

2/4/6/4/1/8

NO. 20

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.2

FINANCIAL INSTITUTIONS & PUBLIC ENTERPRISES

MONDAY, 5 JUNE 1995 - G26, NATIONAL ASSEMBLY

09H00

DOCUMENTATION

**Embargoed until 09h00
5 June 1995**

TABLE OF CONTENTS

Item	Title	Pages
1.	Agenda	1-2
2.	Minutes of previous meeting held 29 May 1995.	3-4
3.	Second Draft Formulation on the AG	5-10
4.	Revised draft formulation on the AG	11-15
5.	Presentation by Mr C Rustomjee	16-17
6.	Submission on the SARB	18-27
7.	Invitation	28
8.	Press clippings	29-30

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.2

FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES

Please note that a meeting of the above Committee will be held as indicated below:

Date: 5 June 1995

Time: 09h00

Venue: Room G26, National Assembly Wing

AGENDA

1. Opening and Welcome
2. Notice of meeting and Agenda (p1-2)
3. Adoption and noting of previous minutes
 - 3.1 TC6.2 Minutes: 29 May 1995 (p3-4)
4. Matters arising from minutes

At the meeting held on 29 May 1995 it was agreed that the Law Advisor's 2nd draft formulation (pages 5-10) on the Auditor General revised. The revised document is attached at pages 11-15.

5. Presentation by Mr C Rustomjee, Technical Advisor (p16-17)
6. Submission from Mr N Alant on the role of the independence of the South African Reserve Bank

The committee is requested to note that Mr Alant is a Senior Inspector of the Financial Services Board and is making the submission in his individual capacity.

(p18-27)

7. **Invitation from TC3 : Financial and Fiscal Relations Workshop**
For noting (p28)
8. **Press Clippings** - For noting (p29-30)
9. **AOB**

H EBRAHIM
EXECUTIVE DIRECTOR

Enquiries: Mr S Nyoka and Ms P Fahrenfort, Regis House, Adderley Street
Tel.: 24-5031

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6.2

FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES

MONDAY 29 MAY 1995

PRESENT

Davies R (Chairperson)

Andrew K
Hogan B
Jacobsz F
Makgothi H
Marais G
Nair B
Sisulu M
Welgemoed P

Apologies

Marcus G

Absent

Woods GG

In attendance: P Fahrenfort, G Grove (Law Advisor), S Nyoka

1. Opening and Welcome

The Chairperson opened the meeting at 14h20 and welcomed the members present.

The following announcements were made:

- i) Mr M Sisulu will be an alternate member of the Committee.
- ii) TC3 will be hosting a workshop on Intergovernmental fiscal relations at 14h00 on Monday 5 June 1995.

2. Notice of meeting and agenda

The agenda was adopted.

3. Adoption of previous minutes

The minutes of the meeting held on 22 May 1995 were adopted.

4. Law Advisors reformulated draft on the Auditor General

The Committee discussed the second draft formulation on the Auditor General and agreed that with the exception of ss1(1) and 1(4) (Establishment, independence and impartiality), the text be redrafted.

It was further agreed that the revised document be tabled at the next meeting (Monday 5 June 1995) prior to its submission to the Constitutional Committee.

There being no further business the meeting ended at 16h26.

.....
CHAIRPERSON

.....
DATE

p:\tc\tc6_2\tc229055.min

AUDITOR GENERAL: SECOND DRAFT

INTRODUCTORY NOTE

We have adjusted the First draft in accordance with our understanding of the agreements reached or confirmed during the Sub-Theme Committee's discussion of the First draft. A transcription of the TC's deliberations was made available to us by the Managing Secretary.

In view of sentiments expressed in the CA meeting on the 19 May 1995 about the inclusion of detail in the Constitution we would advise the TC to reconsider whether section 4(4), (5) and (6) and section 5 should be included in the draft.

CA Law Advisers
22 May 1995

SECOND DRAFT - 22 MAY 1995
Status: Draft prepared by CA Law advisers
for discussion by TC 6.2

AUDITOR GENERAL

Establishment, independence and impartiality

1. (1) There shall be an Auditor General for the Republic.¹
- (2) The Auditor-General shall be independent and subject only to this Constitution and the law. The Auditor General shall discharge his or her powers and functions impartially and without fear, favour or prejudice.²
- (3) Organs of state³ shall give the Auditor General the necessary assistance to protect and ensure his or her independence, dignity and effectiveness. In particular the Auditor General shall be accorded by law all such immunities and privileges as are necessary for this purpose.⁴
- (4) Interference with the Auditor General in the discharge of his or her powers and functions is prohibited.⁵

[Foot notes

1. Section 1(1) is based on the agreed position in block 1 of the report and its formulation is based on section 191(1) of the interim Constitution.
2. Section 1(2) is based on the agreed position in block 8 of the report. It is also based on CP XXIX and is a redraft of section 192(1) of the interim Constitution.
3. As defined in section 233 of the interim Constitution "organ of state" includes any statutory body or functionary.
4. Section 1(3) is based on the agreed position in blocks 9 and 11 of the report. See also sections 192(3) and (4) of the interim Constitution.

