THE MAGISTRATES' ASSOCIATION OF SOUTH AFRICA

11 June 1996

CASE NO CCT/23196 -. OBJECTION TO THE CERTIFICATION OF THE CONSTITUTIONAL TEXT IN TERMS OF PARAGRAPH 4 OF THE DIRECTION G BY THE PRESIDENT OF THE CONSTITUTIONAL COURT IN TERMS OF RULE 15

Further to my objection dated 17 May 1996, attached please find :

Submissions on the application by the Constitutional Assembly and its written argument in terms of paragraph 1 of the Directions in terms of Rule 15

Written argument in support of my objection in accordance with paragraph 5 of the Directions in terms of Rule 15.

for your attention

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA - CASE NO CCT/23/96:
RE THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

In accordance with par 1 of the Directions given by the President of the Constitutional Court in terns of Rule 15, the Constitutional Assembly has been requested to submit argument to the Constitutional Court in regard to whether the provisions of section 71 of the Constitution of 1993 have been complied with.

In terms of the said Directions, 25 copies of written argument directed to showing that each of the Constitutional Principles has been complied with, shall be lodged with the Registrar by not later than 4 June 1996.

The Constitutional Assembly has lodged documents purporting to comply with the said Directions. With reference to Constitutional Principles 11, VI and VII, insofar as they relate to the Independence of the superior courts' judiciary, no written argument directed to showing that each of these Principles has been complied with. The Constitutional Assembly has contented itself with a mere reference to the new constitutional text. The Constitutional Assembly has not acceded to the President's request in terms of Rule 15.

It is submitted that the Constitutional Principles are equally applicable to the lower courts judiciary. In this respect, the Constitutional Assembly makes no mention at all in its "written argument".

It is submitted that, in terms of Rule 15 [1], read with section 71[1] [b] of the Constitution of 1993, the formal request by the Constitutional Assembly to the Constitutional Court to perform its functions. In terms of section 7 1[2] of the Constitution of 1993 is brought by way of application [cf the heading of the [Directions given.]
In the absence of even a reference to the lower courts' judiciary and, moreover, any argument in general terms which purports to comply with par 1 of the Directions, it is submitted that the basic requirements for application proceedings have not been met.

It is contended that the applicant, the Constitutional Assembly, bears the burden of proof on the issue and without reasons substantiating the application having been put forward, a case for certification cannot be based on responses [if any] to the argument submitted in support of the objection.

I request that consideration be given to inviting the Constitutional Assembly to reconsider its position and that if it should elect to elaborate, an opportunity be granted to objectors to do likewise.

In the event that these submissions fail and no extension is granted, I hereby attach my written argument in accordance with par 5 of the Directions.

In conclusion I wish to state that I am a member of the Magistrates Association of South Africa, which has lodged a similar objection. Should it, in terms of par 7[c) of the Directions, be authorised to address oral argument to the Constitutional Court at the public hearing, I will abide by whatever ruling is given in terms thereof.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA - CASE NO CCT/23196 WRITTEN ARGUMENT ON THE OBJECTION TO THE CERTIFICATION OF THE NEW CONSTITUTIONAL TEXT

INTRODUCTION

The constitutional principles are "value" oriented and so also are the fundamental rights in the new constitutional text. In order to pass certification, the new text, read in its entire context, will have to reflect [i.e. comply with] the values which underlie the constitutional principles. [see Van Wyk et al eds "Rights and Constitutionalism" - The New South African Legal Order, Juta and Co, Ltd. 1994 at 633 - 6371. "Comply," according to The Readers Digest Oxford Complete Word Finder, 1993 means : "act in accordance [with a wish, command etc."

"Compliance" implies that an act [i.e. certification] has been performed for the reason that [as in terms of section 71[2] of the interim, Constitution] section 71[21 requires it, rather than that the act has been performed in "appropriate" circumstances, i.e. that it merely conforms with the reason. [See A Fagan "In Defence of the Obvious - Ordinary Meaning and The Identification of Constitutional Rules" SAJHR [1995] 545 at 5581]. The point here is, that certification is

permissible only with reference to the constitutional principles and nothing else, more or less. [cf Valente v The Queen 24 DLR [4th] 161 at 175 in which Le Dain J applied an "appropriate" test]. It is submitted that, "complies with" in section 71[21 means precisely what Le Dain J implies it does not, viz certification can take place only if the particular constitutional formula in the new text guarantees the essential conditions of "judicial independence". The essence "of the security afforded by the essential conditions of judicial independence" is in Constitutional principles: - the new text should articulate them [see par II [l]I below). Only in this sense can there be "compliance" and attendant certification be effected.

