1/19/8

# CONSTITUTIONAL ASSEMBLY

# DRAFT AMENDMENTS TO NEW TEXT

# OPINION

[9 OCTOBER 1996]

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**INTRODUCTION**

1. The constitutional court gave judgment on 6 September 1996 on the certification of the new text. It held that certain provisions did not comply with the constitutional principles. The constitutional committee of the Constitutional Assembly has now prepared draft amendments to the new text. The purpose of this opinion is to assess whether the draft amendments cure the deficiencies identified by the constitutional court and comply with the constitutional principles.

2. We assume, for purposes of this opinion, that the judgment of the constitutional court was correct and complete. We accordingly do not express any opinion on any new or further objections that might be raised to any of the provisions of the draft.

3. We will for ease of reference refer to,

- the interim constitution as "IC";
- the constitutional principles as "CP";
- the original new text as "NT"; and

- the draft amended new text as "AT".

**AT23: LABOUR RELATIONS**

4. CP XXVIII requires that the right to engage in collective bargaining be conferred on "employers and employees". NT23(4)(c) conferred this right on trade unions and employers' organisations. The court held that it fell short of the requirement of CP XXVIII in that the right was not conferred on individual employers.[1]

5. NT23(4)(c) has now been replaced by AT23(5) which reads:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining."

6. The implications of this amendment are:

6.1. The right conferred, is now a right "to engage in collective bargaining" and no longer a right "to bargain collectively". The new formulation coincides with the language of CP XXVIII.

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[1]Judgment 43:69

6.2. The court's objection is met by conferring the right to engage in collective bargaining on every employer.

6.3. The right to engage in collective bargaining is not conferred on every individual employee. The court held that this was not necessary because "individual workers cannot bargain collectively except in concert" in that "collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers".[2]

6.4. A new provision is introduced, which allows national legislation "to regulate collective bargaining". There are two possible interpretations of this provision. The first is that it adds nothing because regulation is in any event permissible in terms of the general limitations provision in AT36. On this interpretation, any regulation would be subject to the requirements for limitation in terms of AT36. The second interpretation is that this provision permits regulation free of the strictures of AT36.[3] The latter is,

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[2]Judgment 43:69

[3]It does not follow, however, that it would be permissible by national legislation, to prohibit collective bargaining because "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed". R v. Williams 1914 AD 460; Landelikelisensieraad, Krugersdorp v. Cassim 1961 (3) SA 126 (A); Steyn: Die Uitleg van Wette, 5th ed. 207-208

in our view, the more likely interpretation because the former would render this provision meaningless. There is a real risk that this provision might on the second interpretation be held to offend CP XXVIII which demands that employers and employees be afforded the right to engage in collective bargaining whilst AT23(5) merely affords them that right subject to unrestricted regulation.

7. NT23(5) has been slightly amended. It provided that "(t)he provisions of the bill of rights do not prevent legislation recognising" union security arrangements contained in collective agreements. AT23(6) now provides that "(n)ational legislation may recognise" union security arrangements contained in collective agreements. The latter exception is somewhat narrower than the former and accordingly does not make any new inroads offensive to CP XXVIII.

**AT37(5)(c): NON-DEROGABLE RIGHTS IN EMERGENCY**

8. The court dismissed the objections to the provisions of NT37 relating to states of emergency but voiced strong criticism concerning the lack of rational selection of the rights classified as non-derogable.[4]

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[4]Judgment 60:94-95

9. A number of rights have now been added to the non-derogable list which makes for a more rational selection and in our view meets the court's criticism.

