CONSTITUTIONAL ASSEMBLY

SUB-THEME COMMITTEE 2 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

27 FEBRUARY 1995

ROOM V227

09H00

DOCUMENTATION

TABLE OF CONTENTS

CONSTITUTIONAL ASSEMBLY

SUB-THEME COMMITTEE 2 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

MONDAY 27 FEBRUARY 1995

AGENDA

A meeting of the above committee will be held on Monday 27 February 1995 at 09h00 in Room V227, Old Assembly Wing.

1. CONFIRMATION OF MINUTES

1.1	Minutes:	14 February 1995	**(p1-2)**
1.2	Minutes:	20 February 1995	**(p3-5)**

2. MATTERS ARISING

At a seminar held on Monday 23 January addressed by Dr C Stals, Governor of the Reserve Bank of South Africa, the Committee requested that Dr Stals submit a memorandum with regard to the independence of the Reserve Bank. The related document is attached at **pages 6-14.**

3. SUBMISSION PRESENTATIONS

3.1 COSAB (Council of Southern African Bankers)

Submission for 6 March 1995

3.2 JSE (Johannesburg Stock Exchange) **(p15-18)**

Presenter: Mr Peter Leon, Attorney
Webber, Wentzel & Bowens

4. FURTHER BUSINESS

Enquiries: **Pat Fahrenfort Room 1013, Regis House, Tel: 245031 Ex 240**

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CONSTITUTIONAL ASSEMBLY

SUB-THEME COMMITTEE 2 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

THURSDAY 14 FEBRUARY 1995

PRESENT

Davies R (Chairperson)

Andrew KM
Bekker H
Botha WJ
Jacobsz F
Makgothi H
Marais G
Nair B
Welgemoed P
Woods G

Apologies:

Chiole J
Erwin A
Hogan B
Jordaan JA
Marcus G

P Fahrenfort and A Van Wyk (NP) (in attendance)

1. CONFIRMATION OF MINUTES

9/2/95 Confirmed and signed.

The Commitee accepted the recommendation that it was not necessary for the Secretariat to minute summaries of submission presentations.

2. SUBMISSION PRESENTATION

2.1 SACP

Jeremy Cronin presented the SACP's submission followed by a discussion. The submission is attached at **Annexure A.**

2.2 PAC

The Committee noted the absence of the PAC. It was recommended that the Secretariat contact the PAC to present their submission on Thursday 16 February 1995.

3. CLOSURE

The meeting closed at 10h20.

.....
CHAIRPERSON

.....
DATE

SOUTH AFRICAN COMMUNIST PARTY

Central Committee

ANNEXURE A

SACP SUBMISSION TO CONSTITUTIONAL ASSEMBLY
Theme Committee 6, Sub Committee 2

There are two basic issues in the area of Economic and General Financial Affairs which the SACP wishes to highlight for consideration by the Theme Committee.

1. The new Constitution should NOT contain any prescription on the kind of economic model or dispensation that must prevail in SA.

1.1 This issue was debated at some length in the course of CODESA and the subsequent Multi Party Negotiations. In the end, it was agreed that the present interim Constitution would not contain any such prescription.

1.2 However, there were parties and other interest groups who asserted strongly at the time that the Interim Constitution should declare South Africa to be "a free market system". We believe that such parties and groups are likely, once more, to raise this question. It is for this reason that we are highlighting the matter here.

1.3 The economic model or economic dispensation that prevails in South Africa should be the outcome of free debate, free choice, experience, discussion and negotiation within the context of a multi-party electoral system and a range of consultative forums, like NEDLAC. Political parties, organisations and individuals should be constitutionally free to propagate and seek to win majority support for the full range of economic dispensations. To be constitutionally prescriptive about one dispensation - whether socialism, or so-called "free" market capitalism, or something in between, would undermine multi-party democracy and strait-jacket electoral choices.