INTERPRETATIVE APPROACH TO THE CERTIFICATION EXERCISE

It is important to bear in mind that though the constitutional principles are, for present purposes immutable , once certification takes place, this will no longer be the case: the new text will constitute the composite point of departure for all purposes. The new text will have to contain the material substance of the values contained in and underlying the constitutional principles.

Two interpretative approaches are suggested. The first is an overarching purposive one, because the new text is not yet 'law' and the values are broad concepts which include dimensions such as separation of powers and an independent judiciary and also for the reason suggested in par I above,

The other, perhaps the safer one [because this has to an extent been traversed), is via section 35 and 231 of the interim Constitution in the context of the historical developments preceding the promulgation of the Magistrates Act, 1993 [and thereafter), the interim constitution and the new text. Such an approach is constrained by the linkage of the right to be tried by an independent tribunal, to the actualisation of an independent lower courts judiciary in or in terms of the new text. [On the relevance of legislative history see S v Makwanyane and Another 1995[61 BCLR 665 [CC] at 677G - 682 B; See A Fagan op cit 545 ff dealing with the premise: constitutional rules are limited to what is explicit in the constitutional text; Baloro and Others v University of Bophuthatswana and Others 1995[81 BCLR 1018 [B] 1060 - 1065; S v Zuma and Others 1995[41 BCLR [SAI).

INVESTIGATION INTO THE CURRENT POSITION

APPOINTMENTS

For the support of the contention that magistrates' independence is "not already fully secured in accordance with these principles" [cf par - 3[b] of the Lagos Conference document [1962] or not "absolutely guaranteed" (cf par 1 of the said document] "to the maximum," see the remarks by the Minister of Justice during the second reading debate on the Magistrates Amendment Bill on 29 May 1996. [The, Bill should be law by time this matter comes up for decision].

See also pars A1, 2 and especially 3 of the IBA New Delhi Conference [1982] document; par 41 of the "Singhvi Declaration"; par 3 of General Comment of the HRC on Article 14 of the ICCPR - sv "the relevant constitutional and legislative texts which provide for .... the actual independence of the judiciary from the executive branch and the legislature," par 6 of the ICJ The Rule of Law And Human Rights [Part 1] document 1959]; Chapter X par 2.49 of the Montreal Universal Declaration on The Independence of Justice in relation to the requirement that judicial appointments be made "in consultation with members of the judiciary;" [contra: "after consultation" in the Bill]: par 2.14[b] Part III]and par 19 Part 11 of the Banjul Seminar document and pp 132 - 133 'Terms and Conditions of Service of Judges: A Safeguard to the Independence of the Judiciary' by Hon. Mr Justice B J Odoki in ICJ Report "Independence of the Judiciary and the Legal Profession In English - Speaking Africa".

To counter a possible conclusion that section 174[7] read with sections 165[21 and 165[41 of the new text adequately secure the appointment requirements for magistrates, as against the constitutional principles, the following considerations might hold sway:

a. the "prejudice" contemplated in section 174[7] obviously relates only to the appointee and does not relate to separation of powers and the interests of the accused, litigants and the public insofar as section 174[7] applies.

b. the Magistrates' Amendment Bill (Act] does not comply with section 165[41 of tile new text. Even though this is not now in issue directly, it is at least sufficiently relevant so as to indicate where things are going and also to indicate the need for the Constitutional Court to consider laying down the basic values for incorporation in the new text [i.e. on the assumption that the constitutional principles will fall away.]

c. what possibly, could the rationale be for the distinction between the appointment requirements for judges in those for and those for magistrates ? [cf section 174 [7] , and 178 of the new text. That question needs eds to be answered and therein the flaw will be revealed. Why was clause 100[91 [option 2] of the Working Draft Constitution which provided that the "The appointment of other judicial officers must be made by an Act of Parliament ..." not retained?

REMUNERATION AND CONDITIONS OF SERVICE

SALARIES - these can be reduced by Act of Parliament [see s. 12[6] of Act 90 of 19931. In addition, salaries for judicial officers are not protected by the new text. So, even if section 12[6] of the Magistrates Act, 1993 were to be amended so as to prohibit a salary reduction, there would still be no real protection against parliamentary interference, unless constitutional entrenchment of a prohibition against the reduction of salaries were effected in the same way as for judges.

The effect of this situation, in real terms, is that the so-called independence of the lower courts' judiciary stands on a precarious foundation at best. In terms of independence in the constitutional sense, the so-called independence has no foundation at all. Security in financial terms, for judicial

officers, is one of the pillars upon which the notion of an independent judiciary stands. This is recognised internationally and is the case with judges in our country.

