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Date: 26 October 2015

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The Honourable Mr A Williams
Acting Chairperson
Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
60 Plein Street
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8000

Attention: Mr Andre Hermans
Portfolio Committee: Trade and Industry
Email: ahermans@parliament.gov.za

Dear Mr Williams

LEGAL OPINION: PROMOTION AND PROTECTION OF INVESTMENT BILL [B 18—2015]

1. The Portfolio Committee on Trade and Industry ("the Committee") requests the Office of the Chief State Law Adviser ("the OCSLA") to provide on an urgent basis a legal opinion on whether clause 13(1) of the Promotion and Protection of Investment Bill [B 18—2015] ("the Bill"), provides the Minister of Trade and Industry ("the Minister") unfettered powers to regulate.
2. Clause 13(1) of the Bill provides as follows:

"Regulations

13. (1) The Minister may, by notice in the *Gazette*, make regulations regarding—

- (a) the criteria for the appointment of a mediator or competent authority for the resolution of a dispute;
- (b) the processes and procedures relating to the resolution of disputes contemplated in subsection 12(1);
- (c) any matter which may or must be prescribed in terms of this Act; or
- (d) any other matter the regulation of which may be necessary or expedient in order to achieve the purposes of this Act."

3. The phrase "any other matter the regulation of which may be necessary or expedient in order to achieve the purposes of this Act" in clause 13(1)(d) of the Bill appears to confer wide regulation making powers on the Minister. The Supreme Court of Appeal has on several occasions considered section 26(1) of the Road Accident Fund Act, 1996 (Act No. 56 of 1996), which contains substantially the same phrase as the phrase referred to above in the concluding paragraph of section 13(1) of the Bill. In *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 SCA¹ at p. 65 the Court remarked as follows:

"It is certainly not clear whether the modifier at the end of s 26(1) modifies the whole section or only the words which immediately precede it. In my view, however, this is of no consequence since it must in any event be implied that s 26(1) cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith. See *R v Hildick-Smith* 1924 TPD 69 at 92 and *Caney Statute Law and Subordinate Legislation* at 88. *Bennion Statutory Interpretation* 3rd ed (1997) at 189 points out that underlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the Legislature, as indicated in the enabling Act, must be the prime guide to the meaning of delegated legislation and the extent of the power to make it. Bennion continues as follows:

'The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the Legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it.'

In the case of *Utah Construction and Engineering (Pty) Ltd and Another v Pataky* [1966] AC 629 (PC) ([1966] 2 WLR 197), the Privy Council considered the validity of a regulation made in terms of a statutory provision which empowered the Governor of New South Wales to 'make regulations not inconsistent with this Act prescribing all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act'. Dealing with the argument that the regulation in issue could be justified as being within the empowering section, the Privy Council said at 202 (adopting a statement in the judgment of the High Court of Australia in *Shanahan v Scott* (1956) 96 CLR 245 at 250) that the power delegated by an enactment

'does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the Legislature has adopted to attain its ends.'"
(Our underlining.)

¹ See also *Geldenhuis & Joubert v Van Wyk and Another; Van Wyk v Geldenhuis & Joubert and Another* 2005 (2) SA 512 (SCA) and *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA).

4. For the purposes of this opinion the Supreme Court of Appeal cases quoted above provide clear guidelines regarding the limitations that are placed on the wide regulation making powers conferred on the Minister by clause 13(1)(d) of the Bill. From the underlined parts of the said cases it is clear that the Court regards the words "in order to achieve the purposes of this Act" which are contained in clause 13(1) of the Bill as the first and most important limitation on the wide regulation making powers of the Minister. In the **Bezuidenhout**-case, (*supra*), the Court further elaborated on the point by making it clear that a provision like section 26(1) of the Road Accident Fund Act, 1996, does not enable the Minister to make regulations that—

- (a) add new or different means of achieving the objects of the Act; and
- (b) differ from the scheme established by the legislature in the Act to achieve the objects of the Act.

5. Bennion, ***Statutory Interpretation***, 3rd Ed (1997) at 189, in respect of delegated legislation, states as follows:

" underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the legislature, as indicated in the enabling Act, must be the prime guide to the meaning of delegated legislation, and the extent of the power to make it."

6. In ***Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another 2003 (2) SA 344 (SCA)*** at paragraph 35, the court stated as follows:

"[35] The Republic of South Africa is a constitutional State, Local Authorities and other State institutions may act only in accordance with powers conferred on them by the law. This is the principle of legality, an incident of the rule of law".

7. The principle of legality was expanded on by Ngcobo J in ***Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)*** at paragraph 49, wherein the Honourable Justice stated that:

"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power." (Footnotes omitted).

8. We are of the opinion that in order to determine whether the Minister is authorised to make the proposed regulations it must be established that the said regulations will achieve the purposes of the Bill and do not have the effects envisaged in paragraph 4(a) and (b) above.

9. On perusal of the Bill as a whole it is evident that the legislature seeks to—

"provide for the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to all investors"².

CONCLUSION

10. There is no doubt that the Minister may make regulations under the current Bill as it stands, but the regulations must be consistent with the purpose of the Bill. The regulations may not add new or different means of achieving, or differ from the scheme established by the legislature in the Bill to achieve, the purpose of the Bill.

Yours sincerely



for CHIEF STATE LAW ADVISER
A Small / G Hoon / A Johaar

² See the long title of the Bill.