

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NUMBER CCT/23196**

**re: THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN  
TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF  
SOUTH AFRICA, 1993**

**OBJECTION, IN TERMS OF RULE 15, TO ITEM 23 A. (1) OF ITEM 13 OF ANNEXURE  
A OF SCHEDULE 6 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH  
AFRICA 1996**

I, the undersigned,

PETRUS ARNOLDUS MATTHEE,

Member of Parliament, objects to the inclusion of Item 23 A. (1) of Item 13 of Annexure A of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as Item 23 A. (1))

1.

In terms of Item 23 A. (1), a person loses membership of a legislature if that person ceases to be a member of the party which nominated him/her as a member of the legislature. I submit that this provision is in conflict with certain Constitutional Principles for the reasons set out hereunder-

2.

Item 23 A. (1) is defective because it creates an imperative mandate form of representation which does not comply with the provisions of Constitutional Principles I, ii, iv, vi, vii, viii and xvii. It therefore does not satisfy the provisions of Section 71 (1) of the Constitution of the Republic of South Africa, Act no. 200 of 1993.

3.

The establishment of an imperative mandate deviates from the commonly accepted principles generally associated with a democratic constitutional state \*. It revives a medieval system of representation, which has no place in modern constitutional law.

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\* Klein, H. (Judge at the Federal Constitutional Court of the Federal Republic of Germany), *The Party - Related Mandate in South Africa's New Constitution*, in **Occasional Papers, Konrad Adenauer Foundation**, July 1994, p.4

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4.

The imperative mandate form of representation created by item 23 A. (1) is not recognized by truly representative government systems since:

- 4.1 current modern international positive Constitutional Law does not recognize the imperative mandate form of representation as a true representative form of representation; \*

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\* It has been rejected in **Osborne v Amalgamated Society of Railway Servants** (1909) 1 Ch 163 (CA) in Britain and **Chikerema and Others v The United African Nation Council and Another** 1979 (4) SA 258 (ZA) in Zimbabwe.

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- 4.2 a functioning representative system is unthinkable without a free mandate \*

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\* Stern, K, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. 1, 2nd ed 1984, p. 593 et seq.

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- 4.3 the electorate has very limited influence over a public representative once he/she has been elected because the party takes control of him/her.\* Because of this limited influence, governmental power is not executed on behalf of the subjects. The imperative system is outdated \*\* whilst the free mandate system is accepted worldwide as a norm.\*\*\* This is also the position in countries where the list system of proportional representation applies. \*\*\*\*

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\* This influence is very limited compared to the influence of subjects in a truly representative government system where every single subject (the total electorate) is entrusted with a substantial influence with regard to the composition of government as well as government policies. (see **Basson, D.A.**, Verteen woordiging in die Staatsreg (LLD thesis Unisa), p. 190)

\*\* see **Basson**, p. 320 (note 4 supra)

\*\*\* see note 2

\*\*\*\* see in the case of Germany Section 38 paragraph 1, sentence 2 of the German Constitution; in the case of the Netherlands Section 88 of the Netherlands Constitution, and **Van der Pot Handboek van het Nederlandsche Staatsrecht**, 1972, 88 ff (which also refers to the position in France) (see **Basson. D.A.**, *South Africa's Interim Constitution*, 1995. p. 79)

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5.

In addition to the reasons mentioned in 3 above, an imperative mandate is irreconcilable with the principles of a representative democracy guaranteed by Constitutional Principles viii and xvii since:

- 5.1 members of legislatures should not represent only the interests of their constituency (or party) but should represent the interests of the entire nation;
- 5.2 it deprives legislators the opportunity of changing their views. If legislators are not free to form their own conclusions independently, legislatures become irrelevant talk shops. Debates then have no meaning because the persuasive force of debate and logic is lost. (This is not in accordance with democratic principles);
- 5.3 it undermines the status of legislatures and relegates political power to the members of executive councils of political parties, many of whom are not legislators. (Weak legislatures, dictated to by party executives, fall short of a true democracy.);
- 5.4 it does not make government accountable to the voters. Accordingly, it does not serve accountability, responsiveness and openness and thus amounts to a contravention of Constitutional Principle vi. It makes government accountable to a few party executives (which is in itself most undemocratic because democracy, after all, is government under public responsibility, accountable to the sole font of governmental power, the people).

