NATIONAL PARTY

CASE NO: CCT/23/96

In the matter

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996 [B34A-96] AS ADOPTED BY THE CONSTITUTIONAL ASSEMBLY ON 8 MAY 1996

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

FILING SHEET

Document: Notice of intent to submit oral argument

Presented for service and filing by:

ATTORNEYS FOR THE NATIONAL PARTY OF SOUTH AFRICA

DYASONS
Leopont
450 Church Street
0002 PRETORIA
Our ref.: HSJ Kruger
Telephone: (012) 322 8600
Facsimile: (012) 322 0054 or (012) 320 1534

TO: THE REGISTRAR OF
THE CONSTITUTIONAL COURT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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NOTICE OF INTENT TO SUBMIT ORAL ARGUMENT

- 1 -

The President of the Constitutional Court has in the above matter in terms of rule 15 given directions *inter alia* that "[a]ny political party represented in the Constitutional Assembly that wishes to submit oral argument to the Constitutional Court in terms of rule 15(4) shall inform the Registrar of the Constitution Court by not later than the 20th, May 1996 that it intends to do so..."

- 2 -

We are representatives of the National Party of South Africa which is a political party represented in the Constitutional, Assembly.

- 3 -

We wish to avail ourselves of the invitation by the President of the Constitutional Court to submit oral argument to the Constitution Court in terms of rule 15(4) and wish to draw the Honourable Court's attention to two aspects, which are dealt with *seriatim* hereunder.

- 4 -

FIRSTLY, we wish to draw the Honourable Court's attention to Constitutional Principle XXVIII, read together with Constitution Principle II, in respect of the omission of the right to lock-out.

- 5 -

We shall submit that Constitutional Principle II envisages a due consideration of Chapter 3 of the Interim Constitution, 1993, and that the due consideration of section 27(4) and (5) of the Interim Constitution, 1993, results in the conclusion that subsections (4) and (5) are specific manifestations of the right to collective bargaining which are to be regarded as counterbalances to each other in the realisation of this right. We shall therefore submit for the Court's consideration that to include a peculiar mechanism of collective bargaining in respect of workers without affording a countervailing mechanism to an employer, disturbs the balance created in subsection (4) and (5), as envisaged by Constitutional Principle XXVIII. We shall submit that the requirement of Constitutional Principle XXVIII that the right to bargain collectively must be recognised and protected, requires the Constitution, 1996, to provide a mechanism for an employer to effectively exercise that right.

- 6 -

We shall furthermore submit for the Court's consideration that Constitutional Principle XXVIII requires the Constitution, 1996, to recognise and protect the right of employers to engage in collective bargaining, and that provision is to be made that they have the right to fair labour practices. The right of employer organisations to bargain collectively is recognised in clause

23(4)(c) of the Constitution, 1996, but the right of an individual employer to do so is not. We shall argue that it is incorrect to assume that individual employers can bargain collectively only through employer organisations.

- 7 -

SECONDLY, we wish to draw the Honourable Court's attention to Constitutional Principle XVIII item 2, read together with Constitutional Principle VI, in respect of the powers and functions of the provinces.

- 8 -

We shall submit the question for the Court's consideration of whether an erosion of provincial competencies and powers may have taken place in respect of financial and fiscal issues.

- 9 -

We shall further submit the question for the Court's consideration of whether the effect of subclause 146(2)(c) of the Constitution, 1996, is to substantially diminish provincial powers and competencies.

- 10-

We shall finally submit the question for the Court's consideration of whether the effect of clause 146(4) of the Constitution, 1996, is to oust the court's jurisdiction to enquire into the necessity of national legislation, thereby substantially diminishing provincial powers and competencies.

-11 -

The leader of the National Party of South Africa, Mr F W de Klerk, in his speech before the Constitutional Assembly on 8 May indicated the National Party would vote for the Constitution although it was not a perfect Constitution. The above submissions will be made in this context In order to enable the Honourable Court to ascertain the validity of the questions raised.

SIGNED at CAPE TOWN on this 20th day of May 1996.

_____

DJ DU PLESSIS
REPRESENTATIVE OF THE NATIONAL PARTY

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 23/96

EX PARTE : THE CONSTITUTIONAL ASSEMBLY

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

FILING SHEET

DOCUMENT: **WRITTEN ARGUMENT ON BEHALF OF THE NATIONAL PARTY OF SOUTH AFRICA**

SIGNED at **PRETORIA** on this **4th** day of **JUNE 1996**

(sgd) HSJ KRUGER
Attorneys acting on behalf of the
National Party
DYASON
Leopont Building
Church Street
PRETORIA
Ref: HSJ KRUGER/M CAPAZORIO/nj

TO: The Registrar of the
Constitutional Court
JOHANNESBURG

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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INTRODUCTION

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INTRODUCTION

1 . The National Party of South Africa *("the National Party")* voted in favour of the new constitutional text *("the new Constitution")* passed by the Constitutional Assembly and submitted for certification to the Constitutional Court in accordance., with the provisions of section 71 of the Constitution of the Republic of South Africa, 200 of 1993 *("the interim Constitution").*

2. The reasons why the National Party voted for the new Constitution are of political nature. Reference to them here would be inappropriate.

3 . However, it supported the adoption of the new Constitution secure in the knowledge that although neither it nor its expert advisers could authoritatively determine whether or not it complies, in every respect, with the Constitutional Principles contained in Schedule 4, this Court, as the ultimate judicial guarantor of its constitutionality, is charged with the responsibility of independently and authoritatively certifying such compliance and thus unequivocally formalising and legitimising the country's legal foundation.

4. Having supported the adoption of the new Constitution, the National Party would have preferred to assist the Court in a more neutral fashion than that contemplated by Direction 2 of the Directions issued in terms of Rule 15 on 13 May 1996. The notice of intent to submit oral argument bears testimony to this fact.

5. Upon analysis (of which the Court will have the benefit) it has become clear that

5.1 the entitlement to present oral argument to the Court as of right, can only be exercised if it takes the form of objections to certification of the new Constitution; and

5.2 the aspects of the Constitution referred to in the notice of intent to submit oral argument involve others inextricably linked therewith.

6. Consequently the National Party objects to the certification of the new Constitution, essentially because -

6.1 powers and functions of the provinces provided for in the new Constitution are substantially less than and substantially inferior to those provided for in the interim Constitution;

6.2 of the omission of employers' right of recourse to the lock-out purpose of collective bargaining.

(The relevant clauses, sections and Constitutional Principles will be identified in the process of the development of what must necessarily be termed the *"grounds of objection".)*

THE CONSTITUTIONAL SCHEME

(a) The Constitutional Principles

7. Section 71(1)(a) of the interim Constitution provides that a constitutional text comply with the Constitutional Principles contained in Schedule 4.

8. Subsection (2) provides as follows:

"The new constitutional text passed by the Constitutional Assembly, any provision thereof, shall not be of any force and effect unless Constitutional Court has certified that all the provisions of such comply with the Constitutional Principles referred to in subsection (1)(a)."