- 2 -

5. Section 1(4) is based on block 10 of the report and embodies the principle of non-interference which is a corollary of the principle of independence in section 1(2). See also section 192(3) of the interim Constitution. The IFP has suggested an alternative formulation, please refer to block 10 of the report in this regard.)

Powers and functions

2. (1) The Auditor General shall audit and report on all accounts and financial statements of all state departments and administrations at national and provincial level of government and of all local governments, and all other accounts and financial statements required by a law to be audited by the Auditor General.⁶

(2) The Auditor General may in the public interest investigate, audit and report on the accounts and financial statements of any institution in control of public funds.⁷

(3) When the Auditor General performs an audit he or she shall have access to all information relevant to the audit and all persons affected by the audit shall be obliged to give their co-operation.⁸

Foot notes

6. Based on block 13 of the report. We did not follow the wording of section 193(1) of the Interim Constitution. We find the undefined expression "accounting officers at national and provincial level of government" problematic and would rather suggest a direct reference to the institutions at the different levels whose accounts have to be audited by the AG, i.e. departments of state and administrations. As per instruction of the TC we have tried to simplify the provision.
7. As per agreement in block 15 of the report.

- 3 -

8. As per blocks 12 and 18 of the report. A provision stipulating respect for the AG's position of independence is not regarded as necessary as this is already implied by section 1(2) and (3). As requested by the TC we have reformulated the subsection and included in it provision for access by the AG to all relevant information.]

Reports

3. (1) The Auditor General shall submit all reports on audits conducted by him or her at the respective levels of government to such authorities at the relevant level and, where appropriate, also to such authorities at the other levels of government, as may be prescribed by law.⁹

- (2) Reports of the Auditor General shall in principle be made public.¹⁰

[Foot notes

9. As per instruction by the TC.
10. We have included the words "in principle" to indicate that there may be exceptions to the rule that reports must be made public. Words which would have a similar effect would be:

"with due regard to the general interest".

Appointment, qualifications, tenure and dismissal

4. (1) The President shall appoint as Auditor General a person nominated by a representative committee of Parliament and approved by Parliament by a resolution adopted by a majority of at least two-thirds of the members present and voting.¹¹

- 4 -

(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office, has specialised knowledge of or experience in auditing state finances and public administration and does not hold office in any political party.¹²

(3) The Auditor General shall be appointed for a period of not less than five years and not more than ten years and shall not afterwards be eligible for re-appointment.¹³

(4) If the Auditor General is absent or unable to discharge his or her powers and functions, or if the office of the Auditor General is vacant, the highest ranking member of the Auditor-General's staff shall act as Auditor General during such inability or absence or until the vacancy is filled.¹⁴

(5) The remuneration and other conditions of service of the Auditor General shall be as prescribed by law.¹⁵

(6) The Auditor-General shall not perform remunerative work outside his or her official duties.¹⁶

(7) The President may remove the Auditor General from office only on the grounds of misbehaviour, incapacity or incompetence upon a finding to that effect by a representative committee of Parliament and the adoption by Parliament of a resolution supported by at least two-thirds of the members present and voting calling for his or her removal from office.¹⁷

(8) Where the Auditor General is the subject of such an investigation he or she may be suspended from office by the President.

- 6 -

(2) The Auditor-General may assign any of his or her powers or functions to such persons and subject to such conditions as may be prescribed by law.²⁰

(3) Expenditure incurred during the exercise and performance of the powers and functions of the Auditor-General shall be paid from money set aside by Parliament for such purpose and from fees raised or money obtained in a manner authorised by law.²¹

[Foot notes

20. Although we have provided the above formulations on staff and expenditure we do not consider these provisions to be necessary for inclusion in the Constitution. Provision for the establishment of an Auditor-General already implies the appointment of staff and the provision of adequate funds. We would advise that these provisions do not meet the panel of experts' guidelines on what should be included in the Constitution.

21. Section 5(1) is based on the agreed position in block 23 of the report and section 194(1) of the interim Constitution.

22. Section 5(2) is based on the agreed position in block 23 of the report and is a redraft of section 194(2) of the interim Constitution to accommodate the DP's concerns.]

THIRD DRAFT - 30 MAY 1995

**Status: As adjusted by CA Law
advisers on instructions of TC
6.2**

AUDITOR GENERAL

Establishment, independence and impartiality

1. (1) There shall be an Auditor General for the Republic.¹

(2) The Auditor-General shall be independent and shall discharge his or her powers and functions impartially and without fear, favour or prejudice. The Auditor General shall be subject only to this Constitution and the law.²

(3) Organs of state³ shall through legislative and other measures give the Auditor General the necessary assistance to protect and ensure his or her independence, impartiality, dignity and effectiveness. In particular the Auditor General shall be accorded by law all such immunities and privileges as are necessary for this purpose.⁴

(4) Interference with the Auditor General in the discharge of his or her powers and functions is prohibited.⁵

¹ Section 1(1) is based on the agreed position in block 1 of the report and its formulation is based on section 191(1) of the interim Constitution.