## 6.

The provisions of Item 2' ) A. (1) can undo the electorate's mandate. The electorate has the right to elect its public representatives and expect of them to serve a full term. Political parties can interfere with that right at will, since it can end the membership of its political representatives, forcing a member to cease to be a legislator and thus cutting the bond between the electorate and the representatives'. This is in direct conflict with the principles of representative democracy as entrenched by Constitutional Principles viii and xvii

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\* see **Basson, D.A. and Viljoen, H.P.**, South African Constitutional Law, 1988, pp. 82 - 96, on the nature of representation in Constitutional Law.

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## 7.

The principle of representative democracy is also undermined by Item 23 A. (1). For instance, if a political party has received a mandate from the electorate to implement a specific policy, but changes its policy drastically after an election, members of that party cannot resist, because to act in accordance with their conscience, or to speak out on behalf of the original policy, will cost them their seats.

## 8.

Representative government means:

- 8.1 a government where governmental power is executed on behalf of the people

8.2 where there is an absence of arbitrary execution of power and monarchistic absolutism.\*

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\* see **Basson**, p. 104 (note 4 supra)

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## 9.

9.1 The principles referred to in 7 above constitute a legal value to which the government authority in a material "Rechtstaat" is bound. \* This is emphasized by the following statement of **Hommès**. "De Staat kan slechts Rechtstaat zijn wanneer ook het beginsel van representativiteit is erkent en gepositieerd" \*\*

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\* see **Basson**, p. 30 (note 4 supra)

\*\* **Hommès, HJ van E**, *De Materieele Rechtstaatsidee*, Tydskrif vir die Suid-Afrikaanse Reg, 1978, pp. 49 to 50

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9.2 Since the imperative mandate form of representation does not bring about a truly representative government system, Item 23 A. (1) is irreconcilable with the above mentioned legal value and therefore irreconcilable with a "Rechtstaat"

## 10.

If it is accepted that Item 23 A (1) is irreconcilable with the principle of representation (or representative government) as guaranteed by Constitutional Principles viii and x-vii, it must also be accepted that it is irreconcilable with the principle of democracy as guaranteed by Constitutional Principles ii, viii and xvii, as it is submitted that representative government (which means that government authority is to be executed on behalf of the subjects and not arbitrary) is also a principle of democracy. \*

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\* see **Basson**, p. 186 (note 4 supra)

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## 11.

It is furthermore submitted that Item 23 A. (1) is irreconcilable with a substantial number of universally accepted fundamental rights, freedoms and civil liberties as guaranteed by Constitutional Principle ii: for instance, at the risk of losing his/her seat, every legislator is compelled to toe "the party line", thereby compromising his/her right

- 11.1 to freedom of conscience;
- 11.2 to freedom of speech and expression;
- 11.3 to freedom of thought;
- 11.4 to freedom of belief,
- 11.5 to freedom of opinion;

- 11.6 to freedom of association;
- 11.7 to form, to participate in the activities of and to recruit members for a political party or cause;
- 11.8 to freely make political choices.

12.

This objection is supported by the persons, whose names and signatures appear on Annexure A hereto.

13.

The permission of the above Honourable Court is requested to amplify this objection by heads of argument and oral submissions.

14.

This Honourable Court is requested not to certify item 23 A. (1) in terms of the provisions of Section 71 (1) of the Constitution of the Republic of South Africa, Act no. 200 of 1993.

DATED and signed at CAPE TOWN on this 30th day of MAY 1996.

PETRUS ARNOLDUS MATTHEE

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ANNEXURE A

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER CCT/23/96

OBJECTION, IN TERMS OF RULE 15, TO ITEM 13 OF ANNEXURE A OF SCHEDULE 6 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996

We, the undersigned, hereby support this objection lodged by PETRUS ARNOLDUS MATTHEE:

[Editors note: There are 72 signatories to this petition]