9. In Executive Council, Western Cape Legislature, and Others v President the Republic of South Africa and Others 1995 (4) SA 877 (CC); 1995 (10), BCLR 1289 (CC) paras 29-30, the President of the Court described the Constitutional Principles in the following terms:

"They represent principles which were agreed upon and adopted by the Negotiating Council of the Multi-Party Negotiating Process to provide definitive guidelines for the drafting of the final Constitution..... That they have a significant role to play is obvious. The precise ambit of that role is what is in dispute.

In the Preamble the Constitutional Principles are described as a 'solemn pact' in accordance with which the elected representatives of all the people of South Africa should be mandated to adopt a new Constitution. "

10. At para 37 he continued as follows:

"The language of the Constitution itself provides a strong indication of the applicability and overriding purpose of the Constitutional Principles. ... Various provisions of the current Constitution prescribe how the new Constitution should come about and the Constitutional Principles form part of the future-directed framework, as do certain other provision contained elsewhere in the current Constitution. "

See also: Basson South Africa's Interim Constitution (revised edition (1995)) at 104 and 365;
Van Wyk et al Rights and Constitutionalism: The New South African Legal Order (1994) at 159.

11. Although the Constitutional Principles are *"guidelines"*, section 71(1) of the interim Constitution is nonetheless unequivocal in its requirement that the new Constitution should comply with these guidelines. In this context the President's qualification of this description by the adjective *"definitive "* is significant.

12. The first question which arises, particularly in respect of the Constitutional Principles which relate to jurisdictional areas (functions and powers) of the various tiers of Government, is whether they should be read as a whole collectively constituting a standard against which the constitutional text as a whole must be measured, or if the Court should apply each one separately and in isolation? Secondly, particularly as regards Constitutional Principle XVIII item 2, one is faced with the question whether each

provision of the new Constitution must be measured in isolation against its counterpart in the interim Constitution or whether the Court should compile a balance sheet and determine, with reference to the end result, whether or not provincial powers and functions are substantially less than or substantially inferior to those provided for in the interim Constitution?

13. As far as the first question is concerned, it is submitted that the Constitutional Principles must be read as a whole constituting, as they do, a standard against which the constitutional text must be measured. That does not mean that a provision in the new Constitution cannot render it uncertifiable by reason of its non-compliance with a single Constitutional Principle. It means that the scope and ambit of Constitutional Principles themselves, must be determined with reference also to other Constitutional Principles. As far as the second question is concerned, it is submitted that the Court should determine the significance of individual provisions in the context of jurisdictional areas and determine whether or not in respect of such provisions there is a substantial diminution. In addition, the Court should take a global comparative view of the nett end result. Even though the comparison of individual provisions may not yield a substantial diminution, the overall result may well. It goes without saying that the new Constitution may be found wanting on both scores.

14. Regarding the functional areas of the national and provincial governments respectively, the provisions particularly of Constitutional Principles XVI to XXVII will require thorough analysis. Although the provisions of most of these are reasonably clear, the Court is referred to the following features:

14.1 In a number of instances terminology is used which, in the final analysis,, may be difficult to apply such as *"substantially less", "substantially inferior"* (XVIII.2), *"appropriate and adequate", "function effectively", "financial viability"* (XX), *"most effectively", "essential national standards", "unreasonable action", "necessity ", "where uniformity... is required"* and *"where mutual co-operation is essential or desirable "* (XXI).

14.2 Particularly as regards the concepts *"substantially less " and "substantial inferior"* the Court will have to develop a yardstick against which to measure provincial functions and powers. In this regard Erasmus Provincial Government under the 1993 Constitution. What direction will it take? (1994) 9 SA Public Law 407 at 418 states:

> *"The Constitutional Principles contained in Schedule 4 have also be amended. Principle XVIII now guarantees the present range of provincial powers and functions as a minimum. They may be increased in the final Constitution, not diminished. They 'shall, not be substantially less than or substantially inferior' to those provided for in the 1993 Constitution. "*

14.3 Of the five definitions in the Oxford English Dictionary (2nd edition) it is submitted that the fourth, which reads as follows, conveys the true meaning of *"substantially"* in the context of Constitution Principle XVII item 2:

> *"In all essential characteristics or features; in regard to everything material; in essentials; to all intents and purposes in the main ".*

See Lawson & Kirk v South African Discount and Acceptance Corporation (Pty) Limited 1938 C.P.D. 273 at 279;
Western Bank Ltd v Registrar of Financial Institutions and Another 1975 (4) SA 37 (T) at 44C-F where the Court observed as follows:

> *"The word 'substantially' in the definition means 'in substance', 'in all essential characteristics or features'. According to the Larger Oxford English Dictionary 'substantially' means (1) essentially, intrinsically, (2) actually, really, and (3) in all essential characteristics or features; in regard to everything material in essentials; to all intents; in the main ".*

14.4 Constitutional Principles XVIII item 2 and XIX do not merely have a restricted application in respect of the list of functional areas in Schedule 6 of the interim Constitution, they apply to all provisions which deal with demarcation of jurisdictional areas.

14.5 Although Constitutional Principle XIX applies to the allocation of powers to the national and provincial governments respectively and does not make provision for conflict regulations, it does not follow that clause 146 cannot fall foul of its requirements. Clearly overrides are capable of negating Constitutional Principle XIX.

14.6 *The "non-intervention* " Constitutional Principle XXII does not apply to the original demarcation of jurisdictional areas, but in respect of the manner in which the national government subsequently exercises its functions and powers.

15. The *"definitive guideline* " postulated by Constitutional Principle XVIII item 2, read as follows:

> *"The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution."*

16. An analysis of this Principle in its constitutional setting and against on an the new Constitution is required.

16.1 A comparison between the provision of the interim Constitution and the new Constitution is required.

16.2 Such comparison has to take into account the full complement of power; and functions which provinces are entitled to perform as well as those, which they may lawfully take up.

16.3 Quantitative as well as qualitative comparison is required.

16.4 The Constitutional Principles must be read as a whole. They embody a standard against which the new Constitution as a whole must be measured

16.5 As far as Constitutional Principle XVIII item 2 itself is concerned, the standard laid down for compliance is phrased in negative (but not absolute) terms inasmuch as it requires that there may not be substantial diminution of provincial powers and functions.

16.6 Since the term is not qualified, the *"powers and functions"* of provinces are also to be measured in their totality, i.e. as a whole or a *"package"* comprising the sum total of the legislative and executive competences of provinces.

17. Although the number of variable (and inexact) factors involved are not conducive to accurate comparison, Constitutional Principle XVIII item 2 is inflexible in its requirement that compliance has to be established by the application of measurement or comparison - not value or moral judgment. In S v Zuma and Others 1995 (4) BCLR 401 (CC) paras 17 and 18 Kentridge AJ stated as follows:

"While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. "

18. It is submitted that section 71 read with Constitutional Principle XVIII item 2 requires, in the first instance, an objective and dispassionate attempt to quantify and categorise in terms of scope and quality, the functions and powers conferred on provinces by the interim Constitution (including those in respect of which there is an entitlement) and those to be conferred on them by the new Constitution.

