

Delegation by Parliament of its legislative powers: a South African perspective

Deon Rudman¹



Introduction

The aim of my presentation is to give a SA perspective on the drafting of enabling provisions in Acts of Parliament and to remind ourselves of the importance of these provisions. I will then also examine Parliament's supervisory role relating to subordinate legislation and make a few recommendations for reform.

The constitution and the delegation of legislative power

In dealing with the topic of delegation of its legislative powers by Parliament, one can only do so with reference to our Constitution. South Africa has moved from a system of Parliamentary sovereignty or supremacy to one of constitutional supremacy.

Section 2 of the Constitution provides as follows:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the Executive and all organs of state.

Parliament, which consists of the National Assembly and the National Council of Provinces, is the legislative authority in the national sphere of government. There are also nine provincial legislatures and a large number of municipal councils, all of which have legislative authority. The Constitution provides for the scope of the legislative powers of these legislative bodies which are all democratically elected and deliberative legislative bodies and their legislation is original as opposed to subordinate legislation.

Since the Constitution is the supreme law in South Africa, these legislative bodies are all subject to the Constitution and, therefore, their legislation can be scrutinised by the Constitutional Court, the Supreme

¹ Head of the South African Department of Justice & Constitutional Development.

Court of Appeal and the High Courts. The supremacy of the Constitution in relation to the legislatures is twofold:

- Their legislative power is subject to the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power; and
- laws have to be made in accordance with the Constitution.

The Constitution does not expressly provide for delegation by these legislative bodies of their legislative powers. Neither does it prohibit such delegation. However, there is recognition for such delegation in the Constitution. But what about the doctrine of separation of powers which is one of the cornerstones of our Constitution? This principle is, inter alia, reflected in the structures and the affairs of our government namely the legislative branch, the executive branch and the Judiciary. In South Africa the separation of powers is not complete or absolute. The Constitutional Court has rejected the idea of a rigid separation of powers and has recognised some degree of overlap between the respective functional spheres of the legislatures, the Executive and the Judiciary and has also recognised a degree of interdependence. South Africa's recent constitutional jurisprudence regarding the principle of separation of powers has left the door open for Parliament to continue its practice of delegating its legislative powers, albeit in a different manner.

A number of decisions of the Constitutional Court have made it clear that delegation by Parliament of its legislative powers is constitutional.

However, Parliament is now also subject to the Constitution and its legislation can be tested by our courts. Parliament has to act within certain parameters. An important case in this regard is that of the *JCouncil, Western Cape Legislature* which was decided under the Interim Constitution. In this case, section 16A of the *Local Government Transition Act 209 of 1993*, empowering the President to amend the said Act and its Schedules by Proclamation in the *Gazette*, was found to be invalid because of an unconstitutional delegation of legislative power. The case is important for a number of reasons. The Court made it clear that there is a difference between—

- “delegating authority to make subordinate legislation within the framework of the statute under which the delegation is made, and
- assigning plenary legislative power to another body, including, as s 16A did, the power to amend the Act ...” (which is not allowed under the South African Constitution).

The court referred to the law as it has developed in other countries and came to the conclusion that where Parliament is established under a written Constitution, the nature and extent of its power to delegate legislative powers to the Executive depends ultimately on the language of the Constitution, construed in the light of the country's own history. In our case, it is a history of breaking away from Parliamentary Sovereignty. The case is also important as it refers to the following tests which may indicate that plenary legislative power has been assigned:

- The power to exercise a discretion as to what the law shall be, as opposed to a discretion as to the execution of the law.

- Does the delegation entail more than the mere giving effect to principles and policies contained in the statute itself?

A second limitation on the delegation by Parliament of its legislative powers has been identified, namely the extent to which delegated legislation will interfere with Parliament's distinctive functions and duties. The Constitutional Court held that section 24 of the *Local Government: Municipal Structures Act 117 of 1998* was unconstitutional because it delegated to the Minister for Provincial Affairs and Constitutional Development the authority to determine, by Notice in the *Gazette*, the term of office of municipal councils whilst section 159(1) of the Constitution requires the said term to be determined by national legislation. The reasoning is that the term of office of the municipal councils (an elected legislative body) is a crucial aspect of the functioning of the council and section 159 is intended to protect a democratic political process against interference by the Executive.

