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The Honourable Mr BL Mashile, MP
The Chairperson
Portfolio Committee on Home Affairs
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Honourable Mr Mashile

LEGAL OPINION: THE SOUTH AFRICAN POLICE SERVICE'S FUNCTIONS IN RESPECT OF BORDER MANAGEMENT AND THE IMPLICATIONS OF THE BORDER MANAGEMENT AUTHORITY BILL, 2016

INTRODUCTION

1. In a meeting of the Portfolio Committee on Home Affairs (the "Committee") on 18 October 2016, the Committee considered proposed amendments and comments submitted by the Democratic Alliance (the "DA") in relation to the Border Management Authority Bill, 2016 (the "BMA Bill").

2. The Office of the Chief State Law Adviser made an undertaking to provide the Committee with a legal opinion regarding the classic policing functions performed by the SAPS.

BACKGROUND

3. On 16 August 2016, the South African Police Service (the "SAPS") had made a presentation to the Committee regarding the exclusivity of border control policing functions performed by the SAPS and the unintended consequences of the BMA Bill, 2016 in relation to the classic policing functions performed by the SAPS.

4. The following salient points were extracted from the submission of the SAPS:

- Item 24 of Schedule 6 to the Constitution assigns to the SAPS the responsibility for policing and security of the border management, which includes border control and transnational crime.
- Section 13(6) of the SAPS Act further empowers the SAPS for purposes of border control, to search, seize and arrest, without a warrant, any person or goods.
- The SAPS' function includes specialist functions, such as policing, the investigation of crime, intelligence gathering and the provision of specialised services, which can only be performed by SAPS and cannot be ceded to any other Department.
- The SAPS submitted that section 218(1)(j) of the Interim Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) (the "Interim Constitution"), which states that the National Commissioner shall be responsible for "*such functions relating to border control and the import and export of goods as may be assigned to the service by law*", is still in force and provides the SAPS with a constitutional responsibility in relation to

border control, and the import and export of goods, which must be acknowledged in the Preamble to the BMA Bill.

5. It must be noted that the SAPS and the Department of Home Affairs (the "Department") have, in the meantime, agreed, in a document entitled the "*Principal Agreements from the Meeting held Between the DG of Home Affairs and the Acting National Commissioner of SAPS, 19 September 2016*", on the following:

- The BMA Bill is not unconstitutional regarding its implications for SAPS' classic policing or border control / policing functions and no substantive revisions are necessary to the current BMA Bill on this matter.
- The BMA does not affect the classic policing functions of the SAPS. The SAPS will continue to perform classic policing functions (e.g. crime investigation), whilst the BMA will deal with border law enforcement functions pertaining to the movement of people and goods, as envisaged in the BMA Bill. Classic policing will be a concurrent function between the BMA and the SAPS within the border law enforcement area and at ports of entry.
- Various SAPS specialist functions (e.g. investigations and intelligence gathering) will remain in the SAPS and will not be transferred, nor be assumed by the BMA.
- The SAPS police stations located within the ports of entry will remain in place after establishment of the BMA and the general mandate for the SAPS to be involved in classic policing remains unaffected, while the BMA will assume primary responsibility for border law enforcement.
- The SAPS and the Department will further engage on a range of operational issues that would emanate from the establishment of the BMA

(i.e. through the conclusion of memoranda of understanding, standard operating procedures, etc.).

6. For the benefit of the Committee, we shall consider the points raised by the SAPS in its submission to the Committee in our legal opinion to demonstrate the SAPS' mandate, with emphasis on the following:

- Section 13(6) of the South African Police Service Act, 1995 (Act No. 68 of 1995) (the "SAPS Act");
- item 24 of Schedule 6 to the Constitution of the Republic of South Africa (the "Constitution"); and
- section 218(1)(j) of the Interim Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) (the "Interim Constitution").

LEGAL QUESTION

7. Does section 218(1)(j) of the Interim Constitution, confer an exclusive constitutional responsibility on the SAPS to perform functions in relation to border control and the import and export of goods?

