

## **STRENGTHENING THE NCOP RULES FOR EFFECTIVE BUDGET AND FISCAL OVERSIGHT AND ACCOUNTABILITY**

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### **THE POWER TO OVERSEE AND COMPEL ACCOUNTABILITY?**

I have listened carefully to the presenters on the constitutional obligations of the National Council of Provinces. There is consensus on the oversight role of the National Council of Provinces. There is also consensus on the fact that the National Council of Provinces is constitutionally bound to hold the Executive accountable. I do not quibble with that. For these the presenters also referred to a myriad of laws that grant the National Council of Provinces the authority to oversee and hold the Executive accountable for the budget appropriated to them by Parliament.

I was struck, though not surprised by words of the Deputy Minister of Finance that while it is the Executive that allocates budget, it is legislature that appropriates money. They brought home the point that the legislature has the final word on the allocation of budget. The second statement by the Deputy Minister of Finance that the legislature may call upon them to come and account at its convenience foreshadows the fact that the Constitution clothes the legislature with the authority to oversee and hold the Executive accountable.

This begs the question whether the legislature should complain about the money it appropriates to itself. Perhaps it is not how the money is appropriated as it is the procedure followed in allocating it. Perhaps allocation and appropriation are used interchangeably. Perhaps allocation is sometimes perceived to be a foregone conclusion for appropriation.

Financial Management of Parliament of Provincial Legislatures and Provincial Legislatures Act clearly outlines the procedure to be followed in dealing with both the original budget as well as the revised appropriation. The original as well as the revised appropriation must be approved by Parliament.

### **POWER TO AMEND THE BUDGET?**

The Money Bill Amendment Procedures and Related Matters Act provides for a procedure to amend money bills before Parliament. This Act gives effect to section 77(3) of the Constitution. It provides for the sequencing of the budget process, commencing with the introduction and adoption of Fiscal Framework. This is followed by the adoption of the Division of Revenue Bill. And lastly, the Appropriation Bill. The Act prescribes different procedures for these three instruments. While the Fiscal Framework is dealt with simultaneously by the two House, the Division of Revenue Bill and Appropriation Bills are dealt with in terms of section 76 and 75 of the Constitution respectively.

The question that arises is whether there is a difference between the Fiscal Framework, Division of Revenue Bill and Appropriation Bill and whether these can be introduced independently. Unlike the latter two, Fiscal Framework is not a bill. Because of the different procedures, the canons of interpretation suggest that the three, although intertwined, may be introduced independently. If the Fiscal Framework is dealt with jointly, the impression is that it may be introduced in a joint sitting to the exclusion of the Division of Revenue and Appropriation Bills. If I be correct in this interpretation, then there is no reason why Fiscal Framework may not be introduced in a joint sitting instead of reducing the Delegates to observers.

The first impediment to the above proposition is sections 7(1) of the Money Bills Amendment Procedures and Related Matters Act which requires the Minister to table the Appropriation Bill in the National Assembly at the same time as the national budget.

In what appears to be another impediment, section 5 of the Money Bills Amendment Procedures and Related Matters Act compels only the committees of the National Assembly to annually assess the performance of national departments and to submit budgetary review and recommendations reports. This section however does not preclude the National Council of Provinces from doing so since it is constitutionally obliged to oversee and hold the Executive accountable. It does not have to derive this power from the Money Bills Amendment Procedures and Related Matters Act.

While the Money Bills Amendment Procedures and Related Matters Act authorises Parliament to amend money bills, the weakness in this legislation however is that the National Council of Provinces may only propose amendments to such bills. It has no authority, on its own, to amend a money bill. This is so because all money bills must be dealt with in accordance with the procedure outlined in section 75 of the Constitution. At national level, there is no deadlock breaking mechanism where the two Houses do not agree on the proposed amendments. The National Assembly may still proceed to pass the Appropriation Bill without amendments even if it is returned to it with proposed amendments. The only limitation being that the Appropriation Bill must be consistent with the Fiscal Framework and the Division of Revenue Bill.

It is at this point that the view that it is not only at the stage of making the law but also at its implementation that the National Council of Provinces must exercise oversight becomes relevant. The fact that the National Council of Provinces may be perceived not to have an effective power to amend the Appropriation Bill, does not prohibit it from overseeing the spending by government departments and holding the Executive accountable. That power is derived from the fact that such legislation may not be passed without the participation of the National Council of Provinces.

### **THE DIVISION OF REVENUE BILL – POWER OF THE NCOP?**

The Appropriation Bill is preceded by the Division of Revenue Bill which provides for the equitable division of revenue raised nationally among the three spheres of government. It is classified as a bill affecting provinces and it is dealt with in terms of

section 76 of the Constitution. For it to be passed, provincial mandates are required. Provincial legislatures are at liberty to propose amendments to the Division of Revenue Bill. Depending on the mandates given to the provincial delegates, the National Council of Provinces may amend the Division of Revenue Bill. This power does not derive from the Money Bills Amendment Procedures and Related Matters Act. It emanates from the Constitution - fact that this Bill is classified as a Bill affecting provinces. If the National Assembly does not agree with the Bill as amended by the National Council of Provinces, the Constitution provides for a Mediation Committee to be formed by the equal number of members from each House. The purpose is to attempt to break the deadlock between the two Houses. Mediation therefore makes it possible for the Mediation Committee to agree on a Bill as amended by the National Council of Provinces.