The position is still that Acts of Parliament are in the form of "framework" legislation and the statutory flesh on the structures and scheme is added by means of subordinate legislation. The view has been expressed that law-making is the domain of the legislature and should not be delegated excessively to the executive branch of government.

The South African Constitution prescribes the values of the Republic, one of which is the supremacy both of the Constitution and the rule of law. In view of this, the South African Constitutional Court will most probably scrutinise legislative instruments vigorously so as to ensure that legislation meets the requirements relating to the principle of legality, which forms part of the rule of law. The powers delegated to the Executive may also have serious consequences in the application of the doctrine of *ultra vires*. Parliament and legislative drafters should therefore rather include express provisions authorising the subordinate legislation and draft these provisions in a manner that the recipient of the power has in fact full power to make legislation on all matters for which it may be needed.

Section 8 of the South African Constitution, which deals with the application of the Bill of Rights, provides that the Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of state. This issue has already been covered by my colleague, Enver Daniels and he also drew your attention to the rights that are enshrined in our Bill of Rights. Section 36 of the Constitution, as he indicated, is also part of the Bill of Rights and provides for the limitation of the rights in the Bill of Rights. If Parliament therefore delegates its legislative power it should be borne in mind that, in exercising such delegation, regard will have to be had to the Bill of Rights.

Frequency, nature and extent of delegation

The circumstances necessitating the delegation by Parliament of its legislative powers include limited Parliamentary time. As South Africa is still considered a young democracy, the position of our Parliament might be a little different from that of other jurisdictions in the Commonwealth. In terms of an audit done relating to the obligations of Parliament contained in approximately 282 statutes, e.g. law-making, oversight, appointment of office bearers and forging links with the public, it is evident that Parliament is hard pressed to attend to its obligations. Since society has become very complex and we have to cope with a highly technical and rapid changing environment, Parliament is also inundated with

Bills of a very technical nature or Bills requiring inputs of a highly technical nature; hence the need for the delegation of legislative powers.

An analysis of the legislation passed by Parliament during the period 2004 to 2006 reveals that Parliament generously delegates its legislative powers to the Executive.

I now turn to the recipients of delegated legislative powers. It is common practice to delegate legislative powers to the Executive, namely Cabinet Ministers or the head of the Executive, in our case the President and to statutory bodies. An interesting case in South Africa, in this regard, is the *Mpumalanga Petitions Bill* case. The *Mpumalanga Petitions Bill, 2000* provided for the Speaker of the legislature to make regulations relating to the implementation of the Act and to determine the date of its commencement. The Premier referred the question of the constitutionality of the Bill to the Constitutional Court. The Court held that the Constitution does not limit regulation-making to members of the Executive, nor does the Constitution limit the delegation of legislative powers to the Executive. Referring to the factors that ought to be considered when determining the appropriateness of the delegation of a law-making power, the Court held that—

“since the proposed legislation related to petitions to the legislature, giving substance to the legislature’s oversight responsibility of the Executive and to facilitate public involvement in the legislative and other processes of the legislature; and

since the Bill, once it becomes a provincial Act, would be implemented by the provincial legislature, including the Speaker, and not by the provincial Executive, it would be inappropriate for the Executive to regulate the former function, and wholly appropriate for the legislature to regulate both functions itself through its Speaker who, by virtue of his or her office had the necessary expertise and was fully accountable to the legislature.”

Another interesting example is to be found in the *Public Audit Act 25 of 2004* in terms of which the *Auditor General may make regulations pertaining to any matter to facilitate the application of the said Act*. The Auditor-General must, in terms of this legislation, after consultation with an oversight mechanism, which is to be provided by the National Assembly, submit any regulations made to the Speaker for tabling in the National Assembly. In addition, the Auditor-General must annually submit a report to the National Assembly on his or her activities and the performance of his or her functions.

