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Geagte dr Eloff

Meegaande 'n voorlegging vir oorweging deur die Tegniese Komitee rakende Grondwetlike Aangeleenthede, asseblief.

Die uwe

PROF JOHAN KRUGER
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COMMENTS ON THE TWELFTH REPORT OF THE TC ON CONSTITUTIONAL ISSUES

Although I agree with the general trend of the Report and the chapter on the Judicial Power, I would like to offer some suggestions with regard to the practical implications arising from some of the recommendations. My suggestions mainly concern direct access to the CC by individuals - a proposal which I strongly support, but which may give rise to practical, procedural and even legal problems if not handled properly. Also some remarks will be made concerning the choice of forum when appealing to either the CC or the AD.

1. ACCESS TO THE CC BY INDIVIDUALS

A "hybrid system", (as proposed by the TC) of necessity implies that the "ordinary" courts will have jurisdiction at least in a number (if not the majority) of instances, either as courts of first instance or as courts of appeal/review. For the hybrid system to make sense it must be accepted that the ordinary courts will, more often than not, first have to be approached by individual litigants before such litigants will be allowed to approach the CC, and then only by way of **appeal**. It follows that the number of instances where the CC may be approached directly by individual litigants, will be the exception rather than the rule. Such a situation will clearly not meet the demand for the CC to be readily approachable by individual litigants (and particularly the indigent).

It is submitted that, in order to place the legitimacy of the CC on a sound footing, provision should from the outset be made for direct access as well as for an inexpensive alternative procedure to approach the CC.

It is submitted that the present provisions will not suffice inasmuch as they:

- leave most questions pertaining to direct access unanswered, stipulating only that such access may be provided for in terms of the rules prescribed by the President of the CC (cf. ss 89(1) and (3), 90(10);

- restrict direct access to "other special circumstances where it may be desirable to apprach the Constitutional Court directly" (par 3.5 of the Report);

- only provide for **appeals** to the CC (s. 90(6)) and not for an alternative and inexpensive procedure **instead** of normal appeal procedure.

While accepting that it may be left to the President of the CC to issue rules with regard to special instances where the CC may be approached directly without the ordinary courts having to be approached first (eg in circumstances of direct and imminent encroachment on a fundamental right - thus, something in the nature of an urgent application) the implication of only providing for **appeal** to the CC in all other instances, is that, in effect, access to the CC will still be expensive, time consuming and relatively difficult. Provision should be made to give the term "appeal" a broader meaning.

It is submitted that an alternative procedure to the normal appeal procedure (from the Supreme Court to the CC) should be considered. For the sake of clarity the alternative procedure will be referred to as a "constitutional complaint". This alternative procedure could entail the following essential characteristics.

- That provision is made in the Constitution itself for an alternative procedure **instead** of normal appeal procedure to the CC.

- That such an alternative procedure will entail

    - the bringing of an "appeal" by way of placing before the CC all relevant documentation (eg the record of court proceedings in the court a quo) and written submissions/heads of argument, without the necessity of having to engage counsel in that regard

    - that all "appeals" brought before the CC in this manner will be decided by a specified number of judges (which will be less than eleven) sitting in Chambers; oral argument will not be allowed, except at the request of the CC. It will probably be impractical for all judges of the CC to sit in all cases, particularly in cases where the procedure of the "constitutional complaint" is involved (cf. par. 3.7(d) of the Report).

The details concerning aspects such as screening processes (in the CC itself), the exact way in which the CC will function when adjudicating on "constitutional complaints" (viz. "extraordinary appeals" brought before it in

the way as suggested above etc.) need obviously not be dealt with in the Constiution itself and may be left to the Rules of the CC. (For a cursory explanation of a similar procedure in German Constitutional Law, see my article in 1993 Consultus vol 6 p 17 bottom to 18).

2. THE CHOICE OF FORUM WHEN APPEALING

Once a CC as a separate court is instituted, provision will have to be made for a way in which to distinguish between matters that may/must be directed to the CC (either by way of normal appeal procedure or the procedure of the constitutional complaint) or the AD. To simply leave the choice of forum to the litigant will not suffice and may lead to unsatisfactory results. It is, therefore, suggested that a provision must be included in the Constitution directing all presiding officers hearing matters in the Supreme Court, to either **mero motu** or when called upon to do so by a party, **give a ruling** (as a part of the court's judgment or order) as to whether **any issue material to the adjudication of the matter is of a substantive constitutional nature**. The ruling itself will be appealable to the CC. (For the sake of clarity a graphic representation of the suggested courses open to a litigant is attached.)

To simply leave the matter open in the Constitution and leave it to the Rules of the CC, or the discretion of the presiding judge, will not suffice: it is doubtful whether presiding officers could be obliged in that way to give a ruling as has been referred to above. In the absence of a ruling by the presiding judge as to which of the two courts should be approached on appeal legal uncertainty will prevail.

Such a ruling should be given even though leave to appeal will have to be obtained first (s. 90(9)).

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