1/23/9

NOTES FOR COUNSEL

(1) The amendments to the New Text dealing with the below listed issues would not appear to be contentious or warrant much critical examination:
   (i) all those reflected as "technical"
   (ii) Independence of Public Protector/Auditor-General (Section 193/194)
   (iii) Insulation of LRA (Section 241)
   (iv) Insulation of PNU & R Act
   (v) Commencement of Constitution (Schedule 6 section 22)
   (vi) Independence of Public Service Commission (section 196(2), (3), (5), (7), (8), (10) and (11)
   (vii) State of Emergency (section 37(5))
   (viii) Reformulation of Money Bills (section 50)
   (ix) Definition of 'written decisions' (still to come section 101(1))
   (x) Police Powers (Provincial powers increased even though such increase is not strictly required) section 199(3) (section 206, 207)

(2) The following require more careful consideration for the reasons set out below:
   (i) Collective Bargaining (section 23(4)
   (ii) National Overrides (section 146(2) (d) and (4)
   (iii) Constitutional Amendments (section 74)
   (iv) Local Government (section 155 and 160 read with section 229 (municipal finance)
   (v) Public Service Commission and Provincial Autonomy

(3) <u>Collective Bargaining</u>
The second sentence in the new section 23(4) viz that "national legislation may be enacted to regulate the right to collective bargaining" has a symbolic importance, but is probably unnecessary and obvious. Even though this rider is self evident the Constitutional Assembly would not like to remove it unless it can be shown to seriously prejudice certification. Legal opinion is largely to the effect that the sentence is innocuous provided it does not imply that such regulation takes place outside the limitations clause.

(4) <u>National overrides</u>
The reformulation of this section takes its cue directly from the judgement. It may be that new section 146(4) is unnecessary or adds little. It is included precisely because of the court's failure to appreciate its original intention - to signpost the importance of the consideration of political matters by an appropriate political forum (see e.g. the German Court's approach to this question).

(5) Constitutional Amendments

The new provisions relating to the amendments of the Bill of Rights appear to be unproblematic. Adv Yacoob has however queried whether the provisions of section 74(4); 74(5)(a)(b) and (c) and 74(6) would amount to a special procedure which is a 'more stringent procedure when compared with those required for other legislation" (see para 153). Are these special procedures 'special' when compared against the ordinary sect 76 process?

(6) Local Government

In regard to local government the main concerns relate to the following:

(a) Does new section 75(1) introduce a 'municipal typology' or 'framework' as contemplated in the judgement and principles.

(b) Does section 229, which provides for local government fiscal powers as a single band of fiscal powers and entitlements, mesh sufficiently with the categories of municipal government in section 155. In other words: can it be said that the Constitution provides "for appropriate fiscal powers and functions for different categories of local government". (See Principle XXV)

(c) The device used to allocate such appropriate powers is the criteria set out in new section 155(3)(c) and new section 229(4). All parties agree that it is not possible to actually specify which specific levies and taxes are to be allocated variously to section 155(1)(a) or (b) or (c) type municipalities. All that is required of the new New Text is that 'provision should be made' for appropriate powers.

(d) Does the new Chapter 7, and especially new New Text 155 and 160, alter the general relationship between province and national governments from that as expressed in the original New Text and, if so, is this 'substantial' enough to lead to a revelation of the 'baskets' of powers. Kindly note that old New Text 155(3)(b) has not been carried over to the new New Text 155(6)(c) at our insistence.

(7) The Public Service Commission's powers and Legitimate Provincial Autonomy

It seems clear that there is sufficient particularity in the description of the Public Service Commission's powers (section 196(4)). It is also clear that the Public Service Commission's powers would not impede on the provinces' powers to appoint its staff etc. (See the new specific protection contained in section 197(4)).

However, the Constitutional Assembly wishes to make these provincial powers subject to national norms and standards (e.g. proper advertising, fair recruitment practices, proper qualifications etc.) These norms are to be set - not by the Public Service Commission whose powers are largely that of reporting, investigating, advising, and directing compliance with section 195 values or other national norms and procedures - but by the national government.

While the role of the Public Service Commission conforms to the Court's description of a Public Service Commission (see para 170 and 278), the court elsewhere suggests (a) the Public Service Commission must be a 'check' on the executive (para 176) and (b) provincial compliance with national norms is permissible if the Public Service Commission itself sets these norms (para 276).

The question is - given that norms and standards will be set by the National department or, mostly, by the national collective bargaining forum - is the preferred formulation of section 197(4) ("subject to national norms and standards, and procedures agreed in collective bargaining agreements...") permissible. It would at face value appear to satisfy the court's explicit statements in this regard (see para 278). It is the court, however, which has laid out other contradictory positions on this question.

In this regard the German Constitutional Court has since its inception held that national standards in the public service were permissible.

Fink Haysom