

ASSOCIATION OF REGIONAL MAGISTRATES

22 April 1996

PROCEDURE DURING CERTIFICATION OF FINAL CONSTITUTION IN TERMS OF SECTION 71 OF ACT 200 OF 1993

The conversation between Mr Travers and M Nienaber this morning refers.

The Association of Regional Magistrates of SA (ARMSA) is unhappy about certain aspects of the chapter in the (draft) final of the consequences dealing with courts and the administration of justice.

We are considering challenging certain of the provisions as being inconsistent with the Constitutional Principles contained in schedule 4 of Act 200 of 1993.

If we so decide whether we would like to be afforded the opportunity of presenting oral and or written argument to the Constitutional Court, if necessary through our counsel on the issues involved. Submissions were previously made to the Constitutional Assembly on the same issued.

In the main the issues concern the independence of the judiciary in respect of the magistrates and regional courts.

This request has the approval of the Executive Management Committee of ARMSA.

P. JOHNSON
SECRETARY

RE: OBJECTION TO THE CERTIFICATION OF THE NEW CONSTITUTIONAL TEXT IN TERMS OF PARAGRAPH 4 OF THE DIRECTIONS GIVEN BY THE PRESIDENT OF THE CONSTITUTIONAL COURT IN TERMS OF RULE 15.

1. THE OBJECTORS:-

This objection is brought by:-

1. The Association of Regional Magistrates of South Africa (ARMSA), which represents approximately 90% of sitting Regional Magistrates.
2. The Magistrates' Association of South Africa (MASA), which represents approximately 70% of sitting chief Magistrates, Senior Magistrates and District Court Magistrates (both civil and criminal).

3. The Magistrate members of the Legal Staff Association of South Africa (LESTASA), which represents the majority of the magistrates from the former independent and self-governing states.

These are, to the best of our knowledge, the only three associations representing magistrates currently in existence in South Africa and in short represent the overwhelming majority of the lower court judiciary in South Africa.

2. THE PROVISION OF OR OMISSION FROM THE CONSTITUTION TO WHICH OBJECTION IS TAKEN:-

1. Omissions from Chapter 8, in particular:
 - 1.1. The terms of office, remuneration and removal of magistrates is not dealt with at all.
 - 1.2. No provision is made for an independent body to regulate the appointment, removal from office, terms of office and tenure of magistrates.
2. The provisions of Section 174 (7) - are objectionable in that the legislature is given wide powers to regulate the functioning of the lower judiciary.

3. THE GROUNDS FOR THE OBJECTION:-

- 3.1 Violates international norms.

The present provisions fail to comply with international norms in that the lower courts' independence is not adequately safeguarded.

The following major international instruments deal with the right to a hearing before an independent tribunal:-

1. Universal Declaration of Human Rights (Article 10).
2. International Covenant on Civil and Political Rights (Article 14).
3. African Charter on Human and Peoples' Rights (Article 26).
4. American Convention on Human Rights (Article 8).
5. European Convention on Human Rights (Article 6).

It is therefore submitted that the right to a hearing before an independent tribunal forms part of customary international law. The essential elements of an independent tribunal were examined in the Canadian case of *Valente v the Queen* (1985] 2 SCR 673; [1985] 24 DLR [4th] 161 at 176, where it was held that: "security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence" and at 184 "the second essential condition of independence ... is... what may be referred to as financial security."

The magistrates do not enjoy the protection of either of these conditions in the current formulation of the final Constitution.

In the Ceylonese case of *In Re: Agnes Nona* 53 NLR 106 at 116, the court per Dias, J. held that "there is no distinction between a slight interference by the executive with the Judiciary and a major interference. In either case, the independence of the Judiciary would be affected and must be condemned."

At the African Conference of the Rule of Law held in Lagos in 1959, a document was produced entitled "The Responsibility of the Judiciary for the Protection of the Rights of the Individual in Society." Paragraph 3 thereof provides:-

"In respect of any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the judiciary, it is recommended:

- (a) that these powers should not be put into the hands of the executive or the legislature, but should be entrusted exclusively to an independent organ such as the Judicial service Commission of Nigeria or the *conseil superieur de la mactistrature* in the African French-speaking countries;
- (b) that in any country in which the independence of the judiciary is not already fully secured in accordance with these principles, they should be implemented immediately in respect of all judges, especially those having criminal jurisdiction"

Other relevant instruments are;

1. Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, endorsed by the U.N. General Assembly in Resolution 44/162 of 15 December 1989.
2. The Draft Universal Declaration on the Independence of Justice ("The Singhvi Declaration").
3. The Draft. principles on the Independence of the Judiciary ("Siracusa Principles").
4. The Minimum Standards of Judicial Independence adopted by the International Bar Association's 19th Biennial Conference held in New Delhi in October 1982.

3.2 Violates the values of the new Constitutional Order.

The values of the new order have in part been expounded in the "Postamblell of the Interim Constitution which "provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence... The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which

generated gross violations of human rights, the transgression of humanitarian principles and violent conflicts and a legacy of hatred, fear, guilt and revenge."

A "secure foundation" for such a future society must be laid on the principles of the Rule of Law, (which includes the separation of the executive, legislature and independent judiciary) and the concept of a constitutional state.

This would contrast with the previous pre-democratic order which failed to recognise the principles of constitutional supremacy, the separation of powers and an independent judiciary.

This failure manifested itself in the fact that magistrates were part of the public service and in effect were controlled by the executive.

The danger exists that this situation could again arise in the future as inadequate safeguards are provided in the Constitution for the lower courts' independence.

4. PRINCIPLES VIOLATED.

In the light of the above, it is submitted that the following

Constitutional Principles have not been complied with:-

Principle II
Principle VI
Principle VII.

I.T. DUTTON
ATTORNEY FOR THE OBJECTORS
University of the Witwatersrand

Dear Mr Johnson

28 May 1996

CERTIFICATION OF NEW CONSTITUTIONAL TEXT

Your letter of 22 April 1996 refers.

I have been asked by the President of the Constitutional Court to enquire whether you are in a position to indicate the clause or clauses of the Constitution to which you intend to object and the constitutional principle or principles alleged to have been contravened.

In this regard your attention is drawn to paragraph (4)a of the directions issued by the President of the Constitutional Court

May we remind you that in terms of the directions issued the closing date for submitting objections is 31 May 1996.

MS M NIENABER