DISCUSSION

The applicable rules of statutory interpretation and case law

8. In order to ascertain the role of the SAPS insofar as it relates to border control, we will have to consider the legislative provisions that are applicable and interpret such provisions accordingly. The significant rule of interpretation, as described by Devenish, GE, in his book "*Interpretation of Statutes*", First Edition, at p. 56, is to determine the intention of the legislature. If the intention of the legislature is clear from the language and its context, the presumptions of legislative intent become applicable. The presumptions of legislative intent reflect the character of Roman-Dutch common law which is based on the jurisprudence of natural law. It is only when the intention of the

legislature has been determined that the interpreter must consider whether the words of the statute reflect the intention accurately. If the words of a statute are in accordance with the intention of the legislature, words in a statute must be given their literal and ordinary grammatical meaning.

9. In **Jaga v Dönges 1950 (4) SA 635 (A)** (the “Jaga-matter”) the Appeal Court, as it was then known, laid the foundational principles of statutory interpretation, which are still applicable in practice, by emphasising that any attempt to discover the plain ordinary meaning of the words must include a reference to the context in which they are used. Schreiner JA also defined context when interpreting the provisions of a statute¹ to mean that context is not necessarily limited to the language of the rest of the statute, regarded as “*throwing light of a dictionary kind*” on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose and, within limits, its background.

10. The dictum in the Jaga-matter has been quoted with approval by the Constitutional Court in, *inter alia*, **Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security 2010 (2) SA 181 (CC)** and **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)**, where the Court remarked² further – with reference to **Thoroughbred Breeders’ Association v Price Waterhouse 2001 (4) SA 551 (SCA)** – that “*the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous*”. It has also long been recognised in our case law that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question. Thus, in **Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa D Ltd v Competition Commission and Others, 2002 (2) SA 797 (SCA)**, Schultz JA, writing for the majority of this court, stated as follows:

¹ At page 663 of the Jaga-matter.

² At paragraph 90.

“Our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 543*. But the passage also reflects that **it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be.**” (Our emphasis.)

11. Therefore, the words as contained in the relevant provision should be interpreted in accordance with the ordinary grammatical meaning and, thereafter, the context becomes applicable. As in the Jaga-matter, the scope of the Act, its purpose and background all become relevant in the context in which the language is used.

12. In **Minister of Land Affairs v Slamdien 1999 (4) BCLR 413 (LCC) 422**,³ the Court adopted the following approach to statutory interpretation:

“The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

- (i) in general terms, **ascertain the meaning of the provision** to be interpreted by an analysis of its purpose and, in doing so,
- (ii) **have regard to the context of the provision** in the sense of its historical origins;
- (iii) **have regard to its context in the sense of the statute as a whole**, the subject matter and broad objects of the statute and the values which underlie it;
- (iv) **have regard to its immediate context in the sense of the particular part of the statute in which the provision appears** or those provisions with which it is interrelated;
- (v) **have regard to the precise wording** of the provision; and
- (vi) where a constitutional right is concerned, as is the case here, **adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.**” (Our emphasis.)

³ At paragraph 144.

13. In the judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*⁴, it was noted that “*interpretation is the process of giving meaning to the words used in legislation and consideration must be given to the language, the context and the purpose of the legislation. The plain, ordinary meaning of the words cannot be considered in isolation even though the plain ordinary meaning of the words appears to be clear. There must be a consideration of the context of the statute.*”.

14. In *General Council of the Bar and Another v Mansingh and Others 2013 (3) SA 294 (SCA)*, the Supreme Court of Appeal had to consider the interpretation of section 84(2)(k) of the Constitution. The Court referred, *inter alia*, to the matter of *S v Makwanyane and Another 1995 (3) SA 391 (CC)* and stated as follows:

“The method of interpreting the Constitution has been established in several judgments of the Constitutional Court. In sum, these judgments hold that **the language of the constitutional text must be interpreted purposively and in context** (see eg *Viking Pony Africa Pumps (Pty) Ltd v/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC) para 32 fn 34*). Though **the court must thus seek to give effect to the object and purpose of the provision, it is limited by the language used**. The court is not permitted to impose a meaning on the text that it is not capable of bearing (*South African Airways (Pty) Ltd v Aviation Union of South Africa and Others 2011 (3) SA 148 (SCA) ([2011] 2 BLLR 112) para 29*).”⁵ (Our emphasis.)

