

14 January 2006

The Minister for Justice and Constitutional Development

Private Bag X81

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Attention: Mr JA de Lange

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Dear Minister

Comments on the Constitution Fourteenth Amendment Bill

1. Introduction

1.1. We refer to General Notice No. 2023 of 2005 inviting comments on the Constitution Fourteenth Amendment Bill, 2005 (“the Bill”). Our comments follow.

1.2. The Legal Resources Centre is involved in constitutional litigation of a public interest character. It strives through litigation to protect and uphold the rights of persons too poor or otherwise disadvantaged to approach the courts through their own means. The Legal Resources Centre has been involved in such work since 1979. The Centre also seeks to promote the rule of law in our young constitutional democracy by conducting public interest litigation in the constitutional field.

- 1.3. The comments relate to clause 7(b) of the Bill. The clause seeks to prevent courts from hearing any matter involving the suspension of the commencement of an Act of Parliament or a provincial Act.
- 1.4. In the comments we contend that the amendment is unnecessary, in conflict with other provisions of the Constitution, in conflict with relevant foreign and international law, destined to bring about injustice and in conflict with foundational constitutional values.

2. **The current legal position**

- 2.1. It seems to us that relief in the form of suspension of the coming into force of Acts of Parliament (for purposes of these comments, the term must be taken to include provincial Acts) might be sought in three circumstances.
- 2.2. The first is in the context of abstract constitutional review in terms of sections 80 and 122 of the Constitution, where members of a legislature apply to the Constitutional Court to have all or part of an Act declared unconstitutional after signature by the President. Sections 80(3) and 122(3) make express provision for an order of suspension by the Constitutional Court. Other courts have no jurisdiction under this section.
- 2.3. The second is where such suspension is sought as a form of temporary relief pending litigation concerning the constitutionality of an Act.
- 2.4. The third is where such suspension is sought as a form of final relief on the basis that an Act not yet brought into force, is found finally by the Constitutional Court to be constitutionally invalid.

- 2.5. The second form of suspension referred to above (ie as a form of temporary relief outside of the context of abstract review) has been the subject of at least three decisions of the Constitutional Court of which we are aware. These are *National Gambling Board v Premier, Kwazulu-Natal & Others* 2002 (2) SA 715 (CC) para 54; *President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as amici curiae)* 2003 (1) SA 472 (CC) (“the first floor-crossing judgment”) and in *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as amici curia)* (No. 1) 2003 (1) SA 488 (CC) (“the second floor-crossing judgment”).
- 2.6. In none of these judgments has the Constitutional Court found it necessary to decide the matter of whether the courts in fact have the power to suspend the coming into force of legislation outside of the context of abstract review in terms of sections 80 and 122 (see first floor-crossing judgment at para 27).
- 2.7. However, in the first floor-crossing judgment, the Constitutional Court made comments about the grant of interim relief pertaining to official action pursuant to an Act subject to constitutional challenge. These comments would apply with even greater force to interim relief in the form of suspension of the coming into force of an Act, which is recognised as a more drastic remedy. In this regard, the Court said the following:

“[31] Having regard to the importance of the Legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a Court to interfere with its will

unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends the Constitution and has thus achieved the special support required by the Constitution, Courts should be all the more astute not to thwart the will of the Legislature save in extreme cases.”

3. Conflict with other provisions of the constitution

- 3.1. Although clause 7(b) purports to be only an amendment of section 172 of the Constitution, its effect is also to delete or repeal sections 80(3) and 122(3). This is the consequence of the clear wording of clause 7(b), particularly the words “[d]espite any other provision of this Constitution”.
- 3.2. It is difficult to understand the rationale for this aspect of the amendment. The suspension provisions in sections 80(3) and 122(3) are plainly appropriate in order to ensure that, in appropriate circumstances, legislation is not brought into force where its constitutionality is shrouded in uncertainty from the very outset and proceedings are pending in this regard.
- 3.3. Nor has there been any litigation of which we are aware which has involved the direct application of these provisions and which illustrated them to be cumbersome in any way or the cause of any injustice.
- 3.4. Even if there is a rationale for the repeal of sections 80(3) and 122(3) (which we dispute), the Constitution as the primary law must be clear. Such a repeal ought to be brought about directly by the deletion of the subsections concerned, not indirectly via an amendment to section 172.

- 3.5. Clause 7(b) is also in conflict with the broad and flexible provision for interim relief pending constitutional disputes contained in section 172(2)(b) of the Constitution.
- 3.6. It is a well established principle that courts will grant interim relief pending final relief in order to avoid injustice. The nature of interim relief is often related to the final relief sought, albeit that the relief is only granted temporarily, with a wide discretion conferred on the courts to include provisions to avoid injustice to the party against whom interim relief is granted. There is no compelling reason not to have similar provisions in the context of constitutional disputes where the effect if the application is granted will be to render an unconstitutional statute permanently inoperative.
- 3.7. In this context, it must be borne in mind that interim relief, including a suspension of an Act, is aimed purely at preserving the status quo on a temporary basis pending the decision of the court. The ruling does not affect the final outcome of the dispute (see the *National Gambling Board* case at para 49). It aims to prevent irreparable harm being done to the party seeking interim relief before the dispute has been determined.

