

1/3/2/2/30

**EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL**

**TWENTY SECOND REPORT  
OF THE  
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES  
TO THE  
NEGOTIATING COUNCIL  
  
9 NOVEMBER**

**1. REVISION OF CHAPTER 11**

We have considered the bilateral document dealing with Chapter 11, and, as instructed by the Negotiating Council, have revised the Chapter in the light of this document and the debates in the Council. The revised provisions are set out in the addendum to this report. Material changes to the original draft are indicated by footnotes.

**2. EXISTING ASSETS AND LIABILITIES**

We have had difficulty in formulating appropriate provisions dealing with the assumption of assets and liabilities on the basis of the bilateral document. In particular:

- 2.1 The suggested process of referring the allocation of assets and liabilities to the Financial and Fiscal Commission will give rise to uncertainty, lack of control

and absence of responsibility for assets and the servicing of liabilities during the period between the date on which the Constitution comes into force and the date on which the allocations are eventually made.

2.2 There is no clarity as to how differences will be resolved if the Commission's recommendations are not approved by Parliament.

2.3 The criteria for the "equitable, objectively based and transparent" allocation of assets and liabilities, are not indicated, save in the most general of terms.

3. For the sake of discussion we have drafted clauses 143-145 A to deal with the issues raised in the bilateral document. The practicability of these provisions depends on a formulation of section 119 which allows for a clear allocation of functions from the outset within the functional areas listed in Schedule 9.

#### 4. **PROCUREMENT PROCEDURES**

The provisions in the bilateral document dealing with the procurement of goods and services are to some extent couched in the language of principles, rather than legislation. We have attempted to put these proposals into legislative form. In our view it will be sufficient for the Constitution to provide a framework for appropriate legislation, and there is no need for it to set out all the detail referred to in the bilateral document. The proposals we make are contained in section 150.

## 5. GUARANTEES BY NATIONAL GOVERNMENT

In our 18th report (page 16) it was suggested on the basis of previous bilaterals that the following provision should be inserted in Chapter 11:

*The national government may not guarantee any loans, unless -*

- (a) the guarantee is an explicit requirement demanded by an international financial institution; and*
- (b) the Financial and Fiscal Commission has verified the need for the guarantee and has recommended that it be given.*

This suggestion is not dealt with in the most recent bilateral document and requires further debate.

## 6. DISQUALIFICATION AS MEMBER OF PARLIAMENT

The bilateral document proposes an amendment to section 42 to disqualify persons who fail to register as taxpayers, and submit tax returns timeously, from being members of Parliament. This provision, if accepted by the Negotiating Council, should rather be inserted in section 43. which deals with vacation of seats by members of Parliament, who lose their qualifications after their election to parliament. The proposal is in the following terms:

43(1) A member of the National Assembly shall vacate his or her seat if he or she:

- (f) cannot within a period of two months after his or her election to Parliament, and on an annual basis thereafter, provide adequate proof to the Secretary of Parliament, that he or she -

- (i) is registered as a taxpayer for income tax purposes; and
- (ii) has, subject to any extension granted by the Commissioner for Inland Revenue, submitted all such returns of income as are required to be submitted by him or her in terms of the relevant Income Tax legislation.

A corresponding paragraph would have to be inserted in section 53(1) to deal with Senators, and possibly to section 104(1) to deal with members of the Provincial legislatures.

## **7. REMUNERATION OF MEMBERS OF PARLIAMENT**

A proposal that a Commission be appointed to make recommendations on salaries to be paid to political representatives at all levels of government, and that "the Receiver of Revenue shall be required to assess all income tax returns of elected representatives of all levels of government" are included in the bilateral document.

We require instructions as to whether such provisions are to be included in the Constitution.

*ADDENDUM TO 22ND REPORT (CONSTITUTIONAL ISSUES)*

CHAPTER 11

Finance

**Vesting of property**

143. (1) All property which immediately prior to the coming into operation of this Constitution vested in any administration as defined in subsection (5), and

(a) which was being used by such administration for the purpose of or relating to a function in respect of which a province has legislative competence in terms of section 118 of this Constitution shall, subject to the provision of subsection (2), vest in such Provincial government, and

(b) which was being used for any other purpose, shall, subject to the provisions of subsection (2) vest in the National government.

