

cnt40:fundmem

MEMORANDUM

THE PROMOTION OF ORDERLY INTERNAL POLITICS BILL

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1. INTRODUCTION

The Promotion of Orderly Internal Politics Bill ('the bill') will have a profound effect on organisations which receive money from outside the country and engage in 'political activities'. In addition, it will amend the Fund Raising Act 107 of 1978 in a number of important respects.

The memorandum detailing the objects of the bill is instructive and chilling: it is asserted that the principle which underpins the bill is that 'political aims and objects ought to be pursued in the Republic without interference, monetary or otherwise, from abroad' (Memorandum on the Objects of the Promotion of Orderly Internal Politics Bill, 1988; para 1).

In addition to seeking to limit what is perceived to be the pernicious influence of foreign finance by introducing the concept of restricted organisations and persons, the bill also prohibits certain forms of conduct. By way of illustration, it creates an offence for saying or doing 'anything which is intended to have the effect, or which may reasonably have the effect that ... (a) hostility

between persons of different nationality, cultural or religious groups or parts of such groups is caused, encouraged or fomented' (clause 16(1)). The reason for these prohibitions is stated as follows:

' Events during the past years have again proved that the fomenting of hostility between various political, nationality, cultural, religious or population groups, and the inciting of such groups against one another, are used as instruments in the advancement of national and international political and other objectives. This type of conduct is dangerous and despicable and is usually used by extremists and terrorists.' (Memorandum on the Objects of the Promotion of Orderly Internal Politics Bill, 1988; para 6).

2. NEW CONCEPTS AND CONTROLS

(a) Prohibition on Foreign Funds

The bill introduces a total prohibition on political parties receiving money from outside the republic. In addition, 'no other organisation or person may directly or indirectly receive from outside the Republic, or directly or indirectly bring in or cause to be brought into the Republic, any money which is intended to be used, or in the discretion of that organisation or person, may be used, to further, propagate, pursue or oppose any political aim or object' (clause 2).

(b) Restricted Organisations and Persons

At present the Affected Organisations Act 31 of 1974 makes

provision, via an elaborate administrative process, for an organisation to be declared an affected organisation.

Such an organisation may not receive foreign money. The bill makes provision for an organisation or person to be declared restricted.

Before issuing a notice to this effect, the Minister of Justice must be 'satisfied' that the organisation or person:

- (a) engages or participates in the furthering, propagating, pursuing or opposing of any political aim or object; or
- (b) is being used as a channel for introducing money which in the opinion of the Minister is to be used for the financing of activities -
 - i) which may endanger the safety of the public or the maintenance of public order in the Republic; or
 - ii) which may delay the termination of a state of emergency the existence of which has been declared in the Republic, from outside the Republic into the Republic; and
- (c) has received or receives money from outside the Republic ...' (clause 3(1))

(c) The Machinery and Effects of Restriction

The bill creates the office of Registrar of Restricted Organisations and Persons. This functionary is entrusted with the exercise of the most important powers and functions in terms of the bill. He is, however, subject to the control and supervision of the Minister in exercising these powers and functions (clause 4).

Once an organisation is declared restricted, it may be required to transfer or deliver to the Registrar any money in its possession or under its control which it acquired from outside the Republic, prior to the restriction (clause 5(1)). In addition, when such an organisation receives foreign money after it has been restricted, it is required to give notice to the Registrar of the receipt of that money and to transfer or deliver it to him (clause 5(2)(a)).

This obligation also falls on non-restricted organisations or persons receiving money 'for or on behalf of or for the benefit of' a restricted organisation. (Such an organisation or person will be referred to hereafter, for the sake of convenience, as a 'conduit'). In this case when notice is given to the Registrar by the conduit, he must give notice to the restricted organisation of the receipt of the money (clause 5(2)(b)).

If the Registrar has reason to suspect that foreign money has not been transferred to him, either by the restricted organisation or its conduit, he may direct the appropriate organisation or person to transfer or deliver the money to him (clause 5(3)(a)). If such a notice is directed to a conduit, notice must also be served on the restricted organisation (clause 5(3)(b)).