² Section 1(2) is based on the agreed position in block 8 of the report. It is also based on CP XXIX and is a redraft of section 192(1) of the interim Constitution.

³ As defined in section 233 of the interim Constitution "organ of state" includes any statutory body or functionary. The TC considers it essential that a proper definition of this term be included in the final constitutional text.

⁴ Section 1(3) is based on the agreed position in blocks 9 and 11 of the report. See also sections 192(3) and (4) of the interim Constitution.

⁵ Section 1(4) is based on block 10 of the report and embodies the principle of non-interference which is a corollary of the principle of independence in section 1(2). See also section 192(3) of the interim Constitution. The IFP has suggested an alternative formulation, please refer to block 10 of the report in this regard.

Powers and functions

2. (1) The Auditor General shall audit and report on the accounts and financial statements of all national and provincial state departments and administrations and of all local governments, and also such other accounts and financial statements as may be required by law to be audited by the Auditor General.⁶

(2) The Auditor General may in the public interest investigate, audit and report on the accounts and financial statements of any institution in control of public funds.⁷

(3) When the Auditor General performs an audit he or she shall have access to all information relevant to the audit and all persons in possession of such information shall be obliged to give their co-operation.⁸

Reports

3. (1) The Auditor General shall submit all reports on audits conducted by him or her to such authorities at the relevant level of government, and, where appropriate, also to such authorities at the other levels of government, as may be prescribed by law or as may be determined by the Auditor General in his or her discretion.

⁶ Based on block 13 of the report and subsequent discussions in the TC.

⁷ As per agreement in block 15 of the report.

⁸ As per blocks 12 and 18 of the report.

- 3 -

- (2) All reports of the Auditor General shall be made public.⁹

Appointment, qualifications, tenure and dismissal

4. (1) The President shall appoint as Auditor General a person -
- (a) nominated by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and
 - (b) approved by Parliament by a resolution adopted, without debate, by a majority of at least two-thirds of the members present and voting.¹⁰

(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office, has specialised knowledge of or experience in auditing, state finances and public administration and does not hold office in any political party or organisation.¹¹

(3) The Auditor General shall be appointed for a period of not less than five years and not more than ten years and shall not be eligible for re-

⁹ As per agreement by the TC.

¹⁰ As per agreement in the TC.

¹¹ As per agreement in block 3 of the report. Based on section 191(3) of the Interim Constitution. The IFP has proposed the following formulation:

"The Auditor General should be a person of appropriate character and expertise."

appointment.¹²

(4) The President may remove the Auditor General from office only on the grounds of misbehaviour, incapacity or incompetence upon -

- (a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and
- (b) the adoption by Parliament of a resolution supported by at least two-thirds of the members present and voting calling for his or her removal from office.¹³

(5) The President may suspend the Auditor General from office when his or her removal from office on the grounds of misbehaviour, incapacity or incompetence is under consideration.¹³

Assignment of powers and functions and provision of funds¹⁴

5. (1) The Auditor-General may assign any of his or her powers or functions to such persons and subject to such conditions as may be prescribed by law.

¹² Section 4(3) is based on the agreed position in block 4 of the report and section 191(4) of the interim Constitution. The IFP proposes the following formulation:

"The Auditor General shall be appointed for a maximum period of two five-year terms."

¹³ Section 4(4) and (5) drafted as per instruction of the TC. See also block 7 of the report.

¹⁴ The TC considers as essential the inclusion in the Constitution of provisions providing for the assignment of the AG's powers and functions to other persons and guaranteeing the allocation of adequate funds to the AG.

- 5 -

(2) Expenditure incurred during the exercise and performance of the powers and functions of the Auditor-General shall be paid from money which shall be set aside by Parliament for such purpose and from fees raised or money obtained in a manner authorised by law.

MEMORANDUM - PAGE ONE OF TWO

**TO: DR. R. DAVIES
CHAIRPERSON T.C.2**

FROM: MR. C.D.R. RUSTOMJEE, TECHNICAL ADVISOR, T.C.2.

SUBJECT: ITEMS TO BE DEALT WITH DURING JUNE 5 PRESENTATION

DATE: 31 MAY 1995

1. I refer to my recent Memorandum to yourself dated 25 May 1995, in which I proposed setting out a summary of the key questions and issues raised by members of Theme Committee 6.2 during the meeting held on 22 May 1995, on which a presentation will be made by myself on 5 June 1995.

In terms of the above Memorandum, this summary is to be circulated today. This summary is contained in Paragraph 2 below and has been prepared based on the transcript of the 22 May 1995 meeting of the Theme Committee.

A package of key documents on central banking and on central bank independence in particular, has already been circulated to all members of the Theme Committee on 25 May 1995, as key articles dealing with issues of importance to the committee, prior to the 5 June 1995 meeting.

