

12 November 1993

In bilateral discussions between the SA Government and African National Congress the following document on Finance: Existing Assets and Liabilities of the State (of National and SPR-Governments) was formulated for submission to the Technical Committee on Constitutional Issues. This is a preliminary draft and both parties may propose modifications.

JUDICIAL AUTHORITY

1. The existing clause 86 in the 12th Report is agreed upon.

HEADS OF SUPREME COURT AND CONSTITUTIONAL COURT

1. Insert the following new clause 87:

"87. (1) There shall be a Chief Justice of the Supreme Court of South Africa who shall be appointed by the State President after consultation with the Judicial Service Commission and in consultation with the Cabinet.

(2) There shall be a President of the Constitutional Court of South Africa who shall, subject to the provisions of section 89, be appointed by the State President after consultation with the Chief Justice."

(See paragraph 6 under the heading "Outstanding Matters still to be agreed upon".)

CONSTITUTIONAL COURT AND IT'S JURISDICTION

The existing clauses 87, 90 and 91 are agreed upon subject to the following:

1. Clauses 87, 90 and 91 are renumbered as clauses 88, 91 and 92 respectively.
2. **Jurisdiction of the Constitutional Court**

2.1 The Constitutional Court shall have exclusive jurisdiction in the following constitutional matters:

2.2.1 Compliance with the general Constitutional Principles.

2.2.2 The constitutionality of an Act of Parliament.

2.2.3 Disputes of a constitutional nature between organs of -

(a) the Central Government;

(b) the Central Government and all other levels of Government;

(c) the SPR's.

2.2.4 The question whether any matter falls within its jurisdiction.

2.2.5 Any other matter provided for in the Constitution.

2.2.6 The violation or anticipated violation by Central Government or any organ or agent thereof of any fundamental right (an organ or agent of the Central Government shall not include any other level of Government or an organ or agent thereof).

2.2.7 Considering and advising on the legality of intended parliamentary legislation.

3. Jurisdiction of other Courts

3.1 An SPR or local division of the Supreme Court shall, subject to the provisions of the Constitution, have jurisdiction in the following constitutional matters:

3.1.1 To inquire into the constitutionality of a law, other than an Act of Parliament, within its area of jurisdiction.

3.1.2 The violation or anticipated violation by second and third tier government or any organ or agent thereof of the fundamental rights enshrined in the Constitution.

3.1.3 The constitutionality of executive and administrative actions of all organs of state in terms of any legislation applicable within its area of jurisdiction.

3.1.4 The question regarding the legality of intended legislation of all levels of Government other than Central Government. (ANC to revert on final decision on this paragraph.).

3.1.5 Any other matter provided for in the Constitution or any other law.

4. Constitutional and related matters coming to other Courts

4.1 If a matter before the Supreme Court involves an issue which falls in the exclusive jurisdiction of the Constitutional Court, the Court shall refer such issue to the Constitutional Court. Refusal to refer such a matter shall be appealable to the Constitutional Court.

4.2.1 If a matter before the Supreme Court involves questions of fact and/or law as well as a constitutional issue not falling within the exclusive jurisdiction of the Constitutional Court, the Supreme Court shall hear the matter.

4.2.2 In a matter referred to in paragraph 4.2.1 *supra* there shall be an appeal to the Appellate Division.

4.2.3 The Appellate Division may dispose of a matter where it is not necessary to obtain a ruling on the constitutional issue.

4.2.4 Where it is necessary to obtain a ruling on the constitutional issue the Appellate Division shall refer the matter to the Constitutional Court.

4.2.5 Where the Appellate Division disposes of a matter in terms of paragraph 4.2.3 *supra*, but is of the opinion that the constitutional issue is of substantial importance, it may refer the constitutional matter to the Constitutional Court.

4.3 If a matter before the Supreme Court involves a question of fact and/or law as well as a constitutional issue which falls within the exclusive jurisdiction of the Constitutional Court, the Supreme Court -

4.3.1 shall dispose of the matter where it is not necessary to obtain a ruling on the constitutional issue (where for example it is not relevant for the finalization of the matter);

4.3.2 shall, if in such a matter it is necessary to obtain a ruling on the constitutional issue, refer the constitutional issue to the Constitutional Court;

4.3.3 may, if it has disposed of the matter in terms of paragraph 4.3.1 *supra*, but is of the opinion that the constitutional issue is of substantial importance, refer the constitutional issue to the Constitutional Court.

