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## GENERAL NOTICE

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### NOTICE 335 OF 2002

#### DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

##### PUBLICATION OF BILLS AMENDING CONSTITUTION

The Minister for Justice and Constitutional Development intends introducing the—

- Constitution of the Republic of South Africa Amendment Bill, 2002; and
- Constitution of the Republic of South Africa Second Amendment Bill, 2002,

in the National Assembly. The Bills are hereby published for public comment in accordance with section 74(5)(a) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). Any person wishing to comment on the proposed amendments is invited to submit written comments to the Minister for Justice and Constitutional Development. Comments should kindly be directed to the attention of Mr J A de Lange, Private Bag X 81, Pretoria 0001, by not later than 12 April 2002. (Electronic mail address: DelangeJ@justice.gov.za)

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#### CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA AMENDMENT BILL

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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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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## BILL

To amend the Constitution of the Republic of South Africa, 1996, in order to enable a member of a Municipal Council to become a member of another party whilst retaining membership of that Council; to enable an existing party to merge with another party, or to subdivide into more than one party, or to subdivide and any one of the subdivisions to merge with another party, whilst allowing a member of a Council affected by such changes to retain membership of that Council; and to provide for matters connected therewith.

WHEREAS section 46(1)(d) of the Constitution of the Republic of South Africa, 1996 (the Constitution), requires an electoral system for the National Assembly that results, in general, in proportional representation;

AND WHEREAS section 47(3)(a) of the Constitution provides that a person loses membership of the National Assembly if that person ceases to be eligible on the grounds listed in section 47(1);

AND WHEREAS section 105(1)(d) of the Constitution requires an electoral system for provincial legislatures that results, in general, in proportional representation;

AND WHEREAS section 106(3)(a) of the Constitution provides that a person loses membership of a provincial legislature if that person ceases to be eligible on the grounds listed in section 106(1);

AND WHEREAS item 23A of Schedule 2 to the Constitution of the Republic of South Africa, 1993, provides that an Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76(1) of the new Constitution to amend that item and item 23 in order to provide for—

- the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature; and
- any existing party to merge with another party, or any party to subdivide into more than one party, whilst allowing a member of a legislature affected by such changes, to retain membership of such legislature;

AND WHEREAS section 157 of the Constitution requires an electoral system for local government—

- comprising either proportional representation or proportional representation combined with a system of ward representation; and
- ensuring that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties;

AND WHEREAS section 158 provides for certain criteria for eligibility for membership of a Municipal Council;

AND WHEREAS the Local Government: Municipal Structures Act, 1998, provides for an electoral system for local government comprising proportional representation combined with a system of ward representation;

AND WHEREAS no provision has been made in the Constitution in respect of local government for—

- a councillor to retain membership of a Municipal Council where such a councillor ceases to be a member of the party which nominated that councillor; and
- any party to merge with another party, or any party to subdivide into more than one party or any party to subdivide and any one of the subdivisions to merge with another party, whilst allowing a member of a Council affected by such changes, to retain membership of that Council;

AND WHEREAS section 27 of the Local Government: Municipal Structures Act, 1998, provides that a councillor—

- who was elected from a party list and ceases to be a member of that party; or
- who was elected to represent a ward and who was—
  - (i) nominated by a party as a candidate in the ward election and ceases to be a member of that party; or
  - (ii) not nominated by a party as a candidate in the ward election and becomes a member of a party,
 ceases to be a member of the Municipal Council in question;

AND WHEREAS the need exists for uniformity within the three spheres of government regarding loss or retention of membership of any legislature or Municipal Council in the event of a change of party membership, or mergers or subdivision or subdivision and merger of parties,

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

#### **Amendment of section 157 of Act 108 of 1996, as amended by section 2 of Act 87 of 1998**

1. Section 157 of the Constitution of the Republic of South Africa, 1996, is hereby amended—

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

“(1) Subject to section 158A, a Municipal Council consists of—

(a) members elected in accordance with subsections [(2), (3), (4) and (5)] (2) and (3); or

(b) if provided for by national legislation—

(i) members appointed by other Municipal Councils to represent those other Councils; or

(ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.”; and

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

“(3) An electoral system in terms of subsection (2) must **[ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties]** result, in general, in proportional representation.”.