**AT45: JOINT RULES AND ORDERS**

10. AT45 has been amended but the amendment does not affect compliance with the constitutional principles.

**AT57(2): RULES AND ORDERS OF THE NATIONAL ASSEMBLY**

11. AT57(2) has been amended but the amendments do not affect compliance with the CPs.

**AT61: ALLOCATION OF DELEGATES**

12. AT61(2) and (3) have been amended but the amendments do not affect compliance with the CPs.

**AT64(7): CHAIR AND DEPUTY CHAIR OF THE NCOP**

13. AT64(7) is a new provision but it does not affect compliance with the CPs.

## AT65(2): AUTHORITY OF NCOP DELEGATES

14. AT65(2) has been slightly amended but the amendments do not affect compliance with the CPs.

## AT70(2): RULES AND ORDERS OF THE NCOP

15. AT70(2)(c) has been slightly amended but the amendment does not affect compliance with the CPs.

## AT74: AMENDMENT OF THE CONSTITUTION

16. CP XV provides that amendments to the constitution shall require "special procedures involving special majorities". The court interpreted this requirement to mean that both "special procedures" and "special majorities" were required. It held that whilst NT74 prescribed "special majorities" for constitutional amendment, it did not require "special procedures" and accordingly fell short of the demand of CP XV.[5] In coming to this conclusion, the court gave a hint of the kinds of special procedures it had in mind:

> "It is of course not our function to decide what is an appropriate

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[5]Judgment 90:156

procedure, but it is to be noted that only the National Assembly and no other House is involved in the amendment of the ordinary provisions of the NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required."[6]

17. AT74 distinguishes between four kinds of constitutional amendment:

17.1. Amendments of sections 1 and 74(1).[7]

17.2. Amendments of the bill of rights.[8]

17.3. Amendments of particular concern to a province or the provinces generally namely those which,

- relate to a matter that affects the NCOP;[9]

- alter provincial boundaries, powers, functions or institutions;[10]

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[6]Judgment 91:156

[7]AT74(1)

[8]AT74(2)

[9]AT74(3)(b)(f)

[10]AT74(3)(b)(ii)

- amend a provision that deals specifically with a provincial matter;[11] and

- concern only a specific province or provinces.[12]

17.4. All other amendments.[13]

18. The first three categories are subject to special and more stringent requirements. The last category is subject only to the general requirements which apply to all constitutional amendments. These are the requirements which have to meet the demand of CP XV because the latter makes its demand in respect of all amendments to the constitution.

19. AT74(4), (5) and (6) introduce the following new procedural requirements for all bills amending the constitution:

19.1. The bill may not include provisions other than constitutional amendments and matters connected with these amendments.[14]

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[11]AT74(3)(b)(iii)

[12]AT74(7)

[13]AT74(3) to (7)

[14]AT74(4)

19.2. At least thirty days before such a bill is introduced, particulars of the substance of the proposed amendment must be,

- published in the government gazette for public comment;[15]

- submitted to the legislatures for their views;[16] and

- submitted to the NCOP for public debate unless the amendment is one that is required to be passed by the NCOP.[17]

19.3. The bill may not be put to the vote in the National Assembly within thirty days of its introduction or tabling in the assembly.[18]

20. These procedures are new. But can they be said to be "special"? The court held that they had to be "more stringent" than the procedures applicable to other bills.[19] The new procedures are "special" in the

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[15]AT74(5)(a)

[16]AT74(5)(b)

[17]AT74(5)(c)

[18]AT74(6)

[19]Judgment 89:153

sense that they are more stringent and are peculiar to constitutional amendments insofar as they do not apply to ordinary bills in terms of AT75 and AT76. They are also of the kind contemplated by the court in the passage quoted above.

21. The new requirements introduced by AT74(4), (5) and (6) are rather weak insofar as,

- notice needs to be given only of the "substance" of a proposed amendment;
- the period of notice and the corresponding opportunity for response, is extremely limited; and
- there is no requirement that any comment be taken into account.

We are however on balance of the view that the new requirements probably pass muster and meet the objection raised by the court under CP XV.