2. SUMMARY OF ISSUES REQUIRING CLARIFICATION ON 5 JUNE 1995.
 - Outlining the meanings of and distinctions between "operational", "instrument" and "goal" independence;
 - Outlining the meanings of and distinctions between the "objectives", "goals"/"operational goals" of the Reserve Bank ("RB"), particularly as these apply to the Constitution;
 - Considering whether there are major differences in interpretation of "goals", "objectives" and "primary objectives" either legally or in modern management literature, which might conflict with the meaning intended to be given to these words in the Constitution.
 - Examine what dispute-resolution mechanisms are available, in the instance where there is disagreement between the Governor and the Minister of Finance on monetary policy; also how disputes can be resolved quickly enough to preempt financial market disruption.
 - Examine what is understood by price stability, in effective practical policy terms.

- Consider to what extent the Governor or the Minister can act in their day to day policy making without "concurrence"?
 - Whether there are any other ways of phrasing the clause prepared by the CA Law Advisors on page 12 (clause 12 on p13 of the documentation containing the CA Law Advisors' legal opinion on the independence and impartiality of the SARB).
3. Kindly be advised that meetings have been scheduled between myself and the Minister of Finance, as well as the Governor of the SA Reserve Bank, prior to the 5 June 1995, to obtain their views on the above issues.
4. I trust that the summary in Paragraph 2 is an accurate summary of the large range of issues raised in the Theme Committees' meeting of 22 May 1995, on which clarification is being sought. Please advise however if there are any additional items on which a presentation is required on 5 June 1995.

Yours sincerely

C.D.R. Rustomjee

C.D.R. RUSTOMJEE
TC2 Technical Advisor

SUBMISSION

TO THE

CONSTITUTIONAL ASSEMBLY

**(THEME COMMITTEE 6.2: FINANCIAL INSTITUTIONS
AND PUBLIC ENTERPRISES)**

ON THE ISSUE OF THE

INDEPENDENCE OF THE SOUTH AFRICAN RESERVE BANK

N G ALANT

30 MAY 1995

1. Introduction

This submission contains my personal views which are based on my experience as an employee of the Reserve Bank (Exchange Control Department) between March 1988 and July 1993.

In view of this experience I have come to the conclusion that-

the Reserve Bank is not the appropriate institution to administer the Bank Supervision and Exchange Control systems;

Bank Supervision and Exchange Control are operational and administrative functions which are distinct from and require a different approach than Monetary Policy;

the Bank should be more transparent with regard to its duties and the manner in which these are executed; and

provided that the functions of the Reserve Bank are clearly defined, I am satisfied that Sections 195 to 197 of the present Constitution be embodied in the final constitution.

2. Approach to this submission

The submission is drafted mainly from a legal perspective.

The degree or nature of independence to be accorded to the Reserve Bank ("the Bank") in the final constitution should be determined with regard to two issues:

- 2.1 The future role to be accorded to the Bank (its functions); and
- 2.2 the question of accountability.

It is, therefore important to obtain clarity on these two issues before the drafting of the final constitution.

3. Purpose of this submission

Following what has been said in paragraph 2 above, the purpose of this submission is to-

inform the Committee on Financial Institutions and Public Enterprises about the current functions of the Bank and how the Bank has perceived its own role in this regard; and

discuss the current position with regard to the accountability of the Bank.

4. The current responsibilities of the Bank

It seems appropriate at the outset to examine certain of the current functions of the Bank. The three most important functions which the Bank performs in practice are:

4.1 Monetary Policy

The Bank has traditionally been responsible for the formulation and implementation of Monetary Policy. The primary objectives of the Bank are set out in Section 3 of the Reserve Bank Act, No 90 of 1989 and reads as follows:

"In the exercise of its powers and the performance of its duties the Bank shall pursue as its primary objectives monetary stability and balanced economic growth in the Republic, and in order to achieve those objectives the Bank shall influence the total monetary demand in the economy through the exercise of control over the money supply and over the availability of credit."

Monetary Policy has a macro-economic approach which focuses on the protection of the value of the currency.

4.2 Bank Supervision

Section 3 of the Banks Act, No 90 of 1989 determines that the office of the Registrar of Banks is part of the Bank.

Section 4 of the same Act provides as follows:

"The Reserve Bank shall, subject to the approval of the Minister, designate an officer or employee in its service as Registrar of Banks, who shall perform, under the control of the said Bank and in accordance with the directions issued by that Bank from time to time, the functions assigned to the Registrar by or under this Act."

The Governor of the Bank, Dr C L Stals has on occasion expressed the view that it may be desirable to establish an arm's length relationship between the Bank and the Registrar of Banks due to a conflict of interest that may arise.

4.3 Exchange Control

The Bank is responsible for the day to day administration of Exchange Control. The Exchange Control Regulations are issued under the Currency and Exchanges Act, No 9 of 1933 and provides the Treasury (Minister of Finance) with certain powers. The Minister has in the past in a letter addressed to the

Governor of the Bank delegated to the Bank and or employees of the Bank certain of his powers and functions under the Exchange Control Regulations. The Bank, therefore acts as the agent of the Minister with regard to the administration of Exchange Control.

Due to the structure mentioned in the previous paragraph, the Bank has, as far as the administration of Exchange Control is concerned, not had the same degree of independence from Government as in other areas of the Bank's operations.

