

2/2/1/69

CONSTITUTIONAL ASSEMBLY

**MANAGEMENT COMMITTEE
THURSDAY
3 OCTOBER 1996
V16**

**ADDITIONAL
DOCUMENTATION**



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

MC/10/10Oct96

To: Members of the Management Committee

**From: HASSEN EBRAHIM
Executive Director**

Date: 1 October 1996

Subject: New Matters

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1. I attach copies of letters detailing requests for amendments to the text which require the consideration of the Management Committee.
 2. Kindly find -
 - a) a request by Nedlac regarding a provision in the chapter of the administration of justice affecting the jurisdiction of the Labour Appeal Court; and
 - b) a request by the Department of Land Affairs requesting the insertion of a provision similar to that of section 239 of the interim constitution.
 3. These matters do not arise from the technical refinement exercise carried out by the experts or the judgement of the Constitutional Court. The guidance of political parties is therefore required. Should parties agree to these requests, it is proposed that the experts be instructed to draft provisions accommodating the concerns.

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THE NEW CONSTITUTION



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

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27 September 1996

**Mr Cyril Ramaphosa
Chairperson
Constitutional Assembly**

**By Fax
021 241160**

Dear Cyril

CONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE LABOUR RELATIONS ACT, 1995

Constitutionality of the Labour Relations Act, 1995

It was brought to the attention of Nedlac, by Judge Myburgh, Judge President of Labour Courts, that certain sections of the Labour Relations Act, 1995, may be unconstitutional.

Section 167(2) of the LRA provides that the Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of matters that lie within its exclusive jurisdiction.

However, section 166 of the Constitution states that the Supreme Court of Appeal may decide appeals in any matter and is the highest court appeal except in constitutional matters.

Thus section 167(2) of the LRA appears to be contrary to section 166 of the Constitution.

Section 167(3) of the LRA provides that the Labour Appeal Court has powers and authority, in respect of matters that lie within its exclusive jurisdiction, equal to those of the Appellate Division of the Supreme Court.

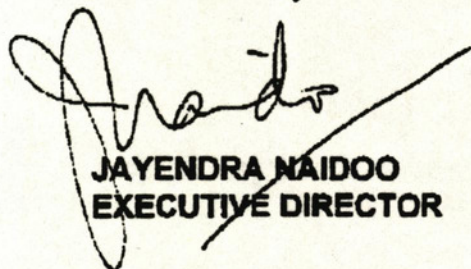
However, according to section 166 of the Constitution, the Supreme Court of Appeal is the highest court in land. Thus section 167(3) of the LRA also appears to be contrary to section 166 of the Constitution.

It was the express intention of the social partners that a Labour Appeal Court, consisting of specialists, would expeditiously and finally resolve all labour disputes, and that the Labour Appeal Court should, in respect of labour disputes, have powers equal to the Appellate Division.

Judge Myburgh has recommended that the Constitution should be amended to enable the LRA's provisions regarding the status of the Labour Appeal Court to be carried through.

Nedlac supports the Judge President's recommendation. As the LRA is coming into operation on 11 November 1996 we would like to request that this proposed amendment to the Constitution be considered by the constitutional drafters during the current round of negotiations.

Yours sincerely



JAYENDRA NAIDOO
EXECUTIVE DIRECTOR

Department of Land Affairs
Departement van Grondsake
Kgoro ya tša Naga
UMnyango wezoMhlaba



Ref: DG2/7

Mr Cyril Ramaphosa
Chairperson
Constitutional Assembly
P O Box 15
CAPE TOWN
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Fax: 021 - 4032070

Dear Mr Ramaphosa

On behalf of Minister Derek Hanekom, I am sending you with this letter a memorandum which deals with a serious technical gap in the new Constitutional text, and proposes a simple amendment to rectify it.

The Minister will be very grateful if you would kindly place this before the Constitutional Assembly.

Kind regards

A handwritten signature in black ink, appearing to read 'Geoff Budlender'.

GEOFF BUDLENDER
DIRECTOR-GENERAL

DATE: 20 September 1996
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THE TRANSFER OF STATE LAND: A GAP IN THE NEW CONSTITUTIONAL TEXT

- 1 Section 239 of the interim Constitution:
 - 1.1 vests all State land in either the national or provincial governments, in terms of a set of rules; and
 - 1.2 creates a mechanism for the Registrars of Deeds to be informed, by way of a "section 239(2) certificate", of the government in which the land has vested.
- 2 It should be noted that all State land has therefore already vested in the national and provincial governments. This happened on 27 April 1994, when the interim Constitution came into effect.
- 3 The Minister of Land Affairs receives a large number of requests for certificates in terms of section 239(2), certifying in which government the land has vested. This is necessary when State land is to be transferred and when servitudes have to be registered. This year the Minister has issued an average of 32 certificates, involving 192 properties, per month. Often, the land concerned is to be developed and subdivided into a larger number of erven.
- 4 The new Constitution does not contain any provision similar to section 239(2). This was clearly the result of an oversight. The result is that once the new Constitution comes into effect:
 - 4.1 there will be no mechanism for the Registrars of Deeds to establish which government is the owner of State land; and
 - 4.2 it will therefore be impossible for any State land to be transferred.
- 5 The Department of Land Affairs prepared a draft Bill to fill this gap and deal with related matters. The draft Bill has been discussed at a meeting of relevant national departments and provincial governments, and has been circulated for comment.

- 6 For reasons which are not relevant here, the matter has been delayed. Some Departments have expressed doubt about whether this can competently be done with ordinary legislation. There is no reasonable prospect that legislation (if competent) can be enacted before the middle of 1997 at the very earliest.
- 7 The result is that when the new Constitution comes into effect, there will be will be a complete stop to any transfers of State land, for whatever purpose.
- 8 The most frequent purposes for which State land has to be transferred, or registered rights have to be granted, include the following:
 - 8.1 *Housing*: The State is very often the owner of the land which is to be developed and/or transferred in terms of housing projects.
 - 8.2 *Commercial or industrial development*: The State often wishes to sell land on which commercial or industrial development is to take place.
 - 8.3 *Servitudes*: Eskom regularly requires the granting of servitudes over State-owned land, in order to provide electricity to new consumers.
 - 8.4 *Roads*: There is a regular need for the disposal of State land during the process of road-building, often in the form of land swaps.
 - 8.5 *Previous sales*: There are many cases in which State land has already been sold, and transfer must now be given in terms of existing obligations.
- 9 The inability of government to transfer State land or to register real rights in State land will therefore be disastrous for government at all levels.

PROPOSAL

10 It is proposed that a new "sec 239(2)" provision be inserted in the new constitutional text.
The new provision would:

10.1 be purely technical in nature, and should not be controversial

10.2 fill a gap in the new Constitution, which exists as a result of error,

10.3 follow the wording of sec 239(2) of the interim Constitution, which creates the current mechanism for certification.

11 The suggested wording of the new section, which could be inserted in Chapter 14 ("General Provisions"), is as follows:

(a) *A registrar of deeds shall upon the production of a certificate by a competent authority that immovable property described in the certificate is vested in a particular government in terms of section 239 of the Constitution of the Republic of South Africa, 1993, make such entries or endorsements in or on any relevant register, title deed or other document to register such immovable property in the name of such government.*

(b) *No duty, fee or other charge shall be payable in respect of a registration in terms of paragraph (a).*



**G M BUDLENDER
DIRECTOR-GENERAL
DEPARTMENT OF LAND AFFAIRS**

27 September 1996