1.4 We make this point as a South African Communist Party, mindful of the negative lessons to be drawn from the former Soviet Union and East European societies, in which socialism was often entrenched constitutionally. Economic dispensations need to enjoy democratic support and they need to prove themselves in practice.

1.5 As distinct from ideological prescriptions about models and dispensations, we would certainly not object to the new Constitution containing a broad commitment to an economy that is based on the fundamental principles of meeting the basic needs of the population, being rooted in reconstruction and development, and in balanced and sustainable growth.

2. RESERVE BANK. The existing clauses in the Interim Constitution (notably para. 196, 1 and 2), describing the Primary Objectives of the SOUTH AFRICAN RESERVE BANK, need amendment to bring the Central Bank into closer conformity with the Reconstruction and Development imperatives that now confront us as South Africans.

2.1 Primary objectives of the Central Bank

2.1.1 Paragraph 196. (1) of the Interim Constitution states:

> "The primary objectives of the South African Reserve Bank shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic."

We believe that this description is too narrow.

2.1.2 An improved version should read something like the following:

> **"The primary objectives of the South African Reserve Bank shall be to manage the currency in the interests of reconstruction, development, and a balanced and sustainable economic growth in the Republic."**

2.1.3 Our motivation for the above:

* while reconstruction, development and economic growth are all closely connected, in a given context a difficult choice might have to be made in which growth is slowed temporarily in the interests of reconstruction or development. It may (perhaps legitimately) be argued that "balanced" and "sustainable" growth are referred to, and not just any growth at any cost. We believe, however, that it is important to be more holistic and to be clear about this.

* our conviction in this regard is reinforced by, for instance, the current Mission Statement of

the SA Reserve Bank which describes as its primary goals ensuring that:

> "South Africa has a vigorous economy based on the principles of a free market system, private initiative and effective competition."

In the entire Mission Statement there is not a single reference, however vague or broad, to the general ideals of reconstruction and development.

2.2 The "Independence" of the Central Bank

2.2.1 We support the principle that the Reserve Bank should be insulated from partisan interference. But this should be balanced with mechanisms to ensure that the Bank is accountable to the broad, democratically mandated, goals of government (in this case, the goals of reconstruction and development).

2.2.2 One route for ensuring such accountability should be through Parliamentary legislation which would need to consider:

* ways of ensuring a Reserve Bank Board of Governors that is more representative and more in tune with the present social challenges in our country;

* increasing the transparency of the Bank, by ensuring greater answerability to Parliament.

2.2.3 But consideration should also be given to tightening up on the wording in para. 196.2 of the present Interim Constitution. The present wording qualifies the Reserve Bank's independence with the following formulations:

* "subject only to an Act of Parliament referred to in section 197"; and

* "Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters."

In regard to the latter formulation, we assume that "regular consultation" means "in consultation with", and NOT the weaker "after consultation with". This needs to be made clearer. The Ministry of Finance and the Reserve Bank need to work as a <u>team</u>.

2.2.4 Our motivation for the above:

* Contrary to the stipulations of the Interim Constitution, we do not believe that the present SA Reserve Bank is, indeed, "independent". The Board of Governors of the Bank, in its composition, and in the dogmatic monetarist ideology and personal backgrounds of its members, is deeply connected with one powerful interest group in our country - namely the white-dominated, private financial sector. Insulating the Reserve Bank from partisan interference cannot mean simply insulating it from narrow party political manipulation, while other powerful interest groups go unnoticed.