4. **Issue undecided**

- 4.1. In so far as the second form of suspension referred to above is concerned, (ie temporary suspension pending a decision on constitutionality other than in the context of abstract review) the issue is also relatively untested.
- 4.2. On the one occasion where such an order was made by the Cape Provincial Division, it was set aside on appeal to the Constitutional Court as having been wrongly made (first floor-crossing judgment at paras 33 and 34). At the time of the order of the Cape Provincial Division, the guidelines which

were later laid down by the Constitutional Court in the first floor-crossing judgment did not exist. The guidelines since provided by the Constitutional Court bind all other courts and there is little prospect of such an order being made injudiciously.

4.3. In the unlikely event of this happening, the first floor-crossing judgment illustrates that the situation can relatively quickly and effectively be remedied by appealing to the Constitutional Court.

4.4. To the extent that clause 7(b) reflects a concern about the appropriate boundary lines between the judicial and legislative spheres of government, the accepted referee of such issues in a constitutional democracy is the Constitutional Court. In those circumstances, it is far preferable that the issue be left for determination in an appropriate case by the Constitutional Court. To do otherwise would be to register a vote of no confidence in the Constitutional Court. That would be most unfair and undesirable, given its proven track record to date in playing the role of constitutional referee.

5. **Designed to give rise to injustice**

5.1. It emerges from the first floor-crossing judgment (particularly para 31 quoted above) that (if it is ultimately found to be permissible outside of sections 80(3) and 122(3)) an order suspending an Act could only be granted –

5.1.1. with all due deference to the Legislature, given its importance in a constitutional democracy (especially where it is a constitutional amendment);

5.1.2. if it is in the interests of justice;

- 5.1.3. if it is absolutely necessary to avoid likely irreparable harm; and
- 5.1.4. if there is no other less intrusive measure to avoid such harm.
- 5.2. To this we should add the requirement laid down in the *National Gambling Board* case, that the applicant for interim relief must have a *prima facie* right to the final relief sought. In the context of a constitutional challenge, this means that the law challenged must be *prima facie* unconstitutional.
- 5.3. That is the law as it stands, without the amendment which will be brought about by Clause 7(b). The amendment is therefore targeted at preventing the grant of interim relief suspending the coming into force of an Act in the circumstances where –
 - 5.3.1. the interests of justice do in fact require such a suspension;
 - 5.3.2. not granting the suspension is indeed likely to cause irreparable harm to the party seeking such relief;
 - 5.3.3. there are no other less intrusive measures to avoid such harm; and
 - 5.3.4. the legislation is *prima facie* unconstitutional.
- 5.4. It is apparent from this analysis that the amendment, whether wittingly or not, is designed to ensure that suspension will be refused even where it is likely to bring about irreparable harm and a serious injustice. It is most difficult to accept that this presents a justifiable rationale for the amendment.

6. **Suspension as final relief**

- 6.1. In the third situation referred to above ie where legislation, which has not yet been brought into operation, is found to be unconstitutional and is therefore permanently suspended from coming into operation, there is no justification whatsoever for the prohibition brought about by Clause 7(b).
- 6.2. In the circumstances contemplated there, there would have been a final determination of unconstitutionality by the Constitutional Court and there would be no justification either for excluding the courts from hearing the matter or for precluding a final order preventing the legislation from coming into operation.
- 6.3. Indeed, the provision could give rise to a constitutional crisis in that it would allow the President to bring into force unconstitutional legislation and preclude the courts, including the Constitutional Court from hearing any court case which sought to prevent that outcome.
- 6.4. In this context, Clause 7(b) is also in conflict with section 38 of the Constitution which confers broad discretionary powers on the courts to formulate appropriate relief where fundamental rights in the Bill of Rights have been infringed or (most importantly *in casu*) threatened.

7. **Ouster clauses are constitutionally objectionable**

- 7.1. Constitutional Principle VII contained in Schedule 4 to the Interim Constitution provides as follows:

“The judiciary shall be ... independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.”

- 7.2. This principle represents a crucial component of the rule of law, which is a foundation value provided for in section 1(c) of

the Constitution. The principle also represents what was described by the late Mohammed DP (as he then was) as a “fundamental premise”¹ of the Constitution, which may not be capable of amendment at all.

7.3. The principle also finds recognition in the fact that the right of access to court is a fundamental right protected in section 34 of the Constitution.

7.4. The provision in section 172(2)(b) for the grant of appropriate interim relief (which in our view includes interim suspension of an Act in the exceptional circumstances laid down by the Constitutional Court) represents a very important tool in the hands of the courts in carrying out the function which has been entrusted to them of safeguarding the Constitution and the Bill of Rights and ensuring a just society based on the rule of law. Such relief represents an integral part of the right of access to court.