Applicable law

The Interim Constitution of the Republic of South Africa, 1993

15. Sections 215 and 218 of the Interim Constitution are applicable to the SAPS. Section 215 of the Interim Constitution states as follows:

“215. Powers and functions.—The powers and functions of the Service shall be—

⁴ At paragraph 18 to 23.

⁵ Page 298, at par 10.

- (a) the prevention of crime;
- (b) the investigation of any offence or alleged offence;
- (c) the maintenance of law and order; and
- (d) the preservation of the internal security of the Republic.”.

The powers and functions are listed broadly in section 215, but this section does not specifically refer to the borderline or border control. However, it does make reference to the “preservation of internal security”.

16. Section 218 of the Interim Constitution refers to the responsibility of the National Commissioner and states as follows:

“218. Responsibilities of National Commissioner.—(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for—

(a)– (i)

(j) **such functions relating to border control and the import and export of goods as may be assigned to the Service by law;**

.....” (Our emphasis.)

17. Section 218(1)(j) of the Interim Constitution states that the responsibility for **such functions relating to border control and the import and export of goods as may be assigned to the Service by law**, belongs to the National Commissioner, subject to the directions of the Minister. If we consider the ordinary language of this provision, it is clear that *such functions relating to border control and the import and export of goods* **that are assigned to the Service by law** will be the functions under the mandate of the National Commissioner. This section does not specifically state how such functions may be assigned to the SAPS, except to state that it may be **assigned by law**. In our view, ordinary legislation may be enacted by Parliament to either repeal or amend section 218(1)(j) of the Constitution.

18. The SAPS, in its submission to the Portfolio Committee on Home Affairs, averred that it has an exclusive constitutional mandate over border control functions, but remains

silent regarding the import and export of goods – a function that is also contained in section 218(1)(j) of the Interim Constitution. If the SAPS is submitting that border control is an exclusive constitutional mandate of the SAPS, then it logically follows that the functions relating to the import and export of goods should also be regarded as functions over which the SAPS would have an exclusive constitutional mandate. However, the South African Revenue Service (“SARS”) also performs functions relating to the import and export of goods, which means that there is certainly no exclusivity to the functions that are referred to in section 218(1)(j) of the Interim Constitution. The only difference will be their mandates as provides for in their respective legislation.

19. Furthermore, no reference is made in section 218(1)(j) of the Interim Constitution to the “exclusivity” of the border control function and how it relates to the constitutional mandate of the SAPS. Section 218(1)(j) only refers to “*such functions relating to border control*” and “*the import and export of goods*”. In addition, section 215 of the Interim Constitution does not specifically identify “border control and the import and export of goods” as functions or powers of the SAPS.

The Constitution of the Republic of South Africa, 1996

20. Sections 205, 206 and 207 of the Constitution, as well as item 24 of Schedule 6 to the Constitution, must be considered when interpreting section 218(1)(j) of the Interim Constitution. Section 205 of the Constitution states as follows:

“205. Police service.—

(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) **National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively**, taking into account the requirements of the provinces.

(3) **The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants**

of the Republic and their property, and to uphold and enforce the law.” (Our emphasis.)

21. Section 205 of the Constitution thus provides that **national legislation must establish the powers and functions of the SAPS**. In this regard, it must be mentioned that we are not aware of any legislation that lists border control and the import and export as powers and functions of the SAPS, except for section 13(6) of the SAPS Act, which states as follows with regard to members of the SAPS:

“(6) Any member may, **where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic**, without warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, **at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state**, or in the territorial waters of the Republic, **or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters**, or at any airport as defined in section 1 of the Aviation Act, 1962 (Act 74 of 1962), or within any reasonable distance from such airport and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized.”

