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CHAMBER OF MINES OF SOUTH AFRICA

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FUNDAMENTAL RIGHTS DURING THE TRANSITION

There is attached a memorandum by the Chamber of Mines of South Africa containing representations on the Seventh Progress Report of the Technical Committee on Fundamental Rights during the transition.

We would be grateful if you would submit the memorandum to the Technical Committee on Fundamental Rights during the transition as well as to the Negotiating Council of the Multi Party Conference.



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MEMORANDUM

to the

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE
TRANSITION**

on the

**SEVENTH PROGRESS REPORT OF THE
TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION**

The Chamber would like to present to the Technical Committee a memorandum on its Seventh Progress Report. This memorandum deals firstly with two issues of general concern whereafter specific comments are made on the provisions contained in the Report.

MAJOR CONCERNS**A. Preparation and future influence of an interim Charter**

The first major concern the Chamber has is over the degree of consultation between the framers of the Report and persons outside the Negotiating Council at Kempton Park. The Chamber has not had a reasonable opportunity to comment on the various reports of the Technical Committee. Unrealistic time limits imposed on the submission of representations has made it exceedingly difficult to contribute towards the process of developing an interim Charter of Fundamental Rights for South Africa.

In the second place, it is not clear from the Seventh Report how much of the Report has been agreed to in the Negotiating Council and how much remains to be settled. The introduction to the Seventh Report records that many of the formulations in the Report have already been approved by the Council. Reports in the Press indicate however that a number of provisions in the Report remain a source of controversy and it is believed that the Committee is in the process of preparing a further Report.

Thirdly, it is not possible to foresee how long the interim Charter being developed in the Negotiating Council will endure. Clause 31 of the version in the Seventh Report indicates that it shall be "of full force and effect until a Bill of Rights duly enacted by the elected constitution-making body has come into effect". One cannot predict how long it will take such a body to agree on a permanent Bill of Rights. Although the Charter currently under consideration is clearly intended to be of an interim nature, one should bear in mind that it may become difficult in the future to exclude from a more permanent Charter features that have been included in the interim Charter.

The Chamber appreciates the urgency surrounding the whole political process in South Africa, but requests that all interested and affected parties be afforded a reasonable opportunity to engage in real and meaningful debate concerning such an important issue as a Charter of Fundamental Rights.

B. The principle of verticality

In the Chamber's view a Charter of Fundamental Rights should provide only for vertical rights, namely, the rights of citizens *vis-a-vis* the State and not for horizontal rights, namely, the rights of one citizen *vis-a-vis* the rights of another citizen. If the Charter is to have horizontal application a number of issues, for example the labour relations aspects of the Charter, eviction, access to information, assembly, demonstration and petition, the extension of *locus standi* and property rights, which would be acceptable in a Charter having only vertical application, become contentious and need to be addressed.

In the Sixth Report of the Committee there was a strong indication that the Charter would have only vertical application. The Seventh Report, however, contains a fundamental shift in this regard as it provides in clause 1(1)(b) that the provisions of the Charter shall "bind, where just and equitable, other bodies and persons". In the comment on this clause it is stated that this formulation would leave "room for the evolutionary and natural development of the concept of the horizontal enforcement of rights in the jurisprudence of the designated judicial authority". It is considered that even if the Charter were to have vertical application only,

horizontal rights would continue to evolve and develop through the legislative process and that it is not necessary for the clause to be formulated in this way. It is submitted that the determination of what is just and equitable by an as yet undefined body is uncertain and will cause much confusion in the practical application of the Charter. The Chamber submits that the Charter should only provide for vertical rights.

SPECIFIC COMMENTS ON THE SEVENTH PROGRESS REPORT

A. Even if the draft Charter is to have only vertical application, certain issues raise concern.

1. *Extension of locus standi (clause 1(5)(b))*

By clause 1(5)(b) a class action by a person on behalf of a group or class of persons whose rights are alleged to have been infringed is entertained. The well established principle of *locus standi* in our law namely, that a plaintiff must have a direct interest in the matter and must be able to prove injury in order to have a right to approach the courts, should not be disturbed. An extension of the *locus standi* principle in this way would create the prospect of an increase in litigation to the detriment of the economy and development of South Africa.

2. *Administrative decisions (clause 18)*

By clause 18(1) every person shall have the right to lawful and procedurally fair administrative decisions.

It is assumed that the expression "administrative decisions" is confined to decisions taken by public officials in that branch of public law which regulates the legal relations of public authorities with private individuals and organisations, or with other public authorities. This right should accordingly be interpreted as having vertical application only.