#### **Insertion of section 158A in Act 108 of 1996**

2. The following section is hereby inserted into the Constitution of the Republic of South Africa, 1996:

##### **“Loss or retention of membership of Municipal Councils, mergers between parties and subdivision of parties, and filling of vacancies**

**158A.** (1) A councillor who, other than in accordance with subsection (2), (3) or (4), ceases to be a member of the party which nominated that councillor as a member of the Municipal Council concerned, ceases to be a member of that Municipal Council.

(2) (a) Subject to subsection (5), a councillor who was elected from the party list of a party represented in that Council (the nominating party) and who becomes a member of another party (the other party), remains a councillor of the Municipal Council concerned if that councillor—

(i) has become a member of the other party after the expiry of 12 months from the date of the previous election of all Municipal Councils; and

(ii) whether by himself or herself, or together with one or more other councillors who simultaneously ceased to be members of the nominating party, represents not less than 10 per cent of the total number of seats held by the nominating party in that Council.

(b) The seat held by a councillor referred to in paragraph (a) must be regarded as having been allocated to the other party of which that councillor has become a member.

(3) (a) Subject to subsection (5), a councillor who was elected to represent a ward, remains a councillor for that ward if that councillor—



- (i) used on the part of the ballot paper for wards the same distinguishing mark or symbol as a party which contested the election, and, after the expiry of 12 months from the date of the previous election of all Municipal Councils, ceases to be a member of that party and becomes a member of another party or ceases to be a member of that party and does not become a member of another party; or
- (ii) did not use on the part of the ballot paper for wards the same distinguishing mark or symbol as a party which contested the election and, after the expiry of 12 months from the date of the previous election of all Municipal Councils, becomes a member of such a party.
- (b) The ward represented by a councillor referred to in paragraph (a) must be regarded as having been allocated to—
  - (i) the party of which that councillor has become a member; or
  - (ii) that councillor if such councillor has not joined another party.
- (4) (a) Subject to subsection (5), any political party (the original party) which is represented in a Municipal Council may, after the expiry of 12 months from the date of the previous election of all Municipal Councils—
  - (i) merge with another party; or
  - (ii) subdivide into more than one party or subdivide and any one subdivision may merge with another party, if the members leaving the original party represents not less than 10 per cent of the total number of seats held by the original party in respect of that Council.
- (b) If a party merges with another party or subdivides into more than one party or subdivides and merges with another party in terms of paragraph (a), the councillors concerned remain members of that Municipal Council and the seats held by them must be regarded as having been allocated to the other party which they represent.
- (5) (a) The provisions of subsections (2), (3) and (4)—
  - (i) shall apply for a period of 15 days immediately after the commencement of this section, and, in the year of the commencement of this section, from the first to the fifteenth day of September; and
  - (ii) in the years thereafter, it shall only apply for the periods of the first to the fifteenth day of February and the first to the fifteenth day of September of each year, but it shall not apply if such a period falls within 12 months of the date when the next election of all municipal councils must be held.
- (b) During a period referred to in paragraph (a)—
  - (i) a councillor may change membership of a party only once, before the expiry of that period, by informing the municipal manager of the municipality concerned in writing of his or her decision to join another party or to join a party or to cease to be a member of any party, and if applicable, submit to the municipal manager written confirmation from such other party that he or she has been accepted as a member of that party, and
  - (ii) a party may merge with another party or subdivide into more than one party or subdivide and any one subdivision may merge with another party, only once, before the expiry of the period referred to in paragraph (a), by informing the municipal manager of the municipality concerned in writing that it has merged with another party or subdivided into more than one party or subdivided and merged with another party, and, if applicable, submit to the municipal manager written confirmation from such other party that it has accepted such merger.
- (c) During a period referred to in paragraph (a), no party represented in a Municipal Council may suspend or terminate the party membership of a councillor representing that party or perform any act whatsoever which may cause such a councillor to be disqualified from holding office as such a councillor or change such councillor's position on a party list relating to the said Municipal Council, without the written consent of the councillor concerned.
- (6) After the composition of a Municipal Council has been changed as a result of the provisions of subsection (2), (3) or (4)—
  - (a) each party affected by—
    - (i) a change of membership as contemplated in subsections (2) and (3); or
    - (ii) a merger or subdivision or subdivision and merger as contemplated in subsection (4),
 must forthwith submit a list or a revised list, as the case may be, of candidates in respect of such a Municipal Council indicating the changes effected as a result of the change of party membership or the merger or subdivision or subdivision and merger of parties; and
  - (b) the municipal manager of the municipality concerned must, within 14 days after the submission of the list referred to in paragraph (a), publish a notice in the *Provincial Gazette* concerned which reflects—
    - (i) the ward representation in that Municipal Council;
    - (ii) the party representation in that Municipal Council; and
    - (iii) the candidates' lists submitted in terms of paragraph (a); and
  - (c) the composition of a Municipal Council reflected in a notice referred to in paragraph (b)(i) and (ii) shall be maintained until the next election of all Municipal Councils or until the composition of that Municipal Council is again reconstituted in accordance with subsection (2), (3) or (4) or until a by-election is held in that Municipal Council.
- (7) Vacancies in a Municipal Council must be filled in terms of national legislation.”