22. It is our view that section 13(6) of the SAPS Act provides only for certain border control functions of members of the SAPS **where it is reasonably necessary for the control over the illegal movement of people or goods across the borders of the Republic**. The border control functions that will be performed by the BMA will be performed within the border law enforcement area and at ports of entry, **in respect of the legal and illegal movement of people or goods**, whilst the functions of the SAPS, as contained in section 13(6) of the SAPS Act, are only limited to control over the **illegal movement of people or goods**, and further limited only to instances where it is **reasonably necessary** to perform such functions.

23. Section 206 of the Constitution refers to the political responsibility over the SAPS and provides that national policing policy must be determined after consulting with the Provinces. In this regard, section 206 states as follows:

“206. Political responsibility.—(1) A member of the Cabinet must be responsible for policing and **must determine national policing policy after consulting the provincial governments** and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The **national policing policy may make provision for different policies in respect of different provinces** after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled—

- (a) to monitor police conduct;
- (b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- (c) to promote good relations between the police and the community;
- (d) to assess the effectiveness of visible policing; and
- (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions—

- (a) vested in it by this Chapter;
- (b) assigned to it in terms of national legislation; and
- (c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province—

- (a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and
- (b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.” (Our emphasis.)

24. Attention is drawn to section 206(1) of the Constitution that provides for the determination of a national policing policy and legislation that inform the SAPS of its applicable functions. We are of the view that the national policing policy and current applicable legislation do not provide for the SAPS to, specifically, perform functions that relate to border control and the import and export of goods and it also does not appear that these functions are **exclusively conferred** on the SAPS by legislation.

25. Section 207 of the Constitution provides as follows:

“207. Control of police service.—(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner **must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.**

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces—

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.” (Our emphasis.)

Section 207 of the Constitution reaffirms our position that the National Commission and the SAPS are guided by their national policing policy, which does not include exclusivity in respect of functions that relate to border control and the import and export of goods.

26. Item 24(1) of Schedule 6 to the Constitution deals with transitional arrangements and states as follows:

“**24. Public administration and security services**

(1) Sections 82 (4) (b), 215, **218(1)**, 219(1), 224 to 228, 236(1), (2), (3), (6), (7)(b) and (8), 237(1) and (2)(a) and 239(4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to—

- (a) the amendments to those sections as set out in Annexure D;
- (b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and
- (c) consistency with the new Constitution.” (Our emphasis.)

27. Item 24(1) of Schedule 6 to the Constitution thus states that section 218(1)(j) of the Interim Constitution shall continue in force, subject to the amendments in Annexure D to the Constitution⁶, **any further amendment or any repeal of those sections by an**

⁶ Annexure D amends section 218 of the Interim Constitution as follows:

“The amendment of section 218 of the previous Constitution—

- (a) by replacing in subsection (1) the words preceding paragraph (a) with the following words:
“(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for—”;
- (b) by replacing paragraph (b) of subsection (1) with the following paragraph:
“(b) the appointment of provincial commissioners;”;
- (c) by replacing paragraph (d) of subsection (1) with the following paragraph:
“(d) the investigation and prevention of organised crime or crime which requires national investigation and prevention or specialised skills;”;

Act of Parliament passed in terms of section 75 of the new Constitution and consistency with the new Constitution.

28. From a reading of section 218(1)(j) of the Interim Constitution with item 24(1) of the Constitution, we are of the view that section 218(1)(j) may be amended or repealed by an Act of Parliament, passed in terms of section 75 of the Constitution. In effect, this means that the BMA Bill, once enacted, may repeal or amend section 218(1)(j) and a constitutional amendment would not be required to amend section 218(1)(j). However, the BMA Bill, in its current form, does not specifically repeal or amend this section.

Application of the law

29. In summation of the statutory rules of interpretation and further supported by the case law noted above, when interpreting a provision, the words as contained in the provision, should be interpreted in accordance with the ordinary grammatical meaning and thereafter, the context becomes applicable. **The provision to be interpreted cannot be read in isolation of the rest of the provisions in the said Act.** As noted in the principles from the judgments mentioned above, the scope of the said Act, its purpose and background **all become relevant in the context in which the language is used.**

30. After thorough consideration and application of the rules of statutory interpretation to the Interim Constitution, the Constitution and SAPS Act, we opine as follows:

- The functions relating to border control and the import and export of goods are not exclusive to the SAPS, since section 218(1)(j) of the Interim Constitution refers to such functions that **may** be assigned by legislation.