* Para. 197 of the Interim Constitution says that the powers and functions of the South African Reserve Bank "shall be those customarily exercised and performed by central banks". This assumes some universal agreement and practice in regard to the powers of central banks. This is simply not the case. For instance, in many of the successful East Asian economies, the central bank has been a subordinate institution within government. It is worth quoting a recent study on the topic by Paul Bowles (University of Northern British Columbia) and Gordon White (Institute of Development Studies, University of Sussex):

> "One of the key institutional characteristics of the successful East Asian late developers [they are referring specifically to South Korea, the Republic of China, and the Peoples Republic of China] has been their control over their financial systems. The NICs [newly industrialised countries] and China have used their financial systems as a crucial part of an overarching state-led development strategy. In particular, the low interest policy loan has been a central feature of government policy in determining investment policies, allocating capital and shaping industrial growth...In all of these cases...states have followed an interventionist industrial policy premised on the logic of the theory of late development, in which low interest rates for long term credit have been used to channel resources into specific sectors. This has only been possible because the policies of the central bank have been determined within the general development policy making framework...The central banks in these three countries have therefore had relatively circumscribed roles and have generally operated as but one, often

subordinate, player in the government apparatus."

We are not necessarily arguing for the same level of subordination of the South African Reserve Bank to government. We are, however, trying to debunk the common belief that "all economically successful countries have absolutely independent central banks", and the related argument that "unless we constitutionally guarantee an absolute independence of the Reserve Bank, we will frighten off foreign investors."

2.2.5 In summary, the new Constitution needs to ensure that, in protecting the Reserve Bank from partisan interference

* all potential partisan interferers (and not just government) are covered; and

* the degree of Reserve Bank independence is not so extreme that the possibilities of achieving a coherent, democratically-mandated reconstruction and development programme are undermined.

3.1.94

CONSTITUTIONAL ASSEMBLY

SUB-THEME COMMITTEE 2 OF THEME COMMITTEE 6

SPECIALISED STRUCTURES OF GOVERNMENT

MONDAY 20 FEBRUARY 1995

PRESENT

R Davies (Chairperson)

Andrew KM (Alt)
Bekker H
Botha WJ
Makgothi H
Marais G
Nair B
Welgemoed P
Woods GG

Apologies: Jacobs F, Hogan B, Marcus G

In attendance: P Fahrenfort, C Rustomjee

1. SUBMISSION PRESENTATION

1.1 SACOB (South African Chamber of Business)

Presenters: Mr R Parsons, Duminy P, Krawitz P, Wood R (SACOB delegation)

In a succinct summary of their submission, SACOB addressed the following areas highlighting specific issues:

i) **Auditor General**

- the need to ensure that the tax payers money is well spent
- key function of the AG to ensure that money is spent in accordance with the law and what parliament has voted
- the need for proper political accountability

- suggesting an amendment to Section 194[1] regarding appointments
- guarantee the responsibility of the AG to parliament

ii) **The Reserve Bank**

- while provisions in the interim constitution are being supported, it is suggested that accountability and transparency be strengthened

- placed emphasis on the high degree of the independence of the Reserve Bank - which should be independent within the system and not of the system

- proposing that the RB be more representative than at present, ensuring that whatever future appointments are made such as to enforce the independence, credibility and the professionalism as is expected of a central bank

- independence of the RB is a key aspect in creating an environment attractive to potential investors. The terms of directors are not necessarily tied to parliamentary election terms and the bank should be an institution dedicated to preserving the internal and external value of the currency and committed to long term growth of the economy

- favoured the neutrality of monetary stability in the spectrum of economic policy objectives

iii) **Financial and Fiscal Commission**

- has a crucial role in sorting out financial and tax aspects

- is an indispensable element to the success of whatever provincialism, quasi-federalism or devolution of power will be contained in the constitution

- proposed that the FFC's brief in section 199[1] re determination of criteria for allocations to be linked to the brief to recommend equitable allocations in Section 199[1][b] in order for section 199[1][e] to be meaningful

iv) The National Budget

- agrees in principle with provisions of sections 185 and 186 of the interim constitution

- recommends investigation of the following principles with views to inclusion in the final constitution:

  "all monies raised by the central government to be paid into the National Revenue fund unless a specific Act of Parliament creates a dedicated fund into which monies collected under such Act are to be paid and disbursed from";

  "monies may only be disbursed from the National Revenue fund for expenditure budgeted for and approved by Parliament by means of an Appropriation or Supplementary Appropriation Act"

v) Public Enterprise

- agrees with the present situation

vi) Inland Revenue

vii) Income Tax

unless specific justification exists for the retention of section 190 of the interim constitution, it be deleted

It was agreed that SACOB would send the committee a supplementary memorandum clarifying several issues raised.

