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EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

THIRTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 16TH SEPTEMBER 1993

1. Introduction

There are a number of matters regarding the Constitution for the period of transition addressed in our previous reports, on which no definitive decisions have as yet been taken by the Negotiating Council. We require instructions on these matters to enable us to finalise the constitutional text. There are also various matters which have not yet been addressed by us, which should be included in the Constitution. We are in the process of preparing texts and accompanying reports on those matters.

In Part I of this report we set out preliminary proposals for a chapter of the Constitution dealing with local government, a draft of which is contained in the addendum.

In Part II stock is taken of some of the most important outstanding matters requiring the urgent attention of the Negotiating Council.

Part I

Local Government

2. Considerations relating to the chapter on local government

Due to a number of factors, mostly of an historical, political and financial nature, the current situation regarding the development of a restructured system of local government seems to be fluid and unpredictable.

We are aware of the existence of the Local Government Negotiating Forum, but have not had the benefit of insight into its work or any results of its endeavours.

We have found very little guidance for the drafting of a chapter on local government in submissions received from participants in the MPNP.

We have taken note of the relevant provisions of the *Transitional Executive Council (Draft) Bill* approved by the Negotiating Council on 7 September 1993.

A number of the Constitutional Principles contained in Schedule 7 of the draft outline of the Constitution for the period of transition currently under discussion by the Negotiating Council contain provisions directly relevant to a future system of local government. These are Principles VII, XV, XVI, XVII, XIX, XXI, XXII, XXIV 4 and XXIV 9.

We have not dealt specifically with the role of traditional leaders in local government because this is an aspect of the broader question which has been referred to the Planning Committee.

In the addendum to this report we present a draft text for the chapter in the Constitution on local government with a view to facilitating the debate.

3. The draft text

The draft text contains three sections, respectively dealing with the establishment and status of local government, local government finance and a transitional arrangement concerning existing local governments.

Section 140(1) is intended to accord local government the constitutional status of a level of government and to provide for its further regulation by parliamentary and SPR legislation.

Section 140(2) ensures the democratic nature of local government and affords it a measure of autonomy. The autonomy of a local government regarding its physical environment is specifically provided for in section 140(8).

Section 140(3) sets out the matters that must be regulated in detail by statute, though with due consideration of all the relevant provisions of the Constitution. The powers and functions to be exercised, and the services to be rendered by local government are related in section 140(7) to the maintenance of the well-being of local communities.

Section 140(4) provides for the categorisation of local governments (eg cities, towns, villages) and the concomitant differentiation of powers and functions, and also prescribes some important criteria for the determination of the status of a local government.

Section 140(5) requires consultation with a local government before its status is changed.

Section 140(6) would establish a procedure whereby local government is afforded a fair opportunity to express its opinion on draft legislation which will, if adopted, materially affect local government boundaries, powers and functions.

Section 140(9) expressly grants *locus standi* (the right to engage the court and to be heard) in the Constitutional Court to local governments in matters concerning their competences.

Local government finance is addressed elsewhere in the Constitution and we recommend that this matter be dealt with more extensively in chapters 9 and/or 11 in the interests of clarity and comprehensiveness. Against this background section 141(1) is intended to afford local government financial viability by empowering it to levy taxes and to raise revenue. In the proviso, local governments would however be prevented from raising service charges for profit - we consider this to be a limitation justifiable on the grounds of transparency and accountability of government.

Section 141(2) entitles local government to equitable allocations in the area of inter-governmental financial transfers.

Section 142 is intended to provide for continuity of existing local governments against the background of the process of the restructuring of the third tier of government.

Part II

Outstanding Matters

4. Matters relating to the Constitution requiring the consideration of the Negotiating Council

The lists below reflect an overview of most of the issues that need to be addressed in order to enable us to complete the outline of a draft Constitution.

4.1 *Matters raised in previous reports*

- (a) The text of the preamble
- (b) National symbols
- (c) Languages
- (d) The final wording of the chapter on Fundamental Rights
- (e) The electoral system
- (f) Deadlock-breaking mechanisms in the process of constitution-making
- (g) Various issues relating to the national executive
- (h) Various issues relating to the judiciary
- (i) The terminology relating to SPRs (states or provinces or regions)

- (j) The competences of SPRs
- (k) The consolidation and rationalisation of public administration (especially on the SPR level), which is also related to the question of the reincorporation of the TBVC states
- (l) SPR finance and fiscal affairs, including an orderly regulation of financial matters prior to and immediately after the election
- (m) SPR constitutions and the role of SPRs in the further deployment of a new constitutional dispensation
- (n) Traditional leaders.

