

IN THE CONSTITUTIONAL COURT

CASE NO: CCT/23/96

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

FILING SHEET

OBJECTION TO CERTIFICATION OF SECTION 25 OF THE NEW CONSTITUTIONAL

NAME OF OBJECTORS: THE SOUTH AFRICAN AGRICULTURAL UNION ("SAAU")
THE AGRICULTURAL EMPLOYERS' ORGANISATION ("AEO")

1. The SAAU is the main representative of commercial farmers in South Africa. Through the 19 organisations that constitute its membership, it reprise approximately 75% of all commercial farmers, including black, Indian and coloured farmers.
2. The AEO is the only registered employers organisation in the Agricultural industry having some 7 800 members.
3. The objectors submit that Section 25 does not comply with Constitutional Principle II (Schedule 4 - Interim Constitution, 1993).
4. The Constitutional text must meet three criteria stipulated in Constitutional Principle II namely :
 - 4.1 the fundamental rights must be universally accepted;
 - 4.2 the text must contain entrenched and justifiable provisions embody fundamental rights, freedoms and civil liberties;
 - 4.3 the new text must be drafted after having given due consideration to fundamental rights in Chapter 3 (Interim Constitution).

5. The most important international human rights instruments recognise the rights property and positively guarantee this right. Article 17 of the Universal Declaration of Human Rights and Freedoms provides that everyone has the right to own property and that no-one shall be arbitrarily deprived of property. This universal declaration has achieved such wide acceptance that it is regarded as part of customary international law.
6. The African Charter on Human & Peoples' Rights provides (Article 14) that the right to property shall be guaranteed and only encroached upon in the interest of public need or in the general interests of the community and in accordance with appropriate laws.
7. The right to property is also guaranteed in the International Convention on the Elimination of all Forms of Racial Discrimination, the European Convention on Human Rights and Fundamental Freedoms and the American Convention on Human Rights.
8. The universally accepted fundamental right is to guarantee the right to own property and the accepted method of entrenching this right is to state this positively.
9. Section 25(1) is stated negatively (unlike the other fundamental rights) and, read with the remaining subsections, fails to meet Constitutional Principle 11.
10. The Government has concluded agreements with foreign investors to reassure them that their rights will be protected in accordance with international standards. This indicates the fact that the property clause falls short of international standards; that dual standards are envisaged for local and foreign property owners. Attached for convenience is an example of the clause relating to expropriation.
11. The Constitutional Text fails to meet the requirement in 4.2 above, firstly, because of the negative statement of the right dealt with above and secondly, because of the

confusing language used in Section **25**. The attempt to entrench the fundamental right to property (albeit, negatively), becomes blurred by a repetitive and over) record of political qualifications and understandings which do not belong record of the right to property. The attempt to entrench rights relating to reform and related matters in clause 25 will lead to uncertainty, conflict constitutional challenges. It is clear that compromises that have been reached Constitutional Assembly have led to a clause that is inadequate, unduly lengthy and unduly complex. The objectors accept that land reform measures should be contained in Section 25. Alternatively these provisions should be subject to the right to property.

12. It is accepted that land may be expropriated. Having regard to the need to South Africa's population and the realities of agriculture in Africa, the rights I the environment and freedom of trade will be meaningless if expropriation,,; place for any reason other than public purposes and are not subject to the:

12.1 maintenance and protection **of** the agricultural resources ecologically sound and sustainable basis;

12.2 prevention **of** the subdivision **of** agricultural **land into** uneconomical farming units;

12.3 maintenance **of** national **food supply**;

12.4 recognition **of** the contribution that agriculture makes to the economy

The protection **of** the environment has a further economic component, namely the protection of the tourism industry.

13. The public interest must recognise the factors set out in subparagraphs **12.1 to 12.4** above.

14. The right to own property and to have this protected is not to be equated to a right of each citizen to have property.

15. The provisions of Section 25(3) fail to meet the requirement that the right to compensation be entrenched in justifiable provisions in the Constitution. The Constitution must protect the rights of property owners now and for future generations. The introduction of the concept of a manner of variable payment leaves open the argument that payment could be other than cash. It is submitted that compensation should be full, immediate and in cash and that the wording of the section should state this unambiguously. The effect of the words "reflecting equitable balance between the public interest and the interests of those affected and the factors mentioned in 25(3) may cause landowners to get less than in value. No person should be entitled to enter upon land owned by another this is done in accordance with, and after completion of, due process.

16. The Constitutional Assembly was to draft the text, "after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution". Section 25 bears no resemblance to Section **28** in the Interim Constitution. Section 28 contained a positive guarantee **of** property rights (in line with universally accepted formulation of such a fundamental right) in clear and unambiguous terms meaning that this fundamental right was protected] entrenched and unambiguous justifiable provisions. Section 28 contains provisions dealing with land reform such as those in Sections 25(4) - 25(8).

- 7 The objectors request the opportunity to address oral argument to the Constitutional Court at the hearing scheduled for this purpose.

