**OPINION**

**DELEGATION OF LEGISLATIVE POWERS TO OFFICIALS: FINANCIAL SERVICES LAWS GENERAL AMENDMENT BILL**

**1.** The National Treasury seeks general guidance on the ambit of Parliament's power to delegate legislative powers to officials. The issue of legislative powers for officials has been raised in the Standing Committee on Finance in relation to sections 102 and 140 of the Financial Services Laws General Amendment Bill which is currently before the Committee. These two sections respectively amend section 62 of the Long-term Insurance Act and section 55 of the Short-term Insurance Act to grant rule-making powers for purposes of protecting the interest of policyholders to the Registrar referred to in those Acts who is an official of the Financial Services Board. As both sections are essentially identical, I will refer only to section 62 which reads as follows (incorporating certain amendments to be proposed in the Committee):

"**Protection of policyholders**

**62.** (1) The Registrar, by notice in the *Gazette*, may—

*(a)* make rules aiming to ensure that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally;

*(b)* vary or rescind any such rule; and

*(c)* determine the period which must elapse before a rule, variation or rescission takes effect after it has been published in the *Gazette*.

(2) Without derogating from the generality of subsection (1)*(a)*, rules may provide—

*(a)* that provisions with a particular import may not appear in a policy and that they shall be void if they do so appear;

*(b)* that particular information in relation to a policy shall be made known in a particular manner to a prospective policyholder or policyholder, and what the legal consequences shall be if that is not done;

*(c)* that a policyholder may cancel a policy under particular circumstances and within a determined period, and what the legal consequences shall be if he or she does so;

*(d)* for norms and standards with which policies, long-term insurers or types of long-term insurance business must comply;

*(e)* for standardised wording, definitions or provisions that must be included in policies; and

*(f)* that in respect of a contravention of, or a failure to comply with, a rule, a penalty or fine referred to in section 66(1)*(c)* or 67(1)*(c)* shall apply.

(3) Rules referred to in subsection (2) may—

*(a)* apply generally; or

*(b)* be limited in application to a particular kind or type of policies, long-term insurers or long-term insurance business.

(4) *(a)* Before the Registrar prescribes any rule under this section, the Registrar must—

(i) publish notice of the release of the proposed rule in the *Gazette*, indicating that the proposed rule is available on the official web site and calling for public comment in writing within a period stated in the notice, which period may not be less than 30 days from the date of publication of the notice; and

(ii) submit the draft rules to Parliament, while it is in session, for parliamentary scrutiny at least one month before their promulgation.

*(b)* If the Registrar alters a draft rule because of any comment, the Registrar need not publish the alteration before making the rule.

*(c)* After consideration of any comments received in response to the publication and tabling of the draft proposed rule in terms of paragraph *(a)*, the Registrar may publish the final rule in the *Gazette*."

**Constitutional context of Parliament's power to delegate legislative powers**

**2.1** It is universally accepted in all constitutional democracies that only the elected parliament can make law and that the elected parliament cannot surrender its law-making function to the executive. However, it is equally accepted that inherent in the law-making function is the power to assign discretions to the executive as to the execution of the law, which includes the assignment or

delegation of subordinate legislative powers. A distinction is drawn between law as the instrument laying down principles and policies and subordinate legislation which is seen as a legitimate instrument enabling the executive to implement those principles and policies. Delegated legislation that purports to determine principles and policies would generally be regarded as invalid.

**2.2** In **Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others**,[1] which was one of its first cases under the new constitutional order, the Constitutional Court considered the question of delegation of legislative powers and held that although the Interim Constitution did not directly empower Parliament to delegate subordinate legislative powers to other bodies, such a power must be implied.

> "The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms -'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies." (Chaskalson P at par 51)

**2.3** In delivering their judgement, the Court pointed out that the power to delegate legislative powers is not open-ended and that there are implied limitations despite the absence of express constitutional criteria to this effect. Sachs J explained these limitations as follows:

> "[206] At the same time, if it *(i.e. Parliament)* is not to fail to discharge the functions entrusted to it by the Constitution, there must be some limit on the matters which it can delegate. I do not think it would be helpful to attempt to find a single formulation or criterion for deciding when delegation is

[1] 1995 (4) SA 877 (CC)

permissible and when not, I feel that a complex balancing of various relevant factors has to be done, against a background of what Parliament is there for in the first case. There would seem to be a continuum between forms of delegation that are clearly impermissible at the one extreme, and those that are manifestly permissible at the other. To take tragic but telling examples from history, it would obviously be beyond the scope of Parliament to do what the Reichstag did when it entrusted supreme law making powers to Adolph Hitler, or in the manner of a Roman Emperor, to declare itself a god, and its horse a consul. At the other extreme, Parliament can, within the framework of clearly established criteria, delegate to other authorities or persons law-making power to regulate the implementation of its laws. There is however a large amount of delegation in between these two extremes that might or might not be permissible. As I have said, I do not think that any hard and fast rule or simple formula can be used to find a point on the continuum that automatically distinguishes between the two classes of case. To my mind, what would have to be considered in relation to each Act of Parliament purporting to delegate law-making authority, is whether or not it involved a shuffling-off of responsibilities which in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency. This will include an evaluation of factors such as the following:

a. The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;
b. The public importance and constitutional significance of the measure - the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;
c. The shortness of the time period involved;
d. The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;
e. The extent to which the subject matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

f. Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.