(2) When the rationalisation of administrations is carried out in accordance with section 119, or if a provincial government assumes responsibility for functions which were previously being carried out by the national government, the vesting of property under subsection (1) shall be reviewed by the governments concerned, on the basis that property which was being used for or in connection with a particular function shall vest in the government performing such function.

(3) If there should be any disagreement between the governments concerned in relation to the change in the vesting of property under subsection (2), the advice of the Commission on provincial government shall be obtained.

(4) If notwithstanding the provisions of subsection (3) the governments concerned are unable to reach agreement, the differences between them shall be *referred to arbitration*.

*alternatively*<sup>1</sup>

(4) If notwithstanding the provisions of subsection (3) the governments concerned are unable to reach agreement, the differences between them shall be *dealt with in accordance with an Act of Parliament*.

(5) For the purposes of this section -

**"any administration"** shall mean a provincial administration established in terms of the *Provincial Government Act*, 69 of 1986, administrations of the Self-governing Territories established in terms of the *Self-governing Territories Constitution Act*, 21 of 1971 and the Transkei, Bophuthatswana, Venda and Ciskei;

**"property"** shall mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein or in respect thereof.

### **Transfer of property**

144. (1) Immovable property transferred in terms of section 143 shall be transferred to the relevant government without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(2) The Registrar of Deeds concerned shall upon production to him or her of the title deed of any immovable property mentioned in section 143 endorse such title deed to the effect that the immovable property therein described is vested in the government concerned and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the said government to the said property.

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1. A political decision will have to be taken regarding these or other alternative procedures.

### Debts and liabilities

145. (1) All debts and liabilities which are directly linked to the property vesting in a province in terms of section 143 shall be assumed by such province.

(2) All liabilities other than those referred to in subsection (1) shall vest in the national government.

(3) The Financial and Fiscal Commission shall make recommendations to Parliament concerning the re-allocation of debts and liabilities referred to in section 143(1) and (2), taking into account all relevant factors.

(4) The re-allocation of debts and liabilities shall be made by Act of Parliament after taking into account the recommendations of the Financial and Fiscal Commission.

### Audit of property and liabilities

145A. The Auditor-General shall audit the re-allocation of property and liabilities made in terms of sections 143, 144 and 145.<sup>2</sup>

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2. In the bilateral document the following provision has been proposed:

*The national government shall not in any manner be bound by [the principles dealing with the re-allocation of liabilities] in terms of honouring liabilities which have been granted mala fide by any institution after this constitution has been enacted. Any liabilities incurred after this date which have not been subjected to proper appropriation procedures will be open for review and action by the new national Parliament.*

The grounds on which Parliament can repudiate liabilities incurred after the enactment of the Constitution are not clearly stated in this provision. We do not understand what is meant by "liabilities which have been granted *mala fide*", nor the reference to "proper appropriation procedures" in the context of the incurring of liabilities.



## National Revenue Fund

146. (1) There shall be established a National Revenue Fund into which shall be paid all moneys and revenues, as defined by Act of Parliament,<sup>3</sup> raised or received by the National Government, and from which appropriations shall be made by Parliament **[for the purpose of the National Government]**<sup>4</sup> in a manner prescribed by this Constitution and any other law, and subject to the charges imposed thereby.

(2) No money shall be withdrawn from the National Revenue Fund, except under appropriation made by law in accordance with the provisions of this Constitution **[and by any other law]**<sup>5</sup>: provided that revenue to which a province is entitled in terms of section 121(2) (a) and (b) shall form a direct charge against the National Revenue Fund to be credited to the relevant Provincial Revenue Fund.<sup>6</sup>

## Appropriation bills

147. Any bill which appropriates or authorises the appropriation of revenue or money for the services provided by the National Government shall deal only with such appropriation.

## Appropriation to be initiated by a Minister

148. The National Assembly shall not consider any bill for the appropriation of any part of the public revenue, or of any tax or impost, if such bill has not been initiated by a Minister.