19. In this particular instance, having regard to the background of the Principle, particularly its late insertion by means of an amendment to the interim Constitution and the (political) events surrounding that insertion, it is submitted that it was designed precisely to provide the *"purpose"* which a Court may otherwise be called upon to divine. The strict - in fact almost mathematical requirements of this Principle cannot be avoided.

20. On the other hand, the measurement of such abstract and variable quantities qualities is a daunting exercise, further compounded by the following considerations:

20.1 In terms of the scheme of functional division provided for in the interim Constitution, only the Court itself is competent to authoritatively pronounce upon the distribution of legislative and executive powers and functions as between the national and provincial levels of government something which it has not yet done. (As to features of the functional division provided for in section 235 of the interim Constitution, see paras 164 to 176 of the judgment of Kriegler J in Executive Council. Western Cape Legislature, and Others v President of the Republic of South Africa and Others supra and as to the scheme of section 126 read with Schedule 6 of the interim Constitution, para 74 of the judgment of Chaskalson P in the same case; para 25 of the judgment of Mahomed DP in, Premier of KwaZulu-Natal and Others v the President of the Republic of South Africa and Others 1996 (1) SA 769 (CC); 1995 (12) BCLR 1561 (CC); paras 13 and 14 of the judgment of Chaskalson P in In re: The National Education Policy Bill, No. 83 of 1995 1996 (4) BCLR 518 (CC).)

20.2 The manner in which powers and functions are conferred on provinces in the new Constitution differs significantly from the method followed in the interim Constitution, thereby further complicating comparison.

20.3 The use of vague and unqualified terms such as *"substantially"* and "*functions and powers"* is also not conducive to exact comparison or measurement.

THE COMPARATIVE ANALYSIS

(b) The extent and nature of provincial powers and functions in terms of the interim Constitution

21. With the exception of functions specifically allocated to provinces in terms particular sections of the interim Constitution, the conferral of functions and powers on provinces generally was *"conditional"* in two respects:

21.1 Firstly, existing legislation was not assigned unless the province had the necessary infrastructure to administer the particular function. (This does not, however, prevent provinces from adopting new legislation in respect of such matters regardless of whether existing laws have been assigned.)

21.2 Secondly, provinces are not obliged to exercise their competences.

22. Consequently, both as regards the assignment of powers in accordance with the provisions of section 235(8) of the interim Constitution, as well as within the ambit of section 126 read with Schedule 6, provincial asymmetry is a possibility. This does not, however, detract from the original nature of the competence available to provinces to exercise or assume certain powers and functions.

23. The (at least potentially) original and indivisible nature of provincial legislative (and consequently executive) functions is underlined by the wording of section 235(9) which makes it clear, constitutionally, where the capacity to administer legislation pertaining to those aspects of Schedule 6 functional areas which do not fall within the ambit of paragraphs (a) to (e) of section 126(3) resides.

24. For reasons already canvassed it is not possible to determine the precise scope of provincial functions. The vague and general nature of provisions relating to the provincial dispensation in the interim Constitution can be explained with reference to the need to consolidate the elements of the fragmented second tier administrative systems which the interim Constitution repealed and for which it substituted a single provincial dispensation involving the establishment of nine provinces.

25. The provisions which established this dispensation are deliberately flexible and aimed not so much at providing content to provincial functions and powers from the outset as providing a legal framework in terms of which and with reference to which such powers and functions may, in stages or by degree, be assigned, exercised, assumed and ascertained and such content determined.

26. Given the assumptions on which this approach is based, such as that -

26.1 the central and provincial governments will approach provincial governance in a co-operative spirit;

26.2 conflict between levels of government will be avoided or minimised; and

26.3 that bureaucratic interaction would ultimately lead to a practical division of functions and powers between the various levels of government,

the functional allocation is clearly sensible.

27. Such an approach was designed primarily to encourage voluntary inter-governmental co-operation, and not to provide a (potentially premature and thus damaging) rigid and mechanical distribution of functions and powers between levels of government.

28. Essentially the respective legislative (and executive) competences of the national and provincial legislatures in respect of Schedule 6 functional areas must described in terms of the notion of concurrency.

22 An interesting refinement to section 126 has taken place through the mechanism of the Constitution of the Republic of South Africa Amendment Act, 2 of 1994.

Prior to its amendment by that Act, subsection (1) provided as follows:

> *"A provincial legislature shall, subject to subsections (3) and (4), have concurrent competence with Parliament* to make laws for the province *with regard to all matters which fall within the functional areas specified in Schedule 6"* (emphasis supplied).

The introductory part of subsection (3) provided as follows:

> *"An Act of Parliament which deals with a matter referred to in subsection (1) or (2) shall prevail over a provincial law inconsistent therewith, only to the extent that .....*"

and then followed paragraphs (a) to (e).

29. Act 2 of 1994 (through sections 2(a) and (b) thereof) has now removed the vague adjectival description of *"concurrent"* and made the intention clearer by legislating with explicit separate reference to a provincial legislature (in section 126(1), as amended by section 2(a) of Act 2 of 1994) that both may make laws in accordance with exactly the same criteria. The intention, it is submitted, is to make concurrency even clearer.

30. The manner in which provision has been made for the allocation of legislative competences to the national and provincial levels of government provided for in the Constitution does, however, not fit neatly into the accepted existing schemes.

Leonardy South Africa's Constitutional Provisions on Devolution and Federalism in De Villiers Birth of a Constitution (1994) 156-157.

31. This may be ascribed to the difficulties experienced in achieving political consensus on the extent of the legislative competence of the provinces and, consequently, to efforts to increase the legislative autonomy of provinces through repeated amendments to the relevant clauses during the drafting process. It also explains the intensity of the debate as to whether the Constitution creates a federal or unitary constitutional dispensation.

See, for example, Basson South Africa's Interim Constitution (revised edition 1995) xxiv-xxv.

32. Section 126 is the principal provision in the Constitution regarding the division of functions between the provincial and national legislatures. Although it is not the only section which confers legislative authority on provinces (see, for example, sections 114, 135, 160, 213 and 217), it was clearly intended to lay down the basis for a distribution of functions between provinces and the national government.

33. The functional areas listed in Schedule 6 are vaguely defined, as are the constitutional overrides in section 126(3)(a) to (e). The processes leading to the establishment and development of provincial government are clearly aimed at in incremental and experimental approach. See, for example, sections 98(2), 101(3), 155-160, 163-173 and 234-237. This is in keeping with the unresolved issue of federalism, specifically flagged (in the Constitutional Principles) as requiring to be addressed in the final Constitution.

34. As has been indicated, the legislative competences of the provincial and national legislatures in respect of aspects of Schedule 6 functional areas must be described in terms of the notion of *"concurrency "*.

29. However, the scheme within which such concurrency has been provided for defies description in terms of any existing conceptual framework. Leonardy op cit 157 *et seq* points out that the main problem is that explicit provision has not been made for the disposal and description of so-called residual powers. Instead of classic concurrency, he argues, a unique system of *"co-operative"* concurrency has been provided for. (As regards the amended section 126, see further Leonardy op cit 162-163).

35. Leonardy's analysis can be summarised as follows:

35.1 The notion of exclusivity cannot be reconciled with the provisions of section 126(2A) and, therefore, the competence of a provincial legislature must be described in terms of the notion of *"concurrency "*.