CLOSURE: 10H11

.....
CHAIRPERSON

.....
DATE

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SOUTH AFRICAN RESERVE BANK

MEMORANDUM

TO	:	**DR C L STALS** **GOVERNOR**
FROM	:	**HEAD : LEGAL SERVICES DIVISION**
YOUR REFERENCE	:	
OUR REFERENCE	:	**03-07**
DATE	:	**1995-02-13**

PROVISIONS OF THE CONSTITUTION RELATING TO THE SOUTH AFRICAN RESERVE BANK

1. **BACKGROUND**

In response to a request of Subtheme Committee 2 of Theme Committee 6 of the Constitutional Assembly, as conveyed by yourself to the undersigned on 23 January 1995, it is the object of this Memorandum to examine -

(a) the objects, contents and purview of the provisions of sections 195 to 197, inclusive, of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993 - hereinafter referred to as the Constitution); and

(b) the existence of a right of constitutional redress in the event of an intervention in the affairs of the South African Reserve Bank ("the Bank") which, objectively seen, can be said to be in conflict with the objects or explicit provisions of the said sections 195 to 197.

2. **STATUS OF THE BANK**

In section 195 of the Constitution the Bank is -

(a) identified as an institution that is "established and regulated by an Act of Parliament"; and

(b) designated as the central bank of the Republic.

Section 197 of the Constitution declares the powers and functions of the Bank to be those customarily exercised and performed by central banks, but at the same time reserves to the Legislator the right to determine such powers and functions, and to prescribe conditions for the exercise and performance thereof, by an Act of Parliament.

From the provisions of sections 195 and 197, referred to above, it emerges clearly that the Bank is, what is known in legal parlance as, a "creature of statute". This entails -

(i) that the Bank, deriving, as it does, its existence, powers and functions from an Act of Parliament (*in casu*, the Constitution as further amplified by the South African Reserve Bank Act, 1989), can only validly perform such acts as it is expressly or by necessary implication empowered by such Act of Parliament to perform, and is obliged, in the performance of such acts, to comply with such conditions and to heed such limitations as may be prescribed in the relevant Act of Parliament; and

(ii) that Parliament, by virtue of its legislative sovereignty, can amend the legislative framework governing the Bank and its operations as it deems fit, subject only to one limitation regarding the treatment, in the future new Constitution, of the aspect of the independence of the Bank, which matter will be dealt with more fully in paragraph 5 below.

3. THE CONTENTS AND MEANING OF SECTION 196 OF THE CONSTITUTION

For the purposes of the present enquiry, section 196 of the Constitution can be regarded as the more relevant enactment, and is for ease of reference quoted in full :

"Primary objectives

196. (1) The primary objectives of the South African Reserve Bank shall be to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank shall, in the pursuit of its primary objectives referred to in subsection (1), exercise its powers and perform its functions independently, subject only to an Act of Parliament referred to in section 197 : Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.". (Own underlining.)

I understand that part of the discussions of the responsible Subtheme Committee centred on the questions of -

(a) what is the essential meaning of section 196(2), specifically, what does the "independence" granted to the Bank in this subsection (2) entail? and

(b) can an act by an authority of State, for example, by one or other constituent of the National Executive, which, judged objectively, impairs this "independence" of the Bank, be resisted?