[ 207 ] These items should in not in my view be regarded as a checklist to be counted off, but as examples of the interactive factors which have to be balanced against each other with a view to determining whether or not delegation in the circumstances was consistent with the responsibilities of Parliament. None of them, it should be emphasized, permit Parliament to infringe fundamental rights, violate protected spheres of provincial autonomy or in any other way deviate from the constitutional framework within which Parliament must function. Delegation takes place within, not outside the constitutional framework, but even within that framework it can be unconstitutional if it fails to satisfy the above criteria."

**2.4** In turn Mohammed DP explained the criteria for validity of a delegation of legislative powers in the following words:

"[136] The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends *inter-alia* on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally."

**2.5** The above case was decided under the Interim Constitution, but in a number of subsequent cases the Constitutional Court reaffirmed that the position it took in that case is the same under the final Constitution.[2] As such it remains the leading case on the Parliament's power to delegate legislative powers.

**2.6** Another issue relevant to the granting of subordinate legislative powers is the impact such powers may have on constitutional rights. In **Dawood v Minister**

[2] In re Constitutionality of the Mpumalanga Petitions Bill, 2000 2002 (1) SA 447 (CC) at para 19; and AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC).

**of Home Affairs**[3] the Court ruled that when assigning discretions to an executive authority that may affect a person's rights in terms of the Bill of Rights, the enabling Act must give directions as to the circumstances in which those discretions should be exercised, the rationale being that Parliament cannot sanction the breach of a person's entrenched rights by open-ended executive discretions. The Court recognised, however, that there may be circumstances where the factors leading up to an executive decision may be so numerous and varied that it would be inappropriate or impossible for Parliament to stipulate in advance precise guidelines for the exercise of the executive discretion.

**2.7** In **Armbruster & Another v Minister of Finance and Others**[4] the Court distinguished the **Dawood** case from a situation where the economic interests of a person as opposed to his or her fundamental rights were affected. In this case the Court did not insist on specific criteria for the exercise of the relevant discretion which only affected the economic interests of a person. In coming to its conclusion, the Court relied on its earlier view that circumstances may be so numerous and varied that it would simply not be possible for Parliament to determine precise guidelines for each and every eventuality.

**2.8** The approach of the Court seems to be a practical one, viz not to expect the impossible from Parliament to legislate for every conceivable eventuality, but rather to accept executive discretion, whether legislative or administrative, as a necessary tool to assist Parliament to achieve its aims and policies as enacted in its laws, subject, of course, to the ordinary checks and balances against the abuse of power. However, when fundamental rights may be compromised by wide executive discretions, the Court may insist on more strict safeguards.

**3. Constitutionality of delegation of regulation-making powers to officials**

**3.1** From the above decisions of the Constitutional Court one can safely accept that there is nothing in the Constitution that prevents Parliament from

[3] 2000(3) SA 936 CC
[4] 2007(6) SA 550 CC

delegating rule-making powers to an administrative authority such as an official as opposed to political office-bearers such as Ministers. The only issue that needs to be considered is the degree of any constitutional constraints on Parliament when conferring such delegations on officials and determining the scope and extent of the powers to be delegated.

**3.2** That these two factors are valid considerations for determining constitutionality appear from the judgement of Mohammed DP in the 1995 case where he quotes with approval the following from a leading Australian case on the delegation of legislative powers by the Federal Parliament:[5]

> 1. The fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be…(valid) …
>
> 2. The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of lawmaking power conferred, the less likely is it that the enactment will be a (valid) law **…**……..”

**3.3** The delegation of legislative powers to Ministers is the acceptable norm as Ministers are in terms of section 92 of the Constitution accountable collectively and individually to Parliament for the exercise of their powers and functions and are also required to provide Parliament with full and regular reports concerning matters under their control. Ministers are also members of Parliament which facilitates direct interaction between them and Parliament, including Parliamentary Committees.