4.4.1 If a matter before the Supreme Court involves only a constitutional issue within its jurisdiction, it shall dispose of such matter.

4.4.2 In such event there shall be an appeal to the Appellate Division whereafter the procedure set out in paragraphs 4.2.3 to 4.2.5 *supra* shall *mutatis mutandis* apply.

4.5 If a matter before the Supreme Court involves a constitutional issue within its jurisdiction as well as a constitutional issue in the exclusive jurisdiction of the Constitutional Court, the Supreme Court -

4.5.1 may dispose of the constitutional issues within its jurisdiction if the constitutional issue within the exclusive jurisdiction of the Constitutional Court, is not relevant to the finalization of the matter (in such a case paragraph 4.2.2 to 4.2.5 *supra* shall apply;

4.5.2 shall, if in such a matter it is necessary to obtain a ruling on the constitutional issue within the exclusive jurisdiction of the Constitutional Court, refer such constitutional issue to the Constitutional Court;

4.5.3 may, if it has disposed of the matter in terms of paragraph 4.5.1 *supra*, but is of the opinion that the constitutional issue is of substantial importance, refer such constitutional issue to the Constitutional Court.

4.6 The Chief Justice and the President of the Constitutional Court may prescribe rules to facilitate the above procedure.

4.7 In respect of all other courts the procedure set out in clause 91(2) to (4) of the 12th report is acceptable.

COMPOSITION OF CONSTITUTIONAL COURT AND APPOINTMENT OF JUDGES TO THE CONSTITUTIONAL COURT

1. The existing clause 88 is to be renumbered as clause 89.
2. Insert the following clause:

"89. (1) There shall be a President and 10 judges of the Constitutional Court.

(2) No person shall be qualified to be appointed President or Judge of the Constitutional Court unless he or she -

- (a) is a South African citizen; and
- (b) is a fit and proper person to be a Judge of the Constitutional Court; and
- (c) is a judge of the Supreme Court of South Africa or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified -
 - (i) practised as an advocate or an attorney; or
 - (ii) lectured in law at a university; or
- (d) is a person who, by reason of his or her training and experience, has expertise in the field of constitutional law relevant to the application of this Constitution and South African law.

(3) Four judges of the Constitutional Court shall be appointed from the ranks of judges of the Supreme Court of South Africa by the State President in consultation with the Chief Justice and the Cabinet.

(4) The remaining six persons shall be appointed by the State President, after consultation with the President of the Constitutional Court and in consultation with the Cabinet, from the category of persons referred to in subclause (2): Provided that not more than two persons are appointed from the category of persons referred to in subclause (2)(d).

(5) Vacancies on the Bench of the Constitutional Court shall be filled in accordance with the procedure prescribed in clause 87(2) and subclauses (3) and (4) of this section."

(See paragraph 6 under the heading "Outstanding Matters still to be agreed upon", in respect of subclauses 93) and (4) *supra*)

ENGAGING THE CONSTITUTIONAL COURT

1. The existing clause 89 is renumbered as clause 90.
2. The existing clause 89 is agreed upon subject to the following:
 - 2.1 In clause 89(1), in line 5, after "court" to insert "after consultation with the Chief Justice and".

APPOINTMENT, REMOVAL, TERM OF OFFICE AND TENURE OF JUDGES

1. The existing clause 92 is renumbered as clause 93.
2. Amend subclause (1) because of the inclusion of the new clause 87.
3. Subclauses (2) and (3) are agreed upon.
4. Subclauses (4) and (5) still have to be agreed upon.