(d) by replacing paragraph (k) of subsection (1) with the following paragraph:

“(k) the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner;”.

- In addition, the functions relating to border control and the import and export of goods (the use of the word “and” will be interpreted conjunctively, i.e. not merely border control or the import and export of goods, but both phrases) will be the responsibility of the SAPS **only if such functions are conferred on the SAPS by applicable legislation.**
- If it had been the legislature’s intention to confer functions in relation to border control and the import and export of goods **exclusively** to the SAPS, the Constitution would have indicated that legislation **must** be enacted to give effect to the responsibility rather than to state that these functions **may** be assigned to the SAPS by law.
- Since 1993, no legislation has been effected to confirm the SAPS’ alleged “exclusive responsibility” or constitutional mandate in respect of functions that relate to border control and the import and export of goods.
- The SAPS is claiming only border control as an exclusive function and no mention is made of the functions relating to the import and export of goods. Section 218(1)(j) of the Interim Constitution cannot be interpreted in a piecemeal manner, without also considering the context of section 218 in its entirety, within the context of the Constitution.
- In addition, other legislation⁷ have conferred functions that relate to border control and the import and export of goods on, amongst other departments, the Department of Defence, Department of Home Affairs and the SARS. Specific border protection and border control functions are assigned to the Defence Force, certain functions in relation to the import and export of goods are assigned to the SARS (i.e. the Commissioner of SARS) and certain border control functions (i.e. the monitoring of both the legal and

⁷ Please refer to the applicable legislation for the Departments mentioned (i.e. the Defence Act, 2002 (Act No. 42 of 2002), the Immigration Act, 2002 (Act No. 13 of 2002) and the Customs and Excise Act, 1964 (Act No. 91 of 1964), amongst others.

illegal movement of persons) are assigned to the Minister of Home Affairs. There is thus **no exclusivity regarding the assignment** of these functions.

Conclusion regarding legal interpretation of section 218(1)(j)

31. We are of the view that section 218(1)(j) of the Interim Constitution **does not confer on the SAPS the exclusive functions** that relate to border control and import and export of goods. The functions relating to border control **and** the import and export of goods **as may be assigned to the SAPS by law (i.e. in legislation or otherwise)**, will be the responsibility of the SAPS, however, no such “law” currently exists.

32. These pieces of legislation⁸ that confer functions that relate to border control or the import and export of goods on different Ministers have, to date, not been challenged on grounds of being inconsistent with section 218(1)(j) of the Interim Constitution.

33. The powers and functions of the SAPS are informed by the national policing policy and the SAPS Act, neither of which refers to the exclusive performance of functions that relate to border control and the import and export of goods. Furthermore, if the SAPS argues that border control is an exclusive SAPS function, then the import and export of goods must also be considered as an exclusive SAPS function. However, as indicated above, these functions are currently performed by the SARS in terms of the relevant legislation. We have noted that the SAPS does not appear to be concerned about the functions that relate to the import and export of goods, referred to in section 218(1)(j) of the Interim Constitution and interprets the section to confer only border control functions on the SAPS. In this regard, it is our view that section 218(1)(j) of the Interim Constitution should not be interpreted in a piecemeal manner (i.e. by choosing either border control functions or functions that relate to the import and export of goods), but should be interpreted and applied within the context of section 218(1)(j) in its entirety, and within the context of the Constitution.

⁸ The Defence Act, 2002 (Act No. 42 of 2002), the Customs Control Act, 2014 (Act No. 31 of 2014), the International Trade Administration Act, 2002 (Act No. 71 of 2002) and the Immigration Act, 2002 (Act No. 13 of 2002).

Classic policing functions and the power to search and seize

34. Section 13 of the SAPS Act deals with the duties, powers and functions that are conferred on, or assigned to members of the SAPS and, to the extent that it is relevant to the issue at hand, provides as follows:

"13. Members.—(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions **as are by law conferred on or assigned to a police official.**

(2) – (5) . . .

