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DEPARTMENT OF JUSTICE · DEPARTEMENT VAN JUSTISIE
REPUBLIC OF SOUTH AFRICA · REPUBLIEK VAN SUID-AFRIKA

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GRIFFIER HOOGGEREGSHOF VAN SUID-AFRIKA (APPÈLAFDELING)
1993-09-14
BLOEMFONTEIN
(APPELLATE DIVISION)
REGISTRAR, SUPREME COURT OF SOUTH AFRICA

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NAAM / NAME THE HON CHIEF JUSTICE M M CORBETT

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REPUBLIC OF SOUTH AFRICA

CHIEF JUSTICE OF SOUTH AFRICA
APPEAL COURT
BLOEMFONTEIN
9300

P.O. BOX 268

14 September 1993

Dr T Eloff
Head: Administration
Multi-Party Negotiating Process
P O Box 307
ISANDO 1600

Dear Dr Eloff

re: 12th Report on Constitutional Issues

With further reference to the above matter, I send herewith by fax a memorandum which is submitted on behalf of the Judiciary of South Africa and represents the views of my colleagues on the Appellate Division and myself on the 12th Report. Owing to the time constraints involved it has not been possible to canvass the views of other Judges, but I have taken the liberty of sending to the Judges President by fax copies of the 12th Report and this memorandum

Yours sincerely

M M Corbett
CHIEF JUSTICE

MEMORANDUM SUBMITTED ON BEHALF OF THE JUDICIARY OF SOUTH AFRICA ON THE 12th REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

1. We shall confine our comment on the 12th Report of the Technical Committee on Constitutional Issues ("the 12th Report") to the broad differences between its proposals for constitutional adjudication and those put forward in our memorandum on the Chapter on the Administration of Justice in the draft Interim Constitution dated 3 September 1993 and submitted to the relevant committees of the Multi-Party Negotiating Process on 6 September 1993 ("the Judges' memorandum"). We also wish to make mention of a small amendment to the scheme put forward in par 6 of the Judges' memorandum.

2. The broad differences between the proposals contained in the 12th Report and the Judges' memorandum relate to:-

(a) The status of the Constitutional Court ("CC") as a separate court.

(b) The jurisdiction of the provincial and local divisions of the Supreme Court in constitutional matters.

(c) The composition of the CC

(d) The system for the appointment of Judges of the CC and the continuation in office of existing Judges.

(e) The composition of the Judicial Service Commission.

We deal with these matters seriatim.

3. <u>The status of the Constitutional Court</u>

We have carefully considered the relative merits of the CC being a separate court, as advocated in the 12th Report, or being a chamber of the Appellate Division, as advocated in the Judges' memorandum. We remain convinced that the latter option is to be preferred. We think it very important that the CC should be seen as a <u>court of law</u>, albeit a specialized one staffed by Judges specially chosen for the task, and its decisions as expounding the fundamental law of the Constitution. This, in our view, is best achieved by incorporating the CC into the superior court system in the manner suggested by us. There is, we think, a grave danger that a separate CC, especially if it is composed as the 12th Report proposes (we return to this point later), will be seen by the public as a "political" tribunal dealing with fundamental legal issues on

"political" grounds. Nothing could be more damaging to the endeavour to create a human rights culture and to the acceptance by the public of the concept of the rule of law according to the Constitution.

We think, too, that the creation of a separate CC, with an exclusive appellate jurisdiction in constitutional matters, will tend to diminish the status of the Appellate Division. This, in itself, is something to be avoided. The same comment applies to the office of Chief Justice.

It is argued in the 12th Report, in support of the CC being a separate court, that constitutional adjudication requires specialized knowledge of constitutional law, coupled with "an understanding of the dynamics of society" (see par 3.7 of the Report). Although this may sound self-appraising, we believe that senior and experienced Judges are capable of adapting to the task of constitutional adjudication (as they have in many other countries, e g Canada, Zimbabwe and Namibia); and that the experience of practice at the Bar and of sitting as a Judge on the bench has in many cases (at least) given them an insight into, and an understanding of, "the dynamics of society", whatever that may mean precisely. We point out, moreover, that the scheme proposed in par 6 (read with par 7(e)) of the Judges' memorandum contemplates on the CC a blend of Appellate

Division Judges and Judges specially appointed to that Court, who could include persons qualified to be admitted as advocates and having 10 years experience, even though not in private practice. The latter Judges could include constitutional law specialists.