**AT74: ENTRENCHMENT OF THE BILL OF RIGHTS**

22. CP II requires that the bill of rights be "protected by entrenched and justiciable provisions" in the constitution. The court interpreted this requirement to mean that more stringent protection of the bill of rights

was required than that which was accorded to ordinary provisions of the constitution.[20] It held that:

> "In using the word 'entrenched', the drafters of CP II required that the provisions of the bill of rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgment."

and added that:

> "A two-thirds majority of one house does not provide the bulwark envisaged by CP II."[21]

It went on to say that, what was required, was

> "some 'entrenching' mechanism, such as the involvement of both houses of parliament, or a greater majority in the National Assembly or other reinforcement which gives the bill of rights greater protection than the ordinary provisions of the NT."[22]

23. AT74(2) now deals with amendments of the bill of rights. It requires a two-thirds majority in both houses of parliament. This requirement constitutes an entrenching mechanism insofar as ordinary amendments do not require the assent of the NCOP.[23] It indeed adopts the

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[20]Judgment 91:157-159

[21]Judgment 92:159

[22]Judgment 92:159

[23]AT74(3)(a)

suggestion of the court of a mechanism involving both houses of parliament.

24. There are two other categories of constitutional amendment which are subject to stricter requirements than amendments to the bill of rights. They also require a two-thirds majority in both houses of parliament and are moreover subject to the following additional requirements:

24.1. Amendments of sections 1 and 74(1) require a majority of 75% in the National Assembly.[24]

24.2. Amendments of particular concern to a province or the provinces generally also require the approval of the provincial legislature or legislatures concerned.[25]

25. Might it not be argued that CP II requires the bill of rights to be more securely entrenched than any other provision of the constitution and that AT74 fails to meet this requirement insofar as it affords greater protection to these other two categories of special amendment? We think not. CP II requires merely that the bill of rights be entrenched. It does not require or suggest that the provisions of the bill of rights

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[24]AT74(1)(a)

[25]AT74(7) read with AT74(3)(b)

should be the only entrenched provisions or that they should be more securely entrenched than any other provision of the constitution.

26. We are accordingly of the view that AT74 meets the objection of the court raised under the requirement of CP II that the bill of rights be entrenched.

**AT77: NATIONAL MONEY BILLS**

27. AT77 has been amended but the amendments do not affect compliance with the CPs.

**AT79: BILLS REFERRED BACK BY THE PRESIDENT**

28. AT79(3)(b) has been amended by adding to the list of bills requiring reconsideration of the NCOP upon referral back by the president. This amendment does not affect compliance with the CPs except perhaps to enhance collective provincial power exercised through the NCOP. It does not detract from compliance with the CPs.

**AT81: RETROSPECTIVE NATIONAL LEGISLATION**

29. NT81 provided that an act of parliament took effect when published "or

on a later date determined in terms of the act". AT81 now speaks only of "a date determined in terms of the act". It no longer precludes retrospective legislation.

30. The CPs do not demand that the constitution should preclude all retrospective legislation. Any retrosopective legislation would be valid only if it passes muster under the constitution and more particularly, the bill of rights. We are accordingly of the view that the amendment does not introduce any violation of the CPs.

**AT101: EXECUTIVE DECISIONS**

31. A slight amendment has been made in AT101(1)(b). The amendment does not affect compliance with the CPs.

**AT104: PROVINCIAL LEGISLATIVE COMPETENCE**

32. There has been a slight amendment to AT104(1)(b) but it does not affect compliance with the CPs.

**AT116(2): RULES AND ORDERS OF THE PROVINCIAL LEGISLATURES**

33. AT104(1)(b)(iv) is new but it does not affect compliance with the CPs.

## AT120: PROVINCIAL MONEY BILLS

34. The language of AT120 has changed but the changes do not affect compliance with the CPs.

## AT123: RETROSPECTIVE PROVINCIAL LEGISLATION

35. NT123 provided that provincial legislation took effect when published "or on a later date determined in terms of the Act". AT123 now speaks only of "a date determined in terms of the Act". It no longer precludes retrospective legislation.

36. The CPs do not demand that the constitution should preclude all retrospective legislation. Such legislation would be valid only if it conforms to the constitution including the bill of rights. We are accordingly of the view that the amendment does not introduce any violation of the CPs.

## AT130: REMOVAL OF PREMIERS

37. AT130(3) and (4) are new. They provide for the removal of a premier from office by a resolution of the provincial legislature adopted with a

two-thirds majority, on the grounds of a serious violation of the constitution or the law, serious misconduct, or inability to perform the functions of office. Anyone so removed from office on the grounds of a serious violation of the constitution or the law or serious misconduct, looses the benefits of the office of premier and may not serve in any other public office.