35.2 The concept is, however. misapplied since no clear identification of or allocation of residual powers is made; the model provided for in section 126 is based on the incorrect assumption that the notion of concurrency should be married to that of intergovernmental co-operation; and section 126 was drafted in a manner which qualifies (although not precisely) the legislative competence of Parliament in terms which create the illusion that section 126 allocates exclusive powers to provinces.

35.3 Having regard to the history of the Constitution-making process, the top-down approach to federalism, and considerations of logic, it could not have been the intention to give exclusive competence to provinces. Therefore the idea must have been to give concurrent powers to them.

35.4 In the result section 126 creates (in an unsystematic way) a form of legislative competence which appears to provide for concurrency and to leave some sort of power to provinces to dispose of *"residual functions"* (i.e. those aspects of

Schedule 6 functional areas not covered by section 126(3)), but which, in his opinion, is in fact illusory because of certain logical and practical (not legal) considerations.

36. It is, however, submitted that although both national and provincial legislatures have competence in respect of all aspects of Schedule 6 functional areas, the nature and legal status of the relevant legislative competences differ depending on which particular aspect of a Schedule 6 functional area it applies to. Thus it can be said, for want of more suitable, terminology, that a provincial legislature possesses what in fact amounts to concurrent but potentially overriding legislative competence in respect of some (as yet undefined) aspects of the Schedule functional areas, if it chooses to so legislate, and enjoys concurrent but potentially subordinate legislative competence in respect of the remaining dimensions of such functional areas. (The introduction of a distinction between separate facets of functional areas has a precedent in Canadian law: *"This doctrine has become, known as the 'double aspect' doctrine: it would perhaps be clearer if it had become known as the 'double matter' doctrine, because it acknowledges that some kind of laws have both a federal and a provincial 'matter' and are therefore competent to both the Dominion and the provinces. "* (Hogg Constitutional Law of Canada 3rd edition (1992) 381).) If viewed from the perspective of the Canadian division of functions, the South African concept of "*functional areas"* would closely correspond to the subject-matter dealt with by laws characterised by so-called *"double aspects"*.

37. Similarly, Parliament enjoys overriding legislative competence in respect of those same aspects of Schedule 6 functional areas in regard to which provinces possess concurrent but potentially subordinate legislative competence. Conversely Parliament has concurrent but potentially subordinate legislative competence in respect of those aspects of Schedule 6 functional areas in regard to which provinces possess overriding legislative competence.

38. Parliament therefore enjoys overriding competence in respect of those aspects of Schedule 6 functional areas described in section 126(3)(a) to (e) (provided its legislation applies uniformly in all parts of the Republic), whilst the provincial legislatures' competence is thereby reduced to a potentially subordinate concurrent competence.

Basson op cit xxv endeavours to summarise the result in this way:

> *"In addressing the issue of whether the interim Constitution introduces a federal as opposed to a unitary state, the real question is whether the provinces have exclusive competence its those areas which are demarcated as their functional areas. A careful study of the provisions of the interim Constitution reveals that there is no question of exclusive legislative powers for the nine provincial legislatures. In essence, the provinces and Parliament exercise concurrent jurisdiction with regard to the functional areas of provincial legislative competence."*

He adds (op cit 199):

> *"In the same vein, Act 2 of 1994 amended s 126 in an apparent attempt to boost the legislative competence of provincial legislatures vis-à-vis the legislative competence of the national legislature (Parliament). Initially, s 126 provided expressly for the so-called concurrent legislative competence of Parliament with regard to all the functional areas mentioned above. Section 126 also expressly provided that a Parliamentary Act will prevail over a provincial law inconsistent therewith only to a certain prescribed extent. It is submitted that the amended provisions of s 126 in effect, obtains this very same result even though it is not stated expressly that Parliament has 'concurrent' powers in the areas of provincial legislative competence: s 126(2A) states that Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters falling within the legislative competence of provincial legislatures (spelt out in subsections (1) and (2)) - the last-mentioned subsection deals with the recognised principle that all matters reasonably necessary for or incidental to the effective exercise of those powers expressly conferred are impliedly included under the expressly granted legislative competences) ... Accordingly, it can be stated unequivocally that the provinces do not have autonomous powers with regard to their designated areas of legislative jurisdiction and therefore are not in the? same position as, for instance, the component states of the United States of America, which enjoy autonomous legislative powers in their designated functional areas vis-a-vis the Federal Legislature (Congress)."*

As De Villiers The Constitutional Principles: Content and Significance in De Villiers (ed) op cit 47 points out, despite claims to that effect, the fact that Constitutional Principle XIX provides, inter alia, that the powers and functions the provincial levels of government shall include exclusive powers does not mean that section 126 provides for such exclusive powers; on the contrary, the section provides *"only for concurrent and no exclusive powers to the provinces".*

39. This approach appears to have found favour with the Constitutional Court. In Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others Mahomed DP, speaking on behalf of the Court, rejected an argument that a constitutional amendment offended the division of powers identified in section 126 read with Schedule 6 of the Constitution. At para 25 he stated as follows:

> *"This submission was also, wisely, not pressed in argument. It appear to assume that s 126, read with Schedule 6 of the Constitution, gives to a province the exclusive legislative competence to deal with matters which fall within the functional areas specified in Schedule 6. This is a plainly incorrect assumption. Section 126(1) (read with Schedule 6) does give to a provincial legislature the jurisdiction to make laws dealing,* inter alia*, with indigenous law, customary law and local government. But it is made expressly clear by s 126(2A) that Parliament also has that power."*

40. In Executive Council of the Western Cape Legislature and Others President of the Republic of South Africa and Others Chaskalson P stated as follows at para 74:

> *"The new Constitution allocates legislative power to Parliament and to the provincial legislatures. In terms of s 37 Parliament is given legislative competence over the whole of the national territory and in respect of all matters. The legislative competence of the provincial legislature, dealt with in s 126 of the Constitution is restricted. They have concurrent competence with Parliament in respect of the matters referred to in Schedule 6 to the Constitution and their territorial competence is limited to the provincial territory. Section 126(3) makes provision for the way in which any conflict that might arise between national laws and provincial laws in this field of concurrent powers is to be resolved. If there should be such a conflict, national laws are given precedence insofar as they meet criteria specified in s 126(3)(a) - (e) and provincial laws are given precedence in respect of other matters."*

41. The interim Constitution clearly confers original legislative and executive functions and powers on provinces. In addition, the mechanism in terms of which existing laws falling within the functional domain of provinces have to be assigned to competent authorities within the jurisdiction of the governments of province also provides support for in argument to the effect that provinces enjoy original and exclusive competence in respect of particular (as yet unspecified) aspects of Schedule 6 functional areas, i.e. those areas in respect of which Parliament is not able to legislate in terms of paragraphs (a) to (e) of section 126(3) of the interim Constitution.

See para 173 of the judgment of Kriegler J in Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others.

Specific sections of the interim Constitution also confer exclusive functions and powers on provinces in relation to matters such as local government, police and a provincial public protector.