JUDICIAL SERVICE COMMISSION

1. The existing clause 93 is renumbered as clause 94.
2. Amend the existing clause 93 as follows:

"Judicial Service Commission

93. (1) There shall be a Judicial Service Commission which shall, subject to the provisions of subsection (3), consist of -

- (a) the Chief Justice, who shall preside at meetings of the Commission;
- (b) the President of the Constitutional Court;
- (c) one judge-president designated by the judges-president;
- [(c)] (d) the Minister of Justice or his nominee;
- [(d)] (e)[1] one practising advocate designated by the General Council of the Bar of South Africa;
- [(e)] (f)[1] one practising attorney designated by the South African Association of Law Societies;
- [(f)] (g)[1] one professor of law designated by the deans of all the law faculties at South African universities;
- [(g)] (h)[5] four Senators designated by the Senate *en bloc* by a two thirds majority;
 - (i) four persons, who are not members of Parliament an SPR or local authority, from the ranks of practising advocates and attorneys designated by the State President in consultation with the Cabinet;
- [(h)] (j) on the occasion of the consideration of matters specifically relating to an SPR division of the Supreme Court, the Judge President of the relevant division and the Premier of the relevant SPR [or a member of the SPR executive designated by the Premier].

(2) The functions of the Judicial Service Commission shall be -

- (a) to make recommendations regarding the appointment, dismissal, term of office and tenure of judges of the Supreme Court in terms of section 92; and
- (b) to advise the national and SPR government on all matters relating to the judiciary and the administration of justice.

(3) When the Commission performs its functions in terms of subsection (2)(b) it shall sit without the four Senators referred to in subsection (1)(h).

[(3)] (4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decisions and resolutions.

[(4)] (5) The Commission may appoint committees from among its number and delegate any of its functions to such committee."

SEATS OF THE CONSTITUTIONAL COURT AND THE APPELLATE DIVISION

1. The existing clause 94 is renumbered as clause 95.
2. Insert the following:

"95. (1) The seat of the Appellate Division shall be Bloemfontein.

(2) The seat of the Constitutional Court shall be Johannesburg."

LANGUAGES OF THE COURTS

1. The existing clause 95 is renumbered as clause 96.
2. The existing clause 95 is agreed upon.

CONTINUATION OF JUDICIARY AND LEGISLATION RELATING THERETO

1. The existing clause 96 is renumbered as clause 97.
2. This clause has still to be agreed upon.

ATTORNEY-GENERAL

1. The existing clause 97 is renumbered as clause 98.
2. Subclauses (1) and (2) are agreed upon.
3. Subclause (3) has still to be agreed upon. The ANC proposes that it should also be possible for an attorney to be appointed as an attorney-general. This issue needs to be resolved.
4. The Government proposes the inclusion of a further subclause to secure the position of the existing attorneys-general. This has not been agreed upon and has to be resolved.

MAGISTERIAL SERVICES COMMISSION

1. The existing clause 98 is renumbered as clause 99.
2. The Government proposes that the name of the Commission be amended to "Magistrates Commission". The ANC has no objection.
3. The existing clause 98 is otherwise agreed upon.

OUTSTANDING MATTERS STILL TO BE AGREED UPON

1. Clarity on the meaning of the expression "in consultation with the Cabinet".
2. The role of the Human Rights Commission.
3. A sifting procedure with regard to complaints relating to fundamental rights. In this regard the South African Government proposes that the following subclause be inserted in clause 90 of the 12th report:
"(5) (a) Subject to the provisions of this section any person who claims that any of his fundamental rights or freedoms have unlawfully been infringed, may file a constitutional complaint in the manner prescribed by law with the registrar of the Supreme Court of the area in which the alleged infringement occurred.

(b) No filing fee or formal papers shall be required for the filing of a constitutional complaint.

(c) A constitutional complaint referred to in paragraph (b) shall be examined by a judge designated by the judge-president of the Supreme Court concerned or by a committee of judges or other persons designated by him, with the power to make inquiries, carry out investigations and hear evidence.

(d) If such judge or committee has certified that there appears to be reasonable grounds for the constitutional complaint in question, the complaint shall be referred to the Supreme Court concerned, which may formally hear such complaint or deal with it in such other manner as it deems just."

4. A capacity, in the Courts, to be instituted to deal with matters of a constitutional nature which can be swiftly disposed of without court intervention.
5. The degree to which the position of judicial officers shall be secured in the Constitution, has yet to be agreed upon.
6. South African Government to revisit the role of the Judicial Service Commission *vis-a-vis* subsequent appointments to the Constitutional Court.
7. There may be other matters relating to the jurisdiction of the Constitutional Court which may have been overlooked.

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