

Ex parte

NATIONAL TREASURY

In re

NATIONAL ECONOMIC, DEVELOPMENT AND LABOUR COUNCIL ACT

MEMORANDUM

1. My consultant is the National Treasury. It seeks my opinion on whether there is an obligation in law to refer legislation, either specific in nature or general in its terms, to the National Economic Development and Labour Council ('Nedlac') before tabling it in parliament. The short answer is that there is no such obligation.

2. Specifically, my advice is ought on the following:

'Nedlac's mandate with regard to money bills, specifically with reference to the Employment Tax Incentive Bill, in particular, whether it is required that a money bill be submitted to Nedlac for their consent prior to the introduction of the bill into the parliamentary process.

Whether client's understanding of the Nedlac process is correct, in that the action of submitting prospective legislation to Nedlac is undertaken with the aim to consult and with the view to reach consensus, however, that there is no requirement that actual consensus be reached before the executive

(Government) introduces the prospective legislation into the parliamentary process.’

3. Nedlac is a body created under the National Economic, Development and Labour Council Act 35 of 1994 (‘the Act’). It comprises representatives of organized business, organized labour, community organizations and the State. Its objects, which are set out in s 5, are directed at attaining consensus between important social and economic actors on matters of public concern, particularly within the economic and commercial sphere. Specifically encompassed in the objects are the power and duty to ‘consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament’ and ‘consider all significant changes to social and economic policy before it [sic] is implemented or introduced in Parliament.’ Under s 5, provision is also made for the way in which it should conduct its affairs so as to attain its objects. What is contemplated is that it should conduct investigations into market and similar conditions, keep itself abreast of developments, evaluate the impact of legislation and generally conduct research into legislation and policy affecting social and economic matters.
4. Included among its duties is an obligation to ‘work in close co-operation with departments of State, statutory bodies, programmes and other forums and non-governmental agencies engaged in formulation and the implementation of social and economic policy.’ The corollary of this obligation is one that, so far as the State is concerned, postulates a willingness to ‘work in close co-operation’ with Nedlac. The willingness to co-operate is a condition that is left to the volition of the State departments in question, however, and there is no legally binding requirement that they subject their initiatives to Nedlac for approval or even for consideration. It is true that Nedlac is expected to consider legislation of social and economic consequence before it is tabled in Parliament, but the expectation finds no expression in a comparable obligation on the part of the State to submit proposed legislation to Nedlac before tabling it in the legislature.

5. The architecture of the Act has been carefully considered. Under a democratic State such as ours, the enactment of legislation is left to the elected representatives of the people. This principle finds expression in s 43 of the Constitution of the Republic of South Africa 1996, which states that ‘in the Republic the legislative authority of the national sphere of government is vested in Parliament ... of the provincial sphere of government is vested in the provincial legislatures ... [and] of the local sphere of government is vested in the municipal councils.’ Giving Nedlac the power to veto legislation would plainly be in conflict with the Constitution, and the conflict would continue to be present even if the legislature were obliged to defer its decisions pending the process by which legislation was considered by Nedlac. It is in this context that an obligation of no more than voluntary mutual co-operation has been embodied in the Act.

6. Under the Constitution provision is specifically made for money Bills (see s 77). Under s 77(3) provision is made for ‘all money Bills [to be] considered in accordance with the procedure established by s 75 [of the Constitution].’ Section 75 makes provision for the passage of ordinary Bills that have no impact on the provinces. The section regulates the manner in which voting on such Bills must be determined. Given the view I have expressed above, I find it unnecessary to pronounce on whether a money Bill is to be treated differently from an ordinary Bill so far as Nedlac is concerned. Since I consider, for the reasons given above, that the State is under no obligation to consult with Nedlac before tabling legislation, it is a matter of no concern to this question of process whether the Bill happens to be a money Bill or not.

7. I answer the two specific questions asked of me in the following terms:
 - 7.1. **‘Nedlac’s mandate with regard to money bills, specifically with reference to the Employment Tax Incentive Bill, in particular, whether it is required that a money bill be submitted to Nedlac for their consent prior to the introduction of the bill into the parliamentary process.’**

Nedlac has no specific mandate in regard to money Bills. The Employment Tax Incentive Bill need not be submitted to Nedlac for its consent, or even its consideration, prior to its introduction into the Parliamentary process.

- 7.2. **Whether client's understanding of the Nedlac process is correct, in that the action of submitting prospective legislation to Nedlac is undertaken with the aim to consult and with the view to reach consensus, however, that there is no requirement that actual consensus be reached before the executive (Government) introduces the prospective legislation into the parliamentary process.'**

A State department that elects to submit prospective legislation to Nedlac for consideration is under no obligation to stay its hand until Nedlac has considered the legislation. Still less is it under an obligation to obtain consensus on the desirability of the legislation from Nedlac. It can solicit Nedlac's view and, if it chooses, proceed to table the Bill in Parliament in a parallel process. Nedlac for its part is entitled to consider prospective legislation and submit its views to Parliament but cannot expect Parliament to defer its processes pending the deliberations that Nedlac may engage upon. Nedlac is an advisory body, no more and no less.

M S M Brassey SC

Sandton Chambers

23 October, 2013