38. These new provisions do not affect compliance with the CPs.

**AT146: NATIONAL OVERRIDE**

39. AT146(2)(b) and AT146(4) have been amended. They relate to the circumstances in which national legislation override provincial legislation. We deal with these amendments when we address the question of provincial powers.

**ATCH7: LOCAL GOVERNMENT**

40. AT 154, 155, 157 and 160 have been amended. We deal later in this opinion with all the amendments relating to local government.

## AT166: JUDICIAL SYSTEM

41. NT166 described the court structure. It identified five categories of court of which the last was any court "established or recognised by an act of parliament". AT166(e) amends the latter category to provide for any other court "established or recognised in terms of an act of parliament". The amendment does not affect compliance with the CPs.

## AT167: EXCLUSIVE JURISDICTION OF THE CONSTITUTIONAL COURT

42. AT167(4)(d) extends the list of matters subject to the exclusive jurisdiction of the constitutional court by the addition of decisions "on the constitutionality of any amendment to the constitution". The amendment does not affect compliance with the CPs.

## AT193 AND AT194: THE PUBLIC PROTECTOR AND AUDITOR GENERAL

43. CP XXIX requires that the independence of the public protector and auditor general "be provided for and safeguarded by the constitution". In terms of NT193(4) and (5) they were appointed by the president on the recommendation of the National Assembly and in terms of NT194(1) they could be removed from office by ordinary resolution of the National Assembly on the grounds of misconduct, incapacity or

incompetence after a finding to that effect by a committee of the National Assembly.

44. The court held that the independence of these functionaries was not adequately protected because they could, in effect, be removed from office by a simple majority in the National Assembly.[26]

45. AT193(5)(b)(i) and AT194(2)(a) now require super-majorities in the National Assembly for both their appointment and removal from office. A 60% majority is required for their appointment and a two-thirds majority for their removal from office. We are of the view that these amendments adequately address the court's objections.

## AT196: THE PUBLIC SERVICE COMMISSION

### Introduction

46. The provisions relating to the PSC raise three issues of compliance with the CPs:

46.1. The need to define the powers and functions of the PSC.

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[26]Judgment 95:163 and 96:165

46.2. The independence and impartiality of the PSC.

46.3. The impact of the powers and functions of the PSC on provincial power.

**The powers and functions of the PSC**

47. The court held that NT196(1) did not sufficiently define the powers and functions of the PSC. It merely provided that the PSC shall "promote the values and principles of public administration in the public service". The court contrasted this provision with IC210 which defined the powers and functions of the PSC in greater detail. It held that, although the CPs did not expressly require the powers and functions of the PSC to be defined, it was nonetheless necessary to enable the court to determine whether the NT complied with the requirement of CP XXIX that the independence and impartiality of the PSC be provided for and safeguarded; the requirement of CP XX that each level of government shall have appropriate and adequate legislative and executive powers and functions; and the requirement of CP XVIII(2) that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those under the IC.[27]

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[27]Judgment 103:177

48. AT196(4) now defines the powers and functions in as much detail as was done under the IC. We are accordingly of the view that this defect has been cured.

**The independence and impartiality of the PSC**

49. CP XXIX requires the independence and impartiality of the PSC to be provided for and safeguarded by the constitution. The court left open the question whether the NT complied with this requirement. It held that it could not come to any conclusion in this regard "without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially".[28]

50. The powers and functions of the PSC are now defined in AT196(4). It is to have little more than a monitoring role. Its powers are to investigate, monitor, evaluate, propose, report and promote the constitutional values and principles of public administration. Its only power of compulsion seems to be the power in terms of AT196(4)(d) to give directions aimed at ensuring that certain personnel procedures comply with the constitutional values and principles of sound public administration. Given these powers and functions, the role of the PSC

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[28]Judgment 103:176

is that of monitor rather than watchdog.

