax bases of corporate income tax, value-added tax, rates on property or customs duty. The reference to "tax bases" is deleted as these words have no definite meaning in the context they appear in the section.

14. Section 230

The proposed amendment deletes the requirement that a province or municipality may raise loans for capital or current expenditure only "in accordance with reasonable conditions determined by national legislation" and replaces it with the same controlling mechanisms that apply in the case of provincial and municipal fiscal powers. See sections 228 (2) and 229 (2).

Parliamentary procedure

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the proposed amendments fall within the ambit of section 74(3)(b) of the Constitution and consequently require the approval of both the National Assembly and the National Council of Provinces.