42. Finally, it should be emphasised that what ought to be compared is not restricted to the extent of the functions and powers actually exercised or assumed by individual provinces, but all the legislative, executive, administrative and bureaucratic functions and powers that the interim Constitution confers; albeit *"conditionally"* subject to provinces exercising a discretion as to the extent of the, functions and powers each sees fit to exercise or assume with reference to its own particular circumstances.

(c) The allocation of powers and functions in terms of the new Constitution

43. An analysis of the general scheme of functional distribution reveals that basically the same flexible and incremental approach to the determination of respective areas of functional jurisdiction has been followed.

44. There are, however, important differences in the general scheme of functional allocation which inhibits a direct comparison between current and future functions and powers. An attempt will nevertheless be made to show that the differences between the two dispensations consistently yield substantial qualitative ant quantitative erosion of current provincial functions and powers.

45. **THE COLLECTIVE ROLE OF PROVINCES IN RESPECT OF THE NATIONAL LEGISLATIVE PROCESS**

45.1 In terms of the new Constitution each province will be represented in the. National Council of Provinces *("the Council")* by a single delegation comprising ten delegates (clause 60).

45.2 The Council participates in the national legislative process on differentiated basis (clauses 74 to 77).

45.3 Bills falling outside the functional areas listed in Schedule 4 (which contains a list of functional areas of concurrent national and provincial legislative competence) must be referred to the Council for consideration. If the Council proposes amendments to or rejects such a Bill, the National Assembly may pass it again, either with or without amendments, whereafter it must be submitted to the President for assent (clause 75(1)).

45.4 In such cases each individual member of the Council has one vote and the question is decided by a majority of the votes cast (clause 75(2)).

45.5 When the National Assembly passes a Bill falling within a functional area listed in Schedule 4, the Council may, following a process of mediation, effectively veto such a Bill unless the National Assembly passes it version of the Bill or the Mediation Committee's version thereof by vote of at least two-thirds of its members (clause 76(1)).

45.6 When dealing with Bills of this nature, however, clause 65's voting procedure applies. This means that each province has one vote which is cast on behalf of the province by the head of its delegation and that all questions before the Council are agreed to when at least five provinces vote in favour of a question.

45.7 A Bill amending the Constitution requires to be passed by the Council only if it -

45.7.1 affects the Council;

45.7.2 alters provincial boundaries, powers, functions or institutions; or

45.7.3 amends a provision that deals specifically with a provincial matter (clause 74(1)).

45.8 Section 62(1) of the interim Constitution, however, provides that a Bill amending the interim Constitution must, for its passing by Parliament, be required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses.

45.9 The mere fact that the Council plays no role in respect of constitutional amendments not falling within the clause 74(1)(b) category represents a particularly significant diminution of the collective provincial participation in the national legislative process.

45.10 The position is rendered more acute when the inter-relationship between subclauses (1), (2) and (3) of clause 74 is analysed:

45.10.1 Subclause (3) (which provides that if a Bill contemplated in subclause (1)(b) concerns only a specific province or provinces, the Council may not pass it until the Bill has been approved by the relevant provincial legislature or legislatures) is susceptible to amendment in terms of a constitutional amendment passed in accordance with subclause (1).

45.10.2 At first glance, this does not appear to differ from the provisions of section 62(2) of the interim Constitution which can be amended by a Bill passed separately by a majority of at least two-thirds of all the members of both Houses.

45.10.3 In both cases the capacity of an *"affected province"* to veto amendments to provincial powers, functions or boundaries susceptible to amendment.

45.10.4 The difference, however, concerns the way in which two-thirds majority is attained in the second House.

45.10.5 Since clause 65 applies to decisions of the Council for purposes of clause 74, the collective value of the votes of minority parties in the provinces would be capable of being effectively negated (depending on the procedure to be provided for in a future Act of Parliament in terms of which provinces will confer authority on their delegations to cast votes on their behalf). Such an Act will not involve an amendment to the new Constitution.

45.11 Whereas in terms of the current dispensation the collective value of the votes of individual members of minority parties might far exceed 33%, party enjoying the, support of far less than two-thirds of the members of the Council could become capable, by virtue of the distribution of such support, to control the votes of six

provinces and so obtain the required two-thirds majority, viz the votes of six provinces.

45.12 This reasoning follows clause 65 wherever it applies. Depending on what the provisions of clause 65(2) yield, this could lead to a situation where (on the assumption that provinces confer authority on their delegations to cast votes on their behalf by means of an ordinary majority of their members in the Council) a party enjoying 40% percent of the support of individual Councillors could secure the votes of six provinces.

45.13 Even if the uniform procedure contemplated in clause 65(2) were to require a two-thirds majority to confer authority on a provincial delegation to cast a vote on behalf of its members, a party enjoying the support of only 46% of all Councillors would theoretically be capable of commanding the support of six provinces.

45.14 It is consequently submitted that the provinces' participation in the legislative process (comparatively speaking) will be significantly diminished for the following reasons:

45.14.1 The manner of the appointment of delegations adds little to *"directness"* of provincial representation.

45.14.2 The fact that provinces are denied a role in respect of a vast area of possible constitutional amendments, substantially diminishes their legislative powers.

45.14.3 The fact that clause 65 governs (from a provincial perspective most of the important decisions that will have to be made by the Council. This also seriously undermines the principle of proportional representation of minority interests (as to which see Constitutional Principles XVIII, XIV and XV).

46. <u>OTHER POWERS AND FUNCTIONS OF PROVINCES</u>

46.1 The following comparison concerns the relationship between the national and provincial levels of government in respect of a number of functions and powers in quantitative and qualitative terms.

46.2 The new Constitution envisages a relatively complex model of functional distribution. For purposes of comparison, Schedule 4 is clearly important. The problems referred to earlier regarding the precise extent of provincial competence in relation to the functional areas concerned has not been addressed by the new Constitution; arguably for the same reasons.

46.3 The only possible aid is to revert to a direct comparison between Schedule 6 of the interim Constitution and Schedules 4 and 5 of the new Constitution.

46.4 This reveals that the functional areas of local government and tertiary educational institutions, other than universities and technikons, and roads have been omitted from Schedule 4. A few other functional areas have been subjected to some form of qualification; for example, provincial media services and indigenous law and customary law. The fact that a functional area such as police has been made subject to different provisions in the new Constitution itself, presupposes an analysis of those, provisions in order to determine whether or not there has been diminution of provincial functions and powers in respect thereof.

46.5 On the other hand, a number of new functional areas have been added such as -

46.5.1 *"Administration of indigenous forests";*

46.5.2 *"Disaster management";*

46.5.3 *"Pollution control ";*

46.5.4 *"Population development";*

46.5.5 *"Property transfer fees";*

46.5.6 *"Provincial public enterprises"* in respect of the functional are in that Schedule and Schedule 5;

46.5.7 *"Public works "* (to the extent described); and

46.5.8 *"Vehicle licensing".*

46.6 Schedule 5 Part A introduces a number of functional areas not previously included in Schedule 6 of the interim Constitution.

46.7 The following general remarks require to be made at this point:

46.7.1 All the functional areas on the concurrent list of competences are subject to the overrides provided for in clause 146.