7.5. Provisions which preclude access to courts conflict directly with Constitutional Principle VII and the right of access to court. They are known as “ouster clauses” and achieved notoriety under the apartheid regime which regularly sought to shield actions of the apartheid government in breach of human rights and the rule of law from scrutiny by the courts (see generally on ouster clauses Baxter *Administrative Law* 725-733). Members of the Legal Resources Centre were often involved in litigation during the apartheid era where they challenged, to the extent possible under that regime, the enforcement of such ouster clauses.

7.6. Clause 7(b) represents an ouster clause of the most far-reaching kind. Not only does it preclude all courts from

¹ This concept was developed by him in *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996(1) SA769 (CC).

making an order suspending the commencement of an Act of Parliament or a provincial Act, but it prevents them even from granting parties seeking such relief a hearing.

- 7.7. Clause 7(b) goes even further in preventing a court facing an application in which a variety of different forms of relief are sought, one of which is the suspension of the coming into operation of an Act, from even hearing the matter in respect of any of the relief sought. This arises from the phrase –

“no court may hear a matter dealing with ...”

- 7.8. In the circumstances, Clause 7(b) is not only undesirable in a constitutional democracy, but in conflict with its fundamental premises. It is accordingly unconstitutional in itself.

8. **Conflict with the doctrine of separation of powers**

- 8.1. Constitutional Principle VI provides as follows:

“There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”

- 8.2. The ouster clause constituted by clause 7(b), if passed, represents a direct incursion by the legislature into the powers and constitutionally preserved functions of the judiciary.

- 8.3. It is accordingly in conflict with the doctrine of separation of powers, which is not only provided for in the above constitutional principle but also forms a fundamental premise of the Constitution and is implicit in its structure.

- 8.4. The clause has the effect of subtracting significantly from the existing reservoir of power and functions constitutionally entrusted to the judiciary. The granting of interim relief so as

to ensure a just and meaningful outcome to litigation, including constitutional litigation, goes to the heart of the judicial function. On this basis too, therefore, the provision is unconstitutional.

9. **International law and foreign law**

9.1. Section 39 of the Constitution makes international law and foreign law a relevant criterion in considering Clause 7(b).

9.2. In this regard we refer to the attached judgment of the European Court of Justice in the matter of *The Queen v Secretary of State for Transport, Ex parte: Factortame Ltd and Others* (European Courts Reports 1990 page I-2433).

9.3. From that judgment it is clear that in member countries of the EEC, national courts have the power to grant interim relief in the form of suspension of national laws potentially conflicting with Community law, pending the outcome of proceedings regarding the validity of the impugned national legislation.

9.4. The following features of the judgment are significant for present purposes:

9.4.1. the power to grant interim relief is such an important component of the system of reviewability of national legislation against Community law, that any national legislation which was in conflict with the power to grant such interim relief was itself invalid (para 21-22);

9.4.2. the power to grant interim relief suspending legislation is a necessary and obvious corollary of that system of reviewability of national legislation (para 21-22);

9.4.3. there was no suggestion that the power to grant interim relief in the form of suspension of legislation was in any way in conflict with the separation of powers doctrine

which is well respected in the national constitutions or legal systems of EEC member countries;

9.4.4. application of that judgment in the United Kingdom in the granting of interim relief would only require that there be a serious dispute about the validity of the national legislation – it is not even necessary that there be *prima facie* invalidity (para 15(iii));

9.4.5. where the proceedings were pending before the European Court of Justice, the necessary interim relief could be granted by national courts lower down in the system of court hierarchy – in that case the Divisional Court of the Queen’s Bench Division (para 11).

10. **Conclusion**

10.1. Based on what we have set out above, we submit that it is most undesirable that this amendment be made to the Constitution.

10.2. Analysis of the existing jurisprudence of the Constitutional Court reveals that the independence of the Legislature is not threatened by allowing the courts the power in the most exceptional circumstances to suspend the coming into force of an Act. Courts are already compelled by that jurisprudence to show appropriate deference to the legislature, particularly in the case of constitutional amendments which are compliant with section 74 of the Constitution.

10.3. Moreover, Clause 7(b) is in various respects in conflict with the constitutional principles and the fundamental premises of the Constitution and is in itself unconstitutional.

10.4. Clause 7(b) is also in conflict with relevant international and foreign law.

- 10.5. We respectfully submit that the clause should be omitted from the draft Bill.
- 10.6. We thank you for considering these comments. We offer to provide clarification in respect of any points requiring elucidation or supplementation. We respectfully request that we be allowed the opportunity of an oral presentation in any *fora* in which such a presentation might be permitted.

Yours faithfully

Legal Resources Centre

Per: Alan Dodson

Constitutional Litigation Unit

(letter sent by electronic mail)