51. AT196 introduces the following new provisions designed to ensure the independence and impartiality of the PSC:

51.1. In terms of AT196(2) the PSC "is independent and must be impartial and must exercise its powers and performance functions without fear, favour or prejudice".

51.2. Other organs of state are required in terms of AT196(3) "to ensure the independence, impartiality, dignity and effectiveness" of the PSC and may not interfere with its functioning.

51.3. AT196(7) and (8) provide for the appointment of members of the PSC. It has fourteen members nominally appointed by the president. The real power of appointment, however, vests in the National Assembly and the provincial legislatures. Five commissioners are appointed on the recommendation of a multi-party committee of the National Assembly and one by each of the provinces on the recommendation of a multi-party committee of its legislature.

51.4. AT196(11) provides for their removal from office. They may only be removed for misconduct, incapacity or incompetence and only after a finding to that effect by a committee of the legislature which recommended the appointment in the first place and a resolution adopted with the support of the majority of the legislature itself.

52. The only provision that might be said to detract from the independence and impartiality of the PSC, is the requirement of AT196(5) that the PSC be "accountable to the National Assembly". Might it not be said that this requirement renders the PSC subject to direction and control by the National Assembly? We think not. Given the very explicit provisions regarding its independence and impartiality, the requirement of accountability should, in our view, be interpreted to mean no more than that the PSC is required to give account to the National Assembly of the exercise of its powers and functions.

53. We are of the view that AT196 sufficiently complies with the demand of CP XXIV that the independence and impartiality of the PSC be provided for and safeguarded by the constitution. That is particularly so given its role of monitor rather than one adversarial to government.

**Impact on provincial powers**

54. The powers and functions of the PSC may have an effect on the powers and functions of the provinces in relation to their own administration. The definition of the powers and functions of the PSC may accordingly impact on the requirements of CPXX that provincial governments have "appropriate and adequate legislative and executive powers and functions" and CP XXVIII(2) that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those under the IC. We address this implication when we deal with provincial powers towards the end of this opinion.

## AT199: MUNICIPAL LAW ENFORCEMENT AGENCIES

55. NT199(3)(b) allowed municipalities "in appropriate circumstances" to "establish a municipal law enforcement agency, the establishment and powers of which must be regulated by national legislation".

56. This provision has been deleted from AT199(3) but reintroduced in AT206(7). We are accordingly of the view that the amendment does not affect compliance with the CPs.

## AT206 AND 206: PROVINCIAL POLICE POWERS

57. A number of amendments and additions have been made to AT206 and AT207 to enhance provincial police power. The significance of these enhancements are debatable. They have a bearing on the requirement of CP XVIII(2) that the powers and functions of the provinces may not be substantially less than or substantially inferior to those provided for in the IC. We deal with the latter requirement when we deal with provincial powers later in this opinion.

58. It seems to us, however, that the enhancements brought about by the amendments to AT206 and 207 are not sufficiently significant to make any material difference. We will accordingly not attach any weight to these enhancements when we deal with compliance with CP XVIII(2).

## AT229: MUNICIPAL FISCAL POWERS

59. We deal with the amendments to AT229 later in this opinion when we address all the issues relating to local government.

## AT239: DEFINITION OF NATIONAL AND PROVINCIAL LEGISLATION

60. AT239(1) includes new definitions of,

- "national legislation" to include "subordinate legislation made in terms of an act of parliament and legislation in force when the new constitution takes effect which is administered by the national government"; and

- "provincial legislation" to include subordinate legislation made in terms of a provincial act and legislation in force when the new constitution takes effect which is administered by a provincial government.

61. These definitions are apparently not intended to apply to the override provisions in NT146 because NT146(6) in effect provides that subordinate legislation is regarded as "national legislation" or "provincial legislation" for purposes of the override provisions, only if it has been approved by the NCOP. We would suggest that the drafting of AT146(6) and the new definitions in AT239(1) be improved to remove the following shortcomings:

61.1. It must be made clear that the new definitions do not apply to AT146, if that is the intention.

61.2. The effect of AT146(6) is that subordinate legilsation not

aproved by NCOP, cannot override but *can also not be overriden* by other legislation. That was presumably not intended.