(6) Any member may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without a warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters, or at any airport as defined in section 1 of the Aviation Act, 1962 (Act No. 74 of 1962), or within any reasonable distance from such airport and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized." (Our emphasis.)

35. The SAPS referred to classic policing functions (i.e. investigation, arrest, detaining, search and seizure related to crime) and highlighted that section 13(6) of the SAPS Act confers on the SAPS the power to search and seize. We have consulted with the Department and the Department informs us that the BMA will not perform classic policing functions but will assist with border law enforcement insofar as it affects the borderline and the exercise of border law enforcement functions. We disagree with the Department and are of the view that the BMA will inevitably perform certain classic policing functions relating to border law enforcement. Therefore, some classic policing functions may be performed by the BMA.

36. In our opinion, the BMA, as an armed service, must be able to **investigate** border law enforcement matters, **search and seize** at points and places of entry and **arrest** when required. This may overlap with classic policing functions, but it is submitted that functions or powers associated with classic policing are **not exclusively SAPS functions or powers**.

37. This view is supported by the provisions in, amongst others, the following pieces of legislation:

- The Immigration Act, 2002⁹ confers on immigration officers the power to arrest, detain and deport persons as part of the border control functions assigned to the Minister of Home Affairs. This is similar to some of the classic policing functions performed by the SAPS. However, such functions are exercised within the ambits prescribed in the Immigration Act, 2002. There is no transfer of classic policing functions to immigration officers, but both police officers and immigration officers perform the same function but in a different setting (i.e. crime prevention in the country as a whole and specifically pertaining to the specialised immigration matters, respectively).
- Similarly, the Customs and Excise Act, 1964 (Act No. 91 of 1964); Anti – Personnel Mines Prohibition Act, 2003 (Act No. 36 of 2003) and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997) provides for custom officials to perform classic policing functions, as assigned to them.
- Sections 38 to 41 of the International Trade Administration Act, 2002 (Act No. 71 of 2002) go so far as to appoint investigating officers and authorise such officers to investigate matters and also provide for the power to search and seize items, with or without a warrant.

⁹ Immigration Act, 2002 (Act No. 13 of 2002). See section 34 and the Immigration Regulations, 2014 - Powers relating to arrest detention and deportation of illegal foreigners.

- Similarly, the National Environmental Management Act, 1998 (Act No.107 of 1998) provides for the appointment of environmental management inspectors that, in addition to the powers set out in the Act, must be regarded as being peace officers and may exercise all the powers assigned to a peace officer, or to a police official who is not a commissioned officer, in terms of Chapters 2, 5, 7 and 8 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). Environmental management inspectors also have the power to search and seize. These are specialised functions (although they are also policing functions) relating to environmental affairs that the SAPS cannot or does not have the capacity to undertake.
- The Special Investigation Unit and Special Tribunal Act, 1996 (Act No. 74 of 1996) establishes the Special Investigation Unit (“SIU”) that is independent from the SAPS. In terms of its enabling legislation, the SIU thus also performs classic policing functions.
- The Private Security Industry Regulation Act, 2001 (Act No. 56 of 2001) regulates the private security sector and it includes classic policing functions of investigation and providing safety services to an individual or entity in the private sector.

Conclusion of assessment of classic policing functions

38. In summation, we have provided random examples of legislation under the mandate of different Ministers which provide officials with “classic policing functions” insofar as these functions relate to the applicable Acts (i.e. customs officials, Immigration officers and environmental inspectors). The BMA will have similar officers who are either commissioned or non-commissioned officers that will be responsible for border law enforcement only in accordance with the BMA Bill and only within the border law enforcement area (i.e. within a 10 km radius from the border line) and at ports of entry. There is no intention to usurp classic policing functions that currently fall within the

mandate of the Minister of Police, however, as illustrated with other legislation, the BMA may perform functions relating to **inspection, investigation and search and seizure**, within the border law enforcement area (and at ports of entry), for the sole purpose of border law enforcement (i.e. specialised skills which the SAPS may not currently possess).