4.2 *Matters not yet considered*

- (a) The Ombudsman and a Human Rights Commission
- (b) Financial provisions of a general nature
- (c) The Auditor-General
- (d) The Reserve Bank
- (e) The composition and operation of the Financial and Fiscal Commission
- (f) The Commission for Administration and the Public Service
- (g) The armed forces and the police
- (h) Protection of the organs of civil society
- (i) Various general, transitional and technical provisions relating to, inter alia, the status of international law, continuity of existing laws and the legal system, and definition, construction and commencement clauses.

ADDENDUM TO THE THIRTEENTH REPORT (CONSTITUTIONAL ISSUES)

CHAPTER 10

Local Government

Establishment and status of local government

140. (1) Local governments shall be established for the residents of areas demarcated in terms of law and the functioning and structure of local government shall be regulated by law.

(2) A local government shall be elected democratically and shall be entitled to regulate its own affairs within the limits prescribed by law, which shall guarantee the democratic functioning of such local government.

(3) The boundaries of the area of a local government, the election of its members, the qualifications of voters, the powers and functions of local governments, the formal legislative procedures to be adhered to and all other matters necessary or incidental to local government shall, subject to the provisions of this Constitution, be provided for by law.

(4) A law providing for or relating to local government may make provision for categories of local government with differentiated powers and functions according to considerations of demography, income, physical and environmental conditions and other factors which justify or necessitate such status.

(5) The status of a local government shall not be changed without prior consultation with the local government concerned.

(6) A bill which materially affects the boundaries, powers or functions of local governments shall be published for comment in the *Government Gazette* or the *SPR Gazette* as the case may be, and local governments affected thereby shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

(7) A local government shall be entitled to exercise those powers and functions and to provide such services as may be necessary to maintain and promote the well-being of the residents of the area of the local government.

(8) Conduct affecting the physical environment of a local government area shall be permissible only after consultation with the local government concerned and shall not be undertaken against the wishes of such local government unless such conduct is reasonably required in the national interest.

(9) A local government shall be entitled to approach the Constitutional Court in any matter relating to the encroachment or threatened encroachment upon its competences under this Constitution or any other law.

Local government finance

141. (1) A local government shall be entitled, subject to the provisions of this Constitution, to levy taxes and raise revenue for the purpose of exercising its powers and functions: provided that service charges shall be raised solely for the purpose of recovering the cost of such services.

(2) A local government shall be entitled to an equitable allocation by the SPR government of the revenue referred to in section 121.

Continuation of existing local governments

142. A local government existing at the commencement of this Constitution shall, subject to any changes lawfully made by a competent authority, continue to exist and shall exercise its powers and functions in accordance with the provisions of this Constitution and any other law consistent with those provisions.

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

SIXTEENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 13 OCTOBER 1993

1. Introduction

In this report we propose a formulation of Schedule 8 of the Constitution relating to the procedure for the election of the President. We have found it necessary also to propose a consequential reformulation of clause 2 of the preliminary text of Chapter 6 dealing with the national executive, which was contained in the annexure to our Eleventh Report. The proposed texts are attached as an annexure to this report.

2. The substantive provision of the Constitution

Clause 2(1) provides for the election of the first President in terms of the Constitution by the National Assembly at its first sitting. It appears from the debate in the Negotiating Council that it may be important for the presidential election to take place as soon as possible after the first election. It is for this reason that we suggest that only the National Assembly be involved in the election of the first President. It will take time for the Senators to be elected indirectly by the SPR legislatures and the involvement of the Senate in the first presidential election could therefore delay the election of the first President and the composition of the national executive.

The election of subsequent Presidents in terms of this Constitution, if this should be necessary, will involve the Senate as well as the National Assembly according to

clauses 2(2) and 2(3) which provide for the election of a President in a joint sitting of the National Assembly and the Senate within 30 days of a vacancy occurring.

The second part of clause 2(2) introduces the notion of a new election of a President in the event of a general election following the dissolution of the National Assembly before a new constitutional text is adopted in terms of Chapter 5. If this principle is accepted by the Negotiating Council, consequential amendments to Chapter 6 will be required.

Presidential elections envisaged in clauses 2 (1) and 2 (3) shall be presided over by the Chief Justice or a Judge or the Appellate Division designated by him or her.

Clause 2(6) stipulates that no person may be elected as President unless he or she has been elected to the National Assembly. Thus Senators and extra-parliamentary political leaders will not qualify to be elected as President.

On being elected the President will be obliged to vacate his or her seat in the National Assembly and clause 2(7) stipulates how the resulting vacancy in the National Assembly will be filled.

Clause 2(8) provides that the President shall not hold any other public office in respect of which he or she receives any remuneration out of public funds.

3. Schedule 8

Schedule 8 enumerates the details of the procedure to be followed at the election of the President.