Having regard to the views of the Constitutional Court in the *Mpumalanga Petitions Bill*-case, it appears as if the Auditor-General will also be responsible for the implementation of certain sections and the Auditor-General will also be subject to certain sections of the Act. There is also the aspect of accountability to the National Assembly both in respect of the regulations made and regarding the activities and performance of his or her functions.

I now wish to make a number of observations in regard to the *extent* to which Parliament delegates its legislative powers:

My first observation—The question arises as to how Parliament has dealt with policy matters and substantive issues and has Parliament, on occasion, delegated legislative powers to the executive that can be regarded as policy. I will answer this question by referring to a few examples:

- In terms of the *National Gambling Act, 2004*, the Minister may make regulations regarding the maximum number of any kind of licence, relating to gambling, to be granted in the Republic or in each province, subject to section 45. Section 45 sets out the criteria to be taken into account in determining the maximum number, thus guiding the Executive in the exercise of a discretion that might be regarded as a policy matter and which has serious implications for members of society.

The Finance Services Ombud Scheme Act 37 of 2004 provides that the Minister may—

- (a) make regulations regarding the limitations on the jurisdiction of the statutory ombud, but
- (b) simultaneously provides for factors to be taken into account in limiting the jurisdiction.

An Act of Parliament which creates a new scheme should contain the principles and policies. It can therefore be argued that a matter relating to limitations to the jurisdiction of a statutory ombud should be dealt with in the Act. In this instance, Parliament has empowered the Minister to regulate this matter but has once again put in place criteria to take into account when exercising the discretion.

- (c) The *Maintenance Act 99 of 1998* deals with, inter alia, applications for maintenance orders or the substitution of existing maintenance orders, the issuing of such orders and certain aspects relating to the execution thereof. The Act authorises the Minister for Justice and Constitutional Development to make regulations regarding the execution of maintenance orders. In analysing an execution process in general, one realises that such a process deals with executable property, property exempted from execution and the title of goods sold in execution, all of which are aspects normally regulated by an Act of Parliament. This might be an example where an enabling provision was drafted without having considered the entire process relating to execution. Hence it is very important that legislative drafters conceptualise the whole process before engaging in the drafting of the enabling provision.
- (d) Another example of enabling provisions which might be too broad, are sections of the *Magistrates Act of 1993* which empower the Minister to make regulations –
 - (aa) creating a structure and prescribing procedures in terms of which members of the public may report to such structure any alleged improper conduct on the part of a magistrate;
 - (bb) determining the powers and functioning of the structure;
 - (cc) the duties, powers, conduct and discipline of magistrates; and
 - (dd) the legal liability of any magistrate in respect of any act done in terms of the Act.

These are matters which one normally would have expected to be regulated in the parent Act and not in subordinate legislation.

My second observation is that Parliament very often delegates general legislative powers or provides for “catch-all phrases” or “umbrella provisions”. Although one might wonder to what extent this technique is used as a matter of course as opposed to really being required, South Africa is not unique in including a general legislative power in almost all Acts. There are many ways in which this is done, which might give rise to legal challenges regarding the manner in which the different formulations are to be interpreted. In analysing the general legislative powers contained in these Acts, one should be fully aware of the need to delegate legislative powers in broad terms so as to cater for scenarios not foreseen or anticipated in the drafting of the legislation. I have looked at various formulations and have come to the conclusion that, because some of these formulations allow for a subjective test, they will limit judicial review and for that reason are too wide. Let me refer to a few of these formulations:

- (a) The Minister may make regulations not inconsistent with the Act concerning any matter which in the opinion of the Minister is necessary for the effective carrying out or furtherance of the objects of the Act.
- (b) The Minister may make regulations regarding matters contemplated in certain sections of the Act, and, in general, regarding any incidental matter that may be considered necessary or expedient to prescribe in order to achieve the objects of the Act.

