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CONSTITUTIONAL ASSEMBLY

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MEMORANDUM

**TO: ALL MEMBERS OF THE CONSTITUTIONAL COMMITTEE
SUBCOMMITTEE**

FROM: EXECUTIVE DIRECTOR

DATE: 23 January 1996

RE: MEMORANDUM FROM INDEPENDENT PANEL OF EXPERTS

Included for your consideration is a memorandum produced by the Independent Panel of Experts entitled, "*Inherent Jurisdiction and Common Law Jurisdiction.*"

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THE NEW CONSTITUTION

MEMO

INHERENT JURISDICTION AND COMMON LAW JURISDICTION

Sections 96(5) and 97(3) of the Working Draft provide that the Constitutional Court and the Supreme Court of Appeal, respectively, will have no jurisdiction other than that granted in the Constitution.

Sections 97(2) and 98(2) provide that the Supreme Court of Appeal and the High Courts, respectively, will have the inherent jurisdiction that vested in such court(s) before the Constitution took effect.

The questions to be considered are:

- is "inherent jurisdiction" distinguishable from "common law jurisdiction" and if so, what are the differences?
- is it necessary to retain either "inherent jurisdiction" or "common law jurisdiction", or both, in order to assure the proper and uninterrupted functioning of the courts?

The inherent jurisdiction of the Supreme Court has been described as follows:

"... apart from powers specifically conferred by statutory enactments and subject to any deprivations of power by the same source, a Supreme Court can entertain a claim or give any order which, at common law, it would be entitled to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court... The inherent power is not merely one derived from the need to make the court's order effective, and to control its own procedure, but to hold the scales of justice where no specific law provides directly for a given situation"

Ex Parte Millsite Investments Co (Pty) Ltd.
1965(2) SA 582(T) at 585 G-H

Pollak on Jurisdiction (1993) 28 comments:

"In short, therefore, the position is that unlike, say, the magistrate's courts or the industrial court, the power of the Supreme Court is not spelled out in a legislative framework and limited by its creating statute: it inherently has all such power as entitles it to entertain, to hear 'all causes arising' within the area over which it exercises jurisdiction".

Pollak gives the following examples of the exercise by the Supreme Court of its inherent jurisdiction:

- to regulate their own proceedings;
- to control their own officers;
- to prevent abuse of their process;
- to maintain their dignity;
- to ensure that substantial justice is not denied by a strict adherence to procedural rules,

Inherent jurisdiction cannot be used to create substantive law.

According to Pollak (30) the Supreme Court's power to review the proceedings of administrative and quasi-judicial bodies, tribunals, etc, does not derive from its inherent jurisdiction but is part of the general jurisdiction of the court.

The common law, as a source of jurisdiction, in effect means that the courts define their own jurisdiction, since they are the final judges of what the common law is (Pollak, 2). Also, within the territorial limits prescribed by the Supreme Court Act 1959, the jurisdiction of its component divisions depends upon the principles in regard to jurisdiction which are part of the common law. In order to ascertain whether a division has or has not jurisdiction in a particular case it is necessary to refer to the Roman-Dutch law as it has been adopted and developed in South Africa and to apply that law in the light of the territorial and other limits imposed upon the powers of the division by statute (Pollak 38).