It is also argued (in par 3.7 of the 12th Report) that if the CC is established as a chamber of the Appellate Division the Chief Justice will decide which court, the CC or the Appellate Division, is to hear the matter and will thus in effect decide on the composition of the Court. A further consequence would be that important constitutional issues might be decided by Judges who are not constitutional Judges. We would point out that in terms of the model proposed by us this would not occur. In accordance with that proposal (see par 6(c) of the Judges' memorandum) whenever it appears to the Chief Justice that an appeal raises a constitutional issue which may be decisive of the appeal he is obliged to route it through to the CC. The words underlined are meant to exclude the case where the so-called constitutional issue appears to be irrelevant or frivolous. If it later appeared to be relevant and decisive, or if it cropped up after the appeal had been set down for hearing before the general chamber of the Appellate Division, there could be machinery for then referring the matter to the CC.

With regard to the point raised in par 3.7(d) of the 12th Report, we have reconsidered par 6(f) of the Judges' memorandum and would agree tht it is desirable that the CC always sit en banc. In that event the total number of members of the CC could be reduced to nine or even seven and would consist of the Chief Justice and four (or three) Judges from the Appellate Division and four (or three) Judges specially appointed to the Court.

There is a further point in support of the notion that the CC should be a chamber of the Appellate Division, viz that it is desirable that once seized of a matter the CC should be empowered to decide all aspects of the case. Take this example. Suppose that a person approaches the Supreme Court with an application to have an executive or administrative decision declared invalid on two grounds: (1) that it offends against the Bill of Rights and is unconstitutional and (2) that it is assailable on one or other of the various review grounds at common law. The Court rules on one or other or both of these issues and there is an appeal by the losing party raising both issues. How is this to be dealt with on appeal? Must both the CC and the Appellate Division hear the matter, the one to decide the constitutional issue and the other to decide the common law issue? This would be a very time-consuming and unwieldly procedure. We would suggest that the matter should go only before the CC, which would be empowered to deal with both issues

and give a final judgment. It follows that the CC should be a court of law, composed, at least partly, of Judges of the Appellate Division, and capable of deciding issues other than questions of pure constitutional law.

4. <u>The Constitutional Jurisdiction of the Supreme Court</u>

The 12th Report proposes that the provincial and local divisions of the Supreme Court (for convenience I shall refer merely to "the Supreme Court") be vested with a constitutional jurisdiction in three main areas (see sec 90(4) of the addendum to the 12th Report). In effect this would seem to mean that these divisions will <u>not</u> have a constitutional jurisdiction in regard to -

(i) the validity of an Act of Parliament (including presumably any provision of an Act of Parliament), and

(ii) disputes of a constitutional nature between organs of the state.

We do not agree with this limitation on the constitutional jurisdiction of the Supreme Court and are not sure what motivates it. If it be the relative importance of the matters referred to in (i) and (ii) above, then we would argue that the constitutionality of an executive or administrative act or of legislation, other than an Act of Parliament, could raise questions of equal, or even

greater, importance to society than those arising under (i) and (ii) above. If it be motivated by the need in such cases for a speedy decision, then this could be provided under a system of direct reference, such as that proposed under par 6(e) of the Judges' memorandum.

Furthermore, this limitation on the constitutional jurisdiction of the Supreme Court could lead to considerable practical difficulties. This is best illustrated by way of an example which is of real relevance and typical of the kind of difficulty likely to arise. A person is charged in the Supreme Court with dealing in dependence-producing drugs under Act 41 of 1971. The State relies on one or more of the presumptions in sec 10 of the Act which place an onus on the accused. The defence takes the point that the relevant portions of sec 10 are invalid in that they conflict with the provision in the Bill of Rights which enacts that an accused is to be presumed innocent. The State counters this by contending that under the Bill of Rights the presumptions constitute limitations which are "reasonable and justifiable in a free, open and democratic society". It seems to us that in such a case convenience, practicality and expedition (not to mention the factor of costs) demand that the trial Court should have jurisdiction to adjudicate on these constitutional issues. This Court would then hear all the evidence, including evidence that might be led on the issue of

permissible limitation under the Bill of Rights, and decide the issues, factual, legal and constitutional, which arise. It might decide that, without any reliance on the presumptions, the accused is guilty; or that he is innocent. In either case the constitutional issue will have become irrelevant. It might, on the other hand, decide tht the presumptions are unconstitutional, in which event the State would, presumably, have a right of appeal to the CC on this issue; or that they are constitutional, in which event the accused would be entitled to appeal on this issue to the CC. If, at any stage before judgment, it were to become apparent to the trial Court that facts are not in dispute and that the issue of constitutionality is the only one, then the procedure we propose in par 6(e) of the Judges' memorandum would come into operation.

