The FW de Klerk Foundation

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

CFCR Submission on NPA and SAPS amendment Bills.

The CFCR has some good news for all the honourable members of both committees considering the two bills now before them; there is no need to debate the bills clause by clause. The bad news is reserved for those honourable members who favour the implementation of the Polokwane resolutions of the ANC which are behind the legislation proposed by the executive in the two bills; both bills are fundamentally and in principle bad in law, flawed as policy and are inconsistent with the Constitution. They are accordingly invalid and must be rejected by all the members of the committees who consider themselves bound to uphold the Constitution. That should mean everyone. Both bills must be referred back to the executive marked "REJECTED" simply because they do not comply with the Constitution. There is no need to examine their minutiae, a fair conspectus of their constitutional context shows that they can not, in all good conscience, be proceeded with at all.

The bills have, according to the tenor of the Polokwane resolutions, been prepared as a matter of urgency. In the process it seems that insufficient attention has been paid to the requirements of the Constitution. They are before these committees in a state which will not enable them to become valid and binding laws of the land.

Under the Constitution, parliament is not sovereign as it was in the old South Africa. On the contrary, it is the Constitution, together with the rule of law, that are supreme. This is what s 1(c) of the Constitution stipulates unambiguously and expressly: "Supremacy of the constitution and the rule of law" are foundational values in our new constitutional order.

This is emphasized by s 2 which reads:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The conduct of the ANC in passing the resolutions is invalid and the proposed laws contemplated in the bills are equally invalid.

This is essentially because of the structural unconstitutionality of the scheme of the bills. The main thrust of the bills and the resolutions is that the DSO will be disbanded and the investigative personnel who now reside under the control of the NPA will be housed in a new unit of the SAPS, over which the NPA will have no control at all. The DSO can not simply be liquidated without regard to the constitutional requirements that saw it called into existence.

The first question the legal advisers of the executive ought to have asked in relation to the bills, and it is one we ask them now, is naturally: "Will they pass constitutional muster?" It seems that in the haste to meet the deadline set at Polokwane insufficient attention was paid to this crucial requirement.

The NPA is a creature of the Constitution and its structure and functions are set out in s 179 of the Constitution. Of particular importance in the present context are the requirements of sub sections (2) and (4) of this section:

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

The SAPS is also a creature of the Constitution. For present purposes consider s 205 (2) and (3):

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Under s 206(1) a member of the Cabinet is responsible for policing and must determine policy after consulting provincial governments. In contrast, it is the NDPP who must determine prosecution policy in consultation with the DPPs and with the concurrence of the Cabinet member responsible for the administration of justice, who exercises final responsibility over the prosecuting authority.

These specific structures fall under separate chapters of the Constitution. The NPA is dealt with in the "Courts and Administration of Justice" chapter and the SAPS falls under "Security Services." These are chapters 8 and 11 respectively. The founders of our Constitution could have agreed upon a different constitutional structure had they so chosen. They were of course bound, in creating the structure now in place, by the foundational principles underlying the interim Constitution which are still binding upon us all. The short point is that the NPA was given independence to act without fear, favour or prejudice and the SAPS was put firmly under the control of the Minister of Safety and Security with no institutional independence of any kind. This is the constitutional dispensation by which everybody, including the executive, is bound.

It is clear from any reading of s 7 of the NPA Act that the necessary incidental functions which the Constitution gives to the NPA are in fact and in law carried out by the DSO. In a sense the prosecutors are the heart, body and brains of the NPA while the DSO

investigators are its arms and legs. So, the constitutional implications of taking away the arms and legs by dissolving the DSO have to be considered. In particular, will this allow the constitutionally ordained functional independence of the NPA to survive? Can it ever be independent if it has to look to the SAPS to carry out the necessary incidental functions contemplated by the provisions of s 179(2)? The only reasonable answer to both questions is clearly and unequivocally: "No."

Much of the debate around the proposed dissolution of the DSO has been focused on the DSO and its personnel. The effect the dissolution will have on the NPA itself has been somewhat neglected in the cut and thrust. The constitutional dispensation agreed to and enshrined in Chapter 8 is one in which the NPA must be independent and must have necessary incidental powers. These are the prerequisites of s 179(4) read with s 179(2). Both of these are fundamental to the rule of law: for our prosecutorial authority to be worth its salt in the civilized and liberated order in our constitutional democracy it must be independent and must have the necessary incidental capacity to act independently. These are the Constitution's express requirements. Both of these requirements will be removed if the DSO is dissolved in accordance with the Polokwane resolutions and the draft bills now on the table. This is clearly inconsistent with the Constitution and accordingly is invalid under s 2 and liable to be struck down as such.

It is a basic test of constitutionalism, which we in the new South Africa embraced upon liberation, that there should be limitations on the powers of government. National legislation must ensure that the NPA can function "without fear, favour or prejudice." This can be traced back to Constitutional Principles XXX and XXXI. An independent NPA is a salutary limitation upon the powerful in government. If there is any doubt about this submission, consider the cases of Jacob Zuma, Jackie Selebi and before them Winnie Mandela and Tony Yengeni. It is only an NPA independent of their influential positions that could prosecute them. As Willie Hofmeyr pointed out on behalf of the NPA yesterday, the NPA has had accusations made about its independence, but none has ever been proved in a court of law.

Both bills are legally fatally flawed, the one for taking over the investigative personnel of the DSO in a structure in which it does not constitutionally belong, and the other for allowing the elimination of the investigative functions at present carried out within the NPA through the good offices of the DSO.

The executive can not act under dictation of the Polokwane resolutions – its powers must be exercised personally and in good faith without misconstruing the nature of such powers. The Constitutional Court has so ruled. All such powers are limited by what the Constitution allows. No conduct inconsistent with the Constitution can ever be valid. This is of the essence of a constitutional democracy such as ours. The National Assembly does not, and quite rightly should not, countenance any proposed laws which are inconsistent with the Constitution.

There is also the question of the effect of the bills upon the international obligations of the country. Our commitments as a nation in 2003 to the UN Convention Against Corruption and the AU Convention on Preventing and Combating Corruption both

mandate independent specialized anti-corruption bodies. If these bills become law there will be no such body in South Africa. We will be in breach of our international obligations and the African Peer Review mechanism will be used to criticize our failure to keep the DSO or a suitably independent body like it on our Statute Book. We will be asked to take remedial steps. It seems that our international obligations have been overlooked in the irrational, unlawful, unreasonable and unduly hasty manner in which the executive seeks, unconstitutionally, to implement the Polokwane resolutions. This joint committee, in which, the nation is assured from the chair, the "jury is still out," should have no part of it.

In amplification of the CFCR written submissions numbered 08DSO 77, and in the letter dated 4 August 2008 already circulated by the committee secretaries (to whom we are duly indebted) written by its attorneys, Webber Wentzel, the CFCR has provided detailed substantiation of the points made in this presentation and has made further constitutional points regarding both the rationality and reasonableness of the bills and the executive's decision which underlies them. There is not sufficient time available to orally expatiate upon them, the CFCR knows and trusts that they will be given due consideration. We remain ready and willing at all times to uphold the Constitution and to answer any questions that honourable members may have to the best of our ability.

We urge all honourable members to reject both bills for, inter alia, the reasons we have given.

Paul Hoffman SC
Director
Centre for Constitutional Rights
6 August 2008.