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**SOUTH AFRICAN GOVERNMENT OFFICE  
- WORLD TRADE CENTRE -**

12 November 1993


Head of the Administration  
Multi-Party Negotiating Process  
World Trade Centre

Dear Dr Eloff

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE  
ATTENTION OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL  
ISSUES**

1. Attached is a submission by the South African Government *"IN RESPECT OF CLAUSE 87(2) IN THE CHAPTER ON THE JUDICIAL POWER AND THE ADMINISTRATION OF JUSTICE"*.
2. Kindly transmit the document for immediate attention to the Technical Committee on Constitutional Issues.

Yours sincerely

  
GOVERNMENT OFFICE: WORLD TRADE CENTRE

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MINISTERIE  
VAN JUSTISIEMINISTRY  
OF JUSTICE

REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

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Verwysing/Reference

12 November 1993

Dear Mr Van der Westhuizen

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT IN RESPECT OF  
CLAUSE 87(2) IN THE CHAPTER ON THE JUDICIAL POWER AND THE  
ADMINISTRATION OF JUSTICE**

I enclose herewith a copy of the Government's submission in respect of clause 87(2) in the Chapter on the Judicial Power and the Administration of Justice for urgent submission to the Technical Committee on Constitutional Matters, please.

With kind regards

  
HEAD: MINISTERIAL SERVICES

CJ241193

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT IN RESPECT OF CLAUSE 87(2) IN THE CHAPTER ON THE JUDICIAL POWER AND THE ADMINISTRATION OF JUSTICE**

1. On 11 November 1993 the South African Government and the ANC submitted a document wherein certain proposals relating to the Chapter on the Judicial Power and the Administration of Justice were reflected.

2.1 The South African Government wants to draw the Technical Committee's attention to the proposed Clause 87(2) under the heading "Heads of Supreme Court and Constitutional Court" in order to clarify the Government's position regarding this clause. Clause 87(2) reads as follows:

"(2) There shall be a President of the Constitutional Court of South Africa who shall, subject to the provisions of section 89, be appointed by the State President after consultation with the Chief Justice."

2.2 As was already indicated by the Government at the first bilateral discussion in this regard a convention should be developed whereby the State President should perform all such appointments in consultation with Cabinet. It is of utmost importance that the meaning of the word "President", where he performs certain functions must be seen in context with the rest of the Constitution.

2.3 In this regard the proposed clause 76(3) of the Draft Constitution, which reads as follows, is also important:

"The President shall exercise all other powers and perform all other functions as may be conferred upon or assigned to him or her in terms of this Constitution or any other law in consultation with the Cabinet." (Our underlining.)

Whereas the appointment of judges is not a function specifically stipulated in clause 76(1) or (2), the Government was of the opinion that it is not necessary to specifically insert the words "in consultation with the Cabinet" in the proposed clause 87(2), because the wording of clause 76(3) will automatically include such meaning. It is, however, argued by some that due to the inclusion of the expression "in consultation with the Cabinet" in clauses 87(1) and 89(3) and (4) and the omission of the expression in clause 87(4), this may be interpreted that the legislature specifically intended that the provisions of clause 76(3) should not apply in respect of clause 87(2) and therefore the State President would not have to consult the Cabinet when he appoints the President of the Constitutional Court.

2.4 It has been argued that this matter should be left to the courts to interpret. It was, however, always the Government's intention that the State President should act in consultation with the Cabinet in this regard. The Government holds the view that this is a matter of such importance that it should be clearly spelt out that clause 76(3) is also applicable to the appointments in clause 87(2).