61.3. What is the status of subordinate legislation not approved by the NCOP when it comes into competition with conflicting legislation?

61.4. How is subordinate legislation, and particularly subordinate provincial legislation, approved by the NCOP?

62. We are, however, of the view that the new definitions do not introduce any new violation of the CPs.

**AT243: COMMENCEMENT OF THE CONSTITUTION**

63. NT244(1) provided that the constitution would come into effect on a date set by the president by proclamation "but no later than 1 January 1997". AT243(1) is to be amended by extending the deadline to 1 July 1997 or omitting it altogether. The amendment does not, in our view, affect compliance with the CPs.

## AT Sch 6 Item 21(5): AUTHORITY OF PROVINCIAL DELEGATES

64. AT schedule 6 item 21(5) introduces a new transitional provision which allows each province to "determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the NCOP" until an act of parliament is enacted in terms of AT65(2) which provides for a uniform procedure.

65. This provision might marginally and temporarily enhance provincial power. It does, however, not have any material effect on compliance with the CPs.

## AT Sch 6 Item 21(6): LOCAL GOVERNMENT FISCAL POWER

66. AT schedule 6 item 21(6) introduces a new transitional provision which allows municipalities to continue to impose any tax, levy or duty which they are authorised to impose at the commencement of the new constitution, until national legislation is enacted in terms of AT229(1)(b) authorising municipalities to impose other taxes, levies and duties. This new provision does not, in our view, materially affect compliance with the CPs.

**AT Sch 6 Item 22: THE TRUTH ACT**

67. NT schedule 6 item 22(1)(a) incorporated the "national unity and reconciliation" statement of the IC into the NT. It was held to be consistent with the CPs. It has now been amended but its substance has been retained. The amended provision is in our view also consistent with the CPs.

68. NT schedule 6 item 22(1)(b) immunised the promotion of National Unity and Reconciliation Act 34 of 1995 against constitutional review. The court held that it was in conflict with CP IV which provides that the constitution shall be supreme and CP II and CP VII which provide that the fundamental rights contained in the constitution shall be justiciable.[29] This deficiency has now been cured by the deletion of the offending provision immunising the act.

**AT Sch 6 Item 28: FISCAL MATTERS (TRANSITIONAL PROVISION)**

69. AT schedule 6 item 28 is a new transitional provision. It provides that certain provisions of AT chapter 13 on a variety of financial matters[30]

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[29]Judgment 87: 149

[30]namely sections 213 to 216, 218, 226 and 228 to 230

may not be enforced before 1 January 1998.

70. This new transitional provision does not, in our view, affect compliance with the CPs.

**AT Sch 6 Item 29: REGISTRATION OF STATE LAND**

71. AT schedule 6 item 29 provides for the registration of transfer of state land into the names of the authorities created under the new constitution. It does not, in our view, affect compliance with the CPs.

**AT Sch 6 Annexure "B" Item 1(g): CONSULTATION OF GNU**

72. AT schedule 6 Annexure "B" item 1 introduces an additional matter upon which the president must consult the executive deputy presidents in the government of national unity. It requires him to do so "before signing any international agreements". The addition does not, in our view, affect compliance with the CPs.

**IMMUNITY OF THE LABOUR RELATIONS ACT**

73. NT241(1) immunised the Labour Relations Act against constitutional review. The court held that it was in conflict with CP IV which provides

that the constitution shall be supreme and CP II and CP VII which provide that the fundamental rights contained in the constitution shall be justiciable.[31]

74. The offending provision has been deleted from AT. It accordingly cures the defect.

## LOCAL GOVERNMENT

### Introduction

75. The court upheld three objections to the provisions of the NT relating to local government.[32] We will deal with each of these objections in turn.

