The Environmental Law Association

Durban
31 May 1996

CERTIFICATION PROCEDURE: OBJECTION

The Environmental Law Association of South Africa hereby objects to the manner in which the environmental rights clause (section 24) of the final Constitution was formulated. It is our submission that the procedure in terms of which it was adopted by the Constitutional Assembly does not comply with principle II of the Constitutional Principles embodied in the Schedule 4 of the Interim Constitution.

That principle constitutes an enjoinder to the Constitutional Assembly to give due consideration, to *inter alia* the fundamental rights contained in Chapter 3 of the Interim Constitution.

It is our organisation's submission that at least one other consideration to which the Constitutional Assembly ought duly to have applied its mind was the representations made to it by members of the public and by the relevant parliamentary subcommittees.

It is further submitted that Principle IX, the underlying tenet of which is the need for open and accountable administration at all levels of government, has been infringed.

The grounds for objection are as follows:

Our organisation together with other organisations, made submissions to the Constitutional Assembly in February 1996. Copies of these will be furnished if necessary. Thereafter, we were invited to make oral representations to the environmental portfolio committees of the Senate and the House of Assembly. These were duly made during March 1996. The said committees accepted our proposal and they were duly forwarded to the relevant committees. Despite this acceptance, the formulation of the environmental law right proposed, section 24, as adopted by the Constitutional Assembly, did not reflect either the formulation or the substance of our submissions.

Enquiries were made concerning the reason for this omission and in response we received a letter from the Chairperson of the Environmental Portfolio Committee, a copy of which is annexed marked 'A'. In essence, it appears that the clause was not considered because there were issues perceived to be more important and the Committee ran out of time. Further, some of the members felt themselves unable to deal with the issue because they were not informed about it.

It is our submission that our organisation had, in terms of section 24 of the Interim Constitution, the right to lawful administrative action. This submission is made particularly the Constitutional Assembly, on many occasions, invited the public to make representations concerning the Constitution. This invitation was made, inter alia, through various media, at considerable cost. Our organisation had a legitimate expectation that their representations would be properly

considered, We therefore submit that Constitutional Committee acted in an administratively unlawful way in that it either failed to apply mind at all or ignored relevant considerations.

It is recognised that the legislature, in drafting the Constitution, is engaged in activities which are largely legislative, rather than administrative. However, it is submitted that to the extent that it undertook to consider and assimilate these, it was involved in an administrative exercise to which the laws of administrative justice apply. In particular, section 24 of the Interim Constitution is applicable.

It is acknowledge that some of the rights contained in chapter two were more politically contentious than others and therefore required more debate, the result of failing to consider some rights because others were regarded as more important is to create a hierarchy of rights, something which the Bill of Rights itself does not do and which is not permissible in terms of any of the Constitutional Principles.

While we have reservations about the content of clause 24, we would like to emphasise that the basis of this objection does not go to the merits of the clause, but is grounded in procedure. We submit that it can never be justifiable in an open and democratic society to promulgate a Constitution (which will be the cornerstone of our legal system in the post apartheid era) where invited representations were not duly considered and where some of the clauses were not debated at all, simply because time ran out.

We therefore request that clause 24 of the Constitution be revisited and, if after due consideration, it is thought appropriate, amended.

ROBYN STEIN & TERRY WINSTANLEY
Regional co-ordinators of the Northern and KwaZulu Natal branches of the Environmental Law Association.

Parliament of the Republic of South Africa

Cape Town
28 May 1996

With reference to your fax dated 15 May, 1996, the submission was forwarded to the Constitutional Assembly on 28 March 1996. This is the day after the last meeting that you had with the Portfolio Committee on Environmental Affairs and Tourism. I have attached a copy of the letter that I received from the chairperson of the Constitutional Assembly, Mr. Cyril Ramaphosa, after I enquired whether the submission had received any attention.

After discussions with the chairperson of the Constitutional Assembly, it seemed that they did not have enough time to debate the issues sufficiently despite the fact that it had reached them timeously. This was partly due to the fact that there were more contentious constitutional issues that they needed to resolve (lock-out, right to life and education clauses). It was also partly due to opposition from some members who were not sufficiently informed about the issue.

I would like to assure you that while the Portfolio committee on Environmental Affairs and Tourism has not abandoned the constitutional route, we have opted for building a strong and effective department.

PETER MOKABA
Chairperson of the Portfolio Committee on Environmental Affairs & Tourism