With regard to the question posed in (a) above, the following is to be noted :

(i) the peremptory nature of the relevant provision places a statutory duty on the Bank to act independently while pursuing its statutorily defined primary objectives through the exercise of its powers and the performance of its functions (cf. "The South African Reserve Bank shall ..... exercise its powers and perform its functions independently .....");

(ii) the Bank's relevant independence is confined solely to the exercise of its powers and the performance of its functions in the pursuit of its primary objectives of the protection of the internal and external value of the currency in the interest of balanced and sustainable economic growth in the Republic. From this truism it follows, in my submission, that the Bank cannot lay claim to a right of autonomous action in matters not pertaining to the pursuit of its defined primary objectives. For example, a decision regarding the adjustment, by means of an Act of Parliament, of the Bank's corporate framework as currently laid down in the South African Reserve Bank Act, 1989, would lie within the sole discretion of the Legislator,

provided however that, in the taking of any legislative action that may indirectly redound negatively on the above-mentioned circumscribed independence of the Bank, even the Legislator will have to be alive to the Constitutional restraints that will be dealt with in paragraph 5 below.

The crucial problem of the exact nature and purview of the "independence" granted to the Bank in section 196(2) of the Constitution still remains to be solved. Because of its recent origin section 196(2) of the Constitution has not yet formed a subject for interpretation by a court of law, and we consequently do not have the benefit of a judgment of the court in which the meaning of the phrase "..... shall ..... exercise its powers and perform its functions independently ....." has been thrashed out. In the circumstances we have, in seeking to ascertain the Legislator's intention with and the true meaning of the relevant phrase, to fall back on what has been described as a cardinal rule of the interpretation of statutes, namely, that the intention of the Legislator must in the first place be sought in the words used by him in the relevant enactment and, further, that such words must be given their ordinary, literal, grammatical meaning. (cf. Union Government v. Mack 1917 AD 731 at 739; Gravenor v Dunswart Iron Works 1929 AD 303; Labuschagne v Minister van Justisie 1967 (2) SA 575 (A) 584 C). In order to ascertain the scope of the meanings available for a word, reference to a dictionary is permissible, and I have consequently referred to the Concise Oxford Dictionary (Eighth Edition) in which the key-word "independent", from which the adverb "independently" is derived, is *inter alia* defined as :

"not depending on authority or control ....."

I submit that the above-stated definition of "independent" goes to the heart of the Legislator's intention with, and reflects the true meaning of, the phrase "..... shall ..... exercise its powers and perform its functions independently ....." appearing in section 196(2), namely, that in the exercise of its powers and performance of its functions (which powers and functions, directed as they are towards the protection of the internal and external value of the currency, are primarily embodied in instruments of monetary policy) the Bank

- shall be entitled, and is indeed obliged, to act on its own authority; and

- shall be free from control, whether by way of directives, instructions or any other form of direct or indirect coercion, by any entity outside the Bank.

Lest it be said that by placing the foregoing construction on its independence the Bank will be arrogating to itself an autonomy not reconcilable with its status as an agent of government, attention is drawn to the Bank's obligation, laid down in the proviso to section 196 (2), to regularly consult with the Minister responsible for national financial matters.

To conclude this part of the enquiry, relating to the nature and ambit of the independence conferred upon the Bank in section 196 (2), it is submitted that the circumscribed autonomy postulated above, is in accordance with the best informed opinion currently prevailing in the relevant field, in terms whereof a significant number of central banks, while closely collaborating with Government in the formulation of macro-economic policy, are nevertheless required to autonomously pursue price stability through the application of the monetary expertise at their disposal.

4. CONSTITUTIONAL REDRESS IN THE EVENT OF AN INFRINGEMENT OF THE BANK'S INDEPENDENCE

As contended in paragraph 3 above, there rests a constitutional duty, imposed by section 196(2) of the Constitution, upon the Bank to act independently when exercising its powers and performing its functions in the pursuit of its primary objectives. There would consequently be, it is submitted, a correlative duty upon the Bank to resist any form of intervention, from whatever source, that would tend to fetter its discretion in the exercise of its powers and performance of its functions or to coerce it into acting against its better judgment in the pursuit of a sound monetary policy. Such attempts at intervention could originate from various sources, but given the background of the present enquiry, I will concentrate in what follows on intervention by one or other constituent of the National Executive, such as the Cabinet or a member thereof, the said Executive at least having a realistic claim of jurisdiction over the Bank.