A further aspect which constitutes a negation of independence for the lower courts is the salary determination mechanisms provided for in sections 12[1] and 12[3] of the Magistrates Act, 1993. In terms hereof, the lot of judicial officers is inextricably linked to the Public Service. There simply is no legislative mechanism for a separate and independent salary determination for judicial officers in the lower courts. What explanation is there for this unfair discrimination between these two judicial components on a matter which is so fundamentally vital to judicial independence.

CONDITIONS OF SERVICE - the reference in the Regulations in terms of the Magistrates Act, 1993 to Public Service measures and their applicability to judicial officers, together with the determination of tariffs based on those first determined for the public sector are a further manifestation of the discriminatory practice alluded to previously.

The following international instruments illustrate that the substance of
independence for all judicial officers is financial security:

Article Ill section 1 of the US Constitution;

UN Basic Principles on the Independence of the Judiciary [Annex - article 11]

Procedures for The Effective Implementation of the UN Basic Principles
[procedures 1 and 5];

General Comment 13 of the HRC on Article 14 of the ICCPR [par 3 independence of the judiciary... guaranteed in practice"; par 4 - "apply to all courts"].

"Singhvi Declaration pars 16 [a]18 and 41 .

ICJ: The Rule of law and Human Rights [Part I par 1].

IBA Minimum Standards of Judicial Independence (Part A pars 1 (b), 2, 14 and 15].

Lusaka Conference (contribution by Boyce P Wanda at p 71 - "Safeguards for judicial independence, including provisions for the "rights" of judges, must be made part of our constitutions", and at p 76 under "Remuneration," Conclusion and Recommendation of the Lusaka Seminar [Part 11 par 331].

Banjul Seminar [pl20]; p 138 Montreal Universal Declaration [Part V par 2. 19 [a].

See also CRM Dlamini "Human Rights in Africa - Which way South Africa?" [p38] where he states ""There are four possible attitudes towards judicial independence in Africa, namely : [1] a complete disregard of the doctrine of separation of powers as a Western import unsuited to developing countries; [ii] an official commitment to judicial independence unsupported by adequate legal guarantees; [iii] a comprehensive set of legal safeguards occasionally violated by interference from the executive in politically sensitive issues; and [iv] effective institutionalised judicial independence. Whereas the first three categories reflect the position of different African governments, it is doubtful whether the fourth category exists anywhere in Africa. Most African governments fall within the third category."

With reference to the "delinking" process referred to at pp 18-20 of the Minister' parliamentary address, if there is no express constitutional injunction or safeguard in respect of magistrates salaries etc, the "building of independence" could be stymied. With respect, the Ministers best intentions do not provide any guarantee in the long term. His remarks, in fact, are an admission that his objectives are not programmed by any new constitutional text injunctions. If the were, the remarks would have followed a different line. [See generally J Dugar "International Human Rights" in Rights and Constitutionalism in Van Wyk et al op cit 171 - 195].

COMMENT

Even though salaries etc of magistrates are in fact determined and establish by law, their financial security is dictated by public sector circumstances, such as bargaining chamber negotiations, strikes etc Magistrates do not fit into that arrangement and do not enjoy labour relations protection). Crises in the public sector, [labour, political or financial) might so dominate that the security judicial salaries and service benefits are placed at risk. Objective perceptions and reality would not allow the conclusion that judicial independence is being potentially undermined or indirectly being interfered with in such circumstances. The collective independence of Magistrates viewed from their objective
relationship with the executive [in the sense alluded to in Valente [supra] at 169 - 173 would not survive such crises. For these reasons it would be better safeguarded by way of a written constitution.

CONCLUSION

Other aspects relating to independence will not be dwelt on, since the same reasoning
as above applies to them overall.

Since the independence of the lower courts' judiciary is in a process of evolution, it would seem that the most effective way of achieving that end would be for the new constitutional text to specify the broad basic principles by which that end should be reached.

The reluctance expressed by Le Dain J in Valente (supra at 176 is distinguishable in
the present case for the following reasons -

a] the amendment of the "judicature provisions of the Constitution" are in issue hence the certification exercise [provided they do not comply with the constitutional principles].

b] given the past position of magistrates and their current position, the adoption of uniform standard provisions, in the new text, relating to the independence of the entire judiciary, will demonstrate to all that the bridge has been crossed [and burned!].

c] the various international instruments strongly recommend otherwise.

d] the new power and responsibility given to the courts by the Bill of Rights [as reflected in Constitutional Principle II] demands a higher standard of or safeguard for judicial independence.

e] the public perception and reality of judicial independence will be enhanced if the new text dictates the terms [and it will speed up the evolution process].