Under the system proposed by the 12th Report, the Supreme Court would have no jurisdiction in a case such as this: the proceedings would have to be suspended and the matter referred in initio to the CC in terms of sec 90(5) of the addendum. This would give rise to the difficulties referred to in par 4 of the Judges' memorandum, viz in particular, the decision of a constitutional issue where on the facts the court might otherwise hold that it is irrelevant; the delay and disruption of the trial before the Supreme Court, including the disappearance of witnesses, etc; the cost

of a special reference to the CC which eventually turns out to have been unnecessary. Also, it is not clear how the CC would handle the question of evidence relevant to the issue of constitutionality. Would it hear the evidence itself and thus get embroiled in what may develop into a lengthy trial? Or what would it do?

Sec 90(5) speaks of the question of the validity of the Act being referred to the CC. Does this mean a stated case? If so, then we repeat the comment in par 4(b) of the Judges' memorandum.

5. <u>The Composition of the CC</u>

We have indicated how we think the CC should be composed in par 6(f) of the Judges memorandum, as amended in par 3 above. Sec 88 of the addendum to the 12th Report contemplates a CC consisting of a President and 10 other Judges appointed by the State President in accordance with nominations made by Parliament. The qualifications for a Judge of the CC are set forth in sec 88(2) of the addendum. We adhere to our original view as to how the CC should be composed. Moreover, we have two main objections to the qualifications in sec 88(2). In the first place sec 88(2)(d) appears to contemplate someone who is not legally qualified in the manner defined in sec 88(2)(c); indeed someone who is not legally qualified at all. We do not find this acceptable. It is unthinkable that one of the highest

courts of law in the land should be composed, even in part, of laymen. In the second place, there is no indication that there should be any kind of a mix of the persons holding the various different qualities in sec 88(2). Thus the CC as appointed could theoretically contain no Judges of the Supreme Court and be composed, for example, wholly of university lecturers in law.

If our proposals as to the composition of the CC are rejected and a model along the lines of sec 88(2) is accepted, we urge that at any rate sec 88(2) be amended by the deletion of (d) and by a stipulation that at least six of the Judges of the CC be appointed from the ranks of Supreme Court Judges.

6. **The Appointment of Judges**

We are not in favour of the method for appointing Judges of the CC described by sec 88(3) of the addendum and adhere to the view that all judicial appointments should be made by the Judicial Service Commission.

It is not clear how candidates for the CC (President and CC Judges) would come before the joint standing committee ("JST") referred to in sec 88(3). Would they make application for the positions? That factor and the inquisitorial process involved would, we think, tend to deter many candidates of real quality.

Furthermore, the process of nomination and approval by Parliament, especially as provided by sec 88(4), is difficult to understand and we question whether it is workable in practice. In passing, we think that the interviews referred to in sec 88(3) should not be in camera.

In regard to the continuation in office of existing Judges, as provided by sec 96(1) of the addendum, we are not sure what is meant by the concluding words -

> "... until such functioning and appointment may lawfully be changed by the competent authority".

This appears to threaten the security of tenure of existing judges and, therefore, to strike at the independence of the judiciary. We would prefer a provision which deems all existing Judges to have been appointed in terms of sec 92.

7. Composition of the Judicial Service Commission ("JSM")

Judges should be chosen for their character, personality and professional competence. As the main function of the JSM appears to be to make recommendations regarding the appointment of Judges, we fail to see why there should be five senators on the JSM. They would be unlikely to have much knowledge of the candidates for

appointment. Indeed the senators would outnumber the maximum possible number of Judges on the JSM. In our view if there is to be senate representation on the JSM, then it should be limited to one senator.

M M CORBETT
CHIEF JUSTICE

13 September 1993