At present it is not clear in our law whether an administrative decision taken by a public authority vested with discretionary powers may be set aside on the ground of unreasonableness. It is submitted that the opportunity should now be taken to determine finally that unreasonableness does constitute a ground of review in South African administrative law by amending clause 18(1) to provide that:

"Every person shall have the right to lawful, reasonable and procedurally fair administrative decisions"

This proposal is consistent with a view expressed by the South African Law Commission.

At present the legislature may arbitrarily exclude by ouster clauses the inherent powers of review of the Supreme Court. It is recommended that the proposal put forward by the South African Law Commission that the right of a citizen to approach the Supreme Court for review should be entrenched so that the legislature or executive may not infringe this right, otherwise than under the powers of limitation and suspension which apply in the case of all other fundamental rights. This could be achieved by adding to clause 18 a new subclause (3) to the following effect:

"Every person shall have the right to have recourse to the Supreme Court to review, by virtue of its inherent jurisdiction, any subordinate legislation and any executive act and any administrative act."

3. *Property (clause 23)*

It is noted that clause 23(2) concerning the determination of compensation for expropriated property will change the basis on which compensation for expropriated property is currently determined by providing for the court to determine "just and equitable" compensation, rather than market price and/or compensation for actual financial loss where there is an open market for the property expropriated. The proposal contained in

clause 23(2) will make the basis on which compensation is to be determined 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 is to be taken into account in determining a just and equitable compensation.

It is submitted that compensation for expropriated property should be calculated in accordance with objective testable norms and further that such compensation should be in cash and not in kind or by Government stocks and debentures.

Unlike the version of the Charter in the Sixth Report, that in the Seventh Report contains a clause 23(3) which records that "Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible". This would appear to render clause 23 even more unsatisfactory since nothing is said about the position of the person from whom rights are to be removed for the purposes of their restoration. In addition it is not clear who will determine whether a restoration or payment of compensation is feasible or what factors will be taken into account in determining the feasibility or the measure of compensation. The Chamber recommends the deletion of clause 23(3). If the clause is to be retained, the right of an expropriatee to a market-related compensation determined by the courts should be expressly recognised.

4. *Environment (clause 24)*

As currently worded in the draft Charter it is submitted that the right is not practically enforceable. It could be argued that a large amount of human activity is detrimental to health or well-being, and if a person were entitled to protect his rights to prevent such activities, then the economy would be seriously affected. It is submitted that the right should rather be negatively phrased so that it enshrines the right to a certain minimum standard but does

not grant a right of an indeterminate extent. It is accordingly recommended that the right be redrafted along the following lines:

"Everyone has the right not to be exposed to an environment which is dangerous to human health or well-being or which is seriously detrimental thereto."

It is considered imperative that environmental rights should operate only in a vertical and not in a horizontal manner and that an infringement of such rights by a citizen should not be the subject of legal challenge by another citizen. The State has sufficient administrative authority to regulate resource use and conservation and therefore should be the only target for the exercise of such environmental rights. An extension of such rights to operate horizontally could lead to delays and increased costs in development thereby impeding economic development. It could also lead to vexatious litigation.

B. If the interim Charter is to have horizontal as well as vertical application, there are a number of additional issues which raise concern.

1. *Conflict of Rights*

No recognition is given in the draft Charter to the fact that a right of a certain individual may have to be balanced against the conflicting rights and interests of other individuals. The Charter should expressly state that the rights contained therein shall be exercised responsibly with due regard to the rights of others.

2. *Extension of locus standi (clause 1(5)(b))*

Comments made in relation to this clause under A. 1 above also apply here. A class action ~~as~~ between individuals has even more far reaching implications and is not supported by the Chamber.

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3. *Assembly, demonstration and petition (clause 10)*

By clause 10 every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions. The Technical Committee's Sixth Report contained a note beneath clause 10 indicating that the question whether political parties should have the right to hold political meetings on private premises should be referred to the "Technical Committee on Elections". When one reads clause 10 with clause 1(1)(b) of the Seventh Draft, however, there may be room for clause 10 to be applied in such a way as to entitle a party to hold such a meeting on private property where this is "just and equitable". If the Charter is to have horizontal application this clause should accordingly be qualified to make it clear that such assembly and demonstration is limited to public property only and that the right does not extend to meetings on private premises.

4. *Access to information (clause 17)*

If the draft Charter is to have horizontal application, the right of access of a person to all such information as is necessary for him to protect or exercise his rights is opposed by the Chamber. The access to information between individuals is adequately catered for in our present law. At the least there is sensitive commercial information that it is not desirable to disclose in all circumstances. In any event the word "information" should be qualified by the adjective "reasonable".