Clause 5(4) creates two very wide deeming provisions: if money has been credited to the account of a restricted organisation or a conduit on instruction from outside the Republic, or from a bank account in the Republic of a person who is resident outside the Republic or from an organisation having its head office outside the Republic, such funds shall be deemed to have been received from outside the Republic.

In terms of clause 6 a restricted organisation may within 30 days from transferring or delivering money to the Registrar, or of receiving a notice informing that a conduit has delivered money or of receiving a copy of a notice directing a conduit to transfer money to the Registrar, furnish the Registrar with written proof concerning the source of the money, the reasons why and purpose for which the money was paid and the purpose for which the money is to be used.

If this information does not satisfy the Registrar he may require the restricted organisation to furnish further information in writing or direct that an office bearer or officer appear before him to give oral evidence. The restricted organisation itself may request the opportunity to give oral evidence. No legal representative or any other person shall be present during a hearing 'except a

person in the service of the State, whose presence is considered necessary by the Registrar' (clause 6(4)).

In terms of clause 6(7) the Registrar, in investigating the source of funds and the purpose for which the funds were forwarded to the restricted organisation or are to be used, has wide powers of entry, search and seizure. He may 'without prior notice enter any premises and there make such investigation and enquiry as he may deem necessary, and seize any document on those premises which in his opinion has a bearing on the purpose of the investigation, or make extracts therefrom or copies thereof, and require any person whom he suspects to have the necessary information, to give an explanation of anything contained in such a document.'

Once money has been transferred or delivered to the Registrar in the circumstances outlined above, and no proof has been given as to the source of the money, the reason why and purpose for which the money was paid and the purpose for which the money is to be used, he may return the money to the foreign source from which it came. If this is not practical, he may dispose of it in such a manner as the Minister may, after consultaion with the Minister of National Health and Population Development, determine (clause 7(1)).

If, on the other hand, he is satisfied after considering proof, further information, documents or explanations that the money or part thereof will not be used 'for the furthering, propagating, pursuing or opposing of any political aim or object' or for the financing of an activity which may endanger the safety of the public or the maintenance of public order or which may delay the termination of a state of emergency in existence at the time, he shall transfer or deliver the money or part thereof to the restricted organisation for which it was intended.

He is required, in relation to any money withheld from the restricted organisation, to report to the Minister. The Minister will decide on the basis of this report whether to hand back the money to the restricted organisation or, if he is satisfied with the Registrar's findings, direct the Registrar to return the money or dispose of it as he, along with the Minister of National Health and Population Development, determines. The Minister is then required to give notice to the restricted organisation of his decision.

(d) Court Applications

In terms of clause 8, restrictions are placed on court proceedings relating to administrative action by the

Minister.

In the first place clause 8(1) seeks to partially oust the court's jurisdiction to determine the validity of a notice issued in terms of clause 3(1) (i.e. a restriction notice) and clause 7(3)(b)(ii) (i.e. confirming the Registrar's decision not to hand money back to a restricted organisation). It attempts to do so by restricting the period in which proceedings can be launched to within 30 days of the date of issue of a clause 3(1) notice or the receipt of a clause 7(3)(b)(ii) notice.

Furthermore the proceedings must be completed within twelve months of the date of issue or date of receipt of the appropriate notice. In this instance, however, the court can condone the fact that proceedings have not been completed if it is satisfied that the delay 'is not due to the fault of the party who instituted the proceedings'.

In addition, no court may make an order suspending the operation of any notice pending the outcome of proceedings (clause 8(2)) but money which is the subject of litigation may not be returned to its source or otherwise disposed of by the Minister until the proceedings are completed (clause 8(3)).

(e) Other Obligations Imposed on Restricted Organisations and Persons

A restricted organisation which has received money in accordance with the provisions of the bill may only use that money for the purposes stated to the Registrar (clause 9). To facilitate the administration of the act, every restricted organisation must open a separate savings or cheque account at a financial institution, into which all money transferred to it by the Registrar will be deposited, keep the prescribed records of its financial transactions in relation to that money and timeously furnish the Registrar with the prescribed reports, returns and financial statements. (The prescribed records, reports, returns and financial statements and matters relating thereto will, no doubt, be covered by regulations made in terms of clause 15.)