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3. The inclusion of the underlined phrase, which was not in our original formulation, will have the effect of leaving it to Parliament to decide which moneys should be paid into the Revenue Fund and which moneys should be dealt with differently.
  4. This phrase, as proposed in the bilateral document, should be deleted, because it is superfluous.
  5. The phrase in brackets has been proposed in the bilateral document: we do not recommend its inclusion.
  6. The inserted proviso is based on a subclause (3) which was proposed in the bilateral document.

**Annual Budget**

149. The Minister of Finance shall in respect of every financial year cause to be laid before the National Assembly an annual budget reflecting the estimated receipts and expenditure of the Government for that year.

**Procurement administration**

150. (1) The procurement of goods and services for any level of government shall be regulated by Act of Parliament and provincial laws which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

(2) The tendering system prescribed in terms of subsection (1) shall be fair, public and competitive, and tender boards shall be required to give reasons for their decisions to any interested parties.

(3) No member of the Cabinet or the legislature or of any organ of the state or any other person shall improperly interfere with the decisions and operations of the tender boards.

(4) All decisions of any tender board shall be recorded.

***Auditor-General*****Establishment and appointment**

161. (1) There shall be an office of Auditor-General for the Republic to which shall be appointed, in terms of subsection (2), an Auditor-General who shall have the functions, powers and duties prescribed by this Constitution and by any other law.

(2) A joint standing committee of Parliament, composed of one member of every political party represented in the National Assembly and the Senate, shall, at the request of the President nominate a person to be appointed by the President as Auditor-General and such nomination shall be approved by resolution adopted by two-thirds of the members present at a joint sitting of the National Assembly and the Senate: provided

that, in connection with such resolution, no debate shall be allowed; and provided further the post of Auditor-General shall not be vacant for more than 90 days.<sup>7</sup>

(3) The Auditor-General shall be a South African citizen who is a fit and proper person to hold such office and who shall be appointed with due regard to his or her specialised knowledge of or experience in auditing, state finances and public administration.

(4) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, the Auditor-General will hold office for a period of not less than 5 years and not more than 10 years and shall not thereafter be eligible for reappointment.

(5) The remuneration and other conditions of service of the Auditor-General shall be determined in accordance with the provisions of an Act of Parliament, and such remuneration and the other conditions of service shall not be altered to his or her detriment during his or her term of office.

(6)<sup>8</sup> The Auditor-General may be removed from office by the President, but only on the grounds of misconduct, incapacity or incompetence determined by the joint standing committee of Parliament referred to in subsection (2) and upon receipt of a request for such removal by Parliament adopted at a joint sitting of the National Assembly and the Senate.<sup>9</sup>

(7) An Auditor-General who is the subject of investigations by the joint standing committee of Parliament in terms of subsection (6) may be suspended by the President pending such investigation.

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7. The inclusion of the underlined requirement as proposed in the bilateral document raises the problem of the consequences of failure to comply therewith: what will happen if the committee fails to reach agreement within 90 days?

8. The following clause contained in our draft has not been included in the bilateral document:  
 (6) *The Auditor-General shall not perform remunerative work outside his or her official duties.*

9. The underlined phrase is a suggested amendment of both our original draft and that of the bilateral document.

- (8) The President may permit the Auditor-General to vacate his or her post.<sup>10</sup>

### **Independence and Impartiality**

162. (1) The Auditor-General shall be independent and impartial and carry out his or her functions, powers and duties subject only to this Constitution and the law.

(2) The Auditor-General and the persons appointed in terms of section 164(1) shall have such immunities and privileges as may be assigned to them by Act of Parliament for the purpose of ensuring the independent and impartial exercise of their powers and functions.

(3) No member of the Cabinet or the Legislature or of any organ of the state or any other person shall improperly interfere with the Auditor-General or a person appointed in terms of section 164(1) in the exercise of his or her powers, duties and functions.

(4) All organs of the state shall accord such assistance as may be reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the Auditor-General in the execution of his or her functions, powers and duties.