In this case it is clear that the general legislative power is limited to “any incidental matter” which only authorises the making of regulations relating to administrative and procedural matters and not regulations interfering with individual rights. The exercise of the power is not dependent on the subjective judgment of the delegate but will be tested objectively; it must be necessary or at least expedient, which has a much lower threshold.

- (c) The Minister may make any regulation with regard to any matter that is, firstly, governed by the Act and, secondly, that is incidental to the objects or implementation of the Act. With reference to the power to make a regulation with regard to a matter that is governed by the Act, Parliament has not restricted the power only to the making of regulations of a procedural or administrative nature.

If every word in this provision is to be given a meaning, then this power must be different from the power to make regulations “incidental to the objects or implementation of the Act”. One could also ask, what exactly does “governed by the Act” mean?

Legislative drafters *should* be aware that the use of different formulations makes interpretation difficult and, as far as possible, use uniform provisions.

I will, however, acknowledge that some of the general legislative powers might not be as wide as appears at first glance since one should be mindful of the relation between the parent Act and the legislation made under the delegation, namely that the latter should not be inconsistent with the former, and that the Act should be read as a whole. Secondly, if the *eiusdem generis rule*², is applied, the general legislative power will be limited.

My third observation—This is that the headings of the enabling provisions read differently. The following versions are used:

- (a) The Minister may make regulations regarding /in regard to
- (b) The Minister may make regulations relating to/ in relation to
- (c) The Minister may make regulations concerning
- (d) The Minister may make regulations in respect of

Are there any particular reasons for the different formulations and should we not try to adopt a uniform approach to limit legal challenges and to make it easier for the government officials advising *the* Executive regarding his or her delegated legislative powers.

My fourth observation—Parliament sometime obliges the Executive to make regulations and in other cases the Executive is allowed a discretion. There are also examples where, in the same Act, recipients of legislative powers are obliged to make regulations *relating* to particular aspects but has a discretion in respect of other matters. What is interesting to note, is that in some instances where a discretion has been given to the Executive, one finds an enabling provision reading as follows:

- “The Minister may make regulations regarding –
- (a) all matters which by this Act are required or permitted to be prescribed by the Minister; and
- ...”.

The word “may” should actually then be read to mean “must” in so far as the matters which are in terms of the Act required to be prescribed. Should this be the case, why can the enabling provision not provide in one subsection for the aspects in respect of which regulations must be made and in another subsection for the aspects in respect of which the recipient has a discretion. This will ensure that the recipient has a clear understanding of what is expected of him or her.

² See Lady Justice Arden’s paper *The impact of statutory interpretation on legislative drafting*, p. 4 above.

Parliamentary supervision

Parliamentary supervision is extremely important as section 43 of the Constitution places an obligation on Parliament to enact, amend and repeal rules of law. The principle of representation is one of the essential elements of a democratic system. The following quote is relevant in this regard:

“As only the second Parliament in our young democracy it is incumbent upon this Parliament to put in place measures that will promote the development of an institution worthy of the vision held by those who coined the phrase: ‘The People’s Parliament.’”

In addition, the Constitution requires the National Assembly, which is one of the components of Parliament, to provide for mechanisms –

- “(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of –
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state.”

No modern state can be governed effectively without the legislature delegating some of its legislative powers to the Executive to make subordinate legislation. Having regard to Parliament’s mandate, it is necessary that Parliament creates a legislative framework within which such delegated exercise of law-making takes place. That explains Parliament’s mandate to monitor and regulate the use of the delegated law-making power by the Executive. In the paper I have provided statistical information relating to the different ways in which Parliament monitors the execution of delegated legislative powers.

The issue of Parliamentary scrutiny must be looked at from two angles:

- Legislative framework: What are the requirements or guidelines provided for in the South African Constitution, other legislation, the parent Act or, more specifically, the enabling provision?
- At the practical level, how is this role being carried out to ensure effective supervision?