Item 9 of the Schedule empowers the Chief Justice to make detailed rules relating to the election of the President and to make these known in a manner that he or she may consider necessary.

The first step in this election will be to call for nominations (item 1). The formalities in regard to nominations are set out in item 2.

Item 3 requires the announcement of the names of the nominated candidates by the presiding judge and provides that no debate shall be allowed at the meeting. Should

only one nomination be received, the presiding judge shall then in terms of item 4 declare such candidate to be duly elected.

Where there is more than one candidate, a vote involving a secret ballot must follow in terms of item 5. Those present will be entitled to exercise a single vote. A candidate who secures a majority (more than 50%) of all the votes cast, shall be declared duly elected by the presiding judge.

If this is not the case, items 6, 7 and 8 provide for a process of elimination of the participation of candidates with the smallest number of votes until a single candidate receives a majority of all the votes cast. It also provides for the procedure to be followed in the case of two candidates receiving an equality of votes.

The net result of the procedures described and set out in Schedule 8 is that a successful presidential candidate will be elected by an absolute majority of all the votes cast.

ANNEXURE TO THE 16TH REPORT (CONSTITUTIONAL ISSUES)

**PARTIAL REDRAFT OF THE ANNEXURE TO THE 11th REPORT
(CONSTITUTIONAL ISSUES)**

**Relating to the election of the President, and to be read in conjunction with the
proposed Schedule 8**

Election of the President

2. (1) The first President under this Constitution shall be elected by the National Assembly at its first sitting.

(2) The election of a President other than that referred to in subsection (1) shall be held within 30 days after the vacation of the office of President, or in the event of a general election held in terms of this Constitution, within 30 days after the commencement of the first session of the Senate after such general election.

(3) The election referred to in subsection (2) shall take place at a joint sitting of the National Assembly and the Senate.

(4) The Chief Justice or a Judge of the Appellate Division designated by him or her for this purpose shall preside over the elections referred to in subsections (1) and (2).

(5) The election of the President in terms of this section shall be conducted in the manner provided for in Schedule 8.

(6) No person may be elected as President unless he or she has been elected to the National Assembly.

(7) On being elected the President shall vacate his or her seat in the National Assembly, and the political party to which he or she belongs shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on such party's election list compiled for the general election, or if there is no such person, by nominating any member of such party.

(8) The President shall not hold any other public office in respect of which he or she receives any remuneration or allowance out of public funds.

SCHEDULE 8

Procedure for the Election of the President

1. Nominations of candidates shall be called for by the person presiding at the meeting at which the President is to be elected.
2. Every nomination shall be submitted in the form prescribed by the Chief Justice and shall be signed by two members of Parliament and also by the person nominated, unless he or she has in writing signified his or her willingness to accept the nomination.
3. The names of the persons duly nominated as provided for in item 2 shall be announced at the meeting at which the election is to take place by the person presiding thereat, and no debate shall be allowed at the election.
4. If in respect of any election only one nomination has been received, the person presiding at the meeting shall declare the candidate in question to be duly elected.
5. Where more than one candidate is nominated for election, a vote shall be taken by secret ballot, each person present and entitled to vote having one vote and any candidate in whose favour the majority of all the votes cast is recorded, shall be declared duly elected by the person presiding at the meeting.
6. (a) If no candidate obtains a majority of all the votes so cast, the candidate who has received the smallest number of votes shall be eliminated and a further ballot shall be taken in respect of the remaining candidates, this procedure being repeated as often as may be necessary until a candidate receives a majority of all the votes cast and is declared duly elected.

- (b) Whenever two or more candidates being the lowest on the poll have received the same number of votes, the meeting shall by separate vote, to be repeated as often as may be necessary, determine which of those candidates shall for the purpose of subitem (a) be eliminated.

7. Whenever -

- (a) only two candidates have been nominated; or
- (b) after the elimination of one or more candidates in accordance with the provisions of this Schedule, only two candidates remain,

and there is an equality of votes between those two candidates, the person presiding at the meeting shall at the time the result of the election is announced, fix the time and date at which a further meeting will be held, being a date not more than 7 days thereafter.

8. At the further meeting referred to in item 7, the provisions of this Schedule shall apply as if such further meeting were the first meeting called for the purpose of the election in question.

9. (a) The Chief Justice shall make rules in regard to the procedure to be observed at a meeting at which the President is to be elected, and rules defining the duties of the presiding officer and of any person appointed to assist him and prescribing the manner in which the ballot at any such meeting shall be conducted.

- (b) Any such rules shall be made known in such manner as the Chief Justice may consider necessary.

10. The election of the President in terms of section 2(2) shall be held at a time and place to be fixed by the Chief Justice and made known by notice in the *Government Gazette* at least 7 days before the date fixed for such election.