46.7.2 All the functional areas on the list of exclusive competences are subject to the overrides referred to in clause 147(2).

46.7.3 Where a matter is governed in terms of other provisions of the Constitution, such as police (clauses 205-208) and local

government.(Chapter 7), the comparison will require an analysis of the relevant constitutional provisions and their counterparts.

46.8 On analysis it is clear that certain significant functions and powers provided for in the interim Constitution (and which can only be describes as exclusive and original) are destined to fall away. For example -

46.8.1 the competence to establish Provincial Service Commission (clause 196);

46.8.2 the competences in respect of the police (clauses 205-207);

46.8.3 the competence to appoint a provincial public protector (clause 182).

46.9 The competence to adopt provincial constitution is now regulated in much greater detail and, as a result, even more restricted.

46.10 Certain financial constraints (which do not currently exist) have also been provided for; for example, the requirement that provinces fund functions provided for by their constitutions but not specifically foreseen in the new Constitution out of their own resources.

46.11 *The "exclusive"* powers in Schedule 5 (read with clause 147(2)) are susceptible to national legislative *"overrides"* under even more widely phrased circumstances than the so-called *"concurrent"* Schedule 6 functions of the interim Constitution.

46.12 Clause 149 is framed far more absolutely and rigidly than its counterpart, section 126(5). The latter specifically foresees the possibility of partial prevalence and not the inevitable suspension of entire laws. In In re: The National Education Policy Bill, No. 83 of 1995 at para 16 Chaskalson P stated as follows:

> *'The legislative competences of the provinces and Parliament to make laws in respect of schedule 6 matters do not depend upon section 126(3). Section 126(3) comes into operation only if it is necessary to have resort to it in order to resolve a conflict. If the conflict is resolved in favour of either the provincial or the national law, the other is not invalidated; it is subordinated and, to the extent of the conflict rendered inoperative."*

To the extent that clause 149 will render entire laws inoperative, it thus affords another example of an attempt to curtail provincial legislative, competence.

46.13 In terms of the interim Constitution the executive authority of provinces is directly and automatically linked to their legislative authority (section 144(2)).

46.14 The new Constitution envisages a much more qualified system executive authority. In addition to the specific description (qualification of the manner in which provincial executive functions will have to be exercised as provided for in clause 125 (and similarly in respect of the Premier as provided for in clause 127), provision is made in clause 100 for national intervention in the provincial executive function in the event of a province failing to fulfil executive obligations. This is currently not provided for in the interim Constitution and, more significantly, in direct violation of Constitutional Principle XXII.

46.15 The extent to which such responsibility may be taken over in terms of clause 100 is described by reference to circumstances resembling those set out in paragraphs (a) to (e) of section 126(3) of the interim Constitution. This leads to a significant comparison. The description of the national competence provided for in clause 100 by reference to, broadly, the existing overrides in section 126(3), implies that there is no facet of provincial executive competence (and therefore legislative competence (see clause 125)), which is beyond the reach provided for in clause 100.

46.16 Put differently, every facet of provincial executive responsibility is susceptible to be taken over and exercised on behalf of such province by the national government at least to the extent contemplated in the current overrides.

46.17 This has one of the following implications -

46.17.1 in terms of the new Constitution provinces have no competences, which relate to functions outside the reach of the overrides presently contained in section 126(3); or, alternatively,

46.17.2 if the new Constitution in fact confers on provinces such executive (and by definition legislative) powers as they presently enjoy, clause 100 paves the way to deprive them of such powers in a previously unforeseen manner - clearly a substantial diminution of provincial executive powers.

46.18 In summary, provincial executive competences have been substantially diminished by virtue of -

46.18.1 "disconnecting" it from provincial legislative authority;

46.18.2 qualifying it in terms of clauses 125 and 127;

46.18.3 providing for the potential infringement of the functional and territorial integrity of provincial executive authority in terms clause 100; and

46.18.4 indirectly, by means of the limitation of the scope of provincial legislative authority, which consequently and by definition has the effect of reducing the scope of provincial executive authority.

(d) <u>Clause 146</u>

47. In this overall context clause 146 of the new Constitution is particularly significant for the comparative inquiry involving the scope of provincial powers and functions.

48. Subclause (2) sets out the circumstances under which national legislation concerning a Schedule 4 functional area will prevail over provincial legislation.

49. Clause 146(2)(b) is an entirely new national override. The current section 126(3)(b) of the interim Constitution (the nearest equivalent) is not nearly as wide. The vague requirement relating to uniformity across the nation in the interests of the country as a whole has been added. Subclauses (b)(ii) and (iii) see the introduction of the equally vague concepts of *frameworks"* and *"national policies"*. It is submitted that clause 146(2)(b) was not necessary for purposes of compliance with Constitutional Principle XXI item 2 and consequently falls foul of Constitutional Principle XVIII item 2.

50. Clause 146(2)(c)(v) also sees the introduction of an entirely new override. It wide and capable of justifying large scale intervention by national government.

51. In paragraph 22 reference was made to the fact that before its amendment by Act 2 of 1994 the introductory part of subsection (3) provided as follows:

> *"An Act of Parliament which deals with a matter referred to in subsection (1) or (2) shall prevail over a provincial law inconsistent therewith, only to the extent that ...* ".

52. By virtue of the amendment it now reads as follows:

> *"A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except insofar as ..."*

53. This resulted in what is said to be *"a complete turn-about in the scheme things"*. Erasmus op cit 417 who describes the significance of this amendment as follows:

> *"Provincial legislation now prevails over a national law inconsistent with it, except where the previous five grounds* (those referred to in paragraphs (a)-(e)) *apply and require national legislation. In addition a national act must apply uniformly in all parts of a country before it can prevail over a provincial law. Because the national parliament may still, under certain conditions, pass legislation on the topics mentioned in Sch 6, those areas cannot be described as*

completely exclusive to the provinces. But neither are they exclusive national powers. In terms of the new formula they are 'concurrent" in a qualified sense with a preference for national legislation. They are also not delegated powers. The provincial empowerment in this regard is original because it is provided for in the Constitution.

Technically this amendment creates a preference for provincial legislation. The national legislature bears an onus and will have to show why and to what extent its laws should prevail. "

54. Subclauses (2) and (3) of clause 146 envisages the reinstatement of the *status quo ante* by providing that in the circumstances set out therein national legislation shall prevail over provincial legislation.

55. By reversing the hierarchy between provincial legislative (and executive) competence and national legislative competence, the new Constitution will place the onus on provinces to show, in the event of inconsistency, that national legislation does not prevail by reason of the constitutional overrides provided for in clause 146 (the same applies to clause 147(2) which provides that national legislation of the nature contemplated in clause 44(2) prevails over provincial legislation in respect of the (exclusive) functional areas contained in Schedule 5).

56. The question which is raised by this new approach, is whether it affects provincial competences to a significant extent.

57. The incidence of the burden of proof is a matter of substantive law. It decides which party will fail if, after hearing all the evidence, a court is left in doubt.

Hoffmann & Zeffertt <u>South Law of Evidence</u> (3rd edition) at 385 and 396.

58. It follows that the shifting of the onus has profound consequences for the power and functions of provinces, particularly in the realm of the application of vague and general overrides.