Infringement of the Bank's independence in the relevant context can take different forms, all of which cannot be foreseen. As an example, intervention on the part of the Executive could take the form of pressure on the Bank to relax control over money growth so as to aid short-term inflation-driven economic growth.

Incidentally, you have advised me that during your interview with Subtheme Committee 2 of Theme Committee 6 on 23 January 1995, reference was made, in the context of possible manifestations of government intervention in the affairs of the Bank, to the possibility of the acquisition by the State of the total equity share capital of the Bank. I assume that basic to this thought is the notion that by such "ownership" of the Bank and the concomitant power to determine the composition of its board of directors, or of such other governing body as may be created for the Bank, the Government would be able to exercise a degree of influence over the Bank's actions and decisions in the formulation and execution of monetary policy. With regard to the whole concept of such a "nationalized" central bank, I wish to offer the following comments :

- such a proposed adjustment of the shareholding in the Bank can only be effected by an Act of Parliament in terms whereof sections 4 to 9, inclusive, and 21 to 24, inclusive of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), are appropriately amended;

- the Bank, being a "creature of statute" and subject to the legislative sovereignty of Parliament as pointed out in paragraph 2 above, will have no legal ground on which to resist such legislative change;

- regarding the practical result of such "nationalization" of the Bank; as remarked by yourself in your opening address at the Second City of London Central Banking Conference in 1993 : ownership of a central bank is not the most important determining factor in assessing its degree of autonomy. For example, a state-owned central bank such as the Deutsche Bundesbank is in its statutory mandate expressly declared independent of instructions from the German Federal Cabinet, so, too, the National Bank of Hungary; while a privately-owned central bank such as the Swiss National Bank is nevertheless required to co-ordinate its major monetary policy measures

with those of the Swiss Federal Council;

- in the final instance, the degree and ambit of autonomy to be accorded the Bank, regardless of its corporate character, rests upon an informed decision of the Government, taken in the best national economic interest.

But to revert to the basic subject of this paragraph 4, namely the Bank's duty to resist pressures that tend to inhibit it in the professionally independent exercise of its powers and performance of its functions, and the mechanisms for such resistance available to it under current legislation:

(1) In my submission such mechanisms for resistance do exist, and are to be found in the following excerpts from section 98 (2) of the Constitution :

> "98. (2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including -
>
> (a) .....
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;". (Own underlining).

(2) In terms of section 101(3)(b) of the Constitution a provincial or local division of the Supreme Court shall, within its (geographical) area of jurisdiction, also have jurisdiction in respect of such a dispute as set out in section 98(2)(b) quoted above. An appeal from a decision of such a provincial or local division of the Supreme court on such a dispute shall lie to the Constitutional Court (*vide* section 102(12) of the Constitution).

(3) It is submitted, on the basis of the foregoing provisions of the Constitution, that the Bank would, in the event of an intervention in its conduct of

monetary policy which, objectively seen, amounts to a restriction of its independent decision-making on the choice and application of instruments of monetary policy, be entitled and indeed obliged to lay the matter, if not consensually resolved, as a dispute before the Constitutional Court or the provincial or local division of the Supreme Court having jurisdiction, for a decision. As indicated hereinbefore, a constituent of the Executive such as the Cabinet or a member thereof can be challenged as the opposite party in such a dispute, inasmuch as the Executive also constitutes an "organ of state" as envisaged in section 98(2)(b) quoted above. (cf. Wiechers : "Administratiefreg" 2nd Ed. p.73).