I am not qualified to express an opinion about the success or otherwise of the Bank's monetary policy. However, before I proceed to discuss the legal issues connected with the performance of the functions of Bank Supervision and Exchange Control, I deem it necessary to say something about the Bank's perception of its own role.

5. The Bank's approach to its functions

Dr Stals has unconditionally committed the Bank and Monetary Policy to the principles of the free market. From this platform the Bank not only approaches the issues of Monetary Policy (money supply, credit, inflation, interest rates etc), but also the functions of Bank Supervision and Exchange Control. In fact, the Bank regards the latter functions primarily as issues of Monetary Policy.

6. The legal implications of the Bank's approach to Bank Supervision and Exchange Control

The Bank's approach as set out in paragraph 5 has conflicted with its administrative function of implementing Bank Supervision and Exchange Control. In implementing these two systems the Bank, at times downsized or disregarded the provisions of administrative law and also failed to properly apply the legislation pertaining to these systems. Because I was exposed mainly to the implementation of Exchange Control, I shall only briefly refer to Bank Supervision:

6.1 Bank Supervision

A reading of Section 4 of the Banks Act (see 4.2 above) will indicate that there is no clear distinction between the responsibility of the Bank and the Registrar of Banks.

The responsibilities of the Registrar may receive attention in the report of the Nel Commission of Enquiry. Evidence was led before the Commission that the Registrar failed to assume responsibility for supervision over the Masterbond Group in terms of the Banks Act as he wanted "to maintain a low profile" in view of the problems with Cape Investment Bank and Pretoria Bank (See the

enclosed article that appeared in the Beeld of 24 May 1994).

6.2 Exchange Control

- 6.2.1 It will be useful to refer to the findings of the "Commission of Enquiry into certain possible irregularities" under the chairmanship of His Honourable Judge L T C Harms dated 29 March 1989 (The enquiry dealt with, inter alia, the activities of Mr Albert Vermaas whose criminal trial is still in progress):

Judge Harms found that-

senior officials in the Exchange Control Department of the Bank had different views about the functioning of the exchange control mechanism (paragraph 128 of the report);

there were different views in the Bank about the duties of Authorised Dealers (commercial banks) with regard to the verification of information contained in exchange control applications to the Bank (paragraph 129);

the Bank and the commercial banks had different views about their respective roles (paragraph 130);

Mr Vermaas was, without just cause, allowed to hide the identity of alleged foreign buyers (paragraph 131.(a));

documents accompanying exchange control applications were not read by Bank officials, or if they were read, were read uncritically (paragraph 131.(b));

Bank officials failed to put proper and effective conditions to exchange control approvals (paragraph 131.(c)); and

there was no control mechanism to establish if conditions were being adhered to (paragraph 131.(d)).

- 6.2.2 According to paragraph 128 of the above-mentioned report the General Manager of the Exchange Control Department of the Bank was of the opinion that it was not the duty of the Bank to see that over invoicing of imports do not take place; he argued that it was the duty of the Department of Customs and Excise.
- 6.2.3 In my opinion the comment of Judge Harms was very relevant and generally applicable.
- 6.2.4 As is confirmed in 6.2.1 - 2 above, the Bank's approach has always been to define its responsibilities as narrowly as possible. The result was that nobody was prepared to accept responsibility for the proper functioning of the

Exchange Control system. "Control" over foreign exchange existed only on paper.

- 6.2.5 The policy of the Bank to leave it to the Authorised Dealers to decide for themselves what documents and information they would require from their clients before releasing the foreign exchange (or Financial Rand as the case may be), created enormous opportunities for clients with less than honourable motives. Officials of Authorised Dealers did not know what documents and official procedures applied to the wide variety and often very complex transactions of their clients. Authorised Dealers were also reluctant to ask their clients too many questions for fear of annoying the client and losing the client to another Authorised Dealer.
- 6.2.6 The Bank's prescriptions to the Authorised Dealers (they are called the "Rulings") require that the Dealer must, when submitting an application, state whether the application is recommended and the reasons for its view. Bank officials did as a rule not pay serious attention to this requirement.
- 6.2.7 In January 1990 I wrote a letter to an Authorised Dealer who had submitted an application which did not contain the recommendation referred to in the previous paragraph. The letter which requested further information was cancelled by Management without prior consultation with me. The applicant and the Authorised Dealer were then called to the Bank for an interview. According to the minutes of this interview (I was not asked to be present) the application was then substantially approved without the submission of further formal evidence.
- 6.2.8 Referring to the application mentioned in the previous paragraph, I wrote a memorandum in February 1990 in which I stated, inter alia, that the Bank sometimes relies on inferior information when considering applications. I pointed out that this could be regarded as negligence or even gross negligence. The memorandum was not well received by Management. On my insistence, though, the Bank in October 1990 instructed its attorney to write a legal opinion about the Bank's responsibilities with regard to exchange control applications. I was not party to the briefing.
- 6.2.9 The attorney concluded, inter alia, that he did not have "sufficient experience in the practical day - to - day application of Exchange Control to be able to advise the Bank about what would constitute a reasonable approach to information and documents to be supplied in support of applications".
- 6.2.10 I wrote a letter dated 24 May 1993 to the Minister of Finance, to inform him of my concerns regarding the Bank's duty and the carrying out of that duty.
- 6.2.11 However, since my position in this situation became intolerable, I had no option but to resign from the Bank and to accept a retrenchment package.