(f) Inspections

The Registrar has power to appoint inspectors to assist him in the policing of restricted organisations (clause 11(1)). A certificate of appointment, signed by the Registrar, serves as proof of appointment as an inspector (clause 11(4)).

The Registrar and inspectors have the following powers:

- i) power to enter any premises without prior notice, to investigate and make enquiries while there without warrant to search the premises then or at any time for money, security, records, accounts or documentation (clause 11(6)(a));
- ii) power to examine or remove such securities, records, accounts or documents, to make or cause to be made extracts or copies and to seize such documents if, 'in his opinion, they can provide proof of the commission of any offence or irregularity' (clause 11(6)(b));
- iii) power to request any explanation of a document of any person present on the premises, an office bearer or an officer of a restricted organisation (clause 11(6)(c));
- iv) power to examine any past or present office bearer, officer, employee, auditor, accountant or representative of a restricted organisation. This examination is restricted to the affairs and activities of the organisation 'insofar as they are connected with the receipt and appropriation of money...' (clause 11(6)(d)). The person being examined may have a lawyer present (clause 11(7)).

(g) Offences and Penalties

The bill creates two categories of offences. The first category consists of the following:

- i) receiving foreign money for a political activity as defined in clause 2 (clause 13(2)(a));
- ii) failure, on the part of a restricted organisation or conduit to comply with a notice or direction to transfer foreign money to the Registrar or to give notice of the receipt of such funds (clause 13(1)(b));
- iii) using foreign money for a purpose other than that specified to the Registrar (clause 13(1)(e)); and
- iv) 'participating in any transaction, agreement or scheme which is intended to evade section 5(2)' (i.e. transferring of foreign money to the Registrar) (clause 13(1)(i)).

The offences in this category carry a maximum penalty of R20,000.00 or twice the amount of money involved, whichever is the greater, or 10 years imprisonment or both (clause 13(2)(a)).

The second category of offences relate to such matters as refusing to furnish proof relating to the source of foreign money, the reason why and purpose of a payment to

a restricted organisation and the proposed use of the money (clause 13(1)(c), (d), (f), (g) and (h)). These offences carry a maximum sentence of a fine of R1,000.00, imprisonment for one year or both the fine and imprisonment (clause 13(2)(b)).

(h) Other Prohibitions

Two further sets of offences are created which are unrelated to the bulk of the subject matter of this bill. The first deals with the saying or doing of anything which 'is intended to have the effect or may reasonably have the effect' of causing, encouraging or fomenting hostility between persons of different nationality, cultural or religious groups or parts thereof or insulting or injuring in his or her feelings any member of a nationality, cultural or religious group or persuading, advising, encouraging or inciting members of such a group to commit violence against any member or members of the same or any other group (clause 16(1)). These offences carry a maximum sentence of a fine of R4,000.00, imprisonment for two years or both.

The second set of offences relate to the display or exhibition in public of any 'flag, standard, banner, badge, emblem, mark or slogan' which has been identified by the Minister in the Gazette as having the effect of

creating hostility between persons of different nationality, cultural or religious groups, is insulting or injures the feelings of a member of such a group or incites violence against a member or members of such a group (clause 17(1)). Any person who, in public, displays or exhibits such an object or who attends or remains present at any 'gathering, concourse, procession, congregation of persons or occasion' where such an object is displayed or exhibited shall be guilty of an offence and be liable to a maximum fine of R4,000.00, to imprisonment for two years or to both (clause 17(2) and (3)).

3. AMENDMENTS TO THE AFFECTED ORGANISATIONS ACT 31 OF 1974

The amendments in the bill to the Affected Organisations Act are aimed at bringing it into line with the tenor of the bill. By and large they are not substantial amendments.

In the first place provision is now made for affected persons whereas formerly provision was only made for affected organisations. An affected person is defined as 'a person who has in terms of section 2 been declared to be an affected person' (clause 18(b)).