5. THE BANK'S INDEPENDENCE IN THE NEW CONSTITUTIONAL TEXT

At the risk of being platitudinous, I consider that a passing reference to section 71(1)(a) of the Constitution may perhaps not be out of place. In terms of the said section 71(1)(a) a new constitutional text shall comply with the Constitutional Principles contained in Schedule 4 to the Constitution. One such Principle is Principle XXIX set forth in Schedule 4, and reads as follows :

> "The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.". (Own underlining).

Apart from the fact that the Legislator is thus bound by the provisions of section 71(1)(a) of the Constitution (unless it is amended in the interim in accordance with the provisions of section 62(1) of the Constitution) to entrench the independence of the country's central bank in the contemplated new constitutional text, what is of significance is the high premium placed to date upon the independence of, *inter alia*, the Reserve Bank by the Legislator - even to the point of elevating it to a constitutional principle. On mature consideration, however, this action should not be cause for surprise, having regard to the world-wide drive for greater central bank independence which resulted from various authoritative analytical studies of the optimum regimen for price stability.

6. RECOMMENDATION

I believe, according to your advices, that the question was raised as to whether the provisions regarding the Bank, currently contained in sections 195 to 197 of the Constitution, needed any further legislative elaboration in a new constitutional text. I would, with respect, advise against any drastic departure from the current wording of the said sections because in their present form they constitute, in my submission, a well-balanced arrangement of the relationship between the Government and its monetary policy agent. It is generally acknowledged that the relationship between the Government and the central bank is essentially one of mutual trust and consultation and close co-ordination of economic policy targets and measures. Such relationship, creating as it does the opportunity for the blending of socio-economic forethought and professional economics expertise, runs a risk of being impaired if made subject to a plethora of prescriptive legislative provisions.

M C Janse van Rensburg

03\07\14\ah

The Johannesburg Stock Exchange

Executive President

By telefax: (021) 461 4339

16 February 1995

The Chairperson
Constitutional Theme Committee Six : Financial
Institutions and Public Enterprises
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Sir

SUBMISSION BY THE JOHANNESBURG STOCK EXCHANGE ON THE ROLE OF THE FINANCIAL SERVICES BOARD WITHIN THE SOUTH AFRICAN FINANCIAL SERVICES INDUSTRY

1 Introduction

1.1 In the light of current deliberations within Theme Committee Six of the Constitutional Assembly on the constitutional role of, *inter alia*, institutions within the financial services industry, the Johannesburg Stock Exchange ("the JSE") wishes to place on record its views on the role of the Financial Services Board ("The FSB"). This submission is prompted, partly, by reported representations made by Transnet Limited that the independence and responsibilities of banking and financial market supervisors such as the South African Reserve Bank ("the Reserve Bank") and the FSB should be protected under the Constitution (*Business Day*, 10 February 1995).

1.2 While the JSE does not express any views on the position of the Reserve Bank, it wishes to place on record its opposition to any suggestion of constitutionally entrenching the existing position of the FSB.

2 The genesis of the FSB

2.1 Under the Financial Services Board Act, 1990 ("the FSB Act"), the FSB is the principal regulator of the financial services industry in South Africa. This includes all South Africa's financial markets, the insurance, pension fund and unit trust industries. The FSB was established pursuant to the 1989 recommendations of the Van der Horst Committee of inquiry commissioned by the then Minister of Finance ("the Van der Horst Committee").

2.2 The Van der Horst Committee was appointed to investigate the creation of a new financial services regulator in view of deficiencies in the then regulatory body, the Financial Institutions Office ("the FIO"). The FIO had been established in 1956 as a branch of the Department of Finance and was responsible for the implementation of all public policy and legislation concerning financial institutions. The Minister of Finance ("the Minister"), however, was responsible for the formation of all such policy and all legislation. The problems of the FIO had been found by an earlier commission of enquiry to have been caused, in the main, by its inability to obtain and retain trained and professional staff owing to uncompetitive public service levels of remuneration.