Should the Division of Revenue be amended, section 9(4) of the Money Bills Amendment Procedures and Related Matters Act requires any amendment thereto to be consistent with the Fiscal Framework and section 214 of the Constitution. Section 10(4) in turn requires that any amendment to the Appropriation Bill be consistent with the Fiscal Framework and the Division of Revenue Bill. This in accordance with the sequence prescribed by the Act.

Section 214 of the Constitution gives the National Council of Provinces enormous powers in the passing of the Division of Revenue Bill. In considering the Division of Revenue Bill, section 214(2) requires the following to be taken into account

- (a) the national interest;
- (b) any provision that must be made in respect of the national debt and other national obligations;
- (c) the needs and interests of the national government, determined by objective criteria;

- (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- (e) the fiscal capacity and efficiency of the provinces and municipalities;
- (f) developmental and other needs of provinces, local government and municipalities;
- (g) economic disparities within and among the provinces;
- (h) obligations of the provinces and municipalities in terms of national legislation;
- (i) the desirability of stable and predictable allocations of revenue shares; and
- (j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

A closer look at the factors to be considered reveals that in considering the Division of Revenue Bill, the National Council of Provinces must ensure that the interests of the national, provincial and local spheres of government are taken into consideration. The majority of the factors is however focused on the provincial and local spheres of government. The question to be answered is whether the National Council of Provinces does so? This requires an interplay between the three spheres of government in furtherance of the principles of co-operative government. It presupposes that the three spheres are sufficiently resourced and empowered to provide the information required to factor the decision whether to amend the Division of Revenue Bill or not. The mandates of the provinces must objectively support their proposed amendments. Of particular importance, the provincial delegates must be willing to negotiate with each in order to support the proposed amendments. This during the committee negotiating stage.

## **A NEED FOR MORE POWERS FOR COMMITTEES?**

As indicated, it appears to me that there is consensus that there is no need for further legislation to enable Select Committees to perform their constitutional obligations. The question is whether the Rules of the National Council of Provinces sufficiently provide for its effective participation in the budget as well as in the budget and fiscal oversight and accountability processes. It may be argued that there is no need to amend the Rules to give the committees of the National Council of Provinces more powers than they currently possess.

For the purposes of overseeing and holding the Executive accountable, the National Council of Provinces has established Select Committees. These Committees are clustered in accordance with the portfolios of government. Each has the responsibility to oversee the exercise of executive authority within its area of operation and to report to the House on those matters. In addition to conducting oversight on their own accord, Select Committees are required to report to the House on matters referred to them. To enable them to perform their functions, the Rules arrogate to the Select Committees the powers to summon any person to appear before it to give evidence on oath or produce documents, conduct public hearings, receive petitions or submissions or conduct public hearings. Most importantly, Select Committees have the power to determine their own procedures. Thus, they may determine their own programmes and other logistics, subject to the directions of the Programme Committee.

Section 4 of the Money Bills Amendment Procedures and Related Matters Act makes provision for the powers and functions of the Finance and Appropriation Committees. It however does not make provision for powers and functions of other oversight committees. It appears that this is only for the purposes of processing the annual Fiscal Framework, the Division of Revenue and Appropriation Bills.

Neither the Rules nor the Money Bills Amendment Procedures and Related Matters Act specifically provide for tabling and consideration of Strategic Plans, Annual

Performance Plans and budget allocations of departments in the National Council of Provinces. In fact, as indicated earlier, the Money Bills Amendment Procedures and Related Matters Act only provides for tabling in the National Assembly. It further makes provision for the tabling of budgetary and budget review and recommendations reports in the National Assembly. Even if the Rules or the Act do not explicitly provide for that, section 92(2) makes the Members of Cabinet accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Section 92(3) compels Members of Cabinet to provide Parliament with full and regular reports concerning matters under their control. It may therefore be necessary to amend the Rules so as to explicitly make provision for the tabling of the Strategic Plans, Annual Performance Plans and budget allocations to all departments. Given the size of the National Council of Provinces, it may not always be possible to consider these for all the departments and their entities.

There also seems to be an assumption that the National Council of Provinces has committees like the Standing Committee on Public Accounts and Standing Committee on Auditor-General. It does not have. While it may not be necessary to establish these committees, it is however necessary to establish a strong relationship between the Office of the Auditor-General, National Treasury and the National Council of Provinces. This will go a long way in ensuring that the reports that are tabled in the National Assembly are equally tabled in the National Council of Provinces. This relationship needs to be formalised.

## **RECOMMENDATIONS**

- The Rules be amended so as to provide for the
  - tabling of Strategic Plans, Annual Performance Plans and budget allocations to the department
  - consideration of the above by Select Committees
  - policy debate by the House
  - determination by the Chairperson, in consultation with the other Presiding Officers, Provincial Whips and parties, of the votes to be debated

- The Money Bills Amendment Procedures and Related Matters Act so as to provide
  - tabling of the annual national budget in the joint sitting
  - tabling of the Appropriation Bill and the Division of Revenue separately from the annual national budget
  - for the tabling and consideration of Strategic Plans, Annual Performance Plans and budget allocations to the department
  - tabling and consideration of the budgetary review and recommendations reports in the National Council of Provinces.
  
- To establish a relationship with the Office of the Auditor-General and National Treasury