- 6.2.12 In February and April 1989 the Bank issued press statements announcing certain measures that had been taken in response to the criticism of the Harms Commission referred to in paragraph 6.2.1. These measures had little, if any, effect. One of these measures was the creation of an investigation division to investigate exchange control offences. I believe that the administration of exchange control applications actually deteriorated after the introduction of the Investigation Division. The creation of this division tended to confirm the view that the duty of the Reserve Bank was not to be pro-active on the side of prevention, but rather reactive on the side of contraventions. The Investigation Division also adopted this view. It did not seem to matter that an exchange control application which was approved within thirty minutes even though it looked suspicious, later necessitated a thirty months criminal investigation by a team of investigators.
- 6.2.13 The Exchange Control Department was to a large extent an "approval factory" where the majority of applications were approved. Standard wording, often not suitable to the specific type of application were used to formulate the reply (See in this regard the case of State versus Moringer and others SA 1993(4) SA 452). Applications containing an unacceptable motivation in terms of Exchange Control policy were declined and in a minority of cases further information would be requested.
- 6.2.14 Returning to the issue of accountability, the Constitutional Assembly may wish to consider whether any authority ever conducted any "check" to establish whether the measures introduced in reaction to the report of the Harms Commission, were effective.
- 6.2.15 The complex nature of many international transactions necessitated the application of professional skills in the Exchange Control Department. However, during the five years and five months that I spent in that Department, of the two hundred staff members there were no Chartered Accountants. I was the only admitted attorney.
- 6.2.16 Dr Stals had made it clear that the Bank disliked exchange controls. His view is that Exchange Control was forced on the country by external factors.
- 6.2.17 The failure by the Bank and the other financial authorities to administer the Exchange Control system effectively, had a cost. The high number of contraventions (many of which involved highly complex investigations) placed a tremendous burden on the criminal justice system and the system was unable to cope with these cases. This in turn, also undermined the integrity of our criminal justice system.

7. The current position with regard to the Bank's accountability

- 7.1 The Bank is a public company with its own share capital. The shares are listed

on the Johannesburg Stock Exchange. No shareholder is allowed more than 10 000 shares and the Government does not hold any shares in the Bank. The annual dividend that the Bank may pay is, however restricted to 10 per cent on share capital and surplus profits are transferred to the Treasury. The Bank is, therefore accountable to its shareholders in terms of the Companies Act, No. 69 of 1973.

- 7.2 The Bank is managed by a Board of fourteen directors, half of which (including the Governor and three Deputy Governors) are appointed by the State President. The other seven directors are elected by the shareholders.
- 7.3 In terms of the Reserve Bank Act, the Governor must annually submit to Parliament via the Minister of Finance the Bank's annual financial statements and a report on the implementation of Monetary Policy.
- 7.4 The Bank as a public enterprise under administrative law must act in the public interest. Administrative acts must conform to a variety of requirements in order to be valid. In practice though, there is very little the public can do to establish whether the Bank is adhering to the norms of administrative law. A breach of administrative law (which includes an act conducted in bad faith) is, however not a criminal offence and judicial proceedings to attack the validity of an administrative act of the Bank are rare.
- 7.5 Negligence by the Bank does not amount to a criminal offence. The liability of the Bank for damages due to negligence based on so-called "pure economic loss" is uncertain in our law. In view of the cost of litigation and the Bank's ability to draw out proceedings indefinitely, claims for damages against the Bank are very rare and the uncertainty referred to above may remain for a long time.
- 7.6 The Ombudsman Act, No 118 of 1979 does not apply to the Reserve Bank as it is not a state institution.
- 7.7 The Public Protector Act, No 23 of 1994 incorporates Section 112(1)(a)(ii) of the Constitution which gives the yet to be appointed Public Protector jurisdiction over certain acts of a person "performing a public function". There appears to be uncertainty at present as to whether the Bank will fall under the jurisdiction of the Public Protector.

8. Observations with regard to the issue of accountability

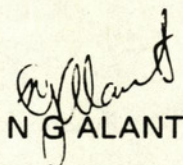
- 8.1 It is my view that the administration of Exchange Control would never have deteriorated to the level it had if there was transparency by the Bank on how it carried out its duties.
- 8.2 I believe that some functions of an institution may require greater disclosure or a different form of disclosure than other functions. This distinction could perhaps

also be applied to the Bank. The legal requirements of the systems of Bank Supervision and Exchange Control are clearly very different from the requirements of Monetary Policy and the first-mentioned two systems should preferably be administered by a separate institution.