### **Powers, Functions and Duties**

163. (1) The Auditor-General shall audit and report on all the accounts and financial statements of all the accounting officers at national and provincial government level, other than that of the office of Auditor-General, and of all other persons in the national and provincial public services entrusted with public assets, trust property and other assets.

(2) The Auditor-General shall audit and report on all the accounts and financial statements of any local authority, board, fund, institution, company, corporation or other organization established or constituted by or under any law and of

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10. The following clause contained in our draft has been replaced in the bilateral document:

(8) *The Auditor-General may at any time resign by lodging his or her resignation in writing with the President.*

which the accounts and financial statements shall in terms of law be audited by the Auditor-General and of all persons in the employment of such body entrusted with **own**, trust or other assets.<sup>11</sup>

(3) The Auditor-General shall also, at the request of the President, conduct performance audits.<sup>12</sup>

(4) The Auditor-General may, whenever he or she considers it to be in the public interest, or upon receipt of a complaint, investigate, audit and report on the accounts and financial statements of any statutory body or any other institution in control of public funds.

(5) No further duty or function may be imposed upon or assigned to the Auditor-General other than by means of an Act of Parliament.

(6) Whenever the Auditor-General or a person appointed in terms of section 164 exercises his or her powers and functions in terms of this Constitution, he or she shall have access to all books, records and other documents and information relating to the accounts and financial statements referred to in this section.

(7) The Auditor-General shall report on the accounts examined by him or her and submit such reports to the authorities designated by Act of Parliament to receive them, and, unless otherwise provided by Act of Parliament, such reports or a report on any other matter shall be tabled in each house of Parliament within 7 days after receipt thereof by such authority; or if Parliament is not in session, within 7 days of the next ensuing session.

(8) The Auditor-General shall make public any report referred to in subsection (7) after the expiry of a period of 14 days from the date on which such report was submitted to the authorities concerned.

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11. This is a reformulation of clause 163(2) of our draft. We suggest that the meaning of the word "own" highlighted in the text is unclear.

12. This is a new provision.

### Staff and expenditure

164. (1) The Auditor-General may appoint, in a manner prescribed by law, such persons as may be necessary for the discharge of the work of the Office of the Auditor-General.

(2) The Auditor-General may delegate any of his or her functions to persons referred to in subsection (1) subject to such conditions as shall be prescribed by law.

(3) Expenditure incurred during the performance of the functions of the Auditor-General in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose and from fees raised or money obtained in a manner authorised by Act of Parliament.

### *South African Reserve Bank*

#### Central bank

165. The South African Reserve Bank, established and regulated by Act of Parliament, shall be the central bank of the Republic.

#### Primary objectives

166. (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.<sup>13</sup>

(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 duties

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13. This is a new formulation. The original formulation was as follows:

(1) *The primary objectives of the Reserve Bank shall be to achieve monetary stability in the interest of balanced and sustainable economic growth of the Republic and for that purpose to exercise control over the supply of money and the cost and availability of credit.*

independently: Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.<sup>14</sup>

### **Powers and duties**

167. (1) The powers and duties of the South African Reserve Bank shall be those customarily performed by central banks, which shall be determined by Act of Parliament and shall be subject to such conditions as may be described by such Act.

(2) All decisions of the Board of Governors and the Board of Directors of the South African Reserve Bank shall be recorded.<sup>15</sup>

### *Financial and Fiscal Commission*

#### **Establishment**

170. A Financial and Fiscal Commission shall be appointed by the President in terms of this Constitution within 60 days of its coming into operation.

#### **Objects and functions**

171. (1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to national, provincial and local<sup>16</sup> government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the national, provincial and local governments, including -

- (a) financial and fiscal policies;
- (b) equitable fiscal and financial allocations to the national, provincial and local governments from revenue collected nationally;

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14. This proviso has been reformulated.

15. This is a new provision.

16. In the bilateral document the inclusion of local government in this section was suggested.

- (c) taxes, levies, imposts and surcharges that a provincial government intends to levy;
- (d) the raising of loans by a provincial or local government and the financial norms applying thereto;
- (e) criteria for the allocation of financial and fiscal resources; **[to provinces]**<sup>17</sup> and
- (f) any other matter allocated to the Commission by law.