59. Apart from the fact that new grounds which would justify the prevalence of national legislation have been introduced and the onus shifted (matters which by themselves would have the effect of substantially diminishing the legislative competence of provinces in respect of Schedule 4 functional areas) subclause (4) -

59.1 either removes a legislative determination for purposes of subclause (2)(c) from the realm of justiciability by the introduction of an irrebuttable presumption; or

59.2 creates a rebuttable constitutional presumption which will effectively further diminish the powers and functions of provinces.

If it involves an ouster of the jurisdiction of the courts rather than a presumption, it is clearly in conflict with Constitutional Principles VI and VII.

60. It is accepted that in some way or another effect had to given to the requirements of Constitutional Principle XXIII which provides that in the event of a dispute concerning the legislative powers allocated by the new Constitution concurrently to the national and provincial governments which cannot be resolved by the Court on a construction of the new Constitution, precedence must be given to the legislative powers of the national government.

61. This was done in clause 148 which provides as follows:

> *"If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution."*

62. It follows that not only is clause 146(4) clearly not required by any Constitutional Principle but, on the contrary, significantly erodes provincial competences contrary to the provisions of Constitutional Principles XVIII item 2, XIX, XXI item 6 and XXV without the sanction of any other Constitutional Principle.

63. Collectively the implications of the subclauses are exacerbated when viewed in conjunction with the submissions pertaining to the diminution of functions and powers which section 65 achieves.

(c) <u>Provincial finance and fiscal affairs</u>

64. A province is entitled, in terms of clause 227 of the new Constitution, to receive., an equitable share of revenue to enable it, *inter alia*, to exercise the functions allocated to it. The erosion of provincial powers and functions to which extensive reference has been made will in inevitably also erode its entitlement to access to and disposal of financial resources.

65. Clause 227(4) provides that a province would have to provide for itself any resources that it requires to fund functions which have their origin in provincial constitutions not specifically envisaged in the new Constitution. This represents a new burden not previously provided for or implied.

66. The omission of the contents of the current section 155(2) in which the sources of revenue in respect of which the provinces are entitled to an equitable share potentially diminishes their capacity to perform their powers and functions since they no longer have a guarantee that all the sources mentioned there will be take into account when an equitable share has to be determined.

67. In terms of the interim Constitution laws which provide for the division of revenue, the levying of taxes by provinces and the framework within which provinces may raise loans

have to be adopted by both Houses of Parliament sitting separately (sections 155(2A), 156(1A) and 157(IA)). The Senate consequently has a veto. In terms of the new Constitution such laws will have to be adopted according to the same procedures as laws dealing with concurrent matters (clause 76(4)(b)). In the final analysis the Council will not have a veto. This will diminish the role of provinces in the adoption of such legislation. In this regard, Basson op cit 197 states as follows:

> *"Furthermore, although the provincial legislatures do not enjoy fiscal competences (save for the one instance referred to below, an Act of Parliament must empower provincial legislatures to raise taxes - see s 156(1) (a)). Acts of Parliament which deal with crucial provincial financial matters, that is, Acts which deal with the provinces' share of revenue collected nationally (s 155); the levelling of taxes by provinces (s156); and the raising of loans by provinces (s 157); must be passed by the two Houses sitting separately - giving the Senate a veto over such legislation, which is crucial in determining the financial independence of provinces."*

68. The interim Constitution does not provide for the discontinuance of the transfer of funds to organs of state. This is now provided for in section 216 of the new Constitution and represents a potentially serious inroad into provincial powers and functions.

69. The framework legislation envisaged in clause 219 of the new Constitution (particularly subclause l(b) which envisages an upper limit for members of provincial legislatures) limits the provinces' current capacity in this regard (section 135(4)).

(f) <u>The omission of a lockout clause</u>

70. Constitutional Principle II provides as follows:

> *"Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, <u>which shall be drafted after having given due consideration to</u>* inter alia *<u>the fundamental rights contained in Chapter 3 of this Constitution</u>*" (emphasis supplied).

71. Constitutional Principle XXVIII provides as follows:

> *"Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices."*

72. Section 27 of the interim Constitution deals with labour relations and provides as follows:

"(1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lockout for the purpose of collective bargaining shall not be impaired, subject to section 33(1)" (emphasis supplied).

73. Clause 23 of the new Constitution provides as follows:

" (1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right -

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right -

(a) to determine its own administration, programmes and activities

(b) to organise;

(c) to bargain collectively; and

(d) to form and join a federation.

(5) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements" (emphasis supplied).

74. Clause 241 of the new Constitution provides as follows:

(1) A provision of the Labour Relations Act, 1995 (Act No. 66 of 1995) remains valid, despite the provisions of the Constitution until the provision is amended or repealed.

(2) A Bill to amend or repeal a provision of the Labour Relations Act, 1995 may be introduced in Parliament only after consultation with national federations of trade unions, and employer organisations.

(3) The consultation referred to in subsection (2), including identification of the federations to be consulted, must be in accordance with an Act of Parliament."

75. Expanding on the theme of the interim Constitution's provisions relating to National Unity and Reconciliation, Chaskalson P stated as follows at para 37 in **Executive Council, Western Cape Legislature v President of the Republic South Africa and Others** :

> *"It should be mentioned that the current Constitution is itself is a transitional measure, designed to tide the country over an interim period while a new Constitution is being drafted. Indeed, it proclaims itself as an 'historic bridge'; it was never intended to be the final destination. Thus while it brings about far-reaching changes in the governance of this country, it also prescribes and regulates the process leading towards the achievement of the final Constitution. In that sense the **historic bridge** is not just between the past, with all that characterised it, and the present which is governed by this Constitution, but also between the present and future, which will be governed in terms of the new Constitution. Various provisions of the current Constitution prescribe how the new Constitution should come about and the Constitutional Principles form part of the future-directed framework, as do certain other provision contained elsewhere in the current Constitution."*

76. It is submitted that Constitutional Principle II's exhortation for the Constitutional Assembly to give due consideration to the fundamental rights contained in Chapter 3 of the interim Constitution recognises the paramount importance not lightly to discard the fruits of the most significant political compromise in recent history as expressed in the interim Constitution.

77. Effectively Constitutional Principle II says that the scheme of Chapter 3 should not be lightly departed from in any significant respect. Since the Constitutional Assembly is under an obligation to take into account all the rights contained in Chapter 3 of the interim Constitution, great significance will be attached to the deletion of any such right.

78. Section 27(1) of the interim Constitution provides for a right to fair labour practices, as does clause 23(1) of the new Constitution.

79. Section 27(2) and (3) of the interim Constitution contemplate the rights of workers and employers to join and form trade unions and employers' organisations respectively and to organise and to bargain collectively. These matters are dealt with in clause 23(2) and (3) of the new Constitution.

80. Section 27(4) of the interim Constitution enshrines workers' rights to strike **for the purpose of collective bargaining**, whereas clause 23(2)(c) of the new Constitution will confer upon workers an unqualified right to strike subject only to the limitations clause (clause 36).