The South African Constitution provides that proclamations, regulations and other instruments of subordinate legislation must be accessible to the public and that national legislation may specify the manner in which, and the extent to which, proclamations, regulations and other instruments of subordinate legislation must be tabled in Parliament and approved by Parliament.

The South African Interpretation Act provides for the *publication* in the Gazette of subordinate legislation including rules and regulations made by the President, a Minister or a Premier of a province. Hence individual Acts do not necessarily provide for this aspect.

The South African Interpretation Act also provides for the *tabling* in Parliament of subordinate legislation made by the President, a Minister or the Premier of a province after publication in Gazette. That is also why many Acts of Parliament do not contain a provision requiring tabling of subordinate

legislation. Parliament has furthermore issued guidelines in respect of the tabling of papers in Parliament which require that particulars of the number, date and title of the Proclamation or Government Notice and the number and date of the *Gazette* in which they were published, must be provided.

Tabling of subordinate legislation in Parliament is an important measure in order to foster and enhance Executive accountability and keep the legislature abreast of the subordinate legislation made under delegated legislative powers. How effective is this tabling requirement? All that is tabled in terms of the Interpretation Act is a list of the regulations and rules that have been made and not copies of the regulations or the rules. The portfolio committees of Parliament only deal with subordinate legislation which is placed before it through tabling. Should the Executive not comply with the Interpretation Act, Parliament will not necessarily know that subordinate legislation has been made. Because there is reason to believe that not all government departments adhere to the requirements for tabling subordinate legislation in Parliament, it might be advisable to explore the possibility of establishing links between Parliament and the Government Printer to provide for the electronic transfer of subordinate legislation so that the necessary supervision can take place.

Another way of ensuring accountability of the Executive in respect of subordinate legislation is to require in the parent Act that the subordinate legislation be submitted to Parliament *before* its publication in the *Gazette*. It would appear as if this type of provision has been used increasingly by Parliament after 1994. However, most of the legislation requiring the submission of subordinate legislation to Parliament before publication, simply requires that the subordinate legislation be submitted but it contains no further directions regarding timeframes and the powers of Parliament in regard thereto. This creates some uncertainty. A proper process needs to be followed and sufficient time must be allowed for Parliament to consider the legislation in order to ensure that the tabling serves a purpose.

To illustrate some of the difficulties experienced, I wish to refer to the following two different formulations relating to submission:

Firstly, where an Act empowers the Executive to *make regulations by notice in the Gazette*, for instance in section 92 of the *Promotion of Access to Information Act, 2000*, which also requires submission to Parliament, the following process is followed: The Executive approves the subordinate legislation, whereafter the regulations are submitted to Parliament. If no response is received from Parliament after a reasonable period, it is assumed that Parliament has no comments and the regulations are then published in the *Gazette*. In passing I can mention that the heading of the regulations in this example will read as follows:

I,, Minister for hereby under section of the Act make the regulations in the Schedule (first person).

The second example is somewhat more complex namely where the enabling provision only provides that the *Executive may make regulations without requiring that this be done by notice in the Gazette*, for instance in section 30 of the *Equality Act*. The *Equality Act* also requires that any regulation made under the Act must be tabled in Parliament 30 days before publication thereof in the *Gazette*. In practice, the Department responsible for the administration of the *Equality Act* will submit proposed regulations to the Minister. The Minister, if satisfied, will make the regulations

although they will only come into operation, at the earliest, on the date of publication in the *Gazette*. After Ministerial approval but before publication in the *Gazette*, the regulations will be submitted to Parliament for the 30 day period. After the expiry of the 30 days, the regulations will be published in the *Gazette*. As already indicated, there is some uncertainty as to exactly what Parliament can do in these circumstances since the regulations have already been made. And in this example, the heading will read as follows:

The Minister ofhas in terms of section made the regulations in the Schedule (third person).

In the first example, the regulations are submitted to Parliament before they are made and in the second example, they are submitted to Parliament after they have been made. This is all very confusing.