Secondly the powers formerly vested in the State President to declare an organisation affected, are now vested in the Minister

of Justice who may declare organisations and persons affected by notice in the Gazette (clause 19).

Thirdly, the prohibition on foreign funds is widened: whereas section 2(2)(a) prohibited any person from canvassing for foreign money for or on behalf of an affected organisation, the amendment prohibits canvassing for foreign money 'for or on behalf of or for the benefit of an affected organisation or person' (clause 19).

Fourthly, a further prohibition is created by the insertion of a section 2(2)(d) which reads:

' No person shall (d) receive money which directly or indirectly comes from abroad in payment of goods supplied to or by or services rendered to or by an affected organisation or person or in payment of goods supplied to or by or services rendered to or by any other organisation or person on instructions of an affected organisation or person.' (clause 19)

The proposed section 2A says:

'No affected organisation or person shall -

- (a) ask for or canvas money from abroad;
- (b) receive money which directly or indirectly comes from abroad;
- (c) bring or cause to be brought or assist in bringing into the Republic any money from abroad whether for itself or himself or for or on behalf of or for the benefit of any other organisation or person.' (clause 19)

Fifthly, the proposed section 8(A) specifies certain financial controls on affected organisations and persons by requiring :

- i) the keeping and submission to the Registrar of the 'prescribed records of all the money received and

expended by it or him and of all its or his assets and liabilities and of all financial transactions entered into by it or him';

- ii) the auditing of the financial statements of affected organisations and persons; and
- iii) exemption from auditing or the furnishing of reports, returns and financial statements.

(clause 23)

Finally, the proposed section 8(B) gives the Minister power to make regulations on 'any matter permitted or required to be prescribed' and any matter deemed necessary or expedient by the Minister in order to achieve the objects of the Act. The Minister may also make regulations which create offences although he may not, by regulation, provide for a penalty exceeding a fine of R500.00 or imprisonment for more than six months (clause 23).

4. AMENDMENTS TO THE FUND RAISING ACT 107 OF 1978

The amendments to the Fund Raising Act are substantial and have far reaching, if absurd, effects. The most important amendments are to the definitions of the terms 'collect' and 'contribution', the deletion of reference to the term 'the public', the repeal of section 1(2) and its replacement with a new section 2. In addition powers of the Director and

inspectors are widened, a new offence is created and the penalties created by the Act are increased.

(a) The Framework

The framework of the Act is altered and so called loopholes have been closed by the new definitions and clause 2. Whereas in the present Act a prohibition exists on the collection of contributions from the public, the bill replaces this with the following prohibition:

' No person shall collect contributions, whether inside or outside the Republic, unless he is authorised thereto in terms of this Act and unless the collection takes place in accordance with the provisions of this Act.' (clause 27)

The term 'collect' is defined as 'in any manner whatsoever soliciting, accepting, collecting or obtaining contributions from any person or organisation or attempting so to collect or obtain, or to receive in or bring or cause to be brought into, the Republic any contribution so collected outside the Republic' (clause 26(a)).

It will be noted that this definition makes no reference to the collection of contributions from the public. It was arguable that the prohibition on collecting funds from the public did not exclude approaches to isolated individuals or individuals within the so-called domestic

circle of the collecting body. The amendment has the effect of closing this means of collecting funds.

The extremely confusing definition of 'contributions' has been amended to mean 'moveable or immoveable property, including money or anything that can be exchanged for or converted into money, the transfer of which, directly or indirectly a) is intended to be a donation or gift; or b) confers a right to participate in any competition, contest, game, scheme, arrangement or system in connection with which any prize may be won'. (clause 26(b))

(b) Powers of the Director

The amendments in clause 28 to the powers of the Director in respect of inspections closely resemble the powers, in similar circumstances, of the Registrar, dealt with above.

First, the Director is freed of the irksome burden of acting only with the approval of the Minister in inspecting the affairs of organisations and persons and when entering premises for the same purpose.