81. Section 27(5) of the interim Constitution grants to employers a right of recourse to the lockout for the purpose of collective bargaining, subject to the limitations clause (section 33), whereas clause 23 of the new Constitution makes no provision for any mechanism of which employers can avail themselves in order to effectively exercise their right to bargain collectively.

82. The right to strike is a particular method employed by workers in the exercise of their right to bargain collectively. Its logical and historical counterpart which gives specific expression to employers's right to bargain collectively is the lockout

83. To retain the one without the other against the background of Constitutional Principle II and the inherent equality requirement of Constitutional Principle XVIII disturbs the balance which the latter Principle requires; which section 27 articulates; and, which Constitutional Principle II demands should be given due consideration.

84. In addition to the recognition of employers' right to engage in collective bargaining, Constitutional Principle XVIII also requires its protection. To provide for a specific method in which this right can be exercised is to provide its protection.

85. It is generally accepted that the right to strike is an effective mechanism to exercise workers' rights to bargain collectively. In respect of employers, the right to lockout is virtually the only effective mechanism to pursue the goals of collective bargaining.

86. The right of an employer in respect of labour disputes is constrained by limits on its ability to dismiss striking workers, the limitations placed on counter-action by an employer in the response to strikes by section 7 of the Labour Relations Act *("the Act"),* the concept of unfair labour practices, and the limitations placed on the employers' ability to change conditions of employment by the principles of contract.

87. Under common law, a lockout constitutes a *prima facie* breach of the contract of employment and an employer would, in the absence of specifically recognised exceptions, be obliged to render payment in respect of the work tendered by the worker. It is

precisely for this reason that labour legislation grants indemnity to employers against liability under its contractual obligations in respect of the lockout. This was recognised by the inclusion in the Act of provisions providing for lockout.

88. Although employers may under certain circumstances deny workers access to their premises under a reservation of admission (guaranteed by freedom of association) this does not relieve the employer of the obligation to effect payment.

89. The constitutionalisation of the right to strike but not the right to lockout would have precluded employers to respond even to an unlawful strike since a lockout would have been capable of being regarded as an infringement of the constitutionally protected right to strike. This problem the Constitutional Assembly sought to overcome by the inclusion of clause 241 in the new Constitution. In so doing it attempted to *"immunise"* the provisions of an *"ordinary"* Act of Parliament from constitutional scrutiny, thereby detracting from the principle enunciated in clause 2 of the new Constitution and Constitution Principles II, IV and VII.

90. The exclusion of the right to lockout also complicates the interpretation of clause 23(1) which provides that everyone has a right to fair labour practices. In the absence of a right to lockout, the right to fair labour practices viewed from an employer's perspective becomes an empty and meaningless concept.

91. Section 241(2)'s requirement to the effect that a bill to amend or repeal provision of the Act may be introduced in Parliament only <u>after consultation</u> with national federations of trade unions and employer organisations is not an effective national federations of trade unions and employer organisations is not an effective substitute for what is currently a fundamental right. Following the required consultation, it can be amended as any other *"ordinary "* law.

92. The phrase *"after consultation with*" must be given the meaning which the courts have attached thereto, which is as follows:

93. It is submitted that Constitutional Principle XXVIII *inter alia* requires the new Constitution to recognise and protect the right of individual employers to engage in collective bargaining.

93.1 There must be consultation before a firm decision is arrived at.

93.2 The person to be consulted must be afforded a reasonable opportunity state his or her case.

93.3 The method of consultation is determined by the person who has to consult.

93.4 Any views which the person who has to take the decision may have, must be communicated to the person that has to be consulted.

93.5 The person that has to be consulted must be fully informed of all relevant facts and considerations.

93.6 The person who takes the decision is not bound by the advice of the person who has to be consulted although such advice must be *bona fide* considered

See: **Colonial Secretary v Molteno School Board 27 S.C. (1910) 96;**

Allie v Union Government (Minister for Native Affairs) 1911 C.P.D 312;

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Rollo and Another v Minister of Town and Country Planning

(1) All E.R. 13;

R v Mbete 1954 (4) SA 491 (E);

Rex v Ntleneza 1955 (1) SA 212 (A)

See also paragraph 32 of the judgment of Mahomed DP (and the authority referred to in footnote 5) in **In re: The School Education Bill of (Gauteng) 1996 (4) BCLR 537 (CC).**

94. Although the right of employer organisations to bargain collectively is recognised in clause 23(4)(c) of the new Constitution, the right of an individual employer to do so, is not.

95. It is incorrect to assume that individual employers can bargain collectively through employer organisations. This discounts the reality of a single employer bargaining with trade unions active in its factory or industry. In many instances, individual bargaining produces agreements applicable only to a particular employer, and not to similar employers. The larger the employer the greater the likelihood of that employer negotiating directly with worker organisations.

96. The granting of organising and collective bargaining rights to employers' organisations rather than individual employers will have the consequence of promoting collective bargaining at a sectoral or higher level only. This would tantamount to entrenching centralised collective bargaining in the new Constitution. Legally there should be room for individual employers (as opposed to employer organisations) to bargain collectively.

CONCLUSION

97. A comparative analysis of individual provisions of the interim Constitution their counterparts in the new Constitution shows that in many respects the powers and functions of the provinces will be substantially less and substantially inferior in terms of the new Constitution than provided for in the interim Constitution.

98. The position is exacerbated when the overall picture is analysed on a comparative basis.

99. Judged by the requirements of the standards collectively postulated by the Constitutional Principles, the new Constitution does not pass constitutional muster. It falls substantially short of the requirements postulated in the applicable Constitutional Principles.

100. One of the main reasons for this is to be found within the four corners of clause 146 which offends Constitutional Principles IV, VI, VII, XVIII item 2, XIX, XX, XXI item 6 and XXV.

101. The financial and fiscal powers of provinces have likewise been substantially reduced, qualitatively as well as quantitatively. The new Constitution is thereby rendered uncertifiable by reason of the provisions of Constitutional Principles XVIII item 2, XXI item 6, XXII and XVI.

102. The inclusion (in clause 23(2)(c)) of the right to strike coupled with the exclusion of the right to lockout renders that clause incompatible with Constitutional Principles II, V and XXVIII. The mere omission of the right to lockout evidences non-compliance with the peremptory requirements of Constitutional Principle II Section 23 is also too restrictive inasmuch as it does not accord individual employers the right to bargain collectively.

103. In the exercise of the responsibility conferred upon it by section 71(2) of the interim Constitution, this Court is consequently obliged to decline to certify that all the provisions of the new Constitution comply with the Constitutional Principle .

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J C HEUNIS
Counsel for the National Party of South Africa

CHAMBERS
CAPE TOWN
3 June 1996

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16. **Allie v Union Government (Minister for Native Affairs) 1911 C.P.D. 312**

17. **Benoni Town Council v Mallela 1930 T.P.D. 671**

18. **Rollo and Another v Minister of Town and Country Planning 1948 (1) All E.R. 13**

19. **R v Mbete 1954 (4) SA 491 (E)**

20. **Rex v Ntleneza 1955 (1) SA 212 (A)**

21. In re: The School Education Bill of 1995 (Gauteng) 1996 (4) BCLR 537 (CC)