- 8.3 As was shown in paragraph 7 above, the Bank is legally accountable to its shareholders, Parliament and the public. In practice however, there is insufficient accountability. More transparency is a pre-requisite if this problem is to be addressed.

9. Final observation

The importance of the Bank to our economic growth and general economic well-being justifies that its position be addressed in the Constitution. The crucial issues to be considered are its independence, its role and its accountability. The three matters are inextricably linked. If its role is to consist of the performance of more than one function, these functions should be identified in the Constitution and care should be taken that the functions are compatible with regard to their application.


N G ALANT

PRETORIA

30 MAY 1995

Beeld 24 May 1994

Registrateur het weggekram, hoor kommissie

Korrespondent

KAAPSTAD. - Die Registrateur van Banke het weggekram van sy verantwoordelikheid om ingevolge die Bankwet oor die Masterbond-groep toesig te hou omdat hy in die lig van die probleme by Cape Investment Bank en Pretoria Bank 'n "lae profiel wou handhaaf".

Die bewering word gemaak in 'n interne brief van 'n inspekteur van die Raad op Finansiële Dienste (RFD) aan die uitvoerende hoofampenaar van die Raad, mnr. Piet Badenhorst. Die brief dien as deel van mnr. Badenhorst se getuienis voor die Nel-kommissie van ondersoek.

In die brief word gewaarsku dat die Registrateur van Banke gaan probeer om sy verantwoordelikheid om teen Masterbond op te tree, op die ampnaam van die ou Kantoor vir Finansiële Instellings (KFI), wat in 1991 die RFD geword het, af te skuif.

Dit lui voorts dat die Registrateur van Banke in 1989 aanvaar het dat die skuldbrieffskema van Masterbond onder sy jurisdiksie val. As toe opgetree is omdat Masterbond die Bankwet oortree het deur deposito's te neem, soos wat in verslae van die KFI uitgewys is, sou beleggers gewaarsku gewees het.

Die KFI daarenteen, is deur die wet verhinder om die inhoud van sy inspeksieverslae openbaar te maak.

Mnr. Badenhorst het getuig dat onreëlmatighede waaroor in vyf inspeksieverslae van sy kantoor oor Masterbond verslag gedoen is, na die Prokureur-generaal en die Registrateur van Banke verwys is.

Laasgenoemde is ook ingelig om "hul oë oop te hou" nadat die Masterbond-direkteure, mnre. Koos Jonker en Johann Brits, in 1988 ook as direkteure van Pretoria Bank aangestel is.

Mnr. Badenhorst het ook getuig dat in teenstelling met gerugte wat reeds versprei is, hy die destydse Minister van Finansies, mnr. Barend du Plessis, vir die eerste keer in Augustus 1991, minder as twee maande voor die ineenstorting van die groep, oor die probleme ingelig het.

Mnr. Badenhorst het getuig dat 'n goeie balans tussen doeltreffende toesig en ooregulering 'n probleem is. Suid-Afrika bestee baie minder aan toesighouding as byvoorbeeld Amerika en Brittanje, maar kan in sekere gevalle selfs leiding gee.

Toesig oor beleggingsagente wat buite die professionele makelaarsberoep optree, is egter nog 'n probleem wat aandag moet kry.

CONSTITUTIONAL ASSEMBLY INTERNAL MEMO

Date: 31 May 1995
To: Pat
From: Mbasa
RE: Internal Workshop on Financial and Fiscal Relations

Please advise members of your Theme Committee about the workshop on **Financial and Fiscal Relations** which will be held on **Monday 05 June 1995 in E249, at 14h00 - 17h00.**

We expect the representatives from:

- i) Canadian High Commission
- ii) German Embassy
- iii) Nigerian High Commission
- iv) Financial and Fiscal Commission

We trust you shall avail yourself for the workshop.

Bank independence not unlimited, committee told

BRUCE CAMERON

POLITICAL EDITOR

The independence of the South African Reserve Bank is not unlimited, director general of finance Estian Calitz has told a parliamentary committee.

The Reserve Bank's independence came under fire from Rob Davies, one of the committee's members, in a document submitted to the Constitutional Assembly last week sparking a major public debate, which affected the financial markets.

At a hearing of the parliamentary finance committee yesterday, Calitz said the Reserve Bank had

the independence to use policy instruments but shared with the government the goals it pursued.

Calitz said there was almost daily contact between the Bank and the ministry of finance or his department.

He said major policy decisions were not taken in isolation by the Reserve Bank but in consultation with the minister of finance.

"It is done with responsibility and sensitivity, particularly to the political responsibilities of the minister," Calitz said.

There were also formal meetings every two to three months between the Reserve Bank and relevant government departments.



ipists

ound them-
culties.

for an end to
hools, saying
liberalised
girls could
ntraceptives
nts knowing.

buli of the
s Network,
he nine-year-
ment organi-
Enrichment
committee
n were mar-
gender and

status in the
and training
in society at
that they bear
social ills that
nties."

g on
armies

ponent
nister for Intel-
Shlanhla, says
many former se-
es could worsen
private armies.

warning in a
re debate in the
bly yesterday..

remobilisation of
nel from the se-
... can lead to
of private ar-
rity agencies."

a said the intelli-
es favoured re-
redployment as
ackages wasted

al capabilities
directed to meet
s including inves-
the illegal weap-
drug smuggling.
offences, money
nd private armies.