### Short title

3. This Act is called the Constitution of the Republic of South Africa Amendment Act, 2002.

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA  
AMENDMENT BILL, 2002**

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

**1. Background**

1.1 On 13 November 2001 the National Assembly gave permission to the Assembly's Portfolio Committee on Justice and Constitutional Development to proceed with the consideration of the *Loss or Retention of Membership of National and Provincial Legislatures Bill, 2001* (the Membership Bill).

1.2 The purpose of the Membership Bill is to create a mechanism in terms of which—

- \* members of the National Assembly or a provincial legislature can change their party membership without losing their seats;
- \* an existing party may merge with another party; and
- \* a party may subdivide into more than one party.

1.3 This mechanism is sought to be created by way of amendments to items 23 and 23A of Schedule 2 to the (interim) Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993).

1.4 However, at present the Constitution does not provide for similar changes of party membership, mergers between parties or subdivision of parties in the context of local government.

**2. Provisions of the Bill**

The provisions of the Bill are largely based on the principles contained in the Membership Bill. These principles entail the following:

- \* Changes of party membership will **only be allowed after the expiry of 12 months** after the date of the previous election of all Municipal Councils.
- \* Similarly, such changes will **not be allowed during the 12 months preceding** the date of the next election of all Municipal Councils.
- \* A **further requirement** is added, namely that a change of party membership will only be allowed if the **members wishing to leave a party represent not less than 10 per cent** of the seats held by the party concerned. (New section 158A(2).)
- \* Similarly, mergers between or subdivisions of political parties will only be allowed after the expiry of 12 months after the date of the previous election of all Municipal Councils, and will **not be allowed during the 12 months preceding** the date of the next election of all Municipal Councils..
- \* In respect of subdivisions the further requirement is also added that the **members leaving the original party must represent not less than 10 per cent** of the seats held by the party concerned. (New section 158A(4).)
- \* All of the above steps may **only take place during limited periods** as determined by the Bill.
  - \* In the year 2002, such periods will be **during the first fifteen days following the commencement of section 158A**, and again from the first to the fifteenth day of September.
  - \* In the years thereafter, such **periods will last from the first to the fifteenth day of February**, and from the **first to the fifteenth day of September**, of each year. (New section 158A(5).)
- \* The Bill also introduces a new principle (not being contained in the Membership Bill), in that provision is made that, during a period allowed for the above changes of membership, mergers or subdivision of parties, **no party** represented in a Municipal Council may—
  - \* **suspend or terminate the party membership** of a councillor representing that party; or
  - \* perform any act whatsoever which may **cause such a councillor to be disqualified from holding office** as such a councillor or change such councillor's position on a party list relating to the said Municipal Council. (new section 158A(5)(c))
- \* During a "window" allowed for crossing/mergers/subdivisions—
  - \* a councillor is **allowed to change party membership only once**; and
  - \* a party may **merge/subdivide only once**. (new section 158A(5)(b))

### 3. 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, functions or institutions; or
- (iii) amends a provision that deals specifically with a provincial matter.

## CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA SECOND AMENDMENT BILL

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

### 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.

# BILL

To amend the Constitution of the Republic of South Africa, 1996, in order to further regulate the allocation of delegates to the National Council of Provinces; and to provide for matters connected therewith.

WHEREAS the National Council of Provinces is composed of a single delegation from each province consisting of six permanent and four special delegates;

AND WHEREAS parties represented in a provincial legislature are entitled to delegates in the province's delegation, and national legislation must determine how many of each party's delegates are to be permanent delegates and how many are to be special delegates;

AND WHEREAS national legislation has been passed in accordance with item 23A of Schedule 2 to the Constitution of the Republic of South Africa, 1993, providing for—

- the manner in which it will be possible for a member of a national or a provincial legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature; and
- any existing party to merge with another party, or any party to subdivide into more than one party, whilst allowing a member of a legislature affected by such changes, to retain membership of such legislature;

AND WHEREAS in terms of the national legislation in question, changes of party membership, mergers between parties or subdivision of parties within a provincial legislature, may necessitate changes in respect of that legislature's delegation to the National Council of Provinces,

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:-

### Amendment of section 61 of Act 108 of 1996

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

“(2) A provincial legislature must, within 30 days after—

- (a) the result of an election of [a provincial] that legislature is declared; or
- (b) the composition of that legislature is changed in accordance with national legislation on account of changes of party membership, mergers between parties or subdivision of parties within that legislature, [the legislature must—

(a)] determine, in accordance with national legislation, how many of each party's delegates are to be permanent delegates and how many are to be special delegates[;], and

[(b)] appoint the permanent delegates in accordance with the nominations of the parties.”.

### Short title

2. This Act is called the Constitution of the Republic of South Africa Second Amendment Act, 2002.

# MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA SECOND AMENDMENT BILL, 2002

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

## 1. Background

1.1 On 13 November 2001 the National Assembly gave permission to the Assembly's Portfolio Committee on Justice and Constitutional Development to proceed with the consideration of the *Loss or Retention of Membership of National and Provincial Legislatures Bill, 2001* (the Membership Bill). The draft Membership Bill was published by the Portfolio Committee in *Government Gazette* No 22835 of 16 November 2001 for public comment.

1.2 The purpose of the Membership Bill is to create a mechanism in terms of which—

- \* members of the National Assembly or a provincial legislature can change their party membership without losing their seats;
- \* an existing party may merge with another party; and
- \* a party may subdivide into more than one party.

This mechanism is sought to be created by way of amendments to items 23 and 23A of Schedule 2 to the (interim) Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993). The said item 23A specifically authorises Parliament to amend items 23 and 23A by an Act of Parliament, passed in accordance with the provisions of section 76(1) of the (new) Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution), in order to achieve the above objectives.

## 2. Provisions of the Bill

2.1 The National Council of Provinces is composed of a single delegation, comprising four special delegates and six permanent delegates, from each province. Parties represented in a provincial legislature are entitled to delegates in the province's delegation in accordance with a formula set out in Schedule 3 of the Constitution. Each provincial legislature must, within 30 days after the result of an election is declared, determine the number of delegates of each party and appoint the permanent delegates of the parties. (Sections 60 and 61 of the Constitution.)

2.2 The provisions of the Membership Bill may lead to significant changes of party representation in a provincial legislature, which may, in turn, necessitate the redetermination of the composition of that legislature's delegation in the National Council of Provinces. As such changes would not result from an election, there is no mechanism in terms of which such a redetermination can take place. The Constitution of the Republic of South Africa Second Amendment Bill, 2001, aims to amend the Constitution in order to provide that, after the composition of a provincial legislature had been changed in accordance with national legislation (the Membership Bill), that legislature must determine the number of delegates of each party to the National Council of Provinces. This is done by amending section 61 of the Constitution so as to provide that a provincial legislature must, within 30 days after the result of an election is declared or the composition of that legislature is changed in accordance with national legislation on account of changes of party membership, mergers between parties or subdivision of parties within that legislature—

- \* determine, in accordance with national legislation, how many of each party's delegates are to be permanent delegates and how many are to be special delegates; and
- \* appoint the permanent delegates in accordance with the nominations of the parties.

## 3. 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.