2.3 The Van der Horst Committee found that in order to resolve the staff problems of the FIO it was necessary to remove the FIO from the civil service and establish a statutory body with the power to employ officers and employees at market related remuneration packages.

3 The FSB's Involvement in policy making

3.1 Despite this limited aim, the FSB Act created a body which, in addition to administering financial services legislation (as the FIO had done previously), also acquired significant powers with respect to policy making which previously had been the exclusive province of the Minister. The interposition of the FSB between the Minister and the financial services industry in relation to policy issues and in many cases the substitution of the FSB for the Minister, has caused uncertainty about the role and function of the various participants involved in regulation and has led to serious problems in practice. An attempt to ameliorate this situation was made in 1993 by the creation of the Policy Board for Financial Services and Regulation ("the Policy Board"), which contains representatives from industry and the FSB, and advised the Minister on policy matters. The Policy Board was established following the de Kock and Melamet Committee reports into the regulation of the financial services industry.

3.2 In addition to its increasing influence in policy making, the FSB has likewise, since its establishment, become increasingly independent of government control. The FSB has ceased to be dependent on public funding and is now funded entirely from levies on the financial services industry. Initial government controls such as the Ministerial authorisation of staff salaries and approval of the rates of levy have now been removed. In 1992 an unsuccessful attempt was made to remove the requirement of audit by the Auditor-General. In 1993 proposals to amend the FSB Act were made to transfer certain powers in financial services legislation from the Minister to the FSB. By proposing the transfer of such powers, instead of the usual delegation of such powers, the Minister's final responsibility and authority to control the exercise of delegated powers would have been excluded. This move, however, was ultimately unsuccessful after vigorous objections from, *inter alia*, the JSE and the Life Offices Association of South Africa.

3.3 The JSE is concerned that despite the laudable, initial motivation of establishing the FSB as the equivalent of the FIO outside the civil service, South Africa is increasingly faced with the situation where ultimate Ministerial control is replaced by "privatised" financial regulation.

3.4 In the JSE's view, privatised regulation is untenable for the following reasons:

3.4.1 the regulation of any activity as a matter of public policy is a State function and it is unrealistic to suggest that such policy can be "de-politicised". It must remain within the control of the government of the day. In a multi-party democracy one may expect public policy to be dynamic, but it is always the province of the Executive and cannot be left to the permanent bureaucracy, whether this is based at the State department or quasi-government organisation level;

3.4.2 the creation of legislation to give substance to public policy is the perogative of Parliament, while the administration of legislation is the function of the Executive. Whatever collaboration there may be between the public and private sectors in the practical application of legislation, the essential responsibility rests with, and cannot be delegated by the Ministry - in this case, the Minister of Finance. The offices and structures established under financial services

legislation must ultimately account to the Minister (and through the Minister to Parliament) for their actions;

3.4.3 in other countries, the same philosophy has been adopted and while there are some other cases of a quasi-private body which finances and staffs the exercise of the regulatory power (Australia for example), the regulatory power itself is retained in the separate specific laws which embody the public policy of control over the particular activities concerned;

3.4.4 when applying his mind to a matter of policy the Registrar will of necessity limit his frame of reference to the impact on the financial markets. The Minister will on the other hand take into account broader issues such as the impact on the national reserves, tax inequalities, etc.

4 Conclusion

4.1. In the JSE's view, an argument in favour of the constitutional independence of the FSB should not be accepted. We believe that a return should be made to the situation where the FSB, as the office responsible for the supervision of financial legislation, should again fall under the direct control of the Minister. This would improve cost-effectiveness and co-ordination between the State regulatory bodies and respresents a return to basic principles of Ministerial accountability and sound constitutional government.

4.2 The JSE is accordingly of the view that, rather than constitutionally entrenching the independence of the FSB, the FSB Act itself needs to be amended to bring the FSB once more under the direct control of the Minister of Finance.

Yours faithfully

R C Andersen
EXECUTIVE PRESIDENT

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