ARTICLE 5

Expropriation

Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in this territory of the other Contracting Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made, without delay, and be effectively realisable.

(2) The investor affected by the expropriation shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a court of law of other independent and impartial forum of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles referred to in paragraph (1).

Ex Parte: THE CONSTITUTIONAL ASSEMBLY

Case NO: CCT 23196

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

NOTICE BY THE SOUTH AFRICAN INSTITUTE OF RACE RELATIONS IN TERMS OF RULE 15(3) AND DIRECTION 4 OF THE DIRECTIONS ISSUED BY THE PRESIDENT OF THE CONSTITUTIONAL COURT ON 13 May 1996 AS AMENDED BY THE PRESIDENT'S NOTICE OF 19 MAY 1996

TAKE NOTICE THAT the SOUTH AFRICAN INSTITUTE OF RACE RELATIONS objects to the certification of the constitutional text adopted by the Constitutional Assembly on 8 May 1996 ('the text') on the following grounds:

1. Horizontal Application of the Bill of Rights

1.1 Section 8(2) of the text makes the bill of rights binding not only on the state but also on all private persons. This subverts the essence of a bill of rights, which is to limit rather than increase the power of the state. For this reason, inter alia, horizontally is excluded from virtually all other bills of rights. Horizontal rights are thus not universally accepted'. Their inclusion infringes Constitutional Principle II, requiring that 'everyone shall enjoy all universally accepted rights' and thereby implying that rights not so accepted do not belong in the text. Furthermore, horizontally contravenes Constitutional Principle IV, requiring that the constitution be made binding on 'all organs of state' and thereby implying that it is not to be made binding on private persons as well.

1.2 Furthermore, Constitutional Principle II requires that the fundamental rights in the bill of rights be 'provided for by ... justifiable provisions'. This means that the rights guaranteed must be clear and specific, and must give rise to certain remedies which are unambiguously enforceable. Horizontal application, however, unsettles well established legal remedies, and requires the courts to devise new remedies instead. This is likely to create difficulties in interpretation and enforcement, and is inconsistent with the requirement in Constitutional Principle II that the guaranteed rights be 'justifiable'.

1.3 Moreover, wherever a right applies horizontally, the legal effect is to generate a new constitutional cause of action not governed by existing law. To adjudicate these new causes of action, the courts are obliged to develop new law. This gives the judiciary an unprecedented law-making function, extending beyond its present interpretative role. This contradicts Constitutional Principle VI, which requires a 'separation of powers' between the legislature and the judiciary

1.4 An attempt has been made to cater for new constitutional causes of action in section 8(3), which requires the courts - in adjudicating horizontal rights - to 'apply, or where necessary, develop the common law'. This provision, however, is ambiguous. It could mean that where a constitutional cause of action appears to overlap with an existing cause of action governed by existing common law, the courts must apply the existing common law rather than develop new law. The section, however, also obliges the courts to develop new common law 'where necessary'. Since the common-law has never regulated guaranteed rights applied horizontally, the development of new law may be 'necessary' in all instances. In developing new common law in this way, the courts will be making rather than interpreting the relevant rules. This contradicts the separation of powers required by Constitutional Principle VI.

1.5 Section 8(3) is also anomalous in that it enjoins the courts, in adjudicating horizontal rights, to apply the common law but not customary law or statute. Legislation, it seems, can be applied only where it has specifically been framed so as to 'give effect' to a right in the bill which applies horizontally. Existing legislation has not been framed in this way. Judges must therefore make new common law even in spheres

where legislation and customary law might otherwise have applied. This, again, contravenes Constitutional Principle VI.

2. Socio-Economic Rights

2.1 Sections 26 and 27 of the text provide that everyone has 'the right to have access' to specified socio-economic benefits, including. adequate housing, health care, and sufficient' food and water. These sections introduce into the text rights which are not ;'justifiable' and which therefore contradict Constitutional Principle II.

2.2 The rights ostensibly conferred by section 26 and 27 are not justifiable for a number of reasons. There is no legal-certainty as to what a 'right-ht to have access' means, for the concept is unprecedented in our law. In addition, these provisions require the courts to pronounce upon whether the legislative and other measures adopted by the state to confer 'access' to these benefits are sufficiently 'reasonable' and 'progressive' to meet the requirements of these sections. They require the courts, in addition, to determine what the state's 'available resources' comprise.

2.3 Section 28(1)(c) of the text gives every child the right to 'basic nutrition, shelter, basic health care services, and social services'. These rights are also not justifiable as required by Constitutional Principle II. It is impossible for the courts to enforce these rights. In addition, they require judges to decide on the raisin. and allocation of revenue - matters which are not justifiable because they fall outside the ambit of established legal. principle. Furthermore, they require the judges to assume aspects of the executive role and thereby also infringe Constitutional Principle VI.

SOUTH AFRICA INSTITUTE OF RACE RELATIONS

J S Kane-Berman