The third measure used by Parliament to exercise control is to require that subordinate legislation *must be approved by Parliament*. Having regard to the different reasons why legislative powers are delegated, it seems counterproductive to use a measure of this nature unless special circumstances exist. The parent Acts seldom prescribes procedures to be followed or the powers of Parliament, hence some sense of uncertainty as to what should be done.

In respect of 29 Acts enacted during 2004—2006, it can be mentioned that—

- in 2 Acts it is required that the regulations be tabled after publication in the *Gazette*; and
- in 3 Acts it is required that the regulations be tabled before publication in the *Gazette*.

Two of the three Acts relate to the 2010 FIFA World Cup legislation. This justifies a conclusion that Parliament uses these forms of scrutiny sparingly and only when appropriate.

Thus statutory provisions exist to ensure Parliamentary scrutiny. Nevertheless, reform is needed. One possibility is to ask the South African Law Reform Commission to include this matter in its review of the Interpretation Act.

Having dealt with the legislative framework, let me look at the practical manner in which Parliament exercises its supervisory function. In South Africa, unlike in some other Commonwealth countries, we do not have a permanent parliamentary mechanism, for example, a standing committee, to scrutinise subordinate legislation. This is done by the portfolio committees established by the Speaker of the National Assembly with the concurrence of the Rules Committee of the National Assembly. These Committees have become the engine room of Parliament since 1994 which may initiate and prepare legislation but must also analyse and consider bills submitted to them by Cabinet. They have very busy schedules and their time is limited. Consequently, scrutiny of subordinate legislation cannot always be done speedily. Furthermore, as far as could be ascertained, the portfolio committees do not have prescribed criteria, except for the Constitution and other relevant legislation, against which they measure or test the subordinate legislation. Scrutiny of subordinate legislation furthermore might in some cases require expertise which is not necessarily available in all portfolio committees. As far as could be ascertained, there are also no procedures designed to facilitate reporting by the portfolio committees.

It is true that there are various Subcommittees on Delegated Legislation. However, their functions are to investigate and make recommendations to the Rules Committee on possible mechanisms that could be

used by legislators to maintain oversight of the exercise of legislative powers delegated to the Executive. They do not attend to the actual scrutinising of subordinate legislation. They have, for example, considered the report of a consultant appointed to conduct research relating to Parliament's oversight and accountability with a view to practically improving existing mechanisms of oversight and to identify areas where oversight mechanisms were required to be put in place.

Having looked at the systems and mechanisms of other jurisdictions relating to Parliamentary scrutiny, it appears that the following is crucial for effective scrutiny:

- (a) Scrutiny must be done in a formal and structured manner;
- (b) mechanisms or structures must be put in place;
- (c) appropriate procedures must be established;
- (d) proper record management is required;
- (e) Parliament requires sufficient capacity to carry out its supervisory task;
- (f) formal reporting by Parliament to the Executive; and
- (g) guidelines or terms of reference for the structures involved in the scrutiny process.

Parliament is fully aware of the fact that the scrutiny process is in need of reform. Hence it mandated an investigation regarding Parliament's functions relating to oversight and accountability and requested that a Legislative Landscape Study be conducted. The Ad Hoc Joint Committee on Oversight and Accountability issued a final report which has been made available for comments. Having regard to the content of the report in general and the recommendations made, there is confirmation for the view that there is room for improvement.

Other safety mechanisms

The size and operation of modern government makes it difficult for legislatures to scrutinise all government activities, including the making of subordinate legislation, effectively. Therefore, part of the oversight function must be to ensure that there are adequate alternative mechanisms in place so that problems can be addressed. An alternative safety measure often used by Parliament where legislative power has been delegated to a statutory body, is the requirement that subordinate legislation be made under the aegis or approval of the Minister responsible for the administration of the parent Act.

