DENEYS REITZ ATTORNEYS
28 May 1996

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

We act on behalf of Business South Africa.

We enclose herewith our client's objections in compliance with the Constitutional Court's directive dated 13 May 1996.

Our client seeks the opportunity to present oral argument to the Court.

DENEYS REITZ

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

THE OBJECTION OF BUSINESS SOUTH AFRICA

THE OBJECTOR

1 Business South Africa is a confederation of employer and business organisations and represents the collective economic and social interests of business in South Africa. It is recognised by the ILO as the representative of South African employers both nationally and internationally. Its members include registered employer organisations representing employers of every size who bargain collectively with unions both through employer organisations and directly.

THE RELEVANT CONSTITUTIONAL PROVISIONS AND PRINCIPLES

2 The objection is that clauses 23 and 241 of the Constitution do not comply with principle XXVIII (read with principle XII) and principle IV respectively.

THE GROUNDS OF THE OBJECTION

3 Principle XXVIII requires that :

3.1 the right of employees and employers to engage in collective bargaining be recognised;

3.2 the right to collective bargaining be protected

3.3 parity be maintained between the collective bargaining rights conferred upon employees and those conferred upon employers.

4 The requirement that the right to collective bargaining be both recognised and protected is not satisfied merely by recording a right in those terms without protecting those activities whereby employers and employees customarily underpin and render effective their right to bargain.

5 A large number of employers engage in collective bargaining with trade unions at plant or enterprise level, but the right to engage in collective bargaining by such individual employers (as opposed to employers' associations: section 23 (4) (c)) is neither recognised nor protected. That omission contravenes principle XXVIII directly and principle XII indirectly.

6 Clause 23(2)(c) confers upon workers the right to strike, and thereby protects their right to engage in collective bargaining. No equivalent protection has, however, been afforded to employers.

7 Collective bargaining is the primary means for resolving the conflicting economic interests of management and labour. A fundamental purpose of labour law is to institutionalise such conflicts by creating structures in which employers and employees, through a struggle in which neither obtains an enduring and decisive advantage over the other, eventually elaborate rules which both are anxious to protect.

8 It is critical to that purpose that a degree of parity be maintained in the deployment of power between employer and employee, and that the State cannot by legislation create a material imbalance in the remedies available to either side in furtherance of collective bargaining.

9 Cameron *et al* in : The New Labour Relations Act at p.4 correctly identify the relationship between collective bargaining and industrial action:

> *"The guarantor of the institution of collective bargaining is the threat of industrial action. No threat is effective unless there is a real possibility of its eventuality. Strikes and lock-outs are integral features of collective bargaining and unless they are afforded protection...the threat becomes non-existent. Without the potential for pain, there would be no serious endeavour to negotiate and conclude a collective settlement."*

10 This approach is and was in 1993 widely accepted by employers and employees, approved by the Appellate Division, and underlies the Interim Constitution and principle XXVIII.

11 The absence of any express reference to the right to strike in principle XXVIII (or elsewhere) indicates that the legislature considered that that right was implicit in the protection afforded to the right to collective bargaining. Given the even-handed treatment of employer and employee in principle XXVIII, the protection of equivalent employer rights must similarly be implicit.

12 In South Africa the strike takes a number forms, including the total or partial cessation work, go-slows, intermittent strikes, work to rule and overtime bans. It is often supported by sympathy strikes, picketing, protest action, product boycotts and community pressure. In other countries, a number of these actions are either illegal, or simply not employed, and constitute dismissable offences. In this country therefore the strike is a most formidable weapon capable of inflicting grievous harm on the employer.

13 On one interpretation, Clause 23 has not only entrenched the right to strike without entrenching any countervailing employer right, but has also deprived the employer of any effective counteraction. On this interpretation, by entrenching the right to strike without similarly protecting the right to lock out, clause 23 renders those provisions of the Labour Relation Act, 1995 which grant the right to lock out unconstitutional on the ground that they diminish the right to strike.

14 Clause 241(1) recognises and seeks to ameliorate the consequences of that interpretation. If effective in this, it is contrary to principle IV, which provides that the Constitution shall be the supreme law of the land. By insulating the Labour Relations Act from the Constitution, section 241(1) seeks to elevate the former Act above the Constitution. If ineffective, the protection it purports to afford is illusory, because the employer rights it protects are vulnerable to repeal or statutory prohibition after a process of consultation.

15 By conferring upon trade unions the right to bargain collectively the Constitution by implication may impose a duty to bargain upon employers. But parliament is free to deprive employers of every course of action or response by which they might endeavour to advance their own bargaining positions or resist the demands of the union. The right to lock out, to close the plan or to implement wage offers after impasse may be removed. An obligation to pay striking workers may be imposed. The employer's constitutional right to engage in collective bargaining is in those circumstances a hollow right, devoid of substance.

16 Collective bargaining encompasses both the resistance of another's demands, and the endeavour to secure compliance with one's own. Unless the employer's right to engage supportive action such as the lock out guaranteed in the Constitution, its ability ever to secure assent to its demands in the course bargaining, is precarious. Without the right to engage in such action, collective bargaining is reduced to passive resistance.

M. J. D. WALLIS S.C.

C. D. A. LOXTON S.C.
A. E. FRANKLIN
K. GOVENDER
COUNCIL FOR THE OBJECTOR

28 May 1996

CERTIFICATION OF NEW CONSTITUTIONAL TEXT: YOUR REF. MR J. PITMAN: RE BUSINESS SOUTH AFRICA

I have been asked by the President of the Constitutional Court to inform you that the following directions have been given in response to your letter dated 13 May 1996 written on behalf of Business South Africa:

1. Business South Africa may submit written argument to the Court in regard to clause 23 of the Constitution.

2. Such written argument shall be brief and succinct and shall be lodged with the Registrar of the Constitutional Court by not later than 18 June 1996. It should deal with the objections to the said clause which may have been lodged with the Registrar in terms of paragraphs 2, 3, 4 or 5 of the directions given by the President of the Constitutional Court on 13th May 1996.

3. Upon receipt of the written argument referred to in paragraph 2 hereof, further directions will be given indicating whether or not Business South Africa will be permitted to present oral argument at the public hearing in amplification of its written argument.

The date for oral argument has provisionally been set down for 1 July 1996. You will be advised of further directions in due course.

MS M. NIENABER