

REPUBLIC OF SOUTH AFRICA

CONSTITUTIONAL ASSEMBLY

ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS

TUESDAY, 17TH SEPTEMBER 1996

CHAIRPERSONS REPORT:

INTRODUCTION

1. The Constitutional Court ruled that it could not certify that the constitutional text adopted by the Constitutional Assembly on 8 May, 1996 was in compliance with the Constitutional Principles set out in schedule 4 of the interim Constitution. Judgement of the court was delivered on 6 September, 1996. The Management Committee was reconvened on 12 September to consider the process of addressing those issues which failed to comply with the Constitutional Principles.

REPORT ON PROCESS OF CERTIFICATION OF CONSTITUTIONAL TEXT ADOPTED ON 8 MAY 1996.

2. The Constitutional Assembly adopted the text of the Constitution in terms of section 73 of the interim Constitution on 8 May 1996. Two days later the Chairperson, acting in accordance with rule 15 of the Rules of the Constitutional Court, transmitted the text to the Constitutional Court and requested the Court to perform its certification functions in terms of section 71(2) of the interim Constitution.
3. A team of counsel were appointed to represent the Constitutional Assembly at the hearing of the Constitutional Court. The team consisted of advocates G Bizos SC, W H Trengove SC, M T K Moerane SC, N Gozo and K Moroka-Motlana.
4. The President of the Court, considering it to be in the national interest to deal with the matter as thoroughly yet expeditiously as possible, determined that both written and oral representations would be received and fixed 1

July 1996 as the date for the commencement of oral argument. On Monday 13 May 1996 he issued detailed directions, including a timetable, for its disposal. The directions included provision for written argument on behalf of the Constitutional Assembly to be lodged with the Court and invited the political parties represented in the Constitutional Assembly that wished to submit oral argument to notify the Court and to lodge their written grounds of objection. Although there was no legal provision for anyone else to make representations, because of the importance and unique nature of the matter, the directions also invited any other body or person wishing to object to the certification of the text to submit a written objection. The Court, with the assistance of the Constitutional Assembly, also published notices (in all official languages) inviting objections and explaining the procedure to be followed by prospective objectors. Each written objection was studied and, if it raised an issue germane to the certification exercise which had not yet been raised, detailed written argument was invited.

5. Thereafter the President issued further directions from time to time for the orderly conduct of the proceedings. In particular a detailed timetable was issued, allocating specific times on particular days for oral submissions. Because of the relatively tight timetable and the importance of the issues at stake, the Court condoned non-compliance by members of the public with the dates fixed in the directions and considered all relevant representations, however belatedly lodged.
6. Notices of objection, written representations and oral argument were submitted on behalf of five political parties. Objections were also lodged by or on behalf of a further 84 private parties. The political parties and the Constitutional Assembly as well as 27 of the other bodies or persons were afforded a right of audience. Interest groups and individuals propounding a particular contention were permitted to submit argument jointly notwithstanding the absence of a formal link between them.
7. Hearings commenced on Monday 1 July 1996 and continued until Thursday 11 July 1996. Individual objectors were heard in person; otherwise representation was permitted through persons ordinarily entitled to appear before the Court or through a duly authorised member of the organisation concerned.
8. Judgement was delivered on 6 September, 1996. All members of the Constitutional Assembly have been provided with a copy of the judgement. The Court concluded its judgement with two observations. "The first is to reiterate that the Constitutional Assembly has drafted a constitutional text which complies with the overwhelming majority of the requirements of the CPs. The second is that the instances of non-compliance which we have listed in the preceding paragraph, although singly and collectively important,

should present no significant obstacle to the formulation of a text which complies fully with those requirements."

A copy of the Court's conclusions and order is attached and marked as Annexure A.

Process

9. The Management Committee met on 12 September, 1996. It was reported that unless the Constitutional Court was provided with the amended constitutional text by early October, the Court would only be in a position to consider its certification by February, 1997. The Management Committee confirmed the desirability of finalising the text at the earliest possible convenience. It accordingly agreed to the following process to address the issues on which the adopted text was found not to comply with the constitutional principles:-
 - (a) To mandate the Executive Director to reconvene the technical experts previously engaged in the finalisation of the adopted text to consider the judgement and prepare formulations for consideration by the political parties.
 - (b) To reconvene two sub-committees to consider the issues requiring attention in the context of the judgement. Each sub-committee would consist of 3 representatives from the ANC, 2 from the NP and 1 each from the IFP, FF, DP, PAC and ACDP.
 - (c) To invite parties to submit to the Executive Director the names and contact details of their representatives by 18 September, 1996. The sub-committees would be convened on 25 September, 1996 to commence work.
 - (d) The sub-committees should seek to complete their work and table a progress report with the Constitutional Committee by 7 October. The Constitutional Committee will then table its report and submit an amended text for approval by the Constitutional Assembly in terms of Sec 73 (2) and 73A (2) of the interim Constitution on 11 October, 1996.

ANNEXURE A

CHAPTER VIII. CONCLUSION AND ORDER

CONCLUSION

It is therefore our conclusion that the following provisions of the New Text do not comply with the CPs:

- Sec 23, which fails to comply with the provisions of CP XXVIII in that the right of individual employers to engage in collective bargaining is not recognised and protected.
- Sec 241(1), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.
- Sch 6 sec 22(1)(b), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.
- Sec 74, which fails to comply with -
 - CP XV in that amendments of the Sec do not require "special procedures involving special majorities"; and
 - CP II in that the fundamental rights, freedoms and civil liberties protected in the Sec are not "entrenched".
- Sec 194, which fails in respect of the Public Protector and the Auditor-General to comply with CP XXIX in that it does not adequately provide for and safeguard the independence and impartiality of these institutions.
- Sec 196, which fails to comply with -
 - CP XXIX in that the independence and impartiality of the PSC is not adequately provided for and safeguarded; and
 - CP XX in that the failure to specify the powers and functions of the Public Service Commission renders it impossible to certify that legitimate provincial autonomy has been recognised and promoted.
- Sec ch 7, which fails to comply with -
 - CP XXIV in that it does not provide a "framework for the structures" of local government;

CP XXV in that it does not provide for appropriate fiscal powers and functions for LG;

and CP X in that it does not provide for formal legislative procedures to be adhered to by legislatures at LG level.

- Sec 229, which fails to comply with CP XXV in that it does not provide for "appropriate fiscal powers and functions for different categories of local government".

To the extent set out in this judgment the provisions relating to the powers and functions of the provinces fail to comply with CP XVIII.2 in that such powers and functions are substantially less than and inferior to the powers and functions of the provinces in the IC.

We wish to conclude this judgment with two observations. The first is to reiterate that the Constitutional Assembly has drafted a constitutional text which complies with the overwhelming majority of the requirements of the CPs. The second is that the instances of non-compliance which we have listed in the preceding paragraph, although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements.

B. ORDER

We are unable to and therefore do not certify that all of the provisions of the Constitution of the Republic of South Africa, 1996 comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993.

