



**TO:** THE CHAIRPERSON, SOCIAL DEVELOPMENT PORTFOLIO  
COMMMITTE

**FROM:** NCOP<sup>i</sup> & LEGAL SERVICES UNIT

**SUBJECT:** CONSTITTIONAL AND LEGAL IMPLICATIONS OF THE  
FUNDRAISING AMENDMENT BILL

**DATE:** 24 MAY 2023

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## ***I. INTRODUCTION***

[1] This opinion seeks to advise the Chairperson as well as Honourable Members on the Legislative implications of the Bill.

[2] In terms of layout, this opinion is structured into five parts. Part I contains this introductory section, Part II sets out the background of the Bill, Part III constitutional and legislative framework in order to place it into context. Part IV contains the clause-by-clause analysis, comment is however provided on clauses which we are of the opinion warrant the attention of the Committee. Part V deals with the issue of tagging and lastly, our conclusions and recommendations are found in Part VI of the opinion.

## ***II. BACKGROUND AND PURPOSE***

- [3] The Fund-raising Amendment Bill, 2020 (“the Bill”), aims to rationalise the Fund-raising Act, 1978 (Act No. 107 of 1978) (“the principal Act”), by consolidating the Disaster Relief Fund, the Refugee Relief Fund, the Social Relief Fund and the State President’s Fund into the Disaster Relief and National Social Development Fund, so as to focus on proactive mitigation of disasters and promote the social development of communities. The consolidation of the Funds will streamline administrative processes and enable more efficient services to poor communities and reduce costs.

### **III. CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK**

- [4] Schedule 4 of the Constitution identifies welfare services, population development and disaster management as functional areas of concurrent national and provincial legislative competence.
- [5] The Fund-raising Act, 1978 provided for control of the collection of contributions from the public and for the establishment of various relief funds was repealed, except for the relief fund chapter thereof, repealed in 1997 by the Non-profit Organisations Act, 1997.
- [6] The Public Finance Management Act No. 1 Of 1999 regulates financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.
- [7] The Disaster Management Act 57 of 2002 provides for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centres; disaster management volunteers;

#### **IV. CLAUSE ANALYSIS**

- [8] **Clause 1** seeks to amend the definitions of “Minister” and “Secretary” to remove obsolete references in section 1 of the principal Act.
- [9] **Clause 2** seeks to amend section 17 of the principal Act. The proposed amendment mainly intends to reduce the maximum number of members of a board established under the principal Act to administer a fund from 15 to 10.
- The composition of the board, including the requirements and its responsibilities needs to be clarified to avoid confusion among the members of the public. Though it could be said that some of these matters are regulated in existing legislation such as the Companies Act and the Public Finance Management Act which sets out fiduciary duties and legal consequences. It would be beneficial for this section to be synchronised with the relevant sections on the Companies Act so as to avoid any interpretation issues which may lead to litigation.
- [10] **Clause 3** seeks to amend section 18 of the principal Act to make provision for the objects of the Disaster Relief and National Social Development Fund which consolidates the funds that it replaces in the principal Act.
- The consolidation of the Funds will streamline administrative processes and enable more efficient services to poor communities and reduce costs.
- [11] **Clause 4** seeks to amend section 20 of the principal Act in order to empower the Minister to give directions to a board in respect of disbursement of funds and to ensure that a board acts in accordance with ethical principles.
- There needs to be parameters in order to clarify the authority of the Minister.

- [12] **Clause 5** seeks to amend section 22 of the principal Act mainly to provide for the financial management and control of the funds established in the principal Act in accordance with the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- [13] **Clause 6** seeks to substitute section 25 of the principal Act. The proposed substitution seeks to further provide for the administrative work of the boards and for disbursement of funds managed by the boards established in the principal Act.
- [14] **Clause 7** seeks to insert section 25A in the principal Act in order to provide for the discontinuation and transfer of certain funds. The new section 25A provides that, as from the effective date, which is the date of commencement of section 7 of the Fund-raising Amendment Act, 2020—
- (a) the following funds established under section 16 of the principal Act cease to exist:
    - (i) The Refugee Relief Fund ;
    - (ii) the State President’s Fund; and
    - (iii) the Social Relief Fund;
  - (b) the Disaster Relief Fund established under section 16(a) of the principal Act continues to exist under the name of the Disaster Relief and National Social Development Fund;
  - (c) all amounts credited to any fund referred to in paragraph (a), immediately before the effective date, vest in the Disaster Relief and National Social Development Fund;
  - (d) any board established by the Minister in terms of section 17 and responsible for managing a fund referred to in paragraph (a) is dissolved; and
  - (e) subject to paragraph (c), all liabilities, assets and rights existing as well as accruing of the funds referred to in paragraph (a) must devolve upon the Department of Social Development.
- [15] **Clause 8** seeks to amend section 36 of the principal Act in order to further provide for the making of regulations.

[16] **Clause 9** provides for the short title and commencement of the Act. It will be noted that the commencement clause provides for different commencement dates in respect of the sections of the Act to be proclaimed so as to cater for the bringing into operation of, for instance, the aforesaid section 7 of the Fund-raising Amendment Act, 2022, at a later date to enable the Department to prepare for the implementation thereof.

## V. **TAGGING**

[17] The essence of tagging has been explained by the courts. In the case of *Tongoane and Others v Minister of Agriculture and Land Affairs* 2010 (8) BCLR 741 (CC), the court held that what matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill in substantial measure fall within a functional area listed in schedule 4.

[18] The court further held in *Tongoane* that, the test for tagging must be informed by its purpose. The court continued to say that tagging is not concerned with determining the sphere of government that has the competence to legislate on the matter, nor is the process concerned with preventing interference in the legislative competence of another sphere of government.

[19] Section 76(1) of the Constitution of the Republic of South Africa (“the Constitution”) provides that, when the National Assembly passes a Bill which fall within a functional area listed in Schedule 4 of the Constitution and legislation envisaged in any of the sections listed in sections 76(3), (4) or 5 of the Constitution, the Bill must be referred to the NCOP.

[20] In light of the principles in the *Tongoane* case, we submit that the Bill was correctly tagged as a section 76 Bill since the Bill to a great extent affects the interest, concerns and capabilities of provinces.

## VI. **CONCLUSION AND RECOMMENDATIONS**

[21] It is recommended that that when considering this Bill, the Committee notes the proposed recommendations as set out above pending public participation. Section 118(1) of the Constitution provides that “*a legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees*”. In *Doctors for Life International v The Speaker of the National Assembly and Others [2006]*, the court held that legislatures must facilitate public participation at a point in the legislative process where involvement by interested members of the public would be meaningful. We therefore recommend that there be extensive public consultation which is inclusive of a roundtable discussion with primary stakeholders.

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<sup>i</sup> Fundraising Amendment Bill B29B-2020