5. *Eviction (clause 20)*

The requirement in clause 20 that the availability of appropriate alternative accommodation may be taken into account by a court as a relevant factor in deciding whether a person should be evicted or not is an additional factor not currently contained in our law. This additional factor should be deleted if the right is to have horizontal application as it will interfere with the free market system and have inequitable financial implications for all property owners. It should be noted from the comment beneath clause 20 in the

Seventh Report that the Ad Hoc Committee referred to therein has recommended the deletion of clause 20. This recommendation is supported by the Chamber.

6. *Labour relations (clause 22)*

Ideally a Charter of Fundamental Rights should make no reference to labour rights at all because the Charter should be confined to vertical rights and not deal with horizontal rights.

If the Charter is to have horizontal application, it is in any event belived to be wrong to include any labour rights in an interim Charter. By including such provisions in a transitional document, one preempts the outcome of the deliberations in the National Manpower Commission which is the forum agreed upon between Government, employers and employees as the proper forum to deal with such matters. In short, the time is not right for the inclusion, in the proposed interim chapter of the constitution, of rights which will impact on labour law, particularly on those areas of labour law that remain contentious such as the inclusion of an unlimited right to strike or right to lockout which would distort the law and be especially damaging during the forthcoming transitional phase and the development of our country.

Should it be impossible for labour rights to be excluded from the interim Charter, the provisions of the proposed Charter should be completely neutral to the status quo on labour law. This may be achieved by deleting the right to strike and lockout which is not yet unequivocally established in our current law.

Alternatively the word "freedom" should be substituted for the word "right" where it occurs in clause 22(3). As a less preferable alternative one could list in the Charter a series of countervailing employee rights and employer rights (particularly the right to dismiss) so that they would be considered collectively and applied in such a way as to have the same effect as the status quo.

By clause 28(2) the provisions of a law in force at the commencement of the Charter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by the legislature. The Sixth Report indicated that this proposal had been inserted into the draft Charter in the light of submissions made by the National Manpower Commission. It is understood that the National Manpower Commission has made further representations to the effect that the provisions of such a law should remain in force until repealed or amended by the legislature after the legislation has been considered by the National Manpower Commission. The Commission has also recommended that the labour rights be reformulated to confer a right to form and join trade unions and employers organisations according to the law, to organise and bargain collectively according to the law and to strike and lockout workers according to the law. These recommendations should be accommodated in the Seventh Report.

A further concern relating to labour rights that are to be enforceable between individuals is that the inclusion of a provision along the lines of clause 1(5)(a), that a person whose rights have been infringed or threatened may apply to a competent designated authority for relief, may give rise to competing jurisdictions between the industrial court and other courts that may in due course adjudicate on rights flowing from the proposed Charter. This potential conflict between the industrial courts and the constitutional courts should be clarified.

7. *The limitation and interpretation clauses (clauses 28 and 30)*

By clause 30(2) no rule of the common law, custom or legislation shall limit any right or freedom contained in the Charter, save as provided for in the Charter. By clause 28 the rights contained in the Charter may be limited by a law applying generally to the extent reasonable and justifiable in a free, open and democratic society based on the principle of equality (but without negating the essential content of the right in question).

The scope for any qualification of a right contained in the Charter would appear to be extremely limited in that a limitation of a right may not "negate the essential content of the right in question" (the meaning of which expression is obscure) and in addition must be justifiable and reasonable. It is suggested that if the Charter is to have horizontal application, qualification of a right should be allowed in the event of it being either reasonable or justifiable.

In the comment on clause 30(1) in the Seventh Report the Technical Committee expresses its disagreement with the suggestion that clause 30(1) should record that the Charter should be interpreted so as to promote values based on the principle of liberty and equality. The Technical Committee wishes to confine the basic principle to equality. This apparent bias towards equality and against liberty is a cause for concern. The Chamber proposes that the principle of liberty should be inserted into clause 30(1) in order to balance the principle of equality.

It is to be noted that clause 30(4) provides that a law limiting a right entrenched in the Charter shall be presumed to be constitutionally valid until the contrary is proved. In terms of the proviso to clause 30(4), however, laws limiting political rights and (insofar as they relate to the expression of free and fair political activity) rights to freedom of expression, assembly, association, movement, access to information and the right to lawful and procedurally fair administrative decisions shall be strictly construed. In this way, the Charter gives a greater degree of protection to rights relating to political activity than to other rights. The Chamber suggests that clause 30(4) be deleted in its entirety as all the rights that have a proper place in such a Charter should be afforded the same degree of protection.

CONCLUSION

Subject to the above comments, the Chamber of Mines welcomes an entrenched Charter of Fundamental Rights justiciable by an independent judiciary as an essential part of a new constitution for South Africa.

Chamber of Mines of South Africa
August 1993

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