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CONSTITUTIONAL ASSEMBLY

URGENT

MEMORANDUM

TO: Party Secretaries
FROM: Executive Director
DATE: 27 March 1996
RE: Urgent Distribution of Revised "Proposed Amendment to Interim Constitution."

N.B. URGENT

Could we ask you once again to urgently distribute the enclosed document to your party's members of the Management Committee.

Many, many thanks.

**H EBRAHIM
EXECUTIVE DIRECTOR
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You've made your mark



Now have your say

THE NEW CONSTITUTION

SECOND PROPOSED AMENDMENT TO INTERIM CONSTITUTION

[Note:

Words in bold brackets denote deletion and words underlined denote insertion. This document must be read together with the document of the same heading submitted to the meeting of the Management Committee of the 26 March 1996.]

Constitutional Principles and certification

71. (1) A new constitutional text shall -

- (a) comply with the Constitutional Principles contained in Schedule 4; and**
 - (b) be passed by the Constitutional Assembly in accordance with this Chapter.**
- (2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection 1(a).**
- (3) A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.**
- (4) During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text, or part or provision thereof, would, if passed by the Constitutional Assembly, comply with the Constitutional Principles.**

Adoption of new constitutional text

73. (1) The Constitutional Assembly shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution.

(2) For the passing of the new constitutional text by the Constitutional

Assembly, a majority of at least two-thirds of all the members of the Constitutional Assembly shall be required: Provided that provisions of such text relating to the boundaries, powers and functions of provinces shall not be considered passed by the Constitutional Assembly unless approved also by a majority of two-thirds of all the members of the Senate.

- (3) If the Constitutional Assembly fails to pass a proposed draft of the new constitutional text in accordance with **[subsection (2)]**, subsections (1) and (2), but such draft is supported by a majority of all its members, such proposed draft shall be referred by the Chairperson to the panel of constitutional experts referred to in section 72(2) for its advice, to be given within 30 days of such referral, on amendments to the proposed draft, within the framework of the Constitutional Principles, which might secure the support required in terms of subsection (2).
- (4) An amended draft text unanimously recommended by the panel of constitutional experts and submitted to the Constitutional Assembly within the said period of 30 days shall be considered by the Constitutional Assembly and be voted on within 14/30 days of the date on which it was submitted to the Constitutional Assembly, and may be passed in terms of subsection (2). **[and if passed in accordance with subsection (2), it shall become the Constitution of the Republic of South Africa]**.
- (5) Should the panel of constitutional experts fail to submit within the said period of 30 days to the Constitutional Assembly an amended draft text which is unanimously recommended by the panel, or should such an amended draft text not be passed by the Constitutional Assembly in accordance with subsection (2), any proposed draft text before the Constitutional Assembly may be approved by it by resolution of a majority of its members for the purposes of subsection (6), within 14/30 days of the date of submission of the amended Draft Text by the Panel [of Constitutional Experts] or, if no amended draft text is submitted by the panel [of constitutional experts] within 44/60 days after the date of referral to the panel [of constitutional experts] in terms of subsection (3).
- (6) A text approved under subsection (5) shall, after it has been certified by the Constitutional Court in terms of section 71(2), be referred by the President, for a decision by the electorate by way of a national referendum, which shall be called within 14 days after approval under subsection (5), and which shall be held within 90 days of the date on which the National referendum is called.
- (7) The question put before the electorate in the referendum shall be the acceptance or rejection of the text approved under subsection (5).

- (8) The text presented to the electorate in the referendum shall, if approved by a majority of at least 60 per cent of the votes cast in the referendum and subject to subsection (13), become the Constitution of the Republic of South Africa.
- (9) If the text, or any amended text taking into account the reasons of the Constitutional Court, is not supported or approved in terms of subsection (3) or (5), or is not approved in the Referendum, in accordance with subsection (8), [or if a new constitutional text is not passed in terms of this Chapter within the period of two years referred to in subsection (1),] the President shall dissolve Parliament by proclamation in the *Gazette* within 14 days of the date of the referendum, [or the expiry of the said period] or after the date on which the relevant text was not supported or approved in terms of subsection (3) or (5) whereupon an election contemplated in section 39(1)(a) shall be held.
- (10) The Constitutional Assembly as constituted after such an election, shall pass the new constitutional text within a period of one year as from the date of its first sitting after such election.
- (11) For the passing of the new constitutional text referred to in subsection (10) by the Constitutional Assembly, a majority of at least 60 per cent of all the members of the Constitutional Assembly shall be required: Provided that provisions of such text relating to the boundaries, powers and functions of provinces shall not be considered passed by the Constitutional Assembly unless approved also by a majority of at least 60 per cent of all the members of the Senate.
- (12) The provisions of subsections (3) to (9) of this section and the other sections of this Chapter shall apply *mutatis mutandis* in respect of the Constitutional Assembly referred to in subsection (10) of this section.
- (13) A new constitutional text adopted in terms of this Chapter shall be assented to by the President and shall upon its promulgation be the Constitution of the Republic of South Africa.

Procedure in the event of non-certification¹

73A. Option 1

- (1) If the Constitutional Court finds that a draft of the new constitutional text passed by the Constitutional Assembly in terms of section 73(2) does not comply with the Constitutional Principles, the Constitutional Court shall refer the draft text back to the Constitutional Assembly together with the reasons for its finding.
- (2) The Constitutional Assembly shall, within three months of the date of referral pass an amended text in accordance with section 73(2), taking into account the reasons of the Constitutional Court.
- (3) The amended text shall be referred to the Constitutional Court for certification in terms of section 71, whereupon the provisions of subsections (1) and (2) again apply.
- (4) If the Constitutional Assembly fails to pass an amended text in accordance with section 73(2), the provisions of section 73(3) to (9) shall apply *mutatis mutandis*.
- (5) If the Constitutional Court finds that a draft of the new constitutional text approved by the Constitutional Assembly in terms of section 73(5) does not comply with the Constitutional Principles, subsections (1), (2) and (3) shall apply *mutatis mutandis*.

Option 2

- (1) If the Constitutional Court finds that a draft of the new constitutional text passed by the Constitutional Assembly in terms of section 73(2) or approved by it in accordance with section 73(5), does not comply with the Constitutional Principles, the Constitutional Court shall refer the draft text back to the Constitutional Assembly together with the reasons for its finding.

¹ Option 1 means that if the Constitutional Court finds that the text does not comply with the Constitutional Principles and refers that text back to the Constitutional Assembly in the context of a referral to the Constitutional Court after approval in terms of section 73(5), the Constitutional Assembly is not limited to securing approval in terms of section 73(5), but has the additional option of passing the text in terms of section 73(2). This would render a national referendum unnecessary. If it is intended to limit the Constitutional Assembly to approval of an amended text for purposes of section 73(5) the formulation in option 2, is appropriate.

- (2) The Constitutional Assembly shall within three months of the date of referral pass an amended text in accordance with section 73(2) or approve an amended text in accordance with section 73(5), as the case may be, taking into account the reasons of the Constitutional Court.
- (3) The amended text shall be referred to the Constitutional Court for certification in terms of section 71, whereupon the provisions of subsections (1) and (2) again apply.
- (4) If, in the case of a draft text where section 73(2) applies, the Constitutional Assembly fails to amend the draft text in accordance with section 73(2) within the period prescribed in subsection (2) of this section, the provisions of section 73(3) to (9) shall apply *mutatis mutandis*.