**3.4** Administrative office-bearers, on the other hand, are not equally accountable to Parliament. As officials they are more specifically responsible to their political heads, although they are subject to parliamentary oversight in terms of section 55(2)(b) and to be summoned to appear before Parliamentary

[5] *The Victorian Stevedoring & General Contracting Company (Pty) Ltd v Dignan* 46 C.L.R. 73.

Committees to explain and justify their actions. Because of this “distance” between Parliament and officials, the delegation of legislative powers to officials are bound to be more contentious than delegations to Ministers.

**3.5** As shown above, delegations to officials are not unconstitutional *per se*, but would be more prone to attack than delegations to Ministers unless appropriate parliamentary oversight mechanisms are built into the enabling Act. The norm should be full accountability to both Parliament and the Minister to ensure that any rules issued by the official are aimed at carrying out the principles and policies of the enabling Act.

**3.6** In the example quoted in paragraph 1 (proposed section 62 of the Long-term Insurance Act), the Registrar to whom the rule-making power is delegated, is required to submit any draft rules to Parliament for parliamentary scrutiny at least one month before their promulgation and to consider any comments received before publishing the final rules. This may well be the “direct link” between the official and Parliament that may be required to ensure constitutionality. Not only does this provision enable parliamentary scrutiny of all rules in draft form, but it also confers on the relevant parliamentary committee a kind of *de facto* veto over the rules before their enactment into law.

**3.7** Another way to deal with this issue is to vest all subordinate legislative powers in the Minister who is directly accountable to Parliament. However, under the current financial regulation system, rule-making powers are extensively vested in an official (the Registrar) and not in the Minister. In this regard I am advised that numerous practical considerations justify the current system, including the following:

(a) The technical nature of financial regulation and the degree to which specialist knowledge is needed for effective regulation.

(b) The importance of the time factor in addressing matters where rapid intervention is critical.

(c) Issues on which regulations are made are more often than not of a non-political, administrative/technical nature.

(d) Best practice in other jurisdictions indicate that regulation-making powers are vested in financial-specialist or administrative authorities/bodies rather than in political office-bearers.

(e) Regulations are subject to the ultra vires rule which means that they may be struck down by a court if not authorised in the enabling Act.

**3.8** Directly related to the issue of the political or administrative identity of the person or body in whom legislative powers are vested, is the extent and scope of the delegation. The delegation of so-called plenary powers in circumstances short of war or other national emergencies would as a rule be unconstitutional irrespective of whether they are granted to a political or administrative office-bearer. In other instances the delegation of wide but justifiable legislative powers may pass muster only if they are delegated to a political office-bearer and not to an official.

**3.9** When granting rule-making powers to officials, special attention should be given to the language used. Technically speaking, if careful attention is given to setting clear boundaries in the enabling Act for regulation-making, which is usually achieved by spelling out or listing the matters on which regulations may be made, and to avoiding unnecessary wide, open-ended language there should not be unmanageable constitutional complications. The overriding consideration should be to respect the fundamental rule that law-making is the function of Parliament and that the purpose of regulations is a subordinate one, namely to give effect to the principles and policies set out in the law and not to create new law.

**3.10** Having said that, it must be stressed that wide language is not in itself a ground for unconstitutionality and may, in some cases, be the appropriate mechanism to ensure that the principles and policies of the enabling Act are carried out. The language of section 62(1)(a) is undeniably wide and the question is whether the wide language is justified given the matter it purports to address, viz. protection of policyholders. Consumer protection appears to me to be one of those topics for which it is probably impossible to give a precise checklist of what must and what may not be done or what will or will

not harm consumers unjustifiably. The only way to deal with undesirable insurance practices effectively is to assign discretionary powers to the relevant authority to deal with them as and when they are contrived, given the infinite nature of human ingenuity.

**3.11** Although section 62 will probably pass muster as drafted, I feel a bit uncomfortable with the fact that the purpose of the rule-making function, viz. policyholder protection, is only mentioned in the heading and not in the text. It may be advisable to work the concept of policyholder protection, and perhaps also the requirement of consistency with the Act, into the text of section 62(1)(a), as follows:

> "(1) The Registrar, by notice in the *Gazette*, may—
>
> *(a)* make rules, **[aiming to ensure]** <u>not inconsistent with this Act, aimed at ensuring for the purpose of policyholder protection</u> that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally;".

The deletion of the words "in the interests of the parties and in the public interest generally" could also be considered as these words are to some extent tautological and secondary. To make rules to ensure that policies are entered into, executed and enforced in accordance with sound insurance principles and practice, will as a matter of fact always be in the interest of the parties and in the public interest.

## 4 Conclusion

**4.1** Nothing in the Constitution prevents Parliament from delegating wide rule-making powers to officials provided the basic principles as highlighted by the Constitutional Court are respected and adhered to in the legislation assigning those powers.

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