(2) In carrying out its functions the Commission shall, *inter alia*, take into consideration the provisions of this Constitution, the national interest, economic disparities between and within the provinces, the population and developmental needs of the provinces, the administrative responsibilities<sup>18</sup> and other legitimate interests of each province.

#### **Constitution, expertise and impartiality**

172. (1) The Commission shall consist of -

- (a) a chairperson and deputy chairperson, who shall also be the chief executive officer and deputy chief executive officer of the Commission's staff,<sup>19</sup> appointed by the President on the advice of the Cabinet; and
- (b) 9 members each of whom shall be nominated by a different provincial executive and who shall be appointed by the President; and
- (c) 7 members appointed by the President on the advice of the Cabinet.<sup>20</sup>

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17. It is proposed that the highlighted words be deleted.

18. The bilateral document suggests the deletion of the underlined words: we however suggest that they be retained.

19. The underlined phrase is taken from the bilateral document.

20. Subparagraph (c) is a new provision taken from the bilateral document.



(2) No person shall be qualified to be appointed to the Commission unless he or she -

(a) is a South African citizen; and

(b) is a person who, by reason of his or her training and experience, has expertise in the field of economics or public finance or public administration.

(3) Unless the Constitution adopted in terms of Chapter 5 provides otherwise, a member of the Commission may only be removed from office by the President on account of misconduct, incapacity or incompetence: provided that removal of a member of the Commission from office and the reasons therefor shall be communicated by the President by message to Parliament and to the provincial legislatures within 14 days after such removal or, if Parliament or a provincial legislature is not then in session, within 14 days after the commencement of its next ensuing session.

(4) Vacancies in the Commission shall be filled in accordance with the provisions of this section.

(5) A member of the Commission shall be eligible for re-appointment.

(6) A member of the Commission shall perform his or her duties fairly, impartially and independently.

(7) The chairperson and deputy chairperson<sup>21</sup> shall not perform or commit himself or herself to perform remunerative work outside their official duties.

(8) A member of the Commission shall not hold office in any political party or political organisation.

(9) It shall be an offence to influence or attempt to influence a member to act otherwise than in accordance with the provisions of subsection (6).

21. The underlined words replace the words "a member of the Commission" and are based on the bilateral document.

(10) The chairperson and deputy chairperson shall be the only full-time members of the Commission.<sup>22</sup>

(11) The chairperson and deputy chairperson shall be appointed for a period of 5 years and the other members of the Commission for a period of 2 years.<sup>23</sup>

### **Meetings of the Commission**

173. (1) The first meeting of the Commission shall be held within 30 days of its appointment at a time and place to be determined by the Chairperson, and subsequent meetings will be held at a time and place determined by the Commission or, if authorised thereto by the Commission, by the Chairperson. If both the Chairperson and Deputy Chairperson are absent from a meeting, the members present shall elect one from amongst their members to act as Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of two-thirds of all the members of the Commission shall constitute a decision of the Commission.

(4) All the decisions of the Commission shall be recorded.

### **Committees**

174. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a meeting of the

22. This is a new provision taken from the bilateral document.

23. This is a new provision based on the bilateral document.

committee the members present shall elect one from among their number to act as chairperson.

- (4) (a) The Commission may, subject to such directions as it may issue from time to time -
- (i) delegate any function entrusted to it by or under section 171 to such a committee; and
  - (ii) grant authority that a duty assigned to it by or in terms of section 171 may be performed by such a committee.
- (b) The Commission shall not be divested of a function so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.

#### **Co-option of persons to serve on or advise committees**

175. (1) A committee may co-opt any person to serve on such committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

#### **Remuneration and allowances of members of the Commission and other persons**

176. Members of the Commission and persons referred in section 175 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

**Appointment of Staff**

177. (1) The Commission may appoint and accept secondment of staff as it may deem necessary in consultation with the Commission for Administration.<sup>24</sup>

(2) Expenditure incidental to the performance of the functions of the Commission in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose.

**Regulations**

178. The President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

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24. This is a reformulation of the original provision.