KNOCK-DOWN: Medical personnel carry an injured pedestrian to an ambulance after he was hit by a car on the Western Boulevard during peak hour. A medic on board the Good Hope traffic patrol helicopter was landed to stabilise the man's condition.

Changing priorities difficult — Liebenberg

AREUS 31/5/95

CLIVE SAWYER
Political Correspondent

CHANGING budget priorities is proving more difficult than was first expected, says Minister of Finance Chris Liebenberg.

His statement comes amid evidence that MPs are under increasing pressure from constituents for signs of reconstruction and development programme spending.

He was replying to a national assembly debate yesterday on state expenditure.

Mr Liebenberg's deputy, Alec Erwin of the African National Congress, made a similar admission.

It would not be possible to achieve gigantic reform of budget priorities in a year, said Mr Erwin.

Barbara Hogan (ANC) said constituents asked: "Is this the RDP budget?"

She praised the Department of State Expenditure for its remarkable performance in giv-

ing guidance to other departments on budget priorities.

But, she warned that the government's plan for medium-term spending, to be released in a few months, risked lacking credibility because there had been too little consultation of "broad society".

Ms Hogan said commitment was needed from all state departments that priorities in their budgets would be changed.

She repeated a call, made last year, for South Africa to host an international conference on budget reform.

Marcel Golding (ANC) said changing the direction of government spending would take time. He lashed out at the trend for certain ministers to "repackage" existing programmes as RDP projects.

Mr Golding said an example was the claim by Minister of Mineral and Energy Affairs Pik Botha that a third of the

ministry's budget went to RDP-related projects.

Gavin Woods (IFP) said millions of rands were being wasted by the incompetence of government departments.

Citing the Katz report on tax administration and various reports to the public accounts committee, he said: "Apart from the high instance of straightforward graft, there is malignant incompetence".

This led to debilitating rates of taxation.

Replying to the debate, Mr Liebenberg said budget reprioritisation had proved more difficult than was expected at first.

Those who wrote the constitution had not expected the complexities about the allocation of finances among three levels of government.

Mr Liebenberg said South Africa's needs could not be met with the funds available and the limitation that raising taxes would stifle growth.

Municipal Reporter

RESIDENTS of some of "leafiest" suburbs in Town are relatively deep rears with their elect payments.

This emerged at the Town City Council's meeting yesterday.

Ian Iversen of the Democratic Party said officials learned how to apply for reluctant payers. In instance, a Waterfront restaurant which owed R30 000 was on a Friday night it would pay or its power would be cut in 15 minutes. The restaurant paid.

The council reaffirmed support for the collection of rears and agreed to "with vigour" their rears but has decided not to institute an ad-hoc committee to deal with the matter.

Mr Iversen said officials were aware of their delinquent rears recovery was well.

Figures showed that in Stantia, 19.2 percent of rears were in arrears, in Rosebank 22.1 percent, Rosebank 26.8 percent, Bakoven and Bay 26.8 percent and in Sandown 36.3 percent.

Council buy about beehives

Municipal Reporter

DO you want to have one on Table Mountain? Buy a few palm leaves and a beehive in a forest.

If so, the Cape Council is able to be identified by its revitalisation which advertises extraordinary varieties you can pay the cost.

For instance, it will floodlights on Table Mountain famous rockface, palm leaves for private and R2 each for a R14 a year to keep a council forest.

Film-makers will know they will pay more than R380 a day for film council park or city councillors necessary to encourage industry, which is a lucrative source of income for the

A COMMERCIAL FEATURE

Impressive new meat market

Full backing for free hand of auditor-general

Adrian Hackland (E)
p2 (J/GW)
CAPE TOWN — Political parties yesterday reported unanimity on enshrining the auditor-general's independence and impartiality in SA's new constitution.

The chairman of the sub-theme committee considering the place of financial institutions in the constitution, ANC MP Rob Davies, said a "high level of consensus" had been achieved. Even the views of the Inkatha Freedom Party, which is not taking part in the constitutional process, had been incorporated.

NP committee member Piet Weigemoed described the level of consensus as "99.9%" with only a few nonsubstantive matters left to be redrafted.

Among clauses agreed were that the auditor-general be appointed by a parliamentary committee representing every political party for a maximum of

two five-year terms. The incumbent would have the discretion to investigate accounts of any institution controlling public funds.

The committee will finalise the proposal next Monday before passing it on to the constitutional committee for inclusion in the draft constitution.

The committee is also due to consider the more controversial question of the independence of the SA Reserve Bank. The debate escalated into a row last week as Bank Governor Chris Stals announced his opposition to ANC plans to differentiate between the operational and gross independence of the institution.

Technical adviser Cyrus Rustonjee has been requested to analyse information from the Bank. Finance Minister Chris Liebenberg and other sources. He is scheduled to give the committee a presentation next Monday.