39. Currently, there is no dominant presence of the SAPS with respect to border control policing, and no specific laws regulating border policing. Our view is that there is nothing that prohibits officers of the BMA to perform investigation, search and seizure functions within the ambit of the proposed BMA Bill, within the border law enforcement area and at ports of entry. Other departments successfully perform some of the classic policing functions and this does not prevent the SAPS or the BMA from performing the same functions within the country, concurrently with those other departments.

Recognition in BMA Bill of SAPS mandate

40. The functions that relate to border control and the import and export of goods, as provided in section 218(1)(j) of the Interim Constitution, are not only peculiar to the SAPS. Some of the classic policing functions are present in other pieces of legislation to the extent that it is exercised within the ambits of each piece of legislation (for the purposes as set out in the respective Acts). The BMA will operate within the border law enforcement area and at ports of entry and will perform functions within the ambit of the BMA Bill (for the purposes of strengthening our borders and border management).

41. It is acknowledged and enshrined in our Constitution that there is a single police service and further, that the powers and functions of the SAPS are expounded in the SAPS Act. It will be superfluous to restate what is already enshrined in the Constitution or current legislation (i.e. that there is a single police service and the objects of the SAPS).

42. We have noted that the SAPS commented in its presentation to the Committee about the recognition in the BMA Bill regarding the mandate of the Defence Force and

that no reference is made in the Bill to the mandate of the SAPS. It is our view that the borderline functions of the Defence Force are stipulated in the Defence Act, 2002, whereas the functions that relate to border control and the import and export of goods, which the SAPS is claiming as exclusive SAPS functions, are not provided in any law.

43. If these functions were to be recognised specifically in the BMA Bill, it would be giving effect to section 218(1)(j) of the Interim Constitution by confirming such functions relating to border control and the import and export of goods in national legislation, which would be in conflict with the objective of the BMA Bill, as well as the objective of other legislation that provide for functions that relate to the import and export of goods.

44. Furthermore, it will confer such functions relating to border control and the import and export of goods onto the SAPS without specifying these functions. This will lead to ambiguity in the BMA Bill and the Bill would then be unconstitutional on ground of vagueness.

45. We are not aware of any current national policy decisions, proposed legislation by the SAPS or Cabinet decisions which could be regarded as “national legislation” envisaged under section 218(1)(j) of the Interim Constitution.

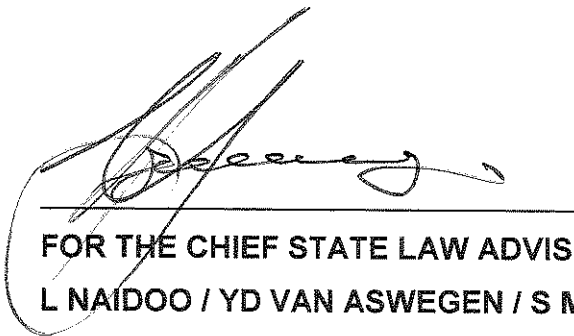
CONCLUSION

46. Our interpretation of section 218(1)(j) of the Interim Constitution is that functions that relate to border control and the import and export of goods are not exclusively conferred on the SAPS. In addition, section 218(1)(j) refers to both border control functions and functions that relate to the import and export of goods, which cannot be interpreted in a piecemeal manner. Only the functions relating to border control and the import and export of goods that are assigned to SAPS by legislation will be the responsibility of the National Commissioner. Currently no such legislation or policy exists. Since 1993 there has been no legislation that assigned functions relating to border control exclusively to the SAPS.

47. Classic policing functions (i.e. investigation, arrest, search and seizure) are not exclusively performed by the SAPS for the reasons expounded above. The BMA will also perform such functions within the border law enforcement area and at ports of entry.

48. We are therefore of the opinion that the inclusion of a reference to section 218(1)(j) of the Interim Constitution in the BMA Bill will lead to ambiguity and may render the Bill unconstitutional for the reasons expounded above.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'L. Naidoo', is written over a horizontal line. The signature is stylized and somewhat cursive.

FOR THE CHIEF STATE LAW ADVISER

L NAIDOO / YD VAN ASWEGEN / S MASAPU / E DANIELS