### A framework for local government

76. CP XXIV requires "a framework for local government powers, functions and structures". The court held that chapter 7 of the NT did not create

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[31]Judgment 87:149

[32]Judgment 165:299-305

such a framework.[33] It described the minimum requirements for such a framework as follows:

> "At the very least, the requirement of a framework for local government structures necessitates the setting out in the NT of the different categories of local government that can be established by the provinces and a framework for their structures. In the NT, the only type of local government and local government structure referred to, is the municipality. In our view this is insufficient to comply with the requirements of CP XXIV. A structural framework should convey an overall structural design or scheme for local government within which local government structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how local government executives are to be appointed (and) how local government governments are to take decisions...".[34]

77. The NT creates a framework for local government powers, functions and structures as follows:

77.1. NT152 and 153 describe the broad objects and duties of local government.

77.2. NT155 deals with the structure of local government. It creates three categories of municipality.[35] National legislation must

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[33]Judgment 166:301

[34]Judgment 166:301

[35]NT155(1)

define the different types of municipality within each category;[36] establish the criteria for the choice of category of municipality within each area;[37] the criteria and procedures for the determination of municipal boundaries;[38] and provide for an appropriate division of powers and functions between municipalities with overlapping areas of jurisdiction.[39] The legislation must take account of the need to provide municipal services in an equitable and sustainable manner.[40] Provincial legislation must choose the types of municipality to be established in each province.[41] Each provincial government must establish the municipalities in its province and monitor, support and promote the development of local government.[42]

77.3. In terms of NT151(2) the executive and legislative authority of a municipality is vested in its municipal council. NT157, 158 and 159 provide a framework for the composition, election,

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[36]NT155(2)

[37]NT155(3)(a)

[38]NT155(3)(b)

[39]NT155(3)(c)

[40]NT155(4)

[41]Nt155(5)

[42]NT155(6)

membership and terms of office of municipal councils.

77.4. NT160 describes the internal legislative and executive procedures of municipal councils.

77.5. In terms of NT151(3) a municipality has the right to govern the local government affairs of its community subject to national and provincial legislation. NT156(1) and (2) confer legislative and executive authority on municipalities in respect of the local government matters listed in parts B of schedules 4 and 5 and all other matters assigned to them by national and provincial legislation. National and provincial government are required in terms of NT156(4) to assign or delegate to municipalities, the administration of all matters listed in parts A of schedules 4 and 5 which necessarily relate to local government and which would be more effectively administered locally, provided that the municipalities concerned have the necessary administrative capacity.

77.6. The court suggested that the requirement of a framework for local government powers, functions and structures, "should indicate how local government executives are to be appointed". It is not clear to us why a constitutional framework for local

government, powers, functions and structures, should descend to this level of detail. AT160(1) does, however, provide that a municipal council must elect its chairperson[43] and may elect an executive committee and other committees in accordance with national legislation.[44] The latter provision is subject to AT160(6) which allows national legislation to prescribe criteria to determine whether municipal councils may elect an executive committee. These provisions are rather cryptic and open-ended. They do, however, in our view, constitute a sufficient indication how local government executives are to be appointed, for purposes of the demand for a constitutional framework for local government.

77.7. AT155(6) and (7) provide for national and provincial government to monitor and ensure the effective performance of local government powers and functions.[45]

78. These provisions do, in our view, create a framework for local government, powers, functions and structures as required in terms of

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[43]NT160(1)(b)

[44]NT160(1)(c)

[45]NT155(7) is rather ineptly worded. What may national and provincial governments do in the exercise of their power "to see to" the effective performance of local government powers and functions?

CP XXIV.

**Legislative procedures of local government**

79. CP X demands that all legislative organs at all levels of government adhere to formal legislative procedures. The court held that NT chapter 7 failed to meet this demand.[46]

80. AT160(3), (4) and (5) now provide for the formal legislative procedures of local government. They do, in our view, cure the defect.

**The fiscal powers of local government**

81. CP XX demands that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The court did not find that the NT failed to meet this demand. It did, however, find that it failed to meet the more specific demand of CP XXV that the framework for local government provide "for appropriate fiscal powers and functions for different categories of local government".