The Director's powers are also increased to allow entry into premises of an organisation or person other than that under investigation if he deems this necessary, to demand delivery of any money, securities, records, accounts or

documents while on such premises or at any other time and to demand delivery of documents at a time and place determined by him.

(c) Exemptions

Section 33, dealing with exemptions, has been amended by clause 29 to provide for two distinct categories of exemptions. The first consists of bodies which are authorised to collect contributions in terms of any other law and state institutions both of which may collect contributions internally and externally. The remaining exemptions only apply to collecting internal contributions. This means, for example, that an organisation may only collect membership fees from members inside the country. The provisions of clause 2 will apply if an organisation seeks to collect a membership fee from a member living abroad. Educational institutions and religious bodies are restricted in a similar way.

(d) Offences and Penalties

In addition to tinkering with the offences relating to requests or demands made, and the answering of questions put by the Director or an inspector in terms of the Act the bill creates a new offence: that of receiving a contribution and 'by means of any scheme, arrangement or

agreement' giving out or attempting to give out that it is not a contribution (clause 30(b)).

Finally the penalties for contraventions of the Act are increased substantially. In the case of the more serious offences, a maximum fine of R20,000.00 or imprisonment for 10 years or both, may be imposed, while in the case of the less serious offences a fine of R2,000.00 or one years imprisonment or both may be imposed (clause 30(d)).

Under the present Act the penalties are a maximum fine of R1,500.00, imprisonment for three years or both in the case of the more serious offences and a fine of R500.00, imprisonment for six months or both in the case of the less serious offences.

5. CONCLUSIONS

The broad strokes used by the framers of the bill are particularly perturbing. Not only are sweeping emergency type powers given to the Minister, the Registrar and his delegates, but the concepts employed in it are, to say the least, open ended: only the doctrine of parliamentary sovereignty will save them from being struck down for vagueness: for instance, the term 'political aim and object', with or without the qualifications in the bill, is so broad as to cover, one presumes, campaigning for a change to the income tax laws. How

a court will interpret such a provision can only be a matter of speculation.

Of present importance are whether trade union activities, otherwise protected by the Labour Relations Act, can be deemed to be 'political acts or objects' or whether the educational or support/counselling functions of a union or other organisation can fall within the scope of the bill. The root of the problem lies in the wide, subjective discretion granted to the Minister, making challenges to his decisions very difficult. In effect, the Minister and the Registrar will define the terrain on which any legal battles will be fought.

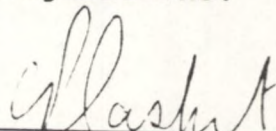
It is worth noting that despite appearances, clause 8 which purports to restrict legal intervention, is not as potent as it may seem. It contemplates challenges to action taken 'in terms of' clauses 3(1) and 7(3)(b)(ii). A court still has the jurisdiction to pronounce on whether any action was in fact taken 'in terms of' these clauses and, if not, it may ignore the attempt to oust its jurisdiction. If, in other words, the Minister acted beyond his power, clause 8(1) is meaningless, as he cannot be said to have acted in terms of the relevant clause.

The amendments which the bill proposes to the Affected Organisations Act, are not substantial. This statement must, however, be seen in the context of the already draconian provisions of that statute in its present form. They clearly

tighten the Act and render otherwise legitimate avoidance of its provisions more difficult. The administrative procedures which have to be complied with prior to an organisation or person being declared affected remain, so it is possible that the Act will not be used against many organisations or persons: the procedures for restriction are shed of formality and 'due process' safeguards, are easier for the State to use and will probably be as effective.

The proposed amendments to the Fund Raising Act are substantial and will have a profound effect on organisations. The total prohibition on collecting contributions, 'whether inside or outside the Republic' from 'any person or organisation' is so wide that, on the face of it, a person may not accept a birthday present. It also renders the lawful raising of internal funds eg. from one's 'domestic circle' more difficult and subject to the same problems which now exist in relation to overseas funds.

The three financial components of the bill create a tight and interlinked network of controls in which the administrative 'penalties' and processes and the criminal provisions are intended as severe deterrents. The bill, in short, looks like the financial equivalent of the emergency regulations.



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