

## CHAMBER OF MINES OF SOUTH AFRICA

5 HOLLARD STREET • JOHANNESBURG • 2001

A212

[212]

OFFICE OF THE LEGAL ADVISER

Your Ref.:

Our Ref.

P.O. Box 809, Johannesburg, 2000  
Telephone 838-8211  
Telegraphic Address: Bullion  
Telefax (011) 834-3176  
834-1884TELEFAX COVERNOTE

TELEFAX NO. 397-2211

DATE 3 November 1993

TO Ms S Hutchings  
World Trade Centre

FROM A van Achterbergh  
Chamber of Mines of South Africa

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERNOTE) 6


Dear Madam

SEVENTEENTH REPORT OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES AND CERTAIN PROPERTY RIGHTS IN  
CHAPTER 3 OF THE DRAFT CONSTITUTION

There is attached a memorandum prepared by the Chamber of Mines of South Africa containing representations on the Seventeenth Report of the Technical Committee on Constitutional Issues and on certain property rights dealt with in Chapter 3 of the draft Constitution.

We would be grateful if you would submit copies of the memorandum to the Technical Committee on Constitutional Issues, the Technical Committee on Fundamental Rights during Transition, the Planning Committee of the Multi-Party Negotiating Process and to members of the Negotiating Council.

Yours faithfully



A van Achterbergh  
ASSISTANT LEGAL ADVISER

Enclosure

AVAMC/93/157

MEMORANDUM

by the

CHAMBER OF MINES OF SOUTH AFRICA

on the

SEVENTEENTH REPORT OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES

and on

PROPERTY RIGHTS IN CHAPTER THREE OF THE DRAFT CONSTITUTION

The Chamber has prepared the following memorandum on the seventeenth report of the Technical Committee on Constitutional Issues and on certain aspects of property rights dealt with in Chapter three of the draft Constitution.

A. The Seventeenth Report of the Technical Committee on Constitutional Issues.

The Chamber has identified four areas of concern in this report:

- \* a central Auditor-General and/or regional Auditors-General;
- \* the necessity for a constitutionally defined system of fiscal management;
- \* how to deal with the assets and liabilities of the present administration under a new constitutional order; and
- \* the independence of the Reserve Bank and the appointment, tenure and termination of service of the Governor of the Reserve Bank.

1. Auditor-General

The Chamber cannot unconditionally support the concept of centralisation of the office of the Auditor-General. Since the SPRs will be empowered to undertake expenditure and probably to legislate revenue they should each have an Auditor-General reporting directly to the SPR legislators. Where moneys are paid over to SPRs by the central government, the central government Auditor-General should be empowered, over and above the audit by the SPR Auditor-General, to audit the SPR audit reports relating to the expenditure of the moneys paid over by the central government and, if deemed necessary, to conduct an independent audit on the SPR's expenditure of the moneys paid to it by the central government.

2. Fiscal management

The Chamber is of the opinion that there should be a constitutionally defined system of fiscal management in which there is a clear allocation of powers, functions and responsibilities between the central government and the SPRs. There should be certainty as to which authority would levy which taxes, i.e. the delineation of the relationships between the different authorities should be clear and reliable. Overlapping powers and uncertainty should be avoided, particularly in relation to taxation.

While it is desirable that the SPRs have responsibility for their own fiscal management, it is equally desirable that where there is fiscal devolution, there should not be fiscal chaos. Taxes should therefore preferably be collected centrally and then reallocated to SPRs on the basis of equitable allocations or, alternatively, the nature and extent of the SPR collection should be determined centrally.

3. Assets and liabilities of the present administrations

Although the Technical Committee has not yet formulated sections 143-145 of Chapter 11 which will deal with existing assets and liabilities of the State, the problem is discussed in section 2 of the report. The Chamber's understanding of the Technical Committee's proposed solutions to the problems relating to the rationalisation of the existing administrations and the establishment of new administrations at national and SPR level, is:

- \* for the SPR governments to assume responsibility for all the assets, rights and short-term liabilities that relate to the functions to be taken over by them;
- \* for the national government to assume responsibility for all other assets, rights and short-term liabilities as well as all long-term liabilities. The latter will become part of the national debt; and
- \* that servicing the national debt would, therefore, have first claim (i.e. before allocations to the national government and the SPR governments) on the national revenue account.