82. AT229 now deals explicitly and clearly with local government fiscal

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[46]Judgment 167:301

powers. Municipalities may impose,

- rates on property and surcharges on fees for services provided by or on behalf of the municipality;[47] and

- if authorised by national legislation, other taxes, levies and duties appropriate to local government but excluding income tax, value added tax, general sales tax or customs duty.[48]

83. These powers do, in our view, meet the demand of CP XXV for appropriate local government fiscal powers and functions. But CP XXV also demands that the appropriate fiscal powers and functions must provide for "different categories of local government." It does not necessarily mean that different categories of local government must have different fiscal powers. But insofar as differentiation is demanded, it is in our view adequately provided for by the power of national government to differentiate in terms of AT229(1)(b), (2)(b), (3) and (4).

84. We are accordingly of the view that the AT cures the objection raised by the court.

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[47]AT229(1)(a)

[48]AT229(1)(b)

## PROVINCIAL POWERS

### Introduction

85. The court held that the powers and functions of the provinces under the NT were substantially less than and substantially inferior to those in the IC in violation of CP XVIII(2). It suggested that this deficiency could be cured by doing away with the features of NT146(2)(b) and 146(4) which diminished provincial power. It qualified this conclusion however by holding that it could not give a firm or final answer to the question of compliance with CP XVIII(2) "until the issues relating to the powers of the provinces in regard to the appointment of their own employees, as well as the powers and functions of the PSC, have been clarified".[49]

### National Overrides

86. The court held that the offensive feature of NT146(2)(b) was that it introduced "the criterion for the setting of norms and standards for a matter that it be required 'in the interests of the country as a whole' in place of the criterion in IC126(3)(b) that the norms and standards be

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[49]Judgment 259:473

required for the 'effective performance' of the matter".[50] AT146(2)(b) addresses this complaint by reverting to the "effective performance" criterion. It accordingly does away with the offensive feature identified by the court.

87. The court held that the offensive feature of NT146(4) was that it created a presumption in favour of national legislation in respect of legislation passed by the NCOP.[51] AT146(4) now does away with the presumption and requires merely that the court "must have due regard to the approval or the rejection of the legislation by the NCOP". It accordingly removes the offensive feature identified by the court.

88. The AT in other words adopts the court's suggestion. The removal of the two offensive features in NT146 should tip the balance back to compliance with CPXVIII(2).

**The impact of the PSC**

89. We have already dealt with the provisions governing the PSC under the AT. They do not diminish the powers of the provinces or in any event

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[50]Judgment 262:480

[51]Judgment 262:480

not significantly so:

89.1. The provinces effectively appoint nine of the fourteen members of the PSC.[52]

89.2. The powers and functions of the commission are largely that of a monitor.[53] Its only power of compulsion is the power in terms of AT196(4)(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals, comply with the values and principles described in AT195. This power is, if anything, more limited than the power of direction under IC 210(1)(a).

89.3. The provinces were entitled under IC213 to establish their own provincial service commissions. AT196(13) now provides instead that the provincial nominees to the PSC "may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation".

89.4. AT197(4) provides that the provinces "are responsible for the appointment, promotion, transfer and dismissal of members of

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[52]At196(7) and (8)

[53]AT196(4)

the public service in their administrations" but "subject to procedures agreed to in any collective bargaining agreement of the public service". Insofar as the qualification is limited to agreed procedures, it does not materially inhibit the provincial power of appointment, promotion, transfer and dismissal. The qualification is, however, cryptic and its purpose unclear. Is a province to be bound by an agreement to which it is not a party? If not, what is the purpose of a constitutional provision which in effect says no more than that provinces are bound by their own agreements? We suggest that the qualification be deleted or reformulated.

90. We are however of the view that the AT provisions governing the public service do not diminish provincial power.

## CONCLUSIONS

91. We are in conclusion of the view that the AT adequately meets the objections to the NT raised by the constitutional court except that there is a real risk that the second sentence of AT23(5) may be held to violate CP XXVIII. The latter risk may be avoided by deleting the second sentence of AT23(5) or by making it clear that the contemplated

regulation has to be subject to the requirements for limitation in terms of AT36(1).

**WIM TRENGOVE SC**

**Chambers**
**Johannesburg**
**9 October 1996**