Another important measure is mandatory consultation with interested parties and affected persons. There are many examples of Acts of Parliament requiring consultation. In most cases, it is required that consultation should take place without requiring that there must be agreement on the regulations. It is especially in instances where the legislative power is to be exercised *in consultation with* another body or functionary, which means that the parties should agree, that irrational or arbitrary conduct can be prevented. After 1994, there seems to be an increase in the number of Acts requiring consultation, most probably due to the underlying constitutional values of accountability, transparency and participation. Let me offer some statistics regarding consultation required by referring to the 29 Acts that I have already mentioned:

- In 13 Acts consultation is required.
- In 11 Acts publication of the draft instrument with a view to inviting comment is required.

There are some interesting developments taking place in South Africa in respect of consultation. The *Promotion of Administrative Justice Act of 2000* deals with administrative action affecting the public and provides that where an administrative action materially and adversely affects the rights of the public, then consultation must take place, for instance through a public inquiry or by following a notice and comment procedure. This Act emanates from the Constitution which guarantees the right to just administrative action. A recent Constitutional Court case in which the question as to whether the making of subordinate legislation constitutes an administrative action, was dealt with, is the *New Clicks*-case. In this case three different views about the applicability of the Act were expressed, none of which attracts majority support:

- The first being that the Act applies to all instances of subordinate legislation – both the law-making procedure and its substance;
- Secondly, whether the Act applies to a particular instance of delegated law-making depends on whether the exercise of powers granted by a particular statute constitute administrative action within the meaning of the Constitution and whether the Act then excludes the particular power from its scope;
- Lastly, the Act does not apply to subordinate legislation.

This case has given much food for thought as to consultation prior to the making of subordinate legislation.

There is increasing pressure to improve the business environment by reducing costs and other impediments. Hence an increasing demand that regulations be effective and efficient. The Presidency and the National Treasury of South Africa has recently conducted an investigation on the Possibilities for Regulatory Impact Analysis (RIA) in South Africa. Draft Guidelines have been developed, the idea being that all regulatory proposals made at the national level, whether they take the form of draft primary or secondary legislation, are potentially subject to RIA. The draft guidelines are still in the process of being finalised. The RIA requires not only consultation but also the generating of different options and the evaluation thereof against set criteria. The purpose is to put in place effective but affordable regulatory measures. The South African Minister of Finance has recently required that a RIA be conducted, in line with the draft guidelines, in respect of draft regulations relating to the promotion of equality to be made under section 30 of the Equality Act, an indication of how serious Government is with this initiative. This initiative is in line with measures adopted by other jurisdictions, for example the United Kingdom. The application of RIA will most definitely prevent the development of ineffective and expensive regulatory measures which have a negative impact on the economic growth and development in South Africa. It will also assist Parliament with its scrutiny function.

Another way of monitoring the exercise of delegated legislative powers by the Executive, is, in my view, through sunset clauses which, in general, refer to a system of periodic review of subordinate legislation to ensure that it is still applicable. The Department of Justice and Constitutional Development has requested the South African Law Reform Commission to consider the sunseting of subordinate

legislation as part of its investigation relating to the review of the *Interpretation Act*. The Commission has consequently investigated this matter. A draft report is presently being compiled. Should this reform be accepted and implemented, South Africa would be on par with some other countries which have introduced sunset clauses in their legislation. Should we go this route, capacity will have to be created to do the required review.

Conclusion

In my view it would be fair to conclude that the state of subordinate legislation in South Africa calls for reform. The following

- In the first place, legislative intervention is required to, inter alia, deal with problems relating to tabling of subordinate legislation in Parliament, before or after publication but also in regard to approval and disapproval of such legislation.
 - The finalisation of the investigation relating to oversight and accountability of Parliament is of primary importance so as to ensure proper mechanisms and standards for review.
 - The idea of a central register for all subordinate legislation should also receive attention. Similarly, to enable Parliament to effectively monitor the content of subordinate legislation, consideration should be given to creating a register of all legislation that delegates legislative powers.
 - Furthermore, Parliament should, when scrutinising subordinate legislation, also review the enabling provision.
 - Legislative drafters must be extremely careful when drafting enabling provisions and all the aspects that I have referred to should be considered.
 - A detailed manual should be compiled indicating how enabling provisions should be drafted to ensure uniformity, where appropriate.
-