The Chamber is concerned that the method of allocation outlined above could give rise to anomalies arising from the fact that timing of expenditure and the funding policies (eg the decision to fund on a long-term or short-term basis) differed amongst the existing administrations. For example, an SPR government which took over from an administration which tended to fund projects of questionable social and economic value with long-term finance would have the associated obligation assumed by the national government. As a result, the taxpayers of the other regions, who all contribute to the servicing of the national debt, would effectively be subsidising the irresponsible spending of that region's past administration. In addition, administrators from the existing system of government who retain their positions in the new system would no longer be accountable for any past expenditure decisions provided that they were funded on a long-term basis.

It is thus very important that provisions providing mechanisms to address inequalities be inserted.

4. Independence of the Reserve Bank and the appointment, tenure and termination of service of the Governor of the Reserve Bank

Section 166(2) provides for the Reserve Bank to exercise its powers and perform its duties independently, provided that it must act in support of the general economic policy of the government of the Republic. The Chamber is of the view that in requiring the Reserve Bank to act in support of the

general economic policy of the Government, the independence of the Reserve Bank could be undermined. The Chamber is thus of the view that the proviso in this section should either be deleted or amended to make it clear that in acting in support of the general economic policy of the government the Reserve Bank would not be required to compromise its independence.

The Chamber is further of the view that the appointment, tenure and termination of service of the Governor of the Reserve Bank should be built into the constitution as is the case with the Auditor-General. This could be done by amending section 167 appropriately.

B. Property rights in Chapter 3 (fundamental rights) of the draft Constitution

Section 28 of Chapter 3 of the draft Constitution (which deals with property rights) is of some concern to the Chamber. By subsection (2) the compensation payable in the event of expropriation, if not agreed upon, must be determined by a court of law as just and equitable "taking into account all relevant factors". The Chamber is of the view that compensation should be determined by the market price and/or compensation for actual financial loss where there is an open market for the property expropriated and that section 28(2) should be amended accordingly. By providing for a court to take into account all relevant factors the basis on which compensation is to be determined becomes very uncertain as, in addition to the market value, the use to which the property is being put, the history of its acquisition, the interests of those affected and the value of the owner's investment in it will amongst others have to be taken into account in determining a just and equitable compensation.

In terms of section 28(4) a person who has been dispossessed of rights in land as a consequence of any racially discriminatory policy has the right to restoration of such rights (subject to time limits and procedures to be fixed by Parliament) unless restoration is not "feasible", in which case the person has a right to compensation or other remedies according to law. Thus where it is "feasible" the right to restoration could be exercised. This provision is subject to subsection (2) which provides, inter alia, that expropriation of property rights will be permissible in the public interest, while subsection (3) provides that for purposes of subsection (2) expropriation of

property rights for restoration to dispossessed persons will be deemed to be in the public interest. It thus follows that the right to restoration could be exercised regardless of the impact thereon on the optimal utilisation of the land and mineral rights in the land and the implications of this on broader social and economic considerations. Land underlain by minerals which are effectively being exploited could be subject to restoration even if such restoration would render the minerals economically unexploitable. So too could productive farming land, through restoration, be effectively rendered uneconomic. Industrial, commercial and other land may similarly be affected. The Chamber is therefore of the view that section 28 should be amended so as to remove the potential adverse consequences on economic activities. In particular, the phrase "not feasible" in section 28(4) could be replaced by "not in the public interest", and a proviso should then be added at the end of section 28(3) to the effect that where the restoration of property rights could negatively affect the optimal utilisation of economic resources, such as agricultural land and minerals, for the benefit of the nation, then such restoration will not be deemed to be in the public interest.

AVA/MC/93/156